# BOUVIER'S

# LAW DICTIONARY

BY

JOHN BOUVIER

*Ignoratis terminis ignoratur et ars.* — Co. Litt. 2*a*

*Je sais que chaque science et chaque art a ses termes propres, inconnus au commun des hommes.* — Fleury

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BY

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# A

# LAW DICTIONARY.

## J.

**JACENS.** In abeyance. Toml.

**JACENS HÆREDITAS.** See HÆREDITAS JACENS.

**JACET IN ORE.** It lies in the mouth. Fleta, lib. 5, c. 5, § 49.

**JACOBUS.** A gold coin an inch and three-eighths in diameter, in value about twenty-five shillings, so called from James I., in whose reign it was first coined.

It was also called *broad*, *laurel*, and *broad-piece*. Its value is sometimes put at twenty-four shillings, but Macaulay speaks of a salary of eight thousand Jacobuses as equivalent to ten thousand pounds sterling. Hist. Eng. ch. xv. A cut of this coin showing both sides will be found in the Century Dictionary, *sub v. broad*.

**JACTITATION.** Boasting of something which is challenged by another. Moz. & W.

The word is used principally with reference to *jactitation of marriage*, which title see. In Louisiana, it is the name used as an action for slander of title to land.

*Jactitation of right to a seat in a church* appears to be the boasting by a man that he has a right or title to a pew or sitting in a church to which he has legally no title.

*Jactitation of tithes* is the boasting by a man that he is entitled to certain tithes, to which he has legally no title. See Rog. Ecc. L. 482.

**JACTITATION OF MARRIAGE. In English Ecclesiastical Law.** The untruthful boasting by an individual that he or she has married another, from which it may happen that they will acquire the reputation of being married to each other. 3 Bla. Com. 93. It was held that the boasting must be malicious as well as false; 2 Hagg. 230, 280.

The ecclesiastical courts formerly might in such cases entertain a libel by the party injured, and on proof of the facts enjoin the wrong-doer to perpetual silence, and, as a punishment, make him pay the costs; 3 Bla. Com. 93; 2 Hagg. Cons. 423, 285; 2 Chitty, Pr. 459.

The jurisdiction of such a suit would now be in the Probate, Divorce, and Matrimonial Division, but the remedy is now rarely resorted to, as, in general, since Lord Hardwicke's act (1766), there is sufficient certainty in the forms of legal marriage in England to prevent any one being in ignorance whether he or she is really married or not—a reproach which, however, is often made against the law of Scotland. The Scotch suit of a declarator of putting to silence, which is equivalent to jactitation of marriage, is often resorted to, a notorious instance of its use being that in the Yelverton marriage case; 1 Sc. Sess. Cas. 3d ser. 161.

**JACTURA** (Lat. *jaceo*, to throw). A jettison (*q. v.*).

**JACTUS** (Lat.). A throwing goods overboard to lighten or save the vessel, in which case the goods so sacrificed are a proper subject for general average. Dig. 14. 2, *de lege Rhodia de jactu*; 1 Pardessus, *Collec. des Lois marit.* 104; Kuricke, *Inst. Marit. Hanseat* tit. 8; 1 Par. Mar. Law 288, note.

**JAIL.** See GAOL; PRISON.

**JACTUS LAPILLI** (Lat. the throwing down of a stone). **In Civil Law.** A method of preventing the acquisition of title by prescription by interrupting the possession. The real owner of land on which another was building, and thereby acquiring title by usucapion (*q. v.*), could challenge the intrusion and interrupt the prescription by throwing down a stone from the building before witnesses called upon to note the transaction.

**JAMUNLINGI, JAMUNDILINGI.** Freemen who delivered themselves and property to the protection of a more powerful person, in order to avoid military service and other burdens. Spelman, Gloss. Also, a species of serfs among the Germans. Du Cange. The same as *commendati*.

**JAMUNLINGUS.** Commendatus (*q. v.*).



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**JANITOR.** A person employed to take charge of rooms or buildings, to see that they are kept clean and in order, to lock and unlock them, and generally to care for them. 84 N. Y. 352. See FLAT.

Formerly, a door-keeper. Fleta, lib. 2, c. 24.

**JAPAN.** An empire of Asia, consisting of four islands lying in the Pacific Ocean east of China, Korea, and Siberia. The government is a limited monarchy administered by an emperor, and what may be termed a cabinet and privy council. The constitution was promulgated in 1889. There is an imperial parliament consisting of two houses. The house of peers is partly hereditary and partly elective, a limited number being nominated by the emperor. The house of commons consists of three hundred members elected by the people. The great council or cabinet consists of ten members, and the sumitsu-in, established in 1888, is very similar to the English privy council. The empire is divided for administrative purposes into three fu and forty-three ken (prefectures), and there is a political subdivision into eighty-five provinces. There are numerous courts by which justice is administered in accordance with modern jurisprudence. The daishin-in, or supreme court, is a court of appeal in all except district court cases, and its decisions are binding on the lower courts. It has, like the German imperial court, original and exclusive jurisdiction of treason and capital crimes. The chiho-saibansho, or provincial court, is the general court of original jurisdiction for civil cases and also criminal cases, except treason, capital crimes, and charges against the imperial family. It also has jurisdiction in bankruptcy. The koso-in, or superior court, is an intermediate court of appeal for cases from the provincial court and of final appeal for cases from the district court. The ku-saibansho, or district court, has jurisdiction of civil cases to the amount of 100 yen, and of other cases without limitation of amount where (as we would express it) the venue is local, such as suits concerning rents, boundaries, or possession; also of suits on contracts, of employment for less than a year, bailments, guardianships, and custody of various registers, as of ships, land, patents, trade-marks, and the like. The judges are appointed for life and are irremovable except by a special law. The feudal system was abolished in 1871.

For an extended review of the "Administration of Justice in Japan," see a series of articles by Professor John H. Wigmore, 36 Am. L. Reg. N. S. 437, 491, 571, 628.

**JAVELOUR. In Scotch Law.** Jailor or gaoler. 1 Pitc. Crim. Tr. pt. 1, p. 33.

**JEOFAILE** (L. Fr.). I have failed; I am in error.

Certain statutes are called statutes of amendments and jeofailes, because, where a pleader perceives any slip in the form of his proceedings, and acknowledges the error (jeofaile), he is at liberty, by those statutes, to amend it. The amendment, however, is seldom made; but the benefit is attained by the court's overlooking the exception; 3 Bla. Com. 407; 1 Saund. 228, n. 1; Doct. Pl. 297; Dane, Abr. These statutes do not apply to indictments.

**JEOPARDY.** Peril; danger.

The term is used in this sense in the act establishing and regulating the post-office department. The words of the act are, "or if, in effecting such robbery of the mail the first time, the offender shall wound the person having the custody thereof, or put his life in jeopardy by the use of dangerous weapons, such offender shall suffer death." 3 Story, Laws U. S. 1992. See Baldw. 93-95.

The situation of a prisoner when a trial jury is sworn and impanelled to try his case upon a valid indictment, and such jury has been charged with his deliverance. 1 Bail. 655; 7 Blackf. 191; 1 Gray 490; 38 Me. 574, 586; 23 Pa. 12; 12 Vt. 93.

It is the peril in which a prisoner is put when he is regularly charged with a crime before a tribunal properly organized and competent to try him; 121 Pa. 109.

This is the sense in which the term is used in the United States constitution: "no person . . . shall be subject for the same offence to be twice put in jeopardy of life or limb," U. S. Const. art. v. Amend., and in the statutes or constitutions of most if not all of the states.

This provision in the constitution of the U. S. binds only the United States; 2 Cow. 819; 5 How. 410; 20 S. C. 392; 1 Bish. N. Cr. L. § 981. At one time it was not uniformly so considered, and it was held *contra*, 2 Pick. 521; 18 Johns. 187; Walker, Miss. 134. This was the same fluctuation of judicial opinion as to the effect of the early constitutional amendments which affected other questions. See EMINENT DOMAIN. In this country this rule depends in most cases on constitutional provisions. In England it is said to be one of the universal maxims of the common law; 4 Bla. Com. 335; and Stephen in repeating the expression adds in a note that although Blackstone uses the term "jeopardy of his life," it is not confined to capital offences, and extends to misdemeanors; 4 Steph. Com. 384; 3 B. & C. 502. In a leading case where the question was considered whether the rule applied when a jury had been discharged for want of agreement it was held that the court had authority in its discretion to discharge the jury in such a case, and that such action did not operate as an acquittal. This is also the prevailing opinion in this country. See *infra*. In the English case referred to, it was said by Cockburn, C. J., that in considering the question of the right to discharge a jury in such case they were not dealing with one of those principles which lie at the foundation of the law, but with a matter of practice, which has fluctuated at various times, and "even at the present

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day may perhaps be considered as not finally settled;" L. R. 1 Q. B. 289. This would seem to be a more reasonable construction of the language of Lord Cockburn than that sometimes put upon it. See 1 Bish. N. Cr. L. § 982. That which he characterized as a mere matter of practice was not the existence of the doctrine of jeopardy, but whether it was applicable.

The constitutional provision, which refers to "*life or limb*," properly interpreted, extends only to treason and felonies, but it has usually been extended to misdemeanors; 1 Bish. Cr. L. § 990; 26 Ala. 135; but not to proceedings for the recovery of penalties, nor to applications for sureties of the peace; 1 Bish. Cr. L. § 990.

A person is in legal jeopardy when he is put upon trial, before a court of competent jurisdiction, upon indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance; Cooley, Const. Lim., 4th ed. 404; approved in 9 Bush 333; 21 Alb. L. J. 398; 77 Cal. 183.

The discharge of a competent jury without defendant's consent, express or implied, without sufficient cause, operates as an acquittal; 62 Mich. 307; 76 Cal. 57; 83 Ala. 96.

But where the indictment was good and the judgment erroneously arrested, the verdict was held to be a bar; 2 Yerg. 24.

After a jury has been impanelled and sworn in a criminal case, the trial cannot stop short of a verdict without the defendant's consent except for imperative reasons, such as the illness of a juror, the judge, or the defendant, the absence of a juror, or a disagreement. The absence of a witness for the state is not sufficient unless by consent of the accused, and his consent is not established by the mere fact that, being without counsel, he does not object to a postponement; 25 S. E. Rep. (S. C.) 220. The discharge of a jury on the last day of the term after they have for five days failed to agree upon a verdict, made against the objection of the defendant, bars another trial for the same offence; 121 Pa. 109; *contra*, 111 N. C. 695; 15 So. Rep. (Ala.) 602.

Where one of the jurors is discharged because of the death of his mother, and the court declared a mistrial, a plea of former jeopardy is not good; 91 Ga. 831.

An order of an examining magistrate, either committing or discharging the accused, is not a bar to a second hearing on the same charge; 18 So. Rep. (Ala.) 729.

But it has been held by the United States Supreme Court, that where a jury in a criminal case is discharged during the trial and the defendant subsequently put on trial before another jury, he is not twice put in jeopardy within the meaning of the fifth amendment to the United States Constitution; 142 U. S. 148; and in a later case it is said that a jury may be discharged from giving any verdict, whenever the court is of opinion that there is a manifest necessity for the act, or that the ends of public justice would otherwise be defeated, and may also order a trial before another jury, and a defendant is not thereby twice put in jeopardy; 155 U. S. 271. This case is quite in accord with an English decision made upon much consideration; L. R. 1 Q. B. 289; and Bishop, as the result of a very extended examination and citation of authorities, concludes: "But in England and Ireland, at present, and in most of our states, when a reasonable time for discussion and reflection has been given the jury, and they have in open court declared themselves unable to agree, and the judge is satisfied of the truth of the declaration, they may be discharged and the prisoner held to be tried anew. And this doctrine is applied as well in felony as in misdemeanor." Bish. Cr. L. § 1033. See JURY.

It has been held that the accused was not in jeopardy, and may be again put upon trial, if the court had no jurisdiction of the cause; 7 Mich. 161; or one of its members is related to the prisoner and under a statute the conviction is void; 142 N. Y. 130; or if the indictment was so defective that no valid judgment could be rendered upon it; 36 Ga. 447; 105 Mass. 53; or if by any overruling necessity the jury are discharged without a verdict; 9 Wheat. 579; 68 N. C. 203; or if the term of the court comes to an end before the trial is finished; 5 Ind. 290; or the jury are discharged with the consent of the defendant, express or implied; 9 Metc. 572; or if after verdict against the accused it has been set aside on his motion for a new trial or on writ of error, or the judgment thereon has been arrested; 13 Johns. 351; 8 Kan. 232; s. c. 12 Am. Rep. 469, n.; 7 Mont. 489; 127 Ill. 507; 41 Minn. 50; 111 N. C. 695; 64 Cal. 260; 38 Fla. 389; or where there is any irregularity of verdict which will compel a reversal upon the application of the accused; 83 Ala. 96; 77 Cal. 213. See Cooley, Const. Lim., 4th ed. 404–5; Von Holst, Const. L. 260; Story, Const. § 1787.

Where a prisoner during his trial fled the jurisdiction, and it became necessary to discharge the jury, it was held that he was never in jeopardy; 13 Reporter 105; s. c. 59 Cal. 357.

The constitutional guaranty is against two trials for the same offence, and the decisions as to what constitutes identity of the offences are not uniform. They are collected in 1 N. Cr. L. §§ 1048–69, by Mr. Bishop, who lays down the following rules as sustained by just principle: "They are not the same when (1) the two indictments are so diverse as to preclude the same evidence from maintaining both; or when (2) the evidence to the first and that to the second relate to different transactions, whatever be the words of the respective allegations; or when (3) each indictment sets out an offence differing in all its elements from that in the other, though both relate to one transaction,—a proposition of which the exact limits are difficult to define; or when (4) some technical variance precludes a conviction on the first indictment, but does not appear on the second.

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On the other side, (5) the offences are the same whenever evidence adequate to the one indictment will equally sustain the other. Moreover, (6) if the two indictments set out like offences and relate to one transaction, yet if one contain more of criminal charge than the other, but upon it there could be a conviction for what was embraced in the other, the offences, though of different names, are, within our constitutional guaranty, the same." The author considers the test to be, "whether if what is set out in the second indictment had been proved under the first, there could have been a conviction; when there could, the second cannot be maintained; when there could not, it can be;" *id.* § 1052, and cases cited in notes.

Where the greater offence includes a lesser one, a verdict on an indictment for the minor offence only is a bar to a trial on an indictment for the greater offence, and the same principle applies if the jury are out in the first case when the second is called; 149 Pa. 35. In this case, this was said to be not a mere technical rule of procedure, but a substantial one founded in reason, and in harmony with the constitutional mandate that no person shall be subject to be twice in jeopardy for the same offence.

There is some difference of opinion, however, in the application of this rule in homicide cases. If a prisoner is put on trial for murder and convicted of manslaughter and that verdict is set aside, on defendant's application for a new trial or an appeal, he cannot again be tried for murder; 11 Ia. 350; 54 Ill. 325; 41 La. Ann. 610; on this principle it has been held that if a prisoner has been indicted for murder, convicted of murder in the second degree, and afterwards granted a new trial on his own motion, he cannot, on the second trial, be convicted of a higher crime than murder in the second degree; 33 Wis. 121; s. c. 14 Am. Rep. 748, n.; 35 Mo. 105; 61 N. W. Rep. (Ia.) 246; 31 Fla. 262; 72 Ala. 201 (see 99 Cal. 227); *contra*, 20 Ohio St. 572; 8 Kan. 232; s. c. 12 Am. Rep. 469, n. A distinction has been made in some cases based upon the theory that the two lower grades of homicide do not bear the same relation to the offence charged. Manslaughter is clearly a different crime from that charged, and a conviction of that offence is therefore an acquittal of the graver one. But it has been said that the division of murder into two degrees does not make two offences and the same rule should not apply; 65 Cal. 232; 67 Vt. 465. Indeed the whole theory is that, when the defendant obtains a reversal, the conviction of the lesser crime is an acquittal of the graver one, so that another trial would be within the prohibition against putting the accused twice in jeopardy; 18 Neb. 57; 20 Ohio St. 572; 8 Kan. 232; 60 Ind. 291; 83 Ky. 1; 11 Mo. App. 92. But it is said that "the weight of authority is that securing a new trial only operates to set aside conviction and not the verdict so far as it operates as an acquittal;" 1 McClain, Cr. L. § 390; 30 Wis. 216; 13 Tex. 168. If it is an acquittal *pro tanto* nothing less than constitutional amendment can remove the effect of the general provision as to jeopardy; 107 U. S. 221. In some state constitutions, as those of Arkansas, Colorado, Georgia, and Missouri, the usual declaration securing a person from being put twice in jeopardy is modified by a further provision that if the jury disagree, or if the judgment be arrested after verdict or reversed for error in law, the accused shall not be deemed to have been in jeopardy; Ark. II. 8; Colo. II. 18; Ga. I. 8; Mo. II. 23.

Statutes which provide for a severer punishment when a criminal is convicted of a second or third offence are not in violation of the constitutional provision that no one shall be twice put in jeopardy for the same offence. The doctrine is that the subsequent punishment is not imposed for the first offence, but for persistence in crime; 2 Pick. 165; 158 Mass. 598; 115 Ill. 583; 48 Wis. 647; 47 Cal. 113; 159 U. S. 673, aff. 121 Mo. 514.

The question of former jeopardy cannot be passed upon by the supreme court on *habeas corpus* proceedings, but is a proper plea in bar, to be tried by the lower court; 32 Pac. Rep. (Wash.) 1063.

Whether an offence is one against the laws of the state or against the United States, and whether the same act may be an offence against both, punishable by each, without infringing upon the constitutional guaranty against being twice put in jeopardy for the same offence, are questions which a state court of original jurisdiction is competent to decide in the first instance, and the proper time to invoke the jurisdiction of the Supreme Court of the United States is after the highest state court has passed upon the question adversely to the accused; 155 U. S. 89. See NON BIS IN IDEM; AUTREFOIS ACQUIT; JURY.

**JERGUER.** **In English Law.** An officer of the custom-house, who oversees the waiters. Techn. Dict.

**JET.** **In French Law.** Jettison (*q. v.*).

**JETTISON, JETSAM.** The casting out of a vessel, from necessity, a part of the lading. The thing so cast out.

It differs from flotsam in this, that in the latter the goods float, while in the former they sink, and remain under water. It differs also from ligan.

The jettison must be made for sufficient cause, and not for groundless timidity; 66 Fed. Rep. 776; 57 *id.* 403. It must be made in a case of extremity, when the ship is in danger of perishing by the fury of a storm, or is laboring upon rocks or shallows, or is closely pursued by pirates or enemies.

If the residue of the cargo be saved by such sacrifice, the property saved is bound to pay a proportion of the loss. In ascertaining such average loss, the goods lost and saved are both to be valued at the price they would have brought at the place of

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delivery on the ship's arrival there, freight, duties, and other charges being deducted; Marsh. Ins. 246; 3 Kent 185; Park. Ins. 123; Pothier, *Charte-partie*, n. 108; Boulay-Paty, *Dr. Com.* tit. 13; Pardessus, *Dr. Com.* n. 734; 1 Ware 9. The owner of a cargo jettisoned has a maritime lien on the vessel for the contributory share from the vessel on an adjustment of the average, which may be enforced by a proceeding *in venue* in the admiralty; 19 How. 162; 2 Pars. Marit. Law, 373. See Abbott; Kay, Shipping; AVERAGE; ADJUSTMENT; DERELICT.

**JEUX DE BOURSE.** In French Law. A kind of gambling or speculation, which consists of sales and purchases which bind neither of the parties to deliver the things which are the object of the sale, and which are settled by paying the difference in the value of the things sold between the day of the sale and that appointed for delivery of such things. 1 Pardessus, *Droit Com.* n. 162.

**JEWEL.** A precious stone; a gem; a personal ornament, consisting more or less of precious stones. Ornaments intended to be worn on the person.

The precise meaning of the word was discussed by Shaw, C. J., in 14 Pick. 370. He said: "The question whether plain gold earrings and knobs, without any precious stone, pearl, or other gem set in them, constitute jewelry." "*Jewelry* is not found in any English dictionary, and is probably an Americanism. It is defined in Webster to be jewels in general. He defines 'jewel' to be 'an ornament worn by ladies,' 'a pendant in the ear.' It is manifest, however, that these are put by way of instances, and not intended as strict definitions. The term '*bijou*,' which seems to be nearly analogous to it in the French language, is defined to be 'a little work of ornament, valuable (*precieux*) for its workmanship or by its material. *Cette femme a de beaux bijoux.*' *Dict. de l'Acad.* The counsel on both sides cited passages of Scripture to show, on the one side, that the translators of the common version included ornaments of gold under the name of jewels, and on the other, to show that by a distinct enumeration they excluded them. These instances do little more than show that, though the argument founded on them is at first view plausible, it would be entirely unsafe to rely upon it as a ground of legal construction. Nor can much more reliance be placed upon lexicographers; they are necessarily confined, in a considerable degree, to generalities, and cannot ordinarily go into minute and very accurate distinctions. On the best consideration we have been able to give the subject, we are satisfied that the legislature, in the use of the word 'jewelry,' intended to employ it as a generic term, of the largest import, including all articles under the genus. Without attempting to define the term used in the statute, we are all of opinion that earrings and ear-knobs are included under the term jewelry, as it was used in the statute."

It has been held that a watch is not a "jewel ornament," "it is not carried or used as a jewel or ornament, but as a timepiece or chronometer, an article of ordinary wear by most travellers of every class, and of daily and hourly use by all. It is as useful and necessary to the guest in his room as out of it, in the night as in the day-time. It is carried for use and convenience, and not for ornament." 43 N. Y. 539. See also, to the same effect, 33 N. Y. Sup. Ct. 271.

The meaning of the word is most frequently drawn into question in cases involving the construction of statutes limiting the liability of innkeepers for money, jewelry, or valuables not deposited in the safe. In such a case it was said, "The watch, and pen and pencil case are certainly valuables, and perhaps might be called jewels, but I think should be considered a part of the traveller's personal clothing or apparel. The legislature certainly did not expect the traveller, after retiring, to send down his ordinary clothing or apparel to be deposited in the safe;" 36 Barb. 70; but under a similar statute specifying money, jewelry, and articles of gold and silver manufacture, a gold watch was held to be included as an article of gold manufacture; 24 Wis. 241.

The meaning of the word is also frequently involved in cases arising under the tariff laws, which usually contain also the term "imitation jewelry." In such a case Lacombe, J., said: "The word jewelry is generally used as including articles of personal adornment, and the word further imports that the articles are of value in the community where they are used. . . . The articles of value used for personal adornment in our civilization are, and for centuries have been, the precious metals gold and silver, to which, I think, platina is now generally added, and what are known as the precious stones, the diamond, sapphire, ruby, etc." "There is such a thing as imitation jewelry. . . . If by a pleasing combination of appropriate materials, by an attractive arrangement of parts, an article is produced bearing a general resemblance to real jewelry ornaments, and suitable for similar uses, it may fairly be called imitation jewelry." 33 Fed. Rep. 709.

Where a jeweller claimed an exemption as tools of a debtor, of those which he himself worked with on watches as well as of those which his apprentice worked with on jewelry, and it being found by the jury that the principal business was that of jeweller, both were held to be exempt. The court said that the circumstance that he was also engaged in the business of repairing watches did not make him a watchmaker in distinction to a jeweller; . . . "this is rather part of the employment of a jeweller, as exercised in this country, than a distinct and separate occupation by himself." 2 Pick. 80.

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Family jewels constitute one of the kinds of personal property for the unlawful detention of which the remedy at law is considered inadequate and equitable relief is sustained; Ad. Eq., 8th ed. 91.

They are also included in the paraphernalia (*q. v.*), and "even the jewels of a peeress have been held such;" 2 Bla. Com. 436.

Jewels of the wife, though given by her husband's will to her for life, were decreed to her absolutely, as her paraphernalia (*q. v.*), as against creditors who sought to have them sold to pay debts charged on real estate in aid of the testator's personal estate; 1 Bro. C. C.* 576.

**JEWS.** The name given to the descendants of the patriarch Abraham.

The Jews were exceedingly oppressed during the middle ages throughout Christendom. In France, a Jew was a serf, and his person and goods belonged to the baron on whose demesnes he lived. He could not change his domicil without permission of the baron, who could pursue him as a fugitive even on the domains of the king. Like an article of commerce, he might be lent or hired for a time, or mortgaged. If he became a Christian, his conversion was considered a larceny of the lord, and his property and goods were confiscated. They were allowed to utter their prayers only in a low voice and without chanting. They were not allowed to appear in public without some badge or mark of distinction. Christians were forbidden to employ Jews of either sex as domestics, physicians, or surgeons. Admission to the bar was forbidden to Jews. They were obliged to appear in court in person when they demanded justice for a wrong done them; and it was deemed disgraceful to an advocate to undertake the cause of a Jew. If a Jew appeared in court against a Christian, he was obliged to swear by the ten names of God and invoke a thousand imprecations against himself if he spoke not the truth. Sexual intercourse between a Christian man and a Jewess was deemed a crime against nature, and was punishable with death by burning. *Quia est rem habere cum cane, rem habere a Christiano cum Judæa quæ* CANIS *reputatur: sic comburi debet*; 1 Fournel, *Hist. des Avocats*, 108, 110. See Merlin, Répert. *Juifs*.

Under the Roman law the Jews were the subject of severe restrictive laws and were classed in the enactments of the Christian emperors with apostates, heretics, and heathens; Mack. Rom. L. § 152. Marriage with them was forbidden; *id.* § 555; and a Jew could not be the tutor of a Christian; *id.* § 616.

In the fifth book of the Decretals it is provided that if a Jew have a servant that desireth to be a Christian, the Jew shall be compelled to sell him to a Christian for twelve-pence; that it shall not be lawful for them to take any Christian to be their servant; that they may repair their old synagogues, but not build new; that it shall not be lawful for them to open their doors or windows on Good Friday; that their wives shall neither have Christian nurses, nor themselves be nurses to Christian women; that they wear different apparel from the Christians, whereby they may be known, etc. See Ridley's View of the Civ. and Eccl. Law, part 1, chap. 5, sect. 7; Madox, Hist. of Exch.

In England, the Jew could have nothing that was his own, for whatever he acquired he acquired not for himself but for the king; Bract. f. 386 *b*. For about a century and a half they were important elements in English history, as their greatest privilege was to be allowed to do things that were forbidden to Christians, notably, to take interest on money. This money-lending business required some governmental regulation, the king having a deep interest in it, for what was potentially owed to the Jew was owed to the king, and this matter could hardly be left to the English tribunals as they would do but scant justice to the Jew, and therefore but scant justice to the king who stood behind the Jew. In 1194, an edict was issued about the Jewish loans. In every town in which the Jews lived an office was established for the registration of their deeds. All loans and payments of loans were to be made under the eye of certain officers, some of them Christians, some of them Jews, and a copy or part of every deed was to be deposited in an ark or chest under official custody. A few years later a department of the royal exchequer—the exchequer of the Jews—was organized for the supervision of this business. At its head were a few "Justices of the Jews." This exchequer was, like the great exchequer, both a financial bureau and a judicial tribunal. It managed all the king's transactions—and there were many—with the Jews, saw to the exaction of tallages, reliefs, escheats, and forfeitures, and also acted judicially, not merely as between king and Jew, but also as between king and gentile, when, as often happened, the king had for some cause or another seized into his hand the debts due to one of his Jews by Christian debtors. Also it heard and determined all manner of disputes between Jew and Christian. 1 Pol. & M. 451.

This system could not work well; it oppressed both Jew and Englishman, and from the middle of the thirteenth century the king was compelled to rob them of their privileges, to forbid them to hold lands, and some efforts were made to induce them to give up their profession of usury, as was also done in France and elsewhere during the same period, but the fact is, that they were so heavily taxed by the sovereigns or governments of Christendom, and at the same time debarred from almost every other trade or occupation—partly by special decrees, partly by the vulgar prejudice—that they could not afford to prosecute ordinary vocations. In 1253 the Jews—no longer able to withstand the constant hardships to which they were subjected in person and property—begged of their own accord to be allowed to leave the country. Richard of Cornwall, however, persuaded them to stay. Ultimately, in 1290 A. D., they were driven from the shores of England, pursued by the execrations of the infuriated rabble, and leaving in the hands of the king all their property, debts, obligations, and mortgages, they emigrated for the most part to France and Germany.

Practically, the only disabilities to which Jews are now subject in England are, incompetence to fill certain high offices in the state (*e. g.* that of lord chancellor), and inability to present to an ecclesiastical benefice attached to an office in her majesty's gift. 3 Steph. Com. 88.

**JOB.** The whole of a thing which is to be done. In this sense it is employed in the Civil Code of Louisiana, art. 2727: "To build by plot, or to work by the job," says that article, "is to undertake a building for a certain stipulated price." See Duranton, *du Contr. de Louage*, liv. 3, t. 8, nn. 248, 263; Pothier, *Contr. de Louage*, nn. 392. 394. See DEVIATION.

**JOBBER. In Commercial Law.** One who buys and sells articles in bulk and resells them to dealers. Stock-jobbers are those who buy and sell stocks for others. This term is also applied to those who speculate in stocks on their own account.

**JOCALIA** (Lat.). Jewels (*q. v.*). This term was formerly more properly applied to those ornaments which women, although married, call their own. When these *jocalia* are not suitable to her degree, they are assets for the payment of debts; 1 Rolle, Abr. 911.

**JOCKEY CLUB.** An association of persons for the purpose of regulating all matters connected with horse racing.

Such a club is a private and not a quasi-public corporation, and may refuse to allow certain persons to enter horses for its races; 22 N. Y. S. 394; s. c. 2 Misc. Rep. 512. A grant by the state to such a corporation to make and register bets and sell pools on the result of its races is not a grant of state aid, but is merely a removal of the

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statutory prohibition against the exercise of a right existing at common law; *id.*

**JOINDER. In Pleading.** Union; concurrence.

**Of Actions.** In Civil Cases. The union of two or more causes of action in the same declaration.

At common law, to allow a joinder, the form of actions must be such that the same plea may be pleaded and the same judgment given on all the counts of the declaration, or, the counts being of the same nature, that the same judgment may be given on all; 2 Saund. 177 *c*; Comyns, Dig. *Actions* (G); 16 N. Y. 548; 4 Cal. 27; 12 La. Ann. 873; 33 N. H. 495. And all the causes of action must have accrued to the plaintiff or against the defendant; 12 La. Ann. 44; in the same right, though it may have been by different titles. Thus, a plaintiff cannot join a demand in his own right to one as representative of another person, or against the defendant himself to one against him in a representative capacity; 2 Viner, Abr. 62; Bacon, Abr. *Action in General* (C); 21 Barb. 245; 54 Fed. Rep. 985. See 25 Mo. 357. Nor can a cause of action in tort and in contract be joined; 28 Abb. N. C. 317; nor a tort with a claim for money had and received; 89 Ga. 154.

In *real actions* there can be but one count.

In *mixed actions* joinder occurs, though but infrequently; 8 Co. 876; Poph. 24; Cro. Eliz. 290.

In *personal actions* joinder is frequent.

By statutes, in many of the states, joinder of actions is allowed and required to a greater extent than at common law.

In Criminal Cases. Different offences of the same general nature may be joined in the same indictment; 1 Chitty, Cr. Law 253, 255; 29 Ala. N. S. 62; 28 Miss. 267; 4 Ohio St. 440; 6 McLean 596; 4 Denio 133; 18 Me. 103; 1 Cheves 103; 4 Ark. 56; 158 Mass. 164; 25 Neb. 581; see 14 Gratt. 687; 30 Tex. App. 623; and it is no cause of arrest of judgment that they have been so joined; 29 E. L. & Eq. 536; 29 N. H. 184; 11 Ga. 225; 3 W. & M. 164; see 1 Strobh. 455; but not in the same count; 5 R. I. 385; 24 Mo. 353; 1 Rich. 260; 4 Humphr. 25; see 9 Lawy. Rep. Ann. 182, note; and an indictment may be quashed, in the discretion of the court, where the counts are joined in such manner as will confound the evidence; 17 Mo. 544; 19 Ark. 568, 577; 20 Miss. 468.

No court, it is said, will, however, permit a prisoner to be tried upon one indictment for two distinct and separate crimes; Steph. Cr. Proc. 154; 29 N. H. 184. See 5 S. & R. 59; 10 Cush. 530.

Where, out of precaution to meet every aspect of a single offence, an indictment charges distinct crimes, and no attempt is made to convict accused of disconnected offences, the state will not be compelled to elect on which he shall be tried; 91 Ala. 87. Three separate offences, but not more, against the provisions of U. S. Rev. Stat. § 5480, prohibiting the use of the mails with intent to defraud, when committed within the same six calendar months, may be joined, and when so joined there is to be a single sentence for all, but this does not prevent other indictments for other offences under the same statute committed within the same six calendar months; 123 U. S. 672.

**In Demurrer.** The answer made to a demurrer. Co. Litt. 71 *b*. The act of making such answer is merely a matter of form, but must be made within a reasonable time; 10 Rich. 49.

**Of Issue.** The act by which the parties to a cause arrive at that stage of it in their pleadings, that one asserts a fact to be so, and the other denies it. For example, when one party denies the fact pleaded by his antagonist, who has tendered the issue thus, "And this he prays may be inquired of by the country," or, "and of this he puts himself upon the country," the party denying the fact may immediately subjoin, "And the said A B does the like;" when the issue is said to be joined.

**Of Parties.** In Civil Cases. In Equity. All parties materially interested in the subject of a suit in equity should be made parties, however numerous; Mitf. Eq. Plead. 144; 2 Eq. Cas. Abr. 179; 1 Pet. 299; 13 *id.* 359; 7 Cra. 72; 2 Mas. 181; 5 McLean 444; 2 Paine 536; 1 Johns. Ch. 349; 2 Bibb 184; 24 Me. 20; 7 Conn. 342; 11 Gill & J. 426; 4 Rand. 451; 7 Ired. Eq. No. C. 261; 2 Stew. Ala. 280; either as plaintiffs or defendants, so that there may be a complete decree which shall bind them all; 133 U. S. 233, 579. But, where the parties are very numerous, and sue in the same right, a portion may in some cases appear for all in the same situation; Beach, Eq. Pr. § 63; 16 Ves. 321; 16 How. 288; 11 Conn. 112; 3 Paige, Ch. 222; 19 Barb. 517. See 152 Mass. 123.

Mere possible or contingent interest does not render its possessor a necessary party; 6 Wheat. 550; 3 Conn. 354; 5 Cow. 719. And see 3 Bibb 86; 6 J. J. Marsh. 425. Contingent remaindermen are not necessary parties to a suit to set aside the deed creating the remainder; 143 Ill. 290; nor a residuary legatee to a bill filed by a legatee or creditor to assert a claim against the estate of a testator; 17 N. J. Eq. 156.

There need be no connection but community of interest; 2 Ala. N. S. 209. It is not indispensable that all the parties to a suit should have an interest in all the matters contained in the suit, but it will be sufficient if each party has an interest in same material matters in the suit, and they are connected with the others; 128 U. S. 403.

A court of equity, even after final hearing on the merits and on appeal to the court of last resort, will compel the joinder of necessary parties; 89 Mo. 284.

*Plaintiffs.* All persons having a unity of interest in the subject-matter; 3 Barb. Ch. 397; 2 Ala. N. S. 209; and in the object to be attained; 2 Ia. 55; 113 Mo. 348; 89 Va. 455; who are entitled to relief; 14 Ala.

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N. S. 135; may join as plaintiffs. The rights claimed must not arise under different contracts; 8 Pet. 123; 5 J. J. Marsh. 154; or be vested in the same person in different capacities; 1 Busb. Eq. 196. And see 1 Paige 637; 5 Metc. 118. Persons representing antagonistic interests cannot be joined as complainants; 14 So. Rep. (Ala.) 765.

*Assignor* and *assignee.* The assignor of a contract for the sale of lands should be joined in a suit by the assignee for specific performance; 8 Sandf. Ch. 614; and the assignor of part of his interest in a patent in a suit by assignee for violation; 3 McLean 350.

But he should not be joined where he has parted with all his legal and beneficial interest; 32 Me. 203, 343; 13 B. Monr. 210. The assignee of a mere chose in action may sue in his own name, in equity; 17 How. 43; 5 Wisc. 270; 6 B. Monr. 540; 7 *id.* 273.

*Corporations.* Two or more may join if their interest is joint; 8 Ves. 706. A corporation may join with its individual members to establish an exemption on their behalf; 3 Anstr. 738. Corporations themselves are indispensable parties to a bill which affects their corporate rights or liabilities; 148 U. S. 603.

*Husband* and *wife* must join where the husband asserts an interest in behalf of his wife; 6 B. Monr. 514; 3 Hayw. 252; 5 Johns. Ch. 196; 9 Ala. 133; as, for a legacy; 5 Johns. Ch. 196; or for property devised or descended to her during coverture; 5 J. J. Marsh. 179, 600; or where he applies for an injunction to restrain a suit at law against both, affecting her interest; 1 Barb. Ch. 313. Where a widow sues to set aside a deed executed by herself and husband on the ground that it was procured by fraud, the administrator of the husband is not a necessary party; 58 Hun 605.

Under modern statutes for the enlargement of the rights and remedies of married women, it is in many cases unnecessary to join the husband in suits to which he was formerly a necessary party. See MARRIED WOMAN.

*Idiots* and *lunatics* may be joined or not in bills by their committees, at the election of the committee, to set aside acts done by them whilst under imbecility; 1 Ch. Cas. 112; 1 Jac. 377; 7 Johns. Ch. 139. They must be joined in suits brought for the partition of real estate; 3 Barb. Ch. 24. In England it seems to be the custom to join; 2 Vern. 678. See Story, Eq. Pl. § 64, and note; Story, Eq. Jur. § 1336, and note.

*Infants.* Several may join in the same bill for an account of the rents and profits of their estate; 2 Bland 68.

*Trustee* and *cestui que trust* should join in a bill to recover the trust fund: 5 Dana 128; but need not to foreclose a mortgage; 5 Ala. 447; 4 Abb. Pr. 106; nor to redeem one made by the trustee; 2 Gray 190. And see 3 Edw. Ch. 175; 7 Ala. N. S. 386.

An *appeal* may be prosecuted by one party to the record, as against another, without joining other parties who are in no way interested in the controversy; 80 Fed. Rep. 961.

*Defendants.* In general, all persons interested in the subject-matter of a suit who cannot be made plaintiffs should be made defendants. They may claim under different rights if they possess an interest centering in the point in issue; 4 Cow. 682. In order to obtain the rescission of a contract of sale, all of the parties interested in the property involved must be brought before the court; 52 Kan. 227.

*Bills for discovery* need not contain all the parties interested as defendants; 1 M'Cord, Ch. 301; and a person may be joined merely as defendant in such bill; 3 Ala. 214. A person should not be joined as a party to such bill who may be called as a witness on trial; 13 Ill. 212; 8 Barb. Ch. 482. And see 1 Chandl. 286.

*Assignor* and *assignee.* An assignor who retains even the slightest interest in the subject-matter must be made a party; 2 Dev. & B. Eq. 395; 1 Green, Ch. 347; 2 Paige 289; 11 Cush. 111; as a covenantee in a suit by a remote assignee; 1 Dana 585; or an assignee in insolvency, who must be made a party; 3 Johns. 543; 1 Johns. Ch. 339; 10 Paige 20; or the original plaintiff in a creditor's bill by the assignee of a judgment; 4 B. Monr. 594.

A fraudulent assignee need not be joined in a bill by a creditor to obtain satisfaction out of a fund so transferred; 1 Paige 637. The assignee of a judgment must be a party in a suit to stay proceedings; 11 Paige 438.

*Corporations* and *associations.* A corporation charged with a duty should be joined with the trustees it has appointed, in a suit for a breach; 1 Gray 399; 7 Paige 281. Where the legal title is in part of the members of an association, no others need be joined; 1 Gilm. 187. The directors of a corporation may be included as parties defendant in a bill against the corporation for infringement of a trade-mark; 53 Fed. Rep. 124. When discovery is sought, the officer from whom the information is to be obtained should be made a co-defendant with the corporation; 93 Ala. 542.

Officers and agents may be made parties merely for purposes of discovery; Beach, Eq. Pr. § 61, n.; 9 Paige 188.

*Creditors* who have repudiated an assignment and pursued their remedy at law are properly made parties to a bill brought by the others against the trustee for an account and the enforcement of the trust; 3 Wisc. 367. So, when judgments are impeached and sought to be set aside for fraud, the plaintiffs therein are indispensable parties to the bill; 20 Ala. 200. To a bill brought against an assignee by a creditor claiming the final balance, the preferred creditors need not be made parties; 28 Vt. 465. See, also, 20 How. 94; 1 Md. Ch. 299; 3 Metc. 474; 11 Paige 49.

*Debtors* must in some cases be joined with the executor in a suit by a creditor; though not ordinarily; Story, Eq. Pl. § 227; 1 Johns. Ch. 305. Where there are several debtors, all must be joined; 1 M'Cord, Ch.

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301; unless utterly irresponsible; 1 Mich. 446. Judgment debtors must in some cases be joined in suits between the creditor and assignees or mortgagees; 5 Sandf. 271. In an action by judgment creditors for the appointment of a receiver, to take charge of property belonging to their debtor, the payees of unpaid purchase-money notes given for such property are necessary parties; 12 So. Rep. (Miss.) 596.

*Executors* and *administrators* should be made parties to a bill to dissolve a partnership; 21 Ga. 6; to a bill against heirs to discover assets; 7 B. Monr. 127; to a bill by creditors to subject lands fraudulently conveyed by the testator, their debtor, to the satisfaction of their debt; 9 Mo. 304. See, also, 21 Ga. 433; 6 Munf. 520; 7 E. L. & Eq. 54.

*Foreclosure suits.* All persons having an interest, legal or equitable, existing at the commencement of a suit to foreclose mortgaged premises, must be made parties, or they will not be bound; Tiedm. Eq. Jur. § 441; 4 Johns. Ch. 605; 10 Paige 307; 10 Ala. N. S. 283; 3 Ark. 364; 6 McLean 416; 11 Tex. 526; including the mortgagor within a year after the sale of his interest by the sheriff; 4 Johns. Ch. 649; and his heirs and personal representative after his death; 2 Bland 684. But bond-holders for whose benefit a mortgage has been made by a corporation to a trustee need not be made parties; 5 Gray 162; Jones, Corp. Bonds & Mortg. § 398. A person claiming adversely to mortgagor and mortgagee cannot be made a defendant to such suit; 3 Barb. Ch. 438.

*Heirs*, *distributees*, and *devisees.* All the heirs should be made parties to a bill respecting the real estate of the testator; 3 N. Y. 261; 2 Ala. N. S. 571; 4 J. J. Marsh. 231; 5 Ill. 452; although the testator was one of several mortgagees of the vendee, and the bill be brought to enforce the vendor's lien; 6 B. Monr. 74; but need not to a bill affecting personalty; 1 M'Cord, Ch. 280. Where, in a suit to set aside a deed for fraud, one of the heirs did not join as plaintiff, he may be made a party defendant, even if he should elect to affirm the deed; 156 Mass. 203. All the devisees are necessary parties to a bill to set aside the will; 2 Dana 155; or to enjoin executors from selling lands belonging to the testator's estate; 2 T. B. Monr. 30. All the distributees are necessary parties to a bill for distribution; 1 B. Monr. 27; to a bill by the widow of the intestate against the administrator to recover her share of the estate; 4 Bibb 543; and to a bill against an administrator to charge the estate with an annual payment to preserve the residue; 1 Hill, Ch, 51. See, also, 11 Paige 49; 2 T. B. Monr. 95; 5 id. 573. A bill cannot be filed against the heirs and devisees jointly for satisfaction of a debt of the deceased; 9 Paige 28.

*Idiots* and *lunatics* should be joined with their committees when their interests conflict and must be settled in the suit; 2 Johns. Ch. 242; 3 Paige 470.

*Partners* must, in general, be all joined in a bill for dissolution of the partnership, but need not if without the jurisdiction; Lind. Part. 460; 17 How. 468; 12 Metc. 329. And see 3 Sto. 335.

Assignees of insolvent partners must be joined; 10 Me. 255.

Dormant partners need not be joined when not known in the transaction on which the bill is founded; 7 Blackf. 218.

*Principal* and *agent* should be joined if there be a charge of fraud in which the agent participated; 3 Sto. 611; 12 Ark. 720; and the agent should be joined where he binds himself individually; 3 A. K. Marsh. 484.

*Trustee* and *cestui que trust.* If a trustee has parted with the trust fund, the *cestui que trust* may proceed against the trustee alone to compel satisfaction, or the fraudulent assignee may be joined with him at the election of the complainant; 2 Paige 278. Where a claimant against the estate of a deceased person seeks to follow the assets into the hands of a trustee, it is not necessary to make the beneficiaries parties; 45 Ch. Div. 444.

On a proceeding in equity for the appointment of trustees under a mortgage, where two of the three trustees have died, and there is no provision in the mortgage for filling the vacancies, the mortgagor and the surviving trustee are necessary parties; 85 Me. 79.

The trustees under a settlement of real estate, against whom a trust or power given to them to sell the estate is to be enforced, are necessary parties to a suit for that purpose; 39 E. L. & Eq. 76. See, also, *id.* 225; 24 Miss. 597; 19 How. 376; 5 Du. N.Y. 168; 8 Md. 34.

At Law. *In actions ex contractu.* All who have a joint legal interest or are jointly entitled must join in an action on a contract, even though it be in terms several, or be entered into by one in behalf of all; 1 Saund. 153; Archb. Civ. Pl. 58; 8 S. & R. 308; 15 Me. 295; 3 Brev. 249; 3 Ark. 565; 16 Barb. 325; as, where the consideration moves from several jointly; 2 Wms. Saund. 116 *a*; 4 M. & W. 295; or was taken from a joint fund; 19 Johns. 218; 1 Meigs 394.

Some contracts may be considered as either joint or several, and in such case all may join, or each may sue separately; but part cannot join leaving the others to sue separately.

In an action for a breach of a joint contract made by several, all the contracting parties should be made defendants; 1 Saund. 158, n.; even though one or more be bankrupt or insolvent; 2 Maule & S. 33; but see 1 Wils. 89; or an infant; but not if the contract be utterly void as to him; 3 Taunt. 307; 5 Johns. 160, 280; 1 Pick. 500.

On a joint and several contract, each may be sued separately, or all together; 1 Pet. 73; 1 Wend. 524.

A corporation is a necessary party to a suit brought by its stockholders to enforce its rights; 149 U. S. 473.

*Executors* and *administrators* must bring their actions in the joint names of all; Crosw. Ex. & Adm. § 636; 5 Scott, N. R.

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728; 1 Saund. 291 *g*; 2 N. & M'C.70; 1 Dutch. 374; even though some are infants; Broom, Part. 104.

All the executors who have proved the will are to be joined as defendants in an action on the testator's contract; 1 Cr. M. & R. 74; 4 Bingh. 704. But an executor *de son tort* is not to be joined with the rightful executor. And the executors are not to be joined with other persons who were joint contractors with the deceased; 2 Wheat. 344; 6 S. & R. 272; 5 Cal. 173.

Administrators are to be joined, like executors; Comyns, Dig. *Administrators* (B 12). Foreign executors and administrators are not recognized as such, in general; 2 Jones, Eq. 276; 10 Rich. 393; 7 Ind. 211.

*Husband* and *wife* must join to recover rent due the wife before coverture on her lease while sole; Co. Litt. 55 *b*; Cro. Eliz. 700; on the lease by both of lands in which she has a life estate, where the covenant runs to both; 20 Barb. 269; but on a covenant generally to both, the husband may sue alone; 1 B. & C. 443; in all actions in implied promises to the wife acting *in autre droit*; Comyns, Dig. *Baron & F.* (V); 9 M. & W. 694; 4 Tex. 283; as to suit on a bond to both, see 2 Penning. 827; on a contract running with land of which they are joint assignees; Woodf. Landl. & T., 1st Am. ed. 529; Cro. Car. 503; in general, to recover any of the wife's choses in action where the cause of action would survive to her; Comyns, Dig. *Baron & F.* (V); 1 Chitty, Pl. 17; 1 M. & S. 180; 13 Wend. 271; 10 Pick. 470; 9 Ired. 163; 21 Conn. 557; 24 Miss. 245; 2 Wisc. 22.

They may join at the husband's election in suit on a covenant to repair, when they become joint grantees of a reversion; Cro. Jac. 399; to recover the value of the wife's choses in action; 5 Harring. 57; 24 Conn. 45; 2 Wisc. 22; 2 M. & S. 396, n.; in case of joinder the action survives to her; 6 M. & W. 426; 10 B. & C. 558; in case of an express promise to the wife, or to both where she is the meritorious cause of action; Cro. Jac. 77, 205; 1 Chitty, Pl. 18; 5 Harring. 57; 32 Ala. N. S. 30.

They must, in general, be joined in actions on contracts entered into by the wife *dum sola:* 2 Term. 480; 7 *id.* 348; 8 Johns. 149; 1 Grant, Cas. 21; 5 Harring. 357; 25 Vt. 207; see 15 Johns. 403; 7 Mass. 291; where the cause of action accrues against the wife *in autre droit;* Cro. Car. 518. They may be joined when the husband promises anew to pay the debt of the wife contracted *dum sola;* 7 Term 349; for rent or breaches of covenant on a joint lease to both for the wife's benefit; Broom, Part. 178. In an action on a contract against a husband and wife, a contract signed by the husband alone is insufficient to support a judgment against the wife; 158 Pa. 295.

*Joint tenants* must join in debt or an avowry for rent; Broom, Part. 24; but one of several may make a separate demise, thus severing the tenancy; Bacon, Abr. *Joint Ten.* (H 2); 3 Campb. 190; and one may maintain ejectment against his cotenants; Woodf. Landl. & T. 789.

*Partners* must all join in suing third parties on partnership transactions; 2 Campb. 302; 18 Barb. 534; 7 Rich. 118; including only those who were such at the time the cause of action accrued; Broom, Part. 65; although one or more may have become insolvent; 2 Cr. & M. 318; but not joining the personal representative of a deceased partner; 4 B. & Ald. 374; 9 B. & C. 538. See 118 Ind. 313; with a limitation to the actual parties to the instrument in case of specialties; 6 M. & S. 75; and including dormant partners or not, at the election of the ostensible partners; Pars. Part. § 202; 10 B. & C. 671; 4 B. & Ald. 437. See 4 Wend. 628; 71 Mich. 475. A partner who has sold his interest to another partner is not a necessary party to an action for an accounting of the partnership affairs; 130 U. S. 505. Where one partner contracts in his name for the firm, he may sue alone, or all may join; 4 B. & Ad. 815; 4 B. & Ald. 437; but alone if he was evidently dealt with as the sole party in interst; 1 M. & S. 249. Partners cannot sue or be sued in their copartnership name, but the individual names of its members must be set out; 5 So. Rep. (Miss.) 112; 17 Or. 256.

The surviving partners; 3 Ball & B. 30; 1 B. & Ald. 29, 522; 18 Barb. 592; must all be joined as defendants in suits on partnership contracts; 1 East 30. And third parties are not bound to know the arrangements of partners amongst themselves; 4 M. & S. 482; 8 M. & W. 703, 710.

A partner need not be joined if he was not known as such at the time of making the contract and there was no indication of his being a partner; Lind. Part. 281; 1 Bosw. 28; 19 Ark. 701. And see PARTNERSHIP.

*Tenants in common* should join in an action on any joint contract; Comyns, Dig. *Abatement* (E 10).

*Trustees* must all join in bringing an action; 1 Wend. 470.

*In actions ex delicto.* Joint owners must, in general, join in an action for a tortious injury to their property; 1 Saund. 291 *g*; 11 N. H. 141; in trover, for its conversion; 5 East 407; in replevin, to get possession; 6 Pick. 571; 8 Mo. 522; 15 Me. 245; or in detinue, for its detention, or for injury to land; 3 Bingh. 455; 29 Barb. 9.

So may several owners who sustain a joint damage; 1 W. & M. 223.

The grantor and grantee of land cannot join in a counter-claim for continuing trespasses on the land sold, since their rights of action are not joint; 6 Ind. App. 663.

For injury to the *person*, plaintiffs cannot, in general, join; 2 Wms. Saund. 117 *a*; Cro. Car. 512; Cro. Eliz. 472.

Partners may join for slanders; 3 Bingh. 452; Lind. Part. 278; 8 C. & P. 708; for false representations; 17 Mass. 182; injuring the partnership. The joinder or nonjoinder of a dormant partner constitutes no objection to the maintenance of a suit in any manner whatever; 71 Mich. 475.

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In a suit against joint contractors, one of whom is dead, the survivors only should be made parties, the administrator of the deceased partner not being necessary; 44 Ill. App. 114.

An action for the infringement of letters patent may be brought jointly by all the parties who at the time of the infringement were the holders of the title; 1 Gall. 429; 1 McAll. 83.

In cases where several join in the commission of a tort, they may be joined in an action as defendants; 6 Taunt. 29; 14 Johns. 483; as, in trover; 1 M. & S. 588; in trespass; 2 Wms. 117 *a*; for libel; Broom, Part. 249.—not for slander; Cro. Jac. 647; in trespass; 1 C. & M. 96.

*Husband* and *wife* must join in action for direct damages resulting from personal injury to the wife; Schoul. Husb. & W. 167; 3 Bla. Com. 140; 4 Iowa 420; see 11 So. Rep. (La.) 541; in detinue, for the property which was the wife's before marriage; 2 Tayl. 236; 37 W. Va. 877; see 30 Ala. N. S. 582; for injury to the wife's property before marriage; 2 Jones, N. C. 59; where the right of action accrues to the wife *in autre droit*; Comyns, Dig. *Baron & F.* (V); 2 B. & P. 407; and, generally, in all cases where the cause of action by law survives to the wife; 4 B. & Ald. 523; 10 Pick. 470; 35 Me. 89.

They may join for slander of the wife, if the words spoken are actionable *per se*, for the direct injury; 4 M. & W. 5; 22 Barb. 396; 2 T. B. Monr. 56; 25 Mo. 580; 4 Ia. 420; 11 Cush. 10; 112 N. C. 293; (but she may maintain an action in her own name; 89 Ga. 829;) and in ejectment for lands of the wife they may join; Broom, Part. 235; 1 Bulstr. 21. An action for permanent injury to community property must be brought by husband and wife jointly; 8 Wash. 78.

They *must* be joined as defendants for torts committed by the wife before marriage; Co. Litt. 351 *b*; 5 Binn. 43; or during coverture; 19 Barb. 321; 2 E. D. Smith 90; 17 S. E. Rep. (S. C.) 851; or for libel or slander uttered by her; 5 C. & P. 484; and in an action for waste by the wife, before marriage, as administratrix; 2 Wms. Ex. 1441.

They may be joined in trespass for their joint act; 3 B. & Ald. 687; 6 Gratt. 213.

*Joint tenants* and parceners, during the continuance of the joint estate, must join in all actions *ex delicto* relative thereto, as in trespass to their land, and in trover or replevin for their goods; 2 Bla. Com. 182, 188; Bacon, Abr. *Joint Ten.* (K); 29 Barb. 29. Joint tenants may join in an action for slander of the title to their estate; 3 Bingh. 455. They should be sued jointly, in trespass, trover, or case, for anything respecting the land held in common; Comyns, Dig. *Abatement* (F 6); 1 Wms. Saund. 291 *e*. Joint tenants should join in an avowry or cognizance for rent; 3 Salk. 207; or for taking cattle damage feasant; Bacon, Abr. *Joint Ten.* (K); or one joint tenant should avow in his own right, and as bailiff to the other; 3 Salk. 207. But a tenant in common cannot avow the taking of the cattle of a stranger upon the land damage feasant, without making himself bailiff or servant to his co-tenant; 2 H. Bla. 388; Bacon, Abr. *Replevin* (K).

*Master* and *servant*, where co-trespassers should be joined though they be not equally culpable; 5 B. & C. 559. *Partners* may join for a joint injury in relation to the joint property; 3 C. & P. 196. They may be joined as defendants where property is taken by one of the firm for its benefit; 1 C. & M. 93; and where the firm makes fraudulent representations as to the credit of a third person, whereby the firm gets benefit; 17 Mass. 182. In an action against a corporation for a tort, the corporation and its servants by whose act the injury was done may be joined as defendants; 98 N. C. 34.

*Tenants in common* must join for a trespass upon the lands held in common; Littleton § 315; 8 Cow. 304; 28 Me. 136; or for taking away their common property; Cro. Eliz. 143; or for detaining it; 1 Hill, N. Y. 234; or for a nuisance to their estate; 14 Johns. 246.

IN CRIMINAL CASES. Two or more persons who have committed a crime may be jointly indicted therefor; 7 Gratt. 619; 6 McLean 596; 10 Ired. 153; 8 Blackf. 205; only where the offence is such that it may be committed by two jointly; 3 Sneed 107; and not where there are distinct and different offences; 97 N. C. 474. A principal and accessory may be joined in one indictment; 155 Mass. 224; 65 N. H. 284.

They may have a separate trial, however, in the discretion of the court; 15 Ill. 536; 1 Park. Cr. Ca. 424; 7 Gratt. 619; 10 Cush. 530; 5 Strobh. 85; 9 Ala. N. S. 137; and in some states as a matter of right; 1 Park. Cr. Ca. 371.

See Dicey, Parties; Steph. Pl.; PARTIES.

As to the effect of *Misjoinder* and *Nonjoinder*, and how and when advantage should be taken of either, see those titles.

**JOINT.** Joined together; united; shared by two or more. The term is used to express a common property interest enjoyed or a common liability incurred by two or more persons; as applied to real estate it involves the idea of survivorship. See ESTATE IN JOINT TENANCY; ESTATE IN COMMON.

With respect to the ownership of choses in action, the term implies that the interest and right of action are united so that all the owners must be joined in a suit to enforce the obligation jointly held. See JOINT AND SEVERAL.

A joint liability on choses in action implies that though each person subject to it is liable for the whole, they are all treated in law as together constituting one legal entity and must be sued together or a release to one will operate in favor of all. One who pays the debt is entitled to contribution (*q. v.*).

**JOINT ACTION.** An action brought by two or more as plaintiffs or against two

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or more as defendants. See JOINT AND SEVERAL; ACTIONS; JOINDER.

**JOINT ADMINISTRATORS.** See ADMINISTRATOR.

**JOINT AND SEVERAL.** A liability is said to be joint and several when the creditor may sue one or more of the parties to such liability separately, or all of them together at his option. Dicey, Parties 230. Where one is compelled to pay the whole debt or more than his proper share, he is entitled to contribution (*q. v.*). In case of the death of one his liability remains against his estate; Wms. Pers. Prop. 363. As a general rule all the transactions of partners are said to be joint and several. See PARTNERSHIP.

As to joint and several debtors, Lord Mansfield said in Rice *v.* Shute, Burr. 2611, that "all contracts with partners were joint and several, and every partner was liable to pay the whole." But it was remarked by Spencer, C. J., that "it would be straining Lord Mansfield's opinion unreasonably to say, that he meant technically that all contracts with partners were joint and several, for, then, the non-joinder of any of the partners never could be pleaded in abatement, which all the court expressly decided. In equity they are joint and several; and so they were as regarded that suit, the defendant having neglected to avail himself of the objection in a legal manner. Surely it cannot be said that in a legal sense, when there are a plurality of debtors, that their contract is joint and several, when they have engaged jointly to pay the debt. Each debtor is bound for the whole, until the debt is paid; but as regards the remedy to coerce payment, there is a material and settled distinction. If they have undertaken severally to pay, separate suits may be brought against each; but when their undertaking is joint, unless they waive the advantage, by not interposing a plea in abatement, they must be sued jointly, if in full life, and neither has been discharged by operation of a bankrupt or insolvent law, or is not liable on the ground of infancy." 18 Johns. 459.

**JOINT AND SEVERAL BOND.** A bond of two or more obligors, who bind themselves jointly and severally to the obligees, who can sue all the obligors jointly, or any one of them separately, for the whole amount, but cannot bring a joint action against part,—that is, treat it as joint as to some and several as to others.

**JOINT BOND.** The bond of two or more obligors, the action to enforce which must be joint against them all.

**JOINT COMMITTEE.** A committee composed of members of both houses of a legislature. See May, Parl. Pr.

**JOINT CONTRACT.** One in which the contractors are jointly bound to perform the promise or obligation therein contained, or entitled to receive the benefit of such promise or obligation.

It is a general rule that a joint contract survives, whatever may be the beneficial interests of the parties under it. When a partner, covenantor, or other person entitled, having a joint interest in a contract not running with the land, dies, the right to sue survives in the other partner, etc.; 1 Dall. 65, 248; Add. Contr., 9th ed. 239. And when the obligation or promise is to perform something jointly by the obligors or promisors, and one dies, the action must be brought against the survivor; Hamm. Partn. 156.

When all the parties interested in a joint contract die, the action must be brought by the executors or administrators of the last surviving obligee against the executors or administrators of the last surviving obligor; Add. Contr. 239. See CONTRACTS; PARTIES; CO-OBLIGOR.

**JOINT DEBTORS.** Two or more persons jointly liable for the same debt.

To sustain a suit against joint debtors, a joint and subsisting indebtedness must be shown; 18 Johns. 459; and by proceeding to judgment against one or more of joint debtors the debt is merged in the judgment as to all; *id.*

**JOINT DEBTORS' ACTS.** Statutes enacted in many of the states, which provide that judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, and that, "in an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper." The name is also given to statutes providing that where an action is instituted against two or more defendants upon an alleged joint liability, and some of them are served with process, but jurisdiction is not obtained over the others, the plaintiff may still proceed to trial against those who are before the court, and, if he recovers, may have judgment against all of the defendants whom he shows to be jointly liable. 1 Black, Judg. §§ 208, 235.

**JOINT EXECUTORS.** Those who are joined in the execution of a will. See EXECUTOR.

**JOINT FIAT.** A fiat which was formerly issued against two or more trading partners.

**JOINT FINE.** The fine which might be levied upon a whole vill.

**JOINT HEIRS.** Co-heirs.

**JOINT INDICTMENT.** One indictment brought against two or more offenders, charging the defendants jointly. It may be where there is a joint criminal act, without any regard to any particular personal default or defect of either of the defendants: thus, there may be a joint indictment against the joint keepers of a gaming-house; 1 Ventr. 302; 2 Hawk. Pl. Cr. 240.

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**JOINT LIVES.** An expression used to designate the duration of an estate or right, limited or granted to two or more persons, to be enjoyed during the lives of both or all of them.

An annuity to two for their lives is payable until the death of one. Where the survivor is to be benefited, the conveyance or devise is usually expressed to be "to hold their joint lives and the life of the survivor."

**JOINT OWNERSHIP.** See JOINT.

**JOINT RESOLUTION.** A resolution adopted by both houses of congress or a legislature. When such a resolution has been approved by the president or passed with his approval, it has the effect of a law. 6 Op. Atty. Gen. 680.

The distinction between a joint resolution and a concurrent resolution of congress, is that the former requires the approval of the president while the latter does not. Rep. Sen. Jud. Com. Jan. 1897.

**JOINT STOCK BANKS. In English Law.** A species of *quasi corporations*, or companies regulated by deeds of settlement. See JOINT STOCK COMPANY.

**JOINT STOCK COMPANY.** An association of individuals for purposes of profit, possessing a common capital contributed by the members composing it, such capital being commonly divided into shares of which each member possesses one or more, and which are transferable by the owner. Shelf. Jt. St. Co. 1.

A *quasi* partnership, invested by statutes in England and many of the states with some of the privileges of a corporation. See 10 Wall. 556: L. R. 4 Eq. 695.

A partnership whereof the capital is divided, or agreed to be divided, into shares so as to be transferable without the express consent of the co-partners. Pars. Part. § 435.

Such associations are not pure partnerships, for their members are recognized as an aggregate body; nor are they pure corporations, for their members are more or less liable to contribute to the debts of the collective whole. Incorporated companies are intermediate between corporations known to the common law and ordinary corporations and partake of the nature of both. 1 Lindl. Partn., 1st ed. 6.

They are to be distinguished from limited partnerships chiefly in that there is, in a joint stock company, no *dilectus personarum*, that is, no choice about admitting partners, the shares are transferable without involving a dissolution of the asssociation, the assignee of shares becomes a partner by virtue of the transfer, and the rights and duties of the members are determined by articles of association, or in England by a deed of settlement; 1 Pars. Contr., 8th ed. 144.

The power to manage the business is vested exclusively in the directors, and a shareholder, as such, has no power to contract for the company; 2 H. L. Cas. 520. Generally the number of shares is fixed by the charter, but it is sometimes provided that there shall not be less than a certain number nor more than a certain number. In such cases it is left for the company to determine the number within the limits prescribed; 45 Me. 254; but where the charter fixes the amount of the capital stock, and provides that it may be increased from time to time at the pleasure of the corporation, the directors have no power to increase the amount of the stock, although the charter provides that all the corporate powers shall be vested in, and exercised by a board of directors, and such officers and agents as such board shall appoint; 18 Wall. 233.

In New York joint stock companies have all the attributes of a corporation except the right to have and use a common seal, and an action is properly brought for or against the president as such, and the judgment and execution against him bind the joint property of the association, but do not bind his own property; 74 N. Y. 234; but it has been held that the provisions in the New York statutes are merely local in their operation, and that the members may be sued in other states as partners; 128 Mass. 445; 60 Me. 468. They may be served with summons in another state in the same manner that corporations are served; 44 N. E. Rep. (Ohio) 506; and on an issue as to whether an association was a joint stock company or a corporation, its classification by the statutes of New York, where it was created, has been held not conclusive; 1 Ohio, N. P. 259. A joint stock company having some of the characteristics of a corporation and some of a partnership, including the right to a common seal, ownership of the property by the association, and the right to sue and be sued in the corporate name, is as much a citizen of the state which created it as a corporation organized under its laws, and when sued in another state is entitled to a removal to the federal court irrespective of the citizenship of its individual members; 46 Fed. Rep. 209; 1 Flip. 611; 10 Biss. 273.

At common law they are held not corporations but are to be sued as partners; 128 Mass. 445; 60 Me. 468; 4 Metc. 535; 64 Ia. 220. But in states where there are statutory provisions concerning them the indebtedness of joint stock companies will be charged *pro rata* to the solvent members; 34 S. W. Rep. (Tex.) 178. An English joint stock company (in this case a fire insurance company) endowed by its deed of settlement with the following powers and faculties, 1. A distinctive artificial name by which it can make contracts. 2. A statutory authority to sue and be sued in the name of its officers as representing the association. 3. A statutory recognition of it as an entity distinct from its members by allowing them to sue it or be sued by it. 4. A provision for its perpetuity by transfer of its shares so as to secure succession of membership, was held to be a corporation in this country; 10 Wall. 566; 100 Mass.

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531; notwithstanding the acts of parliament declaring it should not be so considered, and the court held that such corporations, whether organized under the laws of a state of the Union or a foreign government, may be taxed by another state for the privilege of conducting their corporate business therein.

When such a company is not organized under the statutes a suit brought by or against it should be in the name of all the partners or of one or more for the use of all; 1 Ia. 369; 58 Me. 537; and a defective certificate of organization will render all the parties liable to a common-law action as partners; 127 Pa. 255. A mere subscription for shares in an unincorporated joint stock company will not make the subscribers liable as partners to third persons dealing with the company; they must have intended to become members and share in the profits of the business, but an unexplained subscription is evidence of that fact; 53 Mo. App. 245.

It is an incumbent duty on the part of a joint stock company not to permit a transfer of stock until fully satisfied of the shareholder's authority to transfer; L. R. 9 Eq. 181; 152 Pa. 232; 129 Mass. 46; 2 Bing. 393; and as to the nature of shares in such an association see SHARES.

An authority conferred on the directors to make contracts and bargains, and to transact all matters requisite for the affairs of the company will not in general authorize the directors to draw bills; 19 L. J. Ex. 34; 9 C. B. 574; 20 L. J. Q. B. 160; but if the directors have authority to bind the company by bills, and they regularly accept, in the name of the company, a bill drawn on the company, every member is liable as a joint acceptor to any holder who is not also a member of the company; 8 M. & H. 834; 10 *id.* 132; 19 L. J. Ex. 34; 5 E. & B. 1; so the acceptance of a bill by an agent who is also a member of the company binds him personally; 9 Exch. 154.

To a suit for a dissolution or winding up of the affairs of a joint stock company, all the shareholders, however numerous, must be parties; 1 Keen 24; and any member of the company may institute an action for its dissolution; 92 Hun 432. The fact that such a company has conducted business for twenty-three years without making dividends for its stockholders, is good ground for its dissolution at suit of one of them; 35 Atl. Rep. (Vt.) 459. A society that cannot be incorporated because organized to resist the enforcement of laws cannot sue in the society name for the collection of a debt; 44 Mich. 313. See Bissett; Buckley; Wordsworth, Joint Stock Companies; Ang. & Ames; Thompson, Corporations; Lindl. Partn.; Lindl. Company Law; CORPORATION; DIRECTOR; STOCKHOLDER; PARTNERS; PARTNERSHIP.

**JOINT TENANTS.** Two or more persons to whom are granted lands or tenements to hold in fee-simple, fee-tail, for life, for years, or at will. Freem. Coten. & Par. § 9; 2 Bla. Com. 179. The estate which they thus hold is called an estate in joint tenancy. See ESTATE OF JOINT TENANCY; JUS ACCRESCENDI; SURVIVOR.

**JOINT TORTFEASORS.** Wrongdoers; two or more who commit a tort.

When several persons join in an offence or injury, they may generally be sued jointly, or any number less than the whole may be sued, or each one may be sued separately; 10 Wend. 654. Each is liable for himself, because the entire damages sustained were occasioned by each, each sanctioning the acts of the others, so that by suing one alone, he is not charged beyond his just proportion. Any number less than the whole may be sued, because each is answerable for his companion's acts. Thus a joint action may be brought against several for an assault and battery, or for composing and publishing a libel; 2 Saund. 117 *a*; Bacon, Abr. *Actions in General* (C); 2 Tyl. 129.

But to this rule that for a joint injury a joint action may be brought, there is an exception, namely, that no joint action can be maintained for a joint slander; this exception, seems to proceed upon the ground that each man's slander is his own, and it cannot by any means be considered that of another. Although this exception appears to be fully established, yet it is difficult to see the reason of it; when one of several trespassers gives the blow, he is considered as acting for the others, and, if they acted jointly, they may be jointly sued; why not consider the speaker, when acting in concert with others, as the actor for the whole in uttering the words? The blow is no more that of the person who did not give it than the words are the words of him who only united with the other in an agreement that they should be spoken. In either case, upon principle, the maxim, *qui facit per alium facit per se*, ought to have its force. Such, however, is not the law.

Where a person is injured by a joint tort and accepts satisfaction from one of the wrongdoers, he cannot sue the other; 28 Atl. Rep. (N. J.) 582.

A covenant not to sue one of two joint tortfeasors does not operate as a release of the other from liability; [1892] 2 Q. B. 511; nor does the dismissal of an action against one together with an executor for a valuable consideration, of an agreement not to sue him, release the other; 143 Ill. 358; nor does the fact that where property is jointly converted by two persons, and one of those converting accounts to the owner, who accepts part of the proceeds, remove the other's liability; 5 Tex. Civ. App. 341.

**JOINT TRESPASSERS.** Two or more who unite in committing a trespass.

**JOINT TRUSTEES.** Two or more persons who are intrusted with property for the benefit of one or more others. See TRUSTEE.

**JOINTRESS, JOINTURESS.** A woman who has an estate settled on her by

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her husband, to hold during her life, if she survive him. Co. Litt. 46.

**JOINTURE.** A competent livelihood of freehold for the wife, of lands and tenements, to take effect, in profit or possession, presently after the death of the husband, for the life of the wife at least.

Jointures are regulated by the statute of 27 Hen. VIII. c. 10, commonly called the statute of *uses*.

To make a good jointure, the following circumstances must concur, namely: It must take effect, in possession or profit, immediately from the death of the husband. It must be for the wife's life, or for some greater estate. It must be limited to the wife herself, and not to any other person in trust for her. It must be made in satisfaction for the wife's whole dower, and not of part of it only. The estate limited to the wife must be expressed or averred to be in satisfaction of her whole dower. It must be made before marriage. See 27 Ohio St. 60, where it is said that it may also be made after marriage. A jointure attended with all these circumstances is binding on the widow, and is a complete bar to the claim of her dower; or, rather, it prevents its ever arising. See 4 Kent 55.

But there are other modes of limiting an estate to a wife, which, Lord Coke says, are good jointures within the statute, provided that the wife accepts them after the death of the husband. She may, however, reject them, and claim her dower; Cruise, Dig. tit. 7; 2 Bla. Com. 137. As to the effect of jointure as a bar of dower, see Wms. R. P., 6th ed. 235, and the American notes. See DOWER. It is held that a jointure cannot be affected by a post-nuptial agreement; 7 Houst. 102; s. c. 30 Atl. Rep. 735.

In its more enlarged sense, a jointure signifies a joint estate limited to both husband and wife. 2 Bla. Com. 137. See 14 Viner, Abr. 540; 3 Bac. Abr. 190; Bouvier, Inst. 176; Washb. R. P.

**JOUR.** A French word signifying day. It is used in our old law-books: as, *tout jours*, forever. It is also frequently employed in the composition of words: as, *journal*, a day-book; *journeyman*, a man who works by the day; *journeys account*.

**JOURNAL. In Maritime Law.** The book kept on board of a ship or other vessel which contains an account of the ship's course, with a short history of every occurrence during the voyage. Another name for log-book. Chitty, Law of Nat. 199.

**In Commercial Law.** A book used among merchants, in which the contents of the waste-book are separated every month, and entered on the debtor and creditor side, for more convenient posting in the ledger.

**In Legislation.** An account of the proceedings of a legislative body.

The constitution of the United States, art. 1, s. 5, directs that "each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy. See 2 Sto. Const., 5th ed. § 839.

The constitutions of the several states contain similar provisions.

On a reference to the journal of the federal house of representatives to ascertain whether a duly authenticated law was passed, the court is bound to assume that the journal speaks the truth, and cannot receive oral evidence to impeach its correctness; 144 U. S. 1; but the debates in congress may not be resorted to for the purpose of discovering the meaning of a statute; 166 *id.* 290

The journal of either house is evidence of the action of that house upon all matters before it; 7 Cow. 613; Cowp. 17. It is a public record of which the courts may take judicial notice; 1 Greenl. Ev. § 482; 5 W. Va. 85; s. c. 17 Am. Rep. 28; 16 *id.* 647; 94 U. S. 260; 60 Ia. 549; 79 Va. 280; 1 Wyo. 85; Cooley, Const. Lim. 135; *contra*, 45 Ill. 119; 2 Cent. L. J. 407. If it should appear therefrom that any act did not receive the requisite vote, or that the act was not constitutionally adopted, the courts may adjudge the act void; Cooley, Const. Lim. 164. Failure to comply with certain constitutional provisions in the passage of an act can be shown only by the journals; 27 S. E. Rep. (Ga.) 183; and if the journal sufficiently shows on its face a substantial compliance with constitutional requirements, a mere clerical omission in the journals of either house will not vitiate an act; 27 S. E. Rep. (W. Va.) 218. Where they are silent as to the observance of any constitutional requirement, it will not be presumed that such requirement was disregarded, and where they do not expressly show whether the act was constitutionally passed it will be held valid unless there is an omission of some matter expressly required by the constitution to be entered therein; 47 Pac. Rep. (Utah) 670.

Where the constitution requires that the yeas and nays be entered on the journals, they are conclusive as against not only a printed statute published by law, but a duly enrolled act; 25 S. E. Rep. (N. C.) 966.

In determining whether an act was passed in accordance with a constitutional provision requiring the assent of two-thirds of the members, recourse may be had to the journals, if the certificate of the presiding officer fails to show by what vote the bill was passed; 42 N. E. Rep. (N. Y.) 1088.

The journals need not show that a bill was read by sections on its final passage, as required by the constitution, the presumption being that it was read; 18 So. Rep. (Fla.) 767. And where they affirmatively show non-compliance with an essential requirement to the enactment of a bill, or fail to show any essential step in the enactment which the constitution requires them to show, the enrolled bill as evidence of the law is overcome; 18 So. Rep. (Fla.) 767.

Where a bill, as approved, contains im-



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portant clauses which the journals show were stricken out by the amendment in the houses it is invalid; 68 N. W. Rep. (Wis.) 769.

The journals cannot be resorted to by the court for the purpose of inquiring into the motive which actuated the legislature or any member of it in enacting a law; 45 Pac. Rep. (Ida.) 890.

The journals are inadmissible to show that parts of the bill, as passed by the houses, were omitted from the enrolled bill as signed by the presiding officers of the two houses and the governor, where all bills are required to be signed by the governor after having passed the legislative assembly; 42 Pac. Rep. (Ariz.) 1025. Every reasonable presumption is made in favor of the action of a legislative body; it will not be presumed from the mere silence of the journals that either house disregarded a constitutional requirement in the passage of an act, unless in cases where the constitution has required the journals to show the action that has been taken; 25 Ill. 181; 11 Ind. 424; 3 Ohio St. 475; and the presumption that a properly authenticated bill was passed is not overcome by the failure of the journals to show any fact which is not specifically required by the constitution to be entered therein; 67 N. W. Rep. (Minn.) 632. Such a bill properly enrolled, signed, and approved cannot be impeached by reference to the journals of either house, to show that it was enacted in conformity to constitutional requirements; 35 S. W. Rep. (Ky.) 3; *id.* 275.

**JOURNEY.** Originally a day's travel. It is now applied to travel from place to place, without restriction of time. But when thus applied, it is employed to designate a travel which is without the ordinary habits, business, or duties of the person, to a distance from his home, and beyond the circle of his friends or acquaintances. 53 Ala. 521.

**JOURNEYS ACCOUNT. In English Practice.** A new writ which the plaintiff was permitted to sue out within a reasonable time after the abatement, without his fault, of the first writ. This time was computed with reference to the number of days which the plaintiff must spend in *journeying* to reach the court: hence the name of *journeys account*, that is, journeys *accomptes* or *counted*. This writ was *quasi* a continuance of the first writ, and so related back to it as to oust the defendant or tenant of his voucher, plea of *non-tenure*, *joint tenancy fully administered*, or any other plea arising upon matter happening after date of the first writ; Co. Litt. fol. 9 *b*.

This mode of proceeding has fallen into disuse, the practice now being to permit that writ to be quashed, and to sue out another. See *Termes de la Ley;* Bacon. Abr. *Abatement* (Q); 14 Viner, Abr. 558; 4 Comyn, Dig. 714; 7 M. & G. 762; 8 Cra. 84.

**JUBILACION. In Spanish Law.** The right of a public officer to retire from office, retaining his title and his salary, either in whole or in part, after he has attained the age of fifty years and been in public service at least twenty years, whenever his infirmities prevent him from discharging the duties of his office.

**JUDAISMUS** (Lat.). The religion and rites of the Jews. Du Cange. A quarter set apart for residence of Jews. Du Cange. A usurious rate of interest. 1 Mon. Angl. 839; 2 *id.* 10, 665. *Sex marcas sterlingorum ad acquietandam terram prædictam de Judaismo, in quo fuit impignerata.* Du Cange. An income anciently accruing to the king from the Jews. Blount.

**JUDEX** (Lat.). **In Old English Law.** A juror. Spelman, Gloss. A judge, in modern sense, especially—as opposed to *justiciarius*, *i. e.* a common-law judge—to denote an ecclesiastical judge. Bracton, fol. 401, 402.

**In Roman Law.** One who, either in his own right or by appointment of the magistrate for the special case, judged causes.

Thus, the *prætor* was formerly called *judex*. But, generally, prætors and magistrates who judge of their own right were distinguished from *judices*, who were private persons, appointed by the prætor, on application of the plaintiff, to try the cause, as soon as issue was joined, and furnished by him with instructions as to the legal principles involved. They were variously called *judices delegati*, or *pedanei*, or *speciales*. It has been said that they resembled in many respects jurors: thus, both are private persons, brought in at a certain stage of the proceedings, viz., issue joined, to try the cause, under instructions from the judge as to the law of the case. But civilians are not clear whether the *judices* had to decide the fact alone, or the law and fact. The *judex* resembles in many respects the *arbitrator*, or arbiter, the chief differences being, *first*, that the latter is appointed in cases of trust and confidence, the former in cases where the relations of the parties are governed by strict law (*in pactionibus strictis*); *second*, the latter has the whole control of cases, and decides according to equity and good conscience, the former by strict formulæ; *third*, that the latter may be a magistrate, the former must be a private person; *fourth*, that the award of the arbiter derives its force from the agreement of submission, while the decree of the *judex* has its sanction in the command of the prætor to try the cause; Calvinus, Lex.; 1 Spence, Eq. Jur. 210, note; Mackeldey, Civ. Law, Kaufmann ed. § 193, note.

It has been said that there was generally one judex, sometimes three,—in which case the decision of two, in the absence of the third, had no effect; Calvinus, Lex. But another careful writer says that "although there could never be more than one *judex*, there were sometimes several *arbitri*, but the *arbiter* was chosen from the same class as the *judex*." Sand. Inst. Just. Introd. lxiii.

Down to the time of handing over the cause to the *judex*, that is, till issue joined, the proceedings were before the prætor, and were said to be *in jure;* after that before the *judex*, and were said to be *in judicio*. In all this we see the germ of the Anglo-Saxon system of judicature; 1 Spence, Eq. Jur. 67.

A judge who conducted the trial from beginning to end; *magistratus*. The practice of calling in *judices* was disused before Justinian's time: therefore, in the Code, Institutes, and Novels, *judex* means judge in its modern sense. Heineccius, Elem. Jur. Civ. § 1327.

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The term *judex* is used with very different significations at different periods of Roman law. The distinctive features of the position of the *judex* belong to the earlier history of the Roman law.

A recent writer defines very clearly the functions of the *judex* at that period as distinguished from those of the magistrate: "In the earlier history of civil procedure in Rome, we find two sharply defined divisions,—the proceedings which were said to be *in jure*, and those which were *in judicio*. The former took place before the magistrate, who represented officially the judicial power of the State. This magistrate in this capacity decided, in the first instance, whether the claim of the complaining party was cognizable at all,—whether there was any form of procedure by which it could be enforced. If it was controverted, and there seemed to be any action that would fit the case, the *litis contestatio* was formed, by a solemn appeal addressed by each party to his witnesses, and the controversy was then referred to the *judex*, or in some cases to a body or college of *judices*. The *judices* were not magistrates, and did not represent the power of the State. They were, it would seem, more in theory like referees. They took up the issue which had been stated by the magistrate, heard the testimony, and pronounced the *sententia*, and this finding was afterwards enforced by the magistrate." Howe, Stud. Civ. L. 246.

This relates to the period during which the sharply defined distinction between proceedings *in jure* and those *in judicio* was strictly observed. If, for example, the dispute concerned property it was assigned temporarily to the possession of one party, who gave security for its restoration if required, and the *judex* simply decided which litigant was right; Morey, R. L. 18, 389. The growth of the proceeding by *formula* during the next period was doubtless largely due to its convenience as a method of conveying to the *judex* the instructions of the magistrate with respect to the case referred to him. The new proceeding tended very much to increase the flexibility of the law in its application to particular cases, as it has been said there was no tradition to fetter the formula of the *prætor*. In the old *litis contestatio* the issue was formulated in narrowly prescribed terms; in the new *formula* the terms used were informal and freely chosen by the magistrate. "The *formula* was thus well adapted as a means for directly submitting to the decisions of a *judex in judicio* any question, or complex of questions, which the *prætor* deemed actionable. The *prætor* himself was now in a position, while formulating the legal issue, to give the *judex* at the same time direct instructions in reference to the decision of such issue. For whether the judge condemned or acquitted depended now solely on the manner in which the *prætor* formulated the question in dispute." Sohm, Inst. Rom. L. 177. It was now for the first time that the *judex* became in effect an official, he ceased to be an independent private person bound only by the positive law, and his action was dominated by the limitations of the *prætor's* edict. Thus the latter became a dominating force in legal procedure, and the *judex* in some sense a subordinate official, and the result was "that the formulary procedure obliterated beyond recovery the clear sharp line which had hitherto severed *jus* and *judicium*." This naturally resulted from the fact that by the *formula* the *judex* was converted into an organ or instrument not only of the civil, but also of the *prætor*, made law, and the proceedings *in judicio* and those *in jure* were controlled by the same authority; *id.* 178, 220. In the last period of Roman procedure during the later empire the *prætor* lost his former power of directing the administration of the law, and when the edict came to be fixed by the will of the emperor the *prætor* and the *præses* were bound by it equally with the *judex* and in the same way that the latter had before been limited by their own edict. Its publication by the *prætor* was merely formal, and he became a mere instrument for applying the law, and his duties became more and more ministerial in proportion as, on the one hand, scientific jurisprudence developed and defined the contents of the existing law and, on the other hand, the imperial power, superseding all other agencies, appropriated to itself the function of developing the law. Thus the *judex* gradually became an official whose duty it was to assist the *prætor*, and, in the same way, the *prætor* became in reality an official whose duty it was to assist the emperor; *id.* 220.

For a long period senators alone were qualified to act as judges, and during that time any member of the senate could act, if justified, by mutual consent of the parties, or if they could not agree by law. There were also plebeian judges called *centumviri* elected by the *comitia* constituting a *collegium* divided into sections and having special jurisdiction of citizenship and successions; their jurisdiction was exclusive where it existed. As to the duties of the *judex* see also Inst. 4. 17. 1-7; Sand. Introd. xii., xxi., lxi., lxxiv.; Sohm, Inst. Rom. L. §§ 34-37; PRÆTOR; RECUPERATORS; JUDICIO; IN JURE.

**Judex Ordinarius** (Lat.). **In Civil Law.** A judge who had jurisdiction by his own right, not by another's appointment. Calvinus, Lex.; Vicat, Voc. Jur. Blackstone says that *judices ordinarii* decided only questions of fact, while questions of law were referred to the *centumviri;* but this would seem to be rather the definition of *judices selecti;* and not all questions of law were referred to the *centumviri*, but particular actions: *e. g. querela inofficiosi testamenti.* See 2 Bla. Com. 315; Vicat, Voc. Jur. Utr. *Centumviri.*

**Judex Pedaneus.** Inferior judges; deputy judges; "*petit* judges that try only trifling cases (so-called because they had only a low seat and no tribunal)." Harper's Lat. Dict.; Dig. 3. 1. 1. 6.

The name was given to the *judex* who was delegated to hear the whole cause. Their appointment is said to have been due, in the first instance, to the great increase in the volume of judicial business, which led the emperor Diocletian to authorize the provincial governors to refer cases of minor importance to them. They "were not *judices* in the old sense of the word, but, according to the opinion of Ortolan, permanent magistrates entrusted with the special duty of conducting such cases as the governor might see fit to refer to them. No other view of the character of these officers seems consistent with the autocratic spirit which permeated the whole imperial system;" Morey, Rom. L. 142. A recent writer says, "About the end of the third century, the *præsides provinciarum* were in the habit of proceeding *extra ordinem* in civil actions, *i. e.* they were in the habit of either giving judgment themselves or of delegating the whole cause to a deputy judge, a *judex pedaneus.* This deputy judge (who is also called *judex datus* or *judex delegatus*) is now in form as well as in substance an official who acts in lieu of the magistrate; he is not merely entrusted, like the old *judex privatus*, with the conduct of the proceedings *in judicio*, but is deputed—and this is the reason why no formula is used—to hear and determine the whole cause, including the proceedings *in jure.* Like the proceedings before the *præses* himself, the proceedings before this subordinate judge are *extra ordinem;*" Sohm, Inst. Rom. L. 222. It has been said with respect to these judges that the prætors and other great magistrates did not themselves decide the actions which arose between private individuals: these were submitted to judges chosen by the parties, and these judges were called *judices pedanei.* In choosing them, the plaintiff had the right to nominate, and the defendant to accept or reject those nominated; Heineccius, Antiq. lib. 4, tit. b. n. 40; 7 Touillier, n. 353. As to *judices pedanei*, generally, see Zimmern, Ges. Rom. Priv. § 18.

**Judex Quæstionis.** A magistrate who decided the law of a criminal case, when the *prætor* himself did not sit as a magistrate. Morey, Rom. L. 88.

The director of the criminal court under the presidency of the *prætor.* Harper's Lat. Dict.; Cic. Brut. 76, 264.

**Judex Selectus.** A select or selected *judex* or judge.

The judges in criminal suits selected by the *prætor.* Harper's Lat. Dict.; Cic. Verr. 2, 2, 13, § 32.

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These *judices selecti* were used in criminal causes, and between them and modern *jurors* many points of resemblance have been noticed; 3 Bla. Com. 366. They were first returned by the *prætor*, then drawn by lot, subject to challenge; they were sworn and talesmen were struck. So many points of resemblance were thought to exist between them and the δικάσται of the Greeks and our juries that the English institution has been thought to be derived from the former ones; *id.* note (n). But the root idea of both systems is sufficiently natural and logical to have been indigenous in both countries. See JURY.

**JUDGE.** A public officer lawfully appointed to decide litigated questions according to law.

An officer so named in his commission, who presides in some court.

In its most extensive sense the term includes all officers appointed to decide litigated questions while acting in that capacity, including justices of the peace, and even jurors, it is said, who are judges of the facts. 4 Dall. 229; 3 Yeates 300. In ordinary legal use, however, the term is limited to the sense of the second of the definitions here given; 15 Ill. 388; unless it may be that the case of a justice or commissioner acting judicially is to be considered an extension of this meaning. See 3 Cush. 584.

By the common law every court, while engaged in the exercise of its lawful functions, has the authority to preserve order, decency, and silence in its presence, and may apprehend and punish the offender without examination or proof; but if the offence be committed out of court the party is entitled to notice and a hearing in his defence; 1 Cal. 152; 28 Ind. 205. See CONTEMPT.

An assault on a judge sitting in court is not only punishable as a contempt, but indictable, as a crime against public justice, and more aggravated than an ordinary assault, or even than an assault committed upon another person in a court; 2 Bish. N. Cr. L. § 250; this principle comes from the common law and was, as early as 25 Edw. 3, embodied in a statute, under which such an offence was punishable by the loss of the right hand, forfeiture of lands and goods, and perpetual imprisonment. In Neagle's case, 135 U. S. 1, it was held that "an assault upon a judge of a court of the United States, while in discharge of his official duties, is a breach of the peace of the United States, as distinguished from the peace of the State in which the assault takes place." In this case the petitioner was a United States deputy marshal, appointed for the express purpose of guarding Mr. Justice Field against a threatened attack, which took place, and the killing was held by the court to have been caused by a just apprehension that an attack would result in the death of the justice, and was justifiable and a judgment of the circuit court, discharging him from the custody of the sheriff, by whom he was held under process of the state court, was affirmed.

So any insult, disrespect, or insolence to a judge is punishable; 2 Bish. N. Cr. L. § 250. On this subject, it was said by Holroyd, J.: "In the case of an insult to (the judge) himself, it is not on his own account that he commits; for that is a consideration which should never enter his mind. But though he may despise the insult, it is a duty which he owes to the station to which he belongs not to suffer those things to pass which will make him despicable in the eyes of others. It is his duty to support the dignity of his station, and uphold the law, so that in his presence, at least, it shall not be infringed;" 4 B. & Ald. 329, 339.

Within this principle it was held to be a contempt to write a letter to a judge, libelling or abusing him in regard to one of his decisions; 18 Kan. 72; or when the judge of an inferior tribunal refuses obedience to processes from a superior one; 13 Wend. 664; 1 Eng. L. & Eq. 516; 2 Caines 97; 2 Johns. Cas. 118; 6 B. Monr. 638; T. U. P. Chart. 43, 315.

It has been held that abusing a judge out of court, with reference to expressions made by him on a trial, was a contempt; 2 Va. Cas. 408; but in another case it was held that newspaper articles in regard to the conduct of a judge during a trial, and charging him with being an abettor of a person against whom an indictment for murder was pending, could not be visited as a contempt; 4 Sm. & M. 751. In the federal courts, and in many states, the subject is regulated by statute: U. S. Rev. Stat. § 725; 16 Fed. Rep. 853; 1 Flipp. 108; 19 Wall. 505; 64 Ill. 195; 89 N. C. 28; 8 W. & S. 77; 110 Ind. 301. The question whether a contempt can be committed otherwise than in court cannot be said to be settled, but Bishop is of the opinion that the English and better American doctrines recognize such contempts, yet, under limitations easily defined; 2 Bish. N. Cr. L. § 258. In all such cases the offence is against the state, not the judge; *id.* § 269; 7 Wheat. 38; 36 Wis. 355; 36 Ind. 196; 7 Blatch. 23.

In a recent case a judge who was a candidate for re-election, instituted contempt proceedings against the editor of a newspaper and a lawyer who wrote a communication in the newspaper criticising his judicial conduct. An order adjudging both parties in contempt was entered, but its execution was prevented by a writ of prohibition from the supreme court of Wisconsin, which said: "Truly, it must be a grievous and weighty necessity which will justify so arbitrary a proceeding, whereby a candidate for office becomes the accuser, judge, and jury, and may within a few hours summarily punish his critic by imprisonment. The result of such doctrine is that all unfavorable criticism of a sitting judge's past official conduct can be at once stopped by the judge himself, or, if not stopped, can be punished by immediate imprisonment. If there can be any more effectual way to gag the press and subvert freedom of speech, we do not know where to find it. Under such a rule the merits of a sitting judge may be rehearsed, but as to his demerits

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there must be profound silence. In our opinion no such divinity 'doth hedge about' a judge—certainly not when he is a candidate for public office;" 18 N. Y. L. J. 28, where the subject of contempt out of court is discussed generally.

The question has recently been raised, "Can a judge be guilty of contempt of court?" In a county court in England the judge made some strong observations on the conduct of a bankrupt who applied for his discharge, characterizing him as being guilty of "bare-faced and impudent robbery." It is suggested in this connection that while liable to abuse, on the whole, the rule exempting judges from prosecution of any kind for observations made upon the bench is a rational one; 56 Alb. L. J. 202.

Bribery or attempting to bribe a judge was, at common law, a very grave offence. Indeed the earlier definitions of bribery seem to confine the offence to judicial officers; 4 Bla. Com. 139; 3 Inst. 145; and they have been criticised upon this ground for being too narrow. See 1 East 188; 4 Burr. 2494; 2 Bish. N. Cr. L. § 85, n. 1. Upon the same ground are condemned sinister approaches, with intent to influence judges indirectly, though not amounting to bribery; *id.*; and on this subject it was said by Lord Cottenham: "Every private communication to a judge, for the purpose of influencing his decision upon a matter publicly before him, always is, and ought to be, reprobated; it is a course calculated, if tolerated, to divert the course of justice, and is considered, and ought, more frequently than it is, to be treated, as what it really is, high contempt of court;" 1 Macn. & G. 116, 122.

Judges are appointed or elected in a variety of ways in the United States. For the federal courts they are appointed by the president, by and with the consent of the senate; in some of the states they are appointed by the governor, the governor and senate, or by the legislature. The judges of the federal courts, and of the courts of some of the states, hold their offices during good behavior; of others, during good behavior, or until they shall attain a certain age: and of others, for a limited term of years. The federal judges must have the tenure of office during good behavior conferred upon them before they can be invested with any portion of the judicial power of the government; 37 Fed. Rep. 567.

Impartiality is the first duty of a judge: if he has any (the slightest) interest in the cause, he is disqualified from sitting as a judge; *Aliquis non debit esse judex in propria causa*; 8 Co. 118; 6 Pick. 109; 4 Ohio 675; 17 Ga. 253; 22 N. H. 473; 19 Conn. 585; 43 La. Ann. 924; 91 Cal. 342; 75 Ia. 159. See 38 Ill. App. 441; 83 Tex. 99; such as his relationship to the parties; 142 N. Y. 130; even where such party is administrator only; 37 S. W. Rep. (Tex.) 846; (but relationship to plaintiff's attorney will not disqualify him; 38 S. W. Rep. (Tex.) 53.) Either party may make the objection that the judge is of kin to one of them; 10 Ind. 299; and it is for the judge to determine, in the exercise of sound judicial discretion, whether by reason of kinship, etc., it would be improper for him to hear a particular case; he cannot be compelled to vacate the bench by the affidavit of the litigant; 84 Ky. 18. A pecuniary interest in the case on trial will incapacitate him from sitting in the cause, both by the common law and the statutes: 12 Fla. 138; 9 Md. 324; 13 Mass. 340; as where he is interested as a stockholder in a railroad corporation making an application for a commission to appraise land, his interest is such as to invalidate the report of the commissioners; 4 Ohio St. 675; and where the lord chancellor who was a shareholder in a company in whose favor the vice-chancellor had made a decree, affirmed this decree, it was reversed on that ground; 3 H. L. Cas. 759; but it has been held that where the interest of the judge is merely that of a corporator in a municipal corporation, the legislature may provide that this shall constitute no disqualification when the corporation is a party, apparently on the ground that the interest is insignificant; 1 Gray 475. But it is doubtful whether even the legislature can go beyond this class of cases and abolish the maxim; Cooley, Const. Lim. 516.

If one of the judges is disqualified on this ground, a judgment rendered will be void, even though the proper number may have concurred in the result, which includes the interested judge; 6 Q. B. 753; or though the parties agree to waive objections to the jurisdictions; 38 S. W. Rep. (Tex.) 10. The objection may be raised for the first time in the appellate court; 6 Cush. 332; 2 H. L. Cas. 387; but in Iowa it was held that an objection to a judge of the court of original jurisdiction on the ground of interest must be made in that court; 1 Ia. 486.

In a suit on a collector's bond by the chosen freeholders of a county, one who was an inhabitant, a freeholder, and a taxpayer in the same county was incompetent to sit as judge; 21 N. J. L. 656. A judge is not disqualified to try a case because he has tried an action in trespass concerning the same property; 35 Atl. Rep. (Vt.) 333.

The interest which disqualifies a judge of the supreme court so that a judge of the circuit court may sit in his stead must be immediate, certain, and dependent on the result of the case, and not remote, uncertain, or speculative; 10 Fla. 213.

The general rule that it is irregular and improper for a judge to try any cause in which he has such an interest as would disqualify as a witness does not apply to orders purely formal in their character, and it is doubtful whether it would extend to a case in which no other judge could try and determine the cause. If the judge is deprived of authority to act, by statutory inhibition, the proceedings are void, otherwise voidable only, and therefore valid until avoided; 27 Ala. 423.

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It is said to be discretionary with him whether he will sit in a cause in which he has been of counsel; 2 A. K. Marsh. 517; Coxe, N. J. 164. See 2 Binn. 454; 5 Ind. 230; 82 Tex. 484. But the practice is to refuse to sit in such case. And in 5 Coldw. 217, it was held that where the judge who rendered the judgment in the case had been counsel in it, the judgment was a nullity; 30 Fla. 595. The question arose in Delaware at the time of the appointment of Bates, Chancellor, in 1865, whether he was legally disqualified from sitting in such cases, so as to bring them within the constitutional provision, giving jurisdiction to the chief justice in all cases in which the chancellor was interested. In view of the desire of the chancellor not to sit in cases in which he had been of counsel, the question was considered by him and Gilpin, C. J., and the conclusion reached that there was not a legal disqualification. This conclusion was communicated by the chancellor to the legislature with a suggestion that provision should be made for the appointment of a chancellor *ad litem* in such cases; MSS. notes of Bates, Chancellor. A magistrate authorized to sign writs cannot sign them in his own case; 47 Conn. 316.

Where there is no other tribunal that can act, the judge may hear the case; Freem. Judg. § 146; 5 H. L. C. 88; 19 Johns. 501; *contra*, Hopk. Ch. 2; 105 Mass. 221. See Cooley, Const. Lim., 2d ed. 207, 506, 509; 25 Mich. 83.

It was held that the absence of a judge from the court-room for a considerable time during the arguments of the jury without the consent of the parties was reversible error; 70 N. E. Rep. (Wis.) 682.

A judge is not competent as a witness in a cause trying before him, for this among other reasons, that he can hardly be deemed capable of impartially deciding on the admissibility of his own testimony, or of weighing it against that of another; 1 Greenl. Ev. § 364; 2 Mart. La. N. S. 312; 2 Cal. 358. See Comyn, Dig. *Courts* (B 4), (C 2), (E 1), (P 16), *Justices* (I 1, 2, 3); Bacon Abr. *Courts* (B); 1 Kent 291, 1889 ed.; CHARGE.

While acting within the bounds of his jurisdiction, the judge is not responsible for any error of judgment or mistake of law; 12 Co. 23; 2 Dall. 160; 2 N. & M'C. 168; 1 Day. Conn. 315; 5 Johns. 282; 9 *id.* 395; 3 A. K. Marsh. 76; 1 South. 74; 1 N. H. 374; 45 La. Ann. 1299; 8 Mo. 148; 21 Me. 550; 26 Ala. 527; 1 Bish. N. Cr. L. § 460; unless, possibly, a mistake was induced by gross carelessness or ignorance partaking of a criminal quality; 12 Mod. 493. An action will not lie against a judge of a court of record for any act done by him in his judicial capacity; 6 B. & C. 611. An action of a judge, to be criminally or even civilly cognizable, must be wilful and corrupt; 1 W. Bla. 19; 2 Mo. 23; 47 Me. 462; 26 Ala. 527; 9 Johns. 395; 8 Mo. 148, 254.

It is a rule sometimes asserted to be absolute and sometimes only *prima facie* that a judicial officer has no protection against the consequences of an act not within his jurisdiction; 2 Gray 120, 410, 570; 13 Wall. 335; 4 Conn. 407; 1 *id.* 40. But a distinction has sometimes been suggested between acts in excess of jurisdiction and those outside of it. For the latter it has been said that a judge of a court of superior jurisdiction is not liable; Lord De Grey, C. J., in 2 W. Bla. 1141. Of this case it is said by a writer cited *infra*, who dissents from the doctrine: "It is true this rule is a mere *dictum*, and also that the decision has been since overruled; but this *dictum* has sometimes been referred to with approval in subsequent cases;" 15 Am. L. Rev. 440. And Field, J., in 7 Wall. 523, said that such a judge is not liable when he acts in excess of his jurisdiction, except for malice. This expression, like that of Lord De Grey, was *obiter*, inasmuch as the case sustained the jurisdiction which had been questioned. In 73 N. Y. 12, this point was so decided, but the court drew a distinction between the case where the judge had acquired no jurisdiction at all, and the case where the act was merely in excess of jurisdiction after jurisdiction had been acquired. There the judge of the circuit court had imposed a re-sentence upon a prisoner, and he was accordingly imprisoned; the supreme court held the second sentence illegal, and discharged the prisoner. These cases and the doctrine asserted in them have been doubted and criticised by Arthur Biddle in 15 Am. L. Rev. 442 and note, where the authorities cited and relied on are critically examined. More recently the distinction has been discussed by Bishop, who states the doctrine of distinction between excess and absence of jurisdiction with approval, and even goes further, considering that where the jurisdiction is a close one and it is decided by the judge or magistrate carefully and earnestly in favor of his jurisdiction, "in reason and not quite without support from authority," he should not "suffer, though another or even a higher court held the contrary"; 1 Bish. N. Cr. L. § 460; Bish. Non-Contr. § 788.

There is no distinction between a judge acting in court and acting judicially out of court, that is, in chambers; 3 Moore, P. C. 52; Wilm. 208. See 46 Pac. Rep. (Kan.) 24.

"A judge of a court not of record is not liable for any injury sustained which is the result of an honest error of judgment in a matter wherein the court has jurisdiction, and when the act done is not of a purely ministerial nature." The rule is thus stated in 15 Am. L. Rev. 444. See further an article in Ir. L. T. and Sol. J., Nov. 13, 1880; 6 Am. Dec. 303; 29 Am. Rep. 80, n.; 23 Am. Rep. 690. See CORAM NON JUDICE.

One circuit judge has no power to review and revise the action of another circuit judge; 16 S. C. 362; 35 *id.* 273; nor has a judge when without the state, power to grant an injunction; 131 Ind. 437.

The acts of a judge *de facto* are not open to collateral attack; 140 U. S. 118.

A judge who acts corruptly may be im-

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peached; 5 Johns. 282; 8 Cow. 178; 4 Dall. 225. See IMPEACHMENT.

See, generally, JUDICIAL POWER; JUDGE-MADE LAW.

Under the Roman law a judge, by whose act or default in deciding or conducting a lawsuit, a party to the suit was injured, was liable to an action for damages, the amount of which was left to the discretion of the judge. Such action was regarded as *quasi-delictual*, because it was available, not only in cases of deliberately unfair decisions, but also in cases of less serious errors committed by the judge, as overlooking the day fixed for trial or disregarding the rules of law concerning adjournment and the like (*imprudentia judicis*). In such a case he was termed *judex qui litem suam fecit* (who makes the suit his own). The action in question, however, could not be taken on the ground that the judgment was unjust in substance; Sohm, Inst. Rom. L. 330; Mack. Rom. L. § 506; Morey, Rom. L. 383.

**JUDGE ADVOCATE.** An officer of a court-martial who is to discharge certain duties at the trial of offenders. His duties are to prosecute in the name of the United States; but he shall so far consider himself as counsel for the prisoner, after the prisoner shall have made his plea, as to object to leading questions to any of the witnesses or any question to the prisoner the answer to which might tend to criminate himself. He is, further, to swear the members of the court before they proceed upon any trial, and may also administer oaths for purposes of military justice and other purposes of military administration; U. S. Rev. Stat. 2 Supp. 524.

There are eight judge advocates of the army with the rank of major of cavalry, who perform their duties under the direction of the judge-advocate-general (*q. v.*), and have power to issue process for witnesses and to appoint reporters of court to which they are assigned; U. S. Rev. St. §§ 1200–2. See Rules and Articles of War, art. 69; 2 Story, U. S. Laws 1001; Holt. Dig. *passim*.

**JUDGE-ADVOCATE-GENERAL.** An officer of the army of the United States, provided for by Rev. St. § 1194, who is the head of the bureau of military justice and has the rank of brigadier-general; *id.* 1198. His duty is to receive, revise, and cause to be recorded the proceedings of all courts-martial, courts of inquiry, and military commissions, and perform such other duties as have heretofore been incident to the office; *id.* § 1199.

By the act of July 5, 1884, the bureau of military justice and the corps of judge advocates were consolidated under the title of judge-advocate-general's department, consisting of one judge-advocate-general, with the rank and pay of a brigadier general, one assistant with the rank and pay of colonel, three deputies with rank and pay of lieutenant-colonel, and three judge-advocates, each with rank and pay of a major; U. S. Rev. Stat. 1 Supp. § 457.

A similar officer was provided for the navy under the act of June 8, 1880, with the title of judge-advocate-general of the navy. He has the rank and pay of a captain in the navy, or colonel of the marine corps, as the case may be. His duties are to receive, revise, and have recorded the proceedings of all courts-martial, courts of inquiry, and boards for examination of officers, for retirement and promotion, in the naval service, and such other duties as were theretofore performed by naval judge-advocates-general; U. S. Rev. St. 1 Supp. § 290; 2 *id.* § 500.

**JUDGE'S CERTIFICATE. In English Practice.** The written statement of the judge who tried the cause that one of the parties is entitled to costs in the action. It is very important in some cases that these certificates should be obtained at the trial. See Tidd, Pr. 879; 3 Chitty, Pr. 458, 486; 3 Campb. 316; 5 B. & Ald. 796. A statement of the opinion of the court, signed by the judges, upon a question of law submitted to them by the chancellor for their decision.

Under the County Courts Act of 1867, in order to entitle a plaintiff to costs if he brings action in the high court, it is necessary that the judge before whom the action was tried shall certify that there was sufficient reason for bringing the action in the superior court, if he do not recover as much as £20 in an action of contract, or £10 in one of tort.

Under some English statutes the plaintiff is entitled to double or treble costs if the judge before whom the action is tried certifies that he is entitled to them; Archb. Pr. 430. See 3 Bla. Com. 453; CASE STATED.

**JUDGE-MADE LAW.** A phrase used to indicate judicial decisions which construe away the meaning of statutes, or find meanings in them the legislature never intended. It is sometimes used as meaning, simply, the law established by judicial precedent. Cooley, Const. Lim., 4th ed. 70, n. See Austin, Prov. of Jur. where the necessity of judicial legislation and its uses are discussed *in extenso*.

The expression judge-made law is undoubtedly more frequently used in the former sense, and as expressing a certain degree of opprobium. It is, however, unavoidable that in the distribution of powers which is now recognized as a necessary element of civilized government, there should be found at times some uncertainty as to the line of demarcation between the legislative and judicial powers as well as between each of them and the executive. The necessity of what is called judge-made law in the proper sense, and the possibility of its existence in the other sense, arises from the power of construction which necessarily exists, and though salutary when properly exercised, is susceptible of abuse, and in such case, difficult, if not impossible,

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to remedy. Of this power of construction it has been said that it "is a mighty one, and, unrestrained by settled rules, would tend to throw a painful uncertainty over the effect that might be given to the most plainly worded statutes, and render courts, in reality, the legislative power of the state. Instances are not wanting to confirm this. Judge-made law has overrode the legislative department. It was the boast of Chief Justice Pemberton, one of the judges of the despot Charles II., and not the worst even of those times, that he had entirely outdone the parliament in making law." 5 Ind. 41, 46. A recent philosophical writer thus characterizes that kind of judicial legislation which is necessary and proper under such a system as the common law; "Although it is considered necessary in all free states to keep the legislative, executive, and judicial powers for the most part separate, and all our American constitutions provide for this, yet it cannot be completely done. The judges, it is well known, actually make a great deal of law, and this judicial legislation cannot be avoided, and indeed much of the best work that we get in this line is done by them. But this they do as delegates of the sovereign people, as much as congress or the state legislatures;" Terry, Anglo-American Law 11.

Mr. Bishop earnestly contends that there is no judge-made law; he says that "law preceded writing, and no writing can be made comprehensive enough to include all law, and no blundering of the judge is so monstrous as denial of right to a suitor who is simply unable to find his case laid down in the statute law or in a previous decision." His view is that more errors are committed by failure to administer justice according to "the general principles of our jurisprudence and the collective conscience of mankind," for want of statute or precedent, than in all other ways. The common-law system was built up when there were few statutes and the judges derived "principles for their decisions from the known usages of the country and from what they found written by God in the breasts of men." Such, he considers, should be the action of judges now, and he assumes that they will always find principles on which to adjudicate any matter unprovided for by statutes or previous decisions. He argues that in view of "the ceaseless variety of changes in human affairs," while precedents are properly followed, yet, now, as in the earlier periods, they have not covered the entire ground, and it is absurd that questions of right or remedy should depend, not upon the abstract right or the convenience or propriety of a decision either way, but "solely on the accident, whether it arose in early times, received then an adjudication, and the adjudication found a reporter." 1 Bish. N. Cr. L. §§ 18, 19.

In a case for which he could find no precedent, Jessel, M. R., said: "I am afraid that, whatever I may call my decision, it will, in effect, be making law, which I never have any desire to do; but I cannot find that the point is covered by any decided case, or even appears to have been discussed in any decided case. The only satisfaction I have in deciding the point is this, that it will in all probability be carried to a higher court, and it will be for that court to make the law, or, as we say, declare the law, and not for me." L. R. 13 Ch. Div. 798, 805.

It has been said that the phrase judicial legislation carries on its face the notion of judicial usurpation, and is habitually used by the courts as a term of reproach; but it is contended by the writer who admits this current use of the phrase, that, properly used, it means the growth of the law at the hand of the judges, and in that sense, so far from being an evil, "it is a desirable, and indeed a necessary, feature of our system." 5 Harv. L. Rev. 172. In the discussion of the subject the writer last cited considers that with respect to much that has been written on the subject of judicial legislation, the meaning cannot be fully understood without taking into consideration the different theories as to the nature of law. Those writers who accept the theory of Austin and Bentham are naturally found to use the terms judge-made law and judicial legislation as terms meriting contempt, and indeed Bentham so characterizes the whole common law. On the other hand, those writers who take the opposite view and maintain that the origin of law is not command but custom, not only eliminate from consideration the idea of judicial legislation, but go so far as to limit the function of the legislature itself in the effort "to assist society in getting rid of its old customs and forming new ones." Recent supporters of this view are James C. Carter, Rep. Am. B. Assn. 1890, and Prof. Hammond, 1 Bla. Com., Hammond's ed. § 2. See also INTERNATIONAL LAW. The writer in the Harvard Law Review already cited discusses these conflicting views, giving preference to a third theory, intermediate between these two extremes, developed by Lawrence, Essay, Int. L., 2d ed. ch. i. The result is that, in what has been written on the subject of judicial legislation by the advocates of these various theories, there is less difference than is apparent on the surface, and that the process itself is recognized by all, though under different names. The importance of the subject is greatly enhanced in English law by the binding authority which is attributed to former decisions, and the reverence which is accorded to precedent. The conclusion reached is that judicial legislation is a necessary element in the development of the common law, but no precise rules can be laid down either as to the extent to which it should properly go, or how far a judge, in carrying on the process, may undertake to discard old doctrines and substitute new ones. Lord Esher, M. R., in a recent case attempted to distinguish between "fundamental propositions of law" which might be changed only by parliament, and the "evidence of

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the existence of such a proposition," which was within the disposition of the court; 25 Q. B. Div. 57; but as it is very properly remarked, there is no test suggested to enable a court to make this discrimination. "Even when a reform seems most plainly desirable, the conditions under which the judge works often make it preferable that the change should come from the legislature. One step by the court unless followed up can cause nothing but confusion; and the fact that the actual decision alone is binding makes it often doubtful how far a later court will continue the course upon which its predecessor has entered. Whether such a course should be begun depends on all the circumstances of the case. The only sure guides are common sense, and a knowledge of the law which is founded upon a knowledge of its history." 5 Harv. L. Rev. 201. See JUDICIAL POWER; DICTUM; JUDICIAL DECISIONS; PRECEDENTS.

**JUDGE'S NOTES or MINUTES.** Short statements, noted by a judge on the trial of a cause, of what transpires in the course of such trial.

They usually contain a statement of the testimony of witnesses, of documents offered or admitted in evidence, of offers of evidence, and whether it has been received or rejected, and the like matters.

In general, judge's notes are not evidence of what transpired at a former trial, nor can they be read to prove what a deceased witness swore to on such former trial; for they are no part of the record, and he is not officially bound to make them. But in chancery, when a new trial is ordered of an issue sent out of chancery to a court of law, and it is suggested that some of the witnesses in the former trial are of an advanced age, an order may be made that, in the event of death or inability to attend, their testimony may be read from the judge's notes; 1 Greenl. Ev. § 166.

**JUDGMENT. In Practice.** The conclusion of law upon facts found, or admitted by the parties, or upon their default in the course of the suit. Tidd, Pr. 930; 32 Md. 147; 143 Ill. 537. It may be on the main question, or on all of the questions, if there are several; 49 Ohio St. 364.

The decision or sentence of the law, given by the court of justice or other competent tribunal, as the result of proceedings instituted therein for the redress of an injury. 3 Bla. Com. 395; 12 Minn. 437. It is said to be the end of the law; 51 Pa. 373. It affects only parties and privies; 40 Minn. 281; 83 Ala. 171; 97 N. C. 112; 17 Or. 42; 139 U. S. 156.

The language of judgments, therefore, is not that "it is decreed," or "resolved," by the court; but "it is considered" (*consideratum est per curiam*) that the plaintiff recover his debt, damages, or possession, as the case may require, or that the defendant do go without day. This implies that the judgment is not so much the decision of the court, as the sentence of the law pronounced and decreed by the court, after due deliberation and inquiry.

Litigious contests present to the courts facts to appreciate, agreements to be construed, and points of law to be resolved. The judgment is the result of the full examination of all these.

DEFINITIONS. The various forms of judgment are designated by the following terms:

*Judgment of assets in futuro*, is one against an executor or heir, who holds at the time no property on which it can operate. See QUANDO ACCIDERINT.

*Judgment of cassetur breve* or *billa* (that the writ or bill be quashed) is a judgment rendered in favor of a party pleading in abatement to a writ or action. Steph. Pl., Andr.'s ed. § 97.

*Judgment by confession* is a judgment entered for the plaintiff in case the defendant, instead of entering a plea, confesses the action, or at any time before trial confesses the action and withdraws his plea and other allegations.

*Contradictory judgment* is a judgment which has been given after the parties have been heard; either in support of their claims or in their defence. 11 La. 366. It is used in Louisiana to distinguish such judgments from those rendered by default.

*Judgment de melioribus damnis* is a judgment entered at the election of the plaintiff for the highest amount where damages have been differently assessed against several defendants. See DE MELIORIBUS DAMNIS.

*Judgment by default* is a judgment rendered in consequence of the non-appearance of the defendant. The term is also applied to judgments entered under statutes or rules of court, for want of affidavit of defence, plea, answer, and the like, or for failure to take some required step in the cause.

*Judgment in error* is a judgment rendered by a court of error on a record sent up from an inferior court.

*Final judgment* is one which puts an end to a suit.

As to *judgment in rem*, *inter partes*, or *in personam*, see those titles.

*Interlocutory judgment* is one given in the progress of a cause upon some plea, proceeding, or default which is only intermediate and does not finally determine or complete the suit. 3 Bla. Com. 396.

*Judgment on the merits* is one rendered after argument and investigation, and when it is determined which party is in the right, as distinguished from a judgment rendered upon some preliminary or merely technical point, or by default, and without trial.

*Judgment of nil capiat per breve* or *per billam* is a judgment in favor of the defendant upon an issue raised upon a declaration or peremptory plea.

*Judgment by nil dicit* is one rendered against a defendant for want of a plea.

*Judgment of nolle prosequi* is a judgment entered against the plaintiff where after ap-

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pearance and before judgment he says "he will not further prosecute his suit." Steph. Pl., Andr. ed. § 97.

*Judgment of non obstante veredicto* is a judgment rendered in favor of one party *without regard to the verdict* obtained by the other party.

*Judgment of non pros.* (*non prosequitur*) is one given against the plaintiff for a neglect to take any of those steps which it is incumbent on him to take in due time. See NON PROS.

*Judgment of non suit*, a judgment rendered against the plaintiff when he, on trial by jury, on being called or demanded, at the instance of the defendant, to be present while the jury give their verdict, fails to make an appearance. See NON-SUIT.

*Judgment by non sum informatus* is one which is rendered when, instead of entering a plea, the defendant's attorney says he is not informed of any answer to be given to the action. Steph. Pl., Andr. ed. § 97.

*Judgment nunc pro tunc*, is one entered on a day subsequent to the time at which it should have been entered, as of the latter date. See NUNC PRO TUNC.

*Judgment pro retorno habendo* is a judgment that the party have a return of the goods.

*Judgment quando acciderint*, is such a judgment against an executor or heir as binds only future assets. See QUANDO ACCIDERINT.

*Judgment quod computet* is a judgment in an action of account-render that the defendant do account.

*Judgment quod partitio fiat* is the interlocutory judgment in a writ of partition that partition be made.

*Judgment quod partes replacitent* is a judgment for repleader. See REPLEADER.

*Judgment quod recuperet* is a judgment in favor of the plaintiff (that he do recover) rendered when he has prevailed upon an issue in fact or an issue in law other than one arising on a dilatory plea. Steph. Pl., Andr. ed. § 97.

*Judgment of respondeat ouster* is a judgment given against the defendant after he has failed to establish a dilatory plea upon which an issue in law has been raised.

*Judgment of retraxit* is one given against the plaintiff where, after appearance and before judgment, the plaintiff enters upon the record that he "withdraws his suit."

See these several titles where they are separately treated.

CLASSIFICATION. Judgments in civil causes, considered with respect to the method of obtaining them, may be thus classified.

1. When the result is obtained by the trial of an issue of fact. In this case the trial may involve questions both of law and fact, but the law is applied incidentally to the trial of the disputed facts, as in the admission or rejection of evidence, the conduct of the trial, and the instruction of the jury or, it may be, in the determination of the question whether the evidence is sufficient either in quality or quantity to be submitted to the jury. In these cases the law is admitted or applied to facts found by a jury or the court.

Judgments upon facts found are the following:

(1) Judgment of *nul tiel record* (*q. v.*) occurs when some pleading denies the existence of a record, and issue is joined thereon; the record being produced is compared by the court with the statement in the pleading which alleges it; and if they correspond, the party asserting its existence obtains judgment; if they do not correspond, the other party obtains judgment of *nul tiel record*.

(2) Judgment upon *verdict* (*q. v.*) is the most usual of the judgments upon facts found, and is for the party obtaining the verdict.

(3) Judgment *non obstante veredicto* is a judgment rendered in favor of the plaintiff *notwithstanding the verdict* for the defendant: this judgment is given upon motion (which can only be made by the plaintiff) when, upon an examination of the whole proceedings, it appears to the court that the defendant has shown himself to be in the wrong, and that the issue, though decided in his favor by the jury, is on a point which does not at all better his case; Smith, Act. 161. This is sometimes called a judgment upon confession, because it occurs after a pleading by defendant in confession and avoidance and issue joined thereon, and verdict found for defendant, and then it appears that the pleading was bad in law and might have been demurred to on that ground. The plea being substantially bad in law, of course the verdict which merely shows it to be true in point of fact, cannot avail to entitle the defendant to judgment; while, on the other hand, the plea being in confession and avoidance involves a confession of the plaintiff's declaration, and shows that he was entitled to maintain his action. Sometimes it may be expedient for the plaintiff to move for judgment *non obstante veredicto*, even though the verdict be in his favor; for, in a case like that described above, if he takes judgment *as upon the verdict* it seems that such judgment would be erroneous, and that the only safe course is to take it *as upon confession;* Cro. Eliz. 778; 2 Rolle, Abr. 99; 1 Bingh. N. C. 767. See, also, Cro. Eliz. 214; 6 Mod. 10; 8 Taunt. 413; Rastell, Ent. 622; 1 Wend. 307; 5 *id.* 513; 6 Cow. 225. See NON OBSTANTE VEREDICTO.

(4) A judgment of *repleader* is given when issue is joined on an immaterial point, or one on which the court cannot give a judgment which will determine the right. On the award of a repleader, the parties must recommence their pleadings at the point where the immaterial issue originated. See REPLEADER. This judgment is interlocutory, *quod partes replacitent*. See Bacon, Abr. *Pleas*, 4 (M): 3 Hayw. 159.

2. When the facts are admitted by the parties, leaving only issues of law to be determined, which are as follows:

(1) Judgment upon a *demurrer* against

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the party demurring concludes him, because by demurring, a party admits the facts alleged in the pleadings of his adversary, and relies on their insufficiency in law. See DEMURRER.

(2) It sometimes happens that though the adverse parties are agreed as to the facts, and only differ as to the law arising out of them, still these facts do not so clearly appear on the pleadings as to enable them to obtain the opinion of the court by way of *demurrer;* for on demurrer the court can look at nothing whatever except the pleadings. In such circumstances the statute 3 & 4 Will. IV. c. 42, § 25, which has been imitated in most of the states, allows them after issue joined, and on obtaining the consent of a single judge, to state the facts in a *special case* for the opinion of the court, and agree that a judgment shall be entered for the plaintiff or defendant by *confession* or *nolle prosequi* immediately after the decision of the case; and judgment is entered accordingly, called judgment on a case stated.

(3) Sometimes *at the trial* the parties find that they agree on the facts, and the only question is one of law. In such case a verdict *pro forma* is taken, which is a species of admission by the parties, and is *general*, where the jury find for the plaintiff generally, but subject to the opinion of the court on a *special case*, or *special*, where they state the facts as they find them, concluding that the opinion of the court shall decide in whose favor the verdict shall be, and that they assess the damages accordingly. The judgments in these cases are called respectively, judgment *on a general verdict subject to a special case*, and judgment *on a special verdict*. See CASE STATED; POINT RESERVED; VERDICT.

3. Besides these, a judgment may be based upon the admissions or confessions of one only of the parties.

(*a*) Such judgments when for defendant upon the admissions of the plaintiff are:

(1) Judgment of *nolle prosequi*, where, after appearance and before judgment, the plaintiff says he "will not further prosecute his suit."

(2) Judgment of *retraxit* is one where, after appearance and before judgment, the plaintiff enters upon the record that he "withdraws his suit," whereupon judgment is rendered against him. The difference between these is that a *retraxit* is a bar to any future action for the same cause; while a *nolle prosequi* is not, unless made after judgment; 7 Bingh. 716; 1 Wms. Saund. 207, n.

(3) A plaintiff sometimes, when he finds he has misconceived his action, obtains leave from the court to *discontinue*, on which there is a judgment against him and he has to pay costs; but he may commence a new action for the same cause.

(4) A *stet processus* is entered where it is agreed by leave of the court that all further proceedings shall be stayed: though in form a judgment for the defendant, it is generally, like discontinuance, in point of fact for the benefit of the plaintiff, and entered on his application, as, for instance, when the defendant has become insolvent, it does not carry costs; Smith, Act. 162.

(*b*) Judgments for the plaintiff upon facts admitted by the defendant are:

(1) Judgment by *cognovit actionem*, *cognovit* or confession, where, instead of entering a plea, the defendant chooses to acknowledge the rightfulness of the plaintiff's action.

(2) Judgment by confession *relicta verificatione*, where, after pleading and before trial, he both confesses the plaintiff's cause of action to be just and true and withdraws or abandons his plea or other allegations. Upon this, judgment is entered against him without proceeding to trial.

Analogous to this is the judgment confessed by warrant of attorney: this is an authority given by the debtor to an attorney named by the creditor, empowering him to confess judgment either by *cognovit actionem*, *nil dicit*, or *non sum informatus*. This differs from a *cognovit* in that an action must be commenced before a *cognovit* can be given; 3 Dowl. 278, per Parke, B.; but not before the execution of a warrant of attorney. Judgments by *nil dicit* and *non sum informatus*, though they are in fact founded upon a tacit acknowledgment on the part of the defendant that he has no defence to the plaintiff's action, yet as they are commonly reckoned among the judgments by default, will be explained under that head.

4. A judgment is rendered on the default of a party, on two grounds: it is considered that the failure of the party to proceed is an admission that he, if plaintiff, has no just cause of action, or, if defendant, has no good defence; and it is intended as a penalty for his neglect; for which reason, when such judgment is set aside or opened at the instance of the defaulting party, the court generally require him to pay costs.

(*a*) Such judgments against the defendant are:

(1) Judgment *by default* is against the defendant when he has failed to appear after being served with the writ; to plead, after being ruled so to do, or, in Pennsylvania and some other states, to file an affidavit of defence within the prescribed time; or, generally, to take any step in the cause incumbent on him. The practice of permitting judgment to be entered by default for want of a sufficient affidavit of defence, when the cause of action is a record, or is sworn to, has become practically universal. Under it courts usually refuse a judgment in cases in which motion on the affidavits raises a doubtful question. When such decisions can be reviewed, an order refusing judgment will rarely be reversed; 163 Pa. 638.

(2) Judgment by *non sum informatus* is a species of judgment by default, where, instead of entering a plea, the defendant's attorney says he is "not informed" of any answer to be given to the action.

(3) Judgment by *nil dicit* is rendered

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against the defendant where, after being ruled to plead, he neglects to do so within the time specified.

(*b*) Such judgments against the plaintiff are:

(1) Judgment of *non pros.* (from *non prosequitur*) is one given against the plaintiff for a neglect to take any of those steps which it is incumbent on him to take in due time.

A judgment by default is just as conclusive between the parties of whatever is essential to support it as one rendered after answer and contest; 157 U. S. 683.

(2) Judgment of *non suit* (from *non sequitur*, or *ne suit pas*) is where the plaintiff, after giving in his evidence, finds that it will not sustain his case, and therefore voluntarily makes default by absenting himself when he is called on to hear the verdict. The court give judgment against him for this default; but the proceeding is really for his benefit, because after a nonsuit he can institute another action for the same cause, which is not the case—except in ejectment, in some states—after a verdict and judgment against him.

Judgments are further classified with reference to the stage of the cause at the time they are rendered.

1. *Interlocutory* judgments are such as are given in the middle of a cause upon some plea, proceeding, or default which is only intermediate, and does not finally determine or complete the suit. Any judgment leaving something to be done by the court, before the rights of the parties are determined, and not putting an end to the action in which it is entered, is interlocutory; Freem. Judg. § 12; 3 Bla. Com. 396. A judgment which is not final is called "interlocutory"; that is, an interlocutory judgment is one which determines some preliminary or subordinate point or plea, or settles some step, question, or default arising in the progress of the cause, but does not adjudicate the ultimate rights of the parties, or finally put the case out of court. Thus, a judgment or order passed upon any provisional or accessory claim or contention is, in general, merely interlocutory, although it may finally dispose of that particular matter; 1 Black, Judgm. 21.

Such is a judgment for the plaintiff upon a plea in abatement, which merely decides that the cause must proceed and the defendant put in a better plea. But, in the ordinary sense, interlocutory judgments are those incomplete judgments whereby the right of the plaintiff is indeed established, but the *quantum* of damages sustained by him is not ascertained. This can only be the case where the plaintiff recovers; for judgment for the defendant is always complete as well as final. The interlocutory judgments of most common occurrence are where a demurrer has been determined for the plaintiff, or the defendant has made default, or has by *cognovit actionem* acknowledged the plaintiff's demand to be just. After interlocutory judgment in such case, the plaintiff must ordinarily take out a *writ of inquiry*, which is addressed to the sheriff, commanding him to summon a jury and assess the damages, and upon the return of the writ of inquiry final judgment may be entered for the amount ascertained by the jury. It is not always necessary to have a writ of inquiry upon interlocutory judgment; for it is said that "this is a mere inquest of office to inform the conscience of the court, who, if they please, may themselves assess the damages;" 3 Wils. 62, per Wilmot, C. J.; and accordingly, if the damages are matter of mere computation, as, for instance, interest upon a bill of exchange or promissory note, it is usual for the court to refer it to the master or prothonotary, to ascertain what is due for principal, interest, and costs, whose report supersedes the necessity of a writ of inquiry; 4 Term 275; 1 H. Bla. 541; 4 Price 134. But in actions where a specific thing is sued for, as in actions of debt for a sum certain, the judgment upon demurrer, default, or confession is not interlocutory, but is absolutely complete and final in the first instance.

2. *Final judgments* are such as at once put an end to the action by determining the right and fixing the amount in dispute. Such are a judgment for defendant at any stage of the suit, a judgment for plaintiff after verdict, a judgment for a specific amount confessed upon warrant of attorney, and a judgment signed upon the return of a writ of inquiry, or upon the assessment of damages by the master or prothonotary. Judgment for plaintiff is final also in an action brought for a specific sum, as debt for a sum certain, although entered upon a demurrer or default, because here, the *amount* being ascertained at the outset, the only question at issue is that respecting the right, and when that is determined nothing remains to be done. The question what is a final judgment becomes material in many cases where as to such there is a right of review on error or appeal, but not as to interlocutory judgments, as under the constitution and laws of the United States the final judgment of a state court of last resort, in which there is a federal question, may be reviewed by the Supreme Court of the United States. The term final judgment has been variously defined. A judgment which puts an end to the action by declaring that the plaintiff has either entitled himself, or has not, to recover the remedy he sues for. 3 Bla. Com. 398. A judgment which determines a particular cause and terminates all litigation on the same right. 1 Kent, Com. 316. A judgment which cannot be appealed from, but is perfectly conclusive as to the matter adjudicated upon. 24 Pick. 300; 2 Pet. 294; 6 How. 201, 209. A judgment is final which completely settles the rights of the parties. 86 Ky. 381.

When by any direction of a supreme court of a state, an entire cause is determined, the decision, when reduced to form and entered in the records of the court, constitutes a final judgment, whatever may

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be its technical designation, and is subject to review in the supreme court of the United States; 93 U. S. 108; but when the state court remands a cause for further proceedings in the lower court it is not a final judgment; 91 U. S. 1; 124 *id.* 320; 130 *id.* 167; 144 *id.* 197; 146 *id.* 354.

3. When an issue in *fact*, or an issue in *law* arising on a peremptory plea, is determined for the plaintiff, the judgment is "that the plaintiff do recover," etc., which is called a judgment *quod recuperet*; Steph. Pl. 126; Comyn, Dig. *Abatement* (I 14, I 15); 2 Archb. Pr. 3. When the issue in law arises on a dilatory plea, and is determined for the plaintiff, the judgment is only that the defendant "do answer over," called a judgment of *respondeat ouster*. In an action of *account*, judgment for the plaintiff is that the defendant "do account," *quod computet*. Of these, the last two, *quod computet* and *quod respondeat ouster*, are interlocutory only; the first, *quod recuperet*, is either final or interlocutory, according as the *quantum* of damages is or is not ascertained at the rendition of the judgment.

4. Judgment in error is either in affirmance of the former judgment; in recall of it for error in fact; in reversal of it for error in law; that the plaintiff be barred of his writ of error, where a plea of release of errors or of the statute of limitations is found for the defendant; or that there be a *venire facias de novo*, which is an award of a new trial; Smith, Act. 196. A *venire facias de novo* will always be awarded when the plaintiff's declaration contains a good cause of action, and judgment in his favor is reversed by the court of error; 24 Pa. 470. Frequently, however, when judgment is *reversed*, the court of error not merely overturns the decision of the court below, but will give such a judgment as the court below ought to have given; Smith, Act. 196.

NATURE OF THE OBLIGATION. The question whether a judgment is a contract is an old one very much discussed, and in some cases it was held to be such, chiefly upon the authority of Blackstone, who rested his opinion as to the propriety of this classification upon the doctrine of the social compact. The relations of a judgment to the idea of a contract or a *quasi*-contract have of late received much attention, in connection with the more careful investigation and accurate understanding of that class of obligations known as *quasi*-contracts. Blackstone said, "Upon showing the judgment, once obtained, still in full force and yet unsatisfied, the law immediately implies that, by the original contract of society, the defendant hath contracted a debt, and is bound to pay it;" 3 Bla. Com. 160. Of this expression it has been said, "This is certainly a very remarkable statement, and involves large assumptions in regard to 'an original contract of society' and its supposed binding force upon a judgment debtor of the nineteenth century;" Howe, Stud. Civ. L. 188. This early theory of an "original contract of society" has been long since abandoned, and after the time of Blackstone's Commentaries Lord Mansfield, in a carefully considered case, said, "A judgment is no contract, nor can it be considered in the light of a contract, as *judicium redditur in invitum;*" 3 Burr. 1545. The same view of the question was taken by the United States supreme court, which held that a judgment was not a "contract within the meaning of the constitutional prohibition against impairing the obligation of a contract;" 113 U. S. 452. That court has, in two other important cases, discussed the question of the nature of a judgment and the obligation which is created by it, and in both cases it strongly dissents from the view of Blackstone and the earlier text-writers. In Louisiana *v.* Mayor, 108 U. S. 285, 288, the court said: "A judgment for damages, estimated in money, is sometimes called, by text-writers, a specialty or contract of record, because it establishes a legal obligation to pay the amount recovered, and, by a fiction of law, a promise to pay is implied where such legal obligation exists. It is on this principle that an action *ex contractu* will lie upon a judgment. But this fiction cannot convert a transaction, wanting the assent of the parties, into one which necessarily implies it. Judgments for torts are usually the result of violent contests, and, as observed by the court below, are imposed on the losing party, by a higher authority, against his will and protest. The prohibition of the federal constitution was intended to secure the observance of good faith, in the stipulation of parties, against state action. Where a transaction is not based upon any assent of parties, it cannot be said that any faith is pledged with respect to it, and no case arises for the operation of the prohibition." In this case it was held that the conversion of a statutory right to demand compensation for damages caused by a mob into a judgment does not make it a contract within the constitutional prohibition against impairing the obligation of a contract. In the more recent case of Hilton *v.* Guyot, 159 U. S. 113, in referring to the doctrine of Blackstone, with reference to a foreign judgment, the court held that the idea that such judgment imposed or created an obligation or duty was a remnant of an ancient fiction, and "while the theory in question would serve to explain rules of pleading which originated while the fiction was believed in, it is hardly a sufficient guide at the present day in dealing with questions of international law; and it might be safer to adopt the maxim applied to foreign judgments by Chief Justice Weston, speaking for the supreme judicial court of Maine, *judicium redditur in invitum*, or as given by Lord Coke, *in præsumptione legis judicium redditur in invitum;* 15 Me. 167; Co. Lit. 248 *b*." In New York it is held that a judgment is in no sense a contract or agreement; 1 Cow. 316; even a judgment founded upon a contract; 50 N. Y. 176; and the same doctrine is asserted with

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great vigor in a later case; 95 *id.* 428; this is also the prevailing doctrine in other states; 35 Cal. 155; 93 Ala. N. S. 706; 56 *id.* 56; 13 Me. 168; 87 N. C. 404; 15 Ohio St. 364; 2 S. C. N. S. 226; 3 G. Greene 489; (and see 30 Ia. 283); 17 Ill. 572; some cases are cited *contra:* 3 Gray 411; 19 Vt. 43; 4 Keyes 335; S. C. 4 Abb. N. Y. App. Cas. 382. The last case alone was relied on as the authority for the proposition that a judgment is a contract by Harlan, J., dissenting, in Louisiana *v.* Mayor, *supra*, but the case so relied upon is in a collection omitted from the regular reports and is in direct contradiction to cases cited *supra*, in which the opposing doctrine is emphatically stated by the same court, one decided four and the other sixteen years later. See also 9 Kan. 658. The most recent text books concur in supporting the statement already made as to the weight of authority. In one a judgment is said to be not under any circumstances a contract (1 Black, Judgt. § 10), and in another it is said that though a judgment is not a contract, it may be treated in some cases as a contract or as included in that term in certain statutes; 1 Freem. Judgt. § 4. Cases in which the contrary has been held will usually be found within this classification. See CONTRACT.

The civil law conception of the judgment is said to be correctly represented by the Louisiana case of Gustine *v.* Bank, 10 Rob. La. 412, in which it was held that "a judgment does not create, add to, nor detract from, the indebtedness of a party; it only declares it to exist, fixes its amount, and secures to the suitor the means of enforcing payment, and it is therefore necessary to look to the obligation upon which the judgment is based and ascertain whether it has arisen from contract or *quasi*-contract, from a delict or *quasi*-delict, or merely from the operation of law; the obligation is simply enforced and increased or diminished by the decree of the court. "It is declared to exist; it is interpreted; it is applied; it is put in the way of enforcement by the judicial power of the state;" Howe, Stud. Civ. L. 190.

In an interesting criticism upon the terminology adopted by Prof. Keener, in his work on *quasi*-contracts, a writer in the Harvard Law Review objects very seriously to the use of the term *quasi*-contract as an expression of the obligation of a judgment, which he says is "founded upon the mandate of the court, and depends for its validity upon the right of a court to adjudicate between contending parties;" 10 Harv. L. Rev. 213.

REQUISITES AND VALIDITY. To be valid, a judicial judgment must be given by a competent judge or court, at a time and place appointed by law, and in the form it requires. A judgment would be null if the judge had not jurisdiction of the matter, or, having such jurisdiction, he exercised it when there was no court held, or out of his district, or if he rendered a judgment before the cause was prepared for a hearing. "The fact that one judge presided when the cause was heard and another when judgment was rendered, does not invalidate the judgment;" 65 N. W. Rep. (Ia.) 380.

The judgment must confine itself to the question raised before the court, and cannot extend beyond it. For example, where the plaintiff sues for an injury committed on his lands by animals owned and kept carelessly by defendant, the judgment may be for damages, but it cannot command the defendant for the future to keep his cattle out of the plaintiff's land. That would be to usurp the power of the legislature. A judgment declares the rights which belong to the citizen, the law alone rules future actions. The law commands all men, it is the same for all because it is general; judgments are particular decisions, which apply only to particular persons, and bind no others; they vary like the circumstances on which they are founded.

"The validity of a judgment is to be determined by the laws in force when it is rendered, and is not affected by subsequent changes therein;" 24 S. E. Rep. (Va.) 269. "A judgment is not void merely because it is not dated;" 65 N. W. Rep. (Ia.) 380. Courts should not render judgments which cannot be enforced by any process known to the law; 74 Cal. 430. "In an action at law the court cannot render a conditional judgment;" 2 Mo. App. 1191.

The jurisdiction of a foreign court over the person or the subject-matter embraced in the judgment or decree of such court is always open to inquiry, and in this respect a court of another state is to be regarded as a foreign court; 137 U. S. 287; and a judgment in a state court having jurisdiction of the subject-matter and the parties, is binding upon the parties thereto in a suit in another state between the same parties, where the subject-matter and the issues are the same as in the former suit; 147 U. S. 87.

OPERATION AND EFFECTS. The judgment of a court of general jurisdiction is *presumed* to have been rendered in the due exercise of that jurisdiction over person and subject-matter, unless the contrary be shown; 60 Ill. App. 309; and after twenty years the presumption of due notice to the parties becomes conclusive; 161 Ill. 76.

Final judgments are commonly said to *conclude* the parties; and this is true in general, but does not apply to judgments for defendant on *non suit*, as in case of *non suit*, by *nolle prosequi*, and the like, which are final judgments in one sense, because they put an end to all proceedings in the suit, but which nevertheless do not debar the plaintiff from instituting another suit for the same cause. With this qualification, the rule as to the effect of a judgment is as follows: The judgment of a court of concurrent jurisdiction directly upon the point is, as a plea, a bar, or, as evidence, conclusive, between the same parties upon the same matter directly in question in another court. The judgment of a court of exclu-

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sive jurisdiction directly upon the point is in like manner conclusive upon the same matter, between the same parties, coming incidentally in question in another court for a different purpose. But neither the judgment of a concurrent nor exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment. Duchess of Kingston's case, 20 Howell, St. Tr. 538; 2 Smith, L. C. 424; Harr. Cont. 295. See, also, 2 Gall. 229; 4 Watts 183. The rule above given relates to the effect of a judgment upon proceedings in another court; if the court is the same, of course the rule holds *a fortiori*. Moreover, all persons who are represented by the parties, and claim under them or in privity with them, are equally concluded by the proceedings. All privies whatever in estate, in blood, or in law, are, therefore, estopped from litigating that which is conclusive upon him with whom they are in privity; 1 Greenl. Ev. §§ 523, 536. A decree or judgment on a matter outside of the issue raised by the pleading is a nullity; 45 N. J. Eq. 77; and so is the judgment of a court which is without jurisdiction; 124 U. S. 200.

A further rule as to the conclusiveness of judgments is sometimes stated thus: "A judgment of a court of competent jurisdiction cannot be impeached or set aside in any *collateral* proceeding except on the ground of fraud." See, generally, 1 Greenl. Ev. pt. 3, ch. 5; 84 Ky. 14; 85 Tenn. 171; 24 Neb. 490; 97 Mo. 406; 130 U. S. 565; 161 Pa. 455. A judgment of a court having jurisdiction both of the subject-matter and the parties, however erroneous it may be, is a valid, binding, and conclusive judgment, as to the matter in controversy, upon the parties thereto and those claiming under them; 82 Ga. 168; 86 Ky. 614; 118 Ind. 345; 83 Va. 129; 29 W. Va. 794; 130 U. S. 565; 144 *id.* 610; 146 *id.* 279; 152 *id.* 327.

This does not prevent a judgment from being attacked *directly* by writ of error or other proceeding in the nature of an appeal; and its validity may be impeached in other *direct* proceedings, as by motion to open or set it aside, and in contests between creditors in regard to the validity of their respective judgments; in this latter class of cases the court will sometimes award a feigned issue to try questions of fact affecting the validity of the judgment.

If the record of a judgment show that it was rendered without service of process or appearance of the defendant, or if that fact can be shown without contradicting the recitals of the record, it will be treated as void in any other state; 97 Mass. 538; 46 N. Y. 30; s. c. 7 Am. Rep. 299; 48 Ga. 50; s. c. 15 Am. Rep. 660. But this fact cannot be shown in contradiction of the recitals of the record; Rorer, Int. St. L. 128; 17 Vt. 302; 2 McLean 511; 65 Pa. 105; *contra*, 46 N. Y. 30; 24 Tex. 551; 18 Wall. 457. See Cooley, Const. Lim., 2d ed. 27. Nor will it be presumed to be void because of the absence of the return of service on the summons; 82 Va. 690. A judgment is not less conclusive because rendered by default; 122 U. S. 306; but a default judgment is void unless service has been had according to law; 7 Mont. 100, 288; 17 Or. 204; 31 W. Va. 364; and a money judgment against a non-resident defendant who is not personally served within the jurisdiction, and who does not voluntarily appear, is void; 73 Tex. 547; 70 *id.* 588; 147 Mass. 536. In the leading case of Pennoyer *v.* Neff. it was held that a personal judgment is without any validity, if it be rendered by a state court in an action upon a money demand against a non-resident of the state, who was served by a publication of summons, but upon whom no personal service of process within the state was made and who did not appear; no title to property passes by a sale under an execution issued upon such a judgment; 95 U. S. 714.

Matters of defence arising since the judgment may be taken advantage of by a writ of *audita querela*, or, which is more usual, the court may afford summary relief on motion.

Although a judgment is vitiated by fraud it is not thereby rendered absolutely void; it is valid as between the parties to the fraud, and can be avoided only by a person injured by it; 1 Morr. (Ia.) 467; as where one holding a judgment against a railroad brought a suit to have another judgment, and a lease of the road to secure it, declared void for fraud, and obtained a decree accordingly, it was *held*, that the decree did not affect the validity of the judgment and the lease as between the parties thereto; 3 Wall. 704.

All the judgments, decrees, or other orders of courts, however conclusive in their character, are under the control of the court which pronounced them during the term at which they are rendered or entered of record, and may then be set aside, vacated, or modified by the court; 24 Neb. 803; 140 U. S. 25; but after the term has ended, unless proceedings to correct the errors alleged have been taken before its close, they can only be corrected by writ of error or appeal, as may be allowed in a court which by law can reverse the decision; 14 Cent. L. J. 250; 102 U. S. 107; 9 Wall. 103. To this rule there is an exception founded on the common-law writ of *coram nobis*, which brought before the court where the error was committed certain mistakes of fact not put in issue or passed upon by the court, such as the death of one of the parties when the judgment was rendered, coverture if a female party, infancy and failure to appoint a guardian, error in the process, or mistake of the clerk. But if the error was in the judgment itself, the writ did not lie. What was formerly done by this writ is now attained by motion and affidavits when necessary; 14 Cent. L. J. 253; 7 Pet. 147. See 128 Ill. 595; 86 Ky. 128. A judge has the power to amend a

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record at any time, so as to make it speak the truth; 100 N. C. 297; 84 Ala. 36.

A joint judgment which is void as to one of the parties is void as to all; 6 Mackey 548. A judgment against several persons, one of whom dies before its rendition, is voidable as to all; 129 Ill. 241. See RES JUDICATA.

MERGER. The question how far the cause of action is merged in a judgment sometimes becomes very material, as affecting the right to sue on the former in another jurisdiction. The general principle has been thus stated with respect to the operation of the judgment with both parties to it. "The judgment of a court of competent jurisdiction discharges the obligation which the action is brought to enforce. The judgment may operate either to merge the original obligation, in so far as judgment is rendered for the plaintiff; or to estop the plaintiff from subsequently setting up his original claim, in so far as judgment is rendered for the defendant." Harr. Cont. 295.

The effect of the merger of the cause of action is often very serious; one having a right of action against two or more persons may, by recovering judgment against one of them, lose his remedy against the others. As where the plaintiff, in an action upon a joint contract obligation elected to enter judgment against one defendant, in default of plea or answer, the judgment was held a bar to a subsequent action against the other, the debt being merged in the judgment; 67 N. W. Rep. (Minn.) 1015; 89 Hun 44; but the cause of action does not merge in a void judgment; 36 S. W. Rep. (Tenn.) 378.

Where the cause of action has arisen in a foreign country, the plaintiff has the option to sue on a judgment obtained there, or ignoring the judgment to proceed upon the original cause of action, in both cases subject to certain exceptions, as where the judgment is to enforce a penalty or for a tort on which there is no action here; 2 Curt. C. C. 559. This choice of remedy does not exist in the case of judgments in sister states; a cause of action in such case is merged and the remedy is confined to an action on the judgment; Freeman, Judgments § 241; 105 Mass. 504; 31 N. J. L. 317; 16 Pa. 241; *contra*, 2 Gratt. 532. The rule as stated is subject to the exception that there is no merger of the cause of action in the judgment unless the latter is general. Where the judgment was in a penal action, the action was held not to abate on the death of a party, because the judgment having been entered, the action thereafter had the attributes of a contract; 119 N. Y. 117.

It has been held that in an action of tort, the tort merges in the judgment, so as to allow an attachment as on the contract; 2 Ia. 535; although a tort cannot be set up as a counter-claim, the judgment upon it may, as constituting a contract; 4 Keyes 335; so it was held that a judgment so far extinguished the original debt that a set-off available in the suit on the debt by reason of a claim against an assignor of said debt was no longer available after judgment; 38 Ind. 429.

Although a contract could have been attacked as usurious, it was not so after judgment, and a mortgage given to secure the latter could not be objected to on account of the original usury; 12 Mass. 268.

The doctrine of the merger of the cause of action is not carried to such extreme as to defeat the equities or just rights of the defendant or plaintiff. Thus it has been held with some frequency that it can be shown against a judgment that the same was obtained upon a debt which was provable against defendant in proceedings in insolvency, and being so provable was barred by the discharge in insolvency, and as the discharge barred the debt, it barred the judgment resting on the debt; 3 N. Y. 216; 3 Barb. Ch. 360; 3 Barb. 429.

Where the defendant was sued in Massachusetts, in debt on a judgment, he pleaded a discharge under the New York insolvency law, and it was held that the court would look behind the judgment and see whether under the facts giving rise to it, it was so discharged; 12 Pick. 572; and, on the other hand, a judgment apparently discharged by insolvency proceedings, but found to be based on notes executed before the passage of the insolvent law was held not affected by the latter and enforceable; 1 Cow. 316; 3 *id.* 147; so it was held that a judgment does not prevent a creditor from taking an attachment as a non-resident creditor; 2 Md. 457.

In this case the principle is very well stated thus: Though a judgment is to some purposes a merger of the original contract, and constitutes a new debt, yet when the essential rights of the parties are influenced by the nature of the original contract, the court will look into the judgment for the purpose of ascertaining what the original contract was.

The principle of the cases last cited has been frequently enunciated. In the case in 3 N. Y. 216, Hurlbert, J., said, that "a judgment, instead of being regarded strictly as a new debt, is sometimes held to be merely the old debt, in a new form, so as to prevent a technical merger from working injustice." In the case in 12 Pick. 572, Shaw, C. J., said: "Although a judgment, to some purposes, is considered as a merger of the former, and as constituting a new cause of action, yet when the essential rights of parties are influenced by the nature of the original contract, the court will look into the judgment for the purpose of ascertaining what the nature of such original cause of action was. Any other decision would carry the technical doctrine of merger to an inconvenient extent and cause it to work injustice."

FORM. The form of the judgment varies according to the nature of the action and the circumstances, such as default, verdict, etc., under which it is obtained. Anciently great particularity was required in

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the entries made upon the judgment roll; but now, even in the English practice, the drawing up the judgment roll is generally neglected, except in cases where it is absolutely necessary, as where it is desirable to give the proceedings in evidence on some future occasion; Smith, Act. 169. In this country the roll is rarely if ever drawn up, the simple entry on the trial list and docket, "judgment for plaintiff," or "judgment for defendant," being all that is generally considered necessary; and though the formal entries are in theory still required to constitute a complete record, yet if such record should subsequently be needed for any purpose, it may be made up after any length of time from the skeleton entries upon the docket and trial list. See 11 Pa. 399. When the record is thus drawn up in full, the ancient formalities must be observed, at least in a measure.

*Judgments on Verdict.* A judgment on a verdict virtually overrules all demurrers to the declaration; 37 W. Va. 645. The form of such verdicts varies according to the action and frequently also with the character in which a party sues or is sued.

In *account*, judgment for the plaintiff is interlocutory in the first instance, that the defendant *do account, quod computet*; 4 Wash. C. C. 84; 2 Watts 95; 1 Pa. 138.

In *assumpsit*, judgment for the plaintiff is that he recover the damages assessed by the jury, and full costs of suit; 1 Chitty, Pl. 100. Judgment for the defendant is that he recover his costs. For the form, see Tidd, Pr. *Forms* 165.

In *case*, *trover*, and *trespass*, the judgment is the same in substance, and differs but slightly in form from that of assumpsit; 1 Chitty, Pl. 100, 147.

A judgment in trover passes title to the goods in question; 53 Mo. App. 652; 16 So. Rep. (Ala.) 704; but only where the value of the thing converted is included in the judgment; 5 H. & N. 288; and it is held that an unsatisfied judgment does not pass the property; L. R. 6 C. P. 584; 3 Wall. 1, 16; 27 Pac. Rep. (N. M.) 327. In a somewhat analogous case it was held that a judgment for the value of horses lost to the owner by negligence of the defendant, of itself passes title to the horses to the defendant becoming liable for their value; 78 Tex. 298. But see 1 Rawle 121. Where personal property had been sold and partly paid for, title being retained by the vendor, and he recovered in trover both the property and instalments due, on appeal it was directed that the judgment be discharged on payment within a time limited of purchase money, interest, and cost, otherwise the original judgment below to stand of full force; 87 Ga. 230.

In *covenant*, judgment for the plaintiff is that he recover the amount of his damages as found which he has sustained by reason of the breach or breaches of the defendant's covenant, together with costs of suit; 1 Chitty, Pl. 116. Judgment for defendant is for costs.

In *debt*, judgment for the plaintiff is that he recover his debt, and in general nominal damages for the detention thereof; and in cases under the 8th & 9th Will. III. c. 11, for successive breaches of a bond conditioned for the performance of a covenant, it is also awarded that he have execution for such damages, and likewise full costs of suit; 1 Chitty, Pl. 108. But in some penal and other actions the plaintiff does not always recover costs; Esp. Pen. Act. 154; Hull, Costs 200; Bull. N. P. 333; 5 Johns. 251. Judgment for defendant is generally for costs; but in certain penal actions neither party can recover costs; 5 Johns. 251. See the form, Tidd, Pr. *Forms* 176.

In *detinue*, judgment for the plaintiff is in the alternative that he recover the goods or the value thereof if he cannot have the goods themselves, with damages for the detention, and costs; 1 Chitty, Pl. 121, 122; 1 Dall. 458. See the form, Tidd, Pr. *Forms* 187.

If judgment in any of the above personal actions is against the defendant in the character of *executor*, it confines the liability of the defendant for the debt or damages to the amount of assets of the testator in his hands, but leaves him personally liable for costs. See the form, Tidd, Pr. *Forms* 168. If the executor defendant has pleaded *plene administravit*, judgment against him confines his liability to such amount of the assets as shall hereafter come to his hands. See the form, Tidd, Pr. *Forms* 174. A general judgment for costs against an administrator plaintiff is against the estate only.

A judgment against an executor or heir where the plea is false, to the defendant's own knowledge, may be a general judgment as if the recovery was for his own debt, but in other cases a judgment against an executor is generally special, to be levied of the goods or land of his testator; 7 Taunt. 580; 5 *id.* 554.

A judgment on a covenant of a *married woman* against her separate estate may be entered as a personal judgment against her; 20 S. E. Rep. (W. Va.) 917; such judgment must be entered in a special form; 14 Ch. D. 837; but the record need show no special fact fixing her liability; 2 Pa. Dist. R. 690.

In *dower*, judgment for demandant is interlocutory in the first instance with the award of a writ of *habere facias seisinam*, and inquiry of damages, on the return of which final judgment is rendered for the value of the land detained, as ascertained by the jury, from the death of the husband to the suing out of the inquisition, and costs of suit. See the form, 3 Chitty, Pl. 583.

In *ejectment*, judgment for plaintiff is final in the first instance, that he recover the term, together with the damages assessed by the jury, and the costs of suit, with award of the writ of *habere facias possessionem*, directing the sheriff to put him in possession. See the form, 3 Bla. Com. App. xii.; Tidd, Pr. *Forms* 188. A judgment in ejectment is conclusive as to title between the parties thereto, unless the



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jury find for the plaintiff less than the fee; 78 Ga. 142. A consent verdict in ejectment is conclusive on the parties and their privies; 78 Ga. 142.

In *partition*, judgment for plaintiff is also interlocutory in the first instance; *quod partitio fiat* with award of the writ *de partitione facienda*, on the return of which final judgment is rendered,—"therefore it is considered that the partition aforesaid be held firm and effectual forever," *quod partitio facta firma et stabilis in perpetuam teneatur;* Co. Litt. 169. See the form, 2 Sell. Pr. 319, 2d ed. 222.

In *replevin*. If the replevin is in the *detinuit*, *i. e.* where the plaintiff declares that the chattels "were detained until replevied by the sheriff," judgment for plaintiff is that he recover the damages assessed by the jury for the taking and unjust detention, or for the detention only where the taking was justifiable, and also his costs; 5 S. & R. 133; Hamm. N. P. 488. If the replevin is in the *detinet*, *i. e.* where the plaintiff declares that the chattels taken are "yet detained," the jury in giving a verdict for plaintiff find, in addition to the above, the value of the chattels each separately; for the defendant will perhaps restore some, in which case the plaintiff is to recover the value of the remainder; Hamm. N. P. 489; Fitzh. N. B. 159 *b*; 5 S. & R. 130.

If the replevin be *abated*, the judgment is that the writ or plaint abate, and that the defendant, having avowed, have a return of the chattels.

If the plaintiff is *nonsuited*, the judgment for defendant, at common law, is that the chattels be restored to him, and that without his first assigning the object of the taking, because by abandoning his suit the plaintiff admits that he had no right to dispossess the defendant by prosecuting the replevin. The form of this judgment is simply "to have a return," *pro retorno habendo*, without adding the words "to hold irreplevisable;" Hamm. N. P. 490. For the form of judgments of *nonsuit* under the statutes 21 Hen. VIII. c. 19, and 17 Car. II. c. 7, see Hamm. N. P. 490; 2 Chitty, Pl. 161; 8 Wentw. Pl. 116; 5 S. & R. 132; 1 Saund. 195, n. 3; 2 *id.* 286, n. 5. In these cases the defendant has the option of taking his judgment *pro retorno habendo* at common law; 5 S. & R. 132; 1 Lev. 255; 3 Term 349.

When the avowant succeeds upon the merits, the common-law judgment is that he "have return irreplevisable;" for it is apparent that he is by law entitled to keep possession of the goods; 5 S. & R. 145; Hamm. N. P. 493; 1 Chitty, Pl. 162. For the form of judgment in such case under the statutes last mentioned, see Hamm. N. P. 494.

*After Verdict*. the general form of judgment for plaintiff in actions on contracts sounding in damages, and in actions founded on *torts* unaccompanied with violence, is this: "Therefore it is considered that the said A B do recover against the said C D his damages aforesaid, and also —— for his said costs and charges, by the court now here adjudged of increase to the said A B, with his assent; which said damages, costs, and charges in the whole amount to ——. And the said C D in mercy, etc." In *debt* for a sum certain, the general form is "—— that the said A B do recover against the said C D his said debt, and also —— for his damages which he has sustained, as well on occasion of detaining the said debt as for his costs and charges by him about his suit in this behalf expended, by the court now here adjudged to the said A B, and with his assent. And the said C D in mercy, etc." In actions founded on *torts* accompanied with violence, the form of judgments for plaintiff is, "—— that the said A B do recover against the said C D his damages aforesaid, and also —— for his said costs and charges by the court now here adjudged of increase to the said A B, and with his consent; which said damages, costs, and charges in the whole amount to ——. And let the said C D be taken, etc."

Final judgment for the defendant is in these words: "Therefore it is considered that the said A B take nothing by his writ but that he be in mercy, etc. (*or* that he and his pledges to prosecute be in mercy, etc.), and that the said C D do go thereof without day, etc. And it is further considered ——." Then follows the award of costs and of execution therefor. See Tidd, Pr. *Forms* 189.

This is the general form of judgment for defendant, whether it arise upon interlocutory proceedings or upon verdict, and whatever be the form of action. This is sometimes called judgment of *nil capiat per breve* or *per billam;* Steph. Pl., Andr. ed. § 97.

The words "and the said —— in mercy, etc., or, as expressed in Latin, *quod sit in misericordia pro falso clamore suo*, were formerly an operative part of the judgment, it being an invariable rule of the common law that the party who lost his cause was punished by amercement for having unjustly asserted or resisted the claim. And on this account pledges of prosecution were required of the plaintiff before the return of the original, who were real and responsible persons and liable for these amercements. But afterwards the amercements ceased to be exacted,—perhaps because the payment of costs took their place,—and, this portion of the judgment becoming mere matter of form, the pledges returned were the fictitious names John Doe and Richard Roe. Bacon, Abr. *Fines, etc.* (C 1); 1 Ld. Raym. 273.

The words "and let the said —— be taken," in Latin, *capiatur pro fine*, which occur above in the form of judgment in actions founded on torts accompanied with violence, were operative at common law, because formerly a defendant adjudged to have committed a civil injury with actual violence was obliged to pay a fine to the king for the breach of the peace implied in the act, and was liable to be arrested and

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imprisoned till the fine was paid. This was abolished by stat. 5 W. & M. c. 12; but the form was still retained in entering judgment against defendant in such actions. See Gould, Pl. §§ 38, 82; Bacon, Abr. *Fines, etc.* (C 1); 1 Ld. Raym. 273; Style 346.

These are called, respectively, judgments of *misericordia* and of *capiatur*.

JUDGMENTS IN OTHER CASES. On a *plea in abatement*, either party may demur to the pleading of his adversary or they may join issue.

On *demurrer*, judgment for the plaintiff is that the defendant have another day to plead in chief, or, as it is commonly expressed, that he answer over; *quod respondeat ouster*; and judgment for defendant is that the writ be quashed; *quod cassetur billa* or *breve*. But if issue be joined, judgment for plaintiff is *quod recuperet*, that he recover his debt or damages, and not *quod respondeat*; judgment for defendant is the same as in the case of demurrer, that the writ be quashed. But the plaintiff may admit the validity of the plea in abatement, and may himself pray that his bill or writ may be quashed, *quod cassetur billa* or *breve*, in order that he may afterwards sue or exhibit a better one; Steph. Pl., Andr. ed. § 97; Lawes, Civ. Pl. See the form, Tidd, Pr. *Forms* 195. Judgment on demurrer in other cases, when for the plaintiff, is interlocutory in *assumpsit* and actions sounding in damages, and recites that the pleading to which exception was taken by defendant appears sufficient in law, and that the plaintiff ought, therefore, to recover; but the amount of damages being unknown, a court of inquiry is awarded to ascertain them. See the form, Tidd, Pr. *Forms* 181. In *debt* it is final in the first instance. See the form, *id.* p. 181. Judgment on demurrer when for the defendant is always final in the first instance, and is for costs only. See the form, *id.* 195.

*Judgment by default*, whether by *nil dicit* or *non sum informatus*, is in these words, in assumpsit or other actions for damages, after stating the default: "wherefore the said A B ought to recover against the said C D his damages on occasion of the premises; but because it is unknown to the court, etc., now hear what damages the said A B hath sustained by means of the premises, the sheriff is commanded, etc." Then follows the award of the writ of inquiry, on the return of which final judgment is signed. See the forms, Tidd, Pr. *Forms* 165. In debt for a sum certain, as on a bond for the payment of a sum of money, the judgment on default is final in the first instance, no writ of inquiry being necessary. See the form, *id.* 169.

Plaintiff cannot take a default where there is no declaration on file; 55 Ill. App. 350; and a default cannot be entered after defendant has interposed a plea in bar: 14 So. Rep. (Ala.) 630; but the mere filing of an answer will not prevent a judgment by default, there must also be a subsequent appearance by defendant to protect his rights; 4 Tex. Civ. App. 490.

It is error to enter judgment by default while a plea to part and a demurrer to the rest of the declaration are on file; 50 Ill. App. 131; but the rendition of a judgment by default, where the petition states the facts sufficient to maintain the cause of action, is within the discretion of the trial judge; 3 Ohio, Dec. 57; and so is the opening of a judgment by default; 39 Pac. Rep. (Okl.) 281; 61 N. W. Rep. (Minn.) 824; 17 Misc. Rep. 339; where an answer failed to reach the court in time through the fault of the postmaster, it was held that a default should be set aside; 55 Ill. App. 668.

Judgment by *cognovit actionem* is for the amount admitted to be due, with costs, as on a verdict. See the form, *id.* 176. In Pennsylvania by statute, the plaintiff may take judgment for an amount admitted to be due and proceed to trial for the remainder of his claim.

Judgment of *non pros.* or *non suit* is final, and is for defendant's costs only, which is also the case with judgment on a *discontinuance* or *nolle prosequi*. See *id.* 189.

MATTERS OF PRACTICE. *Of docketing the judgment.* By the stat. 4 & 5 W. & M. c. 20, all final judgments are required to be regularly docketed: that is, an abstract of the judgment is to be entered in a book called the judgment-docket; 3 Bla. Com. 398. And in these states the same regulation prevails. See 37 Minn. 533. Besides this, an index is required to be kept in England of judgments confessed upon warrant of attorney, and of certain other sorts of judgments; 3 Sharsw. Bla. Com. 396, n. In most of the states this index is required to include all judgments. The effect of docketing the judgment is to notify all interested persons, including purchasers or incumbrancers of land upon which the judgment is a lien, and subsequent judgment creditors, of the existence and amount of the judgment. Freem. Judg. § 343. Judgments only become liens from the time they are rendered, or notice thereof is filed in the register's office of the county where the property is situated; 133 U. S. 534. In Pennsylvania, the judgment index is for this purpose conclusive evidence of the amount of a judgment in favor of a purchaser of the land bound thereby, but not against him: if the amount indexed is less than the actual amount, the purchaser is not bound to go beyond the index; but if the amount indexed is too large, he may resort to the judgment-docket to correct the mistake; 1 Pa. 408. A failure to index the abstract of a judgment is fatal to the lien; 70 Tex. 434, 458; 77 Ia. 381.

Now, in England, judgments, in order to affect purchasers, mortgagees, and creditors, must be registered in the common pleas, and renewed every five years. See 2 & 3 Vict. c. 11, s. 5.

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*Of the time of entering the judgment.* After verdict a brief interval is allowed to elapse before signing judgment, in order to give the defeated party an opportunity to apply for a new trial, or to move in arrest of judgment, if he is so disposed. This interval, in England, is four days; Smith, Actions 150. In this country it is generally short; but, being regulated either by statute or by rules of court, it of course may vary in the different states, and even in different courts of the same state.

See ARREST OF JUDGMENT; ASSUMPSIT; ATTACHMENT; CONFLICT OF LAWS; COVENANT; DEBT; DETINUE; EJECTMENT; CASE; DECREE; FOREIGN JUDGMENT; LIEN; REPLEVIN; TRESPASS; TROVER. See Freeman; Black, Judgments.

**JUDGMENT BOOK.** A book which is required to be kept by a clerk among the records of the court, for the entry of judgments. Code N. Y. § 279.

**JUDGMENT CREDITOR.** See CREDITOR, JUDGMENT.

**JUDGMENT DEBT.** See DEBT.

**JUDGMENT IN PERSONAM.** See JUDGMENT INTER PARTES; IN PERSONAM.

**JUDGMENT IN REM.** An adjudication pronounced upon the *status* of some particular subject-matter by a tribunal having competent authority for that purpose. 3 Sm. L. Cas., 9th Am. ed. 2015.

An adjudication against some person or thing, or upon the *status* of some subject-matter; which, wherever and whenever binding upon *any* person, is equally binding upon *all* persons. 10 Mo. App. 78.

The universal effect of a judgment *in rem* depends upon the principle that it is a solemn declaration, proceeding from an accredited quarter, concerning the *status* of the thing adjudicated upon; which very declaration operates accordingly upon *the status of the thing adjudicated upon*, and *ipso facto*, renders it such as it is thereby declared to be; 3 Sm. L. Cas., 9th Am. ed. 2015–16, 2032, 2043.

The most frequent cases of such judgment are found in the courts exercising jurisdiction of cases in admiralty. So also a foreign court in a case of divorce which is recognized as establishing the status of a person is a judgment *in rem*.

In the leading case of Pennoyer *v.* Neff, the United States supreme court said: "It is true that, in a strict sense, a proceeding *in rem* is one taken directly against property, and has for its object the disposition of property, without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in this state, they are substantially proceedings *in rem* in the broader sense which we have mentioned." 95 U. S. 734. A judgment against a railway company in favor of an assignee of claims for labor performed for a subcontractor, which forecloses a statutory lien on the property of the company for debt, and orders a sale of the property, cannot be construed as a judgment *in personam;* 12 Am. & Eng. R. Cas. 258; 59 Tex. 587. See IN REM.

**JUDGMENT INTER PARTES or IN PERSONAM.** One which operates only upon those who have been duly made parties to the record and their privies, being against a person merely, and not settling the *status* of any person or thing. See 3 Sm. L. Cas., 9th Am. ed. 2016; JUDGMENT; JUDGMENT IN REM.

**JUDGMENT NISI.** A judgment entered on the return of the nisi prius record with the postea indorsed, which will become absolute according to the terms of the "postea" unless the court out of which the nisi prius record proceeded shall, within the first four days of the following term, otherwise order.

Under the compulsory arbitration law of Pennsylvania, on filing the award of the arbitrators, judgment nisi is to be entered, which judgment is to be valid as if it had been rendered on a verdict of a jury, unless an appeal is entered within the time required by law.

**JUDGMENT NOTE.** A promissory note given in the usual form, and containing, in addition, a power of attorney to appear and confess judgment for the sum therein named. On this account it is not negotiable; 77 Pa. 131; but see 19 Ohio 130.

It usually contains a number of stipulations as to the time of confessing the judgment; 11 Ill. 623; against appeal and other remedies for setting the judgment aside; see 9 Johns. 80; 20 *id.* 296; 2 Cowp. 465; 2 Pa. 501; 15 Ill. 356; an attorney's commission for collection, waiver of exemption, and other conditions.

**JUDGMENT PAPER. In English Practice.** An *incipitur* of the pleadings, written on plain paper, upon which the master will sign judgment. 1 Archb. Pr. 229, 306, 343.

**JUDGMENT RECORD. In English Practice.** A parchment roll on which are transcribed the whole proceedings in the cause, deposited and filed of record in the treasury of the court, after signing of judgment. 3 Steph. Com., 11th ed. 601. See JUDGMENT ROLL. In American practice, the record is signed, filed, and docketed by the clerk, all of which is necessary to suing out execution; Graham, Pr. 341.

**JUDGMENT RECOVERED.** A plea by a defendant that the plaintiff has already recovered that which he seeks to obtain by his action. This was formerly a species of

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sham plea, often put in for the purpose of delaying a plaintiff's action. M. & W.

**JUDGMENT ROLL. In English Law.** A record made of the issue roll (which see), which, after final judgment has been given in the cause, assumes this name. Steph. Pl., Andr. ed. § 97; 3 Chitty, Stat. 514; Freem. Judg. § 75. The Judicature Act of 1875 requires every judgment to be entered in a book by the proper officer.

**JUDICARE.** To judge; to decide or determine judicially; to give judgment or sentence.

**JUDICATIO. In Civil Law.** Judging; the pronouncing of sentence; after hearing a cause. Halifax, Civil Law b. 3, c. 8, no. 7.

**JUDICATORES TERRARUM.** Certain tenants in Chester, who were bound by their tenures to perform judicial functions. In case of an erroneous judgment being given by them, the party aggrieved might obtain a writ of error out of Chancery, directing them to reform it. They then had a month to consider of the matter. If they declined to reform their judgment, the matter came on writ of error before the king's bench; and if the court of king's bench held the judgment to be erroneous they forfeited £100 to the king by the custom. Jenk. Cent. (ii. 34), p. 71.

**JUDICATURE.** The state of those employed in the administration of justice; and in this sense it is nearly synonymous with judiciary. This term is also used to signify a tribunal; and sometimes it is employed to show the extent of jurisdiction: as, the judicature is upon writs of error, etc. Comyn, Dig. *Parliament* (L 1). And see Comyn, Dig. *Courts* (A).

**JUDICATURE ACTS.** The English acts under which the present system of courts was organized and is continued.

The statutes of 36 & 37 Vict. c. 66, and 38 & 39 Vict. c. 77, which went into force Nov. 1, 1875, with amendments in 1877, 40 & 41 Vict. c. 9, 1879, 42 & 43 Vict. c. 78, and 1881, 44 & 45 Vict. c. 68, made most important changes in the organization of, and methods of procedure in, the superior courts of England, consolidating them together so as to constitute one Supreme Court of Judicature, consisting of two divisions: Her Majesty's High Court of Justice, having chiefly original jurisdiction, and Her Majesty's Court of Appeal, whose jurisdiction is chiefly appellate. To the former was transferred the jurisdiction of the courts of chancery (both at common law and equity), queen's bench, common pleas (at Westminster, Lancaster, and Durham), exchequer (as a court of revenue as well as a common-law court), admiralty, probate, divorce, and the assize court, with certain exceptions, of which the most important is the appellate jurisdiction of the court of appeal in chancery. The London court of bankruptcy was included in this list by the act of 1875, but excluded by that of 1875. To Her Majesty's Court of Appeal is transferred the jurisdiction exercised by the lord chancellor and lords justices of the court of appeal in chancery, the court of exchequer chamber, the judicial committee of the privy council on appeal from the high court of admiralty, or from any order in lunacy made by the lord chancellor, or any other person having jurisdiction in lunacy. This was the transfer, by 14 & 15 Vict. c. 83, of the appellate jurisdiction theretofore exercised by the lord chancellor, to the court of appeal, consisting of the lord chancellor and two lords justices, with an appeal, "only on matters of law or equity, or on the admission or rejection of evidence." By the act of 1878, no appeals were to be brought from the High Court or Court of Appeal to the house of lords or the privy council, but by the Appellate Jurisdiction Act of 39 & 40 Vict. c. 59, the house of lords retains for all practical purposes here, its powers and functions to hear appeals from Her Majesty's Court of Appeal in England, and from the courts of Scotland and Ireland. (See JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.) Her Majesty's Court of Appeal practically takes the place of the exchequer chamber in appeals in common-law actions, and also hears appeals in chancery, previously heard by the chancellor or by the court of appeal in chancery, in the exercise of its appellate jurisdiction, and of the same court as a court of appeal in bankruptcy. It consists of five *ex-officio* judges, viz., the lord chancellor as president, the lord chief justice of England, the master of the rolls, the president for the time being of the probate, divorce, and admiralty division of the High Court of Justice, and five ordinary judges of the court of appeal, to be styled, by the act of 40 & 41 Vict. c. 9, lords justices of appeal, the first three of whom are to be made by the transfer of three judges from the High Court of Justice.

The High Court of Justice originally consisted of five divisions as follows: 1. The chancery division consisted of the lord chancellor, the master of the rolls (but by the act of 44 & 45 Vict. c. 68, the master of the rolls ceases to belong to the high court, and provision is made for a judge in his place, who shall be in the same position as a puisne judge under the acts of 1873 and 1875), and such of the vice chancellors of the court of chancery as shall not be appointed ordinary judges of the court of appeal. The Judicature Act of 1877, 40 & 41 Vict. c. 9, provides for the appointment of a new judge, to be attached to the chancery division, and entitles the puisne judges, justices of the high court. The lord chancellor is not to be deemed a permanent judge of the High Court of Justice.

2. The queen's bench division, consisting of the lord chief justice of England, and such other of the judges of the court of queen's bench as shall not be appointed ordinary judges of the Court of Appeal.

3. The common pleas division, consisting of the lord chief justice of the common pleas, and such other judges of the court of common pleas as shall not be appointed ordinary judges of the Court of Appeal.

4. The exchequer division, consisting of the lord chief baron of the exchequer, and certain other barons of the court of exchequer.

5. The probate, divorce, and admiralty division, consisting of two judges, one of whom shall be the judge of the court of probate and of the court for divorce and matrimonial causes, and the judge of the high court of admiralty.

Crown cases reserved were decided by the judges of the High Court of Justice, or at least five of them, of whom the lord chief justice of England, the lord chief justice of the common pleas, and the lord chief baron of the exchequer, or one of them, should sit. Their determination was final, save for some error of law upon the record, as to which no question should have been reserved for their decision, under 11 & 12 Vict. c. 78.

By an Order in Council of Dec. 16, 1880, the offices of lord chief baron of the exchequer and lord chief justice of the common pleas were abolished, and the common pleas and exchequer divisions were merged in the queen's bench division, to which the judges of the other two divisions were attached. The court therefore now consists of three divisions only, chancery, queen's bench, and probate, divorce, and admiralty.

Any judge of any of the above divisions may be transferred by Her Majesty from one to another of the said divisions. Divisional courts of the high courts of justice may be held for the transaction of special business, consisting usually of two judges.

The reports of the adjudicated cases were, under the first division of the court, arranged thus:—

Appeal cases. Cases decided by the house of lords and privy council, cited as App. Cas. They are reported with the cases of the division from which the appeal was taken, and are indicated as, "In the court of appeal," or "C. A.;" chancery division, cited as Ch. Div.; common pleas division, cited as C. P. Div.; exchequer division, cited as Ex. Div.

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Probate division. Cases decided by the probate, divorce, and admiralty divisions, cited as P. Div.

Queen's bench division, cited as Q. B. Div.

There are now four series: Appeal cases, Chancery, Queen's Bench, Probate. In citing cases since January 1, 1891, the year of the report precedes the reference to the court, as: [1895] 1 Q. B. 476; [1894] 2 Ch. 302, and a new series of volumes is begun each year.

These acts provide for a concurrent administration of legal and equitable remedies, according to seven rules, which substantially provide that any one of the courts, included in the acts shall give the same equitable relief to any plaintiff or defendant claiming it as would formerly have been granted by chancery; equitable relief will be granted against third persons, not parties, who shall be brought in by notice; all equitable estates, titles, rights, duties, and liabilities will be taken notice of as in chancery; no proceeding shall be restrained by injunction, but every matter of equity on which an injunction might formerly have been obtained may be relied on by way of defence, and the courts may in any cause direct a stay of proceedings. Subject to these and certain other provisions of the act, effect shall be given to all legal claims and demands, and all estates, titles, rights, duties, obligations, and liabilities, existing by the common law, custom, or statute, as before the acts; the new courts shall grant, either absolutely or on terms, all such legal or equitable remedies as the parties may appear entitled to; so that all matters may be completely and finally determined, and multiplicity of legal proceedings avoided.

Eleven new rules of law are established, which will be found in the act of 1873, c. 66, § 25, amended by the act of 1875, c. 77, § 10, of the following nature; 1. In the administration of insolvent estates, the same rules shall prevail as may be in force under the law of bankruptcy; 2. No claim of a *cestui que trust* against his trustee, for property held on an express trust, shall be barred by any statute of limitations; 3. A tenant for life shall have no right to commit equitable waste, unless such right is expressly conferred by the instrument creating the estate; 4. There shall be no merger by operation of law only, of any estate, the beneficial interest in which would not be deemed merged in equity; 5. A mortgagor entitled for the time being to the possession of the profits of land, as to which the mortgagee shall have given no notice of his intention to take possession, may sue for such possession, or for the recovery of such profits, or to prevent or recover damages in respect of any trespass, or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made jointly with any other person; 6. Any absolute assignment of a chose in action, of which express notice in writing shall have been given to the debtor, shall pass the legal right thereto from the date of notice, and all remedies for the same, and the power to give a good discharge: provided, that if the debtor, etc., shall have had notice of any conflicting claims to such debt, he shall be entitled to call upon such claimants to interplead; 7. Stipulations as to time or otherwise, which would not have been deemed of the essence of the contract in equity, shall receive the same construction as formerly in equity; 8. A mandamus or an injunction may be granted, or a receiver appointed by an interlocutory order, which may be made either unconditionally or on terms; and an injunction may be granted to prevent threatened waste or trespass, whether the estates be legal or equitable, or whether the person against whom the injunction is sought is or is not in possession under any claim of title, or does or does not claim a right to do the act sought to be restrained under color of title; 9. In proceedings arising from collisions at sea, where both ships are in fault, the rules hitherto in force in the court of admiralty shall prevail; 10. In questions relating to the custody of infants, the rules of equity shall prevail; 11. Generally, in all matters in which there is any conflict between the rules of common law and the rules of equity, the latter shall prevail. As to discovery under the Judicature Acts, see 11 Harv. L. Rev. 137, 205.

By the act of 1891, c. 53, to settle doubts said to exist on the subject, it was enacted that the high court should be a prize court within the meaning of the Naval Prize Act of 1864, and the jurisdiction was assigned to the probate, divorce, and admiralty division of the court. An appeal was given only to the queen in council. By the same act the house of lords was authorized to call in the aid of assessors in admiralty cases.

The act of 1894, c. 16, was directed mainly to the restricting the right of appeal.

The division of the legal year into terms is abolished, so far as relates to the administration of justice, but where they are used as a measure for determining the time at or within which any act is required to be done, they may continue to be referred to. Numerous other regulations are established for the arrangement of business and course of procedure under the new system for which reference must be had to the acts. We will merely note that nothing is to affect the law relating to jury trials, and the existing forms of procedure are to be used as far as consistent with these acts. It was provided that nothing should affect the practice or procedure in—1. Criminal proceedings; 2. Proceedings on the crown side of the queen's bench division; 3. Proceedings on the revenue side of the exchequer division; 4. Proceedings for divorce and matrimonial causes. The Chancery Procedure Acts and the Common Law Procedure Acts remain in full force, except so far as impliedly or expressly repealed by the Judicature Acts. Many sections of the former Acts are repealed by subsequent legislation, all which may be found in Chitty's English Statutes, where the acts are published together as amended.

A recent writer on the English courts, in summing up the results of the present system, considers that much advantage has accrued to the public through the rearrangement of the business of the courts; pleading and practice have been assimilated and simplified, and the power of each court to dispose, in one action, of all differences between parties has lessened the cost and delay of litigation. It has not accomplished what was expected to be the result of the change in the direction of the fusion of law and equity. This, it is thought, results largely from the fact that English law is very much of a customary nature, without statutory sanction, and that there is no code or *corpus juris* to which disputes may be referred, and, aside from which, there are no legal rights or obligations. Nevertheless, the dividing line between the two jurisdictions, simplified and improved in their course of procedure, has thus become once more clear and accentuated, and there is every indication that the present working of those courts is satisfactory to the public and to all branches of the legal profession; Inderwick, King's Peace 226.

## JUDICATURE ACTS (IRELAND).

The act of 40 & 41 Vict. c. 57, which went into operation Jan. 1, 1878, established a supreme court of judicature in Ireland, under which acts and subsequent ones a system essentially similar in its constitution to that in England is in force.

**JUDICES.** See JUDEX.

**JUDICIAL ACT.** See ACT.

**JUDICIAL ADMISSIONS.** Admissions of the party which appear of record in the proceedings of the court. See ADMISSIONS.

**JUDICIAL COMMITTEE OF THE PRIVY COUNCIL. In English Law.** A tribunal formerly composed of members of the privy council, established by 2 & 3 Wm. IV. c. 92, and subsequent acts, for hearing appeals from colonial and ecclesiastical courts and the courts of admiralty, and from certain orders in lunacy. By 34 & 35 Vict. c. 91, provision was made for the appointment of four additional members; no one was qualified who was not, when appointed, or had not been a judge of the superior courts at Westminster, or a chief justice of the High Court in Calcutta, Madras, or Bombay. The qualification now required is that the appointee must be one who has held "high judicial office," as

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to the definition of which see JUDICIAL OFFICE.

Much of this jurisdiction, including admiralty and lunacy appeals, has been transferred to the court of appeals. See JUDICATURE ACT; LUNACY ACTS. But the changes under the Judicature and Appellate Jurisdiction Acts do not seem to have disturbed the jurisdiction of the judicial committee over appeals from India and the colonies, which was, and still is, the principal function of that body. It has been said that "as the house of lords is the supreme court of appeal for Great Britain and Ireland, so also is the judicial committee of the privy council and supreme court of appeal for India, the colonies, and the Channel Islands, and as the area of British sovereignty extends, so also is extended the right of appeal to her majesty in council;" 2 Brett, Com. Present Laws, Eng. 775. Recent orders in council extend this right of appeal to include Fiji, Cyprus, and Zululand.

The committee is also empowered upon reference by her majesty in council to hear appeals in ecclesiastical matters, appeals from vice-admiralty courts, petitions against schemes of the charity commissioners, and petitions for the extension of letters patent; *id.*

See also Macpherson's Practice of the Judicial Committee of the Privy Council, the introduction of which contains an extract from Lord Brougham's eloquent description of the jurisdiction.

**JUDICIAL CONFESSIONS.** See CONFESSIONS; PRELIMINARY EXAMINATION.

**JUDICIAL CONVENTIONS.** Agreements entered into in consequence of an order of court; as, for example, entering into a bond on taking out a writ of sequestration. 6 Mart. La. N. S. 494.

**JUDICIAL DECISIONS.** The opinions or determinations of the judges in causes before them. Hale, Hist. Cr. Law 68; Willes 666; 3 B. & Ald. 122; 1 H. Bla. 63; 5 M. & S. 185. See DICTUM; JUDGE-MADE LAW; PRECEDENTS.

**JUDICIAL DECLARATION. In Scotch Law.** The statement made by one of the parties to a suit, when judicially examined as to the particular facts on which the case rests. The term corresponds with admissions (*q. v.*) in English law.

**JUDICIAL DISCRETION.** See DISCRETION.

**JUDICIAL DOCUMENTS.** The papers and proceedings which constitute or become part of the record of a litigation. They include the writs, pleadings, documentary proofs, verdicts, inquisitions, judgment, and decrees incident to a cause or judicial proceeding.

Inquisitions, examinations, depositions, affidavits, and other written papers, when they have become proofs of its proceedings and are found remaining on the files of a judicial court, are judicial documents. A deposition after being received and filed as such is a judicial document and can only be proved as such, and is not admissible as a written statement or confession of deponent. It cannot be received in part and excluded in part; 27 Me. 308.

Judicial documents are thus classified by Starkie: 1. Judgments, decrees, and verdicts. 2. Depositions, examinations, and inquisitions, taken in the course of a legal process. 3. Writs, warrants, pleadings, bills, and answers, etc., which are incident to judicial proceedings.

As to the admissibility and effect of such documents, see, generally, Stark. Ev., Sharsw. ed. [316].

**JUDICIAL DUTY.** Within the meaning of a constitution, such a duty as legitimately pertains to an officer in a department designated by the constitution as judicial. 115 Mo. 36.

**JUDICIAL FACTOR. In Scotch Law.** An administrator or steward appointed by the court of session for the management of an estate which for any reason is *in custodia legis.* See Ersk. Pr. 253.

**JUDICIAL FUNCTION.** The exercise of the judicial faculty or office.

The capacity to act in the specific way which appertains to the judicial power, as one of the powers of government.

The term is used to describe generally those modes of action which appertain to the judiciary as a department of organized government, and through and by means of which it accomplishes its purposes and exercises its peculiar powers.

**JUDICIAL LEGISLATION.** See JUDGE-MADE LAW.

**JUDICIAL LIABILITY.** See JUDGE; 6 Am. Dec. 333.

**JUDICIAL MORTGAGE. In Louisiana.** The lien resulting from judgments, whether these be rendered on contested cases, or by default, whether they be final or provisional, in favor of the person obtaining them.

**JUDICIAL NOTICE.** A term used to express the doctrine of the acceptance by a court for the purposes of the case, of the truth of certain notorious facts without requiring proof.

The classes of facts of which judicial notice will be taken are judicial, legislative, political, historical, geographical, commercial, scientific, and artistic, in addition to a wide range of matters arising in the ordinary course of nature or the general current of human affairs which rest entirely upon acknowledged notoriety for their claims to judicial recognition; Wade, Notice 1403.

If unacquainted with such fact, the court may refer to any person or any document or book of reference for his satisfaction in relation thereto; or may refuse to take judicial notice thereof unless and until the party calling upon him to take such notice produces any such document or book of reference; Steph. Ev. Art. 59.

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Courts will take judicial notice:—of legislative enactments—which are recognized as public acts within the state or territory in which the court is held; 20 Ind. 82; 137 U. S. 214; 123 *id.* 1; 117 *id.* 401; 22 U. S. App. 187; 9 How. 127; 7 Kan. 426; 28 Tex. 452; 17 Md. 309; 13 Mich. 481; 16 Cal. 220; 69 Me. 314; 41 N. J. L. 29; 43 La. Ann. 959; 80 Wis. 407; 75 Mo. 182; and of a private act when expressly recognized and amended by a public act: 6 Ill. App. 157; of a long prevailing construction of a statute by executive officers; 39 L. R. A. (Fla.) 507; of the public statutes of the several states; 15 U. S. App. 332; of the statutes under which city improvements are made; 99 Cal. 17 (but not of a city ordinance; 80 Md. 483); that a city is duly incorporated; 132 Ind. 189; of the corporate existence and names of the counties of a state; 93 Ala. 388.

A court takes judicial notice of its own action in the same cause; 110 Mo. 350; or a state court of the decision of the supreme court of the United States settling the law of the same case; 17 S. W. Rep. (Ky.) 287; of the acts of congress; 70 Cal. 163; 30 Ill. 279; 134 N. Y. 156; 32 Mo. 21; 28 Tex. 452; 10 Ind. 586; 6 Wis. 89; 37 Tex. 13; 16 Gratt. 284; of the rules and regulations of the principal departments of the government under express authority of an act of congress in which the public are interested; 152 U. S. 211; of acts of the executive in relation to declaring a guano island to be within the jurisdiction of the United States; 137 U. S. 224; but not of regulations of the land office; 49 Fed. Rep. 54. The lower courts of the United States and the supreme court, on appeal from their decisions, take judicial notice of the constitution and public laws of each of the states of the Union; 112 U. S. 452; 114 *id.* 218; 159 *id.* 657; of the laws of Pennsylvania existing prior to the constitution; 6 U. S. App. 649. Without special enactment, the law merchant, governing the transfer of commercial paper by indorsement, will be noticed by the courts, where such law has not been abrogated by statute: 41 N. J. L. 29; 12 Cl. & F. 787; 3 C. B. 519; as will the general usage and customs of merchants; 91 U. S. 37 (if they are intelligible without extrinsic proof; 23 Beav. 370); military orders of a general character within the district in which the courts are held, when such orders affect judicial proceedings, and are issued by officers of recognized authority, will be noticed; 20 La. Ann. 141; 36 Tex. 141. In states where the common law has been adopted, it will be presumed that the same law prevails in a foreign state, unless otherwise proved; 1 Houst. 538; 28 Miss. 156; 23 Tex. 639; 80 Ind. 185; 11 N. Y. 437; 39 Ala. 468; 28 Vt. 776; but courts will in general refuse to notice a common-law rule different from their own; 19 Mo. 84; 11 Ind. 331; and although the supreme court take judicial notice of the laws of each state in the Union, yet courts of the several states, which are considered as foreign to one another, are not bound to take judicial notice of the laws of any other state; 2 Freem. Judg. § 571. See FOREIGN LAW.

Judicial notice will be taken of the existence and titles of all the sovereign powers in the civilized world which are recognized by the government of the United States, of their respective flags and seals of state; 7 Wheat. 273, 335; L. R. 2 Ch. App. 585; the *status* of sovereigns; [1894] 1 Q. B. 149; of the law of nations; 14 Wall. 170, 188; of foreign admiralty and maritime courts; 4 Cra. 299, 434; and their notaries public; 8 Wheat. 326, 333; of a treaty with a foreign government; 17 U. S. App. 427; or with Indian tribes; 46 Fed. Rep. 363; 15 *id.* 489; 3 Wis. 709; of the date of the consummation of such treaties; 5 Minn. 78; 16 *id.* 525; of the laws and regulations of Mexico prior to the cession under the treaty of Guadalupe Hidalgo; 141 U. S. 546; of the accession of the chief executive of the nation, and of their own state or territory, his powers and privileges; 33 Miss. 508; 5 Wis. 308; 34 Neb. 435; and the genuineness of his signature; 4 Mart. La. 635; the heads of departments and principal officers of state; 91 U. S. 37; and the public seal; 2 Halst. 553; 3 Johns. 310; the election and resignation of a senator of the United States, or the appointment of a cabinet or foreign minister; 91 U. S. 37; 2 Rob. La. 466; marshals and sheriffs; 27 Ala. 17; 80 Wis. 150; and the genuineness of their signatures; 10 Mart. La. 196; of the law regulating an officer's fee; 129 Ind. 535 (but not their deputies; 10 Ark. 142); of courts of general jurisdiction, their judges; 2 Ohio St. 223; 34 N. E. Rep. (Ind.) 613; their seals, regular terms, rules, and maxims in the administration of justice and course of proceeding; 10 Pick. 470; 17 Ala. 229. The supreme court, on appeal from the circuit court, takes judicial notice of the days of general public elections of members of the legislature, and of members of the constitutional convention of a state, as well as of the time of the commencement of its sitting, and the date when its acts take effect; 159 U. S. 651; see 91 *id.* 37; 6 Wall. 499; 117 U. S. 401. Courts take judicial notice that primary elections are an essential part of our political system; 125 Ind. 207; see 135 *id.* 526; of public proclamation of war and peace and special days of fast and thanksgiving; 4 Md. 409; 110 Mo. 286; see 51 Fed. Rep. 260; of the public proclamations of pardon and amnesty; 145 U. S. 546; of the sittings of congress and also of their own state and territorial legislatures and their established and usual course of proceeding, and the privileges of the members, but not the transactions on the journals; 18 Wall. 154; 45 Ill. 119; 8 Ind. 156; 14 Bush 284; *contra* (as to the journals), 48 Ala. 115; 13 Mich. 481. The English courts have refused to take notice of journals of the house of commons; Hob. 109; but they take notice of the privileges of the house; 9 Ad. & E. 107; 4 Jur. 70; 3 P. & D. 330; and of its standing orders; L. R. 2 Eq. 364.

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Courts will take judicial notice of the general geographical features of their own country, or state, and of their judicial district, as to the existence and location of its principal mountains, rivers, and cities; 27 Ind. 283; 128 *id.* 555; 133 *id.* 178; 40 N. H. 420; 131 N. Y. 617; 141 Ill. 469; 7 C. C. App. 444; 99 Cal. 577; 19 U. S. App. 266; 121 Pa. 109; 57 Ark. 359; 86 Ala. 88; 150 Mass. 221; and that certain places constitute the chief cities or commercial centres of a state; 83 Tex. 650; and of the geographical position and distances of foreign countries and cities in so far as the same may be fairly presumed to be within the knowledge of most persons of ordinary intelligence and education within the state or district in which the court is held; 91 U. S. 37; and see 58 Fed. Rep. 729; and of the boundaries of the several states and judicial districts; 91 U. S. 37; of the territorial extent of the jurisdiction and sovereignty exercised *de facto* by their own government; 137 U. S. 214; 117 *id.* 401; that the districts into which the United States are divided for revenue purposes have defined geographical boundaries; 104 *id.* 41.

The state courts will take judicial notice of the local political divisions of their own state into counties, cities, townships, and the like; 40 N. H. 420; 22 Me. 453; of the population of cities and towns according to the census reports; 3 Ind. App. 399; 94 Ill. 430; 64 Cal. 87; 81 Wis. 440; 133 Ind. 178; and of the length of time ordinarily required to complete an enumeration of the inhabitants of a state; 135 N. Y. 473; of their relative positions but not of their boundaries, further than described in public statutes; 39 Me. 263; 28 Ind. 429; 19 Ia. 319. As to geographical facts, see 10 Abb. N. C. 116.

Judicial notice is also taken of any matters of public history affecting the whole people, and also public matters affecting the government of the nation, or of their own particular state or district; 16 How. 416; 91 U. S. 37; 56 N. J. L. 696; 147 Ill. 66; 1 Abb. 169; 67 Ga. 260; 50 Ala. 537; 13 Ct. Cl. 117; 64 Ind. 553; 2 Cal. 183; but see 28 Tex. 294; 6 Heisk. 202; of the general facts of natural history; 5 C. C. App. 359; 55 Fed. Rep. 964; of the rules of arithmetic; 97 Ala. 159; of legal weights and measures; 4 Tenn. 314; and coins; 5 M'Lean 23; 10 Ind. 36; the character of the general circulating medium, and the public language in reference to it; 8 Monr. 149; but not the current value of the notes of a bank at any particular time; 40 Ala. 391; of the custom of the road as to passing to the right or left; 8 C. & P. 104; and of the sea, if general and notorious; L. R. 3 P. C. 44; and the United States courts especially take judicial notice of the ports and waters of the United States, in which the tide ebbs and flows; 91 U. S. 37.

Of all things which must have happened according to the ordinary course of nature; as the coincidence of days of the week with those of the month; 97 Ala. 647; 6 Ind. App. 97; 84 Me. 111; the ordinary limitation of human life as to age; 97 Ala. 159; of the average height of a man; 23 N. E. Rep. (N. Y.) 9; of the Carlisle Tables in estimating the probable length of life; 151 U. S. 468; of the period of gestation; 2 East 202; the course of time of the heavenly bodies; 6 Ohio Cir. Ct. R. 230; 61 Cal. 404; 47 Conn. 179; 55 Md. 11; the mutation of seasons, and their general relations to the maturity of crops; 91 U. S. 37; of the meaning of words in the vernacular language, but not of catch-words, technical, local, or slang expressions; 20 Pick. 206; 15 Md. 276; 107 Cal. 187; 3 N. Dak. 407 (although formerly the local use of language was noticed; 11 M. & W. 295; 1 Bul. 174; Rolle, Abr. *Court* C, 6, 7; 12 Q. B. 624); such ordinary abbreviations as by common use may be regarded as universally understood; as abbreviations of Christian names, and the like; 91 U. S. 37; 37 Ala. 216; 13 Mo. 89; 54 N. W. Rep. (N. Dak.) 404; but not those which are in any degree doubtful or difficult of interpretation; 8 Tex. 205.

That railroad passenger trains are operated to carry passengers for hire; 32 U. S. App. 182, that a street railway company is a common carrier of passengers; 65 Conn. 201; that two railroads touching the same points are parallel and competing lines; 72 Tex. 404; of notorious customs of railroad companies regarding passengers and freight; 82 Ia. 312; 13 U. S. App. 183; that telegraph lines are necessary to the operation of railroads; 133 Ind. 69; of the relation between the conductor and brakeman of a freight train; 111 N. C. 482; of the duty of passenger conductors to enter and leave their trains while in motion; 102 Mich. 289.

That the attendants of a church are not limited to its members; 161 Mass. 269; that many unincorporated church societies have been in existence; 158 Ill. 631; of the contents of the Bible and the general doctrines maintained by different religious sects; 76 Wis. 177; 18 R. I. 258; but see 16 Kan. 192; 31 Barb. 49.

And, finally, all such matters as may be considered as within the common experience or knowledge of all men; 28 Ala. 83; as, that natural gas is a dangerous agency; 128 Ind. 555; but that it will not explode spontaneously without some other agency acting upon it; *id.* 335; that leaks occurring in gas pipes require immediate repair; 140 Ind. 107; that horses well broken and kind will take fright at a moving vehicle drawn by an invisible motor; 56 N. J. L. 696; that cattle in Texas are infected with a microbe or germ of the Texas or Spanish fever, which can be communicated to other cattle; 126 Mo. 168; of the objectionable character of an undertaker's establishment, in a residential portion of a city; 139 N. Y. 93; of the ordinary duties of a bank cashier; 31 Fed. Rep. 697; that beer is a fermented liquor; 44 Mo. App. 81; 2 Tex. Civ. App. 296; 54 Fed. Rep. 138; 44 *id.* 438; that whiskey is an

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intoxicating drink, as is also a whiskey-cocktail ; 75 *id.* 657 ; that the selling of a proprietary medicine depends less on its merits than upon advertising ; 57 Fed. Rep. 863 ; that hoppers with chutes beneath them are used for many different purposes ; 159 U. S. 611.

It has been said that the courts should exercise this power with caution. Care must be taken that the requisite notoriety exists. Every reasonable doubt upon the subject should be solved promptly in the negative ; per Swayne, J., in 91 U. S. 43. In that case the court took judicial notice, in a patent case, of the principle of operation of an ice-cream freezer, and the subject of judicial notice was there fully discussed.

See, generally, 2 Cent. L. J. 393, 409 ; 3 *id.* 364 ; 14 *id.* 114, 125 ; 5 So. L. Rev. N. S. 214 ; Wade, Notice §§ 1403, 1417 ; and see 3 Harv. L. Rev. 285 ; Eliott, General Practice §§ 182, 188, 408, 426 ; Thompson, Trials ; 4 L. R. A. 33 ; 24 Am. L. Reg. 553 ; 28 *id.* 193, 321, 449 ; 3 Field, Lawy. Br. 248 ; Rob. Pat. § 1009.

**JUDICIAL OFFICE.** A term used to define qualifications of additional members of the judicial committee of the Privy Council (*q. v.*) provided for by 34 & 35 Vict. c. 91. By the later acts the phrase "high judicial office" is defined to mean the office of Lord Chancellor of Great Britain or Ireland, judge of the high courts in England or Ireland, judge of the court of appeal of England, judge of the court of session in Scotland, paid judge of the judicial committee, lord of appeal in ordinary, or member of the judicial committee. 39 & 40 Vict. c. 59, § 25 ; 50 & 51 Vict. c. 70, § 5.

**JUDICIAL POWER.** The authority vested in the judges.

The authority exercised by that department of government which is charged with the declaration of what the law is and its construction so far as it is written law.

The power to construe and expound the law as distinguished from the legislative and executive functions.

The use of the term judicial power in sec. 2, Art. III. of the Constitution of the United States furnished an occasion to Mr. Justice Miller for a comment upon the difficulty of defining the term ; he says, "It will not do to answer that it is the power exercised by the courts, because one of the very things to be determined is what power they may exercise. It is, indeed, very difficult to find any exact definition made to hand. It is not to be found in any of the old treatises, or any of the old English authorities or judicial decisions, for a very obvious reason. While in a general way it may be true that they had this division between legislative and judicial power, yet their legislature was, nevertheless, in the habit of exercising a very large part of the latter. The house of lords was often the court of appeals; and parliament was in the habit of passing bills of attainder as well as enacting convictions for treason and other crimes.

"Judicial power is, perhaps, better defined in some of the reports of our own courts than in any other place, and especially so in the Supreme Court of the United States, because it has more often been the subject of comment there, and its consideration more frequently necessary to the determination of questions arising in that court than anywhere else. It is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision." Miller, Const. U. S. 314.

Another writer directs attention to the absence of a real and just boundary line between judicial and legislative power in the early English jurisprudence. "In the early ages of the English system, however, the line between the judiciary and the legislature was not distinctly marked, and Parliament, consisting of one great chamber, in which sat both lords and commons, not only made but also interpreted the laws. But it has now long been settled in England that the interpretation of statute law belongs to the judiciary alone, and in this country they have claimed and obtained an equal control over the construction of constitutional provisions." Sedg. Const. L. 18.

"The power conferred upon courts in the strict sense of that term ; courts that compose one of the great departments of the government ; and not power in its judicial nature, or *quasi* judicial, invested from time to time in individuals, separately or collectively, for a particular purpose and limited time." 1 Blatch. 635 ; 65 Barb. 444, 448.

"Judicial power is never exercised for the purpose of giving effect to the will of the judge ; always for the purpose of giving effect to the will of the legislature ; or, in other words, to the will of the law." 9 Wheat. 738.

Nevertheless, leaving out of question the greater necessity of real definition and separation of the legislative and judicial power in American constitutional law there is a distinction between judicial power and political power which was fully recognized in English law, continues to be so in American law, and is entirely independent of the case growing out of the constitutional delimitation and separation of the three powers of government.

The distinction between judicial and political questions was fully considered in Penn *v.* Lord Baltimore, 1 Ves. Sen. 444, and it was held by Lord Hardwicke, L. C., that while the dispute as to original boundaries between provinces was a political question to be determined by the king and council, yet where the case arose under an agreement between the parties it was a judicial question.

In The Nabob of Carnatic *v.* East India Co. (1 Ves. Jr. 371) a plea that the defendant was invested with sovereign powers, and therefore not answerable with respect

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to the exercise of them in a court of justice, was overruled; but after the case came to hearing the bill was dismissed upon the ground that the case involved a treaty between persons acting as independent states, and the circumstance that the defendants were subjects merely with relation to England had nothing to do with the matter which was not a subject of private municipal jurisdiction; 2 *id.* 56.

The Cherokee nation was held to be a state but not a foreign state in the sense of the constitution, and therefore could not maintain an action against the state of Georgia in the courts of the United States; 5 Pet. 1. In this case Chief Justice Marshall said that the propriety of interposition by the court to control the state legislature "savors too much of the exercise of political power to be within the province of the judicial department." Mr Justice Thompson in a dissenting opinion which upheld the jurisdiction was careful to say, "I do not claim for this court the exercise of jurisdiction upon any matter properly following under the denomination of political power, and again I do not claim as belonging to the judiciary the exercise of political power. That belongs to another branch of the government. The protection and enforcement of many rights secured by treaties most certainly do not belong to the judiciary. It is only where the rights of persons or property are involved, and when such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief." 5 Pet. 51. See also 4 Dall. 4.

It was very earnestly discussed in one of the early cases concerning the boundary between two states, whether the jurisdiction in such cases, now so well established, was included in the judicial power as understood by the constitution of the United States, and it was held that although the constitution did not in terms extend the judicial power to all controversies between two or more states, yet it in terms excluded none, whatever might be their nature or object; 12 Pet. 657. In this case the court recognized the distinction between political and civil controversies and held that the case in question was the latter because it depended first upon a fact, and second upon the question whether an agreement between the states was void or valid, both of these presenting not a political but a judicial controversy. And it was said that where there was submission by sovereigns or states of a controversy between them, from that moment the question ceased to be a political one but comes immediately within the judicial power for determination by a court.

In Georgia *v.* Stanton (6 Wall. 50, 71) it was said that the distinction between judicial and political power is so generally acknowledged in the jurisprudence both of England and of this country that we need do no more than refer to some of the authorities on the subject. The suit invoked the power of the court to restrain the Secretary of War and his subordinates from executing acts of congress which, it was alleged, would annul and abolish the existing state government. In refusing the injunction the court said that it could hardly be denied that the case called for the judgment of the court upon political questions and upon rights, not of persons or property, but of a political character. "For the rights for the protection of which our authority is invoked, are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a state, with all its constitutional powers and privileges. No case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill, in judicial form, for the judgment of the court." 6 Wall. 77.

The separation of the three departments among which, in modern systems, the sovereign powers of government are distributed, and to some extent the difficulty involved in the effort to distribute those powers, are discussed in the title EXECUTIVE POWER, which, with the title LEGISLATIVE POWER, should be read and referred to in connection with the present title.

Separation of powers, though generally adopted, does not always rest upon a constitutional basis. Whether it does or does not do so affects very materially the judicial power with respect to its stability and independence. In England, not only the supreme legislative authority, but the power of deciding upon the constitutionality of its acts, is vested in parliament, there being no fundamental law in the nature of a written constitution to which that body must conform. The phrase English constitution is one of constant use, and there is, undoubtedly, a body of fundamental principles which are recognized as having been finally accepted as inviolable and which are grouped under that name. A recent writer says that it "is made up of certain views which have been read out of or read into English history and embodied in certain governmental acts,"—"it is in a large part a matter of theory and opinion," and "the substance of it may be summed up in one sentence. All the powers of government are in the hands of parliament." Macy, Eng. Const. 14, 16.

Practically modern opinion is undivided as to this omnipotence of parliament, and under no form of law can its action be restrained or reviewed. Such restraint as is imposed upon it is a moral one which exists only in the potency of certain principles which, in the United States, have been crystallized into constitutional safeguards, while in England they remain, as it were, in solution, affecting, however, and giving form and tone to the government and the body politic. The highest judicial power in England is subordinate to the legislative power, and bound to obey any law that parliament may pass, although it may, in the opinion of the court, be in conflict with the principles of Magna Charta, or the Petition of Rights. Taney, C. J., in 117 U. S. 699, appendix.

It is doubtless true that the parliament could, as a matter of law, abolish all courts and assume to itself the administration of justice, but even in that case there would still exist the judicial power now administered by courts, and it would be equally distinct as now from the legislative function, even if both were exercised by the same agency of government.

The French constitution of Sept. 3, 1791 (the first written constitution in Europe), recited that the judicial power cannot in any case be exercised by the legislative body or by the king, and that tribunals cannot interfere with the exercise of the legislative power nor suspend the execution of the laws, nor encroach upon administrative functions, nor cite any administrators to appear before them on account of their functions. This comprehensive limitation is attributed by a thoughtful writer on this subject to the French historical associations, which

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were hostile to any judicial competency to criticise legislation for unconstitutionality. It is to this influence that the writer referred to attributes the different views on this subject which are found in the French constitution referred to and that of the United States. Coxe, Jud. Pow. 78. From a historical review on the subject the author last cited concludes that in France long before 1787 the French judicial power had been used to declare legislation to be void because contrary to the views of right entertained by the court; and that, by the further contrast to American views, the judicial power in question existed under an unwritten constitution and was expressly prohibited under a subsequent written constitution.

Under the Swiss constitution the federal government is organized to some extent upon the idea of the separation of powers; but as it has been observed, "the separation of powers is not very strictly observed between the federal assembly and the federal council, nor indeed . . . between the judicial authority and the political federal authorities;" Adams and Cunningham on the Swiss Confederation 48. The Swiss federal tribunal is bound by all laws passed by the federal assembly without qualification; which is not competent to decide whether the federal law be constitutional or unconstitutional; this is declared not to be a judicial question, nor is it such a question whether a constitution or a law of a canton contains anything contrary to the constitution of the confederation, such a question is extra-judicial and is decided by the federal assembly; Vincent, Swiss Government 34, 142. Another writer says that the Swiss federal court, although instituted in imitation of the American, differs from it in an essential point, while in the United States judicial power alone extends to declaring a law unconstitutional, under the Swiss constitution some points of cantonal law are reserved and the federal legislature is made the sole judge of its own powers and the authorized interpreter of the constitution; 1 Bryce, Am. Com. 254.

In Germany it is said that the law of a state must yield in case of conflict between it and constitutional law of the empire, and that the judicial tribunal must decide between them, but that it was uncertain whether such tribunal can decide upon a question of the constitutionality of a law of the empire; Coxe, Jud. Pow. 96.

In Canada it is said that the supreme court and the privy council in England have concurred in recognizing the rights of provincial courts to pass upon the constitutionality of the laws enacted by the provincial legislatures and the Dominion parliament; Doutre, Const. of Canada, preface.

For an extended historical commentary on previous systems of law, with respect to the limitations of judicial power in passing upon the validity or effect of legislation, see Coxe, Jud. Pow. pt. 1.

The English doctrine of the absolute inviolability of a legislative act never did acquire a footing in this country. It was repudiated by James Otis nearly a quarter of a century before the framing of the American constitution. He contended before the superior court of judicature for the province of Massachusetts, that the validity of statutes must be determined by courts of justice. This doctrine afterwards became the principle of American constitutional law. Before 1787, the colonial courts refused to grant writs of assistance, on the ground that general writs of assistance were unconstitutional; Quin. 504; and see 1 Bay 252, where an act passed by the colonial legislature was declared void; Mart. (N. C.) 49. Judicial questions of a national character were, under the confederation, determined by a court; Articles of Confederation, Art. 9; and the framers of the constitution ordained and established a judicary as a necessary department, and used in it the phrase *judicial power* as one well understood and not needing definition in the instrument itself. Federalist, Nos. 22, 28, 80, 81; 3 Elliott's Deb. 142, 143.

It is the settled law in this country that the judicial power extends to and includes the determination of the constitutionality and validity of legislative acts, although the propriety of this conclusion is still sometimes challenged. For a discussion of the subject, its history, and the authorities, see CONSTITUTIONAL.

But a court has no power to declare a duly enacted statute unconstitutional simply because it may seem to the court that such legislation does not conform to the general theory upon which the government is founded; 51 Fed. Rep. 774.

The constitution of the United States declares that "the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish." Art. 3, s. 1.

It has been remarked that the essential character of its judiciary is a distinct recognition by the constitution of the nationality of the federal government; Pom. Const. L. § 108.

By the constitutions of the several states, the judicial power is vested in such courts as are enumerated in each respectively. See the articles on the several states. There is nothing in the constitution of the United States to forbid or prevent the legislature of a state from exercising judicial functions; 2 Pet. 413; but even in the absence of special limitations in the state constitutions, legislatures cannot exercise powers in their nature essentially judicial; 13 N. Y. 391. The different classes of power have been apportioned to different departments, and as all derive their authority from the same instrument, there is an implied exclusion of each department from exercising the functions conferred upon the others; Cooley, Const. Lim. 106. The legislative power cannot from its nature be assimilated to the judicial; the law is made by the one, and applied by the other; 1 N. H. 204; 11 Pa. 494; 19 Ill. 282; 1 Ohio St. 81; 13 N. Y. 391; 54 N. J. L. 288; 29 Fla. 1. In the oft-repeated phrase of Chief Justice Marshall, "the legislature makes, the executive executes, and the judiciary construes, the law." 10 Wheat. 1, 46.

Two capital distinctions have been noted between the judicial power in England and in the United States,—the first grows out of the existence in the latter country of a written constitution restricting the power of the legislature, from which springs the duty of the courts to declare invalid any act which is expressly prohibited by or which is not authorized by the constitution, either expressly or by implication. The other results from the power of construction imposed upon the American judge by the brevity of the constitution. Continuing the last thought, it is said:

"The words of that instrument are general, laying down a few large principles. The cases which will arise as to the construction of these general

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words cannot be foreseen until they arise. When they do arise the generality of the words leaves open to the interpreting judges a far wider field than is afforded by ordinary statutes, which, since they treat of one particular subject, contain enactments comparatively minute and precise. Hence, although the duty of a court is only to interpret, the considerations affecting interpretations are more numerous than in the case of ordinary statutes, more delicate, larger in their reach and scope. They sometimes need the exercise not merely of legal acumen and judicial fairness but of a comprehension of the nature and methods of government which one does not demand from the European judge who walks in the narrow path traced for him by ordinary statutes. It is therefore hardly an exaggeration to say that the American constitution, as it now stands, with the mass of fringing decisions which explain it, is a far more complete and finished instrument than it was when it came fire-new from the hands of the Convention. It is not merely their work but the work of the judges, and most of all one man, the great Chief Justice Marshall." Bryce, Am. Com. 248.

The American system of leaving constitutional questions to be settled by the courts is considered by the author quoted to secure very great advantages over the theory which was advanced at the time of the formation of the federal government of subjecting the acts of the state legislature to the veto of congress. The result is, as he puts it, that "the court does not go to meet the question; it waits for the question to come to it. When the court acts, it acts at the instance of a party, sometimes the plaintiff or the defendant may be the national government or a state government, but far more frequently both are private persons, seeking to enforce or defend their private rights." He illustrates this by the fact that the doctrine of Fletcher *v.* Peck, 9 Cra. 87, that a repeal of a grant by the state to an individual impairs the obligation of the contract, was determined in an action between individuals, the result being that the decision upon the validity of the action of the state is relieved from those opinions which might affect its determination, if the state itself were a party; 1 Bryce, Am. Com. 252. A more far-reaching case which might be used as an illustration is the Dartmouth College Case, 4 Wheat. 518, in which an action between an individual and a private corporation, resulted in placing upon the states a limitation of power second to few if any contained in their constitutions.

Under the American constitutional system, there is to be found no force more potent, effective, and far-reaching than this power of constitutional construction which is now unquestionably vested in the courts. Through it the judicial power, in a way, approaches much more nearly to the absolute ultimate authority of the English Parliament than does the legislative power. It has recently been said: "We proceed upon the theory that our constitution is written; and in our written constitutions, state and national, we have provided courts for the purpose of passing upon the laws enacted by the legislatures and determining their constitutionality. We do not know, therefore, whether a governmental act is valid or not until a court of competent jurisdiction has passed upon it. We depend upon our courts to tell us what our constitution means. Our real constitutions are thus found not wholly in the written documents bearing the name, but in the decisions of the supreme court of the United States and in those of the highest courts in the various states. The study of the American constitution is in large part, from beginning to end, a study of judicial decisions." Macy, Eng. Const. 89.

Mr. Bryce considers it a weak point in the federal constitution that a decision of the supreme court may be obtained in reversal of a former one by the appointment of judges to fill vacancies favorable to such reversal, or in case there be no vacancy, by the joint action of congress and the executive in increasing the number of judges. Of the former method, he instances the Legal Tender Cases, 1 Am. Const. 264, 269, 297. This reference served to put in a very definite form the somewhat widespread impression that appointments of judges were made for the purpose of reversing the previous decision of the court. The possibility of such action in any case by the executive is so serious a contingency that this particular charge has been recently made the subject of critical examination by Senator Hoar, whose brother was then attorney general of the United States. His pamphlet is a valuable historical document, and shows by the dates that the appointments in question were made prior to the decision, and from the testimony of members of the cabinet, that they had been agreed upon long before, neither the president nor any member of the cabinet having any knowledge as to the probable decision; see 5 Am. Lawy. 4.

The fact that the suggestion of any motive in the appointment of judges has so rarely been made may be considered strong evidence that the danger alluded to is not a serious one. But even if it were, it is a danger necessarily incident to all human institutions. No system of checks and balances has ever been devised, and probably none ever will be, so perfect as to dispense with the need of integrity and good faith in the administration of government.

It may be noted here, as already stated under CONSTITUTIONAL, that Chief Justice Gibson, in 12 S. & R. 345 (1825), ably contended, after the decision in Marbury *v.* Madison, 1 Cra. 176, that a state court is bound to execute an act repugnant to the constitution of a particular state, but not one repugnant to the federal constitution; though in 2 Pa. 281, he said to counsel that he had modified his opinion on this subject.

A state legislature cannot annul the judgments nor determine the jurisdiction of the courts of the United States; 5 Cra. 115; 2 Dall. 410; nor authoritatively declare what the law is or has been, but what it shall be; 2 Cra. 272; 4 Pick. 23; 3 Mart. La. 248; 10 *id.* 1; 3 Mart. La. N. S. 551; 5 *id.* 519.

Congress cannot interfere with or control state courts except in so far as the federal courts have appellate jurisdiction.

Congress cannot without the consent of

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the state constrain the state courts to entertain or act upon applications for naturalization; 32 Atl. Rep. (N. J.) 743.

The judicial powers of the United States, first under the constitution as originally adopted, extended to cases "between a state and citizens of another state," but the very early case of Chisholm *v.* Georgia, 2 Dall. 419, in which the plaintiff as executor brought an action of *assumpsit* against the state, which was sustained by the court, resulted in the adoption of the 11th amendment. As a consequence it was held that cases past or present in which the state was a party were removed from the jurisdiction of the court; 3 Dallas 378; but the mere fact that a state may be interested does not oust the jurisdiction; 9 Wheat. 738; in a comparatively late case the soundness of the opinion in the case of Chisholm *v.* Georgia was doubted, the suggestion being that the clause of the constitution giving jurisdiction in such cases was properly limited to cases cognizable in the courts of a state or suits by a state against citizens of another state; 134 U. S. 1. The grant of judicial power in all cases in law and equity, etc., was held not to authorize a writ of error in the circuit court of the District of Columbia in a criminal case; 3 Cra. 159; but this provision is held generally to include criminal as well as civil proceedings, and the power so vested in the federal courts is independent of the judiciary of the states; 100 U. S. 257.

In the United States *v.* Smith (1 South. N. J. 33) the action was to recover a penalty under the provisions of an act of congress. The question was raised by plea whether under the act jurisdiction would properly be given to a state court. A demurrer to the plea was overruled, and in a dissenting opinion Southard, J., discusses at length the question, what is the judicial power of the United States.

The distinctive features which characterize the three great departments of government are in the main easily recognized. There is little difficulty in determining whether a power is judicial or executive, and the questions arising with respect to those distinctions result not so much from inherent difficulty in the subject as from a tendency in modern constitutions and legislation to confuse the functions of the two departments in the classes of cases of which illustrations have been already cited. So it may be said that ordinarily there ought to be little difficulty in distinguishing legislative and judicial powers. Properly understood, the two functions are entirely different, and yet there are points of contact from which spring disputed cases, such, for example, as the regulation of procedure, the application of rules of evidence, the attempt to regulate judicial discretion, and many others. This may involve, on the one hand, an unconstitutional delegation of legislative power, or, on the other, the assumption by the legislature of some portion of the authority which belongs to the courts. The cases in which it is a question whether a certain power is legislative or judicial are mainly considered under the title of LEGISLATIVE POWER, to which reference should be made. As a reason why there is naturally found much debatable ground between the judiciary and the legislature, it has been suggested that:

"In most countries the courts have grown out of the legislature; or rather, the sovereign body, which, like parliament, was originally both a law and a legislature, has delivered over most of its judicial duties to other persons, while retaining some few to be still exercised by itself." 1 Bryce, Amer. Com. 235. The author just quoted enumerates the points in which America has followed the English practice. There are no separate administrative tribunals, but officials are sued or indicted in the regular courts; judges are secure in their tenure; judicial proceedings are recognized in law and not set aside by a statute within the competence of the legislature. He considers that America has improved on England in forbidding the legislature to exercise the powers of a criminal court, by acts of attainder, etc., and stands behind England in continuing to use a legislative body as a court of impeachment, the trial of disputed election cases by committees, and the disposition of public franchises, or the appropriation of private property, by legislative rather than judicial methods. Thus three pieces of ground debatable between the legislature and the judiciary, which all originally belonged to the legislature, and in America still do, have been in England made the subject of judicial power and method; *id.* 235–6. The judicial power extends to and includes only such acts as are in their nature judicial. Upon judges, as such, no functions can be imposed except those of a judicial nature." 118 Ind. 83.

It is not a judicial function to entertain appeals from county commissioners upon the propriety of annexing territory to a city, and the act authorizing such appeals is invalid; 71 Fed. Rep. 443; nor to make an arrangement for the business intercourse of common carriers such as in the opinion of the court they ought to make for themselves; 46 Neb. 682; nor to prevent the submission to the people, as directed by the legislature, of a question involving an amendment to the constitution, by enjoining the secretary of state from certifying a question; 68 N. W. Rep. (S. D.) 202.

An act authorizing a court to appoint a municipal board of review to consist of members of different political parties was held to impose political and not judicial powers, and it was not binding on the court; 27 Wkly. L. Bul. 334.

An act of congress of 1792 devolved upon the circuit courts the duty of examining pension claims and certifying them to the secretary of war. In 2 Dall. 409, the attorney general moved for a mandamus to compel the judges to proceed to hear the cases under the act, but the case was not

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decided, as the act was repealed. The reasons given by the circuit judges for refusing to perform the duties imposed upon them by the act are set forth in 2 Dall. 410, n. Under an act of 1793 the nature of the duties assigned to the judges were somewhat changed. This act came before the supreme court in U. S. *v.* Yale Todd. Both of these decisions are set forth in a note of Taney, C. J., in 13 How. 52, where it is said that the result of the opinions in these two cases is that the power thus conferred was not a judicial power, and therefore could not be exercised by the courts, and that as the act intended to confer the power on the court as a judicial function, it could not authorize the judges to exercise it out of court as commissioners, and this decision has ever since been regarded as constitutional law.

Acts held valid as not conferring powers other than judicial are, requiring a certificate by the court as to the value of the services of an informer; 70 Fed. Rep. 310; conferring on the court the power to establish towns; 35 S. W. Rep. (Ky.) 1112; to establish county boundaries; 35 S.W. Rep. (Tex.) 1020; but merely ministerial powers in relation to committing inebriates cannot be assigned to the judiciary; 67 N. W. Rep. (Minn.) 207. The court has jurisdiction to determine the constitutionality of an act apportioning the state into legislative districts; 42 N. E. Rep. (Ind.) 929.

An act authorizing judges to appoint a bridge committee is not a violation of a constitutional provision prohibiting the judicial department from exercising executive functions; 29 Pac. Rep. (Or.) 356; nor is an act providing for the appointment of jury commissioners by the court in violation of the provision of an express constitutional provision prohibiting the legislature from conferring on the court or judge any power of appointment to an office; 14 S. E. Rep. (W. Va.) 407; in this case it was considered that jury commissioners were not public officers, but officers of the court.

Power may be conferred upon a judge to appoint justices of the peace; 90 Va. 679.

Where the constitution forbids the legislature to create or enlarge municipal bodies by special act, it is competent to confer upon the courts the power to determine whether the conditions prescribed by general law for such creation or enlargement have been complied with; 68 Fed. Rep. 774.

It is within the scope of judicial power to inquire whether rates of compensation, fixed by municipalities and corporations for the use of appropriated water in California, operated to deprive the owner of his property without just compensation; 74 Fed. Rep. 79.

An act authorizing a court on appeal from county commissioners to fix the salary of the county attorney is not unconstitutional as imposing legislative functions and duties on the judiciary; 47 Minn. 219.

The legislature cannot constitute the court a board to try contested elections, that power not being essentially judicial; 51 N. W. Rep. (Neb.) 137.

But while the courts are not permitted to have non-judicial duties imposed upon them, so, on the other hand, are the other departments of the government forbidden to invade or usurp the judicial power. And this is held to extend to and include everything necessarily or even properly incident to the exercise of their jurisdiction.

The power to punish contempts is strictly judicial and cannot be abridged by the legislature; 45 N. E. Rep. (Ohio) 199; 17 Col. 252; 37 Pac. Rep. (Okl.) 829; but reasonable regulations by the legislature touching the exercise of this power are binding; *id.*; but the power cannot be conferred upon an executive board; 131 Ind. 471; and an order directing a sheriff to commit a person to jail until he answers questions propounded to him by commissioners appointed to take his examination before trial is erroneous as an attempted delegation of judicial power in allowing the sheriff to determine what is compliance with the order; 17 S. E. Rep. (N. C.) 69.

Where an act provided for filling vacancies in municipal offices by a person elected by the council to serve until "the next city election," it was held that a subsequent act providing that the words quoted should be construed to mean the election at which the voters would have elected the successor without respect to the vacancy, was an invasion of judicial power as seeking to compel the courts to construe the previous act in a way contrary to its letter and spirit; 172 Pa. 140. In this case, however, Mitchell, J., filed an able dissenting opinion in which he maintained that the judgment was an "unprecedented and unwarranted invasion by the judiciary of the legislative authority," that expository acts had been in use in Pennsylvania from colonial days, and that they were "a legislative formula never heretofore questioned." See also 122 Pa. 627; where they are held to be a common form of legislative expression to which future effect must be given. In 2 Pa. 22, it was held that "explanatory acts must be construed as operating on future cases alone, except where they are designed to explain a doubtful statute."

A statute providing that certain corporations should be accepted by courts as "sole security" was void as an attempt to control the discretion of the court; 17 Pa. Co. Ct. R. 274.

Wherever a power is given to examine, hear, and punish, it is a judicial power, and they in whom it is reposed act as judges; Holt, C. J., 1 Salk. 200. In this case the censors of the College of Physicians under their charter fined and imprisoned a physician for administering unwholesome pills and noxious medicines, and it was held that a certiorari would lie.

An act declaring that a failure of assessors to comply with certain provisions of

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the law shall not invalidate the tax is invalid, as an invasion of the judicial function; 46 Wis. 168; but an act making properly certified tax bills *prima facie* evidence of the validity of charges against the property is not; 106 Mo. 137.

The power to hear and decide proceedings for the summary disposition of tenants was held to be a judicial power, and, as such, included in the powers of the recorder conferred on the city judge of New York, and a writ of prohibition will not lie to restrain him from proceeding; 19 Abb. Pr. 136; 29 How. Pr. 176.

The phrase judicial power, as adopted in American constitutional law, includes the determination of questions of fact in equity cases. The term must be construed as vesting such power as the courts under the English and American system of jurisprudence always exercised in that class of actions, and it is not competent for the legislature to withdraw from the courts invested by the constitution with judicial power, as to matters in equity, the determination of questions in fact, as one of the established elements of that power; 23 Wis. 343, 349.

The power of laying out or altering streets vested in the mayor and aldermen of the city, whenever in their opinion the safety or convenience of the inhabitants shall require it, is judicial, and certiorari lies to remove their proceedings in such a case; 8 Pick. 218.

The court may determine whether a particular regulation of a useful business is a reasonable restriction on the consititutional right of citizens to engage in such business; 98 Cal. 73.

It frequently happens that the courts are concluded by the result of an inquiry, quasi-judicial in its character, which under some very general definitions, such as that of Lord Holt, *supra*, might be referred to the judicial power, but is required in this particular case and by the legislature or executive as a guide to their own action.

In cases where the existence of certain facts is necessary to be ascertained as a basis for determining whether it is wise to enact a statute, the ascertainment of the fact by the legislature will be considered conclusive, and its decision will not be reviewed by the courts in a collateral proceeding. As where the establishment of a court depended upon the fact that the county had a population exceeding fifty thousand, the court refused to question the action of the legislature, although it appeared by the United States census that the population of the county was less that the required amount; 112 Mo. 591; and where the legislature prohibited parents from procuring or consenting to the employment of a female child under the age of fourteen years as a dancer, the court would not review its decision that such legislation was necessary to protect the health and morals of children on the ground that the law infringed the rights of parents in some particular cases; 8 N. Y. Cr. Rep. 383.

Where a reapportionment of representatives, based upon relative changes of population, was made by act of congress to take effect two years later, it was held to be a political and not a judicial question, and the courts could not give redress for any injustice resulting therefrom; 36 Neb. 181; but with respect to apportionment of the acts of a legislature, it was held that mandamus proceedings to test their validity presented a judicial question of which the courts had jurisdiction, and not a political question with which they would not interfere; 133 Ind. 178; 33 Wis. 90; 19 N. Y. Supp. 978.

The decision of congress recognizing a claim as an equitable obligation of the government and appropriating money for its payment can rarely be the subject of review by the courts; 163 U. S. 427.

A court or judge cannot be authorized to perform legislative duties; 68 Cal. 194.

An act of the legislature provided that before any railway company should construct its roads in the streets of a city, the city authorities, or the superior court, or a judge thereof, on appeal, should approve the plan of construction. It was held that the power which the superior court or a judge thereof was required to exercise was legislative and not judicial, and therefore could not be exercised by them; 37 Atl. Rep. (Conn.) 1080.

The case discusses the question fully.

An act authorizing the court or judge allowing a mandamus to direct the manner of serving it is not a delegation of legislative powers; 68 N. W. Rep. (Minn.) 1085.

The act of July 25, 1882, authorizing judges and clerks of United States courts to issue subpœnas upon the application of the commissioner of pensions for the examination of witnesses concerning pension claims, is constitutional and under it the courts can compel witnesses to appear and testify on that subject; 78 Fed. Rep. 107. A statute authorizing judges to fix salaries of deputies or assistants employed by county officers is not unconstitutional as a delegation of legislative power to a judicial tribunal; 39 S. W. Rep. (Ky.) 49, overruling 26 *id.* 581.

Questions frequently arise as to the validity of legislative acts requiring of executive officers duties quasi-judicial in their character, the propriety of which is challenged upon the ground that they impose judicial functions upon executive officers. Such are provisions of law authorizing the removal of subordinate officers, the constitution of boards for taxation, assessment, and the like. It is a well-settled principle that "judicial functions or duties can be conferred only upon courts and judicial officers;" 118 Ind. 361; 39 Wis. 390; 83 Cal. 111. But it has been held that there is no invasion of the judicial power in making state executive officers *ex officio* of a state board of taxation: 133 Ind. 513; *id.* 609; or charging them with the duty of assessing property or serving on a board of equalization; 21 Nev. 390. So it was held that the act, authorizing the establishment of a

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public park in the District of Columbia, or providing that in case of disagreement between the land owner and the park commissioners the appraisement should be submitted to the president, if his approval did not impose a judicial function upon the president whose duty was merely to decide whether the United States would have the land at the appraised value, and not to decide whether such value was reasonable as respects the property owner; 147 U. S. 282; such an act merely makes the president the agent of congress to decide whether the proceedings shall be completed or abandoned; 20 D. C. 104.

A constitutional provision prohibiting the legislature from creating other courts than those mentioned in the constitution does not prevent it from authorizing appeals to a court from the decision of a license board; 33 S. W. Rep. (Ky.) 96; and where the judicial power was vested by the constitution in certain named courts, it was still competent for the legislature to provide for the removal of administrative officers in cities by the board of aldermen "sitting as a court," such power being held not strictly judicial; 36 S. W. Rep. (Ky.) 524.

The fact that the law confers on jury commissioners judicial powers in the selection of citizens for jury services does not involve a conflict with the fourteenth amendment of the constitution; 163 U. S. 101.

Judicial powers were not conferred on the governor by authorizing him to investigate charges of official misconduct of state officers with a view to their removal; 56 Kan. 231; or by an act authorizing him to remove any officer appointed by him; 2 Okl. 277; and the action of a governor in removing an officer under such act will not be reviewed by the courts; *id.*; 47 La. Ann. 53.

The power to remove city officers for cause is administrative, not judicial, and may therefore be conferred on a non-judicial body; 90 Wis. 612;

Questions of power between the judiciary and the executive have generally arisen upon applications for a mandamus to compel or an injunction to prevent action of an executive officer.

The question of power to issue a mandamus in such cases is discussed under the title EXECUTIVE POWER, and the authorities are there collected. A discussion of the subject, not strictly in a suit at law, but as the result of one, the participants in which were a judge and a quasi-judicial officer, may be referred to here.

In Gilcrist *v.* The Collector of Charleston it was held that the circuit court has no power to issue a mandamus to a collector, commanding him to grant a clearance, and that all instructions from the executive which are not supported by law are illegal, and no inferior officer is bound to obey them; 4 Hall, Am. L. J. 429. This decision was the subject of a letter from Cæsar A. Rodney, attorney general, to the president criticising the action of the court and challenging its jurisdiction; *id.* 433. In reply to this letter Mr. Justice Johnson, who presided at the trial, made some remarks, in the course of which he says: "Jurisdiction in a case is one thing; the mode of exercising that jurisdiction is quite another;" the jurisdiction of the court must be derived from the constitution, and he expressly disclaims "any other origin of our jurisdiction, especially the unpopular grounds of prerogative and analogy to the king's bench."

In asserting the necessity of the recognition of the right of the courts to coerce an executive officer by a judicial order, he insists that such authority is necessarily involved in the use of the term *power* in the constitution: "The term judicial power conveys the idea both of exercising the faculty of judging and of applying physical force to give effect to a decision. The term power could with no propriety be applied, nor could the judiciary be denominated a department of government, without the means of enforcing its decrees. In a country where laws govern, courts of justice necessarily are the medium of action and reaction between the government and the governed. The basis of individual security and the bond of union between the ruler and the citizen must ever be found in a judiciary sufficiently independent to disregard the will of power, and sufficiently energetic to secure to the citizen the full enjoyment of his rights. To establish such a one was evidently the object of the constitution." He contends that the establishment of a judiciary without power to enforce its decrees would have been to no purpose, and that where a jurisdiction is conferred and no forms prescribed for its exercise, there is an inherent power in the court to adopt a mode of proceeding adapted to the exigency of each case; 4 Hall, Am. L. J. 446.

In Missouri it is held that by reason of the division of the power of government into three departments and the prohibition of the exercise by the one department of powers belonging to another, a mandamus will not lie to compel the governor to perform any duty pertaining to his office, ministerial or political, and whether commanded by the constitution or by law; 25 S. W. Rep. (Mo.) 376. But the mayor of a city is not such an executive officer as is exempt from judicial control; 59 Mo. App. 524.

It has been a subject of controversy how far the decisions of the court of claims control the executive departments of the government of the United States in their action on similar cases. It was said by Richardson, C. J., that the decisions of the court of claims in general, not appealed from, are guides to the executive officers of the government, and furnish precedents for the executive departments in all like cases; 13 Wash. L. Rep. 122. This decision was thus criticised by Comptroller Lawrence: The court of claims undoubtedly had a right (1) to lay down law for itself, but it



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has no authority to lay down law (2) for the executive officers of the government, yet the opinion referred to assumes to do so. This is the necessary effect of the words employed by it, and whether so intended or not, it is their logical effect. For if the court of claims can prescribe not only its own duties and the rules and principles of law governing its own action, but also the same for accounting officers in the executive administration of the executive business of the government, it may for like reasons do the same for heads of executive departments and even the president himself; 6 Dec. First Comp. 238.

The federal courts will not interfere with the pension officers in the exercise of their discretion; 14 Pet. 499; 7 Wall. 347; 116 U. S. 423.

Questions purely political or arising out of international relations the courts do not assume to determine, but leave them to what they term the political departments of the government and follow the decisions of the executive. Such a question is the recognition of independence or belligerency which is discussed at length under the title of EXECUTIVE POWER.

The power of the courts to enjoin executive officers rests upon the same principles as those applicable to a mandamus. It is the general rule that the official action of the executive department of the government or of the state cannot be controlled by a writ of injunction; 32 W. Va. 1; 3 Pickle 319; 109 Ind. 1. The execution of orders of the president for removing intruders from government land will not be interfered with by injunction; 1 Okl. 454.

An injunction may be obtained to protect a *de facto* officer whose title is disputed as well as that of one *de jure*, but it is not an appropriate means of determining a title to an office; 124 U. S. 210; 44 La. Ann. 333. In neither of these cases, however, is there involved any question of conflict between the executive and judicial power, inasmuch as the latter legitimately extends to and includes proceeding for the trial of title to office by *quo warranto*, which title see.

The power of staying the execution of a death sentence pending an appeal conferred by law on a court is not the granting of a reprieve within the meaning of a constitutional grant of executive power, but is a judicial power included in the separation of government into three independent departments; 35 N. E. Rep. (Ind.) 179. See 97 Ind. 373.

In State ex rel. Drake *v.* Doyle, Sec. of State (40 Wis. 175), which was an application for a mandamus against the state officer seeking to require him to revoke the license of an insurance company, return was made pleading an injunction of the circuit court of the United States to restrain the Secretary of State from revoking the license, and it was held that "where a suit is prosecuted in a federal court by a private party against a state officer who has no personal interest or liability in the action, but is sued in his official capacity only, to affect a right of the state only, the state is the real defendant, within the prohibition of the 11th amendment to the federal constitution. A circuit court of the United States has therefore no jurisdiction of a suit by a foreign corporation to restrain a state officer from revoking (as required by the law of the state) a license granted the plaintiff corporation to do business in the state,"

So also the power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government and is to be regulated by treaty or by act of congress and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute or is required by the paramount law of the constitution to intervene; 149 U. S. 698.

Of all the instances of what appears to an American legal mind the confusion of powers under the English system, none is more striking than the commingling of executive and judicial duties found in the office of the lord chancellor.

In commenting upon the alteration in his customary position by the powers of an administrative character conferred upon him by the Judicature Acts, a recent writer says, "It would appear, to the independent observer, that the tenure, the power of appointments, and the administrative duties of the chancellor, though necessarily pertinent to his high office, are inconsistent with his position as chief judge, co-equal and co-ordinate with the others, and that if the intention of the statute was to confer that position upon him, it was contrary to English usage, if not unconstitutional." Inderwick, King's Peace 232.

There has been much recent discussion as to whether the courts, in late decisions dealing with labor strikes and public commotion arising out of them, have extended their jurisdiction beyond recognized principles. In this discussion the phrase "government by injunction" has been constantly used. The cases are cited under the titles: INJUNCTION; CONTEMPT; LABOR UNION; CONSPIRACY; COMBINATION; BOYCOTT; STRIKES; and do not require further discussion here. See also, 13 Law Quart. Rev. 347; 31 Am. L. Reg. N. S. 1, 782; 34 *id.* 576; 37 *id.* 1; 3 Va. L. Reg. 625; Rep. Am. Bar. Assn. 1894, p. 299; 29 Am. L. Rev. 282.

See DELEGATION; EXECUTIVE POWER; LEGISLATIVE POWER; CONSTITUTIONAL; JUDGE-MADE LAW; JURISDICTION; JURY; JUDGE.

**JUDICIAL PROCEEDINGS.** Proceedings relating to, practised in, or proing from, a court of justice.

Conclusive presumptions are made in favor of judicial proceedings. Thus, it is an undoubted rule of pleading that nothing

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shall be intended to be out of the jurisdiction of a superior court but that which is so expressly alleged; 1 Saund. 74; 10 Q. B. 411, 455–459. So also, it is presumed, with respect to such writs as are actually issued by the superior courts at Westminster, that they are duly issued, and in a case in which the courts have jurisdiction, unless the contrary appears on the face of them; and all such writs will of themselves, and without any further allegation, protect all officers and others in their aid acting under them; and this, too, although they are on the face of them irregular, or even void in form; 6 Co. 54 *a*; 10 Q. B. 411, 455.

The rule is well settled by the authorities, that words spoken in the course of judicial proceedings, though they are such as impute crime to another, and therefore if spoken elsewhere would import malice and be actionable in themselves, are not actionable if they are applicable and pertinent to the subject of inquiry. And this extends not merely to regular courts of justice, but to all inquiries before magistrates, referees, municipal, military, and ecclesiastical bodies; and they are only restrained by this rule, viz., that they shall be made in good faith to courts or tribunals having jurisdiction of the subject, and power to hear and decide the matter of complaint or accusation, and that they are not resorted to as a cloak for private malice. The question, therefore, in such cases is, not whether the words spoken are true, not whether they are actionable in themselves, but whether they were spoken in the course of judicial proceedings, and whether they were relevant and pertinent to the cause or subject of inquiry; Newell, Def. Lib. & Slan. 424; Heard, Lib. & S. § 101. The rule that no action will lie for words spoken or written in the course of any judicial proceeding has been acted upon from the earliest times. In 4 Co. 14 *b*, it was adjudged that if one exhibits articles to justices of the peace, "in this case the parties shall not have, for any matter contained in such articles, any action upon the case, for they had pursued the ordinary course of justice in such cases; and if actions should be permitted in such cases, those who have just cause for complaint would not dare to complain, for fear of infinite vexation." And it has been more recently decided, that, though an affidavit made in a judicial proceeding is false, slanderous, and malicious, no action will lie against the party making it; 18 C. B. 126; 4 H. & N. 568.

The general rule is subject to this qualification: that in all cases where the object or occasion of the words or writing is redress for an alleged wrong, or a proceeding in a tribunal or before some individual or associated body of men, such tribunal, individual, or body must be vested with authority to render judgment or make a decision in the case, or to entertain the proceeding, in order to give them the protection of privileged communications. This qualification of the rule runs through all the cases where the question is involved; Odg. Lib. & Sl. 188, n; Heard, Lib. & S. § 104.

Statements made extra-judicially to a magistrate with a view to asking his advice are not a judicial proceeding; 3 B. & C. 24.

**Official Records of the States.** The constitution provides that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. This applies as well to the judgments and records of the courts of the several territories; 48 Minn. 108. Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved and the effect thereof. The term records includes all executive, judicial, legislative, and ministerial acts, constituting the public records of the state; Desty, Fed. Const. 203; 20 How. 250; 16 Tex. 509.

Legislative acts must be authenticated by the seal of the state; 4 Dall. 412.

As to the effect of judicial proceedings under this provision, see FOREIGN JUDGMENTS. As to records generally, see RECORDS.

See generally, JUDGE; JUDGE-MADE LAW; JUDICIAL DOCUMENTS; JUDICIAL POWER; JURY.

**JUDICIAL RATIFICATION. In Scotch Law.** The declaration by a married woman before a judge that a disposition or deed of alienation of her heritable property has been made voluntarily and without fear or coercion on her part. See ACKNOWLEDGMENT.

**JUDICIAL SALE,** A sale, by authority of some competent tribunal, by an officer authorized by law for the purpose. The term includes sales by sheriffs, marshals, masters, commissioners, or by trustees, executors, or administrators, where the latter sell under the decree of a court.

A sale, whether public or private, made by a receiver, pursuant to the direction or authority given by the court, is a judicial sale. 114 N. Y. 621.

It is premature and erroneous to decree a sale of property to satisfy incumbrances thereon before ascertaining the amounts and priorities of the liens binding such property; 22 S. E. Rep. (Va.) 110, reversing 27 *id.* 838.

A decree confirming a master's sale, and declaring that the title be vested in the purchaser "upon the payment of the purchase money," vests no title in such purchaser until the purchase money is paid; 41 S. W. Rep. (Tenn.) 1078.

The officer who makes the sale conveys all the rights of the defendant, and all other persons legally affected by the proceedings, in the property sold. Under such a sale there is no warranty, either express or implied, of the thing sold; 9 Wheat. 616; 51 N. J. Eq. 135; 104 Ind. 185. A sale of real estate does not conclude one not a party to those proceedings; and whatever title he had to the property so sold remains

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unaffected by the sale; 147 U. S. 431. Where the property sold under a decree is correctly represented by a plat, referred to in the advertisement and exhibited at the sale, which discloses an encroachment on a street, the purchaser cannot plead ignorance thereof; 91 Va. 114. A purchaser at a judicial sale, not made under compulsory process, can set up eviction of a paramount title as a defence in an action for the purchase money, but where land is sold in equity to pay the debts of an estate, and a judgment has to be rendered against the purchaser for the purchase money, he cannot enjoin its collection because of eviction; 41 S. C. 508.

The doctrine of *caveat emptor* applies, to a sale under a decree foreclosing a mortgage, and the purchaser cannot rely upon statements made by the officer conducting the sale that he will get a title free from incumbrance; 58 N. W. Rep. (Neb.) 953, aff. 35 Neb. 466.

The purchaser of a leasehold interest at a sheriff's sale is charged with notice of the lease and subject to its covenants and conditions; 158 Pa. 401; and a purchaser at such sale of an heir's interest is bound by notice given at the sale by decedent's heirs that the interest was subject in the purchaser's hands to the right, if any, of decedent's estate to charge the heir's indebtedness against his share; *id.* 292. Where a conveyance from a life tenant is procured by fraud and the property sold under a judgment against a vendee, a purchaser at that sale with knowledge of the fraud can hold against the devisees in remainder; 94 Ga. 664. The title of a purchaser of land at judicial sale duly confirms any rendered invalid by fraud in prior transfer of a decree of sale if the sale itself was free from fraud; 42 Neb. 156. A decree homologating proceedings at a family meeting to sell a child's property will protect a purchaser in good faith; 47 La. Ann. 882. Equity will not relieve a purchaser from complying with the terms of sale because of a defect in the title, rendering the title unmarketable, of which the purchaser was cognizant; 81 Md. 525. Where land is sold under a condition not authorized by the decree of sale, the purchaser will not be compelled to take the title although his son signed the condition without apprehending its effect; 71 Hun 54. It is well settled that "the title of an innocent purchaser of land at a judicial sale under a mortgage is not affected by the usurious character of such mortgage." Saulsbury, Ch., in 5 Del. Ch. 302; 1 Johns. Cas. 158; 10 Johns. 185; 53 Barb. 285. See as to *bona fide* purchaser, 21 L. R. A. 38. When real estate is sold by the sheriff or marshal, the sale is subject to the confirmation of the court, or it may be set aside. See 4 Wash. C. C. 45, 322.

An officer at a sale on execution conducted by himself cannot act as agent, with full discretionary powers of an absent person in the purchase of property, since the law casts on him the duty of fidelity to the execution debtor, and such purchase by the officer is void, and confers no title on his principal; 65 Vt. 457.

Any statements made with a purpose to deter bidding may avoid the sale; 88 Mich. 144; 161 Pa. 418; 38 S. C. 357; 88 Ga. 696.

It is generally said to be a rule that mere inadequacy of price is not of itself sufficient ground for setting aside a judicial sale; 49 N. J. Eq. 356; 22 S. W. Rep. (Ky.) 325; 21 Nev. 291; 145 U. S. 349; and that there must be shown in addition to inadequacy some fraud, accident, mistake, or other special circumstance to warrant rescission of the contract; 89 Va. 836. But the general rule as stated is not sustained without qualifications, since the inadequacy may be so gross as to shock the conscience of the court, as it is frequently expressed, and to be regarded as of itself sufficient ground for setting aside the sale; 36 W. Va. 598; 51 N. J. Eq. 304; as where land valued at $8,000, with incumbrances amounting to $2,700, was sold at $2,000; 56 Minn. 12; or where the same land brought at a subsequent sale $1,500; 60 *id.* 262. Where the price is grossly inadequate, the court will be quick to seize upon any other circumstance impeaching the fairness of the transaction; 161 U. S. 334; or the least irregularity in the proceeding; 63 Mo. App. 456. See as to inadequacy, 2 S. W. Rep. (Ky.) 556.

A sale of property as a whole may be confirmed if the decree that it be so sold is not objected to, and there is no offer of a better bid in case the bidding be reopened; 60 Fed. Rep. 9. The objection that different parcels of real estate were sold together cannot be made by one who has suffered no injury therefrom; 18 So. Rep. (Ala.) 938.

Combinations to prevent competitive bidding, and any conduct at the sale upon the part of interested parties which is fraudulent in fact, or the circumstances attending which induce the court to treat it as fraudulent, will make the sale void, as where there was an agreement between judgment creditors without knowledge of the debtor that one should refrain from bidding, in consideration of a promise to pay his judgment, made by the other, the sale was held void for fraud; 161 Pa. 418; and where a mortgagor publicly announced at the sale that she was a widow dependent upon the premises for support, that she intended to bid, and that she requested no one to bid against her, the sale was set aside; 38 S. C. 357. One intending to purchase commits fraud by hiring another not to bid against him; 43 Neb. 49; 48 Ohio 554; and on disclosure of the facts after sale, payment of purchase money, and conveyance, an administrator's sale may be set aside; 88 Ga. 696; and to show such fraud evidence is admissible of the amount intended to be bid by the competitor who was hired not to bid; *id.*; but where the competitor is induced by an execution creditor under a secret agreement to refrain from bidding, it is incompetent for the creditor to show on a petition for subrogation that the property brought less than its market value; 24

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Pittsb. Leg. J. (Pa.) N. S. 92. Where during an administrator's sale, one of the bidders arranged with the others for a consideration to stop bidding, and he thereby obtained the property for less than its market value, the sale was void; 149 Ill. 163; but where there is an agreement between two persons to prevent bidding, and one of them purchases the land, the sale will not be set aside at the instance of the other on the ground that he was prevented from bidding by reason of inducement offered by the purchaser; 108 N. C. 97. An agreement between five lien holders, any one of whom was financially unable to bid for himself, that one should bid on the property as trustee for them all, was not invalid as a combination to discourage bidding; 41 Neb. 706.

An agreement between parties interested in a judicial sale of land, that one of them shall bid enough to cover certain liens on which the other might be collaterally liable, and that the other shall not bid against him, no plan being formed or means used to procure for either an unjust advantage over third persons, or to prevent bidding by them, is not unlawful.

Upon the refusal of a purchaser at a judicial sale to fulfil his contract, the estate may be resold and such purchaser held liable for any deficiency in price arising upon the second sale; 127 U. S. 518. But it has been held that to be held liable he must be served with a rule, awarded after the sale was reported, to show cause why he should not complete his purchase, or in default, the property to be resold; 23 S. E. Rep. (W. Va.) 571. See as to defaulting purchaser, 27 Alb. L. J. 508.

See an unusually elaborate and valuable note on the subject of injunctions against judicial sales in 30 L. R. A. 98–143; and a similar note upon the protection accorded to purchasers and who is a *bona fide* purchaser, in 21 *id.* 33–54.

See, generally, Rorer, Judicial Sales; Tiedeman, Sales ch. 17; FRANCHISE; EXECUTION; MORTGAGE; SALE; TAX SALE; VOID. And see as to proceedings and conduct of sale, 8 L. R. A. 440; 75 Am. Dec. 704; of franchise, 20 L. R. A. 737; of equity of redemption, 7 Can. L. J. 257; interest sold, 29 Am. St. Rep. 653.

**JUDICIAL SEPARATION.** See SEPARATION.

**JUDICIAL STATISTICS.** Statistics, published by authority, of the civil and criminal business of the United Kingdom, and matters appertaining thereto. Annual reports are published separately for (1) England and Wales, (2) Ireland, (3) Scotland. The statistics for England and Wales contain statements of the police establishments and expenses, and the number of offences committed and offenders apprehended; statements of the number of inquests held by coroners; of the number of persons committed for trial at assizes and sessions, with the result of the proceedings; of the state of prisons, with returns of reformatory and industrial schools, and of criminal lunatics; of the causes in the superior courts of common law and equity, etc., and the county courts; also of the appeals to the Privy Council, and the judicial proceeding of the House of Lords. The same matters, though with some difference in the arrangement, form the bulk of the report for Ireland. Kindred matters are dealt with in the report for Scotland, though there is a wider divergence, rendered necessary by the variation between the laws of Scotland and England; Moz. & W.

**JUDICIAL WRITS. In English Practice.** The capias and all other writs subsequent to the original writ not issuing out of chancery, but from the court to which the original was returnable.

Being grounded on what had passed in that court in consequence of the sheriff's return, they are called *judicial* writs, in contradistinction to the writs issued out of chancery, which were called *original* writs; 3 Bla. Com. 282.

**JUDICIARY.** The system of courts of justice in a country. The department of government charged or concerned with the administration of justice. The judges taken collectively; as, the liberties of the people are secured by a wise and independent judiciary. The term is in very current use in designating the method of selecting judges in a state or country,—as, an elective judiciary.

As an adjective: Of or pertaining to the administration of justice or the courts; judicial,—the judiciary act, the judiciary amendment, the judiciary question, etc. See COURT; JUDGE; 3 Story, Const., 5th ed. § 1573.

**JUDICIARY ACT.** The act of congress of Sept. 24, 1789, establishing the federal courts of the United States.

This act, of which the authorship is attributed to Oliver Ellsworth, has remained in force without substantial change, save in the extension of the system as required by the growth of the nation. Its provisions are embodied in the Revised Statutes.

This act, "considering the complex and highly artificial nature of the federal jurisdiction, is justly regarded as 'one of the most remarkable instances of wise, sagacious, and thoroughly considered legislative enactments in the history of the law.'" 66 Ga. 371, 373.

"The wisdom and forethought with which it was drawn have been the admiration of succeeding generations. And so well was it done that it remains to the present day, with a few unimportant changes, the foundation of our system of judicature, and the law which confers, governs, controls, and limits the powers of all the federal courts, except the Supreme court, and which largely regulates the exercise of its powers." 3 Wall. 407, 414.

**JUDICIO SISTI.** The caution *judicio sisti*, given in a Scotch court, is a security to abide judgment within the jurisdiction of the court. By the ordinary form of the bond the surety undertakes that the principal shall appear to answer any action to be brought within six months. Bell. See Ersk. Prin. III. iii. 28.

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**JUDICIUM. In Roman Law.** The proceeding before a judge or judex (*q. v.*) to obtain his decision of the legal issue, presented as the result of the proceedings *in jure*. Sohm, Inst. Rom. L. § 34. See IN JUDICIO; IN JURE.

**JUDICIUM CAPITALE. In English Law.** Judgment of death; capital judgment. Fleta, lib. 1, c. 39, § 2. Called also "*judicium vitæ amissionis*," judgment of loss of life. *Id.* lib. 2, c. 1, § 5.

**JUDICIUM DEI** (Lat. the judgment or decision of God).

**In Old English Law.** A term applied to trials by ordeal; for, in all trials of this sort, God was thought to interfere in favor of the innocent, and so decide the cause. These trials are now all abolished.

**JUDICIUM PARIUM. In English Law.** Judgment of the peers; judgment of one's peers; trial by jury. Magna Charta, c. 29. See JURY.

**JUGE D'INSTRUCTION. In French Law.** An officer subject to the *Procureur-General*, who in cases of criminal offences receives the complaints of the parties injured, and who summons and examines witnesses upon oath, and after communication with the procureur-general draws up the forms of accusation. They have also the right, subject to the approval of the same superior officer, to admit the accused to bail. They are appointed for three years, but are re-eligible for a further period of office. They are usually chosen from among the regular judges. The criminal procedure as administered by these officers has been characterized by the most inquisitorial methods, opposed in every sense to English and American ideas on the subject. By the act of December 3, 1897, promulgated while this title is in press, changes of the most radical character have been introduced. Under the new law, within twenty-four hours of his arrest, an accused person must be conducted before the procureur de la république, who must require the juge d'instruction to question him immediately. In case of his refusal, absence, or other obstacle, the accused must be examined without delay by the official designated by the public minister. In default of examination within the time prescribed, the public prosecutor must order him to be set at liberty, and any person kept confined for more than twenty-four hours in the place of detention without examination, or without being brought before the public prosecutor shall be considered as arbitrarily detained, and all violations of this law by officials are to be prosecuted as outrages against liberty. At the examination the magistrate having verified the identity of the accused, is required to make known to him the facts charged against him and receive his declaration, first having warned him that he is free not to make any. Mention of this warning must be made in the procés-verbal. If the accusation is sustained, the magistrate shall inform the accused of his right to choose a counsel, and if he makes no choice, shall himself appoint one, if the accused demands it. Mention of this formality must be made in the procés-verbal. If the accused has been found outside of the arrondissement where the warrant was issued, and at a distance of more than ten myriameters (about 60 miles) from the principal place of the arrondissement, he is conducted before the public prosecutor of the one in which he was found and by him examined. The accused is not removed from this jurisdiction against his consent, and if when the inquiry is made of him, that is refused, information is sent to the officer who signed the warrant, with a statement of facts bearing on the identity of the person. The warning must be given to the accused at this examination that he is free not to make any declarations, and it must be mentioned in the procés-verbal. The juge d'instruction charged with the matter decides immediately upon the receipt of this message whether there is reason to order the transfer. In case of flagrant crime the juge d'instruction can proceed to examine him immediately if there is urgency resulting from the condition of a witness in danger of death, or the existence of indications likely to disappear, or even if he is taken away from the place. If the accused remains in custody, he can immediately have the first examination and communicate freely with his counsel. Provisions of the law of July 14, 1865, amending article 613 of the code of criminal instruction are abrogated in all that concerns places of detention subjected to the cell régime. There may be an interdiction of communication ordered by the juge d'instruction for ten days, which may be once only renewed for ten days more. In each case the interdiction of communication shall not apply to the counsel of the accused. He must make known the name of his counsel, and whether detained or set free, cannot be examined unless with his express consent except in the presence of his counsel. The counsel can only act for him after having been authorized by the magistrate, and in case of refusal, a note should be made of the incident in the procès-verbal. The counsel should be summoned by letter at least twenty-four hours in advance. The counsel is entitled to be informed by the recorder of the inquiries to which the accused is to be subjected and of every order made by the judge. *Journal Officiel de la République Francaise*, Dec. 10, 1897.

**JUICIO. In Spanish Law.** A trial or suit. White, New Recop. b. 3, tit. 4, c. 1.

**JUICIO DE APEO. In Spanish Law.** The decree of a competent tribunal directing the determining and marking the boundaries of lands or estates.

**JUICIO DE CONCURSO DE ACREEDORES. In Spanish Law.** The decree obtained by a debtor against his cred-

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itors, or by the creditors against their debtor, for the payment of the amount due, according to the respective rank of each creditor, when the property of the debtor is insufficient to pay the whole of his liabilities.

**JUMPING BAIL.** A colloquial expression describing the act of the principal in a bail bond in violating the condition of the obligation by failing to do the thing stipulated, as, not appearing in court on a particular day to abide the event of a suit or the order of court, but instead, withdrawing or fleeing from the jurisdiction. Anderson's L. Dict.

**JUNIOR.** Younger. This has been held to be no part of a man's name, but an addition by use, and a convenient distinction between a father and son of the same name. 10 Paige, Ch. 170; 7 Johns. 549; 1 Pick. 388; 17 *id.* 200; 3 Metc. Mass. 330. See 131 Mass. 184.

Any matter that distinguishes persons renders the addition of *junior* or *senior* unnecessary; 1 Mod. Ent. 35; Salk. 7. But if the father and son have both the same name, the father shall be *prima facie* intended, if *junior* be not added, or some other matter of distinction; Salk. 7; 6 Co. 20; 11 *id.* 39; Hob. 330. If father and son have the same name and addition, and the former sue the latter, the writ is abatable unless the son have the further addition of junior, or the younger. But if the father be the defendant and the son the plaintiff, there is no need of the further addition of *senior*, or the elder, to the name of the father; 2 Hawk. Pl. Cr. 187; Laws of Women 380.

**JUNIOR BARRISTER.** A barrister under the rank of queen's counsel. Moz. & W. Also the junior of two counsel employed on the same side in a case.

**JUNIPERUS SABINA** (Lat.). **In Medical Jurisprudence.** This plant is commonly called savin.

It is used for lawful purposes in medicine, but too frequently for the criminal purpose of producing abortion, generally endangering the life of the woman. It is usually administered in powder or oil. The dose of oil for lawful purposes, for a grown person, is from two to four drops. Parr, Med. Dict. *Sabina.* Foderé mentions a case where a large dose of powdered savin had been administered to an ignorant girl in the seventh month of her pregnancy, which had no effect on the fœtus. It, however, nearly took the life of the girl. Foderé, tome iv. p. 431. Given in sufficiently large doses, four or six grains, in the form of powder, it kills a dog in a few hours; and even its insertion into a wound has the same effect. 3 Orfila, *Traité des Poisons* 42. For a form of indictment for administering savin to a woman quick with child, see 3 Chit. Cr. L. 798. See 1 Beck, Med. Jur. 316.

**JUNK-SHOP.** A place where odds and ends are purchased and sold. 12 Rich. L. 470. In this case it was said that "it is perfectly immaterial whether it is a large or a small shop," and a person was properly indicted and convicted for keeping such a house without license who bought from other shops, and also from persons bringing to his shop the articles which make a junk-shop. Where a tax was laid upon "stores" in which the stock never exceeds in value $2,000, the term was held to cover a store kept by a dealer in old iron and other metals, old glass, old rope, and old paper stock; 72 Miss. 181.

Acts prohibiting the keeping of such shops without license and prescribing a fine for violation of the act are constitutional; 45 Ohio St. 63; although they impose different licenses upon dealers in general merchandise and those who sell specified articles; 29 La. Ann. 283; but such a tax was held invalid when a municipal ordinance clearly showed that it was for revenue, an act for raising revenue not being an exercise of police power; 72 Miss. 181.

See as to Pawnbrokers, Junk-dealers, etc., 32 L. R. A. 116; PAWNBROKERS.

**JURA.** As to titles based on this word, see the corresponding titles under JUS.

**JURA FISCALIA** (Lat.). Rights of the exchequer. 3 Bla. Com. 45.

**JURA IN RE** (Lat.). **In Civil Law.** Rights in a thing, as opposed to rights to a thing (*jura ad rem*). Rights in a thing which are not gone upon loss of possession, and which give a right to an action *in rem* against whoever has the possession. These rights are of four kinds: *dominium, hereditas, servitus, pignus.* Heineccius, Elem. Jur. Civ. § 333. See JUS IN RE.

**JURA PERSONARUM** (Lat.). **In Civil Law.** Rights which belong to men in their different characters or relations, as father, apprentice, citizen, etc. 1 Sharsw. Bla. Com. 122, n.

**JURA REGALIA** (Lat.). Royal rights. 1 Bla. Com. 117, 119, 240; 3 *id.* 45. See 21 & 22 Vict. c. 45.

**JURAMENTÆ CORPORALES** (Lat.). Corporal oaths, *q. v.*

**JURAMENTUM CALUMNIÆ** (Lat. oath of calumny). **In Civil and Canon Law.** An oath required of plaintiff and defendant, whether the parties themselves insist on it or not, that they are not influenced in seeking their right by malice, but believe their cause to be just. It was also required of the attorneys and procurators of the parties. Called, also, *juxjurandum* or *sacramentum calumniæ.* Calv. Lex.; Vicat, Voc. Jur. Utr.; Clerke, Pr. tit. 42.

**JURAMENTUM JUDICIALE** (Lat.). **In Civil Law.** An oath which the judge, of his own accord, defers to either of the parties.

It is of two kinds: *first*, that which the

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judge defers for the decision of the cause, and which is understood by the general name *juramentum judiciale*, and is sometimes called suppletory oath, *juramentum suppletorium; second*, that which the judge defers in order to fix and determine the amount of the condemnation which he ought to pronounce, and which is called *juramentum in litem*. Pothier, Obl. p. 4, c. 3, s. 3, art. 3.

**JURAT. In Practice.** That part of an affidavit where the officer certifies that the same was "sworn" before him.

The jurat is usually in the following form, viz.: "Sworn and subscribed before me, on the —— day of ——, 1842. J. P., justice of the peace."

In some cases it has been holden that it was essential that the officer should sign the jurat, and that it should contain his addition and official description; 3 Cai. 128; 2 Disn. 472. But see 2 Wend. 283; 12 *id.* 223; 2 Cow. 552; 2 Johns. 479; 17 Ind. 294; Proff. Not; 136 Ind. 630. A jurat being no part of an affidavit, a general demurrer to the sufficiency of the affidavit will not reach a failure to add to the name of the person who administered the oath his official designation; 93 Ga. 252.

An officer in some English corporations, chiefly in certain towns in Kent and Sussex, whose duties are similar to those of aldermen in others; stat. 1 Edw. IV.; 2 & 3 Edw. VI. c. 30; 13 Edw. I. c. 26.

Officers in the island of Jersey, of whom there are twelve, members of the royal court, and elected for life; 1 Steph. Com., 11th ed. 103; L. R. 1 P. C. 94.

**JURATA** (Lat.). **In Old English Law.** A jury of twelve men sworn. Especially, a jury of the common law, as distinguished from *the assiza*, or jury established or re-established by stat. Hen. II.

The *jurata*, or common-law jury, was a jury called in to try the cause, upon the prayer of the parties themselves, in cases where a jury was not given by statute Hen. II., and as the jury was not given under the statute of Henry II., the *writ of attaint* provided in that statute would not lie against a *jurata* for false verdict. It was common for the parties to a cause to request that the cause might be decided by the *assiza*, sitting as a *jurata*, in order to save trouble of summoning a new jury, in which case "*cadit assiza et vertitur in juratam*," and the cause is said to be decided *non in modum assizæ*, but *in modum juratæ*. 1 Reeve, Hist. Eng. Law 335, 336; Glanville, lib. 13, c. 20; Bracton, lib. 3, c. 30. But this distinction has been long obsolete.

*Juratæ* were divided into: *first, jurata dilatoria*, which inquires out offenders against the law, and presents their names, together with their offences, to the judge, and which is of two kinds, *major* and *minor*, according to the extent of its jurisdiction; *second, jurata judicaria*, which gives verdict as to the matter of fact in issue, and is of two kinds, *civilis*, in civil causes, and *criminalis*, in criminal causes. Du Cange.

A clause in nisi prius records called the *jury clause*, so named from the word *jurata*, with which its Latin form begins. This entry, *jurata ponitur in respectu*, is abolished. Com. Law Proc. Act, 1852, § 104; Whart. Law Lex.; 9 Co. 32; 59 Geo. III. c. 46; 4 Bla. Com. 342. Such trials were usually held in churches, in presence of bishops, priests, and secular judges, after three days fasting, confession, communion, etc. Du Cange.

A certificate placed at the bottom of an affidavit, declaring that the witness has been sworn or affirmed to the truth of the facts therein alleged. Its usual form is, "Sworn (or affirmed) before me, the —— day of ——, 18—." A jurat.

**JURATORY CAUTION.** A security sometimes taken in Scotch proceedings, when no better can be had, viz.: an inventory of effects given up upon oath, and assigned in security of the sums which may be found due. Bell, Dict.

**JURE DIVINO** (Lat.). By divine right. Divine Right is the name generally given to the theory of government which holds monarchy to be the only legitimate form of government. The monarch and his legitimate heirs being, by divine right, entitled to the sovereignty, cannot forfeit that right by any misconduct, or any period of dispossession. But where the knowledge of the right heir is lost, the usurper, being in possession by the permission of God, is to be obeyed as the true heir. Sir Robert Filmer, the most distinguished exponent of the theory, died about 1650.

**JURE PROPINQUITATIS** (Lat.). By right of relationship. Co. Litt. 10 *b*.

**JURE REPRESENTATIONIS** (Lat.). By right of representation. See PER STIRPES. 2 Sharsw. Bla. Com. 219, n. 14, 224.

**JURE UXORIS** (Lat.). By right of a wife.

**JURIDICAL.** Relating to administration of justice, or office of a judge. Webster, Dict.

Regular; done in conformity to the laws of the country and the practice which is there observed.

**JURIS ET DE JURE** (Lat.). Of right and by law. A presumption is said to be *juris et de jure* when it is conclusive, *i. e.* when no evidence will be admitted to rebut it, in contradistinction to a presumption, which is simply *juris*, *i. e.* rebuttable by evidence; 1 Greenl. Ev. § 15, note; Wills, Circ. Ev. 29; Best, Pres. 20, § 17; Best, Ev. 43.

**JURIS ET SEISINÆ CONJUNCTIO** (Lat.). The union of seisin, or possession, and the right of possession, forming a complete title. 2 Bla. Com. 199, 311.

**JURIS CONSULTUS** (Lat. skilled in the law). **In Civil Law.** A person who has such knowledge of the laws and

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customs which prevail in a state as to be able to advise, act, and to secure a person in his dealings. Cicero.

The early jurisconsults gave their opinions gratuitously, and were also employed in drawing up written documents. From Augustus to Adrian, only those allowed by the emperor could be jurisconsults; before and after those emperors, any could be jurisconsults who chose. If their opinion was unanimous, it had the force of law: if not, the prætor could follow which opinion he chose. Vicat, Voc. Jur. Utr.

There were two sects of jurisconsults at Rome, the Proculeians and Labinians. The former were founded by Labeo, and were in favor of innovation; the latter by Capito, and held to the received doctrines. Cushing, Int. Rom. Law. §§ 5, 6.

**JURISDICTION** (Lat. *jus*, law, *dicere*, to say). The authority by which judicial officers take cognizance of and decide causes. 60 Vt. 618. The power to hear and determine a cause. 3 Ohio 494; 6 Pet. 709; 2 How. 338. The right of a judge to pronounce a sentence of the law, on a case or issue before him, acquired through due process of law. It includes power to enforce the execution of what is decreed. 9 Johns. 239; 3 Metc. Mass. 460; Thach. 202.

The right to adjudicate concerning the subject-matter in the given case. To constitute this there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudicated belongs; second, the proper parties must be present; and third, the point decided upon must be, in substance and effect, within the issue; 1 Black, Judg. § 242; 55 Ark. 200.

*Ancillary jurisdiction.* Where one court of chancery entertains a bill in aid of a suit commenced in another chancery jurisdiction, both being designed to operate upon the same subject-matter or property right, but where the first suit is inadequate to give complete relief for want of territorial jurisdiction over the entire subject of litigation, the subsequent suits are said to be ancillary to the first. A familiar illustration is a bill to foreclose a mortgage on a railroad passing through two or more states, in which ancillary bills are filed in states other than that in which the first suit is brought, without regard to the citizenship of the parties.

*Appellate jurisdiction* is that given by appeal or writ of error from the judgment of another court.

*Assistant jurisdiction* is that afforded by a court of chancery in aid of a court of law: as, for example, by a bill of discovery, or for the perpetuation of testimony, and the like.

*Auxiliary jurisdiction* is another name given to this jurisdiction in aid of a court of law.

*Jurisdiction of the cause* is the power over the subject-matter given by the laws of the sovereignty in which the tribunal exists.

*Civil jurisdiction* is that which exists when the subject-matter is not of a criminal nature.

*Concurrent jurisdiction* is that which is possessed over the same parties or subject-matter at the same time by two or more separate tribunals.

*Consultative jurisdiction.* Where one court aids another by giving an opinion on a matter which the latter has under consideration, the court which gives the opinion is said to exercise a consultative jurisdiction. 4 App. Cas. 30.

*Criminal jurisdiction* is that which exists for the punishment of crimes.

*Exclusive jurisdiction* is that which gives to one tribunal sole power to try the cause.

*General jurisdiction* is that which extends to a great variety of matters. General jurisdiction in law and equity is jurisdiction of every kind that a court can possess, of the person, subject-matter, territorial, and generally the power of the court in the discharge of its judicial duties. 63 Hun 367.

*Limited jurisdiction* (called, also, *special* and *inferior*) is that which extends only to certain specified causes.

*Original jurisdiction* is that bestowed upon a tribunal in the first instance.

*Jurisdiction of the person* is that obtained by the appearance of the defendant before the tribunal. 9 Mass. 462.

*Territorial jurisdiction* is the power of the tribunal considered with reference to the territory within which it is to be exercised. 9 Mass. 462.

Cooley speaks of "courts of general jurisdiction, by which is meant that their authority extends to a great variety of matters, while others are only of special and limited jurisdiction," that is, have authority extending only to certain specified cases; Const. Lim., 5th ed. 502. The inferior federal courts, though of limited jurisdiction, are not technically inferior courts; 10 Wheat. 192. There are courts which are competent to decide on their own jurisdiction and to exercise it to a final judgment without setting forth in their proceedings the facts and evidence on which it is rendered, whose record is absolute verity, which can be questioned only in an appellate court; other courts are so constituted that their judgments "can be looked through for the facts and evidence which are necessary to sustain them," whose decisions are not evidence of themselves to show jurisdiction and its lawful exercise; 2 How. 341.

Jurisdiction is given by the law; 22 Barb. 323; 3 Tex. 157; and cannot be conferred by consent of the parties; 5 Mich. 331; 23 Conn. 112; 2 Ohio St. 223; 23 Ala. N. S. 155; 34 Me. 223; 4 Cush. 27; 4 Gilm. 131; 6 Ired. 139; 4 Yerg. 579; 3 M'Cord 280; 12 Miss. 549; 32 N. E. Rep. (Ind.) 1025; 82 Wis. 644; 65 Hun 489; 52 Fed. Rep. 770; nor can silence or positive consent of parties confer on a federal court jurisdiction denied by statute; 53 Fed. Rep. 18. Where the jurisdiction of a court as to the subject-matter is limited,

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the consent of parties cannot confer it; 91 Ill. 319. Where under a contract parties agree that in case of a breach one might be served with a writ in Scotland, the court refused to allow service on the defendant domiciled there; no agreement between individuals can empower a court to do an act which it is, by rules made under a statute, forbidden to do; [1896] 1 Q. B. 35. But a privilege defeating jurisdiction may be waived if the court has jurisdiction over the subject-matter; 14 Ga. 589; 6 Tex. 379; 13 Ill. 432; 1 Ia. 94; 1 Barb. 449; 7 Humphr. 209; 4 Mass. 593; 4 M'Cord 79; 3 McLean 587; 5 Cra. 288; 8 Wheat. 699; see 76 Hun 543; and parties may admit facts which show jurisdiction; 22 Wall. 322, where the files of the record were lost and the court thereupon presumed that they contained all necessary jurisdictional facts.

Jurisdiction given by the law of the sovereignty of the tribunal is held sufficient everywhere, at least as to all property within the sovereignty; 2 Blatchf. 427; 10 Rich. Eq. 19; 27 Mo. 594; 1 R. I. 285; and as to persons on whom process is actually and personally served within the territorial limits of jurisdiction, or who appear and by their pleadings admit jurisdiction; 6 Tex. 275; 4 N. Y. 375; 8 Ga. 83. See 11 Barb. 309; 50 Kan. 732. But the appearance of a person on whom no personal service of process has been made, merely to object to the jurisdiction is not such an admission; 37 N. H. 9; 9 Mass. 462. And see 2 Sandf. 717.

In an action for breach of promise of marriage brought against the sultan of a Malay state, it appeared that the contract had been made in England and the sultan had resided there under an assumed name. It was held that the court would take judicial notice of the status of a foreign sovereign; that the court would accept as conclusive the certificate of the proper department of the government that the sultan was an independent sovereign; that the courts of England would not take jurisdiction over any foreign sovereign, unless he elected to submit to their jurisdiction; that a foreign sovereign does not waive his right by going to England *incognito*, nor by any act short of submission in court to the jurisdiction. Such submission would be by notice when sued that he would not claim his privilege or by suing in an English court, in which case he must submit to a counter claim; Mighell *v.* Sultan of Johore, [1894] 1 Q. B. 149.

Jurisdiction must be either *of the subject-matter*, which is acquired by exercising powers conferred by law over property within the territorial limits of the sovereignty, or *of the person*, which is acquired by actual service of process or personal appearance of the defendant. The question as to the possession of the former is to be determined according to the law of the sovereignty; Dav. 407; of the latter, as a simple question of fact. See CONFLICT OF LAWS; FOREIGN JUDGMENTS.

Jurisdiction in a personal action cannot be obtained by service on a defendant outside of the jurisdiction; 95 U. S. 714. The courts of one state have no jurisdiction over persons of other states unless found within their territorial limits; 18 Wall. 367.

Jurisdiction *in rem* over a non-resident's property can be obtained by proceedings against it, of which notice should be given in order to give a binding effect to the proceedings; such notice may be actual or constructive; 95 U. S. 714; see 70 Tex. 588. Any judgment obtained in such proceedings has no effect beyond the property in question; no other property can be reached under it; nor can any suit be maintained on it, either in the same court or elsewhere; 10 Wall. 317.

Where the jurisdiction of a court is based upon the amount in controversy, some cases hold that the test is in the amount alleged in the pleadings to be due; 81 Cal. 599; 13 Md. 314; 6 W. & S. 66; but not if the amount is so alleged in bad faith; 83 Mich. 561; it will be determined by the allegations of the complaint and not on *ex parte* affidavits; 82 Fed. Rep. 209. Where, on an appeal from a justice of the peace, it appears by testimony at the trial that the plaintiff's demand exceeded the statutory jurisdiction, there is no jurisdiction; 37 Pa. 387. Where the amount in controversy appeared by the pleadings to be sufficient to give jurisdiction, but the jury found for a sum less than the jurisdictional amount, it was held that the court did not have jurisdiction; 67 Ind. 546; 42 Wis. 478; but it is also held that in such cases the judgment will stand, but without costs; 13 Md. 314. Where a defence is made to a part of a claim and the jury find for less than the full claim, the jurisdiction is not affected; 42 Fed. Rep. 652.

"By matter in dispute is meant the subject of litigation—the matter for which the suit is brought—and upon which issue is joined, and in relation to which jurors are called and witnesses examined;" 1 Wall. 339. In an action upon a money demand, where the general issue is pleaded, the matter in dispute is the debt claimed; 97 U. S. 565. In actions sounding in damages, the damages claimed give jurisdiction; 116 U. S. 550; in cases impeaching the right to an office, the amount of the salary attached to the office is the criterion; 130 U. S. 175; in ejectment the value of the land claimed determines the jurisdiction; 135 *id.* 195; and so it is in a bill to set aside a fraudulent conveyance as a cloud on the title; 46 Fed. Rep. 317. In all cases facts on which the jurisdiction of a federal court depends must in some form appear on the face of the record; its jurisdiction is limited, and the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appear; 119 U. S. 237; until it is in some way shown by the record that the sum demanded is not the matter in dispute, that sum will govern in all questions of jurisdiction, but when it is shown that the sum demanded is not the real matter in suit, the sum

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shown and not the sum demanded will prevail; 108 U. S. 174; the amount of damages laid in the declaration is not conclusive upon the question of jurisdiction; if the court find that the amount of damages stated in the declaration is colorable for the purpose of creating a case within the jurisdiction of the circuit court, the jurisdiction is defeated, and it is the duty of the court to dismiss the proceedings; this may be shown by evidence or depositions taken in the cause; however done it should be upon due notice to the parties to be affected by the dismissal; 129 U. S. 326. If this be made to appear "to the satisfaction of the circuit court at any time after suit has been brought," the court must dismiss the suit; Act of March 3, 1875 (18 Stat. L. 472). It seems that if, from plaintiff's evidence at the trial, the amount laid in the complaint appears to have been beyond reasonable expectation of recovery, the action should be dismissed; 82 Fed. Rep. 209.

A plea of set-off will not deprive the court of jurisdiction, though, if established, it would reduce the plaintiff's recovery below the jurisdictional amount; 9 W. & S. 66; 81 Cal. 599.

In a creditor's bill several judgments held by different creditors cannot be added to make up the jurisdictional amount in the circuit court; 154 U. S. 556. But it is otherwise where several plaintiffs are interested collectively under a common title, the validity of which is before the court; 143 *id.* 42. A reasonable attorney's fee, stipulated by the parties in case of a suit, may be added to the debt to make up its jurisdictional amount; 80 Fed. Rep. 759. Where the judgment in the supreme court of a territory exceeded $5,000 the supreme court of the United States has jurisdiction though the judgment in the trial court was for a less sum, and the amount is reached by adding interest to that judgment; 145 U. S. 428. On the appeal it must be shown that the amount in controversy in the appellate court is sufficient; 33 W. Va. 60; the plaintiff in error must show this fact; 119 U. S. 387.

A court of general jurisdiction is presumed to be acting within its jurisdiction till the contrary is shown; Brown, Jur. § 202; 10 Ga. 371; 10 Barb. 97; 3 Ill. 269; 15 Vt. 46; 2 Dev. 431. A court of limited jurisdiction, or a court acting under special powers, has only the jurisdiction expressly delegated; 27 Ala. N. S. 291; 26 Mo. 65; 1 Dougl. Mich. 384; 7 Hill, S. C. 39; and it must appear from the record that its acts are within its jurisdiction; 5 Harr. Del. 387; 1 Dutch. 554; 2 Ill. 554; 27 Mo. 101; 22 Barb. 323; 28 Miss. 737; 26 Ala. N. S. 568; 5 Ind. 157; 21 Me. 340; 16 Vt. 246; 2 How. 319; see 128 U. S. 586; unless the legislature, by general or special law, remove this necessity; 24 Ga. 345; 7 Mo. 373; 1 Pet. C. C. 36. See 1 Salk. 414; Bac. Abr. *Courts* (C, D).

When the record of a court of general jurisdiction in another state discloses nothing in regard to the method of process or notice, and there is no evidence on the subject, there is a presumption of jurisdiction over the person, the record itself importing sufficient proof of jurisdiction without disclosing the different steps by which it was acquired; 18 N. Y. L. J. 575.

Where one of two courts of concurrent jurisdiction has taken cognizance of a cause, the other will not entertain jurisdiction of the same cause; Brown, Jur. § 95; 16 Ohio 373; 27 Vt. 518; 25 Barb. 513; 8 Md. 254; 4 Tex. 242; 19 Ala. N. S. 438; 1 Fla. 198; 6 McLean 355; 36 Fed. Rep. 337; 93 U. S. 199; 116 Mass. 84. See 4 U. S. App. 438.

The leading general principle as to concurrent jurisdiction is that whichever court of those having such jurisdiction first acquires possession of a cause will retain it throughout; Wells, Jurisd. § 156; 19 Ala. 438; 25 Barb. 513; 1 Md. Ch. Dec. 351. A court which has acquired rightful jurisdiction of the parties and subject-matter will retain it for all purposes within the general scope of the equities to be enforced; 93 U. S. 199; 47 Ind. 274; where concurrent jurisdiction may be exercised by the federal and state authorities, the court which first takes jurisdiction can be interfered with by no other court, state or federal. It is a subversion of the judicial power to take a cause from a court having jurisdiction, before its final decision is given; 6 McLean 355; 107 Ill. 554. The supreme court and the common pleas have concurrent jurisdiction in matters of equity; and pending a bill in the common pleas, the supreme court will not entertain jurisdiction for the same cause; 1 Grant 212.

The jurisdiction of the court thus first exercising jurisdiction extends to the execution of the judgment rendered; 10 Bush 431. Courts have no power to interfere with the judgments and decrees of other courts of concurrent jurisdiction; 8 Cal. 26, 66.

The rule that among courts of concurrent jurisdiction, that one which first obtains jurisdiction of a case has the exclusive right to decide every question arising in the case, is subject to some limitations; and is confined to suits between the same parties or privies, seeking the same relief or remedy, and to such questions or propositions as arise ordinarily and properly in the progress of the suit first brought, and does not extend to all matters which may by possibility become involved with it; 3 Wall. 334; 4 Biss. 368.

Where the first court, because of its limited jurisdiction or mode of proceeding, is not capable of determining the whole controversy, another court may take jurisdiction and accomplish it; 19 Ala. 438.

At common law the rule is well established that the pendency of a prior suit *in personam* in a foreign court, between the same parties for the same cause of action, is no sufficient cause for stay or bar of a suit instituted in a local court. This rule obtains in regard to actions pending

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in another state of the Union; 1 Curtis 494; 2 W. & S. 129; 44 Pa. 326; but see 3 McLean 221, where it was held that the pendency of a suit between the same parties and respecting the same subject-matter in another state, may be pleaded in abatement in the federal courts, but to make such plea effectual it must show that the court where suit is has jurisdiction.

The pendency of an action in a state court will not bar an action in a United States court to determine the same question between the same parties; 50 Fed. Rep. 656, which was a mortgage foreclosure proceeding, with an oral opinion by Hanford, J.

It is provided by federal statute that "every person who commits murder within any fort, arsenal, dockyard, magazine, or in any other place or district of the county *under the exclusive jurisdiction of the United States* . . . shall suffer death." 1 U. S. Rev. Stat. § 5339. Under this provision the criminal jurisdiction of the United States was held exclusive under an act of cession of land for forts in Nebraska, which provided "that the jurisdiction of the State of Nebraska in and over the military reservation known as Fort Robinson and Fort Niobrara be and the same is hereby ceded to the United States." It was also provided that the jurisdiction ceded should continue no longer than the premises concerned were occupied and used by the federal government; 74 Fed. Rep. 31. So it was held by Tenney, J., that the federal court had jurisdiction in a case of homicide on the battleship Indiana, while she was lying within territory used for naval purposes, under an act ceding "jurisdiction over all the lands used and occupied by the United States as a navy yard and naval hospital, according to the plans furnished by the Navy Department." 18 N. Y. L. J. 518; s. c. 30 Chic. Leg. N. 114, distinguishing 3 Wheat. 336, where the naval vessel was in state waters.

But it has been recently held by the supreme court of New York, appellate division, that the provision of the federal constitution giving to congress exclusive jurisdiction over lands purchased by consent of the state legislature for such purposes (Art. I. § 8, subs. 17), does not oust the jurisdiction of state courts to try civil actions of tort, since congress has not provided for them; 47 N. Y. Supp. 757. The court said further:

"Although the injury to recover damages for which the plaintiff brought this action was sustained on land over which the national government had exclusive jurisdiction, it had no more exclusive jurisdiction over such territory than the respective legislatures of the neighboring States of Massachusetts, Pennsylvania, or Ohio have over their respective territories. Had the injury of which the plaintiff complains occurred within the limits of either of said states, an action could have been maintained in the supreme court of this state to recover damages therefor (3 Hun 70; 12 N. Y. Supp. 310; 54 Barb. 31; 6 Abb. Prac. 165; 45 Barb. 327; 17 Wend. 328; 9 Johns. 67; 14 Johns. 134; 1 Cow. 543), although it has been held that our courts may, in their discretion, refuse to entertain jurisdiction of an action between citizens of a foreign state for acts committed within their state (120 N. Y. 420). If an action can be maintained in the courts of this state, by a citizen thereof, for a personal injury suffered in another state or country, we can see no good reason why such an action cannot be maintained when the injury was committed in this state on land purchased by, and ceded to, the United States. The effect of such cession and purchase is merely to create, so to speak, within our territory, a foreign state or territory."

The court of appeals of that state held that jurisdiction of such actions unquestionably remained in the state in the absence of legislation by congress; 135 N. Y. 336. And in reference to the effect of legislation by congress the court said:

"We are not disposed to hold that even then the judicial power of the courts of this state would be powerless to redress private injuries committed thereon, or that the injured party would be compelled to seek justice in some other jurisdiction. The state did cede such political jurisdiction to the federal government with respect to the lands in question, with certain reservations. Congress has not, however, made any new regulations touching the administration of justice in civil cases, with respect to actions arising therein; and, until some such regulations have been made, the municipal laws of the state for the protection and enforcement of private rights through the courts remain unchanged (114 U. S. 542; 114 U. S. 525). The cession of territory by one sovereignty to another does not abrogate the laws in force at the time of the cession for the administration of private justice. Not, at least, until the new sovereignty has abrogated or changed them, do such laws cease to operate, except, possibly, so far as they may be in conflict with the political character, institutions, and constitution of the government to which the territory is ceded."

In the same case the United States supreme court upheld the judgment on the ground that the federal jurisdiction had lapsed under the terms of the cession and declined to determine the other question; 162 U. S. 399. See 18 N. Y. L. J. 740.

In another class of cases it has been held that a jurisdiction executed by the state courts may be entirely ousted by the interposition of congress by a statute conferring on the federal courts exclusive jurisdiction. An action against a foreign consul may be so brought in the state court; 50 Pac. Rep. (Cal.) 758.

Any act of a tribunal beyond its jurisdiction is null and void, and of no effect whatever; 38 Me. 414; 13 Ill. 432; 21 Barb. 9; 26 N. H. 232; whether without its territorial jurisdiction; 21 How. 506; 15 Ga. 457; or beyond its powers; 22 Barb. 271; 13 Ill. 432; 1 Dougl. Mich. 390; 5 T. B. Monr. 261; 16 Vt. 246.

Illegality in the service of process by which jurisdiction is to be obtained is not waived by the special appearance of the defendant to move that the service be set aside; nor after such motion is denied, by his answering to the merits; such illegality is waived only when, without having insisted upon it, he pleads in the first instance to the merits; 98 U. S. 476. The filing of a general appearance is not a waiver of defendant's right to move to dismiss for want of jurisdiction, where that was based on diverse citizenship and the action was brought in the wrong district; 82 Fed. Rep. 337. But where the court had jurisdiction of the subject-matter and service was made in the jurisdiction, a de-

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fence on the merits after a motion to quash the service of summons had been overruled was held to waive the objection to the jurisdiction; 49 *id.* 807.

It is held that the question must be raised before making any plea to the merits, if at all, when it arises from formal defects in the process, or when the want is of jurisdiction over the person; 7 Cal. 584; 19 Ark. 241; 28 Mo. 319; 22 Barb. 323; 6 Cush. 560; 13 Ga. 318; 20 How. 541; 87 Ga. 193; 45 Ill. App. 374; 76 Hun 543. See 2 R. I. 450; 30 Ala. N. S. 63; 16 Colo. 529; 4 U. S. App. 247; 36 Mo. App. 234; 89 Tenn. 304.

Objection to jurisdiction may be taken by motion to dismiss; 37 Pa. 387; 71 Ind. 417; at common law, by a plea in abatement; 144 U. S. 653; 18 Ill. 292; 3 Johns. 105; it can be raised in the federal courts by a plea in abatement; 46 Fed. Rep. 317; and under the codes, by demurrer, if the want of jurisdiction appear in the complaint; Works, Courts and Juris. 106; or if it be in a court of special jurisdiction, by demurrer, answer, or motion in arrest of judgment; *id.* 109.

Where the subject-matter is not within the jurisdiction, the court may dismiss the proceedings of its own motion; 22 Barb. 271; 4 Ill. 133; 109 Ind. 79; and a remedy may be had by a writ of prohibition; 3 Bla. Com. 13. See PROHIBITION.

If the objection is only to a defective service, it must be raised in the court below; 95 U. S. 714.

Where the citizenship of the parties appears in the petition, defect of jurisdiction on that ground may be raised by demurrer, in the absence of a general appearance; 41 Fed. Rep. 65.

It is rarely, if ever, too late to object to the jurisdiction of a court where the want of power to hear and determine appears on the face of the proceedings; per Bronson, J., 2 Hill, N. Y. 159. Thus, an appellant from chancery to the court of errors may avail himself in the latter court of an objection to the chancellor's jurisdiction, though it was not made before him, when the objection, if valid, is of such a kind that it could not have been obviated, had it been started at an earlier stage in the proceedings; *id.* See 18 Civil Proc. R. 98. The objection that the complainant has an adequate remedy at law when made for the first time in an appellate court is looked upon with supreme disfavor; 4 U. S. App. 326. See 60 Fed. Rep. 322.

The judgment of a court of another state is always subject to impeachment for the want of jurisdiction, either as to subject-matter or parties. Jurisdiction of the subject-matter of an action or judicial proceeding is the power to decide the general question involved therein, and does not depend upon the facts of a particular case, or the ultimate existence of a good cause of action; 18 N. Y. L. J. 575.

Courts of dernier resort are conclusive judges of their own jurisdiction; 1 Park. Cr. Cas. 360; 1 Bail. 294.

It is a general principle of law that an agreement in advance in which an attempt is made to oust the ordinary jurisdiction of the court is illegal and void; 6 Thomp. Corp. § 7466. Parties cannot by contract oust the courts of their jurisdiction; 79 Pa. 480; nor can individuals or corporations create judicial tribunals for the final and conclusive settlement of controversies; 102 Ind. 269; but any person may covenant that no right of action shall accrue till a third person has decided on any difference that may arise between himself and the other party to the covenant; 5 H. L. Cas. 811; 4 App. Cas. 674; 10 App. Cas. 229; but it has been held that a provision for submitting the whole question of liability to arbitrators as a condition precedent to a right of action is invalid; L. R. 1 Q. B. D. 563. But this case is said not to be in harmony with the other English authorities, though it follows the doctrine of Coleridge, J., in 8 Exch. 497, a case which was affirmed in 5 H. L. Cas. 811, but upon broader grounds. See 11 Harv. L. Rev. 239. In Massachusetts, the decisions appear to distinguish between agreements to arbitrate all disputes and those for the submission of the question of damages only, or questions of that kind which do not go to the root of the action; the former are invalid; the latter valid; see 135 Mass. 216; 100 *id.* 117; 153 *id.* 143. In Maine, parties may, by agreement, impose conditions with respect to preliminary and collateral matters, such as do not go to the root of the action, but cannot be compelled, even by their own agreements, to refer the whole cause of action to arbitration, and thus oust the courts of jurisdiction; 79 Me. 221; see 88 *id.* 435. It is said that the rule that a general covenant to submit any differences is a nullity, is too well settled to be questioned; 50 N. Y. 250. See 33 Wis. 331. An agreement that the decision of an engineer, in case of any dispute, shall be obligatory, is binding; 4 W. & S. 205; 3 Wall. Jr. 243; *contra*, 1 Cliff. 439. The subject is ably treated in 11 Harv. L. Rev. 234.

Stipulations in a policy of marine insurance, that any dispute in relation to loss shall be referred to referees; that no policyholder shall maintain any claim thereon until he shall have offered to submit to such reference; and that in case any suit shall be begun without such offer, the claim shall be dismissed and the company exempted from liability under it, are void; 54 Me. 55, 70. A clause in an insurance policy providing for arbitration of any dispute as to loss, and that no action should be maintained till such arbitration was had, does not oust the jurisdiction of the courts; the condition is revocable, though its breach may subject the party to an action for a breach of it; 79 Pa. 478.

A by-law of a mutual fire insurance corporation, to which their policies are expressed to be subject, that any suit on a policy shall be brought in the courts where the company is established, is not binding on the assured; 6 Gray 174.

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An agreement by a foreign insurance company, in conformity with a state statute, that if sued in a state court, it will not remove the suit to a federal court, is invalid; 20 Wall. 445.

An Iowa statute which requires that every foreign corporation named in it shall, as a condition for obtaining a permit to transact business in Iowa, stipulate that it will not remove into the federal court certain suits which it would by the laws of the United States have a right to remove, is void because it makes the right to a permit dependent upon the surrender by the foreign corporation of a privilege secured to it by the constitution and laws of the United States; 121 U. S. 186; the state might as well pass an act to deprive a citizen of another state of his right of removal; *id.* 200. See INSURANCE.

Mutual benefit societies may prescribe regulations as to procedure in enforcing claims, and may require appeals to superior bodies before instituting suit, but they cannot entirely take away the right to invoke the aid of the courts in enforcing claims existing in favor of its members upon contracts; 102 Ind. 269.

An agreement by which the members of an association undertake to confer judicial powers, in respect to the common property, upon its officers, selected out of the association, as a tribunal having general authority to adjudicate upon alleged violations of the rules, and to decree a forfeiture of the rights, to such property, of the parties, is void. The court will not aid in enforcing the judgment of a tribunal sought to be created by private compact, except in case of submission to arbitration of specific matters of controversy; 16 N. Y. 112.

The powers both of courts of equity and of law over their own process to prevent abuse, oppression, and injustice are inherent and equally extensive and efficient; as is also their power to protect their own jurisdiction and officers in the possession of property that is in the custody of the law; 110 U. S. 276.

When a prisoner after pleading guilty is allowed to go out of custody without bail, the court has no further jurisdiction over him, and cannot, at a subsequent term, order his rearrest, and pronounce sentence upon him; 39 N. E. Rep. (Ill.) 568.

As to jurisdiction of a justice of the peace, see that title.

See UNITED STATES COURTS; EXECUTOR; THREE MILE LIMIT; HIGH SEAS; SOVEREIGN; FOREIGN JUDGMENTS; EQUITY; COMMON LAW; ADMIRALTY; JUDGMENTS; JUDGE; JUDICIAL POWER; RECORD.

**JURISDICTION CLAUSE. In Equity Practice.** That part of a bill which is intended to give jurisdiction of the suit to the court, by a general averment that the acts complained of are contrary to equity and tend to the injury of the plaintiff, and that he has no remedy, or not a complete remedy, without the assistance of a court of equity, is called the *jurisdiction clause*. Mitf. Eq. Pl. 43.

This clause is unnecessary; for if the court appear from the bill to have jurisdiction, the bill will be sustained without this clause; and if the court have not jurisdiction, the bill will be dismissed though the clause may be inserted. Story, Eq. Pl. § 34.

**JURISPRUDENCE.** The science of the law. The practical science of giving a wise interpretation to the laws and making a just application of them to all cases as they arise.

By science, in the first definition, is understood that connection of truths which is founded on principles either evident in themselves or capable of demonstration,—a collection of truths of the same kind, arranged in methodical order. In the latter sense, it is the habit of judging the same questions in the same manner, and by this course of judgments forming precedents. 1 Ayliffe, Pand. 3. See Austin, Amos, Markby, Heron, Phillimore, Lorimer, Lindley, on Jurisprudence.

**JURIST.** One versed in the science of the law. One skilled in the civil law. One skilled in the law of nations.

**JURO. In Spanish Law.** A certain pension granted by the king on the public revenues, and more especially on the saltworks, by favor, either in consideration of meritorious services or in return for money loaned the government or obtained by it through forced loans. It is a portion of the yearly revenue of the state, assigned as a rightful indemnity, either in perpetuity or as an annuity.

**JUROR** (Lat. *juro*, to swear). A man who is sworn or affirmed to serve on a jury.

Any person selected and summoned according to law to serve in that capacity, whether the jury has been actually impanelled and sworn or not. 43 La. Ann. 907.

**JURY** (Lat. *jurata*, sworn). A body of men who are sworn to declare the facts of a case as they are proven from the evidence placed before them.

The term "jury," as used in the constitution, means twelve competent men, disinterested and impartial, not of kin nor personal dependents of either of the parties, having their homes within the jurisdictional limits of the court, drawn and selected by officers free from all bias in favor of or against either party; duly impanelled, and sworn to render a true verdict, according to the law and the evidence; 11 Nev. 39.

A late writer considers that the best theory regards the jury system as having been derived from Normandy, where, as in the rest of France, it had existed since its establishment under the Carlovingian kings. It made its appearance in England soon after the Norman Conquest. No trace of it is to be found in Anglo-Saxon times, nor was it, as is often supposed, established by Magna Charta; 10 Harv. L. Rev. 150, by J. E. R. Stephens. The same writer finds the idea of unanimity re-established in the time of Edward IV., a majority verdict having pre-

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viously sufficed; in the Year Books of 23 Edward III. is the first indication of the jury deciding on evidence produced before them in addition to their own knowledge. Early in the reign of Henry IV. evidence was required to be given at the bar of the court, and the modern practice or method of jury trials had its origin; *id.* 159.

Prof. J. B. Thayer finds the origin of the jury in the Frankish inquisition; it existed in Normandy and went thence to England in the eleventh century; 5 Harv. L. Rev. 249. The use of a jury both for civil and criminal cases is mentioned for the first time in English statute law in the Constitutions of Clarendon; *id.* 156.

The origin of trial by jury is said by another recent writer to be rather French than English, rather royal than popular, rather a livery of conquest than a badge of freedom. Originally juries were called in, not to hear, but to give, evidence. They were the neighbors of the parties and were presumed to know when they came into court the facts about which they were to testify. They were chosen by the sheriff to represent the neighborhood. The verdict was the sworn testimony of the countryside. By slow degrees the jury acquired a new character. Sometimes when the jurors knew nothing of the facts, witnesses who did know the facts would be called in to supply the requisite information. They became more and more dependent on the evidence given in their presence by those witnesses who were summoned by the parties. In the fifteenth century the change had taken place, though in yet later days a man who had been summoned as a juror and sought to escape on the ground that he already knew something of the facts, might be told that he had given a very good reason for his being placed in the jury box. It may well be said therefore that trial by jury, though it had its roots in the Frankish inquest, grew up on English soil; 1 Social England 255, 290. So also 1 Poll. & Maitl. 117-121.

Another writer finds its foundation in Norman institutions and its establishment by positive legislation in the time of Henry II. Lesser, Hist. of Jury Syst. 172.

*A common jury* is one drawn in the usual and regular manner.

*A grand jury* is a body organized for certain preliminary purposes.

*A jury de medietate linguæ* is one composed half of aliens and half of denizens.

Such juries might formerly be claimed, both in civil and criminal cases, where the party claiming the privilege was an alien born, by virtue of 28 Edw. III. c. 13, and by an earlier statute, where one party was a foreign merchant; 27 Edw. III. c. 8. Such a jury was provided in criminal cases by a statute of Edward I. It was abolished by 33 Vict. c. 14. The right has been recognized in this country; 1 Dall. 73; 2 Johns. 381; 11 Leigh 690; *contra*, 4 Cra. C. C. 573; 4 Hawks 200. It has been generally abolished by statute; Thomp. & Merr. Juries 19; excepting in Kentucky, where it still exists; *id.*

*A petit or traverse jury* is a jury who try the question in issue and pass finally upon the truth of the facts in dispute. The term jury is ordinarily applied to this body distinctively.

*A special jury* is one selected by the assistance of the parties.

This is granted in some cases upon motion and cause shown, under various local provisions. The method at common law was for the officer to return the names of forty-eight principal freeholders to the proper officer. The attorneys of the respective parties, being present, strike off each twelve names, and from the remaining twenty-four the jury is selected. A similar course is pursued in these states where such juries are allowed. See 3 Sharsw. Bla. Com. 357. The earliest rule of court on the subject was made in 8 Will. III.; 1 Salk. 405. It formerly was granted only in cases of special consequence or great difficulty; but later, a special jury has usually been granted in ordinary cases. In some states such a jury is of course; in New York, statutes provide for such only in cases of special importance or intricacy, as to which the court must decide.

*A struck jury* is a special jury. See 4 Zabr. 843.

Trial by jury is guaranteed by the constitution of the United States in all criminal cases except upon impeachments, and in all suits at common law where the subject-matter of the controversy exceeds twenty dollars in value. The right to such a trial is also provided in many of our state constitutions. It has been held, however, not to be an infringement of this federal constitutional right, where a statute provides that in all criminal prosecutions the party accused, if he shall so elect, may be tried by the court instead of by a jury; Miller, Const. U. S. 494; 5 Ohio St. 57; 30 Mich. 116; 46 Conn. 349; see 16 Am. L. Reg. N. S. 705. It was held by the United States supreme court that a jury trial may be waived when there is a positive legislative enactment giving the right to do so: 146 U. S. 314. This clause of the constitution does not apply to state courts; Hare, Am. Const. L. 860; 134 U. S. 31; 7 Pet. 247; 21 Wall. 557; Cooley, Const. Lim. 410; and therefore the states may in their own constitutions dispense with trial by jury both in civil and criminal cases; Ordron. Const. Leg. 261, and cases *supra*. It does not apply to cases in the court of claims; 102 U. S. 426; nor to proceedings for disbarring an attorney; 107 U. S. 265; nor for assessing damages; Baldw. 202; nor to equity cases in the federal courts; 104 U. S. 726; nor to cases where the right is antecedently and voluntarily relinquished; 4 Wheat. 235; nor does a like provision in a state constitution apply to any proceedings in which a jury was not required at common law; *e. g.*, a justice's court; 30 Mo. 600; 62 Barb. 16; nor to any court which exercised its functions without the aid of a jury prior to the adoption of a constitution; Thomps. & Merr. Juries 11; 74 N. Y. 406.

A jury trial is not guaranteed by a state constitution providing for "due process of law"; 13 N. Y. 378; nor even by the provision for it in the fourteenth amendment; 92 U. S. 90; "due process of law" simply requires that there shall be a day in court, and the legislature may take away or change a remedy; 70 N. Y. 228; but it has been held in some cases that the expression does guarantee a jury trial; 37 Me. 165; 63 N. H. 406; 8 Gray 329; 110 U. S. 516, opinion of Harlan, J., dissenting.

An act providing for the trial of a contested election to a public office which deprives the party of a trial of disputed facts by jury is *not* unconstitutional; 43 Pa. 384.

In the Delaware constitution of 1897, provision is made for the trial of criminal offences against the election laws, by the court without a jury. See DELAWARE.

*The number* of jurors must be twelve; and it is held that the term jury in a constitution imports, *ex vi termini*, twelve men; 20 Ohio 31; 74 N. Y. 406; 6 Metc. 231; 4 Ohio St. 177; 2 Wis. 22; 3 *id.* 219; whose verdict is to be unanimous; 12 N. Y. 190. See 11 Nev. 39, *supra*.

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Where a constitution preserves the right of trial by jury inviolate, the legislature cannot change the number of jurors in either civil or criminal cases; Thomp. & Merr. Juries 10; 35 Mo. 408; 51 Ga. 264.

The question whether the common law requirement of twelve jurors may be changed has in recent years received much attention in the courts. There has been a growing tendency, at least, towards the serious consideration of changes in the jury system as administered at common law and secured by the state and federal constitutions. See GRAND JURY. The decided weight of authority is that, where the right to trial by jury is secured by the constitution, the legislature cannot authorize a verdict by a less number than twelve; that the constitutional reservation implies a right to the concurrent judgment of that number, and any statute limiting it is unconstitutional and void; 41 N. H. 550; 33 Fla. 608; 1 Okl. 366; 36 Pac. Rep. (Ariz.) 499. It is held *contra* in all civil cases in Utah; 37 Pac. Rep. 262; 39 *id.* 541; 9 Utah 61. In the last case the question is considered in an elaborate opinion, which argues that the requirement is no more an essential part of the jury system than those common-law qualifications of jurymen which have not been continued in force. The court say: "Wherever this provision has been tried, it has been found to be a distinct benefit. Such a provision is simply a change in the procedure of applying legal remedies. It is general in its application; it is fair and just to all. No man's property rights are injured by it, and no man can be said to have a vested right in the unanimous action of a jury, any more than in the fact that a juror was anciently required to be a freeholder. All litigants could waive in civil trials at common law and under our constitution this unanimity of verdict. If they could waive it, then it was not one of the requisites which must be preserved in order to preserve a jury trial in civil actions. For these reasons because society progresses, and modes and legal procedure must change with that progress, because this enactment is a just and reasonable expression of the public will, because it is calculated to be a great benefit to all classes of litigants, because it reaches justly, fairly, and impartially all classes of men, because it is claimed only to be an infringement of a broad and general statement in the constitution which ought not to be so narrowly construed as to be a bulwark against progress, we hold that this law was a rightful subject of legislation." But see 166 U. S. 464, reversing the supreme court of Utah (10 Utah 147), where it was held that litigants in common-law actions in the courts of the territory of Utah, while it remained a territory, had a right to trial by jury which involved unanimity of verdict, and this right could not be taken away by territorial legislation. As to unanimity of a verdict in a state court see *infra*. See also 36 Cent. L. J. 437; 89 Ga. 393.

There would seem to be no legal objection to permitting this change by constitutional provision, but even that, it has been held, will not sustain a statute providing that in certain contingencies, at the discretion of the trial court, a jury may consist of less than twelve men; 93 Mich. 399. In California, in civil cases and misdemeanors, the jury may consist of twelve or any number less than twelve upon which the parties may agree in open court. And the number of jurors may be limited in Colorado, Florida, Idaho, Iowa, Louisiana, Michigan, Missouri, Montana, Nebraska, New Jersey, North Dakota, Washington, and Wyoming. See 36 Cent. L. J. 437.

Unanimity in giving a verdict was not universal in the early days of the common law; at times eleven sufficed; in some cases a majority. Probably it was only in the second half of the fourteenth century that unanimity became an established principle; 5 Harv. L. Rev. 296, by Prof. J. B. Thayer. The requirement of unanimity of twelve jurors arose from the custom which taught men to regard it as the proper amount of evidence to establish the credibility of a person accused of an offence; Forsyth, Trial by Jury 240. At common law, except as above stated, unanimity was essential to a verdict, so that it has been held that a conviction by eleven jurors, even where the accused waived a trial by twelve jurors, would be set aside; 18 N. Y. 128. "Unanimity was one of the peculiar and essential features of trial by jury at common law;" 166 U. S. 464, in which case while the court considered it a matter of dispute as to whether the seventh amendment alone invalidated a statute dispensing with unanimity it was held that, under the constitution and a law that no person shall be deprived of the right of trial by jury, a statute of Utah authorizing a verdict in civil cases on the concurrence of nine jurors was invalid; but the court expressly said that the power of a state to change the rule as to unanimity was not before them, and cited 92 U. S. 90; 110 U. S. 516. Changes in this respect have been made in many states. In civil actions in California, Idaho, Louisiana, Nevada, Texas, and Washington, three-fourths may render a verdict; two-thirds in Montana in civil actions and crimes less than felonies, and five-sixths in Idaho, in all cases of misdemeanor. In Iowa the legislature may authorize a verdict by less than twelve in inferior courts.

Unanimity is still required in England. In a late case before the Judicial Committee of the Privy Council, where a British subject was convicted of murder in Japan, the court being comprised of a British judge and five jurors, established under a British treaty, it was argued by Sir Frank Lockwood that the British government could not establish such a court with a jury of less than twelve, but the court held that the conviction was lawful. [1897] App. Cas. 719.

A modification of the jury system, much

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considered and quite generally adopted, is the provision authorizing the parties to waive a jury and elect to have the facts tried by the court. This course in civil cases is authorized in most of the states, as well as in the federal courts. It is provided for in the constitutions of Arkansas, California, Colorado, Florida, Maryland, Michigan, Minnesota, Nevada, New York, North Carolina, Pennsylvania, Vermont, Wisconsin, Washington, and West Virginia. By statute a like practice obtains in Illinois, Missouri, New Jersey, and Wyoming, and also by the bill of rights in Arizona and by statute in New Mexico. There can be a waiver in civil cases and in criminal cases not amounting to felony in Idaho, Montana, North Dakota, and California.

The general principle is, however, that in criminal cases, the accused can neither waive his right to a trial by a jury of twelve nor be deprived of it by the legislature; 18 N.Y. 128; 54 Ind. 461; 63 Ia. 130 (*contra*, 51 Ia. 578); 41 N. H. 550; 66 Mo. 684; 44 Ala. 393; 12 Ohio St. 622; 1 Mont. 118; 43 Mich. 443. Judge Cooley, after stating that less than twelve would not be a common-law jury, or such as the constitution guarantees, adds, "And the necessity of a full panel could not be waived—at least in case of felony—even by consent." Const. Lim., 4th ed. 395. It was held that where one juror was an alien the failure to challenge him was not a waiver of the objection, and on the refusal of the court to set aside the judgment, it would be reversed, on error; 16 Mich. 356; *contra*, 2 Bay 150.

As to waiver of full panel, see 12 Cr. L. Mag. 12; by criminal; 25 Am. L. Reg. N. S. 402; 21 Cent. L. J. 230. On the trial of a misdemeanor, a full jury may be waived; 12 Cush. 80, per Shaw, C. J.; 2 Metc. (Ky.) 1; 59 Fed. Rep. 110; or where the penalty is only a fine; 1 Metc. (Ky.) 365; 41 Mo. 470. A jury may be waived in all civil cases, without any statute; 89 Va. 767.

The fact that a court of chancery may summon a jury to try an issue of fact is not equivalent to the right of trial by jury under the seventh amendment of the constution; 149 U. S. 451. And the constitutional right does not relate to suits over which equity exercised jurisdiction when the constitution was adopted; 26 S. E. Rep. (W. Va.) 557; but the right cannot be defeated by giving equity jurisdiction over an action in which the right applies; *id.* It is not impaired by an act giving the appellate court authority to reverse for excessive damages; 36 Atl. Rep. (Pa.) 296; S. C. 178 Pa. 431. In that case it was held that this act which gives the supreme court "power in all cases to affirm, reverse, amend, or modify a judgment, order, or decree appealed from and to enter such judgment," etc., as it may deem proper and just, does not infringe upon the right of trial by jury and is constitutional; and in a later case, this decision was adhered to, and it was further held that where the supreme court had reversed a judgment, without awarding a new venire, it might subsequently amend the judgment of reversal by adding thereto a formal judgment in favor of defendant; 183 Pa. 142.

*Qualifications.* Jurors must possess the qualifications which may be prescribed by statute, must be free from any bias caused by relationship to the parties or interest in the matter in dispute, and in criminal cases must not have formed any opinion as to the guilt or innocence of the accused.

"1. They are to be good and lawful men. 2. Of sufficient freeholds, according to the provisions of several acts of parliament. 3. Not convict of any notorious crime. 4. Not to be of the kindred or alliance of any of the parties. 5. Not to be such as are prepossessed or prejudiced before they hear their evidence." Cond. Gen. 297. As to bias by reason of opinion, see 15 Wkly. L. Bul. 305; 20 Am. L. Reg. N. S. 117; impressions; 8 Cr. L. Mag. 559.

At common law there was a freehold qualification, but to no certain amount; by 2 Hen. V. it was 40*s.*; Thomp. & Merr. Juries 20; Proffatt, Jury Trial § 115. See 20 Am. L. Reg. N. S. 436, 497.

An alien may serve as a juror, that is, a foreigner intending to be naturalized; 56 Mich. 154; *contra*, 3 Ala. 546, and see Proffatt, Jury Trial § 116; 6 Cr. L. Mag. 336. An atheist has been held to be disqualified; 3 Harr. & McH. 301. Women could not serve as jurors at common law, except upon a jury to try an issue under a writ *de ventre inspiciendo* (*q. v.*); 3 Bla. Com. 362. They are now qualified in some states.

The federal constitution provides that in criminal trials the jury shall be taken "from the state and district where the crime shall have been committed." State constitutions usually confine the selection to the county or district, except where, in some states, a provision is made in case jurors cannot conveniently be found in the county. The right to a trial by a jury of the vicinage is an essential part of trial by jury.

In some states the qualifications of jurors are regulated by the constitution; *e. g.*, Florida requires them to be taken from the registered voters. Georgia requires that jurors shall be upright and intelligent persons. Subject to the constitutional provisions as to impairing the right of trial by jury, the legislature has power to define the qualifications of jurors. It may dispense with the freehold qualification required by common law; 96 Ill. 206; 103 Mass. 412; but see 20 Am. L. Reg. 436; Proffatt, Jury Trial § 115.

In some states conviction for certain high crimes disqualifies; some states require citizenship; others that jurors shall be selected from the qualified voters; others impose tests of integrity, or intelligence or education. Freehold or property tests are required in some states. That the jurors shall be over twenty-one years of age is probably a universal requirement; while in some states those past a certain age cannot serve; Proffatt, Jury Trial § 117.

In the federal courts the qualifications



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are the same as those relating to the highest courts of law in the respective states; U. S. Rev. St. § 800; but this does not require a minute adherence to the state practice; 1 Woods 499, per Bradley, J. A statute confining the selection of jurors to white citizens is invalid under the fourteenth amendment; the right to serve on a jury is an incident of citizenship; 100 U. S. 303; 103 *id.* 370.

The intelligence and ability of a juror are matters within the sound discretion of the court, and it is sufficient if he knows the English language and can understand the testimony and the argument of counsel; 44 La. Ann. 969. It rests with each state to prescribe such qualifications as it seems proper for jurymen, taking care only that no discrimination in respect to such service be made against any class of citizens solely because of their race; 140 U. S. 291.

As to qualifications generally, see 3 L. Mag. & Rev. N. S. 165; 24 Wkly. L. Bul. 438; disqualifications; 3 Alb. L. J. 81.

*The selection* of jurors is to be made impartially; and elaborate provisions are made to secure this impartiality. In general, a sufficient number are selected, from among the qualified citizens of the county or district, by the sheriff, or a similar executive officer of the court, and, in case of his disqualification, by the coroner, or, in some cases, by still other designated persons. See ELISORS. From among these the requisite number is selected at the time of trial, to whom objection may be made by the parties.

Sir Matthew Hale says that the writ to return a jury issues to the sheriff who is entrusted to elect and return the jury without the nomination of either party. The jurors were to be such persons as for estate and quality were fit to serve on that employment. They were to be of the neighborhood of the fact to be inquired, or at least of the county. Cond. Gen.

At common law jurors were selected, usually, by the sheriff or coroner. It is done in this country in various ways; by judges of election; by town authorities or by various officials or special boards or commissions. Statutory provisions as to the time and mode of selecting jurors are said to be usually directory only and need not be strictly complied with; Thomp. & Merr. Juries 44; but this is not the case with all such requirements.

In the federal courts the panel of jurors is selected by the clerk of the court and a commissioner appointed by the court, who must be taken from the opposite political party to that to which the clerk belongs; the clerk and the commissioner place names in the jury box alternately without regard to party affiliations. Any judge may order the names to be drawn from the boxes used by the state authorities in selecting jurors in the highest court of the state; no person may serve as a petit juror more than once in a year. See CHALLENGE.

*Exemption.* Usually public officials are exempt; and persons engaged in various classes of occupations are often exempt; thus in New York, clergymen, physicians, lawyers, professors, and teachers, persons engaged in certain kinds of manufacturing, canal officials, those employed on steam vessels, employes of railroad and telegraph companies, members of the militia and fire department, etc. Exemption is only during actual employment; 79 N. C. 660; and the right of exemption is a personal privilege and usually not a ground of challenge; 10 Kan. 288; 90 Ill. 221; or a disqualification; 11 Tex. 257; 52 Maine 328; 43 N. H. 89.

The members of an association formed to aid in the prosecution of a particular class of offences, and those who are in sympathy with the association, and contribute money for the purposes of its organization, are not competent to sit as jurors on the trial of an indictment for an offence of the class for the prosecution of which the association is formed and the money contributed; 19 So. Rep. (La.) 285. A juror was disqualified at common law by openly declaring his opinion that the party was guilty; 2 Hawk. Pl. C. ch. 43, § 27. Yet if such declaration was made from his knowledge of the case and not out of any ill-will to the party, it is no cause of challenge; 2 *id.* § 28.

Where a statute disqualifies persons related within certain degrees of affinity from serving as jurors on the trial of a cause to which their affinities are parties, husbands whose wives are second cousins are not affinities; 42 N. E. Rep. (Ind.) 549.

In Tennessee it has been held that a statute disqualifying from service, either on grand or petit juries, persons engaged in a conspiracy against law and order is not unconstitutional: 32 S. W. Rep. (Tenn.) 363. In this case the statute in question was for the suppression of what are known as White Caps, and disqualified for jury duty all persons who had been guilty of any offence under the statute. So also a similar disqualification of all persons violating the act for the suppression of polygamy was held valid; 114 U. S. 477.

*Swearing the jury.* At common law it appears to have been the practice to swear each juryman as he is drawn and accepted; Joy, Conf. 220; 18 Conn. 166. The present practice is to swear the entire jury after the panel is completed. Either practice is lawful; 18 Cal. 128. It is not irregular to swear all the jurors when the court opens, to try all the issues that may be brought before them; Thomp. & Merr. Juries 318; 6 Wend. 548. But this practice has been disapproved of in criminal cases on the ground of the salutary effect both on the prisoner and the jury of the formality of administering an oath in the presence of the prisoner; 22 Ill. 160. It is also considered the better practice in criminal cases to have the panel full before the oath is administered; Thomp. & Merr. Juries 319; 9 Fla. 215.

The impanelling and final acceptance of

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a jury by a court is a judicial determination that the jurors are competent; and if any objection to the qualifications of a juror is known to a party before such determination, it cannot be raised afterwards, unless on exception to the overruling of a challenge; 56 Mich. 154.

*Influencing the jury.* An attempt to influence a jury corruptly by promises, persuasions, entreaties, money, entertainments, and the like is a misdemeanor at common law; 95 N. C. 685; 2 Bish. Cr. L. 384; 2 Nev. 268; 5 Cow. 503. Arguments of counsel in open court at the trial of a cause are a legitimate use of influence and are not within this rule, but it would be a crime to take advantage of the opportunity afforded in order to influence the jurors corruptly; 70 Cal. 582. Where an attempt to influence a jury, amounting to embracery, is made, it is immaterial whether they give any verdict or not, and if they give a verdict, it is no defence that it is a true one. This crime may be committed by a juror if he corruptly attempts to influence other jurors: Cl. Cr. L. 326; or if he by indirect practices gets himself sworn on the tales to serve on one side; 1 Litt. 578.

As to the effect of improper influence on, or misconduct of, the jury, see NEW TRIAL.

"If they eat and drink before or after they are agreed of their verdict, they are to be fined; only with this difference, that if they eat at their own charge, the verdict shall stand; but if at the charge of the party, it shall be set aside; 1 Leon. 133; some of them have been fined for having figs and pippins in their pockets, though they did not eat them; *id.*; Moor 599.

*Separation during trial.* At common law the jury was kept together until they had agreed upon their verdict. Even the right to adjourn a trial from day to day was doubted; 24 How. St. Tr. 414. At present jurors in civil cases are allowed to separate each day; and so in trials for misdemeanors, at the discretion of the court. In some cases also in trials for felony, even in capital cases. But in an able work the opinion is maintained that in cases of capital felonies the jury should not be allowed to separate, as they were not at common law; Thomp. & Merr. Juries 367; but absolute isolation is not required; they may be kept under the charge of a sworn officer who shall exercise a reasonable oversight; *id.* 370. The officer in charge must be sworn; 2 Hale, P. C. 296; although if he be a sheriff or constable and *ex officio* in charge of the jury, he need not be specially sworn; 16 Wis. 294.

*Affidavits* of jurors will not be received to impeach a verdict; Thomp. & Merr. Juries 539, citing numerous cases; 6 Houst. 60; 39 Pac. Rep. (Cal.) 59; 50 Cal. 428; 15 Ark. 403; 45 Ill. 37. Nor will statements of third parties who derived their information from a member of the jury; Thomp. & Merr. Juries 547; 62 N. W. Rep. (Neb.) 43; 22 S. W. Rep. (Mo.) 447. The court may question the jury as to the grounds upon which they based their verdict, if there was more than one ground; 12 Metc. 281. A juryman may be heard to show misconduct on the part of third parties; 7 S. & R. 458; and jurymen should report to the court any attempt to influence them; 45 Ill. 37. But affidavits appear to be admissible to impeach the verdict, in Tennessee; 7 Baxt. 273; and to a certain extent in Iowa; 20 Ia. 195; and Kansas; 22 Kan. 277; and to show that a verdict was decided by lot; 35 Ark. 109.

*The province* of the jury is to determine the truth of the facts in dispute in civil cases, and the guilt or innocence of the person accused in criminal cases. Thorn. Jur. § 133. See CHARGE. If they go beyond their province, their verdict may be set aside; 4 Maule & S. 192; 3 B. & C. 357; 2 Price 282; 2 Cow. 479; 10 Mass. 39.

The question whether the jury are judges of the law as well as of the fact, or whether it is the function of the court conclusively to instruct the jury upon the law, particularly in criminal cases, has been very much discussed from the earliest times and has recently been the subject of critical examination by the United States supreme court. See *infra*.

Coke says: "As the jury may, as often as they think fit, find a general verdict, I therefore think it unquestionable that they so far may decide upon the law as well as fact, such a verdict naturally involving both. In this I have the authority of Littleton himself, who hereafter writes, 'that if the inquest will take upon themselves the knowledge of the law upon the matter, they may give their verdict generally.'"

He further says in substance: "Questions of law generally and more properly belong to the judges. The immediate and direct right of declaring upon questions of law is entrusted to the judges; that in the jury is only incidental." Co. Litt. 155 *a*, n. (5).

Though the question had not, until recently, been the subject of a direct decision of the United States supreme court, it had frequently arisen in England and America. In the former country, in the case of the Dean of St. Asaph, the court alluded to the admission by both parties of an ancient rule of the common law, that the law should be determined by the court and the facts by the jury; but they differed as to what was law and what fact, it being contended on one side that the question of guilt in a libel case, after the fact of publication and truth of the innuendoes are found by the jury, was a question of law, and on the other side that the guilt of the defendant was a question of fact. This concurrence of views on the point in question "affords strong proof that, up to the period of our separation from England, the fundamental definition of trials by jury depended on the universal maxim, without an exception, *ad quæstionem facti respondent juratores, ad quæstionem juris respondent judices.*"

The doctrine that a jury may disregard

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the law as declared by the court finds its principal, original support in Bushell's case, Vaughan 135, where the question was on habeas corpus whether jurors were liable to be fined and imprisoned for non-payment of fine for having found a general verdict in opposition to the instructions of the court. Vaughan, C. J., held that because a general verdict of necessity resolves "both law and fact complicately and not the fact by itself," it could not be proved that the jurors did not proceed upon their view of the evidence. This line of argument is implicitly relied upon by the advocates of the extreme right of the jury, but has been rightly characterized as narrow; though conclusive in the case to which it related; 1 Curt. C. C. 23; Hallam, Const. Hist. c. 13; 5 Gray 185. The line of argument in the English case, taken together with the criticisms upon it, well illustrate the difficulties of the subject which arise necessarily in every case which is submitted to a jury upon mixed questions of law and fact. However frankly it may be stated that the jury are bound by the views of the law delivered to them by the court, the obligation to accept those views is rather moral than susceptible of rigid practical enforcement. Early English cases supporting the doctrine that the jury are judges of the fact and not of the law are, 1 Plowd. 111; *id.* 233; 2 *id.* 493; 2 Stra. 766; Lord Hardwicke said:—"The thing that governs greatly in this determination is, that the point of the law is not to be determined by juries; juries have a power by law to determine matters of fact only; and it is of the greatest consequence to the law of England and to the subject, that these powers of the judge and the jury are kept distinct; that the judge determine the law, and the jury the fact; and if ever they come to be confounded, it will prove the confusion and destruction of the law of England." Cas. *temp.* Hardwicke 23. Foster, after stating the rule that the ascertainment of all the facts is the province of the jury, says:—"For the construction the law putteth upon facts stated and agreed, or found by a jury is in this, as in all other cases, undoubtedly the proper province of the court." And he adds that in cases of difficulty, a special verdict is usually found, but, where the law is clear, the jury, under the direction of the court as to the law, may and, if well advised, always will find a general verdict conformably to such direction; Fost. Cr. L., 3d ed. 255. To the same effect, it has been urged, is the settled current of English authority; Wynne's Eunomus, Dial. III. §§ 53, 523; 1 Steph. Hist. Cr. L. 551; 2 Hawk. P. C. c. 22. § 21; 3 Term. 428; 4 Bing. 195; 8 C. & P. 94; *contra*, Vaughan 135; 4 B. & Ald. 145.

The question arose most frequently in England in connection with prosecutions for libel, and it was contended that Fox's Libel Act changed the common-law rule, but this was not the case. In a leading case arising under that act, it was held that it was for the judge to define the offence and then for the jury to say whether the publication under consideration was within that definition; 6 M. & W. 104 (see as to this case, 156 U. S. 97; 1 Curt. C. C. 55); 2 Jur. 137. In the House of Lords the unanimous opinion of the judges was given by Tindal, C. J., in answer to a question whether, if a fine were received in evidence, it ought to be left to the jury to say whether it barred an action of *quare impedit*, that "the judge who tried the cause should state to the jury whether in point of law the fine had that effect, or what other effect on the rights of the litigant parties, upon the general and acknowledged principle *ad quæstionem juris non respondent juratores.*" 4 Cl. and Fin. 445.

In state courts it has been held to be "a well-settled principle, lying at the foundation of jury trials, admitted and recognized ever since jury trial had been adopted as an established and settled mode of proceeding in courts of justice, that it was the proper province and duty of judges to consider and decide all questions of law, and the proper province and duty of the jury to decide all questions of fact;" 10 Metc. 263; 5 Gray 185; 13 N. H. 536; 29 Mich. 173; 6 R. I. 33; 44 Cal. 65; 65 Vt. 1, 34 (overruling 23 *id.* 14, and every case which followed it); 3 J. J. Marsh. 132. The citations include both civil and criminal cases. There undoubtedly exists a power in the jury to override the law as declared by the court and to make their action effective by an acquittal in a criminal case which cannot be set aside. This has received frequent expresssion from judges and courts of great authority. "The unquestionable power of juries to find general verdicts, involving both law and fact, furnishes the foundation for the opinion that they are judges of the law, as well as of the facts, and gives some plausibility to that opinion. They are not, however, compelled to decide legal questions, having the right to find special verdicts, giving the facts, and leaving the legal conclusions, which result from such facts, to the court. When they find general verdicts, I think it is their duty to be governed by the instructions of the court as to all legal questions involved in such verdicts. They have the power to do otherwise, but the exercise of such power cannot be regarded as rightful, although the law has provided no means, in criminal cases, of reviewing their decisions whether of law or fact, or of ascertaining the grounds upon which their verdicts are based;" 26 N. Y. 588; see also 1 Park. Cr. Cas. 147; *id.* 474. In Pennsylvania there has been, in some cases, a very strong expression of the idea that in criminal cases the juries are judges of the law as well as of the fact. This was very earnestly stated by Sharswood, C. J., who said that the power of the jury to judge of the law in a criminal case was one of the most valuable securities guaranteed by the bill of rights of Pennsylvania; 89 Pa.

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532; but this unqualified statement is not sustained by the leading cases in that state. In Commonwealth *v.* Sherry, reported in Whart. Hom. (App.) 481, Rogers, J., said: "You are, it is true, judges in a criminal case, in one sense, of both law and fact; for your verdict, as in civil cases, must pass on law and fact together. If you acquit, you interpose a final bar to a second prosecution, no matter how entirely your verdict may have been in opposition to the views expressed by the court. . . . It is important for you to keep this distinction in mind, remembering that, while you have the physical power, by an acquittal, to discharge a defendant from further prosecution, you have no moral power to do so against the law laid down by the court. . . . For your part, your duty is to receive the law, for the purposes of this trial, from the court. If an error injurious to the prisoner occurs, it will be rectified by the revison of the court in banc. But an error resulting from either a conviction or acquittal, against the law, can never be rectified. In the first case, an unnecessary stigma is affixed to the character of a man who was not guilty of the offence with which he is charged. In the second case, a serious injury is effected by the arbitrary and irremediable discharge of a guilty man. You will see from these considerations the great importance of the preservation, in criminal as well as in civil cases, of the maxim that the law belongs to the court and the facts to the jury."

Other expressions substantially to the same effect are: "If the evidence on these points fail the prisoner, the conclusion of his guilt will be irresistible, and it will be your duty to draw it;" Gibson, C. J., in 4 Pa. 269.

"The court had an undoubted right to instruct the jury as to the law, and to warn them as they did against finding contrary to it. This is very different from telling them that they *must* find the defendant guilty, which is what is meant by a binding instruction in criminal cases;" 96 Pa. 503. In 143 Pa. 64, it was held "that the statement by the court was the best evidence of the law within the reach of the jury, and that the jury should be guided by what the court said as to the law," and this, Paxson, C. J., speaking for the court, declared to be in harmony with the case in which is found the expression of Sharswood, C. J., *supra*.

In this case Mr. Justice Mitchell filed a vigorous and very able concurring opinion in which he says: "Upon one point I would go further and put an end once for all to a doctrine that I regard as unsound in every point of view, historical, logical, or technical. . . . The jury are not judges of the law in any case, civil or criminal; neither at common law, nor under the constitution of Pennsylvania, is the determination of the law any part of their duty or their right. The notion is of modern growth and arises undoubtedly from a perversion of the history and results of the right to return a general verdict, especially in libel cases, which ended in Fox's Bill." He then considers the question historically, and on the authorities, and says that there is not a single respectable English authority for the doctrine, and that, against a "solid phalanx" of American authorities, there is but a single authority in its favor (23 Vt. 14), which was by a divided bench (and which has been since overruled; 65 Vt. 1, *supra*). He concludes that "the jury were never judges of the law in any case, civil or criminal, except as involved in the mixed determination of law and fact by a general verdict." In an annotation of the case in 65 Vt. 1, which overruled what is here characterized as practically the only authority in support of the doctrine, it is said: "The ghost of the doctrine that juries in criminal cases are to judge of the law as well as the facts would seem to be effectually laid by the above decision. . . . That solitary authority (23 Vt. 14), which has often been attacked and discredited, is now by the case above reported completely overruled." 19 L. R. A. 145.

In the United States courts, prior to the direct decision of the supreme court already referred to, the question had been frequently examined. The most elaborate discussion of the subject was by Mr. Justice Curtis, whose opinion is very much relied upon by the supreme court. His conclusion was "that when the constitution of the United States was founded, it was a settled rule of the common law that, in criminal as well as in civil cases, the court decided the law, and the jury the facts; and it cannot be doubted that this must have an important effect in determining what is meant by the constitution when it adopts a trial by jury." 1 Curt. C. C. 23. Following in a much later case, also by the supreme court justices, sitting on circuit, the principle was clearly laid down: "There prevails a very general, but an erroneous, opinion that in all criminal cases the jury are the judges as well of the law as of the fact—that is, that they have the right to disregard the law as laid down by the court, and to follow their own notions on the subject. Such is not the right of the jury." "It is their duty to take the law from the court and apply it to the facts of the case. It is the province of the court, and of the court alone, to determine all questions of law arising in the progress of a trial; and it is the province of the jury to pass upon the evidence and determine all contested questions of fact. The responsibility of deciding correctly as to the law rests solely with the court, and the responsibility of finding correctly the facts rests solely with the jury." Field, J., in 4 Sawy. 457; and to the same effect are, 2 Sumn. 240; 5 Blatch. 204; 5 Cra. C. C. 573; 19 Fed. Rep. 633.

The authorities which have been sometimes relied upon to support the contrary view are, 3 Dall. 1; 1 Burr's Trial 470; 2 *id.* 422; Whart. St. Tr. 48, 84; Chase's Trial App. 44. These authorities received a very critical examination both by Mr. Justice

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Curtis in 1 Curt. C. C. 23, and by Mr. Justice Harlan, who delivered the opinion of the court in Sparf et al. *v.* United States, 156 U. S. 51; and in the dissenting opinion of Mr. Justice Gray (and except by the latter) they were not considered, when properly read, as sustaining the view in support of which they are usually cited. The opinion of Mr. Justice Harlan, last referred to, contains a full discussion of the subject, and in it will be found most of the authorities herein cited. It was held that where there was no evidence upon which the jury could properly find the defendant guilty of an offence included in it less than the one charged, it is not error to instruct them that they cannot return the verdict of any lesser offence. In support of the rule laid down in this decision, see also Cooley, Const. Lim. 323; 1 Greenl. Ev. § 49; Thomp. Tr. § 1016; and the valuable note by Dr. Wharton in 1 Crim. Law Mag. 51. By way of explanation of some of the expressions so much relied upon in support of a contrary view, Mr. Justice Harlan in his opinion referred to, *supra*, says: "The language of some judges and statesmen in the early history of the country, implying that the jury were entitled to disregard the law as expounded by the court, is, perhaps, to be explained by the fact that that 'in many of the states the arbitrary temper of the colonial judges, holding office directly from the crown, had made the independence of the jury in law as well as in fact of much popular importance.' Wharton's Cr. Pl. & Pr., 8th ed. § 806; Williams *v.* State, 32 Miss. 389, 396."

The argument for the right of the jury to decide the law in criminal cases has been most recently fully presented in the dissenting opinion of Mr. Justice Gray, with whom concurred Mr. Justice Shiras, in Sparf et al. *v.* United States. In this opinion from a long and careful examination of the authorities, the conclusion is thus stated: "It is our deep and settled conviction, confirmed by a re-examination of the authorities under the responsibility of taking part in the consideration and decision of the capital case now before the court, that the jury, upon the general issue of guilty or not guilty in a criminal case, have the right, as well as the power, to decide, according to their own judgment and consciences, all questions, whether of law or of fact, involved in that issue." It may be noted that of three cases cited in this opinion as containing the ablest discussion of the subject on both sides, and taking the same view as that advocated by Mr. Justice Gray, two opinions, those of Chancellor Kent and Mr. Justice Thomas in favor of the right, were also dissenting opinions and that of Judge Hall, of Vermont, on the other side, the only one of the three which was an authority, has lately been overruled, as stated *supra*. The English authorities are very fully discussed, and much attention is given to cases which are claimed as authorities in favor of the views presented which have already been cited, *supra*, and of which those who argue against the right of the jury to decide the law, question either the authority or the application. The contention of this dissenting opinion is that the result of the English authorities is in favor of the ultimate right of the jury to decide the law, notwithstanding the instructions of the court, and that the earlier American authorities are to the same effect. It is admitted that in the later American cases, "the general tendency of decision in this country has been against the right of the jury, as well as in the courts of the several states, including many states where the right was once established, as in the circuit courts of the United States. The current has been so strong, that in Massachusetts, where counsel are admitted to have the right to argue the law to the jury, it has yet been held that the jury have no right to decide it, and it has also been held, by a majority of the court, that the legislature could not constitutionally confer upon the jury the right to determine, against the instructions of the court, questions of law involved in the general issue in criminal cases; and in Georgia and in Louisiana, a general provision in the constitution of the state, declaring that 'in criminal cases the jury shall be judges of the law and fact,' has been held not to authorize them to decide the law against the instructions of the court" (156 U. S. 168); to those urged with the late constitutional construction should "have far less weight than the almost unanimous voice of earlier and nearly contemporaneous judicial declarations and practical usage." These cases contain all the learning on the subject on both sides and may be referred to for the full statement and full criticism of authorities which is not practicable within the limits of this title.

See, generally, 15 Law Rep. 1; 11 Am. L. Reg. N. S. 401; 30 *id.* 731, 744; 2 Cr. L. Mag. 664, 671; 3 *id.* 484; 7 *id.* 654; 10 S. E. Rep. (Va.) 745; Hargrave's note to Co. Litt. 155 *b.*; 5 So. L. Rev. N. S. 352.

*Directing the verdict.* The most frequent expression of the rule is that, where there is no evidence tending to prove the facts set up by the party who sustains the burden of proof, the court is bound, on request, to direct the jury to return a verdict for the opposite party; 15 Ga. 91; 36 Mo. 484; 87 *id.* 462. On the other hand, where there is any evidence tending to prove such facts, the court cannot so direct the verdict, but must submit the evidence to the jury and leave it to them to determine whether it is sufficient to that end; 63 Mo. 397; 85 *id.* 247; Thomp. Tr. § 2245.

When the testimony is all in one direction, or when all the evidence for the plaintiff has been given, and it has no tendency whatever to prove the particular issue relied on to recover, and there is no question in regard to the credibility of the witnesses who have given the evidence, the court may determine the whole case as a question of law; 36 Mo. 491; 32 Vt. 612.

It is only where the evidence, with all

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fair and legitimate inferences, and viewed in the most favorable light, is insufficient to justify a verdict for the plaintiff, that the court may direct a verdict for the defendant; 143 Ill. 242; 147 *id.* 120; 52 Fed. Rep. 87; 42 Ill. App. 536; 95 Wis. 4; see 141 N. Y. 514. A federal court may direct a verdict for either party whenever, under the state of the evidence, it would be compelled to set aside one returned the other way; 3 C. C. App. 280. Where, from the testimony before the jury, different minds might draw different conclusions, it is error to direct a verdict; 35 Neb. 372; 95 Ala. 397; 98 *id.* 157; 67 Hun 518; 95 Mich. 140; 8 Misc. Rep. 512. Where the right of recovery depends on questions of fact, there must be a submission to the jury; 160 Pa. 314. A direction to find for the defendant was held proper, in an action against a railroad for interference with the plaintiff's business, where no evidence was offered showing the injury caused by such interference; 154 Pa. 463. Where it is shown by an open statement of counsel for the plaintiff that the contract on which the suit is brought is void, the court may direct the jury to find a verdict for the defendant; 103 U. S. 261. There can be no serious doubt but that the court can at any time direct the jury when the facts are undisputed, and that the jury should follow such direction; *id.*

For a clear statement of the doctrine of peremptory instructions, as recently laid down by Mr. Justice Harlan, see INSTRUCTIONS. See also CHARGE; VERDICT.

*The removal of a case from the consideration of a jury*, in criminal cases, can only take place by consent of the prisoner; 6 C. & P. 151; 1 C. & K. 201; 5 Cox, Cr. Cas. 501; 1 Humph. 103; 6 Ala. N. S. 616; or by some necessity; 5 Ind. 290; 10 Yerg. 536; 26 Ala. N. S. 135; 3 Ohio St. 239; 1 Dev. 491; 2 Gratt. 570; 3 Ga. 60; 4 Wash. C. C. 411; so as to compel the prisoner to be tried again for the same offence; 4 Bla. Com. 360. But where such necessity exists as would make such a course highly conducive to purposes of justice; 2 Gall. 364; 6 S. & R. 586; 2 D. & B. 166; 18 Johns. 205; 9 Leigh. 620; 13 Q. B. 734; 3 Cox, Cr. Cas. 495; it may take place. The question of necessity seems to be in the decision of the court which tries the case; 2 Pick. 503; 4 Harr. Del. 581; 6 Ohio 399; 13 Wend. 55; 9 Wheat. 579. But see 1 Cox, Cr. Cas. 210; 13 Q. B. 734; 5 Ind. 292. A distinction has been taken in some cases between felonies and misdemeanors in this regard; 3 D. & B. 115; 13 Ired. 283; 7 Gratt. 662; 2 Sumn. 19; 6 Mo. 644; 74 N. C. 391; but is of doubtful validity; 18 Johns. 187; 9 Mass. 494; 5 Litt. 137; 26 Ala. N. S. 135; 11 Ga. 353; 1 Benn. & H. Lead. Cr. Cas. 369.

Among cases of necessity which have been held sufficient to warrant the discharge of a jury without releasing the prisoner are *sickness of the judge*; 8 Ala. 72; 8 Bax. 571; or of his *wife*; 59 Ia. 471; *sickness*; 3 Rawle 498; 2 Mood. & R. 249; 3 Crawf. & D. 212; 3 Campb. 207; 1 Thach. Cr. Cas. 1; 2 Mo. 135; 10 Yerg. 532; 5 Humphr. 601; 6 *id.* 249; 9 Leigh 618; 55 Ala. 129; 59 Vt. 84; or other *incapacity of a juror*; 1 Curt. 23; 13 Wend. 351; 3 Ill. 326; 3 Ohio St. 239; 12 Gratt. 689; but see 8 B. & C. 417; C. & M. 647; 8 Ad. & E. 831; 2 Cra. 412; 1 Bay 150; 4 Ala. 454; 1 Humphr. 253; 2 Blackf. 114; 1 Leigh 599; 4 Halst. 256; *sickness of the prisoner*; 2 Leach 546; 2 C. & P. 413; 9 Leigh 623, n.; 68 N. C. 203; 26 Ark. 260; or the *death* or *insanity* of a *judge* or *juror*; 38 Cal. 467; 32 Ind. 480; *expiration of a term of court*; 1 Dev. 491; 1 Miss. 134; 5 Litt. 138; 4 Ala. N. S. 173; 2 Hill, S. C. 680; 2 Wheel. Cr. Cas. 472; and see 5 Ind. 290; 3 Cox, Cr. Cas. 489; *inability of the jury to agree*; 2 Johns. Cas. 201, 275; 2 Pick. 521; 6 Ohio 399; 9 Wheat. 579; 53 Minn. 232; 67 Ind. 354; 47 Conn. 121; 61 Miss. 117; 35 La. Ann. 483; 90 N. C. 664; 27 Fed. Rep. 616; *contra*, 6 S. & R. 577; 3 Rawle 498; 26 Ala. N. S. 135; 10 Yerg. 532; 2 Gratt. 167; 3 Crawf. & D. 212; 1 Cox, Cr. Cas. 210; L. R. 1 Q. B. 289; 121 Pa. 109. But see 7 Gratt. 662; 3 D. & B. 115; 13 Ired. 283. In some states, statutes have provided for a discharge upon a disagreement; 26 Ark. 260; 5 W. Va. 510; 41 Cal. 211.

Insufficiency of the evidence to convict; 2 Stra. 984; 8 Blackf. 540; 2 Park. Cr. Cas. 676; 2 McLean 114; and sickness or other incapacity of a witness; 1 Crawf. & D. 151; 1 Mood. 186; Jebb 270; are not sufficient necessities to warrant the discharge of a jury. See 17 Pick. 399; 2 Gall. 364; 2 Benn. & H. L. Cr. Cas. 337; JEOPARDY.

It is within the discretion of the trial judge to refuse to discharge the jury until they arrive at a verdict; 2 Misc. Rep. 127. A jury may be discharged from giving any verdict, whenever the court is of the opinion that there is a manifest necessity for the act, or that the ends of public justice would otherwise be defeated, and may even order a trial before another jury, and a defendant is not thereby twice put in jeopardy; 155 U. S. 271.

When a jury in a criminal case is discharged during the trial, and the defendant subsequently put on trial before another jury, he is not thereby twice put in jeopardy within the meaning of the fifth amendment to the United States constitution; 142 U. S. 148.

*Duties and privileges of.* Qualified persons may be compelled to serve as jurors under penalties prescribed by law. They are exempt from arrest in certain cases. See PRIVILEGE. They are liable to punishment for misconduct in some cases.

The federal constitution provides (Am. vii.) that "no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." This includes only a new trial or proceedings in an appellate court; it applies to the facts tried by a jury in a state court, and renders invalid an act providing for the removal of a cause from a state to a federal court after it has been tried in the former; 9 Wall. 274.

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A frequent variation from the common-law jury system is to permit the jury to impose the punishment (this being formerly considered a matter for judicial discretion), or, as in some states, to divide the responsibility between the judge and jury; and such legislation is held constitutional; 7 Ind. 332; 70 Ia. 442; 1 Bish. N. Cr. L. § 934.

In criminal cases, in Scotland, a jury consists of fifteen and a majority may convict. In Belgium, criminal and political charges and offences of the press are tried before a jury. Trial by jury has existed in Greece since 1834. In Sweden it exists in cases of offences of the press; and in Italy, in criminal cases, and a majority may convict. In Norway, it was established in 1887, and there also a majority may convict. In Russia, since 1864, all criminal cases involving severe penalties, except political offences, are tried by juries. Hawaii has a jury of twelve, both in civil and criminal cases, of whom nine may render a verdict. In South America, all the states have the jury system. In France, trial by jury exists in cases of felony, and it is provided in Germany, by the imperial code, in all criminal cases except treason, political crimes and offences of the press.

See, generally, Hirsh; Thompson & Merriam, Juries; Best; Forsyth; Proffatt; Spooner; Starkie; Stephen, Jury Trial; Lesser, History of the Jury System; Edwards, Juryman's Guide; Best, Unanimity of Juries; 1 Am. L. Reg. N. S. 524; 26 *id.* 666; 13 Alb. L. J. 176; 14 *id.* 115; 19 *id.* 469; 20 *id.* 68, 129, 297; 17 Am. L. Rev. 398; 20 *id.* 661; 21 *id.* 859; 26 *id.* 666; 4 Cr. L. Mag. 15; 3 So. L. Rev. N. S. 903; 7 L. Quar. Rev. 15; 24 Ir. L. T. 477; 18 Wkly. L. Bul. 95; and as to its development, 5 Harv. L. Rev. 249, 295, 357. See also ASSIZE; CHALLENGE; DUE PROCESS OF LAW; ELISORS; INQUEST; INSTRUCTION; JEOPARDY; JUDEX; NEW TRIAL; TRIAL; GRAND JURY; JURATA; STANDING ASIDE.

Consult Edwards; Forsyth; Ingersoll, on Juries; 1 Kent 623, 640.

**JURY BOX.** A place set apart for the jury to sit in during the trial of a cause.

**JURY LIST.** A paper containing the names of jurors impanelled to try a cause, or it contains the names of all the jurors summoned to attend court.

**JURYMAN.** A juror; one who is impanelled on a jury. Webster, Dict.

**JURY PROCESS.** **In Practice.** The writs for summoning a jury, viz.: in England, *venire juratores facias*, and *distringas juratores*, or *habeas corpora juratorum*. These writs are now abolished, and jurors are summoned by precept. 1 Chitty, Archb. 344; Com. Law Proc. Act, 1852, § 104; 3 Chitty, Stat. 519.

**JURY OF WOMEN.** A jury of women is given in two cases; viz.: on writ *de ventre inspiciendo*, which was a writ directed to the sheriff, commanding him that, in the presence of twelve men and as many women, he cause examination to be made whether a woman therein named is with child or not, and if with child, then about what time it will be born, and that he certify the same. It is granted in a case when a widow, whose husband had lands in fee-simple, marries again soon after her husband's death, and declares herself pregnant by her first husband, and, under that pretext, withholds the lands from the next heir; Cro. Eliz. 506; Fleta, lib. 1, c. 15. In that case, although the jury was made up of men and women, the examination was made by the latter; 1 Madd. Ch. 11; 2 P. Wms. 591. Such a writ was issued in the case of *In re* Blackburn, 14 L. J. N. S. Ch. 336. In New York it is said that an application was made for such a jury in the Rollwagen will case and denied upon the ground that "as the lady was not going to be hanged and did not herself solicit the investigation, there was no power to compel her to submit to it;" 10 Alb. L. J. 3. In the opinion of the court in 141 U. S. 250 the statement is made by Mr. Justice Gray that this writ has never been used in this country. The authorities cited in this title show that this statement is too broad both as to the use of the common-law writ and as to *physical examination*, which title see further as to this case.

Where pregnancy is pleaded by a condemned woman, in delay of execution, a jury of twelve discreet matrons was called from those in court, who were impanelled to try the fact and report to the court. They chose a fore-matron from their own number. On their returning a verdict of "*enceinte*," the execution was delayed until the birth, and in some cases the punishment was commuted to perpetual exile. When the criminal was merely *privement enceinte*, and not *quick* (see QUICKENING), there was no respite. See 2 Hale, Pl. Cr. 412; Taylor, Med. Jur., Bell's ed. 520; Archb. Cr. Pl. 187. The proceeding has been said to be obsolete, though it has been recognized in America; and at a very recent date in England, in Reg. *v.* Webster, tried before Lord Denman at the Old Bailey in London in July, 1879. The plea of pregnancy was interposed before sentence, and immediately "a jury of matrons selected from a crowd of females in the gallery were impanelled" and sworn, and the inquisition was held forthwith before the judge. The result was a verdict that the prisoner was not quick with child and she was sentenced. The *verbatim* report of the proceedings may be found in 9 Cent. L. J. 94. In State *v.* Arden, 1 Bay 487, the plea was allowed and an inquisition held, but the prisoner was found not pregnant and sentenced to death. In State *v.* Holeman, 13 Ark. 105, the plea was overruled in a larceny case where a woman was convicted of a penitentiary offence. In the case of Mrs. Bathsheba Spooner, who was tried in Massachusetts in 1778 for the murder of her husband, she being under sentence of death, petitioned the governor

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and council for a respite on account of pregnancy. A writ *de ventre inspiciendo* was issued by the council to the sheriff directing him to summon a jury of two men midwives and twelve discreet and lawful matrons "to ascertain the truth of her plea." The verdict was that she "is not quick with child," and she was executed, but a *post mortem* examination proved that her assertion was true; 3 Harv. L. Rev. 44; 39 Alb. L. J. 326.

It is difficult to see by what reason or authority this proceeding can be assumed not to be available, according to the course of the common law, in jurisdictions in which that system of jurisprudence is in force, particularly where, as in some states, it is imbedded in the constitution. It has been said on this point: "While the cases are very rare, there is no evidence (or authority, it might be added) that a jury of women is not a part of the machinery of the law in those states in which the common law prevails." 12 A. & E. Encyc. of L. 331.

It may be safely affirmed that no woman who pleads pregnancy in delay of execution will in any common-law jurisdiction be sentenced to death without examination into the truth of the fact pleaded, and in the absence of other statutory provision, it is difficult to see how she could be deprived of this common-law right. It is undoubtedly true that the proceeding is antiquated and ill adapted to the purpose, and therefore the subject is well worthy of legislative attention. Doubtless the rarity of such legislation is due to the infrequency of capital trials of women. In one state at least the contingency is provided for. In New York it is provided by statute that if there is reasonable ground to believe that a female defendant sentenced to death is pregnant, a jury of six physicians shall be impanelled to inquire into the fact, and if it is found by the inquisition that she is "quick with child," the execution is to be suspended until the governor issues a warrant directing it, which he may do as soon as he is satisfied that she is no longer "quick with child," or he may commute her punishment to imprisonment for life; N. Y. Code Crim. Proc. §§ 501-2. See DE VENTRE INSPICIENDO; REPRIEVE.

**JURY WHEEL.** A mechanical contrivance, usually a circular box revolving on a crank, in which the names of persons subject to jury duty are placed, by the officers, and at the times and places prescribed by law, and from which the proper number to constitute the jury panels for any particular term of court are drawn by lot.

**JUS** (Lat.). Law; right; equity. Story, Eq. Jur. § 1. In the Roman law the word had two distinct meanings. It was either a body of law, as the *jus honorarium*, or an individual right, as the *jus suffragii*. See Sohm, Inst. Rom. L. § 7, where this distinction is developed in the course of a discussion of fundamental conceptions. A third use of the word was in apposition to *judicium*, as to which see IN JUDICIO; IN JURE; JUDEX; LEX.

**JUS ABUTENDI** (Lat.). The right to abuse. By this phrase is understood the right to abuse property, or having full dominion over property. 3 Toullier, n. 86. The right of destruction or consumption, and free disposition. Morey, Rom. L. 283. See DOMINIUM JUS UTENDI.

**JUS ACCRESCENDI** (Lat.). The right of survivorship. See SURVIVOR.

**In Roman Law.** The right of accretion. This exists in two cases: According to the general rule a person could not die partly testate and partly intestate, and if any part of the estate was unprovided for, either by the oversight of the testator or any of the heirs, it was ratably distributed among the heirs; Morey, Rom. L. 325; so if the same thing were left to two or more persons each took an equal share; if one of them should die before he had received the legacy, the share of the one so dying passed to the remaining joint legatee or legatees by this right; *id.* 334. It has been suggested that the germ of this right is to be found in the succession by necessity; Sohm, Inst. Rom. L. § 100.

**JUS ACTUS. In Roman Law.** A rural servitude giving to a person a passage for carriages, or for cattle.

**JUS AD REM** (Lat.). **In Civil Law.** A right to a thing. It is generally treated as a right to property not in possession, as distinguished from *jus in re*, which implies the absolute dominion. In English law, this distinction is illustrated by Blackstone, by reference to ecclesiastical promotions, where, although the freehold passes to the person promoted, corporal possession is required to vest the property completely in the new proprietor, who acquires *jus ad rem*, an inchoate, or imperfect, right of nomination and institution, but not the *jus in re*, or complete and full right, unless by corporal possession; 2 Bla. Com. 312. The distinction expressed by these terms in the Roman law is analogous to the common-law distinction between the effect of a right of entry and that of actual entry, which in English real property law is expressed in the maxim *non jus, sed seisina, facit stipitem; id. Jus ad rem* is said to be merely an abridged expression for *jus ad rem acquirendam*, and it properly denotes the right to the acquisition of a thing. Austin, Jur. Lect. 14; Moz. & W.

"On this distinction between claims to things advanced against all men, and those advanced primarily against particular men, is based the division of rights into real and personal expressed by writers of the middle ages, on the analogy of terms found in the writings of the Roman jurists, by the phrases *jura in re* and *jura ad rem*. A real right, a *jus in re*, or, to use the equivalent phrase preferred by some later commentators, *jus in rem*, is a right to have a thing to the exclusion of all other

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men. A personal right, *jus ad rem*, or, to use a much more correct expression, *jus in personam*, is a right in which there is a person who is the subject of right, as well as a thing as its object, a right which gives its possessor a power to oblige another person to give, or procure, or do, or do not do, something." Sand. Inst. Just. Introd. xlviii.

A right which belongs to a person only mediately and relatively, and has for its foundation an obligation incurred by a particular person.

The *jus in re*, by the effect of its very nature, is independent and absolute, and is exercised *per se ipsum*, by applying it to its object; but the *jus ad rem* is the faculty of demanding and obtaining the performance of some obligation by which another is bound to me *ad aliquid dandum vel faciendum, vel præstandum*. Thus, if I had the ownership of a horse, the usufruct of a flock of sheep, the right of habitation of a house, a right of way over your land, etc., my right in the horse, in the flock of sheep, in the house, or the land, belongs to me directly, and without any intermediary; it belongs to me absolutely, and independently of any particular relation with another person; I am in direct and immediate relation with the thing itself which forms the object of my right, without reference to any other relation. This constitutes a *jus in re*. If, on the other hand, the horse is lent to me by you, or if I have a claim against you for a thousand dollars, my right to the horse or to the sum of money exists only relatively, and can only be exercised through you; my relation to the object of the right is mediate, and is the result of the immediate relation of debtor and creditor existing between you and me. This is a *jus ad rem*. Every *jus in re*, or real right, may be vindicated by the *actio in rem* against him who is in possession of the thing, or against any one who contests the right. It has been said that the words *jus in re* of the civil law convey the same idea as thing in possession at common law. This is an error, arising from a confusion of ideas as to the distinctive characters of the two classes of rights. Nearly all the common-law writers seem to take it for granted that by the *jus in re* is understood the title or property in a thing in the possession of the owner; and that by the *jus ad rem* is meant the title or property in a thing not in the possession of the owner. But it is obvious that *possession* is not one of the elements constituting the *jus in re;* although possession is generally, but not always, one of the incidents of this right, yet the loss of possession does not exercise the slightest influence on the character of the right itself, unless it should continue for a sufficient length of time to destroy the right altogether by prescription. In many instances the *jus in re* is not accompanied by possession at all; the usuary is not entitled to the possession of the thing subject to his use; still, he has a *jus in re*. So with regard to the right of way, etc. See DOMINIUM.

A mortgage is considered by most writers as a *jus in re;* but it is clear that it is a *jus ad rem:* it is granted for the sole purpose of securing the payment of a debt or the fulfilment of some other personal obligation. In other words, it is an accessory to a principal obligation and corresponding right: it can have no separate and independent existence. The immovable on which I have a mortgage is not the object of the right, as in the case of the horse of which I am the owner, or the house of which I have the right of habitation, etc.: the true object of my right is the sum of money due to me, the payment of which I may enforce by obtaining a decree for the sale of the property mortgaged. 2 Marcadè 350.

**JUS ÆLIANUM.** A body of laws upon the same plan as the *jus flavianum* (*q. v.*) though more complete. It was published about B. C. 200 by Sextus Ælius and consisted of three parts: (1) The law of the XII. Tables; (2) The interpretation of the same; (3) The description of the *legis actiones* or forms of procedure. Morey, Rom. L. 85.

**JUS ÆSNECLÆ.** The right of the eldest-born to inherit; primogeniture.

**JUS ALBINATUS.** The right of the king by confiscation or escheat to the property of a deceased foreigner unless he had a peculiar exemption. This prerogative was abolished in 1790. Moz. & W.; 1 Bla. Com. 372; 2 Steph. Com. 409, n. It was the *Droit d'Aubaine* of the French law, which title see.

**JUS ANGLORUM.** The laws and customs of the West Saxons, in the time of the Heptarchy, by which the people were for a long time governed, and which were preferred before all others. Wharton.

**JUS AQUÆDUCTUS** (Lat.). **In Civil Law.** The name of a servitude which gives to the owner of land the right to bring down water through or from the land of another, either from its source or from any other place.

Its privilege may be limited as to the time when it may be exercised. If the source fails, the servitude ceases, but revives when the water returns. If the water rises in, or naturally flows through, the land, its proprietor cannot by any grant divert it so as to prevent it flowing to the land below; 2 Rolle, Abr. 140, l. 25; *Lois des Bat.* part 1, c. 3, s. 1, art. 1. But if it had been brought into his land by artificial means, it seems it would be strictly his property, and that it would be in his power to grant it; Dig. 8. 3. 1. 10; 3 Burge, Confl. Laws 417. See Washb. Easem.; RIVER; WATER-COURSE.

**JUS AQUÆHAUSTUS. In Roman Law.** A rural servitude giving to a person a right of watering cattle on another's field, or of drawing water from another's well.

**JUS ÆQUUM.** Equitable law. A term used by the Romans to express the adaptation of the law to the circumstances of the individual case as opposed to *jus strictum* (*q. v.*).

**JUS BELLI.** So much of international law as regulates the relations of nations to each other with respect to a state of war, including belligerency and neutrality, which several titles see.

The right of war so far as it concerns the treatment which may be properly accorded to an enemy; Grot. *De Bell. et Pac.* I. 1, § 3.

**JUS BELLUM DICENDI.** The right of making a declaration of war.

**JUS CIVILE** (Lat.). **In Roman Law.** The private law, in contradistinction to the public law, or *jus gentium*. 1 Savigny, *Dr. Rom.* c. 1, § 1.

The local law of the city of Rome.

It is said that the twelve tables marked the starting-point in the development of the Roman law so far as it can be histori-

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cally authenticated, and that its development advanced steadily in uninterrupted progression until it culminated in the *corpus juris civilis* of Justinian; Sohm, Inst. Rom. L. § 10. It is, however, rather more accurate to say that the *culmination* of the Roman law, as a system, was not reached until the period of the development side by side of the *jus civile* and *jus gentium*. For an interesting discussion of the origin and growth of this system, see Morey, Rom. L. 14, 24. See JUS GENTIUM.

**JUS CIVITATIS** (Lat.). **In Roman Law.** The full franchise of citizenship, comprising, on the one hand, public rights, including the right of holding office and the right of voting; and on the other hand, private rights, including the right to hold and dispose of property, according to the forms of the civil law, and the right of marriage, and all domestic relations Morey, Rom. L. 48.

The collection of laws which are to be observed among all the members of a nation. It is opposed to *jus gentium*, which is the law which regulates the affairs of nations among themselves. 2 Lepage, *El. du Dr.* c. 5, 1. It was very much what is understood in modern terminology by municipal law.

**JUS CLOACÆ** (Lat.). **In Civil Law.** The name of a servitude which requires the party who is subject to it to permit his neighbor to conduct the waters which fall on his grounds over those of the servient estate.

**JUS COMMUNE.** The common law, applicable to all persons alike. The ordinary law, as opposed to *jus singulare* (*q. v.*).

**JUS CORONÆ.** The right of succession to the throne of Great Britain. See UNITED KINGDOM OF GREAT BRITAIN AND IRELAND.

**JUS CURIALITATIS ANGLIÆ.** The right of curtesy. See CURTESY.

**JUS DARE** (Lat.). To enact or to make the law. *Jus dare* belongs to the legislature; *jus dicere*, to the judge.

**JUS DELIBERANDI** (Lat.). The right of deliberating, given to the heir, in those countries where the heir may have *benefit of inventory* (*q. v.*), in which to consider whether he will accept or renounce the succession.

In Louisiana he is allowed ten days before he is required to make his election. La. Civ. Code art. 1028.

**JUS DEVOLUTUM.** A phrase formerly used in Scotch ecclesiastical law to designate the right which devolved on the presbytery to present a minister to a vacant parish or benefice, in case the patron should neglect to exercise his right within the time limited by law, by presenting within six months a properly qualified person. Int. Cyc.

**JUS DICERE** (Lat.). To declare the law. It is the province of the court *jus dicere*, to declare what the law is.

**JUS DISPONENDI** (Lat.). The right to dispose of a thing.

In a general sense it means the right of alienation, and is frequently applied in the case of a married woman with respect to her separate estate. In a special or limited sense, it is applied to the reservation by a vendor of chattels or the ultimate ownership of goods with the possession of which he has parted. It is said to be often a matter of great nicety to determine upon a contract of sale, whether or not the vendor's purpose or intention was to reserve a *jus disponendi*. Benj. Sales, Ch. VI. § 382. See SALE.

The reservation of this right is essential where the property in the thing sold is reserved as a security for deferred payments or purchase-money, and it is permitted in many cases in which it is not permissible at common law. The great increase in the number of transactions in which such reservation is customary, as car trusts, instalment sales, etc., makes the subject one of increased importance and interest.

**JUS DISTRAHENDI.** The right of sale of goods pledged in case of non-payment. See PLEDGE; DISTRESS.

**JUS DIVIDENDI.** The right of testamentary disposition of real estate.

**JUS DUPLICATUM** (Lat. double right). When a man has the possession as well as the property of anything, he is said to have a double right, *jus duplicatum*. Bracton, l. 4, tr. 4, c. 4; 2 Bla. Com. 199.

**JUS EDICERE, JUS EDICENDI.** The right to issue edicts. It belonged to all the higher magistrates, but special interest is attached to the prætorian edicts in connection with the history of Roman law. See PRÆTOR.

**JUS EX NON SCRIPTO.** Law constituted by custom or such usage as indicates the tacit consent of the community.

The definition of Ulpian was: "*Diuturna consuetudo pro jure et lege in his quæ non ex scripto descendunt, observari solet;*" D. 1, 3, 33. This is well, though freely, translated thus: "Whatever has existed for a long period of time, and is in harmony with the moral judgment of the community is regarded as having the force of law, and the judicial authority is bound to recognize it as such, even though it has never been expressed in a legal enactment." Morey, Rom. L. 223. The same author says with respect to such law: "It was also a maxim of the Romans, that not only can laws be established by custom; they can also be abrogated by custom—that is, by contrary usage. It is unnecessary to consider here the objections raised by some modern jurists, such as Austin, to this view of customary, or unwritten, law. It is enough for our present purpose to say that this was the conception of the Roman jurists regarding the origin of a portion of the positive law, and a conception which has been adopted by the majority of modern civilians;" *id.* Another phrase by which this law was known was *jus moribus constitutum*. See LAW.

**JUS FECIALE** (Lat.). **In Roman Law.** Fecial law (*q. v.*). It has been termed that species of international law

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which had its foundation in the religious belief of different nations: such as the international law which now exists among the Christian people of Europe. Savigny, Dr. Rom. c. 2, § 11. But the earlier writers on the civil law gave to it more of a characterization as international law than is attributed to it by the more thoughtful modern writers. See FECIAL LAW; INTERNATIONAL LAW.

**JUS FIDUCIARUM** (Lat.). **In Civil Law.** A right to something held in trust. For this there was a remedy in conscience. 2 Bla. Com. 328. See FIDEI COMMISSUM.

**JUS FLAVIANUM.** A publication of the *legis actiones* or a practical manual of the procedure, including a list of *dies fasti* (*q. v.*).

Of this publication it is said: "The first step which led to the decline of the *legis actiones* was due to their publication. As long as the knowledge of legal forms was restricted to the patrician class, the people at large were helpless in their efforts to obtain an impartial administration of justice." Morey, Rom. L. 85. The author was Cnæus Flavius, who was a scribe or clerk of Appius Claudius. His publication was B. C. 304. It was followed about a century later by the *Jus Ælianum* (*q. v.*). See also Sohm, Inst. Rom. L. § 14, n. 2.

**JUS FODIENDI. In Civil Law.** The name of a rural servitude which permits digging on the land of another. Inst. 2, 3, 2; Dig. 8, 3, 1, 1. A similar right was recognized in early English law; Bract. 222.

**JUS GENTIUM** (Lat.). The law of nations. It has been said that although the Romans used these words in the sense we attach to *law of nations*, yet among them the sense was much more extended. Falck, Encyc. Jur. 102, n. 42. It has been termed a system made up by the early Roman lawyers of the common ingredients in the customs of the old Italian tribes, for the purpose of adjudicating questions arising in Rome between foreigners or natives and foreigners. Maine, Anc. Law 49.

The *jus gentium* is differently characterized by the later writers on the civil law from the meaning given to the phrase by the earlier writers who treated it, as more identical with the idea of modern international law than it is now considered to have been.

The distinction between the *jus gentium* and the *jus civile* is thus admirably expressed: "The *jus gentium*, on the other hand, came to be regarded as a universal law of all mankind, common to all nations, because resting on the nature of things and the general sense of equity which obtains among all men, the '*jus gentium quod apud omnes gentes perœque custoditur*,' a sort of natural law, exacting recognition everywhere in virtue of its inherent reasonableness. It would, however, be erroneous to suppose that the Romans attempted to introduce a code of nature such as the philosophers had devised. The *jus gentium* was, and never had been anything else but a portion of positive Roman law, which commercial usage and other sources of law, more especially the prætorian edict (*q. v.*), had clothed in a concrete form. Nor again must it be imagined that the Romans simply transferred a portion of foreign (Hellenic) law bodily into their own system. In the few quite exceptional cases where they did so (as *e. g.* in the case of hypotheca), they did not fail to impress their institutions with a national Roman character. The antithesis between *jus civile* and *jus gentium* was merely the outward expression of the growing consciousness that Roman law, in absorbing the element of greater freedom, was commencing to discard its national peculiarities and transform itself from the special local law of a city into a general law for the civilized world. The *jus gentium* was that part of the private law of Rome which was essentially in accordance with the private law of other nations, more especially with that of the Greeks, which would naturally predominate along the seaboard of the Mediterranean. In other words, *jus gentium* was that portion of the positive law of Rome which appeared to the Romans themselves in the light of a '*ratio scripta*,' of a law which obtains among all nations and is common to all mankind." Sohm, Inst. Rom. L. § 18.

The origin of the *jus gentium* was undoubtedly to be found in the adjustment of the Roman law to the relations existing between Roman citizens and foreigners, and between foreigners themselves. The growth of a different system was a not unnatural result of the administration of law in cases where both parties were not Roman citizens, by the foreign prætors, who were not bound by the strict rules of the *jus civile*, but from going about from place to place, and administering a kind of equitable jurisdiction in the settlement of disputes, they might not inaptly be termed peripatetic or itinerant arbitrators. The growth of a system of law administered by them alongside of the *jus civile* was not unlike the growth of the equity jurisprudence alongside of the common law. Then, too, the fact that these officers were constantly engaged in settling disputes, to which at least one party was a foreigner, naturally led to their becoming familiar with the principles of other systems of law, and in applying them to the case in hand, so far as they commended themselves to their sense of justice. The new system was afterwards extended to the whole non-citizen class. And while in the first instance it was treated as an entirely distinct system from the *jus civile*, it gradually supplanted the latter, and by a process which was originally the absorption of much of the *jus gentium* into the *jus civile*, it subsequently became recognized as a constituent part of Roman Law, and was gradually welded into a complete system of jurisprudence. See Morey, Rom. L. 59–71; INTERNATIONAL LAW; JUS CIVILE; JUS NATURALE.

**JUS GLADII** (Lat. the right of the sword). Supreme jurisdiction. The right to absolve from or condemn a man to death.

**JUS HABENDI** (Lat.). The right to have a thing. The right to be put into actual possession of property to which one is entitled.

**JUS HABENDI ET RETINENDI.** The right to have and retain the offerings, tithes, and profits of a parsonage or rectory. Toml.; Moz. & W.

**JUS HÆREDITATIS.** The right of succession as an heir, or of inheritance. See DESCENT AND DISTRIBUTION; HÆRES; HEIR.

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**JUS HONORARIUM. In Civil Law.** A name applied to the prætorian edicts and also to the edicts of the *curule ædiles*, when on certain occasions they were published. Inst. 1, 2, 7.

This system of law was simply the usual development of an expanding and elastic jurisprudence, which naturally resulted from the increase in Rome of population and power, and the greater complication of her civilization; Howe, Stud. Civ. L. 10; it was spoken of as having a distinct place by the side, and as the complement, of the *jus civile*; Sand. Introd. Inst. Just. xxi. It was a system of judge-made law (*q. v.*) in the proper sense. Its vigorous development was coincident with the formulary procedure, which was well adapted to give it scope and effect; Sohm, Introd. Rom. L. 178.

Its place and function in the Roman jurisprudence are thus described: "The prætorian law, being a law made by officials, '*jus honorarium*,' was opposed to the *jus civile*, *i. e.* law, in the strict and proper sense of the term, the law made by the people, developed by popular enactments and popular customs. Thus both the *jus civile* and the *jus honorarium* contained elements of *jus gentium*, but in the *jus honorarium*, the influence of the *jus gentium* predominated. The prætorian edict was, in the main, the instrument by means of which the free principles of *jus æquum* gained their victory over the older *jus strictum*. Though at first the edict may merely have served the purpose of giving fuller effect to the *jus civile*, and then of supplementing the *jus civile*, nevertheless, in the end, borne along by the current of the times, it boldly assumed the function of reforming the civil law." *Id.* 54. See JUDEX; PRÆTOR.

**JUS HONORUM. In Roman Law.** The right of holding offices. See JUS SUFFRAGII.

**JUS IMAGINIS. In Roman Law.** The right of displaying the pictures and statues of one's ancestors, somewhat as in the English law of Heraldry, there is a right to the coat-of-arms.

**JUS IMMUNITATIS.** The law of exemption from the liability to hold public office.

**JUS IN PERSONAM.** A personal right. Considered by some writers as a more correct expression for *jus ad rem*, which see. According to the Roman law, property could not be transferred by mere agreement. The latter, even though in form a legal contract, had the effect only of expressing the intention of the parties and creating a personal right against the one making the agreement in a real right to the property itself. Morey, Rom. L. 307. See JUS AD REM.

**JUS IN RE** (Lat.). A right which belongs to a person, immediately and absolutely, in a thing, and which is the same against the whole world,—*idem erga omnes*. See JUS AD REM.

"The objection to using the term *jus in re* is that the expression occurs in the classical jurists as meaning an interest in a thing short of ownership, as the interest of a mortgagee in the thing pledged, and on this ground the term *jus in rem*, which in this sense is not found in the classical jurists, but is supported by the analogy of the familiar term *actio in rem*, seems preferable." Sand. Inst. Just. xlix. See JUS AD REM.

**JUS IN RE ALIENA.** An easement on servitude, or right in, or arising out of, the property of another.

**JUS IN RE PROPRIA.** The right of enjoyment which appertains to full and complete ownership of property. Frequently, by relation, the full ownership or property itself.

**JUS INCOGNITUM** (Lat.). An unknown law. This term is applied by the civilians to obsolete laws, which, as Bacon truly observes, are unjust; for the law to be just must give warning before it strikes. Bacon, Aph. 8, s. 1; Bowyer, Mod. Civ. Law 33. But until it has become obsolete no custom can prevail against it. See OBSOLETE.

**JUS ITALICUM. In Roman Law.** A right bestowed upon a community by which it acquired "the privileges of a colonia Italica (*i. e.* an old colony of Roman citizens endowed with full legal rights), that its soil is therefore exempt from the land-tax and capable of quiritary ownership, in other words, is placed on the same footing as the *fundus Italicus*." Heisterbergk, *Name und Begriff des jus Italicum* (1885). Sohm, Inst. Rom. L. § 22, n. 2.

**JUS ITINERIS. In Roman Law.** A rural servitude giving to a person the right to pass over an adjoining field, on foot or horseback.

**JUS LATII.** The right or privilege conferred upon the various communities of Latium.

This has been termed a "kind of qualified citizenship (*civitas sine suffragio*), such as Rome had, in early times, granted to the inhabitants of Cære." Morey, Rom. L. 50. These rights originally included the rights of intermarriage and of commercial intercourse between Rome and the inhabitants of the Latin towns. The author last cited says: "The possession of these rights formed the essential feature of the early *jus Latii*, or *Latinitas*. In later times, however, the right which went under this name and which was bestowed upon the Latin colonies outside of Latium, included the *commercium* only;" *id.* Sohm says that from the earliest times the members of the town communities of Latium who were the original Latins had the same private marriage law as the Romans. It was, in fact, their original law, and it was because they were allies governed by the same law that they enjoyed the *jus commercii* and the *jus connubii* of the Romans. They did not, of course, possess the public rights of a Roman until the powerful interest attaching to those rights resulted in the granting of Roman citizenship first to the Latin allies then to all the Italian communities; Sohm, Inst. Rom. L. § 22. There were two forms of the *jus latii*, *latium minus* which was the older and usual one, and the *latium majus*. In communities

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in the former, only officials acquired Roman *civitas*. In those which had the latter it was extended to the decuriones. See DECURIONES; *id.* § 22, n. 2. Another authority confines the two forms to magistrates and defines them thus: "The *latium majus* raising to the dignity of Roman citizens not only the magistrate himself, but also his wife and children; the *latium minus* raising to that dignity only the magistrate himself." Bro. L. Dict.

**JUS LEGITIMUM** (Lat.). **In Civil Law.** A legal right which might have been enforced by due course of law. 2 Bla. Com. 328.

**JUS LIBERORUM. In Roman Law.** The privilege conferred upon a woman who had three or four children. In order that she should be able to take all the property given her by will, she must have had this privilege conferred upon her. Sohm, Inst. Rom. L. § 86. In the time of Hadrian, a decree was made conferring upon a mother, as such, who, being an *ingenua*, had the *jus trium liberorum*, or being a *libertina*, the *jus quatuor liberorum*, a civil law right to succeed her intestate children; *id.* § 98.

Another author defines this privilege as one by which exemption was given from all troublesome offices. Brown, L. Dict. And still another ascribes to it exemption from guardianship, priority of office-holding and a treble proportion of corn. Ad. Rom. Ant. 227.

**JUS MARITI** (Lat.). **In Scotch Law.** The right of the husband to administer, during the marriage, his wife's goods and the rents of her heritage.

In the common law, by *jus mariti* is understood the rights of the husband, as *jus mariti* cannot attach upon a bequest to the wife, although given during coverture, until the executor has assented to the legacy. 1 Bail. Eq. 214.

**JUS MERUM** (Lat.). A simple or bare right; a right to property in land, without possession, or the right of possession.

**JUS MORIBUS CONSTITUTUM.** See JUS EX NON SCRIPTO.

**JUS NATURALE.** The name given to those rules of conduct which are universally binding upon men and which are sanctioned by the dictates of right reason, as opposed to rules of conduct prescribed and enforced by the sovereign power of the state which are called positive law, known to the Romans as *jus civile*, and in modern jurisprudence as municipal law.

A much quoted definition of Ulpian was that which nature attaches to animals. Of this it has been said that it was peculiar, and the conception exercised little or no influence upon the judicial thought of Rome. Morey, Rom L. 111, where also are collected many definitions of the Roman jurists.

Sandars considers the passage from Ulpian unfortunately borrowed by Justinian and thereby removed from the connection in which it was used, which was a subsidiary and divergent line of thought, and had nothing to do with the main theory. Accordingly "in considering what the Roman jnrists meant by *jus naturale* this fragment of Ulpian may be dismissed almost entirely from our notice." Sand. Inst. Just. 7.

The conception of the *jus naturale* came from the Stoics and has been termed "by far the most important addition to the system of Roman law, which the jurists introduced from Greek philosophy." Sand. Inst. Just. Introd. xxii. And Maine says of it that "the importance of this theory to mankind has been very much greater than its philosophical deficiencies would lead us to expect." Anc. L. 71.

While it is undoubtedly true that the highest conception of law is that natural law and positive law should be entirely harmonious, it is in the domain of international law that this conception more nearly approaches realization. The *jus gentium* was a system largely based upon the *jus naturale*, and it is due to that fact that the Roman system so largely formed the basis upon which Grotius commenced to build, the system which has developed into modern international law. It has been said that while he "rejected Ulpian's definition of the *jus naturale*, he accepted the idea of natural law expressed in the later *jus gentium* of the Romans as a body of principles based upon the common reason of mankind. It was therefore possible for him to extend the equitable principles already developed in the Roman *jus gentium* to the relations existing between sovereign states. States were looked upon as moral persons—subjects of the natural law, and as equal to each other in their moral rights and obligations." Morey, Rom. L. 208. See JUS GENTIUM; LAW OF NATURE; LAW.

**JUS NON SACRUM. In Roman Law.** That portion of the *jus publicum* which regulated the duties of magistrates.

Non-sacred law; that which dealt with the duties of civil magistrates, the preservation of public order, and the rights and duties of persons in their relation to the state. Morey, Rom. L. 223. It was analogous to that which would now be called the police power.

**JUS NON SCRIPTUM.** See JUS EX NON SCRIPTO.

**JUS ONERIS FERENDI.** An urban servitude in the Roman Law, the owner of which had the right of supporting and building upon the house wall of another.

**JUS PAPIRIANUM.** A collection of *leges regia* said to have been collected from the early periods of Roman history in the time of Romulus, Numa, and other kings.

They were a private compilation described as "fragments of a collection," which, though clearly showing the religious spirit of the early law, are yet meagre and unsatisfactory." Morey, Rom. L. 25. Though a private collection, it is suggested that they received the name of royal laws merely because the regulations which they contained were placed under the immediate protection of the kings. They were concerned in the main with sacred matters, *i.e.* they were essentially of a religious and moral character, and bear clear testimony to the closeness of the original connection between law and religion; Sohm, Inst. Rom. L. § 11, n. 2.

**JUS PASCENDI. In Roman Law.** The rural servitude giving the right of pasturage on another's land.

**JUS PATRONATUS** (Lat.). **In Ecclesiastical Law.** A commission from the bishop, directed usually to his chancellor and others of competent learning, who are required to summon a jury, composed of six clergymen and six laymen, to inquire into and examine who is the rightful patron. 3 Bla. Com. 246.

**JUS PERSONARUM** (Lat.). The right of persons. See JURA PERSONARUM.

**JUS PISCANDI.** See JUS VENANDI ET PISCANDI.

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**JUS POSSESSIONIS.** The simple right of possession which may exist independently of ownership.

"Possession and ownership may, and generally do, coincide. But as a person may be the owner of a thing and not possess it, so a person may be the possessor of a thing and not be the owner. It is when the possessor is not the legal owner that it becomes important to consider to what rights he is entitled by virtue of his possession." Morey, Rom. L. 285. See JUS POSSIDENDI.

**JUS POSSIDENDI.** The right of possessing, which is the legal consequence of ownership. It is to be distinguished from the *jus possessionis* (*q. v.*), which is a right to possess which may exist without ownership,

**JUS POSTLIMINII** (Lat.). The right to claim property after recapture. See POSTLIMINY.

**JUS PRÆTORIUM.** A body of laws developed from the exercise of discretion by the prætors, as distinguished from the *leges* or positive law. See PRÆTOR.

**JUS PRECARIUM** (Lat.). **In Civil Law.** A right to a thing held for another, for which there was no remedy. 2 Bla. Com. 328.

**JUS PRESENTATIONIS.** The right of presentation.

**JUS PRIVATUM.** The municipal law of the Romans as distinguished from the *jus publicum*.

"The relations of power subsisting between persons and the world of things, or the equivalents of things, are the subject-matter of private law. Private law, in other words, has to do with the dominion of persons over things. Its pith is, therefore, contained in the law of property. The subject-matter of public law are the relations of power which subsist between persons and persons. Here, the power is ideal, in the sense that its object is the free-will of another, *i. e.* something invisible and outwardly intangible. Public law, then, has to do with the dominion of persons over persons. The rights of control with which such private law is concerned are reducible to a money value; the rights of control with which public law is concerned are not thus reducible. In private law, again, the subject of a right appears in his individual capacity, as commanding the world of material things. In public law, on the other hand, the subject of a right appears in his capacity as a member of a community, which it is his part to serve in order that he may share in the benefits it confers. Finally, as against their object, the rights of private law merely confer a power, the rights of public law, on the other hand, impose, at the same time, a duty on the person to whom the right pertains. The distinction is clearly exemplified in the case of the right of ownership in a thing, on one side, and the right of a sovereign over his people on the other." Sohm, Inst. Rom. L. §7.

**JUS PROJICIENDI** (Lat.). **In Civil Law.** The name of a servitude by which the owner of a building has a right of projecting a part of his building towards the adjoining house, without resting on the latter. It is extended merely over the ground. Dig. 50. 16. 242; 8. 2. 25; 8. 5. 8. 5.

**JUS PROPRIETATIS.** The right of property, as Blackstone phrases it: "the mere right of property without either possession or even the right of possession. This is frequently spoken of in our books under the name of mere right," *jus merum* (*q. v.*); 2 Bla. Com. 197. See RIGHT OF PROPERTY.

**JUS PROTEGENDI** (Lat.). **In Civil Law.** The name of a servitude: it is a right by which a part of the roof or tiling of one house is made to extend over the adjoining house. Dig. 50. 16. 243. 1; 8. 2. 25; 8. 5. 8. 5.

**JUS PROTIMESEOS.** The right of pre-emption of a landlord in case the tenant wishes to dispose of his rights as a perpetual lessee. Sohm, Inst. Rom. L. § 57.

**JUS PROVINCIARUM.** A franchise conferred upon provincials much more limited that that conferred upon the people of Italy.

It has been described as "equivalent to the *jus italicum* minus the freedom from land taxation which the latter right involved. In short, the provincials possessed no status as Roman citizens; and even their capacity of ownership in their own land was qualified by their tributary obligations to Rome. The civil incapacity of the provincials had reference, however, merely to their exclusion from the strictly legal rights sanctioned by the *jus civile*." Morey, Rom. L. 52.

**JUS PUBLICUM.** See JUS PRIVATUM.

**JUS QUÆSITUM** (Lat.). A right to ask or recover: for example, in an obligation there is a binding of the obligor, and a *jus quæsitum* in the obligee. 1 Bell, Com. 323.

**JUS QUIRITIUM.** Quiritarian ownership, so called under the ancient *jus civile*, because, strictly speaking, there was recognized but this one form of ownership. It could be acquired only through the technical forms of civil law, and never by a foreigner. The strictness which was observed in this respect was due to the fact that this was the form of private ownership, which, under Roman law, was as developed from the general right of dominion and ownership by the state. To prevent hardships and injustice in the strict application of the rules of law, it was permitted to the prætor to issue possessory interdicts to protect the possession of those who had not complied with all the technical conditions of ownership. In this way, legal sanction was given to the right of possession which amounted substantially to a right of property. This affords another illustration of the many points in which the Roman system presents a strict similarity to the English equity jurisprudence as long afterwards developed. Morey, Rom. L. 21, 74, 283; Sand. Inst. Just. Introd. xx.

**JUS RECUPERANDI, INTRANDI, Etc.** The right of recovering and entering upon land.

**JUS RELICTÆ** (Lat.). **In Scotch Law.** The right of a wife, after her husband's death, to a third of movables if there be children, and to one-half if there be none. See Ersk. Prin. III. IX. 6.

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**JUS RELICTI** (Lat.). **In Scotch Law.** The right of the husband in his wife's estate, which is divided in the same manner as that of the husband, in case of his predecease; one third each to the *jus relicti*, *legitim*, and dead man's part (*q. v.*).

**JUS RERUM** (Lat.). The right of things. Its principal object is to ascertain how far a person can have a permanent dominion over things, and how that dominion is acquired.

**JUS SACRUM. In Roman Law.** That portion of the public law which was concerned with matters relating to public worship and including the regulation of sacrifices and the appointment of priests. There was a general division of the *jus publicum* into *jus sacrum* and *jus non sacrum* (*q. v.*).

**JUS SANGUINIS.** The right of blood. Under the Scotch law there was a rule that no right could be lost by prescription unless it had the effect to establish it in another. Hence it was said to be a rule *juri sanguinis nunquam præscribitur;* Ersk. Prin. III. VII. 17.

**JUS SCRIPTA.** Written law. After stating that the Roman law was written and unwritten just as it was among the Greeks, Justinian adds: "The written part consists of laws, *plebiscita*, *senatus-consulta*, enactments of emperors, edicts of magistrates, and answers of jurisprudents." Sand. Inst. Just. 1, 2, 3. See JUS EX NON SCRIPTA.

**JUS SINGULARE.** A law which is an exception to the ordinary law. A special rule applicable to an individual case or class of cases. Where it benefits particular classes of persons, it is called privilege, in an objective sense; privilege in a subjective sense is a particular right conferred upon a definite person by *leges speciales*.

**JUS STILLICIDII VEL FLUMINUS RECIPIENDI. In Roman Law.** An urban servitude giving the owner a right to project his roof over the land of another or to open a house drain upon it.

**JUS STRICTUM** (Lat.). A Latin phrase, which signifies law interpreted without any modification, and in its utmost rigor. JUS ÆQUUM.

**JUS SUFFRAGII. In Roman Law.** The right of voting. This and the *jus honorum* (*q. v.*) were the public rights of the Roman citizen.

**JUS TERTII.** The right of a third person. This is set up by way of defence in many actions where it is sought to establish relations of landlord and tenant, or bailor and bailee, by the plea of setting up the *jus tertii*.

**JUS TIGNI IMMITTENDI. In Roman Law.** An urban servitude which gave the right of inserting a beam into the wall of another.

**JUS TRIPERTITUM.** A threefold right. The term is used by Justinian who says that the requisites of the Roman testament seem to have had a triple origin (*ut hoc jus tripertitum esse videatur*). Sand. Inst. Just. 2, 10, 3. "It is out of regard to this threefold derivation from the prætorian edict, from the civil law, and from the imperial constitutions, that Justinian speaks of the law of wills in his own days as *jus tripertitum*." Maine, Anc. L. 207.

**JUS UTENDI** (Lat.). The right to use property without destroying its substance. It is employed in contradistinction to the *jus abutendi*. 3 Toullier, n. 86.

**JUS VENANDI ET PISCANDI.** The right of hunting and fishing.

**JUS VITÆ NECISQUE.** The right of life and death. Under the ancient Roman law in the time of the XII. Tables, this was included in the absolute power of another.

**JUST.** This word is frequently used in legal phraseology in combination with other words, such as reasonable, equitable, convenient.

Where, as a foundation for an attachment, an affidavit was required that the plaintiff's claim is just, it is not sufficient if it does not state positively, but only inferentially, that his claim is just, and it does not amount to the same thing to say that the plaintiff "ought justly to recover the amount," or that "said several sums are justly due;" 5 Kan. 293.

In the English Traffic Act, in the phrase "just and reasonable," it was said to mean, to the advantage of the customer; 51 L. J. Q. B. 601.

Where conditions of traffic companies are to be just and reasonable, the reasonableness is a question of law, not of fact; 18 C. B. 805, 829.

It is a "just and reasonable" provision in by-laws to disqualify by reason of bankruptcy or notorious insolvency; 10 H. L. Cas. 404.

An agreement to pay what an individual (who was a taxing officer of the court of chancery) should say was a just and reasonable compensation for the services rendered by the complainant's solicitor in a suit commenced in that court, and settled before decree, obliges the party so agreeing to pay the bill of costs regularly taxed by the individual named in the agreement; 1 Den. 508. The terms "just and reasonable," as employed by the legislature in the Practice Act, obviously have reference to the rules of practice then existing by the common law, and contemplate no other or different terms than would be just and reasonable, as judged of by that practice; 1 Bradw. 39.

The words "just and fair" within the meaning of the New York statute, authorizing the imprisonment of a fraudulent debtor, were thus construed: "Where the debtor has procured from the creditor, at whose suit he is imprisoned, property by

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fraud, even if he has spent the proceeds in any way that would be unobjectionable, if they were his own, and if by loss or accident he is deprived of them, his proceedings are not just and fair, and where the debtor has combined or united with others to fraudulently obtain the property of the creditor, at whose suit he is imprisoned, even if such others got the proceeds of the fraud, and he kept none, his proceedings are not 'just and fair' within the meaning of the statute," authorizing the examination of an imprisoned debtor, in proceedings for his discharge from imprisonment, if it appear that his proceedings have not been "just and fair" towards the creditor under whose judgment he is imprisoned; 59 How. Pr. 136, 145.

Just and equitable may as well apply to authorized as unauthorized expenditures, and a claim for services and materials might be so overcharged, both as to the amount rendered, as well as the price for the same, as to make the aggregate of the demand unjust and inequitable, under an act which permits the credit of so much thereof as is just and equitable; 23 Hun 50.

In the English Companies Act, 1862, it is "just and equitable" to wind up a company when the whole substratum of the business which was the object of the company had become strictly impossible; 1 Cox 213; 3 K. & J. 78; 20 Ch. Div. 169; Buckley, Comp. Act 215.

In the phrase a "just cause" for a court to do anything, the word just "does not add much weight, though it may add a little; it means some substantial reason must be shown;" Jessel, M. R., in 21 Ch. Div. 397.

To be "just and convenient" to appoint a receiver or grant an injunction or mandamus, respect must be given to what is just according to settled principles, as well as to what is convenient; 9 Ch. Div. 89.

"All my just debts" includes all debts; Wms. Ex. 1719; L. R. 4 H. L. 506. A direction to pay debts or just debts included a mortgage debt in exoneration of the property, but 30 and 31 Vict. c. 69, § 1, did away with that reasoning; 9 Ch. Div. 12, per Jessel, M. R. A direction to pay just debts did not include a note of the testator made before he was of age, and therefore voidable; 9 Mass. 62. See also 1 Binn. 209; 1 Denio 508; 9 N. Y. 398.

**JUST BEFORE.** "At the time when," was the construction of these words in a plea to justify the killing of a dog; Ir. C. L. 156.

**JUST COMPENSATION.** See EMINENT DOMAIN.

**JUSTICE.** The constant and perpetual disposition to render every man his due. Justinian, Inst. b. 1, tit. 1; Co. 2d Inst. 56. The conformity of our actions and our will to the law. Toullier, *Droit Civ. Fr.* tit. prél. n. 5.

*Commutative justice* is that virtue whose object it is to render to every one what belongs to him, as nearly as may be, or that which governs contracts. To render commutative justice, the judge must make an equality between the parties, that no one may be a gainer by another's loss.

*Distributive justice* is that virtue whose object it is to distribute rewards and punishments to each one according to his merits, observing a just proportion by comparing one person or fact with another, so that neither equal persons have unequal thing nor unequal persons things equal. Tr. Eq. 3; and Toullier's learned note, *Droit Civ. Fr.* tit. prél. n. 7, note.

In the most extensive sense of the word, it differs little from virtue; for it includes within itself the whole circle of virtues. Yet the common distinction between them is, that that which considered positively and in itself is called virtue, when considered relatively and with respect to others, has the name of justice. But justice, being in itself a part of virtue, is confined to things simply good or evil, and consists in a man's taking such a proportion of them as he ought.

Toullier exposes the want of utility and exactness in this division of distributive and commutative justice, adopted in the *compendium* or abridgments of the ancient doctors, and prefers the divisions of *internal* and *external* justice,—the first being a conformity of our *will*, and the latter a conformity of our *actions*, to the law, their union making perfect justice. Exterior justice is the object of jurisprudence; interior justice is the object of morality. *Droit Civ. Fr.* tit. prél. n. 6, 7.

According to the Frederician Code, part 1, book 1, tit. 2, s. 27, justice consists simply in letting every one enjoy the rights which he has acquired in virtue of the laws. And, as this definition includes all the other rules of right, there is properly but one single general rule of right, namely: *Give every one his own.*

**In Norman French.** Amenable to justice. Kelham, Dict.

**In Feudal Law.** Feudal jurisdiction, divided into high (*alta justitia*), and low (*simplex inferior justitia*), the former being a jurisdiction over matters of life and limb, the latter over smaller causes. Leg. Edw. Conf. c. 26; Du Cange. Sometimes high, low, and middle justice or jurisdiction were distinguished.

An assessment; Du Cange; also, a judicial fine. Du Cange.

**At Common Law.** A title given in England and America to judges of common-law courts, being a translation of *justitia*, which was anciently applied to common-law judges, while *judex* was applied to ecclesiastical judges and others; *e. g. judex fiscalis.* Leges Hen. I. §§ 24, 63; Anc. Laws & Inst. of Eng. Index; Co. Litt. 71 *b.*

The judges of king's bench and common pleas, and the judges of almost all the supreme courts in the United States, are properly styled "justices."

The term justice is also applied to the lowest judicial officers: *e. g.* a trial justice; a justice of the peace.

**JUSTICE AYRES. In Scotch Law.** The circuits through the kingdom made for the distribution of justice. Erskine, Inst. 1. 3. 25.

**JUSTICE, DEPARTMENT OF.** The act of September 24, 1789 (1 Stat. L.



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92), organized the judicial business of the United States, made provision for an attorney-general, and charged him with the duty of prosecuting all suits in the supreme court in which the United States was in anywise interested, and of furnishing advice and opinions upon all questions of law when called upon to do so by the president or the heads of the other executive departments of the government. The federal constitution provides that "the executive power shall be vested in the President of the United States," and although it does not specify any subordinate ministerial or administrative officers, yet there is an inferential recognition of such officers in the provision that the president may require the opinion in writing of the principal officer in each of the executive departments upon any subject relating to the duties of his department, and in the provision for the appointment of certain inferior officers "by the heads of departments." The organization of these departments is by the constitution left to the congress, and it was for the purpose of providing for a department which should administer the legal branch of the government that the above act was passed; 6 Op. Att. Gen. 327.

The Department of Justice as it now exists was created by the act of June 22, 1870; 16 U. S. Rev. Stat. 1 Supp. 162; Rev. Stats. U. S. Title VIII., *passim*. See also 1 U. S. Rev. Stat. 1 Supp. pp. 773, 916, 403, 472, and 560. By this act the attorney-general is made the head of this department. He is the chief law officer of the government. He represents the United States in matters involving law questions; gives his advice and opinion when they are required by the president or by the heads of the other executive departments on questions of law arising in the administration of their respective departments; he exercises a general superintendency and direction over all United States district attorneys and marshals in all judicial districts in the states and territories; he is authorized to provide for special counsel for the United States whenever required by any department of government; he is directed to supervise and direct the defence of actions against officers of either house of congress for official acts; he designates penitentiaries for convicts in United States courts; and has general supervision and control over all United States jails and penitentiaries. In the performance of his duties he is assisted by the solicitor-general, four assistant attorneys-general, and six assistant attorneys, as well as by a certain clerical force for the routine work of the office.

By the act of June 22, 1870, provision was made for "an officer learned in the law to assist the attorney-general in the performance of his duties, called the solicitor-general." He assists the attorney-general in the performance of his general duties, and by special provision of law, in the case of a vacancy in the office of attorney-general or in his absence, exercises all of the duties of that officer. Except when the attorney-general otherwise directs, the solicitor-general conducts and argues all cases in the supreme court and in the court of claims in which the United States is interested; and when he so directs, any such case in any court of the United States may be conducted and argued by the solicitor-general, and in the same way the solicitor-general may be sent by the attorney-general to attend to the interests of the United States in any state court or elsewhere.

By the act of 1870, provision is also made for three officers learned in the law called assistant attorneys-general, who assist the attorney-general and solicitor-general in the performance of their duties. By the act of March 3, 1891, an additional assistant attorney-general was created for the purpose of defending the United States in suits brought in the court of claims under that act, for Indian depredations. Of these assistant attorneys-general, one is charged with the defence of the United States in suits brought against the government in the court of claims under its special and general jurisdiction. And he is assisted in the performance of his duties by six assistant attorneys, who, under his general supervision and direction, represent the interests of the United States in the preparation and argument of all cases in that court. The solicitor-general and assistant attorneys-general are appointed by the president of the United States by and with the advice and consent of the senate, while the assistant attorneys are appointed by the attorney-general.

The act creating the Department of Justice also provides for a solicitor of the treasury, an assistant solicitor of the treasury, solicitor of internal revenue, a naval solicitor, and an examiner of claims for the Department of State, commonly called the Solicitor of the Department of State. They are appointed by the president by and with the advice and consent of the senate, and exercise their functions under the supervision and control of the head of the Department of Justice, although they are assigned to duty in the respective departments for which they are appointed. There is also provided an assistant attorney-general for the Department of the Interior and for the Post Office Department, who likewise perform their duties under the general supervision and control of the attorney-general.

The opinions of the attorney-general are reported and have authority the same in kind, if not in degree, with the decisions of courts of justice; 6 Op. Att. Gen. 333.

**JUSTICE, FLEEING FROM.** In order to come within the exception of "fleeing from justice" in R. S. 1045, it is sufficient that there is a flight with the intention of avoiding prosecution whether a prosecution has or has not been begun. It is not necessary that there should be an intent to avoid the justice of the United States; it is enough that there is an intent to avoid the justice of the state which has

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jurisdiction over the same act; 160 U. S. 128. See FUGITIVE FROM JUSTICE; EXTRADITION; RENDITION.

**JUSTICE OF THE PEACE.** A public officer invested with judicial powers for the purpose of preventing breaches of the peace and bringing to punishment those who have violated the laws.

These officers, under the constitution of some of the states, are appointed by the executive; in others, they are elected by the people and commissioned by the executive. In some states they hold their office during good behavior; in others, for a limited period.

Justices of the peace were created by 36 Edw., cap. 12. By 12 Rich. 2, cap. 10, it was provided that there should be no more than six in every county. They were said to be judges of record. They were required to be men of the best reputation, the most prevalent men in the county, together with some lawyers; substantial persons dwelling in the county, men of good governance. They were "not qualified unless they have £12 per annum, except Men of the Law;" Cond. Gen. 145.

In People *ex rel.* Burley *v.* Howland, it was held by the New York appellate division of the supreme court that the legislature could not abolish the office of justice of the peace; 55 Alb. L. J. 319. The court said: "The office of justice of the peace is one of the oldest known to the English law. Originally it was merely a peace office, with no civil jurisdiction, but from a time long antedating the constitution (of New York) it was an office with both civil and criminal jurisdiction. Its most important functions are those of conservators of the peace, and administrators of the criminal law. The statutes conferring the powers and duties of the office date so far back in the history of English law that they may be said to be common-law powers, adopted by us with the office and inseparable therefrom."

At common law justices of the peace have a double power in relation to the arrest of wrong-doers: when a felony or breach of the peace has been committed in their presence, they may personally arrest the offender, or command others to do so, and, in order to prevent the riotous consequences of a tumultuous assembly, they may command others to arrest affrayers when the affray has been committed in their presence. If a magistrate be not present when a crime is committed, before he can take a step to arrest the offender an oath or affirmation must be made, by some person cognizant of the fact, that the offence has been committed, and that the person charged is the offender, or there is probable cause to believe that he has committed the offence.

Probably the most important function of justices of the peace, in the administration of criminal law, is their power of committing magistrates. This they have always, and in most states they have also jurisdiction, either sole or concurrent, with some criminal court of petty offences.

The constitution of the United States directs that "no warrants shall issue but upon probable cause, supported by oath or affirmation." Amendm. IV. After his arrest, the person charged is brought before the justice of the peace, and after hearing he is discharged, held to bail to answer to the complaint, or, for want of bail, committed to prison.

In some states it is held that where there are criminal courts of record in the county, justices of the peace have no trial jurisdiction in criminal cause, but can act only as committing magistrates; 33 Fla. 620; 45 La. Ann. 1012.

A justice who erroneously and in good faith excludes persons from a criminal case as spectators is not liable therefor; 86 Me. 80.

In some of the United States, justices of the peace have jurisdiction in civil cases, given to them by local regulations. The jurisdiction is usually confined to actions of contract, express or implied, replevin, and the like, where a small amount is involved. The limit ranges from $100 to $300, and usually torts and actions for unliquidated damages are not included. The local statutes must be consulted, but the statutes regulating the jurisdiction are sufficiently similar to make the citation of a few cases fairly illustrative of the principles generally applied.

In Philadelphia, under the constitution of 1873, police magistrates take the place of justices of the peace.

The civil jurisdiction of a justice of the peace did not exist by the common law, but depends upon the constitutional warrant or statutory enactment, and there are no intendments in favor of his jurisdiction; 90 Ala. 480.

Where a justice of the peace has been appointed by the proper authorities, his qualifications cannot be questioned before him; 44 Pac. Rep. (Wash.) 270; but where one elected a justice before his term begins files his bond but does not take the oath or perform any official function, a writ of replevin by him before his term actually begins is void; 8 So. Rep. (Miss.) 545. Where a justice has no jurisdiction the filing of an answer by defendant after the overruling of a motion to dismiss will not give him jurisdiction; 51 Ia. 41. Where the appointment was void the consent of parties cannot give jurisdiction to the justice; 29 S. W. Rep. (Tex.) 102.

Where an action would lie in either contract or tort and suit is begun before a justice, in order to sustain the jurisdiction the action will be presumed to have been brought upon the contract; 24 S. E. Rep. (N. C.) 709.

Jurisdiction is sufficiently shown if it appears from the entire record of the proceeding; 53 Mo. App. 44.

It is no objection to the jurisdiction that plaintiff remitted a part of his claim to bring it within the jurisdiction; 60 Ark.

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146; 115 N. C. 298; 20 S. E. Rep. (S. C.) 91; even where unliquidated damages are claimed; 23 S. E. Rep. (W. Va.) 527. But where the sum claimed is in excess of the amount limited by statute the defect cannot be cured and jurisdiction given by a stipulation that the justice may render judgment for the amount to which his jurisdiction is limited; 50 N. W. Rep. (S. D.) 961.

And where lumber was delivered by instalments and the total amount exceeded the jurisdiction, the claim could not be split up into separate actions for the different deliveries in order to bring it within the jurisdictional amount; 109 N. C. 571.

Where a stipulated attorney's fee would increase the amount beyond the jurisdiction the fee may be considered in estimating the amount in controversy; 17 S. W. Rep. (Tex.) 1085; even if the stipulation for the fee is void; 64 N. E. Rep. (S. D.) 525.

Justices of the peace have been held to have no jurisdiction in trespass for the negligent killing of an animal; 16 Pa. Co. Ct. R. 548; or negligently allowing a dangerous animal to go at large; 2 Lack. Leg. N. Pa. 143; or for injuries to a horse by a defective culvert; 5 Pa. Dist. R. 73; or in a suit on a foreign judgment; 7 Houst. 327; in an action on the case for nuisance; 4 Pa. Dist. 290; or for consequential damages due to negligence; *id.* 83. But the jurisdiction was sustained in an action for the destruction of fruit in baskets, run over and crushed by the wheels of defendant's wagon, consequential damages not being involved; 8 Houst. 19; so also there was jurisdiction of an action for killing a horse by a railroad company, because of a breach of contract to maintain cattle guards; 38 W. Va. 711.

The jurisdiction of a justice in a garnishment proceeding does not depend upon the amount the garnishee may owe; 59 Ill. App. 329; in an attachment the jurisdiction is determined by the amount in controversy, not the value of the property attached; 35 S. W. Rep. (Ark.) 214; 24 S. E. Rep. (N. C.) 671. Where the justice has jurisdiction in "matters of contract," it will cover an action for unliquidated damages for breach of contract within the jurisdiction; 55 Ark. 547.

A justice of the peace has no power to vacate a judgment unless it be one of default or non-suit; 61 Mo. App. 288; nor to settle a bill of exceptions; 44 Neb. 10; for the purpose of preserving testimony on a hearing of a motion to discharge the attachment; 43 *id.* 260; nor to grant a nonsuit where a case is on trial before a jury; 24 S. E. Rep. (Ga.) 407.

The court of a justice of the peace has been held a court of record; 57 Ind. 56; 12 Conn. 49; for the reason that it is bound to keep a record of its proceedings and has power to fine and imprison; 7 Blackf. 272. But it has also been held *contra*: 1 Pa. 307; 10 *id.* 157; Hempst. 20; Ga. Dec. pt. II. 50.

Justices of the peace are within the principle that judicial officers are not liable for damages for judicial acts, and only on ministerial acts in cases of intentional violation of law or gross negligence; 7 D. C. 264; 67 N. W. Rep. (Mich.) 982. It was held that he is not liable for rendering a judgment and issuing an order of sale in an action on which he had no jurisdiction, unless he knowingly acted outside of it; 35 S. W. Rep. (Tex.) 416; or unless he did not act in good faith; 61 N. W. Rep. (Ia.) 1004.

The refusal of a justice to approve an appeal is a ministerial act, for which an action will lie against him if he acted corruptly or maliciously; 8 Houst. 154.

Though magistrates and other *quasi*-judicial and sometimes ministerial officers are within the principle that an error of judgment or mistake of law is not punishable, in proceedings against them for acting corruptly in their office, their misapprehensions of the law may be set up in answer to the charge of corruption; 1 Term 653; 13 Q. B. 240; 4 Harring. 555, 556; 75 N. C. 281; 2 Bay 1, 385; 36 Ia. 499; 1 Mass. 227; 1 Bish. N. Cr. L. § 299.

If the action of a justice of the peace is strictly judicial and he has jurisdiction, he is not liable to a civil action, however, it may be as to criminal prosecution, though corruption is alleged; 8 Cow. 178; 38 Me. 530; 21 Barb. 207; 11 Allen 31; 22 Ill. 100; 7 Jones N. C. 525; 65 Ind. 106.

All the acts of a justice of the peace from the commencement to the close of a suit seem to be considered judicial, rather than ministerial, so far as concerns questions of his responsibility; 1 Bish. N. Cr. L. § 463, n. 3; 30 Mo. 420; see 12 Md. 340; but he is liable for exercising authority where he has none; 3 A. K. Marsh. 70; where he acts upon inadequate allegation, but has jurisdiction over the subject-matter, he is not liable; 21 Wend. 552.

As to the powers of justices of the peace, see 3 Ohio, L. J. 671; their jurisdiction; 16 Am. St. Rep. 919; summary jurisdiction; 3 L. Mag. & Rev. N. S. 1007; liability; 15 Am. L. Rev. 492; 25 Am. Rep. 698–701; authentication of judgment; 5 Am. L. Reg. 577; criminal examinations, 9 Alb. L. J. 17, 133; 11 *id.* 86; ousting jurisdiction by questions of title to land; 24 Ir. L. T. 553, 563, 577; judgments; 2 L. R. A. 881. As to the administration of this jurisdiction before there were justices of the peace, see JUSTICES IN EYRE.

See, generally, Burn; Davis; Graydon, Justice; Bache, Manual of a Justice of the Peace; Comyn, Dig.; 15 Viner, Abr. 3; Bacon, Abr.; 2 Sell. Pr. 70; 2 Phil. Ev. 239; Chitty, Pr.; 11 Myer, Fed. Dig. 773.

**JUSTICES COURTS. In American Law.** Inferior tribunals, with limited jurisdiction, both civil and criminal. There are courts so called in the states of Massachusetts and New Hampshire, and probably other states.

**JUSTICES IN EYRE.** Certain judges established, if not first appointed, A. D. 1176, 22 Hen. II.

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England was divided into certain circuits, and three justices in eyre—or justices itinerant, as they were sometimes called—were appointed to each district, and made the circuit of the kingdom once in seven years, for the purpose of trying causes. They were afterwards, when the judicial functions assumed greater importance, directed, by Magna Charta, c. 12, to be sent into every county once a year. The itinerant justices were sometimes mere justices of assize or dower, or of general jail delivery, and the like.

Speaking of the 12th century it is said that "the visitation of the counties by itinerant justices has been becoming systematic." The holding of the assize on circuit was evidently committed to judges of great prominence. "From the early years of the reign (Henry II.) we hear of pleas held on circuit by Richard Lucy the chief justiciar, by Henry of Essex the constable, and by Thomas Becket the chancellor. . . . In 1176, to execute the assize of Northampton, eighteen justices were employed, and the country was divided into six circuits; in 1179, twenty-one justices were employed, and the country was divided into four circuits; indeed from 1176 onwards hardly a year went by without there being a visitation of some part of England. These itinerant justices seem to have been chiefly employed in hearing the pleas of the crown (for which purpose they were equipped with the power of obtaining accusations from the local juries), and in entertaining some or all of the new possessory actions. The court that they held was, as already said, *curia regis*, but it was not *capitalis curia regis*, and probably their powers were limited by the words of a temporary commission. They were not necessarily members of the central court, and they might be summoned before it to bear record of their doings; still it was usual that each party of justices should include some few members of the permanent tribunal." 1 Poll. & Maitl. 134.

These justices in eyre in the reign of Henry III. are thus described: "But we may distinguish the main types of these commissions. What seems treated as the humblest is the commission to deliver a jail. This . . . is done very frequently; generally it is done by some three or four knights of the shire, and thus long before the institution of justices of the peace, the country knights had been accustomed to do high criminal justice. In order to dispose of the possessory assizes of novel disseisin and mort d'ancestor, a vast number of commissions were issued in every year. Early in Henry's reign this work was often entrusted to four knights of the shire; at a later time one of the permanent justices would usually be named and allowed to associate some knights with himself. Apparently a justice of assize had often to visit many towns or even villages in each county; he did not do all his work at the county town. It must have been heavy work, for these actions were extremely popular. In the second year of Edward's reign some two thousand commissions of assize were issued. Just at that time the practice seems to have been to divide England into four circuits and to send two justices of assize round each circuit; but a full history of the circuits would be intricate and wearisome. Above all the other commissions rank the commission for an *iter ad omnia placita*, or more briefly for an *iter*, or eyre. An eyre had come to be a long and laborious business. In the first place, if we suppose an eyre in Cambridgeshire announced, this has the effect of stopping all Cambridgeshire business in the bench. Litigants who have been told to appear before the justices at Westminster will now have to appear before the justices in eyre at Cambridgeshire. There is no business before the bench at Westminster if an eyre has been proclaimed in all the counties. Then again the justices are provided with a long list of interrogatories (*capitula itineris*) which they are to address to local juries. Every hundred, every vill in the county must be represented before them. These interrogatories—their number increases as time goes on—ransack the memories of the jurors, and the local records for all that has happened in the shire since the last eyre took place come seven years ago; every crime, every invasion of royal rights, every neglect of police duties must be presented. The justices must sit in the county town from week to week and even from month to month before they will have got through the tedious task and inflicted the due tale of fines and amercements. Three or four of the permanent judges will be placed in the commission; with them will be associated some of the magnates of the district; bishops and even abbots, to the scandal of strict churchmen, have to serve as justices in eyre. Probably it was thought expedient that some of the great freeholders of the country should be commissioned, in order that no man might say that his judges were not his peers. An eyre was a sore burden; the men of Cornwall fled before the face of the justices; we hear assertions of a binding custom that an eyre shall not take place more than once in seven years. Expedients are being adopted which in course of time will enable the justices of assize to preside in the country over the trial of actions which are pending before the benches; thus without the terrors of an eyre, the trial of civil actions can take place in the counties and jurors need no longer be ever journeying to Westminster from their remote homes. But these expedients belong for the most part to Edward's reign; under his father a jury wearily travelling from Yorkshire or Devonshire towards London must have been no very uncommon sight." 1 Poll. & Maitl. 179, 180, 181.

See 3 Bla. Com. 58; Crabb, Eng. Law 108; Co. Litt. 293.

**JUSTICES OF THE JEWS.** See JEWS.

**JUSTICES OF THE PAVILION** (*justiciarii pavilionis*). Certain judges of a pyepouder court, of a most transcendent jurisdiction, authorized by the bishop of Winchester, at a fair held at St. Giles Hills near that city, by virtue of letters-patent granted by Edw. IV. Prynne's Animadv. on Coke's 4th Inst. fol. 191.

**JUSTICES OF TRAIL BASTON.** Justices appointed by Edward I. during his absence in the Scotch and French wars, about the year 1305. They were so styled, it is said, from *trailing* or drawing the *baston* (*q. v.*), or staff of justice. They were a sort of justices in eyre, with large and summary powers. Their office was to make inquisition, throughout the kingdom, of all officers, and others, touching extortion, bribery, and such like grievances of intruders into other men's lands, barrators, robbers, breakers of the peace, and divers other offenders; Cowel; Toml.; Holt; Old. N. B. fol. 52; 12 Co. 25.

**JUSTICIAR, JUSTICIER. In Old English Law.** A judge or justice. Baker, fol. 118; Mon. Angl. One of several persons learned in the law, who sat in the *aula regis*, and formed a kind of court of appeal in cases of difficulty.

The chief justiciar (*capitalis justiciarius totius Angliæ*) was a special magistrate, who presided over the whole *aula regis*, who was the principal minister of state, the second man in the kingdom, and by virtue of his office, guardian of the realm in the king's absence. 3 Bla. Com. 37; Spelman, Gloss. 330; 2 Hawk. Pl. Cr. 6. The last who bore this title was Philip Basset, in the time of Hen. III.

**JUSTICIARII ITINERANTES** (Lat.). Justices in eyre (*q. v.*).

**JUSTICIARII RESIDENTES** (Lat.). Justices or judges who usually resided in Westminster: they were so called to distinguish them from justices in eyre. Co. Litt. 293.

**JUSTICIARY.** Another name for a judge. In Latin, he was called *justiciarius*,

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and in French, *justicier*. Not used. Bacon, Abr. *Courts* (A).

**JUSTICIES** (from verb *justiciare*, 2d pers. pres. subj., do you do justice to).

**In English Law.** A special writ, in the nature of a commission, empowering a sheriff to hold plea in his county court of a cause which he could not take jurisdiction of without this writ: *e. g.* trespass *vi et armis* for any sum, and all personal actions above forty shillings. 1 Burn, Just. 449. So called from the Latin word *justicies*, used in the writ, which runs, "*præcipimus tibi quod justicies A B*," etc.; we command you to do A B right, etc. Bracton, lib. 4, tr. 6, c, 13; Kitch. 74; Fitzh. N. B. 117; 3 Bla. Com. 3, 6.

**JUSTIFIABLE HOMICIDE.** That which is committed with the intention to kill, or to do a grievous bodily injury, under circumstances which the law holds sufficient to exculpate the person who commits it. A judge who, in pursuance of his duty, pronounces sentence of death, is not guilty of homicide; for it is evident that, as the law prescribes the punishment of death for certain offences, it must protect those who are intrusted with its execution. A judge, therefore, who pronounces sentence of death, in a legal manner, on a legal indictment, legally brought before him, for a capital offence committed within his jurisdiction, after a lawful trial and conviction of the defendant, is guilty of no offence; 1 Hale, Pl. Cr. 496.

Magistrates, or other officers intrusted with the preservation of the public peace, are justified in committing homicide, or giving orders which lead to it, if the excesses of a riotous assembly cannot be otherwise repressed; 4 Bla. Com. 178, 179. So a homicide is justifiable, when committed by an officer in defending a judge of the United States, engaged in the discharge of his judicial duties; 135 U. S. 1.

An officer intrusted with a legal warrant, criminal or civil, and lawfully commanded by a competent tribunal to execute it, will be justified in committing homicide, if in the course of advancing to discharge his duty he be brought into such perils that without doing so he cannot either save his life or discharge the duty which he is commanded by the warrant to perform. And when the warrant commands him to put a criminal to death, he is justified in obeying it; Cl. Cr. L. 134. See 113 N. C. 722. In endeavoring to make an arrest an officer has the right to use all the force that is necessary to overcome all resistance, even to the taking of life; 96 Mo. 666.

A soldier on duty is justified in committing homicide, in obedience to the command of his officer, unless the command was something plainly unlawful.

A man may be justified in killing another to prevent the debauching of his wife; 90 Ga. 472.

A private individual will, in many cases, be justified in committing homicide while acting in self-defence; 134 Ind. 46; 30 Fla. 142; 97 Ala. 32; 31 Tex. Cr. R. 56. If a trespass on the person or property of another amounts to a felony, the killing of the trespasser will be justifiable, if necessary in order to prevent it; 90 Ga. 701. It is not true as a general proposition that one who is assaulted by another with a dangerous weapon is justified in taking the life of the party so assaulting him; 45 La. Ann. 14. The same circumstances that will justify or excuse the homicide where the assault is upon one's self, will also excuse or justify the slayer if the killing is done in defence of his family or servant; 32 Fla. 56. See 86 Ky. 440. See DEFENCE.

An instruction to a jury requiring a justification of homicide to be established beyond a reasonable doubt is erroneous; 65 Hun 420.

To establish a case of justifiable homicide it must appear that the assault upon the prisoner was such as would lead a reasonable person to believe that his life was in peril; 164 U. S. 492.

See, generally, 4 Bla. Com. 178; 1 Hale, Pl. Cr. 496; 1 East, Pl. Cr. 219; 1 Russ. Cr. 538; 2 Wash. C. C. 515; Mass. 391; 1 Hawks 210; 1 Coxe, N. J. 424; 5 Yerg. 459; 9 C. & P. 22; ARREST; HOMICIDE; JUSTIFICATION.

**JUSTIFICATION. In Pleading.** The allegation of matter of fact by the defendant, establishing his legal right to do the act complained of by the plaintiff.

Justification admits the doing of the act charged as a wrong, but alleges a right to do it on the part of the defendant, thus denying that it is a wrong. Excuse merely shows reasons why the defendant should not make good the injury which the plaintiff has suffered from some wrong done. See AVOWRY.

*Trespasses. A warrant*, regular on its face, and issued by a court of competent jurisdiction, is a complete justification to the officer to whom it is directed for obeying its command, whether it be really valid or not. But where the warrant is absolutely void, or apparently irregular in an important respect, or where the act done is one which is beyond the power conferred by the warrant, it is no justification. See ARREST; TRESPASS. So, too, many acts, and even homicide committed in *self-defence*, or defence of wife, children, or servants, are justifiable; Archb. Cr. P. by Pom. 681, n.; see SELF-DEFENCE; DEFENCE; JUSTIFIABLE HOMICIDE; or in *preserving the public peace*; see ARREST; TRESPASS; or under a *license*, express or implied; 3 Cai. 261; 2 Bail. 4; 3 McLean 571; see 13 Me. 115; including entry on land to demand a debt, to remove chattels; 2 W. & S. 225; 12 Vt. 273; see 2 Humphr. 425; to ask lodgings at an inn, the entry in such cases being peaceful; to exercise an incorporeal right; 21 Pick. 272; or for *public service* in case of exigency, as pulling down houses to stop a fire; Year B. 13 Hen. VIII. 16 *b*; destroying the suburbs of a city in time of war; Year B. 8 Edw. IV. 35 *b*; entry on land to make fortifications or in *preservation* of the owner's

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rights of property; 14 Conn. 255; 4 D. & B. 110; 7 Dana 220; Wright, Ohio 333; 25 Me. 453; 6 Pa. 318; 12 Metc. 58.

*Libel and slander* may be justified in a civil action, in some cases, by proving the truth of the matter alleged, and generally by showing that the defendant had a right upon the particular occasion either to write and publish the writing or to utter the words: as, when slanderous words are found in a report of a committee of congress, or in an indictment, or words of a slanderous nature are uttered in the course of debate in the legislature by a member, or at the bar by counsel when properly instructed by his client on the subject. Comyns, Dig. *Pleader*. See SLANDER.

*Matter* in justification must be specially pleaded, and cannot be given in evidence under the general issue. See LICENSE. A plea of justification to an action for slander, oral or written, should state the charge with the same degree of certainty and precision as is required in an indictment. The object of the plea is to give the plaintiff, who is in truth an accused person, the means of knowing what are the matters alleged against him. It must be direct and explicit. It must in every respect correspond with, and be as extensive as the charge in, the declaration.

The justification, however, will be complete if it covers the essence of the libel. But it must extend to every part which could by itself form a substantive ground of action. Where the slander consists in an imputation of crime, the plea of justification must contain the same degree of precision as is requisite in an indictment for the crime, and must be supported by the same proof that is required on the trial of such an indictment. It is a perfectly well-established rule that where the charge is general in its nature, yet the plea of justification must state specific instances of the misconduct imputed to the plaintiff. And, even for the purpose of avoiding prolixity, a plea of justification cannot make a general charge of criminality or misconduct, but must set out the specific facts in which the imputed offence consists, and with such certainty as to afford the plaintiff an opportunity of joining issue precisely upon their existence. Heard, Lib. & Sl. § 240. See LIBEL.

When established by evidence, it furnishes a complete bar to the action.

**In Practice.** The proceeding by which bail establish their ability to perform the undertaking of the bond or recognizance.

It must take place before an authorized magistrate; 5 Binn. 461; 6 Johns. 124; 13 *id.* 422; and notice must, in general, be given by the party proposing the bail, to the opposite party, of the names of the bail and the intention to justify; 3 Harr. N. J. 503. See 3 Halst. 369.

It is a common provision that bail must justify in double the amount of the recognizance if exceptions are taken; 2 Hill, N. Y. 379; otherwise, a justification in the amount of the recognizance is, in general, sufficient.

It must be made within a specified time, or the persons named cease to be bail; 1 Cow. 54. See Baldw. 148.

**JUSTIFICATORS.** A kind of compurgators, or those who, by oath, justified the innocence or oaths of others, as in the case of wages of law.

**JUSTIFYING BAIL. In Practice.** The production of bail in court, who there justify themselves against the exception of the plaintiff. See BAIL; JUSTIFICATION.

**JUSTITIUM. In Civil Law.** A suspension or intermission of the administration of justice in courts; vacation time. Calv. Lex.

**JUSTIZA. In Scotch Law.** The name anciently given to a high judicial magistrate, or supreme judge, who was the ultimate interpreter of the laws, and possessed other high powers.

**JUSTLY.** The words "to act justly" or "do justice" to relatives do not create a precatory trust; 4 Ch. Div. 238.

**JUSTS or JOUSTS.** Exercises between martial men and persons of honor, with spears, on horseback; different from tournaments, which were military exercises between many men in troops. 24 Hen. VIII. c. 13.

**JUXTA CONVENTIONEM.** According to the covenant. Fleta, lib. 4, c. 16, § 6.

**JUXTA TENOREM SEQUENTEM.** According to the tenor following. 2 Salk. 417. A phrase used in the old books when the very words themselves referred to were set forth. *Id.*; 1 Ld. Raym. 415.

**JUZGADO. In Spanish Law.** The collective number of judges that concur in a decree, and more particularly the tribunal having a single judge.

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# K.

**KAIN. In Scotch Law.** A payment of fowls, etc., reserved in a lease. It is derived from *canum*, a word used in ancient grants to signify fowls or animals deliverable by the vassal to his superior as part of the *reddendum*. Erskine, Inst. 11. 10. 32; 2 Ross, Lect. 236, 405.

**KALENDÆ.** Rural chapters or conventions of the rural deans and parochial clergy, formerly held on the calends of every month. Kenn. Paroch. Antiq. 604.

**KALENDARIUM. In Civil Law.** A book containing a list of such capital sums as were lent out at interest. Sohm, Rom. L. 305.

**KANSAS.** The name of one of the states of the United States of America.

The state was carved out of a portion of the Louisiana purchase, and a small portion of the territory ceded to the United States by Texas.

The territory of Kansas was organized by an act of congress, dated May 30, 1854.

The constitution was adopted at Wyandotte July 29, 1859, and Kansas was admitted into the Union as a state, by an act of the congress, approved, January 20, 1861.

Under the constitution, the powers of the state government are divided into three departments, viz.: executive, legislative, and judicial.

EXECUTIVE DEPARTMENT.—The executive department consists of a governor, lieutenant-governor, secretary of state, auditor, treasurer, attorney general, and superintendent of public instruction, who are chosen by the electors of the state, at the time and place of voting for members of the legislature, and hold their offices for two years from the second Monday in January next after their election, and until their successors are elected and qualified.

The secretary of state, lieutenant-governor, and attorney general constitute a board of state canvassers of election, whose duty it is to meet on the second Tuesday of December succeeding each election for state officers, and proclaim the result of such election.

No member of congress, or officer of the state, or of the United States, shall hold the office of governor, except as herein provided.

In all cases of the death, impeachment, resignation, removal, or other disability of the governor, the power and duties of the office, for the residue of the term, or until the disability shall be removed, shall devolve upon the president of the senate.

The lieutenant-governor shall be president of the senate, and shall vote only when the senate is equally divided.

The senate shall choose a president *pro tempore*, to preside in case of his absence or impeachment, or when he shall hold the office of governor.

LEGISLATIVE DEPARTMENT.—The legislative power of this state shall be vested in a house of representatives and senate.

The number of representatives is regulated by law, but shall never exceed one hundred and twenty-five representatives and forty senators.

A majority of all the members elected to each house, voting in the affirmative, shall be necessary to pass any bill or joint resolution.

No bill shall contain more than one subject, which shall be clearly expressed in its title, and no law shall be revived or amended, unless the new act contain the entire act revived, or section or sections amended, and the section or sections so amended shall be repealed.

All laws of a general nature shall have a uniform operation throughout the state; and in all cases where a general law can be made applicable, no special law shall be enacted.

The legislature may confer upon tribunals transacting the county business of the several counties, such powers of local legislation and administration as it shall deem expedient.

For any speech or debate in either house, the members shall not be questioned elsewhere. No member of the legislature shall be subject to arrest, except for felony or breach of the peace, in going to or returning from the place of meeting, or during the continuance of the session; neither shall he be subject to the service of any civil process during the session, nor for fifteen days previous to its commencement.

All sessions of the legislature shall be held at the state capital, and, beginning with the session of eighteen hundred and seventy-seven, all regular sessions shall be held once in two years, commencing on the second Tuesday of January each alternate year thereafter.

The house of representatives has the sole power to impeach. All impeachments are tried by the senate. No person shall be convicted without the concurrence of two-thirds of the senators elected.

JUDICIAL DEPARTMENT. The judicial power of this state is vested in a supreme court, district courts, probate courts, justices of the peace, and such other courts, inferior to the supreme court, as may be provided by law.

The supreme court consists of one chief justice and two associate justices, who are elected by the electors of the state at large, and whose term of office, after the first, shall be six years. At the first election a chief justice shall be chosen for six years, one associate justice for four years, and one for two years.

The supreme court has original jurisdiction in proceedings in *quo warranto*, *mandamus*, and *habeas corpus*; and such appellate jurisdiction as may be provided by law.

The state is divided into thirty-five judicial districts, in each of which there is elected a district judge, who holds his office for four years.

The district courts have such jurisdiction in their respective districts as may be provided by law.

There is a probate court in each county, which is a court of record and has such probate jurisdiction and care of estates of deceased persons, minors, and persons of unsound mind, as may be prescribed by law, and shall have jurisdiction in cases of *habeas corpus*. This court consists of one judge, who is elected and holds his office for two years.

Two justices of the peace are elected in each township.

Justices of the supreme court and judges of the district courts may be removed from office by resolution of both houses, if two-thirds of the members of each house concur, but no such removal shall be made except upon complaint, the substance of which shall be entered upon the journal, nor until the party charged shall have had notice and opportunity to be heard.

*Elections.*—All elections by the people shall be by ballot, and all elections by the legislature shall be *viva voce*.

*Suffrage.*—Every person who shall give or accept a challenge to fight a duel, or who shall, knowingly, carry to another person such challenge, or shall go out of the state to fight a duel, shall be ineligible to any office of trust or profit.

Every person who shall have given or offered a bribe to procure his election, shall be disqualified from holding office during the term for which he may have been elected.

*Education.*—The legislature shall encourage the promotion of intellectual, moral, scientific, and agricultural improvement, by establishing a uniform system of common schools and schools of a higher grade, embracing normal, preparatory, collegiate, and university departments.

No religious sect or sects shall ever control any part of the common school or university funds of the state.

*Corporations.*—The legislature shall pass no special act conferring corporate powers. Corporations may be created under general laws; but such laws may be amended or repealed.

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The term corporation, as used in this article, includes all associations and joint stock companies having powers and privileges not possessed by individuals or partnerships; and all corporations may sue and be sued in their corporate name.

*Miscellaneous.*—Lotteries and the sale of lottery tickets are forever prohibited.

The legislature shall provide for the protection of the rights of women in acquiring and possessing property, real, personal, and mixed, and separate and apart from the husband; and shall also provide for their equal rights in the possession of their children.

A homestead to the extent of one hundred and sixty acres of farming land, or of one acre within the limits of an incorporated town or city, occupied as a residence by the family of the owner, together with all the improvements on the same, is exempted from forced sale, and shall not be alienated without the joint consent of husband and wife, when that relation exists; but no property shall be exempt from sale for taxes, or for the payment of obligations contracted for the purchase of said premises, or for the erection of improvements thereon; Provided, the provisions of this section shall not apply to any process of law obtained by virtue of a lien given by the consent of both husband and wife.

The manufacture and sale of intoxicating liquors shall be forever prohibited in this state, except for medical, scientific, and mechanical purposes.

No distinction shall ever be made between citizens and aliens in reference to the purchase, enjoyment, or descent of property.

There are no common-law crimes in this state. All crimes are defined and punished by statute.

The common law, as modified by constitutional and statutory law, judicial decisions, and the conditions and wants of the people, shall remain in force in aid of the general statutes in this state; but the rule of the common law, that statutes in derogation thereof shall be strictly construed, shall not be applicable to any general statute in this state, but all such statutes shall be liberally construed to promote their object.

"The body of the laws of England as they existed in the fourth year of the reign of James I. (1607) constitutes the common law of this state." 9 Kan. 252.

**KAVIL.** **In Scotch Law.** A lot. Originally the stick or rune-staff used in casting lots. Written also cavel. See Ersk. Prin. 220; Cent. Dict.

**KEELAGE.** The right of demanding money for the bottom of ships resting in a port or harbor. The money so paid is also called *keelage*.

**KEELS.** This word is applied, in England, to vessels employed in the carriage of coals. Jacob, Law Dict.

**KEEP.** To heed; observe; regard; attend to.

Neither a single act of play at a gaming-table, called a sweat cloth, at the races, nor even a single day's use of it on the race-field, is a keeping of a common gaming-table, within the Penitentiary Act for the District of Columbia; 4 Cr. C. C. 659. When it is said that a certain man keeps a woman, the popular inference is, that the relation is one which involves illicit intercourse; 36 Ala. 717. See 3 Allen 101; 52 N. H. 388. To keep a street in safe condition, means to have it so; to make and remake it so; 76 Ga. 585. To keep premises in repair is to have them at all times in that condition; 1 B. & Ald. 585.

*Keep down interest.* To pay interest periodically as it becomes due, but the phrase does not extend to the payment of all arrears of interest which may have become due on any security from the time when the instrument was executed. 4 El. & Bl. 211.

**KEEPER.** To warrant the conviction of one as the keeper of a common gaming house, he need not be the proprietor or lessee; it is sufficient if he has the general superintendence. 67 Ill. 587.

**KEEPER OF THE FOREST** (called, also, the chief warden of the forest). An officer who had the principal government over all officers within the forest, and warned them to appear at the court of justice-seat on a summons from the lord chief-justice in eyre. Manw. For. Law, part 1, p. 156; Jacob, Law Dict. See FOREST LAW.

**KEEPER OF THE GREAT SEAL** (lord keeper of the great seal). A judicial officer who is by virtue of his office a lord, and a member of the privy council. Through his hands pass all charters, commissions, and grants of the crown, to be sealed with the *great seal*, which is under his keeping. The office was consolidated with that of lord chancellor by 5 Eliz. c. 18; and the lord chancellor is appointed by delivery of the great seal, and taking oath; Co. 4th Inst. 87; 1 Hale, Pl. Cr. 171, 174; 3 Bla. Com. 47. See CANCELLARIUS; CHANCELLOR.

**KEEPER OF THE PRIVY SEAL.** The officer through whose hands go all charters, pardons, etc., signed by the king before going to the great seal, and some which do not go there at all. He is of the privy council *virtute officii*. He was first called clerk of the privy seal, then guardian, then lord privy seal, which is his present designation. 12 Ric. II. c. 12; Rot. Parl. 11 Hen. IV.; Stat. 34 Hen. VIII. c. 4; 4 Inst. 55; 2 Bla. Com. 347.

**KEEPING.** In an insurance policy a clause prohibiting the keeping or having benzine in insured premises, was held to be intended to prevent the permanent and habitual storage of the prohibited articles, and that taking it on the premises for the purpose of cleaning machinery was not within the prohibition; 92 Pa. 15.

**KEEPING BOOKS.** Preserving an intelligent record of a merchant's or tradesman's affairs with such reasonable accuracy and care as may properly be expected from a man in that business. An intentional omission, or repeated omissions, evincing gross carelessness will vitiate; an accidental failure to make a proper entry will not; 16 Bankr. Reg. 152.

**KEEPING HOUSE.** **In English Law.** As an act of bankruptcy, it is when a man absents himself from his place of business and retires to his private residence, so as to evade the importunity of creditors. The usual evidence of "keeping house" is denial to a creditor who has called for money. Robson, Bkcy.; 6 Bing. 363.

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**KEEPING OPEN.** A statute prohibiting shops to be kept open on Sunday is violated where one allows general access to his shop for purposes of traffic, though the outer entrances are closed. 11 Gray 308; 16 Mich. 472.

**KEEPING TERM. In English Law.** A duty performed by students of law, consisting in eating a sufficient number of dinners in hall to make the term count for the purpose of being called to the bar. Moz. & W.

**KEEPING THE PEACE.** See SURETY OF THE PEACE.

**KELP-SHORE.** The land between high and low water mark. Stroud. Jud. Dict.

But when the conveyance, "with the kelp-shore" by the metes and bounds given, manifestly excluded the land between high and low water mark, it was held to be excluded, and parol proof could not be received of the intention to include it; 10 Ir. C. L. 150.

**KENILWORTH, DICTUM OF.** An award made by Henry III. and parliament in 1266 for the pacification of the kingdom.

**KENNING TO THE TERCE. In Scotch Law.** The ascertainment by a sheriff of the just proportion of the husband's lands which belongs to the widow in virtue of her *terce* or third. An assignment of dower by sheriff. Erskine, Inst. 11. 9. 50; Bell, Dict.

**KENTLEDGE or KINTLEDGE.** The permanent ballast of a ship. Ab. Sh. 6.

**KENTUCKY.** The name of one of the states of the United States of America.

This state was formerly a part of Virginia, which by an act of its legislature, passed December 18, 1789, consented that the district of Kentucky within the jurisdiction of the said commonwealth, and according to its actual boundaries at the time of passing the act aforesaid, should be formed into a new state. By the act of congress of February, 1791, 1 Story, Laws 168, congress consented that, after the first day of June, 1792, the district of Kentucky should be formed into a new state, separate from and independent of the commonwealth of Virginia. And by the second section it is enacted, that upon the aforesaid first day of June, 1792, the said new state, by the name and style of the state of Kentucky, shall be received and admitted into this Union, as a new and entire member of the United States of America.

The present constitution of this state was adopted September 28, 1891. The powers of government are divided into three distinct departments, legislative, executive, and judicial.

LEGISLATIVE DEPARTMENT.—The legislative power is vested in a house of representatives and a senate, which together constitute the general assembly. The house of representatives consists of one hundred members, elected for a term of two years. They must have attained the age of twenty-four years, and have resided in the state two years preceding the election, the last year thereof in the county, town, or city for which they are chosen. Voters for representatives shall be male citizens of the age of twenty-one years, who have resided in the state two years, or in the county, town, or city one year next preceding the election.

The senate consists of thirty-eight senators, who are elected for four years, and half of the senate is chosen every second year. Senators must be citizens of the United States, of the age of thirty years, and have resided in the state six years preceding the election, the last year thereof in the district for which they are chosen.

The general assembly convenes biennially on the first Tuesday after the first Monday in January.

EXECUTIVE DEPARTMENT.—The executive power is vested in the chief magistrate, who is styled the governor of the commonwealth of Kentucky, and has the constitutional powers usually incident to the office. He is elected for a term of four years by the qualified voters of the state, and is ineligible for the succeeding four years after the expiration of the term for which he shall have been elected. He must be at least thirty years of age, a citizen of the United States, and must have been an inhabitant of the state six years next preceding his election. No member of congress, or person holding any office under the United States, or minister of any religious society, is eligible to this office.

A lieutenant-governor is chosen at every regular election for governor in the same manner and for the same term. He must have the same qualifications, and he is, by virtue of his office, speaker of the senate: has a right in committee of the whole to debate and vote on all subjects, and when the senate is equally divided, to give the casting vote. Should the governor be impeached, removed from office, die, refuse to qualify, resign, or be absent from the state, the lieutenant-governor shall exercise all the power and authority appertaining to the office of governor, until another be duly elected and qualified, or the governor, if absent or impeached, shall return or be acquitted.

The governor has a veto which may be overcome by a majority of each house of the general assembly voting by yeas and nays, and the names of the members voting for and against the bill entered in the journal. Any bill not returned by the governor within ten days (Sundays excepted) shall become a law, as if signed, unless adjournment prevent its return, in which case it shall be a law unless sent back within three days after the next meeting of the legislature. Every order, resolution, or vote, in which the concurrence of both houses may be necessary, except on a question of adjournment, shall be presented to the governor and be approved by him before it shall take effect, or, being disapproved, shall be repassed as before provided. Contested elections for governor and lieutenant-governor shall be determined by both houses of the general assembly, according to such regulations as may be established by law.

JUDICIAL DEPARTMENT.—The judicial power of the commonwealth, both as to matters of law and equity, is vested in one supreme court, styled the court of appeals, and a circuit court in each county, and such courts inferior to the supreme court as the general assembly may from time to time recommend and establish. The court of appeals consists of not less than five nor more than seven judges, who hold their offices eight years and until their successors are duly qualified, but for any reasonable cause the governor may remove any of them on the address of two-thirds of each house of the general assembly. There are now seven judges of this court. The judges are elected; and for the purpose of electing judges the state is by law divided into districts, in each of which the qualified voters elect one judge of the court of appeals. One judge is elected every two years. A judge of this court must have been for five years a resident of the state, and resident in the district for which he may be a candidate two years next preceding his election. He must be at least thirty-five years of age, and have been a practising lawyer, or a practising lawyer and judge, for eight years.

The circuit courts have original general jurisdiction of suits both at common law and equity and of criminal cases, but in Louisville and Jefferson counties a concurrent common-law jurisdiction is vested in a court of common pleas, and concurrent equity jurisdiction in a chancery court.

In each county there is a county court with jurisdiction, for probate of wills, administration of estates, supervision of guardians, and accounts of trustees, bastardy, partition, dower, roads, ferries, mills and dams, and appellate jurisdiction of certain minor appeals from magistrates. The county court is, at stated times, organized as a levy court composed of the presiding judge of the county court and the magistrates of the county, which has the power of a local legislature for county matters.

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The quarterly courts have jurisdiction in cases involving not more than two hundred dollars, not including interest, and concurrent jurisdiction of all matters within the cognizance of justices of the peace; also appellate jurisdiction from the latter, of judgments of more than ten and less than twenty-five dollars.

The county judge may hold inquisitions in lunacy. There are also justices of the peace.

The justices' courts have jurisdiction concurrent with the quarterly courts and exclusive of the circuit court, of actions to recover money on personal property up to the limit of one hundred dollars, exclusive of interest and costs. All judges are elected for terms provided by law, by the qualified voters of the district in which they hold office.

**KEROSENE.** A rock or earth oil. 69 N. Y. 26; 30 Wis. 534.

It is, in a commercial sense, a refined coal or earth oil, and is embraced within those terms as used in an insurance policy. 81 N. Y. 372.

It is not petroleum, but made from the latter by a process of a distillation and refinement; 69 N. Y. 26; 81 *id.* 278.

A court will not take judicial notice that kerosene is an "inflammable fluid" within the meaning of an insurance policy, it must be proved as a fact; 46 N. Y. 421; nor that it comes under the words "burning fluid"; 24 Hun 565. See 30 Wis. 534.

It is a question for the jury whether kerosene is a burning fluid or chemical oil; 92 Pa. 15; or a drug; 53 Vt. 418; where the court, after quoting Webster's definition of a drug, as "any mineral substance used in chemical operations," declined to say as matter of law that benzine is not included in that term. See RISKS AND PERILS; OIL.

**KEY.** An instrument made for shutting and opening a lock.

The keys of a house are considered as real estate, and descend to the heir with the inheritance; Mitch. R. P. 21; 11 Co. 50 *b*; 30 E. L. & Eq. 598; but although they follow the inheritance, they are not fixtures, so far as that the taking of them is not larceny; 5 Blackf. 417; 5 Taunt. 518.

When the keys of a warehouse are delivered to a purchaser of goods locked up there, with a view of effecting a delivery of such goods, the delivery is complete. The doctrine of the civil law is the same; Dig. 41. 1. 9. 6; 18. 1. 74; Benj. Sales, 6th Am. ed. § 1043; 1 East 192; 3 Term 464. See DONATIO MORTIS CAUSA; GIFT.

Keys are implements of housebreaking within statute 14 & 15 Vict. c. 19, § 1; for, though commonly used for lawful purposes they are capable of being employed for purposes of housebreaking; and it is a question for the jury whether the person found in possession of them by night had them without lawful excuse, with the intention of using them as implements of housebreaking; 3 C. & K. 250; 2 Den. Cr. Cas. 472; and the statute was held to include a skeleton, or any other kind of key used for purposes of housebreaking; *id.* Entering by a key left in the door locked on the outside is not housebreaking; 1 Swint. Jus. Cas. 433. See BURGLARY.

**KEYAGE.** A toll paid for loading and unloading merchandise at a quay or wharf.

**KEYS.** The twenty-four chief commoners in the Isle of Man who form the local legislature. 1 Steph. Com., 11th ed. 100.

**KIDEL or KIDDLE.** An open weir whereby fish are caught. 2 Inst. 38.

"Weirs (kidelli or gurgites) were the means usual in ancient times for appropriating and enjoying several fisheries in tidal waters." Lord Selborne, L. C., in 8 App. Cas. 144.

**KIDNAPPING.** The forcible abduction or stealing away of a man, woman, or child from their own country and sending them into another. 4 Bla. Com. 219. At common law it is a misdemeanor; Comb. 10.

There is no wide difference in meaning between kidnapping, false imprisonment, and abduction. The better view seems to be that kidnapping is a false imprisonment, which it always includes, aggravated by the carrying of the person to some other place; Archb. Cr. P. by Pom. 984; 2 Bish. Cr. L. § 750. See 85 Cal. 309. It has been held that transportation to a foreign country is not necessary, though this conflicts with Blackstone's definition, *supra*; 8 N. H. 550. See 1 East, P. C. 429. The consent of a mature person of sound mind prevents any act from being kidnapping; otherwise as to a young child; a child of nine years has been held too young to render his consent available as a defence; Cl. Cr. L. 221; 41 N. H. 53; 5 Allen 518; Thach. Cr. Cas. 488; 74 Ga. 191; 17 Blatchf. 423; but a female fourteen years of age is not kidnapped, if taken away with her consent for the purpose of marriage, and she actually marries; 91 Ga. 763; so, going away by previous arrangement with an unmarried woman who, becoming intoxicated, remained for some days, in illicit intercourse, and was then brought back at her request, was not kidnapping; 35 N. E. Rep. (Ind.) 1023. Physical force need not be applied, threats will suffice; 3 Allen 69; or fraudulently acquiring consent; 109 N. Y. 226; 88 *id.* 192. The crime may be effected by means of menaces; 20 Ill. 315; or by getting a man drunk; 25 N. Y. 373. Where the custody of a child is assigned to one of two divorced parents, and the other, or a third person employed for the purpose, carries it off, it is kidnapping; 41 N. H. 53; 5 Allen 518. It was held that within the meaning of the statute against kidnapping, any place where a child has a right to be is its residence; Wallace *v.* State, 47 N. E. Rep. (Ind.) 13. In this case two children who were acrobats had been sent away from home for the purpose of giving exhibitions to raise money with which to relieve the necessities of the family. While absent from their parents they were decoyed away by defendant, who was indicted for kidnapping under the Indiana statute. The court held that

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they had not acquired a permanent residence, but they were at a place they had a right to be—to which they had been sent by their parents, engaged in the business for which they had been sent. "The purpose of the statute here under consideration certainly was not that a child might be kidnapped at its father's house, but not if it were on a visit at a friend's in a near or distant city. The evident purpose was rather to provide against the kidnapping of a person from any place where he has a right to be, whether that be the place of his 'temporary sojourn or permanent domicile.' A child may be kidnapped, not only from its domicile or the home of its parents, but likewise from a neighbor's house, from church, or school, or hotel, from a hall of public entertainment, or, in fact, from any place where it has a right to be; and it is in that sense that the word 'residence' is here used." 17 N. Y. L. J. 842.

One who takes his child of tender years out of the state, with its consent and with the consent of the mother to whom its custody has been awarded in divorce proceedings, to prevent its presence at a criminal trial in which it had been subpœnaed as a witness, is not guilty of kidnapping; 44 Pac. Rep. (Wyo.) 51. New York, Illinois, and other states have passed statutes on kidnapping. See ABDUCTION: 1 Russ. Cr. 962; 3 Tex. 282; 12 Metc. 56; 2 Park. Cr. Ca. 590; 47 Hun 308; 146 Pa. 24. Where defendant procured an adjudication that the person alleged to have been kidnapped was insane, and, without using force, publicly conveyed her to a lunatic asylum, though she was not insane at the time, he was not guilty of the offence of kidnapping; 139 N. Y. 87.

The indictment must be found in the county in which the person was seized and not in one through which he was carried; 3 Harring. 538.

It has been held, however, that the carrying away is not essential; 8 N. H. 550. The crime includes a false imprisonment; 2 Bish. Cr. Law § 671. See 1 Russ. Cr. 716; 2 Harr. Del. 538; 3 Tex. 282; 12 Metc. 56; ABDUCTION.

It has been held that in order to rescue a kidnapped person his friends may use such force as will be necessary, and that where there is an attack upon the rescuers, a killing of the kidnapper in self-defence is excusable homicide; 25 S. W. Rep. (Ky.) 830.

*Kidnapping Act*, 1872. The stat. 35 & 36 Vict. c. 19, for the prevention and punishment of criminal outrages upon natives of the islands of the Pacific Ocean. Amended by the 38 & 39 Vict. c. 51.

**KILDERKIN.** A measure of capacity, equal to eighteen gallons.

**KILL** (Dutch). Originally the bed of a river or creek, and by relation used to mean the stream itself. It is so used in Delaware and New York, but has been said to have no distinct legal signification. 1 N. Y. 96.

**KIN.** Legal relationship; properly relations by blood, but often including those by marriage. It has been held to include a son-in-law under a statute disqualifying a justice of the peace, in cases to which his kin were parties; 16 Wis. 635; and a second cousin, of a mother under a statute disqualifying jurors in cases where persons of kin were parties; 74 Mo. 271. See NEXT OF KIN.

**KIND.** The agreement that a collector of taxes was to receive his commission "in kind" means the same kind of funds in which the tax is collected; 51 Ark. 213.

Another kind quoted is not synonymous with another quality quoted; 3 Q. B. D. 341. In this case the reference was to seed. As to loans of property to be repaid "in kind," see IN KIND; LOAN FOR CONSUMPTION.

**KINDRED.** Relations by blood. 2 Jarm. Wills 643; 62 Ga. 144; quoting 2 Wms. Ex. 815. It is in some cases, however, used to include relations in law, as children by adoption in a statute; 85 Ky. 671; but not a grandson adopted as a son, so as to make kindred include the adopting parent; 148 Mass. 619. It was held that as the word kindred in the statute of descents means lawful kindred, that term did not include the mother of a bastard, when the right accrued prior to the act enabling illegitimate children to inherit; 38 Me. 153. See 100 Ind. 280; 50 Ia. 532; 129 *id.* 243; 144 Ill. 40. See BASTARD; DESCENT AND DISTRIBUTION.

Nature has divided the kindred of every one into three principal classes. 1. His children, and their descendants. 2. His father, mother, and other ascendants. 3. His collateral relations; which include, in the first place, his brothers and sisters, and their descendants; and, secondly, his uncles, cousins, and other relations of either sex, who have not descended from a brother or sister of the deceased. All kindred, then, are descendants, ascendants, or collaterals. A husband or wife of the deceased, therefore, is not his or her kindred; 14 Ves. 372. See Wood. Inst. 50; Ayliffe, Parerg. 425; Dane, Abr.: Toullier, Ex. 382, 2 Sharsw. Bla. Com. 516, n.; Pothier, *Des Successions*, c. 1, art. 3.

**KING.** The chief magistrate of a kingdom, vested usually with the executive power. See REGNAL; SOVEREIGN.

**KING CAN DO NO WRONG.** This maxim means that the king is not responsible legally for aught he may please to do, or for any omission. Aust. Jur. sect. VI. It does not mean that everything done by the government is just and lawful, but that whatever is exceptionable in the conduct of public affairs is not to be imputed to the king; 2 Steph. Com., 11th. ed. 486; Moz. & W.

This maxim has no place in the system of constitutional law of the United States, as applicable either to the government or

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any of its officers, or of the several states or any of their officers; 101 U. S. 343. Our government is not liable for the wrongful and unauthorized acts of its officers, however high their place, and though done under a mistaken zeal for the public good; 21 Alb. L. J. 397; 2 Wall. 561; 7 *id.* 122; 8 *id.* 269. See, generally, 114 U. S. 290.

**KING'S BENCH.** See COURT OF KING'S BENCH.

**KING'S or QUEEN'S COUNSEL.** Barristers or serjeants who have been called within the bar and selected to be the king's counsel. They answer in some measure to the *advocati fisci*, or advocates of the revenue, among the Romans. They must not be employed against the crown without special leave, which was, however, always granted, at a cost of about nine pounds; 3 Sharsw. Bla. Com. 27, note.

**KING'S EVIDENCE.** An accomplice in a felony, who, on an implied promise of pardon if he fully and fairly discloses the truth, is admitted as evidence for the crown against his accomplices. 1 Phill. Ev. 81. A jury may, if they please, convict on the unsupported testimony of an accomplice; Tayl. Ev. 830; 4 Steph. Com. 398. On giving a full and fair confession of truth, the accomplice has a strong claim to a recommendation to mercy. He cannot be admitted to testify as king's evidence after judgment against him; 2 Russ. Cr. 956. In the United States, this is known as state's evidence. See ACCOMPLICE.

**KING'S PEACE.** See CONSERVATOR OF THE PEACE; PEACE.

**KING'S SILVER.** A fine or payment due to the king for leave to agree in order to levy a fine (*finalis concordia*). 2 Bla. Com. 350; Dy. 320, pl. 19; 1 Leon. 249, 250; 2 *id.* 56, 179, 233, 234; 5 Co. 39.

**KING'S WIDOW.** A widow of the king's principal tenant, who was obliged to take oath in chancery not to marry without the king's consent. Whart. Lex.

**KINGDOM.** A country where an officer called a king exercises the powers of government, whether the same be absolute or limited. Wolff. Inst. Nat. § 994. In some kingdoms, the executive officer may be a woman, who is called a queen.

**KINSBOTE** (from *kin*, and *bote*, a composition). In Saxon Law. A composition for killing a kinsman. Anc. Laws & Inst. of Eng. Index, *Bote*.

**KINSMAN.** A man of the same race or family; one related by blood. Webster.

**KIRBY'S QUEST.** An ancient record remaining with the remembrancer of the English exchequer; so called from being the inquest of John de Kirby, treasurer to Edward I.

**KISSING THE BOOK.** A ceremony used in taking the corporal oath, the object being, as the canonists say, to denote the assent of the witness to the oath in the form it is imposed. The witness kisses either the whole Bible, or some portion of it; or a cross in some countries. See the ceremony explained in Oughton's Ordo. tit. lxxx.; Consitt. on Courts, part 3, sect. 1, § 3; Junkin, Oath 173, 180; 2 Pothier, Obl., Evans ed. 234. In Pennsylvania, by act of 1895, the witness places his right hand on the Bible, but does not kiss it.

**KLEPTOMANIA.** Insanity in the form of an irresistible propensity to steal. Wharton. See 10 Tex. Cr. App. 520. A form of insanity which is said to manifest itself by a propensity to acts of theft; Tayl. Med. Jur., Bell's ed. 766. It is said to be often shown in cases of women, laboring under their peculiar diseases or of those far advanced in pregnancy. There have been instances of well-educated persons who have taken articles of no value and without apparent motive. If it appears that the accused was incompetent to know that the act was wrong, the facts may establish a plea of insanity; *id.*, quoting Tindal, C. J.

A sharp distinction is made between kleptomania and the tendency to steal so commonly observed in the well defined forms of insanity; the former is a defective mental characteristic approaching the confines of insanity on one subject alone, while the individual, on all other subjects, is perfectly sane. It differs from shoplifting in that the shoplifter steals for a purpose, and only those articles which are of value, while the kleptomaniac takes goods of any description, often of no use to herself and with no motive for their possession; 4 Am. Lawy. 533.

In determining the responsibility of such persons for their acts, the principal subjects to be considered are the absence of any real motive, the knowledge of previous acts of a similar character, the history of hereditary taint, and the presence of a neurotic condition; 3 Witth. & Beck. Med. Jur. 279.

Kleptomania is regarded as similar to homicidal insanity; 18 Tex. App. 287; 10 *id.* 520; 1 Bish. N. Cr. L. § 388; and it has been held a valid defence; 18 Tex. App. 287; but when it was rejected as a defence, the court would not disturb the verdict; 9 Co. Ct. Rep. Pa. 164.

As to irresistible impulse as a defence in criminal cases, see INSANITY.

In an English case, tried in 1875, a clergyman charged with stealing, had taken goods when the shopkeeper's back was turned and concealed them in his pocket. He at first denied taking them, then offered to pay for them, and then attempted to leave. At the trial there was medical evidence that he had suffered from brain disease, and had been quite deranged at times. The opinion of medical experts was that the accused did not know the nature or quality of the act he had committed, at the time he had committed it, and he

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was acquitted. Tayl. Med. Jur., Bell's ed. 767.

**KNAVE.** A false, dishonest, or deceitful person. This signification of the word has arisen by a long perversion of its original meaning, which was merely servant or attendant.

To call a man a knave has been held to be actionable; 1 Rolle, Abr. 52; 1 Freem. 277; 5 Pick. 244.

**KNAVESHIP. In Scotch Law.** A certain quantity of grain or meal to which the servant of the mill was entitled as of right. See SEQUEL.

**KNEEL.** To bend the knees in worship without resting on them is to kneel. 36 L. J. Ecc. 10.

**KNIGHT. In English Law.** The next personal dignity after the nobility.

In the administration of royal justice, much of the work was formerly done by the knights; as for the more solemn, ancient, and decisive processes. To swear to a question of possession, free and lawful men were required, but to give the final and conclusive verdict about a matter of right, knights were necessary. In administrative law, therefore, knights were liable to special burdens, but in no other respect did he differ from the mere free man; 1 Poll. & Maitl. 394. Of knights there are several orders and degrees. The first in rank are knights of the Garter, instituted by Edward III. in 1344; next follows, a knight banneret; then come knights of the Bath instituted by Henry IV., and revived by George I.; and they were so called from a custom of bathing the night before their creation. The last order are knights bachelors, who, though the lowest, are yet the most ancient. order of knighthood; for we find that King Alfred conferred this order upon his son Athelstan. 1 Bla. Com. 403. These are sometimes called knights of the chamber, being such as are made in time of peace, and so called because knighted in the king's chamber, and not in the field. Co. 2d Inst. 666. Knights were called *equites*, because they always served on horseback; *aurati*, from the gilt spurs they wore; and *milites*, because they formed the royal army, in virtue of their feudal tenures.

**KNIGHT-MARSHAL.** See MARSHALSEA.

**KNIGHT'S FEE** was anciently so much of an inheritance in land as was sufficient to maintain a knight; and every man possessed of such an estate was obliged to be knighted, and attend the king in his wars, or pay a pecuniary sum in lieu thereof, called *escuage*. In the time of Henry II. the estate was estimated at twenty pounds a year; but Lord Coke, in his time, states it to be an estate of six hundred and eighty acres. Co. Litt. 69 *a*. See 1 Poll. & Maitl. 232.

**KNIGHT'S SERVICE.** Upon the Norman conquest, all the lands in England were divided into knight's fees, in number above sixty thousand; and for every knight's fee, a knight was bound to attend the king in his wars forty days in a year, in which space of time a campaign was generally finished. If a man only held half a knight's fee, he was only bound to attend twenty days; and so in proportion. But this personal service, in process of time, grew into pecuniary commutations, or aids; until at last, with the military part of the feudal system, it was abolished at the restoration, by the statute of 12 Car. II. c. 24. 1 Bla. Com. 410; 2 *id.* 62; Will. Real Pr. 144; 1 Poll. & Maitl. 230.

**KNOCKED DOWN.** A phrase used with reference to an auction, when the auctioneer by the fall of his hammer, or by any other audible or visible announcement, signifies to the bidder that he is entitled to the property on paying the amount of his bid, according to the terms of the sale. 7 Hill 439.

**KNOW ALL MEN BY THESE PRESENTS.** See PRESENTS.

**KNOW.** To have knowledge; to possess information, instruction, or wisdom. 106 Mo. 135.

"It may fairly be assumed that one who has reason to believe a fact exists, knows it exists. Certainly if he be a reasonable being." Strong, J., in 101 U. S. 557.

**KNOWINGLY.** In a statute imposing a penalty upon any one who shall knowingly sell, supply, etc., actual personal knowledge. 4 Lans. 17. In an indictment, a charge that one wilfully testified falsely, includes the assertion that he knowingly so testified; 51 N. W. Rep. (Minn.) 474. The word "knowingly," or "well knowing," will supply the place of a positive averment, in an indictment or declaration, that the defendant knew the facts subsequently stated; if notice or knowledge be unnecessarily stated, the allegation may be rejected as surplusage. See Comyns, Dig. *Indictment* (G 6); 2 Cush. 577; 2 Stra. 904; 2 East 452; 1 Chitty, Pl. 367.

**KNOWLEDGE.** Information as to a fact.

The act of knowing: clear perception of the truth; firm belief; information. Knowledge "is not confined to what we have personally observed or to what we have evolved by our own cognitive faculties." 106 Mo. 135. Where in a charge in a homicide case the court used the expression "knowledge to explain," circumstances proven "tending to show that the defendant was connected with the homicide," it was held to be synonymous with "ability to explain"; 28 Fla. 511.

"Knowledge is information and information knowledge." 1 Heming, 1; 5 Esp. 53.

"Absolute knowledge can be had of but few things." 8 Allen, 35.

"In a legal sense it may be classified as positive and imputed—imputed, when the means of knowledge exist, known and ac-

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cessible to the party, and capable of communicating positive information. When there is knowledge, notice, as legally and technically understood, becomes immaterial. It is only material when, in the absence of knowledge, it produces the same results. However closely actual notice may, in many instances, approximate knowledge and constructive notice may be its equivalent in effect, there may be actual notice without knowledge; and when constructive notice is made the test to determine priorities of right, it may fall far short of knowledge and be sufficient." 81 Ala. 145.

Many acts are perfectly innocent when the party performing them is not aware of certain circumstances attending them; for example, a man may pass a counterfeit note, and be guiltless, if he did not know it was so; he may receive stolen goods, if he were not aware of the fact that they were stolen. In these and the like cases it is the guilty knowledge which makes the crime.

Such guilty knowledge is made by the statute a constituent part of the offence; and therefore it must be averred and proved as such. But it is in general true, and may be considered as a rule almost necessary to the restraint and punishment of crimes, that when a man does that which by the common law or by statute is unlawful, and in pursuing his criminal purpose does that which constitutes another and different offence, he shall be held responsible for all the legal consequences of such criminal act. When a man, without justifiable cause, intends to wound or maim another, and in doing it kills him, it is murder, though he had no intention to take life. It is true that in the commission of all crimes a guilty purpose, a criminal will and motive, are implied. But, in general, such bad motive or criminal will and purpose, that disposition of mind and heart which is designated by the generic and significant term "malice," is implied from the criminal act itself. But if a man does an act, which would be otherwise criminal, through mistake or accident, or by force or the compulsion of others, in which his own will and mind do not instigate him to the act or concur in it, it is matter of defence, to be averred and proved on his part, if it does not arise out of the circumstances of the case adduced on the part of the prosecution. Per Shaw, C. J., in 2 Metc. Mass. 192. Thus, it is not necessary, in an indictment against an unmarried man for adultery with a married woman, to aver that he knew, at the time when the offence was committed, that she was a married woman; nor is it necessary to prove such knowledge at the trial; 2 Metc. Mass. 190. See, as to the proof of guilty knowledge, 1 B. & H. Lead. Cr. Cas. 185-191. See INTENTION; IGNORANCE OF LAW. As to the doctrine of *imputed knowledge*, see NOTICE.

**KNOWN HEIRS.** In a statute relating to the sale of property of unknown heirs, it has been held to mean those persons who are known, and whose right to inherit, or the extent of whose right, to inherit, is dependent on the non-existence of other persons nearer or as near as the ancestor in the line of descent. 65 Hun 175.

# L.

**L.** The twelfth letter of the alphabet. As a Roman numeral it stands for 50. In the English money the small *l* is the sign for pounds. It is also an abbreviation for *liber* (book), law, lord. L. 5. means *Long Quinto*, which is the designation of one of the parts of the Year Books.

**LA CHAMBRE DES ESTEILLES.** The Star chamber. See COURT OF STAR CHAMBER.

**LABES REALE, REALIS, or VITIUM REALE,** in the law of Scotland, is an inherent vice or defect in the title by which anything has been acquired, which affects even the rights of purchasers and creditors who have obtained it innocently. Bell; Moz. & W.

**LABEL.** A slip of ribbon, parchment, or paper, attached to a deed or other writing to hold the appended seal.

In the ordinary use of the word, it is a slip of paper attached to articles of manufacture for the purpose of describing them or specifying their quality, etc., or the name of the maker. The use of a label has been distinguished from a trade-mark proper; Browne, Trade-Marks §§ 133, 537, 538. The use of labels will be protected by a court of equity under some circumstances; *id.* 538. See TRADE-MARK; INFRINGEMENT; UNION LABEL LAWS.

A copy of a writ in the English Exchequer. Tidd, Pr. *156.

**LABOR.** Work requiring exertion or effort, either physical or mental; toil.

Labor and business are not synonymous; labor may be business, but it is not necessarily so, and business is not always labor. Making an agreement for the sale of a chattel is not within a prohibition of common labor on a Sunday, though it is (if by a merchant in his calling) within a prohibition against business; 2 Ohio St. 387. See SUNDAY.

The labor and skill of one man are fre-

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quently used in a partnership, and valued as equal to the capital of another.

The act of February 26, 1885, forbids any person or corporation to prepay transportation or in any way assist or encourage the importation of aliens into the United States, under contract of any kind made previous to their importation, to perform labor or service therein; such contracts are declared void. The penalty is $1,000, which may be sued for by the United States or any person (including the alien) who may first bring his action therefor, as debts of like amount are now recovered in the circuit court, the proceeds to go to the treasury. The district attorney is required to prosecute the suit at the expense of the United States. Masters of vessels knowingly infringing the act are made liable to fine and imprisonment. The act does not extend to foreigners temporarily resident here who may employ servants or clerks; nor to skilled workmen imported to carry on some new industry not at present established, if such cannot be obtained here; nor to actors, artists, lecturers, or singers, nor to strictly domestic servants; nor to persons who may assist relations or friends to emigrate here. The amendment of Feb. 23, 1887, provides for the detention and return of such aliens.

The act is a constitutional exercise of the power to regulate commerce; 28 Fed. Rep. 795; it was passed to protect the health, morals, and safety of the people of this country; 5 U. S. App. 656. It must appear that the alien did in fact emigrate, and that the person who assisted him knew that he was under contract; 41 Fed. Rep. 751; there must have been a contract made previous to the importation, to perform labor here; 13 U. S. App. 472. Where an alien writes to a resident proposing to come here and enter the service of the resident and the latter accepts the offer and pays his passage, it is not within the act; 4 U. S. App. 41. A laborer on a dairy farm is not a domestic servant; 32 Fed. Rep. 75; a milliner is not a professional artist; 41 Fed. Rep. 28; a clergyman brought to this country under contract to take charge of a church as a rector is not within the act; 143 U. S. 457. One is not liable to deportation as a laborer who at the time of the passage of the act requiring alien laborers to register was a merchant and who subsequently became a laborer on a fruit farm which he leased; 71 Fed. Rep. 680: nor is a chemist on a sugar plantation, though his expenses are paid; 163 U. S. 258.

A clause in the constitution of California forbidding the employment by a corporation of any Chinese or Mongolian has been held in conflict with the treaty of the United States with China and void: 1 Fed. Rep. 481; so in New York a statute forbidding a contractor on public work to employ an alien was held a violation of the treaty with Italy and unconstitutional; 34 N. Y. Suppl. 942. See ALIEN; CITIZEN. As to new industries, see 53 Fed. Rep. 554, where the court, in charging the jury, held that the manufacture of lace, in which two or three concerns were "struggling for existence, experimenting, hoping," was a new industry, within the meaning of the act, and that it was a question of law for the court, and directed an acquittal. See LABORER; MASTER AND SERVANT; WAGES.

**LABOR ARBITRATION.** The investigation and determination of disputed matters between employers and employes.

In many of the states, state boards of arbitration have been provided by statute for the hearing and adjustment of differences between employers and their employes, and a recent federal statute applying only to railroad and transportation companies authorizes the executive to appoint commissioners for such investigation and to determine the best methods of righting the grievances of the employes; U. S. Laws, 1888, ch. 1063.

In Missouri, Colorado, and North Dakota the functions of the state board of arbitration are filled by the labor commissioner, and in New York, Ohio, New Jersey, California, Maryland, Texas, Massachusetts, Wisconsin, and Montana, there are statutory provisions for private boards of arbitration. The constitution of Wyoming provides that appeals from the decisions of compulsory boards of arbitration may be taken to the supreme court of the state, and the manner of taking such appeals must be prescribed by law; Const. Wyo. ch. 19, sec. 2.

Objections to bringing labor troubles before the state board of arbitration must be urged before such board before application to the courts; 47 La. Ann. 874; and it devolves on the board in the first instance to pass on questions of regularity and compliance with statutory provisions in the steps taken to bring the matter to its notice; *id.* See Stimson, Lab. L. §§ 67, 68.

It is a curious fact that during the struggle in this country to devise some effective system of labor arbitration, little or no attention seems to have been paid to some very successful efforts in that direction in England which long antedated any American legislation. At a very early period the regulation of wages was controlled by two masters and two journeymen, or, in default of agreement, by a magistrate after hearing both sides, but this was terminated by the separation of the masters and journeymen into two classes, and thereafter wages were fixed either by the employers or the magistrates. The latter system prevailed under the apprenticeship law of Elizabeth, and this continued until early in the eighteenth century, except in the cotton factories, which were not within the law. In this industry, there was satisfactory regulation by a joint committee of laborers and employers, but towards the latter end of the eighteenth century, the latter obtained general control and the apprentice law was repealed. From then until about 1860, this condition remained undisturbed except by frequent petitions to parliament, although in the book printing business the trades unions secured an arrangement for settling price lists by a joint committee of employers and laborers, which was in operation with good success since 1805.

In 1860 the system of arbitration and agreement originated by a manufacturer, Mr. Mundella, successfully dealt with the labor problem in the various branches of trade involved in the stocking weaving and glove industries of the three counties of Nottingham, Leicestershire, and Derbyshire. The system, in brief, provided for a court of arbitration

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and agreement to decide every question relative to wages. It consisted of nine employers and nine laborers, selected respectively by an assembly of their own class for one year. The court had a regular organization with a standing executive committee by which all disputes were disposed of so far as practicable, the final judgment, however, being entered by the court. The two interests involved negotiated with each other on perfect equality and the decisions were binding. Under this system, there was no umpire and no provision for the execution of the judgment, the reliance being entirely upon the moral force of the statute, conscience, and the pressure of public opinion. The practical working of these courts was very successful and, quoting Mr. Mundella, July 4, 1868, "during eight years we had not a single strike, and never in the history of our city and our industry did there exist such a hearty good understanding between employers and laborers as now." The rules may be found in detail in chap. 18 of The Relation of Labor to the Law of To-day, by Brentano, translated by Porter Sherman, from which the historical facts here stated are mainly taken.

Another system of courts of arbitration and agreement was that of Rupert Kettle, a judge of the county court of Worcestershire; the statutes drawn by him were adopted by the employers and laborers in the building trades in Wolverhampton. They were in their main features similar to the Mundella courts, but differed from the latter in the fundamental point of providing an impartial umpire, and through legal provisions, the judgments were made binding in law. These provisions, however, were but seldom required in practice, as the presence of an impartial umpire had a tendency to produce an agreement without calling upon him; *id.* The result of the actual working of these two systems for many years is that they have approached each other, in that those of Kettle have become mere courts of agreement and those of Mundella have in most cases elected an impartial umpire who decides in case of a tie. The relation between the trades unions and the courts of arbitration in many districts has become very intimate, the former making provision in their organization for the labor representation in the latter, paying the laborer's share of the expenses of the courts and enforcing the judgments by expelling members who do not obey them. The courts are similarly supported by societies of employers; *id.*

The work cited sums up the result:—"And from those industries at Nottingham and Wolverhampton since that time the organization of peace has extended from industry to industry and from city to city, until the system has been adopted in a greater or less degree in the most important centres of British industry. But everywhere, where in an industry a court of arbitration according to one or the other of the two systems has been established, there has been since that time neither a strike nor a lockout."

**LABOR A JURY.** To tamper with a jury; to persuade jurymen not to appear. It seems to come from the meaning of labor, to prosecute with energy, to urge: as *to labor a point*. Dy. 48; Hob. 294; Co. Litt. 157 *b*; 14 & 20 Hen. VII. 30, 11. The first lawyer that came from England to practise in Boston was sent back for laboring a jury. Washb. Jud. Hist.

**LABOR UNION.** A combination or association of laborers for the purpose of fixing the rate of their wages and hours of work, for their mutual benefit and protection, and for the purpose of righting grievances against their employers.

In England when the rate of wages was fixed by law or by the determination of a magistrate, and when there was a statutory provision that all conspiracies and covenants among workmen not to make or do their work except at a certain rate or price, it was held a criminal conspiracy for a combination of workmen to refuse to work for so much per diem, though the matter about which they conspired might be lawful for one of them or for any of them to do had they not conspired to do it; 8 Mod. 11; but in the United States, though this decision was followed in the case of the Boot and Shoemakers of Philadelphia; Pamphlet 1806; The Pittsburg Cordwainers; Pamphlet, 1816; and in 14 Wend. 9, and 2 Wheel. Cr. Cas. 262; yet they were decided by inferior courts, and in the first case before the supreme court of Pennsylvania (Com. *v.* Carlisle) that court held that a combination of employers to reduce the wages of their employes was not unlawful; Bright. 36. In the case of the Master Stevedores *v.* Walsh, Daly, J., upheld this principle and denied the authority of the English case; 2 Daly 1; as did Shaw, J., in 4 Metc. 111; and these cases may be considered as having definitely settled the law in this country that a combination of laborers for a lawful purpose does not amount to a conspiracy.

In England, however, the Journeymen Tailors case, 8 Mod. 11, was followed as late as 1855, when it was held that a bond signed by eighteen employers to conduct their business as to rates of wages, time of work, etc., was a combination in restraint of trade and null and void at common law; 6 El. & Bl. 47; and in 1869 the court was divided as to whether a labor union whose by-laws countenanced strikes was not thereby rendered illegal; L. R. 4 Q. B. 602. In 1824 the first act was passed in England which legalized the combination of workmen; 5 Geo. IV. c. 99; but this was repealed the following year, and by the repealing act the combination of workmen was made lawful for the purpose of agreeing upon the prices which they might demand and the hours during which they would work, but making punishable any attempt to enforce the laws of the combining workmen by violence and intimidation; 6 Geo. IV. c. 129. In 1871 two acts were passed for the purpose of consolidating and settling the law; 34 & 35 Vict. c. 31; and these were supplemented by the Trades Union Amendment Act of 1876; these statutes going so far as to declare such combinations lawful even when acting (peaceably) in restraint of trade.

The right of entering and leaving the service of an employer is one that every man possesses and is one of the corollaries of personal liberty, and it has almost uniformly been held that the same right might be exercised by *any number of men jointly*, if conducted in a peaceable and orderly manner and attended with no infringement of the rights of others; 23 Fed. Rep. 748; 106 Mass. 1; 54 Minn. 223; 2 Daly 1; 38 Pac. Rep. (Ore.) 547; *contra*, 32 N. J. L. 151; and labor unions have been recognized by act of congress authorizing their incorporation; U. S. Rev. Stat. 1 Suppl. 498; and by the statutes of most of the states. It has been held that such unions have an entire right to seek to compel employers to deal solely with men belonging to their

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union by all proper means, as by persuasion or even by a properly conducted strike; 60 How. Pr. 163; that if the means are not unlawful, they have a right to endeavor to persuade those who have been accustomed to deal with an employer to withdraw their trade; 77 Hun 215; that they may agree not to teach their trade to others; 113 Mass. 179; and that where the combination is peaceable and without intimidation, employes may peacefully assemble to argue and persuade concerning a reduction of wages with the expectation of a strike, and the employes will not be charged with any loss resulting from their quitting work; 24 U. S. App. 240; and they may lawfully pay the expenses of those who leave their employment and may post in their places of assembly the names of those who have contributed to the fund for the support of the workmen who have left; 17 N. Y. S. 264.

But other cases have held differently: A labor union may not prevent an employer from employing certain workmen; 59 Vt. 273; or from obtaining workmen; 54 Fed. Rep. 40; or prevent workmen from obtaining work; 5 Cox, C. C. 162; 110 N. Y. 633; or threaten a boycott; 30 Atl. Rep. (N. J.) 881; 55 Conn. 46; 45 Fed. Rep. 135; 3 R. & Corp. L. J. 561; or carry out a boycott; 62 Fed. Rep. 803; 147 Mass. 212; or strike with the intention of forcing others to join the union; 10 N. Y. St. Rep. 730; or picket the premises of an employer during a strike with the usual accompaniments of insulting and threatening words and gestures to those who work for him; 10 Cox, C. C. 592; 84 L. T. N. S. 58; 152 Pa. 595; [1896] 1 Ch. 811; but the illegality of the action and the irreparable nature of the injury must be clearly alleged; 144 N. Y. 189; 26 Ore. 527. Leaders of a labor union who receive money from an employer for ending a boycott are guilty of extortion; 133 N. Y. 649; 137 *id.* 29; and it has been held unlawful for an officer of a labor union to order the members thereof not to work for an employer; [1893] 1 Q. B. 715 (but in this case the officer was supplying the employer with goods, and his action was for the purpose of forcing his customer to refrain from acts which he had a right to do, and the action of the officer was held induced for malice); or for a delegate (requested by some of the members of the union) to induce an employer to discharge workmen; [1895] 2 Q. B. 21. If, by threats and intimidation, a labor union drives away the customers of an employer and destroys his trade, it thereby injures him by an unlawful act and is liable for damages to him whether the action was malicious or not; 13 Tenn. 521; and if such union compels a non-union man to leave his employment and prevents him from securing another situation, it is civilly liable for damages to him; 77 Md. 396.

An officer of a labor union may be enjoined from ordering the members to carry out one of the rules of the union; 54 Fed. Rep. 730; and equity may compel a labor union to recall an order to its members; *id.*

A district delegate appointed by the members of a labor union to confer with and advise them in disputes is not the servant or agent of the officers or of the members of the union; [1895] 2 Q. B. 21; and the chairman and secretary of a labor union will not be liable for the action of the district delegate in causing non-union men to be discharged from employment, or for threats of calling upon all union men to strike; *id.*

In a recent English case a trades-union district delegate notified a corporation that if it did not discharge certain of its employes, certain other employes would strike; the former were thereupon discharged and sued the district delegate. The jury found for the plaintiffs and also that the defendant maliciously induced the company to discharge the plaintiffs. Judgment thereon was affirmed by the court of appeals, but was reversed by the house of lords, by a majority of six to three; it was held that malice does not constitute a cause of action in such a case, unless there is some act of actual unlawfulness; and that the gist of this action is procuring a breach of contract, which was not present in this case; Allen *v.* Flood, 42 Sol. Journ. 108 (Dec. 18, 1897). Few legal decisions have been awaited with more interest than this one. Sir Frederick Pollock says of it: "The House of Lords never deserved better of the Common Law;" 14 Law Quart. Rev. 1. And another English law journal says that the decision "is accepted by the profession as sound. . . . In spite of numbers, the weight of judicial opinion is preponderatingly in favor of the law as now stated. The two ablest judges in courts of first instance agreed with the four greatest lawyers in the House of Lords—perhaps we should say of our generation. This is enough. It is curious that politics took sides—perhaps involuntarily; and it is also curious that trades unionism should have to be thankful that there is a House of Lords." 104 Law Times 143 (Dec. 18, 1897).

Under recent acts of congress (the Interstate Commerce Act and the Anti-trust Act of 1887 and 1890 respectively), a labor union may be guilty of criminal conspiracy or forming a combination in restraint of trade if their actions tend to obstruct interstate or foreign commerce, though they consist in merely quitting the service of an employer or preventing others from working for him; 54 Fed. Rep. 994; 55 *id.* 149; 62 *id.* 801, 824; 64 *id.* 27; or in delaying a train carrying the mails; 65 *id.* 210; 67 *id.* 698; 62 *id.* 834, 840; and equity will interfere to compel striking railroad employes to perform their duties "so long as they remain in the employment of the company;" 62 Fed. Rep. 796. That a labor union was in its origin lawful was held no ground of defence: 54 *id.* 994. But in the circuit court for the District of Massachusetts, it was held that it is not sufficient for

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an indictment to allege a purpose to drive certain competitors out of the field; it must show a conspiracy in restraint of trade by engrossing or monopolizing the market: 55 *id.* 605; but see 62 *id.* 801, where the former case was expressly disapproved.

Where the action of a labor union becomes a criminal conspiracy, the remedy is by injunction; and the equitable jurisdiction to prevent conspiracies by combinations of organized labor is justified upon the ground that, though equity will not interfere to prevent the commission of a crime, as such, yet where the acts complained of amount to an infringement of a property right, the court may act; 3 De G. F. & J. 232; or to a nuisance; 147 Mass. 212; or to a boycott; 45 Fed. Rep. 130; or to an intimidation; 51 Fed. Rep. 260. One apprehending injury from such a combination may bring a bill against one or more persons, and obtain at once without waiting for any hearing, or answer by the defendant, a preliminary injunction against not only the defendants named, but all other agents, servants, and subordinates named or unnamed; and, finally, against any person whatever who may have knowledge that such injunction has been granted; 64 Fed. Rep. 320. A disregard of such an injunction amounts to a contempt and subjects the offender to fine and imprisonment, and such offender is not entitled to a jury trial; 58 N. H. 60; 93 Ind. 239; 134 U. S. 31; and from an order in contempt there is no appeal from the court issuing it to a higher court; 71 Wis. 64; although it has been held in some jurisdictions that there may be an appeal where the injunction was issued to protect private interests and not the public; 13 Stew. (N. J.) 673; but even this appeal only goes so far as to give the appellate court the right to investigate and see whether the court below had jurisdiction of the subject-matter; 82 Mich. 75. The person in contempt may, in some jurisdictions, take the matter up by writ of certiorari; 34 Pac. Rep. (Mont.) 39; he may not have a writ of habeas corpus; 158 U. S. 564; 64 Fed. Rep. 724. Jurisdiction was expressly conferred upon the United States circuit court by the Anti-Trust Act of 1890.

A receiver appointed to take charge of property is an officer of the court; any interference with his possession is an interference with the possession of the court and is a contempt, so that a strike by a labor union which tends to interfere with the traffic of a railroad in the hands of a receiver is a contempt; 23 Fed. Rep. 544, 748; 24 *id.* 217; and it was further held that while the employes of receivers may freely quit their employment, they cannot do it in such a way as intentionally to disable the property, nor can they combine nor conspire to quit without notice, with the object and intent of crippling the property and its operation; 27 Fed. Rep. 443, where the object of the strike was to compel recognition of a secret labor organization and the right of its officers to control the operations of a railroad, the officers being not even employes; Pardee, J., said: "This intolerable conduct goes beyond criminal contempt of court into the domain of felonious crimes."

Statutes pronouncing a penalty against an employer for discharging an employe for being a member of a labor union have been passed in Massachusetts, 1892; California, Illinois, Indiana, Idaho, Missouri, and New York, 1893; Ohio and New Jersey, 1894; Wisconsin, 1895; Kansas and Pennsylvania, 1897; England, 1874; and they have been held constitutional; 30 Wkly. L. Bul. 342; but *contra* in Missouri on the grounds that such statutes are in contravention of the fifth and of the fourteenth amendments to the constitution of the United States and of the state constitution which provide that no person shall be deprived of life, liberty, or property without due process of law, and also because it is special legislation in that it does not relate to persons and things as a class—to all workmen, etc.—but only to those who belong to some lawful organization or society, evidently referring to a labor union; and the court said further: "It has none of the elements or attributes which pertain to a police regulation, for it does not in terms or by implication promote or tend to promote the public health, welfare, comfort, or safety, and if it did the state would not be allowed, under the guise and pretence of the police regulation, to encroach or trample upon any of the first rights of the citizen which the constitution intended to secure against diminution or abridgment." 81 S. W. Rep. (Mo.) 781.

See Stimson, Handbook of Labor Law; 2 Am. & Eng. Dec. in Equity 364, note; BOYCOTT; COMBINATIONS; CONSPIRACY; EMPLOYE; EIGHT HOUR LAWS; FACTORY ACTS; INJUNCTION; LABOR; MASTER AND SERVANT; RESTRAINT OF TRADE; STRIKES; TRADE UNION.

**LABORARIIS.** An ancient writ against persons who, having not whereof to live, refused to serve. Cow.; Moz. & W. It was also used against persons who, having served in the winter, refused to continue to do so in the summer; Reg. Orig. 189.

**LABORER.** A servant in husbandry or manufacture not living *intra mœnia*. Whart.

He who performs with his own hands the contract he made with his employer. 46 Pa. 57.

One who labors in a toilsome occupation; a man who does work that requires little skill as distinguished from an *artisan*. Webst. In this sense the word is held to be used in an act giving a lien to laborers; 27 Ark. 567; and in an act exempting the wages of laborers from garnishment; 17 Ill. App. 196. In an act giving preference to employes of an insolvent corporation, it is construed to be equivalent to employe; 29 N. J. Eq. 255; and the term has been held not to embrace any officer for whom

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an annual salary is specifically named and appropriated; 47 Kan. 147.

Under a mechanic's lien law which extends to those who perform labor, an architect has been held to be included; 76 N. Y. 50; 26 N. J. Eq. 29; 13 Minn. 475; *contra*, 6 Mo. App. 445; a house painter; 51 Ill. 422; a teamster; 35 Kan. 11; a drayman; 30 N. J. Eq. 588; 38 Pa. 151; a carriage-maker and a blacksmith; 66 Wis. 481; an overseer and foreman of a body of miners who performs manual labor upon the mine; 104 U. S. 176; 11 Nev. 304; 66 Wis. 481; an overseer and assistant superintendent in the repair of a mill; 1 Or. 169; a master mechanic or machinist; 67 Wis. 590; a plasterer; 7 Gray 429; *contra*, 30 Ga. 525; the manager of a company; 66 Wis. 481; and the superintendent in charge of laborers employed by a railway contractor; 6 How. Pr. 454. Those who have been held not to be laborers entitled to a lien are an engineer; 55 Wis. 465; an assistant chief engineer; 39 Mich. 47; a consulting engineer; 38 Barb. 390; a civil engineer; 84 Pa. 168; a contractor; 39 Mich. 47; 36 Neb. 154; 132 U. S. 220; foremen, clerks, and timekeepers in the employ of a contractor; 14 Kan. 563; the superintendent of a mining company; 16 Hun 186; a farm overseer; 81 N. C. 340; an architect's draughtsman; 10 Co. Ct. Rep. Pa. 171; a cook; 77 Pa. 107: 40 Cal. 185; a farmer; 12 W. R. 375; a farm overseer; 81 N. C. 340; an agent employed at a monthly salary to superintend the erection of buildings; 2 Mont. 443. One who furnishes labor and material is held not a laborer; 81 Ill. 498; and labor of oxen cannot be included in a lien for labor; 34 Me. 286: *contra*, 44 Mich. 538; 30 N. J. Eq. 588; nor can one who is employed to pay off laborers; 17 Mo. 271.

Under statutes giving a preference to laborers, servants, and employes against insolvent corporations, the word laborer is defined to include all persons doing labor or service of whatever character for or as employes in the regular employ of such corporation; N. J. Rev. Stat. 188, § 63. A superintendent of a natural gas company is a laborer under the act preferring claims of laborers: 124 Ind. 159; an assistant bookkeeper; 52 Hun 151; a head miller; 83 Mich. 513; a drayman and the services of his horses; 30 N. J. Eq. 588; an attorney; 58 N. Y. 367; *contra*, 109 N. Y. 631. A bookkeeper of a corporation, who, though occupying a position as one of the directors thereof, and for that purpose having been made a nominal holder of stock, yet has no pecuniary interest in the corporation, has been held to be a laborer and entitled to a lien for services; 35 Atl. Rep. (N. J.) 157.

Those held not within the meaning of such a statute are the president of a corporation; 41 N. J. Eq. 470; even if he were also its general manager; 35 Fed. Rep. 436; the secretary of a corporation; 1 Fed. Rep. 270; a travelling salesman: 109 N. Y. 631.

Under the statutes making stockholders individually liable for debts owing to laborers and servants, a contractor is not included in the term; 24 N. Y. 482; 46 *id.* 521; 39 Mich. 596; or a secretary; 37 N. Y. 640, overruling 43 Barb. 163; or a consulting engineer; 38 Barb. 390; or a superintendent; 17 Hun 463; or an assistant superintendent; 82 N. Y. 626, affg. 16 Hun 186; or a general manager; 90 N. Y. 213; or a travelling salesman; 50 Mich. 326; 88 Tenn. 400; but one who acted as a foreman, performed manual labor, kept the time of the men, and collected bills was held within the meaning of the statute; 29 Hun 39.

Under acts exempting the wages of laborers from garnishment a superintendent of the erection of a building; 14 Md. 559; a shipping clerk; 46 Ga. 466; an overseer of a plantation; 25 *id.* 571; the forwarding clerk of a railroad company: 51 *id.* 576; 71 *id.* 748; a bookkeeper; 77 Ga. 306; a teacher; 54 *id.* 108 (*contra*, 53 Conn. 502); a private secretary to the president of a corporation; 80 Ga. 570; and a telegraph operator; 45 Minn. 31; are held to be included in the term "laborers"; but the "boss" of a department of a factory who directs the operatives and employs and discharges them; 73 Ga. 343; a travelling salesman; 17 Ill. App. 196; 43 La. Ann. 423; an agent who sells goods by sample; 42 Minn. 112; and a railroad conductor; 77 Ga. 386; are not laborers so as to entitle them to an exemption from garnishment.

As to who are laborers under the federal contract importation act, see LABOR.

See 18 L. R. A. 305; EIGHT HOUR LAW; EMPLOYE; MASTER AND SERVANT; LABOR UNION.

**LABORERS, STATUTES OF.** 1. Stat. 23 Edw. III. passed in 1349 by the king in council. After reciting in the preamble that many of the operative class had died of the plague, and the survivors seeing the necessity to which the masters were reduced for want of servants, refused to work unless for excessive wages, it was enacted that all able-bodied persons (free or bond) under the age of three-score years, not exercising any craft, nor having the means of living or land of his own, should if required to serve in a station suiting his condition be bound to serve for the wages usual in the 20th year of the king under penalty of imprisonment. It was also provided that victuals should be sold at reasonable rates, and that no person should give to a beggar who was able to work and preferred to live in idleness, under pain of imprisonment. This statute was partially repealed by stat. 5 Eliz. c. 4; see *infra*; and finally repealed by stat. 26 & 27 Vict. c. 125, passed in 1863. 2. Stat. 12 Rich. 2, which was passed at Cambridge in 1388, forbidding a servant at the end of his term to go out of his district without a letter under the king's seal, on pain of being put in the stocks. The amount of wages was regulated and penalties inflicted on

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masters who gave more than the legal amount. There was also provision for the punishment of beggars except religious people and approved hermits, who had testimonial letters from their ordinaries. 3. Stat. 5 Eliz. c. 4, passed 1562, repealing most of the before mentioned statutes, and regulating workmen and apprentices. The justices of the peace were required to hold special sessions for fixing rates of wages, and a justice absenting himself without any lawful excuse was to be fined £10. For giving more wages than the legal amount masters were to be imprisoned for ten days and to forfeit £5. This statute was substantially repealed by subsequent ones; Moz. & W. See FACTORY ACTS.

**LAC or LAKH.** One hundred thousand. It is used in India, as—a lac of rupees is 100,000 rupees, or about £10,000 or $50,000; Wils. Glos. Ind.; Moz. & W.

**LACHES** (Fr. *lacher*). Unreasonable delay; neglect to do a thing or to seek to enforce a right at a proper time.

The neglect to do that which by law a man is obliged or in duty bound to do. 30 Fla. 612.

The neglect to do what in law should have been done, for an unreasonable and unexplained length of time and under circumstances permitting diligence. 21 S. E. Rep. (S. C.) 277.

Unlike a limitation, it is not a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced; an inequity founded upon some change in the condition or relation of the property of the parties; 10 U. S. App. 227; 145 U. S. 368. It has been said to involve the idea of negligence; the neglect or failure to do what ought to have been done under the circumstances to protect the rights of the parties to whom it is imputed, or involving injury to the opposite party through such neglect to assert rights within a reasonable time; 88 Mich. 177.

Courts of equity withhold relief from those who have delayed the assertion of their claims for an unreasonable time, and the mere fact that suit was brought within a reasonable time does not prevent the application of the doctrine of laches when there is a want of diligence in the prosecution; 5 Col. App. 391; 155 U. S. 449; 160 *id.* 171. The question of laches depends not upon the fact that a certain definite time has elapsed since the cause of action accrued, but upon whether, under all the circumstances, the plaintiff is chargeable with want of due diligence in not instituting the proceedings sooner; 160 U. S. 171; it is not measured by the statute of limitations; 155 U. S. 449; but depends upon the circumstances of the particular case; 141 U. S. 260. Where injustice would be done in the particular case by granting the relief asked, equity may refuse it and leave the party to his remedy at law; 158 U. S. 41; or where laches is excessive and unexplained; 34 U. S. App. 50. In the absence of negligence by the plaintiff, in the prosecution of his claim, no period short of the legal statute of limitations will bar an action on an equitable claim; 23 S. E. Rep. (Va.) 238; and see 78 Fed. Rep. 155, where it was held that "mere delay, for the full period of four years allowed by a state statute of limitations, in bringing a suit *in rem* to recover damages to a cargo, is not of itself, and in the absence of exceptional circumstances from which laches would be imputable, sufficient to justify the court in declining to entertain the suit;" but where the complainant has remained silent for a longer time, after the discovery of the material facts than the time limited by the statute of limitations, it is laches; 12 U. S. App. 137. Where a statute provides that no claim is barred until the limitation of the statute has accrued, a complainant cannot be denied relief because the action lacks but a few days of being barred by limitation, on the ground of gross laches; 19 So. Rep. (Miss.) 707. Where an equitable right of action is analogous to a legal right of action, and there is a statute of limitations fixing a limit of time for bringing an action at law to enforce such claims, a court of equity will, by analogy, apply the same limit of time to proceedings taken to enforce the equitable right; L. R. 6 H. L. 384. One in possession of land may wait until his title and possession are attacked before setting up equitable demands, without being chargeable with laches; 71 Fed. Rep. 618; as where an unauthorized franchise in a street is given, adjoining property owners are not required to attack the validity of the franchise until their rights are actually invaded; 2 U. S. App. 488. Mere lapse of time not sufficient to bar the corresponding legal remedy will not constitute laches barring a suit, there having been no change in the condition or relation of the property or parties which renders the enforcement of the claim inequitable; 18 So. Rep. (Ala.) 154.

Laches in seeking to enforce a right will, in many cases in equity, prejudice such right, for equity does not encourage stale claims nor give relief to those who sleep upon their rights; 4 Wait, Act. & Def. 472; 9 Pet. 405; 91 U. S. 512; 124 *id.* 183; 130 *id.* 43; 142 *id.* 236; 150 *id.* 193; 1 App. D. C. 36; 157 Mass. 46; this doctrine is based upon the grounds of public policy which requires for the peace of society, the discouragement of stale claims; 137 U. S. 556. The question whether one is precluded from equitable relief by the staleness of his demand is for the court and not for the jury; 27 Ore. 219.

It has been held to be inexcusable for 36 years; 16 U. S. App. 391; 27 years, unexplained; 145 U. S. 317; 23 years; 146 U. S. 102; 22 years during which the defendant company spent much labor and money in improvements; 161 U. S. 573; 22 years after knowledge of the facts; 152 U. S. 412; 19 years, on a bill to establish a trust; 7 U. S. App. 481; 14 years, in the assertion of title to lands which meantime had been sold to settlers; 4 U. S. App. 160; 10 years, in pro-

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ceedings to enforce a trust in lands; 158 U. S. 416; 10 years, after the foreclosure and sale of a railroad in a bill by a stockholder to set aside the sale for collusion and fraud which were patent on the face of the proceedings; 146 U. S. 88; 9 years in a suit to have a deed declared a mortgage on the ground that it was obtained by taking advantage of the grantor's destitute condition; 7 U. S. App. 233; 8 years' acquiescence in a trade-mark for metallic paint, during which the defendant had built up an extended market for his product; 17 U. S. App. 145; 8 years in proceedings where complainant in consideration of $10,000 had released certain claims and sought to set the release aside on the ground that it was entitled to a much larger sum than it received; 159 U. S. 243; 3 years, where a person bought property of uncertain value and after three years brought suit to rescind the contract on the ground of fraudulent representation; 31 U. S. App. 102.

To constitute laches to bar a suit there must be knowledge, actual or imputable, of the facts which should have prompted action or, if there were ignorance, it must be without just excuse; 38 Minn. 197; see 173 Pa. 1; 148 U. S. 360; but where there is ignorance of the party's right, laches may be excused; 2 Mer. 362; 2 Ball & B. 104; 48 Fed. Rep. 35; 66 *id.* 834; 146 U. S. 88; 152 *id.* 412; 67 N. W. Rep. (Ia.) 253. Evidence that complainant had arranged to dispose of land bequeathed to her, is evidence that she knew of the existence of a will, and a delay of twenty years in bringing an action to set aside its probate is laches; 68 N. W. Rep. (Mich.) 139. Defence of laches on the ground that one might by inquiry have learned the facts relied on and filed his bill accordingly, is not available to one who is under obligation to disclose such facts without inquiry; 62 Fed. Rep. 869.

One who seeks to impeach a transaction on the ground of fraud must seek redress promptly; 173 Pa. 1; 2 Del. Ch. 247; 58 Fed. Rep. 460; 180 Pa. 529; 169 *id.* 359. Mere lapse of time will sometimes render a fraudulent transaction unimpeachable; 9 Pet. 405; 83 Va. 451; 37 W. Va. 215; 142 Ill. 409; 153 *id.* 293; but when the fraud is secret and suit is begun within a reasonable time after its discovery, laches is not a defence; 37 U. S. App. 61. Laches was held not imputable to a delay of more than ten years in filing a bill to set aside a fraudulent conveyance; 62 Ill. App. 193. See 61 Ark. 527. It is not so much the duty of a suitor in equity to be diligent in discovering his rights as to be prompt in asserting them after they become known; 27 U. S. App. 594; and a delay of eleven months in asking for the reformation of a mortgage on the ground of mutual mistakes was held not such laches as to bar the right of a subsequent mortgagee with knowledge of the mistake; 43 N. E. Rep. (Ind.) 259. Laches in assailing a fraud will not be imputed until the discovery of the fraud by the party affected thereby; 34 Fla. 149; and it has been held that delay will not defeat the right to relief in case of fraud, unless the fraud is known or ought by due diligence to have been known; 22 U. S. App. 12. Ignorance of facts complained of as fraud has been held no excuse for laches when the facts were evidenced by public records accessible to all, unless some affirmative act of deception be shown or some misleading device intended to prevent inquiry and exclude suspicion; 71 Fed. Rep. 7.

Laches may also be excused from the obscurity of the transaction; 2 Sch. & L. 487; see 93 Mich. 285; by the pendency of a suit; 1 Sch. & L. 413; and where the party labors under a legal disability, as insanity; 2 Yerg. 193; infancy; 80 Ala. 402; 71 Mo. 358; 55 Ark. 85; 17 R. I. 519; or coverture; 55 Md. 277; 9 N. J. Eq. 572; 19 Ves. 640; poverty is no excuse for laches; 71 Fed. Rep. 21; 149 U. S. 287; nor are ignorance and absence from the country; 4 U. S. 642; and no laches can be imputed to the public; 4 Mass. 522; 143 *id.* 424; 3 S. & R. 291; 97 Ill. 91; 92 Ind. 107; 85 Ky. 198. Laches on the part of its officers cannot be imputed to the government and no period of delay on the part of the sovereign power will serve to bar its right either in a court of law or equity when it sees fit to enforce it for the public benefit; 9 Wheat. 720; 97 U. S. 584; 130 *id.* 263; 15 C. C. A. 117; 67 Fed. Rep. 969; but though not ordinarily a defence to a suit brought by the government, where such suit is brought solely to benefit a private individual or where the government sues to enforce a right of its own, growing out of some ordinary commercial transaction, it may be set up as a defence; 127 U. S. 338; 91 *id.* 389; 67 Fed. Rep. 975; 71 *id.* 250. It is not a rule of universal application that laches cannot be set up in defence of a suit to enforce a charitable trust; 71 Fed. Rep. 259. Laches of a testator will be imputed to his executor; 34 U. S. App. 50.

The defence of laches may be raised by a general demurrer; 82 Md. 459; 3 App. D. C. 219; 33 Atl. Rep. (R. I.) 876; 157 Ill. 462; 160 *id.* 563; or by plea or answer, or presented by argument either upon a preliminary or final hearing; 37 U. S. App. 109. That the defence to laches must be made by answer and not by demurrer, see 147 N. Y. 241. Even though laches is not pleaded or the bill demurred to, courts of equity may withhold relief from those who have delayed the assertion of their claims for an unreasonable time; 164 U. S. 502. See INJUNCTION.

**LACTA.** A lack of weight; deficiency in the weight of money. The verb lactare said to have been used in an assize of statute in the 6th year of King John. Spel. Gloss.

**LACUS. In Old English Law.** An alloy of silver with base metal. Fleta l. 22, § 6. **In Civil Law.** A lake, a receptacle for water which is never allowed to get dry. Dig. 43, 14, 1, 3.

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**LADA.** A method of trial by purgation. In vogue among the Saxons by which a person was purged of an accusation, as of an oath or ordeal. Spel. Gloss.

**In Old English Law.** A lade or load. A water course, a trench or canal for draining marshy lands. Spel. Gloss.

A court of justice. A lade or lath. Cow.

**LADEN IN BULK. In Maritime Law.** Having the cargo loose in the hold, and not enclosed in boxes, bales, bags, or casks.

**LADY.** In England, the proper title of any woman whose husband is higher in rank than baronet or knight, or who is the daughter of a nobleman not lower than an earl, though the title is given by courtesy also to the wives of baronets and knights. Cent. Dict.

The word lady is derived from *hloef dig* (loaf day), which being applied to the mistress of a house came to be softened into the familiar term lady. On that day, it was the custom for the mistress of the manor to distribute bread to her poorer neighbors. Townsend, Manual of Dates, title Lady; 1 Chamb. Book of Days 154.

**LADY-DAY.** The 25th of March, the feast of the Annunciation of the Blessed Virgin Mary. In parts of Ireland, however, they so designate the 15th of August, the festival of the Assumption of the Virgin.

Upon a parol demise, rent to take place from the following Lady day, evidence of the custom of the country is admissible to show that by Lady day the parties meant Old Lady Day; 4 B. & Ald. 588.

**LADY'S FRIEND.** Previous to the act of 1857, abolishing parliamentary divorces, a functionary in the British house of commons. When the husband sued for a divorce, or asked the passage of an act to divorce him from his wife, he was required to make a provision for her before the passage of the act; it was the duty of the lady's friend to see that such a provision was made. Macq. H. & W. 213.

**LÆNLAND.** Land held of a superior whether much or little. 1 Poll. & Maitl. 38. Land given to the lessee and to two or three successive heirs of his; synonymous with loan land. This species of tenure seems to have been replaced by that of holding by book or bocland. See Maitl. Doomsday Book and Beyond 318. See FOLCLAND.

**LÆSA MAJESTAS** (Lat.). Læse-majesty, or injured majesty; high treason. It is a phrase taken from the civil law, and anciently meant any offence against the king's person or dignity, defined by 25 Edw. III. c. 6. See Glanv. lib. 5, c. 2; 4 Bla. Com. 75; Br. 118; CRIMEN LÆSÆ MAJESTATIS.

**LÆSIO ENORMIS.** The injury sustained by a party to an owner's contract who is overreached by the other to the extent of more than one-half the value of the thing sold. A rescript of Diocletian permitted a rescission of the sale by a vendor unless the purchaser agreed to the additional amount required to make up the value of the thing sold. Sohm, Inst. Rom. L. § 69.

It was sometimes called *læsio ultra dimidium*. Colq. C. L. § 2094.

**LÆSIONE FIDEI, SUITS PRO.** Proceedings in the ecclesiastical courts for spiritual offences against conscience, for non-payment of debts, or breaches of civil contracts. This attempt to turn the ecclesiastical courts into courts of equity was checked by the Constitution of Clarendon, A. D. 1164, *q. v.*, 3 Bla. Com. 52; Whart. Lex.

**LAET. In Old English Law.** One of a class between servile and free. 1 Palg. Rise & Prog. 334.

Of this class a very recent work says: "Thus degrees of servility are possible. A class may stand, as it were, half-way between the class of slaves and the class of free men. The Kentish law of the seventh century as it appears in the dooms of Æthelbert, like many of its continental sisters, knows a class of men who perhaps are not free men and yet are not slaves; it knows the *laet* as well as the *theow*. From what race the Kentish *laet* has sprung, and how, when it comes to details, the law will treat him—these are obscure questions, and the latter of them cannot be answered unless we apply to him what is written about the *laeti*, *liti*, and *lidi* of the continent. He is thus far a person that he has a small wergild but possibly he is bound to the soil. Only in Æthelbert's dooms do we read of him. From later days, until Domesday Book breaks the silence, we do not obtain any definite evidence of the existence of any class of men who are not slaves but none the less are tied to the land." Maitl. Domesd. 27. The *laete* were afterwards termed by the Normans *buiri*, *burs* or *coliberti*; *id.* 36. "His services, we are told, vary from place to place; in some districts he works for his lord two days a week and during harvest-time three days a week; he pays gafol in money, barley, sheep, and poultry; also he has ploughing to do besides his week-work; he pays hearth-penny; he and one of his fellows must between them feed a dog. It is usual to provide him with an outfit of two oxen, one cow, six sheep, and seed for seven acres of his yardland, and also to provide him with household stuff; on his death all these chattels go back to his lord. Thus the boor is put before us as a tenant with a house and a yardland or virgate, and two plough oxen. He will therefore play a more important part in the manorial economy than the cottager who has no beasts. But he is a very dependent person; his beasts, even the poor furniture of his house, his pots and crocks, are provided for him by his lord. Probably it is this that marks him off from the ordinary *villanus* or 'townsman' and brings him near the serf. In a sense he may be a free man." *id.* 37.

In an earlier work of the same author it is said: "Once and only once, in the earliest of our Anglo-Saxon texts (Æthelb. 26), we find mention, under the name of *laet*, of the half-free class of persons called *litus* and other like names in continental documents. To all appearance there had ceased to be any such class before the time of Alfred: it is therefore needless to discuss their condition or origin." 1 Poll. & Maitl. 13.

**LAGA.** The Law.

The word was also extensively used to designate loss; observed in particular districts as Mercen lage, West Saxon lage, Dane lage.

**LAGAN** (Sax. *liggan, cubare*). See LIGAN.

**LAGE DAY or LAGH DAY.** A day of open court; a day of the county court. Cow.; Toml.; Moz. & W.

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**LAGE MAN or LAGA MAN.** A juror. Cow. **In Old English Law.** A man vested with or at least qualified for the exercise of jurisdiction, or sac and soc. Co. Litt. 58 *a*. See LAWMAN.

**LAGEN or LAGENA.** A measure of six sextari. Fleta l. 2, c. viii. It was generally used as a measure of ale.

**LAGER BEER.** See BEER.

**LAGHSLITE or LAHLSLIT** (Sax.). A breach of law. Cowel. A mulct for an offence, viz. : twelve " ores." 1 Anc. Inst. & Laws of Eng. 169.

**LAGU.** Se LAGA.

**LAHMAN.** Anciently a lawyer. Maitl. Domesd. 189. It seems to be another form of lage man, which see.

**LAICUS** (Eccl. Lat.). A layman; laic; one not belonging to the priesthood. Harper's Lat. Dic.

**LAID OUT.** Used in reference to ways, it describes all conditions of a way, such as a way voted to be built, a way being built, or a way built. The context usually determines the meaning of the expression. 83 Me. 514.

**LAIRWITE** (from the Sax. legan, to lie together, and wite, a fine, etc.). A fine for the offence of adultery and fornication which the lords of some manors had the privilege of imposing on their tenants. Co. 4 Inst. 206; Fleta, lib. 1, c. 47.

**LAIS GENTS** (O. Fr.). Secular people; laymen; a jury.

**LAITY.** Those persons who do not make a part of the clergy. They are divided into three states: 1. *Civil*, including all the nation, except the clergy, the army, and navy, and subdivided into the *nobility* and the *commonalty*. 2. *Military*. 3. *Maritime*, consisting of the navy. Whart. Lex. In the United States the division of the people into clergy and laity is not authorized by law, but is merely conventional.

**LAIZ, LEEZ** (O. Fr.). A legate. Kelh.

**LAKE.** A body of water surrounded by land, or not forming part of the ocean, and occupying a depression below the ordinary drainage level of the religion. Cent. Dict.

The fact that there is a current from a higher to a lower level does not make that a river which would otherwise be a lake; and the fact that a river swells out in broad pond-like sheets with a current does not make that a lake which would otherwise be a river; 14 N. H. 477.

The earlier decisions of the courts in this country tended to support the doctrine that no riparian owner could acquire title to the bed of any lake however small; 7 Allen 158; 13 Pick. 261; 30 Me. 47; 13 *id.* 198; but they were based upon the Massachusetts ordinance of 1647 (when the territory of Maine was a part of Massachusetts) which provided that all lakes more than ten acres in extent should be the property of the state for the benefit of the public. Other state courts followed these decisions, however, and while it is a recognized principle in this country that the title to the soil below the waters of a navigable lake is in the state and not in the owner of the abutting soil; 92 N. Y. 463; 34 Ohio St. 492; 34 La. Ann. 838; 19 Barb. 484; 45 Vt. 215; it has been also held that this principle applies to the bed of a non-navigable lake; 42 Wis. 248; 76 Ind. 302; 61 N. W. Rep. (Ia.) 250; 54 N. Y. 377; 120 Ill. 509; but see as to the last case, 140 U. S. 371, which held that the Illinois case did not establish in that state the doctrine that the bed of small lakes does not belong to riparian owners, there being another ground on which the decision was also based; therefore, although it is the practice of the federal courts to follow the decisions of the state courts, they refused in this instance so to do, reversing 16 Fed. Rep. 823. Later decisions in New York also overruled the case of Wheeler *v.* Spinola, 54 N. Y. 377; and hold that the bed of a non-navigable inland lake belongs to the abutting riparian owner; 134 N. Y. 355, reversing 11 N. Y. S. 87; and see in support of this doctrine, 62 Mich. 626; 32 N. J. L. 369; 58 Ind. 248; 61 N. W. Rep. (S. D.) 479; 47 Ohio St. 326.

Where a non-navigable inland lake is the subject of private ownership, neither the public nor an adjacent land owner has a right to boat upon it or to fish in its waters; 24 N. E. Rep. (Ohio) 686; and such an owner may lease his interest in the bed of the lake for a term of years, reserving to himself the right of fishing therein during such term; 11 Ohio Cir. Ct. Rep. 508.

In North Carolina it has been held that the bed of a lake may be the subject of private ownership, but if the waters are navigable in their natural state, the public have an easement of navigation in them which cannot be obstructed; 100 N. C. 477. The riparian proprietor upon a navigable lake has the exclusive right of access to and from the lake in front of his land and of building wharves in aid of navigation not interfering with the public easement; 42 Wis. 214; 10 Mich. 125. See 45 Vt. 215. In England, a non-tidal lake is the subject of private ownership; L. R. 8 App. Cas. 641.

Where the ownership of the bed of the lake is in the state it has no power to arbitrarily destroy the rights of the riparian owner on such lake without his consent and without due process of law, for the sole purpose of benefiting some other riparian owner or for any other merely private purpose; and an act authorizing the drainage of such a lake without the consent of a riparian owner is unconstitutional; 67 N. W. Rep. (Wis.) 918; nor have a board of supervisors, in the absence of a statute directly conferring it, the right to construct a bridge over such a lake; 42 N. W. Rep. (Ia.) 506.

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In the case of a meandered lake the riparian proprietor is held entitled to the middle thereof; 61 N. W. Rep. (S. D.) 479; but in Illinois the title to such waters and the land covered by them is held to be in the state in trust for the people; 161 Ill. 462. Meander lines do not cut off land between such lines and the waters of a meandered lake; 121 Ind. 51; 42 Wis. 233; 44 Mich. 403; 65 Miss. 46; 140 U. S. 371; and derelict land left by the receding waters of a meandered lake is held to belong to the riparian owners; 25 Ark. 120; 32 Pac. Rep. (Utah) 690; but not where the lake is artificially drained; 61 N. W. Rep. (Ia.) 250; and in Illinois, gradual recession of the waters of a meandered lake is held to give the riparian proprietors the right to the new land by following the recession of the waters to their edge; but a considerable body of new land suddenly or perceptibly formed by reliction is held to belong to the state: 161 Ill. 462.

See 18 L. R. A. 695, n.; Ang. Waterc., 7th ed. 65; BOUNDARY; GREAT LAKES; HIGH SEAS; NAVIGABLE WATERS; PONDS; RIPARIAN RIGHTS; WATERS.

**LAMANEUR** (Fr.). **In French Law.** A harbor or river pilot. Ord. Mar. liv. 4, 3.

**LAMB.** A sheep, ram, or ewe, under the age of one year. 4 C. & P. 216.

**LAMBARDE'S ARCHAION.** A discourse upon the high court of justice in England, by William Lambarde, published in 1635. Marv. Leg. Bibl.

**LAMBARDE'S ARCHAIONOMIA.** A collection of the laws of the Anglo-Saxons, William the Conqueror and Henry I. published in 1568 by the same author, keeper of the records in the tower. See Marv. Leg. Bibl.; Allibone, Dict. Authors.

**LAMBARDE'S EIRENARCHA.** A work by the same author upon the office and duties of a justice of the peace. Editions were published in Latin in 1579 and 1581, and in English it was published in 1599. See Marv. Leg. Bibl.; Allibone, Dict. Authors.

**LAMBETH DEGREE.** A degree given by the archbishop of Canterbury. 1 Bla. Com. 381, n. Although he can confer all degrees given by the two universities, the graduates have many privileges not shared by the recipients of his degrees.

**LAMMAS DAY.** The 1st of August. Cowel. It is one of the Scotch quarter days, and is what is called a "conventional term." Moz. & W.

"This was one of the four great pagan festivals of Britain, the others being on 1st November, 1st February, and 1st May. The festival of the Gule of August, as it was called, probably celebrated the realization of the first fruits of the earth, and more particularly that of the grain-harvest. When Christianity was introduced, the day continued to be observed as a festival on these grounds, and, from a loaf being the usual offering at church, the service, and consequently the day, came to be called *Hlaf-mass*, subsequently shortened into Lammas. . . . This we would call the rational definition of the word Lammas. There is another, but in our opinion utterly inadmissible, derivation, pointing to the custom of bringing a lamb on this day, as an offering to the cathedral church of York. Without doubt, this custom, which was purely local, would take its rise with reference to the term Lammas, after the true original signification of that word had been forgotten." Chamb. Book of Days.

**LAMMAS LANDS.** Open, arable, and meadow land which was kept open and by many owners in severalty during so much of the year as was necessary to receive and remove the crop of the several owners, after which they were held and used in common, not only to the owners, but to inhabitants of the parish, manor, or borough. Since Sept. 2, 1752, such lands are open August 12th, under 24 Geo. II. c. 23, § 5; but their name was derived from the earlier practice of keeping them open from Lammas Day to Lady Day. See Cooke, I. A. 47; Elton, Commons 36; 6 Ch. D. 500.

These lands were thus recently defined: "Lands belonging to the owner in fee simple who is absolutely the owner in fee simple, to all intents and purposes for half the year; and the other half of the year he is still the owner in fee simple, subject to a right of pasturage over the land by other people." Jessel, M. R., in 46 L. J. Ch. 721; 6 Ch. D. 507.

**LANA** (Lat.). Wool for carding and spinning. Dig. 7, 8, 12; Harper's Lat. Dict.

**LANCASTER.** See COURTS OF THE COUNTY PALATINE.

**LANCETI.** Vassals who were obliged to work for their lord one day in the week from Michaelmas to Autumn, either with fork, spade, or flail at the lord's option. Spel. Glos.

**LANES, DEZ** (O. Fr.). Of the laity. Kelh.

**LANNS MANNUS** (O. Fr.). A lord of the manor. Kelh.

**LAND.** Any ground, soil, or earth whatsoever: as, meadows, pastures, woods, waters, marshes, furzes, and heath. 45 N. H. 313.

An estate of frank tenement at the least. Shepp. Touch. 92.

In a technical sense, freeholds are not included in the term lands; 3 Madd. 535. The term *terra* in Latin was used to denote land from *terendo quia vomere teritur* (because it is broken by the plough), and accordingly, in fines and recoveries, land, *i. e. terra*, was formerly held to mean arable land. Salk. 256; Cowp. 346; Co. Litt. 4 *a*. But see Cro. Eliz. 476; 4 Bingh. 90; Burt. R. P. 196. See also 2 P. Wms. 458, n.; 5 Ves. 476; 20 Vin. Abr. 203.

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At common law the term land has a two-fold meaning. In its more general sense, it includes any ground, soil, or earth whatsoever, as meadows, pastures, woods, marshes, furze, etc.; 1 Inst. 4 *a*; 2 Bla. Com. 18. In its more limited sense, the term land denotes the quantity and character of the interest or estate which the tenant may hold in land. The land is one thing, and the estate in land is another thing, for an estate in land is a time in land or land for a time. Plowd. 555.

Generally, in wills, "land" is used in its broadest sense; Schoul. Wills § 498; 1 Jarm. Wills 604, n.; 1 Pow. Dev. 186; 10 Paige 140. A freehold estate in reversion or remainder will pass under the term; 2 Vern. 461; 3 P. Wms. 55; 17 Barb. 86; or in a deed; 10 Paige, Ch. 156. But as the word has two senses, one general and one restricted, if it occur in connection with other words which either in whole or in part, supply the difference between the two senses, that is a reason for taking it in its less general sense: *e. g.* in a grant of lands, meadows, and pastures, the former word is held to mean only arable land. Cro. Eliz. 476, 659; 5 Johns. 440.

If one be seized of some lands in fee, and possessed of other lands for years, all in one parish, and he grant all his lands in that parish (without naming them), in fee-simple, or for life, by this grant shall pass no more but the lands he hath in fee-simple; Shepp. Touchst. 92. But if a man have no freehold estate, "lands," in a will, will pass his leasehold; and now, by statute, leasehold will pass if no contrary intent is shown, and the description is applicable even if he have freehold; 1 Vict. c. 26; 2 B. & P. 303; Cro. Car. 292; 1 P. Wms. 286; 11 Beav. 237, 250.

Incorporeal hereditaments will not pass under "lands," if there is any other real estate to satisfy the devise; but if there is no other such real estate they will pass, by statute; Moore 359, pl. 49. See REAL PROPERTY; FIXTURES. Incorporeal hereditaments have been held not land; 2 Sandf. Sup. Ct. N. Y. 552. See 39 N. Y. 87; *contra*, 46 N. Y. 46; 82 *id.* 459; 101 *id.* 322. The word land does not comprehend rents which are incorporeal, which are not lands, but mere rights or profits issuing out of lands and tenements corporeal; 4 Watts 109; 5 Denio 324. In a statute the term has been held to include an easement, if such construction appears to have been in accordance with the intention of the legislature; 15 L. J. Chan. 306. Land has been held to include servitudes, easements, rents, and other incorporeal hereditaments, and all rights thereto and interests therein, equitable as well as legal; 51 N. W. Rep. (Ia.) 18; 19 N. Y. S. 890; and to be synonymous with the terms real estate and real property; 49 Fed. Rep. 549; and to include leases for years; remainders, reversions, rent-charges, tithes, advowsons, and titles of honor; 30 Ch. Div. 136.

Land has an indefinite extent upward as well as downward; therefore, land legally includes all houses or other buildings standing or built on it, and whatever is in a direct line between the surface and the centre of the earth; 3 Kent 378, n. See Co. Litt. 4 *a*; 37 Minn. 4; 9 Day 374; Wood, Inst. 120; 2 Bla. Com. 18; 1 Cruise, Dig. 58; REAL PROPERTY.

*The right to develop the natural resources of land.* All land is held subject to the right, in the state, of taxation and eminent domain. The right to put his land to the most profitable use for his own benefit is one of the landowner's privileges, but how far this right extends has been the subject of much adjudication by the courts. He may develop its natural resources by mining, even if by so doing he injure the property of an adjacent landowner; 8 Atl. Rep. (Pa.) 620; 113 Pa. 126 (overruling 86 *id.* 401; and see 24 *id.* 298, where Black, C. J., laid down the rule that "the necessities of one man's business cannot be the standard of another's rights in a thing belonging to both"); he may make use of springs on his land, even if he thereby drain a stream in which others have a property right; 25 *id.* 528; he may increase the volume of water in such a stream by draining his own swamp land; 26 *id.* 407; and if by any of these methods, he injure another, it is a *damnum absque injuria*.

He may not collect upon his land or suffer to accumulate there anything which, if it escape, may do injury to others, without being liable for all the damage it may do; L. R. 3 H. L. 330; he may not erect upon his land a manufacturing establishment, which is not intended to develop its natural resources, without being liable for any nuisance it may create to others; 28 Atl. Rep. (Md.) 845; 62 Hun 306; 145 Pa. 324; and he may be enjoined from maintaining a nuisance on his land, where such nuisance can be avoided, without proof of damage to plaintiff or negligence on the part of defendant. See FIRE.

He may not divert the water of a stream to an unusual course, even if the quantity of water is not diminished thereby; 43 N. Y. S. 29.

He may not obstruct a passway over his land which has been continuously used by the public for more than 15 years; 38 S. W. Rep. (Ky.) 690.

He may explode nitro-glycerine for the purpose of increasing the flow of natural gas, although by so doing he draw gas from the land of another; 31 N. E. Rep. (Ind.) 57, 61; but he is held liable in damages where he uses for that purpose an explosive so powerful as to injure the property of an adjoining owner; 17 N. Y. S. 22; and he may be enjoined from so doing where he can obtain the same result, although at an increased cost to himself; 43 N. Y. Suppl. 1.

As to acts by an adjoining owner, whereby the right of vertical and lateral support to one's land by the subjacent or adjacent soil is interfered with, see LATERAL SUPPORT.

As to acts by an adjoining owner inter-

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fering with light and air, see ANCIENT LIGHTS.

As to what covenants run with the land, see COVENANTS.

See also REAL PROPERTY; EASEMENTS; BOUNDARIES; LAKES; WATER COURSES; RIVERS; MINES AND MINING; REMAINDERS; REVERSIONS.

**LAND BOOK.** See LANDBOC.

**LAND CEAP, LAND CHEAP** (land, and Sax. *ceapan*, to buy). A fine payable in money or cattle, upon the alienation of land, within certain manors and liberties. Cowel, Gloss.

**LAND CERTIFICATE.** A certificate given to a registered proprietor of freehold land under the English Land Transfer Act of 1875. A similar certificate is given to the transferee on every subsequent transfer. It contains a description of the land as it appears on the register and the name and address of the proprietor, and is *prima facie* evidence of the truth of the matters therein set forth.

**LAND COP.** The sale of land which was evidenced in early English law by the transfer of a rod or festuca (*q. v.*) as a symbol of possession which was handed by the seller to the reeve and by the reeve to the purchaser. The conveyance was made in court, it is supposed, for securing better evidence of it, and barring the claims of expectant heirs: Maitl. Domesd. B. 323.

**LAND COURT. In American Law.** The name of a court which formerly existed in the city of St. Louis, state of Missouri, having sole jurisdiction in St. Louis county in suits respecting lands, and in actions of ejectment, dower, partition. As to the United States courts for the determination of land claims, see UNITED STATES COURTS.

**LAND GABEL.** A tax or duty on land. See GABEL. It is said to have been originally a penny for a house; Spel. Gloss.; and by another authority, in Domesday Book it was a quit-rent for a house site similar to the modern ground rent. Whart. L. Dict. Spelled also Land Gable. Moz. & W.

**LAND GABLE.** See LAND GABEL.

**LAND GRANT.** A legislative appropriation of a portion of the public domain either for charitable or eleemosynary purpose, or for the promotion of the construction of a railroad or other public work.

Although the public lands of the United States and of the various states have been to a great extent conveyed by deeds or patents issued in virtue of general laws, many specific grants have also been made, and were the usual method of transfer during the colonial period. See 3 Wash. R. P. 181; 4 Kent 450, 494; 8 Wheat. 543; 6 Pet. 548; 16 *id.* 367.

It is always to be borne in mind in construing a congressional grant that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of congress; and this intent should not be defeated by applying to the grant the common-law rule making grants applicable only to transfers between private parties; 97 U. S. 491. Followed in 10 Am. & Eng. R. Cas. 552. To ascertain that intent courts will look to the condition of the country at the time of making the grants, as well as the purpose of the grants as expressed on their face; 26 Am. & Eng. R. Cas. 513; 113 U. S. 618.

All government grants are to be strictly construed against the grantees. Nothing passes but what is conveyed in clear and explicit language, and nothing can be implied; 23 How. 66; 23 N. J. Eq. 441.

The provisions of various acts of congress that the land-grant railroads "shall be and remain a public highway for the use of the government, free from all toll or other charge for transportation of any property or troops of the United States," mean that the government may use the roads, with all fixtures and appurtenances, but not that it may compel the roads to transport property and troops without compensation; 12 Ct. of Cl. 35. Such a railroad is under a perpetual contract made by the Land Grant Act of May 17, 1856, to carry the mails at such rates as congress may by law direct or the post-master-general determine; 21 Ct. of Cl. 155.

Priority of grant settles the title of the railroad where the claims conflict and not the priority in filing maps of definite location; 146 U. S. 570; and when grants are made to two railroads, none of the land passes to the second which comes within the prospective rights of the first; *id.* 615.

Title does not vest until the lands are actually selected and set apart under the direction of the secretary of the interior; 141 U. S. 358; 52 Minn. 397.

In case of conflict between railroad land grants the elder title must prevail. So held, where the Northern Pacific Railroad claimed land in Minnesota under a grant of July 2, 1864, and the St. Paul and Pacific Railroad claimed part of the same lands under acts of congress of March 3, 1865, and March 3, 1871; 139 U. S. 1.

Where lands are granted by acts of congress of the same date, or by the same act, in aid of two railroads that must necessarily intersect, each grantee takes an undivided moiety of the lands within the conflicting limits; 159 *id.* 349, 372.

Where congress grants the odd-numbered sections of land for a given distance on each side of a railroad, before the road is located, the title does not pass to any particular sections until the line of the road is made certain, which makes certain also the sections granted: 9 Wall. 95.

Where an act of congress makes a grant of land of the odd-numbered sections within a certain distance of a railroad, the title of the corporation to the land vests at once, and can only be thereafter divested by the

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government for a failure to perform conditions imposed, or upon a proper proceeding instituted to revest the title in the government ; 32 Fed. Rep. 457.

The revocation of a land grant to a corporation which has become dormant, and the transfer thereof to another corporation by an act of the state legislature, is not an invasion of private rights and does not, unless so expressed or clearly implied, burden the transfer with the debts of the dormant corporation; 163 U. S. 31.

Where land is granted to a railroad company before its tract is located, the title to the specific land attaches by a location of the road, and takes effect by relation as of the date of the grant, so as to cut off intervening claims of other roads, claiming under other grants, unless the lands are specially reserved in the statute ; 97 U. S. 491.

The grant to the Northern Pacific R. R. of certain public lands is a grant *in præsenti*. Yet it is in the nature of a float, and the title does not attach to any specific section until capable of identification ; but when once identified, the title attaches as of the date of the grant ; 15 U. S. App. 279. A railroad company takes title to the land upon complying with the act and not before ; 15 *id.* 359.

In acts making land grants to railroad companies, conditions are usually imposed which must be complied with to make the grant operative. Among such conditions are frequently named such as make the grant dependent upon the amount of net earnings, and accordingly, the phrase has been frequently the subject of construction in that connection. "Net earnings," within the meaning of such a law, are ascertained by deducting from gross earnings all ordinary expenses of organization and of operating the road, and expenditures *bona fide* made in improvements, and paid out of earnings, and not by the issue of bonds or stock ; but not deducting interest paid on any of the bonded debt of the company ; 99 U. S. 402. Followed in 20 Ct. of Cl. 70 ; 29 Am. & Eng. R. Cas. 884 ; 27 Fed. Rep. 1. See LANDS, PUBLIC.

**LAND-MARK.** A monument set up in order to ascertain the boundaries between two contiguous estates. For removing a land-mark an action lies. 1 Thomas, Co. Litt. 787. See MONUMENTS.

**LAND OFFICE.** A government bureau established in 1812, originally connected with the treasury, but since 1849 forming a division of the department of the interior.

The commissioner of the general land office performs, under direction of the secretary of the interior, all executive duties appertaining to the surveying and sales of the public lands of the United States, or in any wise respecting such public lands, and also such as relate to private grants of land, and the issuing of patents for all land under the authority of the government ; Rev. Stats. U. S. secs. 446–461 ; he has absolute jurisdiction of any particular grant of public land ; 158 U. S. 155 ; he has the power to supervise the action of the officers of a local land office and to annul a fraudulent entry, but his action is not conclusive ; 4 U. S. App. 332 ; and the courts are not concluded by the decision of the land department on a question of law ; 159 U. S. 46.

The general land office has charge of the record of title to the vast area known as the public domain, and all business pertaining to the survey, disposition, and patenting of the public lands of the United States is transacted through it or under its order and supervision. All questions of fact decided by the general land office are binding everywhere, and injunctions and mandamus proceedings will not lie against its officers ; 9 Wall. 575 ; 7 *id.* 847 ; 9 *id.* 298 ; but a court of equity, after the title has passed from the United States, may relieve against mistakes of law in collateral proceedings, but it must be clear that a mistake of law has been committed ; 96 U. S. 535 ; and if the alleged mistake be a mixed one of law and fact so that the court cannot separate it so as to see clearly where the mistake of law is, the decision is conclusive ; 101 *id.* 476.

Decisions of the land office upon questions of fact within their jurisdiction cannot be reviewed in a collateral proceeding ; 158 U. S. 240. Its construction upon an act of congress and its usage for eighteen years is entitled to considerable weight ; 148 U. S. 562. Its decisions upon questions of fact are conclusive ; 158 U. S. 155. Its rules and regulations have the effect and force of law on the due observance of which all citizens have the right to rely ; 19 U. S. App. 10.

In all matters confided by law to their examination and decision the United States land officers act judicially, and their decisions are as final as those of other courts ; 5 Minn. 223 ; and although such action is generally conclusive, the land office, up to the issuing of the patent in their divestiture of title, cannot by its subsequent action upon a fictitious claim defeat rights already vested. See LAND PATENT.

In a bill which seeks to show that a decision of the land department was procured by fraud, it must be shown that some trick or deceit was practised on the officers of the department. Where such a bill attacks such a decision on the ground that the officers of the department have misconstrued and misapplied the law, it must set out the evidence and what the department found the facts to be, so that the court can separate the department's finding of facts from its conclusions of law. It is not necessary to give notice of a contest before the land department to the predecessors in title of a claimant ; 80 Fed. Rep. 425.

**LAND PATENT.** A muniment of title issued by a government or state for the conveyance of some portion of the public domain.

The issue of a land patent is the convey-

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ance of public lands to the person or persons who, by compliance with the law, have become entitled thereto under a land grant (*q. v.*). It is a conveyance by the government when it has any interest to convey. 121 U. S. 488.

A patent issued under the act of congress of March 3, 1851, to settle land titles, under the Mexican grant, "is not only the deed of the United States, but it is a solemn record of the government, of its action and judgment with respect to the title of the claimant existing at the date of the cession. By it the sovereign power, which alone could determine the matter, declares that the previous grant was genuine; that the claim under it was valid and entitled to recognition and confirmation by the law of nations and the stipulations of the treaty; and that the grant was located, or might have been located, by the former government, and is correctly located by the new government, so as to embrace the premises as they are surveyed and described. Whilst this declaration remains of record, the government itself cannot question its verity, nor can parties claiming through the government by title subsequent." Field, C. J., in 18 Cal. 11, 26.

*Nature and effect of patents generally.* A grant of land is a public law standing on the statute books of the state, and is notice to every subsequent purchaser under any conflicting sale made afterward; 2 U. S. App. 581. The final certificate or receipt acknowledging the payment in full by a homesteader or pre-emptor is not in legal effect a conveyance of the land; 4 *id.* 332. It transfers the full equitable title; 159 U. S. 66. A patent alone passes land from the United States to the grantee; 13 Pet. 498; 20 Mo. 108; 1 Ohio 281; not only as it was at the time of the survey, but as it is at the date of the patent; 134 U. S. 178; and nothing passes a perfect title to public lands but a patent, except where congress grants lands in words of present grant; 13 Pet. 498; though its delivery to the patentee is not essential to pass the title; 102 U. S. 378; and the United States cannot by authority of its own officers invalidate that patent by the issuing of a second one for the same property; 135 U. S. 286; see 21 Wall. 660; 9 Cra. 87; 5 Wheat. 293; 11 *id.* 380; or divest the title by giving a patent to another; 8 Mo. 526. Its office is to define the land; 9 Cal. 322; it has been said to be equivalent to a deed; 20 *id.* 387. After land has been sold by certificate, the United States holds the legal title until the patent issues, but only in trust for the purchaser; and the officers can only act ministerially and issue it to him, and cannot act judicially and determine that another claimant is entitled to it; 2 Ia. 1. A patent is conclusive against all whose rights commence subsequently to its date; 7 Wheat. 212; it conveys the legal title and leaves the equities open; 15 Pet. 98. It relates back to the date of purchase, and title to real estate, acquired under an execution sale, cannot be defeated by the issuing of a patent to the execution defendant, bearing date subsequent to the sale by the sheriff; 5 Ia. 157. But a patent for public land will not be held to take effect by virtue of the doctrine of relation, as of the date of the initial step taken by the patentee, where it appears that the rights by him acquired under such initial step were lost by his lack of diligence, and third parties' rights had intervened; 80 Fed. Rep. 433.

Where the United States has parted with title by a patent legally issued, and upon surveys legally made by itself and approved by the proper department, the title so granted cannot be impaired by any subsequent survey made by the government for its own purposes; 13 La. Ann. 128. A patent founded on a void entry and survey nevertheless passes the legal title from the government to the patentee, but the commencement of the title is the patent; 2 Ohio 216. It passes to the patentee everything connected with the soil, forming any portion of its bed, or fixed to its surface; in short, everything connected with the term "land"; 17 Cal. 199.

A patent for land is the highest evidence of title and is conclusive as against the government, and all claiming under junior patents or titles, until set aside or annulled, unless it is absolutely void on its face; 2 Wall. 525; 13 *id.* 72; *id.* 92; 19 *id.* 646; 23 How. 235; 104 U. S. 636; the presumption being that it is valid and passes the legal title; 18 How. 87. When issued upon confirmation of a claim or a previously existing title, it is documentary evidence, having the dignity of a record of the existence of that title or of such equities respecting the claim as justify its recognition and confirmation; 121 U. S. 488; it must be interpreted as a whole: its various provisions in connection with each other, and the legal deduction drawn therefrom must be conformable with the document; 21 How. 305.

A patent for unimproved lands, no part of which was in the possession of any one at the time it was issued, gives a legal seisin and constructive possession of all the lands within the survey; 5 Pet. 485. The identity of the land must be ascertained by a reasonable construction of the patent, but if rendered wholly unnecessary by inaccurate description the grant is void; 6 *id.* 328.

Government documents are not evidence of titles as against parties claiming pre-existing adverse and paramount title; 124 U. S. 261. A patent issued by the United States cannot be avoided or impeached for fraud in a collateral action; 26 Ia. 493; but it may be collaterally impeached in any action, and its operation and conveyance defeated, by showing that the department had no jurisdiction to dispose of the lands; 121 U. S. 488. Where issued by mistake, inadvertence, or other cause, to parties not entitled to it, they will be declared trustees of the true owner and decreed to convey the title to him; 147 *id.* 242. A patent is void at law, if the grantor

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state had no title to the premises embraced in it, or if the officer who issued the patent had no authority to do so; 142 *id.* 161. In cases of ejectment, where the question is who has the legal title, the patent of the government is unassailable; 139 *id.* 642.

The patent is conclusive evidence that the patentee has complied with the act of congress as concerns improvements on the land, etc.; 3 La. Ann. 203; it is *prima facie* evidence that all legal requirements have been complied with; 7 U. S. App. 507; but a patent fraudulently obtained by illegal issue is void; 4 La. Ann. 262; 2 How. 284; 5 Har. & J. 223.

*Patents for mines.* The fee of all mineral lands remains in the United States until patent issues therefor; 24 Cal. 339; 1 Mont. 410; Copp's Mining Law 37. The locator possesses only the right to purchase until the payment of the purchase money and the issuance of a receipt by the register and receiver of the local land office; 33 Fed. Rep. 562.

The method of procedure for the application for patent is provided for in U. S. Rev. Stats. § 2325. It requires that the applicant shall file under oath in the proper land office an application showing a compliance with the above-mentioned statute, together with a plat and field notes made by or under the direction of a United States surveyor general, and shall post a copy of the plat, together with a notice of the application, on the land, and then file an affidavit of the posting of such notice and copy in the land office. The act also requires that the register of the land office shall post said notice in his office for sixty days, and shall publish it for the same period in a newspaper nearest to the claim. If at the expiration of the said sixty days no adverse claim shall have been filed with the register and receiver of the local land office, the applicant shall be entitled to a patent upon the payment of $5.00 per acre for a lode location, and $2.50 per acre for a placer location, and after the expiration of said sixty days third persons cannot be heard to make objection to the issuance of the patent; see 9 Colo. 208; 4 Sawyer 302; 12 Nev. 320.

The issuance of such a patent is conclusive as to title of land described therein upon a court of law and in controversies between individuals: 3 Mont. 282; 6 *id.* 397; 8 Fed. Rep. 300; 34 *id.* 515. By the act of March 3, 1881, Rev. Stats. 1 Supp. p. 324, it is provided that if in any action brought pursuant to section 2326 of the Revised Statutes, title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to verdict. In such case no costs shall be allowed, and the claimant shall not proceed in the land office or be entitled to a patent for the land in controversy until he shall have perfected his title.

Where an application is pending for a patent to mineral lands, any adverse claim must be filed within the sixty days granted by the statute, and must be under the oath of the adverse claimant; Rev. Stat. §§ 2325–2326; 21 Pac. Rep. 492. If such adverse claim be filed, proceedings upon the patent shall be stayed until the controversy shall have been determined by a court of competent jurisdiction, or the adverse claim is waived; 33 Fed. Rep. 562; 114 U. S. 576. This procedure in the court must be begun by the adverse claimant within thirty days after filing his adverse claim, or his claim will be deemed to have been waived; U. S. Rev. Stats. § 2326; 114 U. S. 576; 2 Mont. 421. The person in whose favor a decision is rendered in such a proceeding is entitled to the patent upon compliance with the provisions of law; U. S. Rev. Stats. § 2326; and it is given to the party establishing the better title, the only question before the court being one of the right of possession of the premises; 21 Fed. Rep. 167. It is necessary for an adverse claimant in such a procedure to prove right of possession as against the United States, as well as against the applicant for a patent; 115 U. S. 45; and where neither party shows title neither can receive a patent; 21 Fed. Rep. 167; 9 Colo. 589.

*How cancelled and annulled.* It is not permissible for courts of law to inquire into the validity of a patent or into any question of fraud in connection with its issuance; 16 Fed. Rep. 829; see 104 U. S. 636. This, of course, applies only to the cases where the department has jurisdiction to act. If such jurisdiction was wanting or if the patent be void upon its face, it may, of course, be collaterally impeached; 104 U. S. 636; 8 Colo. 179. The United States may bring an action to set aside a patent upon allegations of fraud, and such action is triable under the same principles and rules which would obtain between individuals; 114 U. S. 233; 128 *id.* 673; 16 Fed. Rep. 810; *id.* 829, that is when the question arises as to patenting the land to the wrong person; in which case the government merely becomes the instrument by which the right of the individuals can be established and is merely a formal complainant; but if the patent has been obtained from the government by fraud or covers lands which were not subject to patent, the government sues in its sovereign capacity; U. S. *v.* Amer. Bell Tel. Co. (Berliner Case), where the subject is fully discussed and all the cases cited. See PATENT.

It may proceed by bill in equity for a decree of nullity, and an order of cancellation of a patent issued by the government itself, ignorantly, or in mistake, for lands reserved from sale by law, and a grant of which by a patent was therefore void; 2 Wall. 525; or where a patent issued in mistake, and the government has a direct interest or is under an obligation respecting the relief invoked; 141 U. S. 358; or when the patent was issued by mistake or obtained by fraud; 146 *id.* 120; the initiation and control of such a suit lies with the attorney-general; 125 *id.* 273; 127 *id.* 338.

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Misrepresentations knowingly made by the applicant for a patent will justify the government in proceeding to set it aside, as it has a right to demand a cancellation of a patent obtained by false and fraudulent representations; 128 *id.* 673; see 137 *id.* 161; but courts of equity cannot set aside, annul, or correct patents or other evidence of title obtained from the United States by fraud or mistake, unless on specific averments of the mistake or fraud, supported by clear and satisfactory proof; 121 *id.* 325. A bill in equity is the proper remedy; 11 How. 552; although a patent fraudulently obtained by one knowing at the time that another person has a prior right to the land may be set aside by an information in the nature of a bill in equity filed by the attorney of the United States for the district in which the land lies; *id.* A court of equity, upon a bill filed for that purpose, will vacate a patent of the United States for a tract of land obtained by mistake from the officers of the land office, in order that a clear title may be transferred to the previous purchaser; 4 Wall. 232; but a patent for land of the United States will not be declared void merely because the evidence to authorize its issue is deemed insufficient by the court; 16 Ohio 61. A state can impeach the title conveyed by it to a grantee only by a bill in chancery to cancel it, either for fraud on the part of the grantee or mistake of law; and until so cancelled, it cannot issue to any other party a valid patent for the same land; 149 U. S. 79.

After the issue of a patent, assignment and transfers of the pre-emption right will not be inquired into; 4 McLean 366. The issue of a patent of public lands to a person not equitably entitled to it does not preclude the owner of the equitable title from enforcing it in a court of equity; 147 U. S. 47; and fraud on the part of a grantee under a patent does not prevent the legal title from passing to a *bona fide* purchaser; 7 U. S. App. 128; unless the purchaser had sufficient information to put him on inquiry of fraud, in which case he is not a *bona fide* purchaser; 146 U. S. 120. A patent to a deceased person is void; 12 Pet. 264; 7 Ohio 288. On the acquisition of the territory from Mexico, the United States acquired the title to lands under tidewater, in trust for future states that might be erected out of the territory; but this doctrine does not apply to lands that had been previously granted to other parties by the former government; 142 U. S. 161. See LANDS, PUBLIC; LAND WARRANT; LAND GRANT.

**LAND POOR.** A phrase used to indicate the possession of a large quantity of unproductive lands, the payment of taxes and loss of interest on which keeps the owner poor. "A man land-poor may be largely responsible;" 46 Mich. 397; s. c. 9 N. W. Rep. (Mich.) 445.

**LAND REEVE.** One whose business it is to overlook parts of an estate. Mos. & W.

**LAND REGISTRY.** See LAND TITLE AND TRANSFER; REGISTRATION; RECORDING.

**LAND REVENUES.** An income derived from crown lands in Great Britain. These lands have been so largely granted away to subjects that they are now contracted within very narrow limits. The crown was so much impoverished in this manner by William III. that the stat. 1 Anne, c. 7, § 5, was passed, with the stat. 34 George III. c. 75, which amends and continues it, makes void all grants or leases from the ground of royal manors or other possessions connected with land for a period exceeding thirty-one years, or three lives. Long prior to this a Scottish stat. 1455, c. 41, had made necessary the consent of parliament in case of the alienation of crown property. It is said that none of these statutes have succeeded in checking the practice. Early at the beginning of the reign of George III. the hereditary crown revenues derived from escheats, manors held *in capite*, estrays, fines, etc., were surrendered by the king to the general funds, and in the place of them he received a specified sum annually for the civil list.

The supervision of such property as still belongs to the crown is vested in commissioners appointed for the purpose, called the commissioners of woods, forests, and land revenues.

**LAND STEWARD.** An agent who has the management and control of landed estate belonging to an individual or state.

**LAND TAX.** A tax on the beneficial proprietor of land such as is imposed in many of the states; so far as a tenant is beneficial proprietor, and no farther, does it rest on him. It was first imposed in 1693, a new valuation of the lands in the kingdom having been made in 1692, which has not since been changed. In 1798 it was made perpetual, at a rate of four shillings in a pound of valued rent. Under the provisions of the stat. 16 & 17 Vict. c. 74; this tax is now generally redeemed. See Encyc. Brit. *Taxation.*

**LAND TENANT** (commonly called *terre tenant*, *q. v.*). He who actually possesses the land.

**LAND TITLE AND TRANSFER.** The existing system of land transfer is a long and tedious process involving the observance of many formalities and technicalities, a failure to observe any one of which may defeat title. Even where these have been most carefully complied with, and where the title has been traced to its source, the purchaser must buy at his peril, there always being, in spite of the utmost care and expenditure, the possibility that his title may turn out bad. Yeakle, Torrens System 209.

For the past 50 years the project of simplifying land titles and transfer has been agitated in England. For the purpose of considering the best method of so doing, a royal commission was appointed in 1854,

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and its report in 1857 recommended a limited plan of registration of title. In 1862 the Lord Westbury Act, 25 & 26 Vict. cc. 53, 57, provided for the registration of indefeasible titles, but they were confined to good marketable titles. In 1875 the Lord Cairns bill was passed, which provided for the permissive use of a scheme for the registration of title, and was a modified form of the Torrens system, but, as the friends of that system pointed out, the provisions of the bill were not stringent enough, and comparatively little use has been made of it.

This act was amended in several particulars by the Land Transfer Act, 1897. In addition to these changes this amendatory act of 1897 makes some very vital changes in the real estate law of England; it provides as follows: "Where real estate is vested in any person without a right in any other person to take by survivorship, it shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representative or representatives from time to time as if it were a chattel real vesting in them or him." This applies to any real estate over which the testator "has a general power of appointment." Probate and letters of administration may be granted in respect of real estate only, although there is no personal estate. Subject to the powers, rights, duties, and liabilities imposed in the act, the "personal representatives hold the real estate as trustee for the persons by law beneficially entitled thereto, and those persons shall have the same power of requiring a transfer of real estate as persons beneficially entitled to personal estate have of requiring a transfer of such personal estate." "All enactments and rules of law relating to the effect of probate or letters of administration as respects chattels real, and as respects the dealing with chattels real before probate or administration, and as respects the payment of costs of administration, etc., of personal estate and the powers, rights, etc., of personal representatives in respect of personal estate, shall apply to real estate so far as the same are applicable, as if that real estate were a chattel real, etc., save that some or one only of such joint personal representatives" cannot sell or transfer the real estate without the authority of court.

"In the administration of the assets of a person dying after the commencement of the act, his real estate shall be administered in the same manner, subject to the same liabilities for debts, costs, and expenses, etc., as if it were personal estate, provided that nothing herein contained shall alter or affect the order in which real and personal assets respectively are now applicable in and towards the payment of funeral and testamentary expenses, debts, or legacies, or the liability of real estate to be charged with the payment of legacies." In granting letters of administration the court "shall have regard to the rights and interests of the persons interested in the real estate, and his heir-at-law, if not one of the next-of-kin, shall be equally entitled to the grant with the next of kin."

At any time after the death of the owner "his personal representative may assent to any devise contained in his will, or may convey the land to any person entitled thereto as heir, devisee, or otherwise, . . . either subject to a charge for the payment of any money which the personal representatives are liable to pay, or without any such charge; and on such assent or conveyance, subject to a charge for all moneys (if any) which the personal representatives are liable to pay, all liabilities of the personal representatives in respect of the land shall cease, except as to any acts done or contracts entered into by them before such assent or conveyance." After the expiration of a year from the owner's death, "if the personal representatives have failed on the request of the person entitled to the land to convey the land to that person, the court may, if it thinks fit, on the application of that person and after notice to the personal representatives, order that the conveyance be made, or in case of registered land, that the person so entitled be registered as proprietor of the land, either solely or jointly, with the personal representatives. The production of an assent by the personal representatives to the registrar is authority to him to register the transfer. The personal representatives, etc., may, in the absence of any express provision to the contrary . . . with the consent of the person entitled to any legacy . . . or to a share in his residuary estate, etc., appropriate any part of the residuary estate in or towards satisfaction of that legacy or share," placing their own valuation on "the whole or any part of the property of the deceased person," first giving notice to all persons interested in the residuary estate. In case of registered land such appropriation is authority to the registrar to register the person to whom the property is appropriated as proprietor. The act provides that the title to registered land, adverse to or in derogation of the title of the register proper, shall not be acquired by any length of possession."

It also repeals the act of 32 Hen. 8, c. 9, which prohibits sales and other dispositions of land of which the grantor or his predecessor in title had not been in possession for one whole year previously to the dispossession's being made.

It provides that the queen may, by an order in council, as respects any county or part of a county, declare registration of title to be compulsory on sale.

Six months' notice before the order in council is made is required to be given to the *council of the county* in question, and if within three months after receipt of notice with a draft of the proposed order, two-thirds of the members of the *county council* notify the Privy Council that, in their opinion, compulsory registration of title would not be desirable, the order in council shall not be made. The first order in council made under this act shall not affect more

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than one county. The act reserves to parliament certain rights to disapprove of any order in council by which it shall become void. The act makes provision for an indemnity payable thereunder by setting apart a portion of the receipts from fees taken in the land register. If the indemnity fund is insufficient the deficiency is charged to the consolidated fund of the United Kingdom.

Provision is made for regulations by the lord chancellor, with the advice and assistance of certain officials, for the conduct of official searches, and for enabling the registered proprietor to apply for such searches, etc., by telegraph and to receive reply by telegraph.

The act went into effect January 1st, 1898, and is to be cited as the Land Transfer Act, 1897, and construed with the Land Transfer Act, 1875, and the two together are to be cited as Land Transfer Acts, 1875 and 1897.

The system of registration of *deeds* prevails in Scotland, in Middlesex and Yorkshire, in Ireland, France, Belgium, Italy, Spain, part of Switzerland, and the British colonies, excepting Australasia and most of Canada, and in the South American republics, as well as in the United States. The system of registration of *title* prevails in Germany, Austria-Hungary, Australasia, part of Switzerland, and the greater part of Canada; 9 Jurid. Rev. 155. The Torrens system, so called from its author, Sir Robert Torrens, has been in use in New South Wales and Victoria since 1862; in South Australia, 1858; Queensland, 1861; Tasmania, 1863; New Zealand and British Columbia, 1870; Western Australia, 1874; Ontario, 1884; Manitoba, 1883; Duffy & Eggleston, Land Transfer Act, 1890, 8.

The essential point of this system is an official guarantee of title; it is the registration of *title* as distinct from the registration of *deeds*. The latter ascertains the deeds which must be examined under every transfer, while the former renders such examination unnecessary; 9 Jurid. Rev. 155. Under the Torrens system the registrar holds the same relation to the landowner that a company or bank holds to the shareholder.

In Germany the state keeps what may be called a ledger account for each property, and pledges itself to keep it correctly and in such plain fashion that any person of ordinary intelligence can at once, and without examining any deed of any kind, ascertain who stands as owner of the property (which means that his title is perfect), and what debts or other incumbrances exist. In Prussia all transfers are made by word of mouth, without any deed or conveyance. The simplest way is to have both parties to appear before the registrar, and declare their contract, and the purchaser is then entered as owner; 9 Jurid. Rev. 155. For a detailed account of the system of registration of title in Central Europe, see 2 Jour. Com. Leg. 112 (June, 1897).

In the United States the subject of registration of land titles has been considered in many of the states. In New York city the accumulation of record books has become so great in the registry of deeds that searches of title can no longer be carried on by private persons. In that state an attempt was made to simplify and classify these records, by adopting what is known as a block system of registration by which deeds and other instruments are classified and indexed according to the location of the property. While this is a partial relief, it by no means remedies the evils due to a lengthening chain of title, where no part is stronger than its weakest link; Yeakle, Torrens System 215. See Rep. Am. Bar Assn. (1890) 265.

With some modifications, in order to obviate the constitutional questions which might arise under it in this country, the Torrens system was recently adopted in California, Illinois, and Ohio, but in the last two states it has been adjudged unconstitutional, in that it attempts to confer judicial power upon the registration officer; 47 N. E. Rep. (Ohio) 551; 165 Ill. 527; 29 Chic. Leg. N. 93.

In 1897 Illinois passed an act to remedy these defects in the statute, and California passed an amendatory act to the effect that the original act shall be liberally construed by the court. Massachusetts indicated a disposition favorable to this system by providing for the appointment of a committee to draft and prepare an act and report to the next legislature.

See, generally, 35 Am. L. Reg. 605; 36 *id.* 111; 11 Harv. L. Rev. 301; 4 *id.* 271; 6 *id.* 410; Rep. Am. Bar Assn. (1890) 265; Yeakle, Torrens System; Duffy & Eagleson, Transfer of Land Act, 1890; 11 Law Quart. 357; TORRENS SYSTEM.

**LAND TRANSFER ACT.** See LAND TITLE AND TRANSFER.

**LAND WAITER.** In English Law. A custom-house officer who superintends the landing of goods, and who examines, measures, tastes, or weighs them and takes account of it. They are also sometimes required to superintend the shipment of goods where drawbacks are allowed, and to certify the shipping of them on the debentures. They are sometimes called Coast Waiters or Landing Waiters.

**LAND WARRANT.** A negotiable government certificate entitling its holder to be put in possession of a designated quantity of public land, under a land grant or other appropriation of land by congress.

The possession of a warrant at the land office is sufficient authority to make locations under it, and letters of attorney are unnecessary; 4 Pet. 332. The locator of a warrant undertakes himself to find waste and unappropriated land, and his patent issues under his information to the government and at his own risk; he cannot be considered as a purchaser without notice: 5 Cra. 234. A power of attorney given by the holder of a land warrant from the gen-



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eral court authorities, the attorney to locate the land for his own sole use and benefit, and to sell the same and receive payment therefor, is manifestly designed to transfer the interest of the holder of the warrant in violation of the act of congress in that respect, and is void; 3 Chand. 189. Evidence of the payment of the purchase money due the state of Pennsylvania on a land warrant clothes the person paying it with the ownership of the warrant and with the right to maintain ejectment for the land; 152 U. S. 398. Land warrants are not to be regarded as real estate in a probate settlement; 44 Me. 57. See LANDS, PUBLIC; LAND PATENT.

**LANDBOC.** A charter or deed whereby lands or tenements were given under early English law. Cow.; Moz. & W. See BOC-LAND.

Occasionally it is said a bishop or abbot in support of claims of the highest jurisdictional powers "would rely on the vague large words of some Anglo-Saxon land book. But to do this was to make a false move; the king's lawyers were not astute palæographers or diplomatists, but any charter couched in terms sufficiently loose to pass for one moment as belonging to the age before the conquest could be met by the doctrine that the king was not to be deprived of his rights by 'obscure and general words.'" 1 Poll. & Maitl. 571.

**LANDEA. In Old English Law.** A ditch to drain marshy land. Spel. Gloss.; Du Cange.

**LANDED.** As used in a revenue act levying tolls on goods, the clear meaning and purport is "substantially imported," and stones shot from boats to the shore below high-water mark, there to remain until shipped for exportation, were not landed. L. R. 4 Ex. 260.

Timber, floated into a salt water creek, where the tide ebbs and flows, leaving the ends resting in mud at low water and prevented from floating away at high water by booms, is landed; 8 Cra. 110.

When merchandise is sent on shore, and afterwards being in the ship's boat for the purpose of being re-shipped, it is violently seized and detained, either by the orders of a sovereign or by thieves, it is not *safely landed*, under an insurance on the goods, until the same should be discharged and safely landed; 6 Mass. 197, 204.

**LANDED ESTATE OR PROPERTY.** A colloquial or popular phrase to denote real property (*q. v.*). Landed estate ordinarily means an interest in and pertaining to lands. 10 La. Ann. 676. In a tax law it "clearly embraces not only the land, but all houses, fixtures, and improvements of every kind thereon, and all machinery, neat cattle, horses, and mules, when attached to and used on a plantation or farm." *Id.*

A person holding such an estate is termed a landed proprietor, and it is immaterial whether the lands are improved or not; 10 La. Ann. 676. A devise of "all my landed property" carries the fee; 1 N. H. 163; and so does "my landed estate"; 12 Wend. 602; but a devise of "all my landed estate," followed by a particular description of tracts devised, does not include a lot not enumerated, which descends to the heir at law, though excluded from all testator's estate with a shilling legacy; 2 McCord, Ch. 214, 264.

Landed securities are mortgages or other incumbrances affecting land, and this is what must be implied from the direction in a will to lay out a fund in some real security; 3 Atk. 805, 808.

**LANDED ESTATES COURT. In English Law.** Tribunals established by statute for the purpose of disposing more promptly and easily than could be done through the ordinary judicial machinery, of incumbered real estate. These courts were first established in Ireland by the act of 11 & 12 Vict. c. 48, which being defective was followed by 12 & 13 Vict. c. 77. The purpose of these was to enable the owner, or a lessee for any less than 63 years unexpired, of land subject to incumbrance, to apply to commissioners who constituted a court of record to direct a sale. This court was called the Incumbered Estates Court. A new tribunal called the Landed Estates Court was created by 21 & 22 Vict. c. 72, which abolished the former court and established a permanent tribunal. It is said that these statutes facilitated a great revolution in the tenure of land in Ireland, supplying the means by which a great part of the soil passed rapidly from cottier tenants and an embarrassed and non-resident gentry to capitalist farmers and to landlords who cultivated the soil themselves. The result was agricultural prosperity, but great hardship to the tenants, upon whom in Ireland rested the burden of permanent improvements which elsewhere would be borne by the landlord. The sales under the Landed Estates Act deprived the tenants of opportunity to make claim for compensation in the adjustment of rent. Demands for increased rent under penalty of eviction compelled small farmers to emigrate, move to the towns, or remain as servants on their old farms. The acts of retaliation for these changes led to the passage of the Irish Land Act of 1870, followed by that of 1881. Under the latter the tenant farmers obtained very unexampled privileges, and a new court was created for fixing rent. See Int. Cyc., tit. Incumbered Estates Court, and authorities there cited.

A similar court was established for West Indian estates by 17 & 18 Vict. c. 117, the sittings of which were held at Westminster.

**LANDEFRICUS, LANDAGENDE.** The lord of the soil; landlord (*q. v.*).

**LANDEGANDMAN.** An inferior tenant of a manor. Spel. Glos.

**LANDGRAVE.** In Germany, in the middle ages a *graf* or count entrusted with

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special judicial functions, extending over a large extent of territory; later, the title of sovereign princes of the empire who inherited certain estates called *land-gravates*, of which they were invested by the emperor. Cent. Dict.; Lond. Encyc.

**LANDHLAFORD.** A proprietor of land; lord of the soil. Anc. Inst. Eng. See LANDEFRICUS.

**LANDIMERS.** Measures of land. Cow.

In Scotch Law. Measurers of land. Skene.

**LANDING.** A place for loading or unloading boats, but not a harbor for them. 74 Pa. 373.

**LANDING PLACE.** A place laid out by a town as a common landing place and used as such, but not designated as for the particular benefit of the town, is a public landing place. It is not, however, a townway and liable to be discontinued as such by the town. If a public landing place is no longer of use the power to discontinue it is in the legislature; 2 Pick. 44.

The public use of the land of an individual, adjoining navigable waters, as a landing place, for a period of twenty years, with the knowledge of the owner, will not confer a right, nor raise a presumption of a dedication; 20 Wend. 111; 22 *id.* 425, 559; 1 Greenl. 111. When a highway is extended to navigable waters, the riparian owner has no exclusive right of landing; 19 Barb. 204.

Under authority to regulate landings and watering places, commissioners of highways have no right to lay out and establish a new landing place; 17 Wend. 9; but when a road has been laid out and used as a highway to a public landing place for twenty years prior to March 21, 1797, but not sufficiently described, they may ascertain, describe, and enter of record such road, if it was constantly worked and used for six years next preceding; *id.* The selectmen of a town have no authority to lay out a public landing; 1 Greenl. 111.

**LANDIRECTA.** Rights charged upon land. Toml. See TRINODA NECESSITAS.

**LANDLOCKED.** Wholly surrounded by land of some other person or persons, as when the owner of a close surrounded by his own land grants the land and reserves the close. L. R. 13 Ch. Div. 798. In that case it was held that the implied right to a way of necessity operated by way of a regrant from the grantor of the land, and was limited by the necessity which created it; it was not a way of necessity for all purposes, but only such as the close was used for in the condition it happened to be at the time of the grant. *Semble*, the same rule applies if the grant is of the landlocked close with an implied grant of a way of necessity over the surrounding land; *id.*

**LANDLORD.** The lord or proprietor of land, who, under the feudal system, retained the dominion or ultimate property of the feud, or fee of the land; while his grantee, who had only the possession and use of the land, was styled the feudatory, or vassal, which was only another name for the tenant or holder of it. In the popular meaning of the word, however, it is applied to a person who owns lands or tenements which he rents out to others.

**LANDLORD AND TENANT.** A term used to denote the relation which subsists by virtue of a contract, express or implied, between two or more persons, for the possession or occupation of lands or tenements either for a definite period, from year to year, for life, or at will.

When this relation is created by an express contract, the instrument made use of for the purpose is called a lease. See LEASE. But it may also arise by necessary implication from the circumstances of the case and the relative position of the parties to each other; for the law will imply its existence in many cases where there is an ownership of land on the one hand and an occupation of it by permission on the other; and in such cases it will be presumed that the occupant intends to compensate the owner for the use of the premises; 4 Pet. 84; 39 Ill. 578; 60 N. Y. 102. In an action for possession of land and damages for holding over after expiration of a term, proof that plaintiff was owner, that defendant paid rent to him, and that he was duly notified to surrender possession, establishes the relation of landlord and tenant; 3 Ind. App. 207. A tenancy is created by the occupation or temporary possession of land, the title to which is in another; 34 Ill. App. 357.

The *intention to create.* This relation may be inferred from a variety of circumstances; but the most obvious acknowledgment of its existence is the payment of rent; and this principle applies even after the expiration of a lease for a definite term of years; for if a tenant continues to hold over, after his term has run out, the landlord may, if he chooses, consider him a tenant, and he is, in fact, understood to do so, unless he proceeds to eject him at once. If the landlord suffers him to remain, and receives rent from him, or by any other act acknowledges him still as tenant, a new tenancy springs up, usually from year to year, regulated by the same covenants and stipulations entered into between the parties at the creation of the original term in so far as they are applicable to the altered nature of the tenancy; 15 Johns. 505; 4 M'Cord 59; 2 C. & P. 348; 42 Ind. 212; 43 Md. 446; 42 Cal. 316.

The payment of money, however, is only a *prima facie* acknowledgment of the existence of a tenancy; for if it does not appear to have been paid as rent, but has been paid by mistake or stands upon some other consideration, it will not be evidence of a subsisting tenancy; 4 Bingh. 91; 3 B. & C. 413; 4 M. & G. 143. Neither does a mere participation in the profits of land, where the owner is not excluded from possession,

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nor the letting of land *upon shares*, unless the occupant expressly agrees to pay a certain part of the crop as rent, in either case amount to a tenancy; 1 Gill & J. 266; 3 Zabr. 390; 2 Rawle 11; 42 Vt. 94; 60 N. Y. 231; 21 Ill. 200. The relation of landlord and tenant did not exist where the occupancy was simply by military force during the war of the rebellion; 23 Ct. Cls. 188.

But the relation of landlord and tenant will not be implied when the acts and conduct of the parties are inconsistent with its existence; 142 U. S. 396; nor will it be inferred from the mere occupation of land, if the relative position of the parties to each other can, under the circumstances of the case, be referred to any other distinct cause: as, for instance, between a vendor and vendee of land, where the purchaser remains in possession after the agreement to purchase falls through. For the possession in that case was evidently taken with the understanding of both parties that the occupant should be owner, and not tenant; and the other party cannot without his consent convert him into a tenant, so as to charge him with rent; Wood. L. & T. 12; 6 Johns. 46; 21 Me. 525; 8 M. & W. 118; 10 Cush. 259; 16 Vt. 257; 11 N. H. 148; 60 Barb. 463; 46 Me. 456; 12 B. Monr. 504; 16 Pet. 25; 17 Ind. 509; under such a contract the fact that a note given for the first instalment recites that it is given in part payment for rent, does not imply that in default of payment at maturity the relation of landlord and tenant becomes substituted for it; 54 Ark. 16. Where one entered on land under a bond for title, proof of declarations that he had agreed to pay rent is not evidence of abandonment, when he subsequently refused to surrender the bond for his notes, as a condition to renting the premises for another year; 112 N. C. 27. Where, by the terms of a trust deed, the grantor sold and delivered the possession to the trustee, and the latter leased to the grantor at a given rate until sale thereof, the grantor binding himself to surrender possession within ten days of that sale, it was held that the instrument created the relation of landlord and tenant; 45 Mo. App. 339. But see 75 Cal. 342.

The same principle applies to a mortgagor and mortgagee, as well as to that of a mortgagor and an assignee of the mortgagee; for no privity of the estate exists in either case; and, as a general rule, a tenancy by implication can never arise under a party who has not the legal estate of the premises in question; 2 M. & R. 303; 6 Ad. & E. 265; Tayl. Landl. & T. § 25; 16 Vt. 371.

Where mortgagees gave notice of the existence of the mortgage to the tenant of the mortgagor, and required him to pay them the rent thereafter, and the tenant remained in possession after the receipt of the notice, these circumstances alone were not sufficient to support an inference of an agreement that he should become tenant to the mortgagees; 2 Q. B. 484.

The question whether a transaction is a sale on instalments, with a pledge or mortgage to secure purchase money, or a tenancy, is one which frequently arises under the multiplicity of sales on instalments which are now made of both real and personal property. As, where real estate was mortgaged for a sum payable in instalments, with interest, and there was a provision that "the mortgagees lease to the mortgagor the said lands," the rent to be paid precisely as to amounts and times as was appointed for payment of the money secured, and to be in satisfaction thereof, with no clause authorizing distress or possession by the mortgagor until default, and the instrument was not executed by the mortgagees, it was held not to create the relation of landlord and tenant; 18 Can. S. C. R. 483. See SALE.

The relation of landlord and tenant has been held to exist, where a ranch was let, by a written covenant for a term of years, for a share of the produce, with provision for the sale of stock and produce, and division of profits; 96 Cal. 95; also under an agreement between the owner of stone quarry and another person that the latter shall work the quarry, sell the stone, and pay one-fifth of the proceeds to the former; 1 Misc. Rep. 240; 69 Hun 88; where a husband and wife live separately and he is in possession of her land with her knowledge; 38 Neb. 756; under a contract for a number of years at a certain rental per year, provided that all crops that may be made on said land are bound for said rent; 113 N. C. 444; where an occupant of land who without dissent hears the owner say that he would be considered as a tenant for a year at a specified rental unless he vacated immediately; 50 Mo. App. 80; where one had purchased land under a power of sale in a mortgage, which provided that the completion of the sale shall entitle the purchaser to immediate possession of the premises, and any holding of the same thereafter should be as tenant; 36 S. C. 274. The relation of landlord and tenant exists, so as to authorize a forcible detainer against a tenant in possession, whose lease was not enforceable because the premises were leased knowingly for immoral purposes; 25 S. W. Rep. (Tex.) 312. So where mortgagees of a stock of goods in a leased store building took possession of the goods therein, by permission of the mortgagors, and used the building to display and sell the goods, and kept the usual accounts of a retail store, they took possession of and occupied the building as tenants of its owner, and not as licensees of the mortgagors; 34 Atl. Rep. (N. J.) 938.

But a riparian owner holding the lease of a water-right of another riparian proprietor is not a tenant; 70 Cal. 103. Nor does the relation exist where a father deeds lands in fee-simple to his son, who is to give the father one-third of his crops until the latter should be in better financial condition, the son meanwhile to go ahead and improve the land as his own; 136 Ind. 349. Where the owner of a farm rented a house for one year for the use of his tenant who farmed

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on shares, and at the end of his term held over for a few weeks and then rented the farm under a new lease from the grantee, the latter was held not liable for the rent of the tenant-house for the new year; 34 Ill. App. 306. Occupation of lands by a person without recognizing the owner as his landlord, or any agreement to hold under and in subordination to him, is merely a trespass and does not create the relation of landlord and tenant; 21 Nev. 65. One in possession and use of premises under an agreement to keep off trespassers is practically a tenant; 79 Mich. 86. Where the crop growing on leased premises was sold under execution, the purchaser, who was also assignee of the judgment for rent under which the crop was sold, did not become a tenant of the lessor and could go upon the land to harvest the crop without incurring any liability to the lessor for the use of the land while the crop was ripening; 43 Kan. 216. One who rented from a mere occupant (the title being in a third person), could recover possession against the lessor who had entered upon the premises under proceedings for forcible entry and detainer; 8 Houst. 507.

Where a husband leased his wife's land for one year, with the option to the tenant for a further term of four years without authority from her, the receipt by the wife of the share of the farm products reserved by the lease for the first year did not operate by way of estoppel to create a five-years' term, not being an assent in writing as required by the statute of frauds; 30 Atl. Rep. (N. J.) 619.

The possessor of real estate under an unrecorded lease has no rights as against an attaching creditor; 45 La. Ann. 853. One who takes a secret lease from a third party without the knowledge of his landlord will not thereby change his possession; 33 W. Va. 236.

One who, when applying to lease a building, pays one month's rent which is returned to him upon the termination of negotiations for said rent without any lease being signed, has no rights in the premises; 148 Ill. 192.

A tenant who rents his half of the premises to his co-tenant is his landlord and entitled to a preference lien on the tenant's goods for his rent; 26 S. W. Rep. (Tex.) 436.

A tenant for life may lease his estate for the term of his life, and so retain his landlord's rights, on the lessee's default in an annual payment, to sue to remove him as a tenant holding over, and to recover the rent due; 90 Ga. 482.

Generally, the rights and obligations of the parties will be considered as having commenced from the date of the lease, if there be one, and no other time for its commencement has been agreed upon; or, if there be no date, then from the delivery of the papers. If, however, there be no writings, it will take effect from the day the tenant entered into possession, and not with reference to any particular quarter-day; 4 Johns. 230; 15 Wend. 656; 3 Camp. 510; Tayl. Landl. & T. 135 (11th ed.). And these rights and duties attach to each of the parties, not only in respect to each other, but also with reference to other persons who are strangers to the contract. The landlord retains certain rights over the property, although he has parted with its possession, while the tenant assumes obligations with respect to it which continue so long as he is invested with that character.

After the making of a lease, the *right of possession*, in legal contemplation, remains in the landlord until the contract is consummated by the entry of the lessee. When the tenant enters, this right of possession changes, and he draws to himself all the rights incident to possession. Where in a store building the lofts above were unconnected with the store and the access to them was by a separate door, the delivery of the store key with the continued use and occupation of the store was not a symbolical delivery of the lofts above, the separate keys of the door leading to them not being delivered; 3 App. Div. N. Y. 511. The landlord's rights in the premises during the term of the lease are confined to those expressly or impliedly derived from the contract of lease and to the protection of his reversionary interest. And he would have no right, in the nature of an easement, to use a sewer under the premises leased, in such manner as to make the latter untenantable; 147 N. Y. 248. He may maintain actions for such injuries as would, in the ordinary course of things, continue to affect his interest after the determination of the lease. But such injuries must be of a character permanently to affect the inheritance; such are breaking the windows of a house, cutting timber, or damming up a rivulet, whereby the timber on the estate becomes rotten; Woodf. L. & T. 973; 11 Mass. 519; 1 M. & S. 234; 3 Me. 6; 5 Duer 494; 26 How. Pr. 105.

The landlord usually reserves the right to go upon the premises peaceably, for the purpose of ascertaining whether any waste or injury has been committed by the tenant or other persons, first giving notice of his intention. But he has no such right unless he reserves it in the lease. He may also use all ways appurtenant thereto, and peaceably enter the premises to demand rent, to make such repairs as are necessary to prevent waste, or to remove an obstruction; 1 B. & C. 8; 7 Pick. 76; 5 Harr. 378. The entry of a landlord into demised premises for the purpose of rebuilding does not operate as an eviction, where it was with the tenant's assent and not to his entire exclusion; 151 Pa. 101. But if the rent is payable in hay or other produce, to be delivered to him from the farm, he is not entitled to go upon the land and take it, until it is delivered to him by the tenant, or until after it has been severed and set apart for his use: 9 Me. 137; 5 Blackf. 317.

Where the tenant abandoned the land, and executed a bill of sale of the crops, and the landlord entered before the delivery of the bill of sale, the latter passed no title as

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against the landlord, whose entry was held justified by the abandonment; 1 Marvel, Del.

The *landlord's responsibilities* in respect to possession, also, are suspended as soon as the tenant commences his occupation; 4 Term 318; 2 Sandf. 301; 2 Mo. App. 66. But if a stranger receive injuries from the ruinous state of the premises at the time of the demise, or from any fault in their construction, or from any nuisance thereon, even though it be created by a tenant's ordinary use of the premises, the landlord remains liable; 43 Barb. 482; L. R. 2 C. P. 311; 116 Mass. 67; 4 Hun 24; 20 Pa. 387; 2 Colo. App. 534; and if the landlord has undertaken to keep the premises in repair, and the injury be occasioned by his neglect to keep up the repairs, or if he renew the lease with a nuisance upon it, he will be likewise liable; 2 H. Bla. 350; 1 Ad. & E. 822; 67 Ill. 47. See 65 Hun 625. The landlord may be liable for not disclosing a concealed source of danger not discoverable by the tenant, if he not only knows the source of danger but also knows, or common experience shows, that it is dangerous; 147 Mass. 471. In an action by lessee for breach of covenant in a lease to repair, the measure of damages is the difference between the rent the lessee agreed to pay and the rental value of the premises without the repairs having been made; 76 Md. 409.

The *principal obligation on the part of the landlord*, which is, in fact, always to be implied from the operative words of the lease, but is also usually inserted as a distinct covenant, is that the tenant shall enjoy the quiet possession of the premises, —which means, substantially, that he shall not be turned out of possession of the whole or any material part of the premises by one having a title paramount to that of landlord, or that the landlord shall not himself disturb or render his occupation uncomfortable by the erection of a nuisance on or near the premises, which the law holds tantamount to an eviction; Jack. & Gr. L. & T. § 935; 8 Co. 80 *b*; 13 N. Y. 151; 5 Day 282; 29 Md. 35; 10 Gray 258; 3 Duer 464; 6 Dowl. & R. 349. But express covenants for quiet enjoyment are framed usually only against eviction by a paramount title and against the lessor, his heirs, and those claiming under them; implied covenants have a similar effect. So that if the tenant be ousted by a stranger, that is, by one having no title, or if the molestation proceeds from the acts of a third person, the landlord is in neither case responsible for it; 1 Term 671; 5 Hill, N. Y. 599; 13 East 72; 25 Barb. 594; Tayl. Landl. & T. § 304. See 160 Mass. 421.

Another *obligation* which the law imposes *upon the landlord*, in the absence of any express stipulation in the lease, is the payment of all arrears of ground-rent, or interest upon mortgages to which the property leased may be subject. The tenant of property subject to ground-rent is not personally liable unless by express contract in writing he has assumed payment of it; 36 Atl. Rep. (Pa.) 923. The same rule applies as regards all taxes chargeable on the premises, though, as regards these, statutes, both in England and in almost all the United States, have been passed expressly imposing the duty of paying them on the landlord. Sometimes covenants to that effect are inserted in the lease. In general, every landlord is bound to protect his immediate tenant against all paramount claims; and if a tenant is compelled, in order to protect himself in the enjoyment of the land in respect of which his rent is payable, to make payment which ought, as between himself and his landlord, to have been made by the latter, he may call upon the landlord to reimburse him, or he may set off such payment against the rent due or to become due; 3 B. & Ald. 647; 3 M. & W. 312; 19 Mo. 501.

There is no implied warranty on the part of the landlord that the premises are safe or reasonably fit for habitation, for the purpose for which they are intended; 25 Wend. 669; 71 Pa. 383; 3 Gray 323; 48 Me. 316; 147 Mass. 471; 70 Tex. 727; 147 U. S. 413 (but see 3 Rob. La. 52). In the absence of fraud or deceit the landlord is not liable for damages suffered by the lessee because of the unfitness of the premises; 65 Vt. 478; and a railroad company letting a house on a mountain side where snow-slides sometimes occurred, was held not bound to notify the tenant of the danger, although the company knew of it, but the tenant did not and had never lived in a region where snow-slides occurred, and, in the absence of deceit or misrepresentation, the company was not liable for injuries to the tenant or death of members of her family, by the destruction of the house by snow-slide; 147 U. S. 413; but where a building is let to different tenants, the landlord is charged with the duty of keeping the halls and those portions of the building which are for the common use of the tenants in safe condition, and properly furnished with light at night; 34 Atl. Rep. (N. J.) 886. So the landlord is charged with the duty of guarding an elevator shaft for the protection of persons properly in and about the premises, if he rents the building to different tenants; 13 Misc. Rep. 496; or retains control of a portion of the premises himself; 40 Pac. Rep. (Cal.) 950; and where the premises were let with a nuisance on them, which was the cause of an injury to a third person, the owner was liable; 31 Pac. Rep. (Col.) 507; 64 Hun 179. So the owner is liable to one injured by the falling of a fire wall and cornice when the building was leased to several tenants, the portions falling not being in the control of any one of them and there being no agreement for repairs by the tenants; 18 S. W. Rep. (Tex.) 953. But where the owner of an apartment house failed to light the hall in which were two adjacent doors, one opening on the stairs and the other into a water-closet used by all the occupants of the house, and a visitor opened the wrong door, and fell

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downstairs, it was held that the owner was not negligent in failing to light the hall and to keep the stair door locked; 131 N. Y. 674. And the owner of an apartment house was held not liable for injuries, caused by defective steps, received by a visitor going from a wake held in the house to which she had neither an express invitation nor one by implication as a relative or friend of the deceased; 156 Mass. 475; nor was a landlord liable for injuries received by a third person by falling into a coal-hole where there was no fault in its construction, and it was not out of repair; 17 R. I. 137.

Subject to such expressions as those indicated above, it has been the rule that the occupant and not the owner of premises is liable for injuries caused by failure to keep them in repair; 156 Mass. 84; and accordingly, the landlord is not liable to third persons, rightfully upon the premises, for injuries caused by the defective condition thereof unless charged with notice, or by reasonable diligence he could have acquired knowledge; 37 Ill. App. 160; 44 *id.* 105; whether such third persons be in a hotel kept by the tenant; 82 Wis. 839; 156 Mass. 329; or persons visiting the tenant socially; 66 Hun 633; or servants of the tenant; 8 Wash. 722; 156 Mass. 511; but where the landlord is in control of machinery within the leased building and furnishes the power for it, and is negligent in that regard, an employe of the tenant is entitled to recover: 154 Mass. 539. See APARTMENT; FLAT.

The English court of appeal has recently laid down two rules. One is "that the landlord of a house let on a weekly tenancy is under no liability to the tenant to let or to maintain it in good repair." The other is, "that such landlord is not responsible to a person who is in the house on the tenant's business for injuries caused by a structural defect in the premises which existed at the time of the letting." The landlord may be held liable for an injury to a passer-by due to a defect which dates from the time the house was let; [1894] 1 Q. B. 164; and he is liable to a stranger on the highway for injuries caused by a defect in a coalplate, which was not proved to have existed at the beginning of the tenancy; 57 L. J. Q. B. 507; but the ground of this decision has been questioned; 55 Alb. L. J. 27.

The landlord is, in the absence of any express covenant or agreement, under *no obligation to make any repairs;* 42 Neb. 376; 152 Pa. 626; and a promise to repair, made by the landlord during the tenancy without any other consideration than the existence of such tenancy, is without consideration and cannot be enforced; 16 Misc. Rep. 528; but a provision in the lease by which the lessee is "to keep the fences in repair, the material for which to be furnished by the lessor" creates an express covenant of the lessee to repair, performance of which was not excused by the lessor's failure to furnish the material; 174 Pa. 598.

Where the lease provides that repairs shall be made at the tenant's expense "unless by special agreement the lessor undertakes to pay for the same," a subsequent agreement by lessor to pay for repairs is binding upon him; 29 S. W. Rep. (Tex.) 166. Where the lessor covenants to *keep* the outside of the building in good repair, he is obliged to *put* it in good repair where that is needed at the time of the execution of the lease; 33 Atl. Rep. (R. I.) 445. In Philadelphia, by custom, certain substantial repairs are to be made by the landlord; 7 Phila. 472; and it is said that a covenant by the lessor to repair includes the duty of rebuilding in case of fire; 58 Ill. App. 87 And it is not in the power of a tenant to make repairs at the expense of his landlord, unless there be a special agreement between them authorizing him to do so; for the tenant takes the premises for *better or for worse*, and cannot involve the landlord in expense for repairs without his consent; 6 Cow. 475; 1 Ry. & M. 357; 7 M. & G. 576; 52 N. Y. 512; 51 Ill. 492; 33 Cal. 341; 1 Sandf. 321; 22 Ind. 114; 36 Vt. 40; 7 Ind. App. 561; 26 S. W. Rep. (Ark.) 193. Even if the premises have become uninhabitable by fire, and the landlord, having insured them, has recovered the insurance money, the tenant cannot compel him to expend the money so recovered in rebuilding, unless he has expressly engaged to do so; nor can he, in such an event, protect himself from the payment of rent during the unexpired balance of the term; Jack. & Gr. L. & T. § 1049; 8 Paige 437; 1 Sim. 146; 1 E. & E. 474; 52 N. Y. 512; 81 Ill. 607; 85 Ala. 99. See 40 La. Ann. 264; 134 N. Y. 349; 3 Misc. Rep. 237.

It has been held that even where the owner of a building had recovered on a fire policy the full loss sustained by the burning of his building caused by the storage of cotton by his tenants in violation of their lease, he may sue and recover from the lessees for the damage to the building; 33 S. W. Rep. (Tenn.) 615.

On the *part of the tenant*, we may observe that on taking possession he is at once invested with all *the rights incident to possession*, and is entitled to the use of all privileges and easements appurtenant to the premises.

A tenant has an implied right to use appurtenances of a building, a portion of which is rented by him; 125 Mass. 287; 145 *id.* 1; 158 *id.* 577. Where the lease of a salesroom provided that the lessee should be allowed the use of the elevator to bring goods from an upper floor in an adjoining estate connecting with the elevator, and subsequent leases were made letting rooms in an upper part of the building to the same lessee, with "one-horse power only," and no lease gave the express right to use the elevator to carry goods from the basement to the sidewalk or *vice versa*, it was held that there was no evidence from which the right to such use could be implied, although the lessor permitted it; 47 N. E. Rep. (Mass.) 618. The tenant may also maintain an action against any person who disturbs his possession or trespasses upon

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the premises, though it be the landlord himself; 2 B. & Ad. 97; 1 Den. 91; 17 C. B. N. S. 678; 8 Cush. 119; 1 Ohio 251; 4 Wash. 749; 3 Tex. Civ. App. 483; he is entitled to an injunction to restrain a nuisance affecting health and comfort in the use of the premises; 46 La. Ann. 78; and may sue for damages to his crops by the overflow of his lands caused by the wrongful construction of a railroad bank; 55 Ill. App. 251; and even after the expiration of his term may recover for injuries done during the period of his tenancy; 2 Rolle, Abr. 551; Holt, N. P. C. 553. One who enters upon land by the permission, sufferance, or consent of the tenant, is at once charged by the law with the allegiance due from the tenant to his lessor; 99 N. C. 551. As occupant, he is also answerable for any neglect to repair highways, fences, or party-wall. He is liable for all injuries produced by the mismanagement of his servants, or by a nuisance kept upon the premises, or by an obstruction of the highway adjacent to them, or the like; for, as a general rule, where a man is in possession of property, he must so manage it that other persons shall not be injured thereby; 3 Q. B. 449; 2 Ld. Raym. 792; 22 N. Y. 355; 65 Ill. 160; 1 M. & W. 435; 51 Pa. 429; 3 Hun 708.

Another obligation which the law imposes upon every tenant, independent of any agreement, is to treat the premises in such a manner that no substantial injury shall be done to them, and so that they may revert to the landlord at the end of the term, unimpaired by any wilful or negligent conduct on his part. In the language of the books, he must keep the buildings wind-and-water-tight, and is bound to make fair and tenantable repairs, such as the keeping of fences in order, or replacing doors and windows that are broken during his occupation. Except where the lease contains a special exemption from that duty, the tenant is responsible for any waste committed on the demised premises; 57 Ill. App. 659. If it is a furnished house, he must preserve the furniture, and leave it, with the linen, etc., clean and in good order; 5 C. & P. 239; 4 M. & G. 95; 12 M. & W. 827; 55 Md. 71.

Where he had a covenant to keep the premises in a cleanly and healthy condition, he was justified in abandoning them where the landlord constantly rendered them uninhabitable by filling up an open sewer under the premises after the tenant had cleaned it out; 147 N. Y. 248. A covenant to keep in repair imposed on the tenant is ordinarily one to keep the premises in as good repair as they were when the lease was made; 36 S. W. Rep. (Mo.) 602.

But he is *not bound to rebuild* premises which have accidentally become ruinous during his occupation; nor is he answerable for ordinary wear and tear, nor for an accidental fire, nor to put a new roof on the building, nor to make what are usually called general or substantial repairs. Neither is he bound to do painting, whitewashing, or papering, except so far as they may be necessary to preserve exposed timber from decay. In general he need do nothing which will make the inheritance better than he found it; 6 C. & P. 8; 12 Ad. & E. 476; 1 Marsh. 567; 10 B. & C. 299; 2 Daly 140; 10 Q. B. 135; Jack. & Gr. L. & T. § 965.

There is no implied contract binding the lessee to restore buildings which have been destroyed by accident; 180 Pa. 409. Under a covenant by the lessee to deliver up the premises in as good condition as when the lease was made, unavoidable (or inevitable) accident excepted, the landlord is not liable for the repairs to a window broken by a storm; 42 Neb. 376; or for one broken by a stone kicked by a passing horse; 43 Ill. App. 360. If there be an express covenant by the tenant to repair, he must do so though the premises be destroyed by fire; 91 Pa. 88; *contra*, if there is no express covenant to repair; 94 U. S. 53. Where the lease required the tenant to "cash any repairs" on the leased premises to a specified amount, the landlord acquires no right to charge the tenant with repairs made by himself; 44 Neb. 818. Under a covenant that the tenant shall "make the necessary repairs," he is liable for the breaking of a plate glass in the building, though without his fault; 9 Misc. Rep. 326. Where an explosion occurred in a leased building, the landlord was not relieved of the burden of showing negligence of the lessee; 36 Atl. Rep. (Pa.) 923.

Where the tenant had covenanted to make the repairs but the landlord authorized his agent to do some repairing in the course of which, by reason of unskilful workmanship, the wall fell upon a tenant's goods, the landlord was liable; 28 S. W. Rep. (Tex.) 1017.

With respect to *farming leases*, a tenant is under a similar obligation to repair; but it differs from the general obligation in this, that it is confined to the dwelling-house which he occupies,—the burden of repairing and maintaining the out-buildings and other erections on the farm being sustained either by the landlord, or the tenant, in the absence of any express provision in the lease, by the particular custom of the country in which the farm is situated. He is always bound, however, to cultivate the farm in a good and husband-like manner, to keep the fences in repair, and to preserve the timber and ornamental trees in good condition; and for any violation of any of these duties he is liable to be proceeded against by the landlord *for waste*, whether the act of waste be committed by the tenant or, through his negligence, by a stranger; Co. Litt. 53; 1 Taunt. 198; 1 Denio 104; 55 Pa. 347; 70 Ill. 527; 94 U. S. 53; 5 Term 373. As to what constitutes waste, see WASTE.

The tenant's general obligation to repair also renders him *responsible for any injury* a stranger may sustain by his neglect to keep the premises in a safe condition; as, by not keeping the covers of his vaults sufficiently closed, so that a person walking

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in the street falls through, or is injured thereby. If he repairs or improves the building, he must guard against accident to the passers-by in the street, by erecting a suitable barricade, or stationing a person there to give notice of the danger; 109 Mass. 398; 22 N. Y. 366; 65 Barb. 214; L. R. 2 C. P. 311; L. R. 5 Q. B. 501. For any unreasonable obstruction which he places in the highway adjoining his premises, he may be indicted for causing a public nuisance, as well as rendered liable to an action for damages, at the suit of any individual injured. Nor may the tenant keep dangerous animals on the premises; 4 Den. 500; 15 Vt. 404. At common law, if a fire began in a dwelling-house and spread to neighboring buildings, the tenant of the house where the fire began was liable in damages to all whose property was injured. But by a statute of Queen Anne, amended by stat. 14 Geo. III. c. 78, this right of action has been taken away. The statute is generally re-enacted in the United States; *vide* Tayl. L. & T. § 196.

The tenant's *chief duty*, however, is *the payment of rent*, the amount of which is either fixed by the terms of the lease, or, in the absence of an express agreement, is such a reasonable compensation for the occupation of the premises as they are fairly worth. If there has been no particular agreement between the parties, the tenant pays rent only for the time he has had the beneficial enjoyment of the premises; but if he has entered into an express agreement to pay rent *during the term*, no casualty or injury to the premises by fire or otherwise, nothing, in fact, short of an eviction, will excuse him from such payment; Woodf. L. & T. 819; 4 Paige, Ch. 355; 1 H. & J. 42; 16 Mass. 240; 7 Gray 560; 10 M. & W. 321; 6 Phila. 457; 72 Pa. 685; 61 N. Y. 356; 80 Ill. 532; 4 Harr. & J. 564. See 1 App. D. C. 447; 8 Misc. Rep. 307. But this is not the law in South Carolina; 1 Bay 499; 4 McCord 447. But, if he has been deprived of the possession of the premises by the landlord, or by a third person, under a title paramount to that of the landlord, or if the latter annoys his tenant, or erects or causes the erection of such a nuisance upon or near the premises as renders the tenant's occupation so uncomfortable as to justify his removal, he is in either case discharged from the payment of rent; 4 N. Y. 217; 4 Rawle 339; Co. Litt. 148 *b*; 75 Ill. 536; 117 Mass. 262; 106 Mass. 201; 18 N. Y. 509; 63 Ill. 430; 2 Ired. Eq. 350; 17 C. B. 30. If, however, part only of the premises be recovered by paramount title, the rent is apportioned, and the tenant remains liable in proportion to the part from which he has not been evicted; Woodf. L. & T. 1115; 2 East 575; 39 Barb. 59; 1 Allen 489. See RENT. A tenant's liability for rent is not affected by condemnation of part of the demised premises, but it ceases where the estate in the entire premises is extinguished; 136 Ill. 87; 144 *id.* 537.

The obligation to pay rent may *be apportioned*; for, as rent is incident to the reversion, it will become payable to the assignees of the respective portions thereof whenever that reversion is severed by an act of the parties or of the law. But the tenant's consent is necessary for an apportionment when made by the landlord, unless the proportion of rent chargeable upon each portion of the land has been settled by the intervention of a jury; 22 Wend. 121; 5 B. & Ald. 876; 1 M. & G. 577; 6 Halst. 262; 22 Pick. 569. A tenant, however, cannot get rid of or apportion his rent by transferring the whole or a part of his lease; for if he assigns it, or underlets a portion of it, he still remains liable to his landlord for the whole; Cro. Eliz. 633; 24 Barb. 333. Instances of an apportionment by act of law occur where there is a descent of the reversion among a number of heirs, or upon a judicial sale of a portion of the premises; for in such cases the tenant will be bound to pay rent to each of the parties for the portion of the premises belonging to them respectively. So, if a man dies, leaving a widow, she will have a right to receive one-third of the rent, while the remaining two-thirds will be payable to his heirs; so, if a part of the demised premises be taken for public purposes, the tenant is entitled to an apportionment; Co. Litt. 148 *a*; 25 Wend. 456; 13 Ill. 625; 20 Mo. 24; 57 Pa. 271; 3 Whart. 357. At common law rent could not be apportioned as to time; 2 Ves. Sr. 672; 3 Watts 394. But various statutes, such as 11 Geo. II. c. 19, both in England and the United States, have mitigated the hardships resulting from an enforcement of this rule. See Tayl. L. & T. § 389; Mitch. R. P. 69.

A tenant is estopped to deny the validity of his landlord's title; 8 U. S. App. 149; 38 W. Va. 607; 8 Misc. Rep. 268; 147 Ill. 269; 113 N. C. 410; 4 App. Div. N. Y. 523; 3 Okl. 223, 260; 16 So. Rep. (Ala.) 14; 89 Wis. 394; 107 Cal. 107; unless he first surrender to him the possession; 98 *id.* 422. Under this rule one who goes into possession under the guardian of minor heirs cannot question their title; 62 N. W. Rep. (Mich.) 174; even after the expiration of the lease, the tenant is bound by the same rule, unless he surrender possession or give notice that he will thereafter claim under another and valid title; 26 Or. 494; this applies to persons who have entered by the owner's permission, and while in possession never denied his title, and their assignees are likewise estopped; 8 Wash. 603. After the termination of the lease, the lessee may, without a surrender of possession, assert a claim to a superior title; 2 Tex. Civ. App. 441; but a tenant in possession under a lease, who afterwards obtains an outstanding title to an undivided interest in the premises, cannot sue the lessor for partition without first surrendering the possession to the lessor; 97 Ala. 414. Where a widow joined in a lease with heirs, who conveyed to the tenant, the latter was still estopped to deny the tenancy as to the widow and was liable to her for her share of the rents; 6 Misc. Rep. 413. A lessee

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who takes a lease from an adverse claimant to the title is estopped to deny the title of the latter when sued for rent; 158 Pa. 457. The tenant is not estopped from showing that the title under which he entered has expired or been extinguished by operation of law; 34 Fla. 610; 32 *id.* 304; or that the landlord has parted with his title; 24 Ore. 475; although one who enters under a tenant cannot deny the title of the landlord without surrendering possession, yet if he enters under a valid lease, he is not estopped from defending his possession under it, but the landlord is estopped in such a case from denying the right of the lessee to possession under a lease expressly conferring such a right; 107 Cal. 455; nor is the lessee estopped to deny the lessor's title where the land was public domain, not the subject of lease without right from the state; 30 S. W. Rep. (Tex.) 822.

The fact that by inadvertence or mistake the tenant paid rent to the landlord after his interest terminated does not constitute a continuance of the tenancy; 55 Mo. App. 662. Where there was a fraudulent agreement between the landlord and tenant to evade the homestead laws, it was held that a general rule did not apply, and that the tenant might set up and prove the fraudulent agreement in an action of ejectment by the landlord; 55 Kan. 259; so where the landlord has induced one to become his tenant by fraud or mistake the latter may contest the title of the former; 118 Mo. 286. A third person having brought goods upon the land by permission of the tenant, and not claiming possession, is not estopped from disputing the title of the landlord; [1893] 2 Q. B. 168.

One who is a tenant of the grantee by a dower right, and as such in possession of lands, will be, after the death of the doweress, a tenant at sufferance of the reversioners, and if he permits the lands to be sold for taxes, he cannot purchase them and set up the title against the reversioners without notice, but his purchase is to be considered a redemption in favor of the landlord; 19 So. Rep. (Miss.) 348.

These rights and liabilities are not confined to the immediate parties to the contract, but will be found to *attach to all persons* to whom the estate may be transferred, or who may succeed to the possession of the premises, either as landlords or tenants. This principle follows as a necessary consequence of that privity of estate which is incident to the relation of landlord and tenant. A landlord may not violate his tenant's rights by a sale of the property; neither can a tenant avoid his responsibilities by substituting another tenant in his stead without the landlord's consent. The purchaser of the property becomes in one case the landlord, and is entitled to all the rights and remedies against the tenant or his assignee which the seller had; while in the other case the assignee of the lessee assumes all the liabilities of the latter, and is entitled to the same protection which he might claim from the assignee of the reversion; in the case of express covenants, the original lessee is not by the transfer discharged from his obligations; 24 Barb. 365; 19 N. Y. 68; 1 Ves. & B. Ch. 11; 4 Term 94; 17 Vt. 626; 2 W. & S. 556; 12 Miss. 43; 3 Misc. Rep. 95; 47 Mo. App. 45; 155 Pa. 38; 34 Pac. Rep. (Col.) 840. In case of implied covenants he is discharged if the landlord specially accept the assignee as his tenant; 9 Vt. 191; 3 Rep. 22; 1 Sm. L. Cas. *176; and the liability of the assignee may be at any time terminated by him, by a transfer of the estate assigned, even if the transfer be made to a pauper with express intent to evade liability; 3 Y. & C. 96; 9 Cow. 88; 9 Vt. 181. A tenant who accepts a lease from and attorns to one who succeeds to the ownership of the land, is estopped, in an action to recover possession, from setting up any defence under a lease from a former owner, under which he had entered; 167 Ill. 564, aff'g 68 Ill. App. 361. And it has been held that a tenant is under a legal obligation to pay rent to one to whom the lease is assigned by the landlord, without any formal act of attornment; 71 N. W. Rep. (Mich.) 836. A lessor who accepts rent from an assignee of the lease thereby waives a provision of the lease that it shall be void if assigned without the lessor's consent; 78 Hun 443.

The relation of landlord and tenant *may be terminated* in several ways. If it is a *tenancy for life*, it will of course terminate upon the decease of him upon whose life the lease depends; 6 Misc. Rep. 377; but if it be for life, or for a certain number of years, and depend upon some particular event, the happening of that event will determine the tenancy. So if it be for a certain number of years, independent of any contingency, it will expire at the last moment of the last day of the tenancy. See 55 N. J. L. 217; 76 Hun 67. And in all these cases depending upon the express conditions of the lease, no notice to quit will be necessary in order to dissolve the relation of the parties to each other; Co. Litt. 216; 9 Ad. & E. 879; 5 Johns. 128; 1 Pick. 43; 2 S. & R. 49; 18 Me. 264; 7 Halst. 99. A tenant after the expiration of his term becomes a trespasser, though his holding is in good faith under a color and reasonable claim of right; and the landlord without legal process may forcibly enter, therefore, and eject him; 16 R. I. 524; 17 *id.* 731; and by holding over after the expiration of the term, a tenant for years does not become a tenant for another year, unless the landlord so elects; 157 Ill. 90; if he holds over after a notice of increase of rent, the effect is to make him a tenant for another year upon the terms of the old lease with the single exception of the increased rent; 58 Ill. App. 228; and a tenant for one year, with the privilege of three, is bound for the latter if he elected to hold over; 2 Mo. App. 1047.

But a *tenancy from year to year*, or *at will*, can only be terminated on the part of the landlord by a *notice to quit*. This notice might at common law be by parol, but by

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statute in England and in most of the United States must now be in writing; 3 Burr. 1603; 2 Brewst. 528; it must be explicit, and require the tenant to remove from the premises; 2 Clark, Pa. 219; 2 Gray 335; Dougl. 175; 5 Ad. & E. 850; it must be served upon the tenant, and not upon an under tenant; it must run in the name of the landlord, and not of his agent; 10 Johns. 270. But personal service of the notice on the tenant is not absolutely essential, and it is sufficient if the notice be left at the tenant's usual residence with his wife or servant; 4 Tenn. 464; L. R. 5 H. L. 134; 103 Mass. 154; 44 Mo. 581. An estate at will must be mutual; if one party can terminate the lease at any time, so can the other; 83 Va. 547. Such a tenancy is terminated by the alienation of the premises, without notice to the tenant; 38 Atl. Rep. (Me.) 540. Whether a tenant from year to year is in any event bound to give notice to determine the tenancy seems doubtful. See the authorities collected in Bright. Pa. 463. At common law this notice was required to be one of half a year, ending with the period of the year at which the tenancy commenced; 1 W. Bla. 596; 7 Q. B. 638; 4 Bing. 362; and this rule prevails in Kentucky, Tennessee, North Carolina, Vermont, Illinois, and New Jersey as to tenancies from year to year; 1 Johns. 322; 22 Vt. 88; 4 Ired. 291; 3 Green, N. J. 181; 4 Kent 113; 6 Yerg. 431; 8 Cow. 13; 39 Ill. 378. In Delaware, Pennsylvania, South Carolina, New Hampshire, Massachusetts, and Michigan, three months' notice is required; Del. Rev. Code Ch. 130, § 4; 4 Fost. 219; 2 Rich. S. C. 346; 11 Pa. 472; 34 *id.* 96; 113 Mass. 214; while the New York statutes provide for its termination by giving one month's notice wherever there is a tenancy at will or by sufferance, created by the tenant holding over after the term or otherwise; 1 R. S. 745, § 7; 3 Misc. Rep. 99.

In case of such a tendency, in default of notice, the landlord has no right of entry until the term granted has terminated by legal notice, and in default of such notice, the tenant may hold over; 8 Houst. 507. The subject is in general governed by statutory rules too numerous and complicated to set forth. Where a lease provides for the termination of a tenancy upon the tenant's ceasing to work for the landlord and the tenant voluntarily ceases so to work, no notice of the termination of the lease to the tenant is necessary; 8 U. S. App. 149.

The relation of landlord and tenant will also be dissolved when the tenant incurs a forfeiture of his lease by the breach of some covenant or condition therein contained. At common law a forfeiture was incurred if the tenant did any act which was inconsistent with his relation to his landlord; as if he impugned the title of his lessor by affirming by matter of record the fee to be in a stranger, claimed a greater estate than he was entitled to, or undertook to alienate the estate in fee; Co. Litt. 251 *b*, 252 *a*; 12 East 444. But these causes of forfeiture, founded upon strict feudal principles, have been generally abolished in the United States; and a forfeiture of a term of years now only occurs in consequence of a breach of some *express* stipulation contained in the lease, as for the commission of waste, non-payment of rent, or the like; 7 Paige, Ch. 350; 5 B. & C. 855; 22 Md. 122; 20 Ill. 125; 32 Mich. 315. In order to work a forfeiture for non-payment of rent, a demand must be made for the rent, though such demand may be in the form of a notice to quit; 35 Neb. 766; 140 U. S. 25. A delay of a few days in declaring a lease forfeited for non-payment of rent does not constitute a waiver of the right of forfeiture; 145 Ill. 238. A provision of a lease that failure of the lessee to make a payment when due should render the lease null and void, and not binding on either party, does not make the lease void, except at the option of the lessor; 159 Pa. 184. A forfeiture may be waived by an acceptance of, or distraining for, rent which became due after a breach committed by the tenant, or by giving a notice to quit, or by any other act which acknowledges the continuance of the tenancy; 8 Watts 51; 2 N. H. 163; 3 H. & M. 436; 1 M. & W. 408; 6 Wisc. 323; L. R. 7 Q. B. 344; 21 Wend. 537; 40 Mo. 449; 96 Cal. 95; 6 Misc. Rep. 408; and will be relieved against by the courts in all cases where it happened accidentally, or where the injury is capable of compensation, the damages on equitable principles being a mere matter of computation; 12 Ves. Ch. 475; 2 Price 206; 9 Mod. 22; Story, Eq. § 1314; 62 N. Y. 486; 44 Vt. 285; and it is always at the election of the lessor to avail himself of his right of re-entry for conditions broken or not as he pleases; 6 B. & C 519; and *vide* 7 W. & S. 41; 38 Pa. 346; 12 Barb. 440; 5 Cush. 281; 29 Conn. 331; 1 Wall. 64.

Another means of dissolving a tenancy is by an operation of law, termed a *merger*,—which happens where a tenant purchases the fee of the reversion, or the fee descends to him as heir at law, the lease becoming thereby merged in the inheritance, the lesser estate being absorbed in the greater. To produce this result, however, it is necessary that the two estates should meet in the same person and in the same right; for if he who has the reversion in fee marries the tenant for years, or if a tenant makes the landlord his executor, the term of years is in neither case merged, because in either case he holds the fee for his own benefit, while the term of years is taken in one case for his wife's use, and in the other for the benefit of the estate he represents as executor; Woodf. L. & T. 1188; 12 N. Y. 526; Co. Litt. 288 *b*; 1 Washb. R. P. 354; 13 Pa. 16; 35 N. Y. 279. See 86 Tenn. 642. But the universal current of opinion now sets against the operation of the doctrine of merger wherever a result will be produced contrary to the intentions of the parties or prejudicial to the interests of third parties; 34 N. Y. 320; 4 Gray 385; 4 De G. M. & G. 474; 3 Hill 96; 4 Paige 403.

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In addition to the several methods of putting an end to a tenancy already mentioned, we may add that it is, of course, competent for a tenant at any time *to surrender* his lease to the landlord; 117 Mass. 357; 16 Johns. 28; 19 Cal. 354; but a mere agreement to surrender a lease, is inoperative unless accompanied by the act; 41 Ill. App. 223. An express surrender can only be made by deed in England, since the Statute of Frauds, and this provision is in some of the states re-enacted; 8 Taunt. 270; 11 Wend. 616; 8 Allen 202; 8 Wisc. 141. But a surrender by operation of law is a case excepted out of the statute; as, for example, where, during the period of the old lease, a new one, inconsistent with it in its terms, is accepted, the old lease is at an end; 8 Johns. 394; 99 Mass. 18; Tayl. L. & T. 512; 117 Mass. 357; 53 Minn. 480. If the subject-matter of the lease *wholly* perishes; 26 N. Y. 498; 118 Mass. 125; 38 Cal. 259; or is required to be taken for public uses; 38 Mo. 143; 20 Pick. 159; 57 Pa. 271; 119 Mass. 28; 43 N. Y. 377; or the tenant disclaims to hold under his landlord, and therefore refuses to pay his rent, asserts the title to be in himself or unlawfully attorns to another, the tenancy is at an *end*, and the landlord may forthwith resume the possession; 3 Pet. 43; 4 Wend. 633; 21 Cal. 342; 8 Watts 55; 5 Dana 101; 23 Gratt. 332.

Where the tenant, by consent of his landlord, continues in possession after the expiration of his term, in the absence of a new agreement, the law will imply a tacit renewal of the former one; 41 Ill. App. 209; 88 Ga. 610; [1893] 1 Q. B. 736. See 49 Mo. App. 631; 38 W. Va. 607.

*After the tenancy has ended*, the right of possession reverts to the landlord, who may re-enter upon the premises if he can do so without violence. But if the tenant holds over and the landlord takes possession forcibly, so as to endanger a breach of the peace, he runs the risk of being punished criminally for a forcible entry (see FORCIBLE ENTRY AND DETAINER) as well as of suffering the consequences of an action of trespass; 121 Mass. 309; 59 Me. 568; 4 Am. Law Rev. 429; 1 M. & G. 644; 1 W. & S. 90. The landlord should, therefore, in all such cases, call in the law to his assistance, and receive possession at the hands of the sheriff.

The tenant, on his part, is bound quietly to yield up the possession of the entire premises; 148 Ill. 192. And for refusal to perform this duty he will be liable for rent; 51 N. Y. 509; 84 Ill. 62; 62 Me. 248; E. B. & E. 326.

If the tenant, after surrendering possession, resumed it under any agreement with his landlord or his agent, though made by the latter without authority, he is not liable for holding over; 1 App. Div. N. Y. 449; and where a tenant vacated a building and delivered up the key, leaving a press on the premises, which was used by his employes, who had entered the building some days after without his knowledge, he did not hold over; 5 *id.* 124. Where the lessee holds over, he may be treated by the landlord at his option as a tenant or a trespasser; 15 Pa. Co. Ct. R. 243; 12 Misc. Rep. 348. The tenant cannot avoid his responsibility for the rent of another term by notice that he is going to quit, and then not doing it; 169 Pa. 460. Where the agent of the lessor failed to make an answer to the tenant's proposition to hold over as tenant by the month, he was not thereby relieved from the consequences of holding over; 168 Pa. 541. The burden is on the tenant to relieve himself from an action for unlawful detainer by showing the agreement for the renewal of the tenancy; 56 Mo. App. 440.

But where a tenant for years had planted a crop, after a decree foreclosing a mortgage on the leased land under which the land was sold before the crop matured, and the purchaser having notified the tenant that he would expect rent in money or in kind. the latter was held entitled to the crop; 62 N. W. Rep. (Neb.) 32. Upon the abandonment of a farm by a tenant before the end of the term, the possessory right in whatever property is on the farm, including harvested crops, reverts to the lessor; 9 Houst. 281.

The tenant has a reasonable right of egress and regress for the purpose of removing his goods and chattels; 2 Bla. Com. 14; 24 Me. 424; L. R. 5 C. P. 334. He may, also, in certain cases, take such estovers as are attached to the estate and the *emblements* or annual profits of the land after his tenancy is ended, as to which his rights are largely affected by local customs (see ESTOVERS; EMBLEMENTS); 86 Ala. 508; 56 Conn. 374; but a tenant for years is not entitled to them; 48 Mo. App. 430; nor where the landlord re-enters and takes possession because of the failure of the tenant to pay rent; 69 Hun 588: and, unless restricted by some stipulation to the contrary, may remove such *fixtures* as he has erected during his occupation for his comfort and convenience, particularly if for trade purposes. As between landlord and tenant, whatever is affixed to the land by the tenant for the purpose of trade, whether it be made of wood or brick, is removable at the end of the term; 142 U. S. 396; 139 N. Y. 432. See FIXTURES.

The ordinary common-law remedy by which a landlord proceeds to recover the possession of his premises is by an action of ejectment, and in these cases it is a general rule that the tenant is never permitted, for reasons of sound public policy, to controvert his landlord's title, or to set up against him a title acquired by himself during his tenancy which is hostile in its character to that which he acknowledged in accepting the demise: 3 B. & C. 413; 2 Denio 481; 3 Ad. L. & E. 188; 15 N. Y. 327; 61 Me. 590; 54 Pa. 196; 42 Md. 81; 72 N. C. 294; 18 Wall. 431; 133 Ind. 14. But to this rule there are some exceptions: of these the chief are cases where the landlord's interest has expired during the lease; 2 Zab. 261;

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Tayl. L. & T. § 708; or where he has sold and conveyed the land; 10 Md. 333; 50 Ill. 232; 99 Mass. 15; or where the tenant has been evicted by title paramount, and accepted a new lease under the real owner of the premises; 69 Pa. 316; 66 Me. 167; 32 Mich. 285.

But the slow and measured progress of the action of ejectment in most cases affords a very inadequate remedy to the landlord; and in order, therefore, to obviate the evils arising from its delays, the statutes of the different states provide a summary proceeding, by which a landlord may be speedily reinstated, upon short notice, in cases where a tenant abandons the premises before the end of the term without surrendering the lease, leaving rent in arrear, continues to hold over after the expiration of his term, or has become unable or unwilling to pay rent for the use of the premises; 22 Wend. 611; Tayl. L. & T. § 713.

See, further, on the subject of this article, Woodfall; Smith; Taylor; Archbold; Comyns; Cootes; and Smith & Soden, on the Law of Landlord and Tenant; Platt on Leases; Washburn on Real Property, 5th ed. *292.

**LANDLORD'S WARRANT.** A warrant of distress. A written authority from a landlord to a constable or bailiff authorizing him to make a distress upon the tenant's goods and chattels in order to force the payment of rent or some covenant in a lease. See DISTRESS; LANDLORD & TENANT.

**LANDS.** See LAND; LANDS, PUBLIC.

**LANDS CLAUSES CONSOLIDATION ACTS.** Important acts, beginning in 1845, and last amended by 32 & 33 Vict. c. 18, the object of which was to provide legislative clauses in a convenient form for incorporation, by reference in future special acts of parliament, for taking lands, with or without the consent of their owners, for the promotion of railways, and other public undertakings. Moz. & W.

These statutes or some designated part thereof are incorporated in all acts of parliament, authorizing public works which require the acquisition of land, and they correspond to the grant of the delegated right of eminent domain in legislative charters in the United States. The scope of these acts of parliament includes provision for the purchase of lands by agreement between the promoters of an undertaking of a public nature and the owners of the land required; and also for the acquisition of the land otherwise than by agreement, in which contingency the compensation to be paid is settled either by the verdict of a jury or by arbitrators. In the case of persons under disability or absent from England, provision is made for the valuation of their compensation. Forms of covenants are prescribed, and upon their execution the fee-simple of the lands is vested free of all terms for years and other qualifications; or in case of copyholds, the covenants must be enrolled on the court rolls, and must be thereafter enfranchised. Mortgages on the lands purchased may be redeemed and released of rent charges, and the surrender of leases may be procured upon such terms as may be agreed upon, or in default of agreement as may be settled by the verdict of a jury or by arbitration. The acts also authorize the sale of superfluous lands by the promoters, the original owner having the option to repurchase them, and next after him the nearest adjoining owners unless the land is built upon, suitable for building, or situated within a town. It is usually provided that the costs are borne by the promoters. See 2 Brett, Com. 661; PROMOTER.

**LANDS, PUBLIC.** Under the title public lands of the United States is comprised such land as is open to sale or other disposition under general laws. 145 U. S. 538; 92 *id.* 763; 10 Nev. 260. In a statute authorizing location of script, it does not include tidelands; 153 U. S. 278. Nor does the term include lands to which any claims or rights of others have attached; 145 *id.* 538.

GOVERNMENT OWNERSHIP. The public domain embraces lands known in the United States as "public lands," lying in certain states and territories known as "land states and territories," and was acquired by the government of the United States by treaty, conquest, cession by states or other nations, and purchase, and is disposed of under and by authority of the national government, when the Indian title thereto (which is one of possession merely) has been extinguished by treaty stipulations or otherwise.

The fee in unsold lands is either in the federal or state governments. The Indians have only a right of use, which, however, cannot be divested, except by purchase or war; 2 McLean 412.

They have the unquestionable right to the lands which they occupy until extinguished by a voluntary cession to the government; 92 U. S. 733; *id.* 760; while the claim of the government extends to the complete ultimate title, charged with the right of possession by the Indians, and to the exclusive power of acquiring that title of possession; 8 Wheat. 603; 6 Cra. 87; 17 Wall. 211; 95 U. S. 517.

The English possessions in America were not claimed by right of conquest, but by right of discovery. The discoveries were made by persons acting under the authority of the government for the benefit of the nation; and the crown, according to the principles of the British constitution, was the proper organ to dispose of the public domain; 16 Pet. 409. See also 8 Wheat. 595. The United States hold the public lands within the new states by force of the deeds of cession and the statutes connected with them and not by any municipal sovereignty which it may be supposed they possess or have reserved by compact with the new states, for that particular purpose; 3 How. 224.

The interest of the United States in lands held by it within state boundaries is simply proprietary, the sovereignty residing within the state, and its rights differ from those of any ordinary land-holder in the state, only as provided in the constitution of the United States, and by the terms of the compact between the general and the state government at the time of the admission of the latter into the Union; 5 Minn. 223.

All lands in the territories not appropriated by competent authority before they were acquired are, in the first instance, the exclusive property of the United States, to be disposed of to such persons, at such

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times and in such modes and by such titles, as the government may deem most advantageous to the public; 20 How. 561.

The United States is the sole owner of the soil, and has entire and complete jurisdiction over it. Through congress, it provides the methods of disposition under grants, settlement laws, or sales, public or private; may prevent trespasses, and in all methods retain the entire control over it until sold or otherwise disposed of. Congress has the same power over it as over any other property belonging to the United States, and this power is vested in congress without any limitation; 6 McLean 517; 13 Wall. 92; 20 How. 558; 14 Pet. 526; 13 *id.* 436; and any change of political condition, as in a territory becoming a state, or change of boundary of a territory or state, in no wise affects the absolute and complete proprietary power of the national government over the public domain. It remains until the last acre is disposed of. It cannot be taxed by a state; 4 How. 169; nor can a state exercise any power or control over the public lands which may lie within its limits; 5 McLean 344; 14 Pet. 526; 4 How. 169; 6 McLean 517.

The control of the United States over their own property is independent of locality, and no state or territory can interfere with their control, enjoyment, or disposal of such property; nor are the contracts of the government with respect to subjects within its constitutional competency, local, or confined in their effect and operation strictly to the *situs* of the subjects to which they relate; 20 How. 558.

For the amount of the public lands and the manner in which it was acquired by the national government, see Donaldson's History of the Public Domain, p. 10; H. R. Misc. Docs. No. 45, part 4, 2d Sess. 47th Cong., vol. 10.

NATIONAL CONTROL AND DISPOSITION. The constitution of the United States (Article 4, section 3, par. 2) provides that: "The congress shall have the power to dispose of and to make all needful rules and regulations respecting the territory or other property belonging to the United States," the word property in the above quotation meaning lands; 6 McLean 517. Under the authority thus conferred upon it, the congress has provided a complete system for the regulation and disposal of the public domain. In the early stages of the history of the government the public domain was put within the jurisdiction and control of the secretary of the treasury, but on March 3, 1849, congress created the home, now the interior department, and by section 3 of that law provided that "the secretary of the interior shall perform all the duties in relation to the general land office of supervision and appeal now discharged by the secretary of the treasury." Thereafter the general land office became and still continues to be a bureau in the interior department. The secretary of the interior is now charged with the supervision of the public business relating to the public lands, including mines and pension and bounty lands. Rev. Stats. chaps. 2 and 3, pp. 74–78. See LAND OFFICE.

Under the supreme control which has been vested in it by the constitution, the congress has divided the public domain into various land districts, and has provided for the appointment of a surveyor general for the states and territories, and of certain deputy surveyors; U. S. Rev. Stat. §§ 2207–2233. It has also provided for the appointment of various registers and receivers, and the creation of what is known as local land offices in the various land districts. The duties of these officers is to receive applications to enter the public lands under the various land laws, and to hear contests concerning the same, with rights of appeal to the general land office and from thence to the secretary of the interior. See U. S. Rev. Stat. §§ 2234–2247. For the various land districts and their creation, see U. S. Rev. Stat. § 2248.

KINDS OF LAND AND METHODS OF ACQUIRING SAME. The public lands may be divided with respect to their character into, first, agricultural lands, which are acquired under the various laws, such as pre-emption, homestead, etc., at the price of $1.25 per acre when they lie without, and $2.50 per acre when they lie within, the limits of any grant made by congress in aid of the construction of a railroad; U. S. Rev. Stat. § 2357; 160 U. S. 136; second, mineral lands, which are sold at $5.00 per acre, under which term we include lands containing placer deposits of minerals, which are sold at $2.50 per acre; third, coal lands, which are sold at $20.00 per acre when situated within 15 miles of any completed railroad, otherwise at $10.00 per acre; fourth, desert lands, which are sold at $1.25 per acre, provided they do not lie within the limits of a railroad grant; 160 U. S. 136; and fifth, saline lands, sold at $1.25 per acre.

Various methods for the sale or other disposition of the public domain have been enacted from time to time, a very interesting history of which may be found in Donaldson's History of the Public Domain 196, 208, 676. The provisions of law which formerly existed relative to the acquisition of public lands by private entry and public sale and through the timber culture laws have been repealed; R. S. 1 Supp. pp. 682, 940. The methods of acquiring the agricultural lands of the United States are now, through the operation of the pre-emption law, superseded by the provisions of the amended homestead law and the desert land act.

*Pre-emptions.* The provisions of the law formerly existing with relation to the acquisition of title under the pre-emption laws were repealed and superseded by the act of March 3, 1891; Rev. Stat. 1 Supp. pp. 939, 940, especially section 3 of said act, p. 942. The acts of March 3, 1877, 19 Stat. L. 404, May 27, 1878, and June 14, 1878, 20 Stat. L. 63–113, permitting pre-emptioners who have changed to homestead entries to credit their time from original settlement, are

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superseded as to future permanent operations by the act of March 3, 1891, *supra*. See also act of March 3, 1889; Rev. Stat. 1 Supp. p. 682. Various other acts contain provisions common to pre-emption and homestead entry, and are by this act superseded as to the former. This act, however, does not affect entries made under the pre-emption laws prior to its passage. See sec. 4 of said act, and 15 Land Decisions 482.

*Desert Land Act.* Desert lands are such as will not, without artificial irrigation, raise an agricultural crop. These lands are confined to what is known as the arid regions which are situated in certain western states and territories. Provision is made for the acquisition of lands of this character by conducting water thereon, and performing certain other requirements, as provided in the act of March 3, 1877; Rev. Stat. 1 Supp. p. 137. For sections 4 and 8 added to this act, see act of March 3, 1891, Rev. Stat. 1 Supp. pp. 940, 941.

*Saline lands.* Provision for the sale of land of this character is made by the act of January 12, 1877; Rev. Stat. 1 Supp. 127. Under its provisions a hearing is ordered and witnesses are examined as to the character of the land in question, and the testimony taken at the hearing is transmitted to the general land office for its decision. Should the tract be adjudged agricultural, it will be subject to disposition as such. Should the tract be adjudged to be of saline character it will be offered at public sale to the highest bidder for cash at a price of not less than $1.25 per acre. In case it is not sold, it is subject to private sale at a price not less than $1.25 per acre, in the same manner as other public lands are sold. *Quære:* Whether this act is repealed by section 9 of the act of March 3, 1891? U. S. Rev. Stat. 1 Supp. 943.

*Coal lands.* For the provisions relating to the acquisition of lands of this character, see Rev. Stat. U. S. § 2347. See also Donaldson's History of the Public Domain 1277, 1278.

MINERAL LANDS, RESOURCES, AND CLAIMS; *location of, under U. S. Laws.* The existing provisions and regulations relative to the acquisition of mineral lands, the title of which is in the government, are to be found in United States Revised Statutes, §§ 2318–2352, and in 1 Supp. Rev. Stats. pp. 166–7; 276, 62, 324, 948, 950. For a history of the attempted legislation prior to the passage of the act of 1866 (the first mining law), see Yale on Mining Claims 340–350; and Weeks on Mineral Lands, Addenda, chap. 1, for the act of 1866.

*Requisites of location.* All valuable mineral deposits in lands belonging to the United States, whether surveyed or unsurveyed, are "free and open to exploration and purchase by citizens of the United States, or those who have declared their intention to become such" (Rev. Stats. § 2319), and citizenship or declared intention is a condition precedent to the right of location; 19 Fed. Rep. 82; 12 Pac. Rep. (Ida.) 904. A state corporation is a citizen for this purpose, provided the members thereof are citizens and qualified to make the location; 21 Pac. Rep. (Col.) 1019; 13 Colo. 105; 130 U. S. 630. Upon declaring his intention to become a citizen, an alien may have advantage of work previously done, and of a record previously made; 19 Fed. Rep. 78; and an alien locator may convey to a citizen so as to give title from date of conveyance, provided no third person acquires rights prior to such conveyance; 1 Fed. Rep. 537. See 6 Wall. 122. A location made jointly by aliens and citizens is a good location by the citizens; 1 Fed. Rep. 537.

A mineral location can only be made on the unsold, unappropriated and unoccupied lands of the United States; 3 Wall. 304; 24 Cal. 562; 67 Cal. 656; 14 Cal. 461; 6 Colo. 393; but the right to possession is derived solely from a valid location; 4 Mont. 370; 4 *id.* 527; and cannot be held as "occupied" so as to defeat a subsequent location unless all the laws, including the yearly assessment work, etc., are complied with; 104 U. S. 284; 115 *id.* 408; 59 Cal. 613; 6 Mont. 53. The act describes mineral lands as "valuable mineral deposits." This means lands which may be profitably mined in the usual manner; Copp's Mining Lands 324. Lands containing minerals, but not in profitable quantities, are not mineral lands; 115 U. S. 392; 28 Fed. Rep. 482; 45 Cal. 482. But non-mineral lands, to the extent of 5 acres, may be located as mill sites, when in connection with a lode location or separately; Rev. Stats. § 2337. Title to mineral lands can only be acquired in the precise manner provided by the laws relating to such lands; and a patent obtained under the provisions of any other law is void; Rev. Stats. § 2318; 21 Wall. 660; 115 U. S. 392, 408. If a patent issue for agricultural land on which there is a known lode, title to such lode does not pass; 5 Oreg. 104; but *contra* if subsequently discovered; Copp's Min. Lands 124; 17 Cal. 199. The right to locate is initiated by discovery and appropriation, which forms the source of title; development being the requisite of continued possession; 113 U. S. 537; 116 *id.* 418; 22 Pac. Rep. (Cal.) 304. A location before an actual discovery confers no rights upon the locator; 1 Fed. Rep. 530; 11 *id.* 676.

No specific time is designated by the statutes within which the location must be completed; but if one begin a location and then depart he cannot return and complete the location so as to hold it against one who, during such absence, has made a complete location; 65 Cal. 419. A location is dependent, primarily, upon what is found in the discovery shaft, the discovery of ore elsewhere being, as a rule, unavailing; 8 Fed. Rep. 725: but see 3 Utah 94; 6 Colo. 581; 15 Nev. 383, where evidence was admitted in proof of discovery to show the existence of a vein other than at the location point. The work leading up to the discovery need not have been done by the locator, provided the existence of the vein

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was known to him at the time of location; 7 Mont. 80.

It is not priority of discovery, but priority of compliance with the various requirements of the law that gives the right to the mine; 13 Nev. 455. As to the proper manner of staking out a claim so as to conform to the lode or vein, see 98 U. S. 463. See also 6 Colo. 393; 13 Nev. 442. Laws and regulations for the location, development, and working of mines may be made by the states and by the miners themselves; Rev. Stats. §§ 2319–2324.

As to the extent of ground open to location and the method of staking it off, see Rev. Stats. § 2320, and for the provisions relating to placer locations, see Rev. Stats. §§ 2329, 2333. See 128 U. S. 673; Copp's Min. Lands 52.

The term "placer claim," as used in Rev. Stats. § 2329, means "ground between defined boundaries which contains mineral in its earth, sand, or gravel; ground that includes valuable deposits not in piece, that is, not fixed in rock, but which are in a loose state, and may, in most cases, be collected by washing or amalgamation, without milling." 128 U. S. 679.

It is incumbent upon one in possession of a placer claim whereon is a vein or lode, to state that fact in his application for a patent, or the patent will not carry such vein or lode. If discovered subsequent to the issuance of the patent, however, such vein or lode is covered by the placer patent; Rev. Stats. § 2333; 67 Cal. 286; 116 U. S. 687.

The statutory requirements concerning the description of the location, Rev. Stats. §§ 2318, 2324, are: (1) that the location shall be along the vein or lode; (2) that it shall be distinctly marked on the ground so that the boundaries can be readily traced and that such description shall be by reference to some permanent object for the identification of the claim; (3) that all the lines shall be parallel—the last requirement being directory only, the object being to prevent a party from claiming more width of vein outside his surface lines than within them; 83 Cal. 203. All other details of location are governed by the rules and regulations of miners and state laws; Rev. Stats. § 2324.

Although the federal laws do not require the posting of any notice of location on the claim, but only require the recording of such notice in the mining district, yet the posting of a notice is almost universally required by the miners' regulations, and by state laws; 113 U. S. 537; 10 Cal. 446; 40 Fed. Rep. 787. See LODE; VEIN.

*Re-location.* A mining claim is subject to re-location where the owner has failed to comply with the statutory requirements, or has failed to observe local rules; Rev. Stats. § 2324; 73 Cal. 520; 12 Nev. 312; 1 Mont. 325. But the forfeiture must have actually occurred before re-location, otherwise the re-location is invalid and the re-locator a trespasser; 11 Fed. Rep. 680; 1 Idaho 107: 21 Pac. Rep. (Ida.) 413; 104 U. S. 279. A re-location is made in the same manner and carries the same rights as original location; 6 Colo. 393; 9 *id.* 339; 20 Pac. Rep. (N. M.) 798.

*Annual work.* It is provided by federal statute that during each year, after location and until a patent issues, there shall be performed on the claim not less than $100 worth of labor on improvements; Rev. Stats. § 2324; and this provision is applicable alike to placer claims and to lode claims; 65 Cal. 40. The work may be done anywhere upon the surface of the claim within its surface lines or below the surface within the lines extended vertically downward, but it must be done as a necessary means of extracting ore; 5 Sawy. 439; 6 Mont. 138. See also 109 U. S. 440; 104 *id.* 655. By act of February 11, 1875, U. S. Rev. Stats. 1 Supp. 62, it is provided that where a tunnel has been run for the purpose of developing a lode, the tunnel shall be considered as expended on said lode, and that it shall not be required to perform work on the surface of the lode as required in § 2324 Rev. Stats. See 111 U. S. 355.

This work may be done by any party in interest, whether such party have a legal or equitable claim; 11 Fed. Rep. 680. The amount of work required by the statute cannot be decreased by any state law or miners' regulation; 7 Colo. 443; 60 Cal. 631; and may be done at any time within the year; 104 U. S. 279; 8 Colo. 41.

Failure to perform the work will be excused if brought about by actual existing fear of bodily harm, or prevented by coercion or duress actually and presently existing; 7 Fed. Rep. 331; 113 U. S. 527.

Where claims are held in common, this annual work may be done on any one claim; Rev. Stats. § 2324; 111 U. S. 350; 109 *id.* 440.

*The apex rule.* Ordinarily the locator would be confined to the limits of his surface measurements both as to surface possession and beneath it, but by the apex rule the locator is entitled not only to the surface included within the lines of his location, but also to all of the veins, lodes, and ledges throughout their entire depth, the apex of which lies inside of such surface lines extending downward vertically, albeit such veins, lodes, or ledges may depart from a perpendicular course in such wise as to extend outside of the side lines of the location, provided such right shall not extend beyond the entire lines of the location projecting in their own line or until they intersect the veins or ledges; Rev. Stats. § 2322; 11 Fed. Rep. 670; 23 Pac. Rep. (Ida.) 547; 42 Fed Rep. 626. But this right does not carry with it power to follow into the lands of an adjoining proprietor holding title to agricultural lands; 36 Fed. Rep. 668. But see 42 Fed. Rep. 98. This rule of the apex has been a fruitful source of litigation, the following being a few of the more important cases: 118 U. S. 196; 75 Cal. 78; 3 Fed. Rep. 368; 8 *id.* 725; *id.* 297; 42 *id.* 98; 2 McCrary 121; 114 U. S. 576; 98 *id.* 463; 42 Fed. Rep. 98; 8 *id.* 297; 1 Ari. 426; 2 Utah 355.

PRIVATE ACQUISITION. The rule is well

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settled, that when public lands have been surveyed and placed in the market, or otherwise opened to private acquisition, a person who complies with all the requisites necessary to entitle him to a patent in a particular tract or lot is to be regarded as the equitable owner thereof, and the land is no longer open to location. Any subsequent grant of the same land to another party is void, unless the first location or entry be vacated and set aside; 98 U. S. 121; see 13 Pet. 498; and when different grants cover the same premises, the earlier takes the title; 139 U. S. 1.

Public lands of the United States may be granted by statute or by treaty, as well as by patent; 1 Doug. Mich. 546. As to the latter method, see LAND PATENT.

After public lands have been entered at the land office and a certificate of entry obtained, they are private property, the government agreeing to make a conveyance as soon as it can, and in the meantime holding the naked legal fee in trust for the purchaser, who has the equitable title; 133 U. S. 496; 128 *id.* 456; and they cease to be public; 132 *id.* 357.

Courts have power to protect the private rights of a party who has purchased in good faith from the government, against the interference or appropriations of corrective resurveys made by the land department subsequently to such purchase; 128 U. S. 699. The power to make and correct surveys of the public lands belongs to the political department of the government, and while the lands are subject to the supervision of the General Land Office, its decisions in such cases are unassailable by the courts, except by a direct proceeding; 128 U. S. 699; 142 *id.* 161.

Persons entering on lands, whether "vacant" or "public land," or land acquired by the government of the United States under a foreign grant, are to be deemed trespassers; 1 McAll. 119; and an agreement to sell and transfer their possession and improvements is an illegal and void agreement to continue the trespass, and a note given for the purchase money of an improvement on vacant lands of the United States is for an illegal consideration, and no action will lie upon it; 2 Miss. 150; 8 Fla. 34; and a trespasser of land from the government is entitled to improvements thereon at the time of the purchase, and if the party who made them should afterwards remove them he is liable in an action of trespass; 32 Miss. 138. The occupancy of the public lands of the United States constitutes, at least so far as trespasses by a stranger are concerned, a tenancy at will, and not a tenancy from year to year; 5 Stew. & P. 82. A person cultivating public lands to which he has no title is not protected by the doctrine of emblements, and a purchaser from the United States is entitled to all crops growing upon the land at the time: 5 Mo. 335; but a person by entry upon such land acquires no title to timber cut prior to, and lying upon the land at, the time of his entry; 19 *id.* 362.

In addition to the methods of disposing of the public domain to actual purchasers or settlers upon it, congress has disposed of immense quantities of land in various other ways. For example, grants made in aid of the construction of railroads, either granted directly to the road itself or to a state as a trustee for the use of the road. Large quantities of land have also been granted to the states as they were admitted into the Union, for educational, charitable, and other purposes. A large amount of the public domain has also been taken up under land bounties for military and naval services prior to 1861 and subsequent, and also by the granting of lands for town sites and county seat purposes. An interesting account of all this legislation will be found in Donaldson's History of the Public Domain. See also Barringer & Adams, Mines and Mining; INDIANS; IRRIGATION; MINES AND MINING; PATENT; LAND GRANT; LAND WARRANT; LAND OFFICE; LAND PATENT.

**LANDS, TENEMENTS, AND HEREDITAMENTS.** A phrase used in early English law to express all sorts of property of the immovable class, as goods and chattels did the movable class. Wms. R. P. 5.

The technical expression for the most comprehensive description of real property.

**LANGEMANNI.** The lords of manors. 1 Co. Inst. 5; Moz. & W.

**LANGUAGE.** The medium for the communication of perceptions and ideas.

*Spoken language* is that wherein articulate sounds are used. See 90 Ga. 456.

*Written language* is that wherein written characters are used, and especially the system of characters called letters and figures.

By conventional usage, certain sounds and characters have a definite meaning in one country, or in certain countries, and this is called the language of such country or countries: as, the Greek, the Latin, the French, or the English language. The law, too, has a peculiar language. See Eunom. Dial. 2.

On the subjugation of England by William the Conqueror, the French-Norman language was substituted in all law proceedings for the ancient Saxon, which, according to Blackstone, 3 Com. 317, was the language of the records, writs, and pleadings until the time of Edward III. Mr. Stephen thinks Blackstone has fallen into an error, and says the record was, from the earliest period to which that document can be traced, in the Latin language. Plead. Appx. note 14. The history of legal language in England is further stated by Blackstone as follows: By the statute 36 Edw. III. st. 1, c. 15, it was enacted that for the future all pleas should be pleaded, shown, defended, answered, debated, and adjudged in the English tongue, but be entered and enrolled in Latin. The Norman or law French, however, being more familiar as applied to the law than any other language, the lawyers continued to employ it in making their notes of the trial of cases, which they afterwards published in that barbarous dialect under the name of Reports.

After the enactment of this statute, on the introduction of paper pleadings, they followed, in the language as well as in other respects, the style of the records, which were drawn up in Latin. This technical language continued in use till the time of Cromwell, when by a statute the records were directed to be in English; but this act was repealed at the restoration by Charles II., the lawyers finding it difficult to express themselves as well and as concisely in the vernacular as in the Latin tongue; and the language of the law continued as before till



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about the year 1730, when the statute of 4 Geo. II. c. 26, was passed. It provided that both the pleadings and the records should thenceforward be framed in English. The ancient terms and expressions which had been so long known in French and Latin were now literally translated into English. The translations of such terms and phrases were found to be exceedingly ridiculous. Such terms as nisi prius, habeas corpus, fieri facias, mandamus, and the like, are not capable of an English dress with any degree of seriousness. They are equally absurd in the manner they are employed in Latin; but use, and the fact that they are in a foreign language, have made the absurdity less apparent.

By statute of 6 Geo. II. c. 14, passed two years after the last-mentioned statute, the use of technical words was allowed to continue in the usual language,—which defeated almost every beneficial purpose of the former statute. In changing from one language to another, many words and technical expressions were retained in the new, which belonged to the more ancient language; and not seldom they partook of both. This, to the unlearned student, has given an air of confusion and disfigured the language of the law. It has rendered essential, also, the study of the Latin and French languages. This, perhaps, is not to be regretted, as they are the keys which open to the ardent student vast stores of knowledge. In the United States, the records, pleadings, and all law proceedings are in the English language, except certain technical terms which retain their ancient French and Latin dress. 3 Bla. Com. 317.

From the Conquest until 1731, says Prof. F. W. Maitland, the solemnest language of the law was Latin, and even in the Anglo-Saxon time, though English was the language in which the laws were published and causes pleaded, Latin was the language in which the kings made grants of land. In 1016 the learned men of both races could write and speak in Latin. French was then little more than a vulgar dialect of Latin, and a language in which the people could not write anything. The Conqueror used both Latin and English in his laws, charters, and rights, but Latin soon got the upper hand and became for a while the one written language of the law. In Chancery there was nothing but Latin, and the judgments of the courts were in that language. This continued until 1731. Meantime in the twelfth or early in the thirteenth century, ordinances and statutes written in French began to appear. Under Edward I. French became the language in which laws were published and law books written and continued to be the language of the statute books until the end of the middle ages. Under Henry VII. English became the speech in which English lawgivers addressed their subjects. As the oral speech of litigants and their advisers, French prevailed from the Conquest onwards, but in the local courts a great deal of English must long have been spoken. The jurisprudence of a French-speaking court became the common law, the measure of all rights and duties, and was carried throughout the land by the journeying justices. In the thirteenth century French was used in pleading and the professional lawyer wrote and thought in French. In 1362 a statute endeavored to make English instead of French the spoken language of the law courts, but law writing was still in French. Gradually in the sixteenth century the lawyers began to write in English, though many French law terms still continued to be used; 1 Soc. Eng. 278; and see 1 Poll. & Maitl. 58.

The effect of the Norman conquest of England is still apparent in the technical, legal words in ordinary use. "At the present day," says a recent writer, "it would hardly be too much to say that all our words having a definite legal import are in a certain sense French words. A German jurist is able to expound the doctrines of Roman law in genuinely German words. On many a theme an English man of letters may by way of exploit write a paragraph or a page and use no word that is not in every sense a genuinely English word; but an English lawyer who attempted a similar puritanical feat would find himself doomed to silence. . . . It is worthy of remark that within the sphere of public law we have some old terms that have come down to us from unconquered England. Earl was not displaced by count, sheriff was not displaced by viscount, our king, our queen, our lords, our knights of the shire are English; our aldermen are English if our mayors are French; but our parliament and its statutes, our privy council and its ordinances, our peers, our barons, the commons of the realm, the sovereign, the state, the nation, the people are French; our citizens are French and our burgesses are more French than English. So too a few of the very common legal transactions of daily life can be described by English verbs. A man may give, sell, buy, let, hire, borrow, bequeath, make a deed, a will, a bond, and even be guilty of manslaughter or of theft, and all this is English. But this is a small matter. . . . Let us look elsewhere and observe how widely and deeply the French influence has worked. Contract, agreement, covenant, obligation, debt, condition, bill, note, master, servant, partner, guarantee, tort, trespass, assault, battery, slander, damage, crime, treason, felony, misdemeanor, arson, robbery, burglary, larceny, property, possession, pledge, lien, payment, money, grant, purchase, devise, descent, heir, easement, marriage, guardian, all are French. We enter a court of justice; court, justices, judges, jurors, counsel, attorneys, clerks, parties, plaintiff, defendant, action, suit, claim, demand, indictment, count, declaration, pleadings, evidence, verdict, conviction, judgment, sentence, appeal, every one and every thing, save the witnesses, writs and oaths, have French names. In the province of justice and police with its fines, its gaols, and its prisons, its constables, its arrests, we must, now that outlawry is a thing of the past, go as far as the gallows if we would find an English institution. Right and wrong we have kept, and though we have received *tort* we have rejected *droit* but even law probably owes its salvation to its remote cousin the French *lei*." 1 Poll. & Maitl. 58.

Agreements, contracts, wills, and other instruments may be made in any language, and will be enforced. Bac. Abr. *Wills* (D 1). An English court, having to construe a contract made in a foreign country and foreign language, must obtain a translation of the instrument and an explanation of the terms of art, if any; 10 H. L. C. 624. And a slander spoken in a foreign language, if understood by those present, or a libel published in such language, will be punished as if spoken or written in the English language; Newell, Def. Sland. & L. 231; Bac. Abr. *Slander* (D 3); 1 Rolle, Abr. 74; 6 Term 163. See FOREIGN LANGUAGES. For the construction of language, see articles CONSTRUCTION; INTERPRETATION; Jacob, Intr. to the Com. Law Max. 46.

At an early period, the Latin was the diplomatic language in use in Europe. Towards the end of the fifteenth century that of Spain gained the ascendency, in consequence of the great influence which that country then exercised in Europe. The French, since the age of Louis XIV., has become the almost universal diplomatic idiom of the civilized world; though some states use their national language in treaties and diplomatic correspondence. It is usual in these cases to annex to the papers transmitted a translation in the language of the opposite party, wherever it is understood this comity will be reciprocated. This is the usage of the Germanic Confederation, of Spain, and of the Italian courts. When nations using a common language, as the United States and Great Britain, treat with each other, such language is used in their diplomatic intercourse.

It is believed that the first departure from the rule that the French language should be used in all diplomatic conferences and congresses was in the Berlin conference of 1889, held between the representatives of Germany, Great Britain, and the United States, with reference to

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the affairs of Samoa. As appears by a protocol of the first session, the proposal was made by the representatives of the United States, and assented to by those of Germany and Great Britain, that the proceedings of the conference should be conducted in the English language. The president of the conference, however, though a German, reserved to himself the right to use the French language at any time if he should find difficulty in expressing himself satisfactorily in the English, but he did not find it necessary to avail himself of that right. Accordingly, the protocols of the first of these sittings were in French, and after that in English.

See, generally, 3 Bla. Com. 323; 1 Chitty, Cr. L. 415; 2 Rey, *Inst. jud. de l'Angleterre*, 211, 212; Kelh. Dict.; Tayl. Law Gloss.

**LANGUIDUS** (Lat.). **In Practice.** The name of a return made by the sheriff when a defendant, whom he has taken by virtue of process, is so dangerously sick that to remove him would endanger his life or health. 3 Chit. Pr. 249, 358; T. Chitty, Forms 753.

**LANIS DE CRESCENTIA WALLIÆ TRADUCENDIS ABSQUE CUSTUMA, etc.** An ancient writ that lay to the customer of a port to permit one to pass wool without paying custom, he having paid it before in Wales. Reg. Orig. 279.

**LANO NIGER.** A sort of base coin, formerly current in England. Cow.

**LANZAS. In Spanish Law.** A certain contribution in money paid by the grandees and other high officers in lieu of the soldiers they ought to furnish government in time of war.

**LAPIDATION.** The act of stoning a person to death. Webster.

**LAPSE. In Ecclesiastical Law.** The transfer, by forfeiture, of a right to present or collate to a vacant benefice from a person vested with such right to another in consequence of some act of negligence by the former. Ayl. Par. 331.

Upon six months' neglect of the patron, the right lapses to the bishop; upon six months' neglect of bishop, to archbishop; upon his six months' neglect, to king. The day on which the vacancy occurs is not counted, and the six months are calculated as a half-year. 2 Burn, Ec. L. 355.

To glide; to pass slowly, silently, or by degrees. To slip; to deviate from the proper path. Webster, Dict. See LAPSED DEVISE; LAPSED LEGACY.

**LAPSE PATENT.** A patent issued to a petitioner for land. A patent for which land to another party has lapsed through neglect of patentee. The lapse patent relates to date of original patent, and makes void all mesne conveyances. 1 Wash. Va. 39. See LAND PATENT.

**LAPSED DEVISE.** A devise which has lapsed, or does not take effect because of the death of the devisee before that of the testator.

The subject-matter of the lapsed devise will, if no contrary intention appear, be included in the residuary clause (if any) contained in the will. In England, by stat. 1 Vict. c. 26, §§ 25, 26, 32, 33, if the devise be to children or other issue of the devisor, and the issue of the devisee be alive, the devise will not lapse, if no such intention appear in the will. A devise always lapses at common law if the devisee dies before the testator, and such was the general rule in this country; 37 N. Y. 54; 2 Yeates 525; but in many if not all the states, if made to a son or grandson of the testator, it takes effect, by force of statute, in favor of his heirs, if he die before the testator. In North Carolina, a devise to a child dying before the testator does not lapse, but goes to the issue of such child; 107 N. C. 507; so in Massachusetts, in the case of a devise to a child or *other relative;* 3 Washb. R. P. *523; 101 Mass. 38.

In Maryland, the provision against lapse goes much further, and it is provided that no devise or bequest shall fail by reason of the death of the devisee or legatee before the testator, and it takes effect in like manner as if they had survived him; 6 Har. & J. 54. See 1 Jarm. Wills, 6th Am. ed. *307, n.; 4 Kent 541. In regard to a lapsed devise where the devisee dies during the life of the testator, the heir of the devisee will not take; 1 Dana 201; but the estate will go to the testator's heir, notwithstanding a residuary devisee. But if the devise be void, as where the devisee is dead at the date of the will, or is made upon a condition precedent which never happens, the estate will go to the residuary devisee, if the words are sufficiently comprehensive; 2 Vern. 394; 15 Ves. 589; 3 Whart. 477; 1 Harring. 524; 4 Kent 541. But some of the courts hold in that case even, that the estate goes to the heir; 6 Conn. 292; 3 Jones, Eq. 141; 4 Ired. Eq. 320; 13 Md. 415, where it was said that there was no solid distinction between a lapsed and a void devise, and that in both cases the heir at law should take, and not the residuary devisee.

When the devise is to the person deceased, with such words as "and his heirs" added, they are generally held to be words of limitation, and not of description. So a devise of the proceeds of land to three persons, one-third to each, and to "their heirs respectively for ever," lapsed on the death of one as to his share, the word heirs designating the estate, not the takers; 36 W. N. C. Pa. 247; so where a residuary devise was to two persons, "their heirs and assigns"; 162 Mass. 448. The rule that devises lapse by the death of the devisee is not changed by adding to the devise the words "to have and to hold the same to them, their heirs and assigns for ever"; 113 N. Y. 396. And where land was devised to a daughter for life and then to be "equally divided among the lawful heirs of" another daughter, it

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was held that the word heirs must be taken in a technical sense, and as the last mentioned daughter was alive at the death of the first, the devise to the heirs lapsed; 1 Rich. Eq. 396.

In case of gifts to a class, the rule is that there is no lapse, but they go to the other members of the class; Theobald, Wills 643. It is, however, held that the gift is not to a class if the members of the class are named; 11 Sim. 397; 2 J. & H. 656; nor if to "five daughters of A" or "my nine children"; 9 Ch. D. 117; 15 Ch. D. 84; and where the residue was given to sons named, there being nothing to show that testator intended otherwise, they took as individuals and not as a class, and the share of the son who died before his father's death lapsed, and passed as intestate real estate; 15 R. I. 138. See LAPSED LEGACY.

In case of a devise to two as joint tenants, if one die before the testator, where survivorship in a joint tenancy has been abolished, his share has been held to fall in the residue; Wins. Eq. 89. Where land was devised to a son who was also appointed executor, and he died and the testator by codicil appointed another executor, referring to the death of his son, it was held that the devise did not lapse, and should be construed as a devise to the son's heirs; 6 Dana 51.

A devise to one for life with a remainder does not lapse by the death of the first taker before that of the remainderman; 15 Ark. 682. The refusal or incapacity of the first taker of a devise or legacy to several in succession does not cause it to lapse, but it passes to the next; 28 N. H. 459; 43 *id.* 17. If one is appointed by will to take in case of the death of the first devisee, and on that event, the appointee can take as contemplated by the will, there will be no lapse, although the devisee dies before the testator, but the ulterior gift will take effect immediately on testator's decease as a direct unconditional gift; 14 B. Mon. 333.

A devise in trust for a son, and "in the event of the son dying childless" then over, lapsed by the death of the son in the lifetime of the testatrix, and the devise over did not take effect; 152 Mass. 24.

A devise made to a wife for life, with remainder to the daughter, and with power to the wife to sell and invest the proceeds for the benefit of the daughter, does not lapse during the lifetime of the wife, being for the benefit of the latter as well as the former; 142 N. Y. 160.

In England, by the Wills Act § 32, a devise of an estate tail does not lapse, if at the death of the testator there is any issue who would inherit under the entail, and it was held that the section applies to a gift to a child dead at the date of will; 2 Sm. & G. 396.

With a single important exception, the same principles apply to devises and legacies with respect to lapse, and as to that difference, and also for other cases on the subject, see LAPSED LEGACY.

See also Green, Lapse (App'x to Wythe's Va. Reports); Tudor, Real Property 904; 20 L. Mag. 163; 9 Am. L. Rec. 503; 94 Am. Dec. 155–60; WILL.

**LAPSED LEGACY.** A legacy which, on account of the death of the legatee before the period arrives for the payment of the legacy, lapses or deviates from the course prescribed by the testator, and falls into the residuum. 1 Wms. Ex., 7th Am. ed. *1071; 10 S. & R. 351.

A legacy which has never vested or taken effect; one which, originally valid, afterwards fails, because the capacity or willingness of the donee to take has ceased to exist before he obtained a vested interest in the gift. 126 N. Y. 615.

A distinction exists between a lapsed devise and a lapsed legacy. A devise which lapses does not fall into the residue unless so provided by the will, but descends to the heir at law; on the contrary, personal property passes by the residuary clause, where it is not otherwise disposed of; Beach, Wills 316; 2 Bouv. Inst. 2158, 2116; 15 Ves. 709; 2 Mer. 393; 3 Whart. 477. See LAPSED DEVISE.

A lapsed legacy passes by a general residuary clause; 27 Abb. N. C. 437; so also did a legacy which lapsed because it was void; 63 Hun 352. A lapsed or void legacy goes to the residuary legatee unless an intention to the contrary clearly appear; 1 Sm. & M. 589; 3 Edw. Ch. 79; 2 Tayl. 315; 2 Root 487.

The reason assigned for this difference is that a bequest of personal property refers to the state of the property at the time of the death of the testator, and that a devise operates only on land of which the testator was seised when he made his will; and it is not to be presumed he intended to devise by a residuary clause, a contingency which he could not have foreseen, nor to embrace in it lands contained in a lapsed devise; 1 Dana 207; Willes 293; 6 Conn. 292; 3 Harr. & McH. 333. "How far the alteration of the law of those states where after-acquired lands may be devised will destroy this distinction, it is difficult to say." 1 Bouv. Inst. 2150.

The Pennsylvania act of 1879, June 4, P. L. 88, made the law respecting the devolution of a lapsed devise the same as that of a lapsed legacy, but it was held that this applied only to lapsed specific devises in the body of the will, and that as to lapsed shares of the residue no change was intended; 15 W. N. C. Pa. 417. And the same provision exists, except where the will requires a different construction, in Virginia, North Carolina, West Virginia; but in the last state, if there is no residuary devisee, it goes to the heir at law.

The common-law distinction between lapsed devises and lapsed legacies with reference to falling into the residuum has been abrogated by statute in New York, and lapsed devises as well as lapsed legacies fall into the residuum; 152 N. Y. 475.

In Kentucky, in case of lapse, neither real nor personal property passes as part

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of the residue, but both are intestate property, unless the contrary intention appear in the will.

Where a testator gave a share of his residuary personal estate to his widow who took under the will, and another share to a daughter who died before him without issue, it was held that the testator died intestate as to the share given to the daughter, and that the widow was entitled to one-third of it under the intestate laws; 82 Pa. 428.

Where the rent of a house was given for life to testator's daughter, and at her death to be sold, the proceeds to go to her children when twenty-one years of age, and the income meanwhile to be applied to their maintenance, it was held that the legacy to the children was vested, and on their death in the lifetime of the mother there was no lapse, but the property vested in the life-tenant in fee as the heir of her children as against the heir at law of the original testator; 19 Wall. 167, reversing 7 D. C. 226.

If a legacy is payable out of real estate in consequence of a deficiency of personal property, it will go to the heir at law in case of lapse, and if the personal estate is sufficient to pay debts and legatees, it will go to the residuary legatee; 9 Paige 94. A legacy to one for life with remainder to another does not lapse upon the death of the first taker during the testator's life; 4 Desaus. 305; 3 Ired. Eq. 581. If a legacy is payable out of a particular debt due the testator, it does not fail on failure of payment of the debt; 6 Watts 473.

Unless the legatee survive the testator, as a rule neither he nor his representatives have any claim to the legacy; 2 W. & S. 450; 18 Pick. 41; 4 Strobh. Eq. 179; 64 Me. 366; 62 Conn. 140; and the same rule applies where a legacy is given to a man and his executors, etc.; 1 P. Wms. 83; 3 Bro. C. C. 128; 108 Mass. 382; 39 Conn. 219; though the testator may expressly provide otherwise; 1 Bro. C. C. 84; L. R. 14 Eq. 343. A declaration that a legacy shall not lapse is not sufficient to prevent it unless the intention is clear that it shall go to the estate of the legatee; 3 Ves. 493; 4 Beav. 318; 27 *id.* 418; 4 D. M. & G. 633; but gifts to A and his executors and administrators with the direction that it shall not lapse is sufficient; 2 Atk. 572. A direction that a legacy should vest from the date of the will is not sufficient to prevent lapse; 14 Eq. 343. From a devise of the remainder of an estate in distinct parcels there arises an inference that the testator did not intend that lapsed legacies should fall into the residue; 24 Ga. 84.

A gift to A, and in case of his death to his executors and administrators, will go to A's executors in the event of his death before the testator; 54 L. J. Ch. 648, aff'g 32 W. R. 516 and overruling 1 Myl. & K. 470.

Where a testator bequeathed his estate to several legatees, and having learned of their death, interlined in his will between the words "as follows" and the list of the legatees the words "or to their heirs," and after the names added words signifying their decease and republished the will, the legacies did not lapse; 154 Pa. 523, distinguishing 2 Rawle 28 and 104 Pa. 342. Where a legacy was given to one in trust for his wife, the income for her life, with power of appointment by will, and in default thereof "it shall be equally divided among my children or their legal representatives," the words legal representatives meant executors and administrators, and not next of kin, and the legacy to any child who died without issue in the lifetime of the testator lapsed; 1 Ohio N. P. 314. A bequest of personal property to one and "heirs and assigns" are words of limitation, and the legacy lapsed on the death of the legatee before that of the testator; 159 Mass. 280; so also to one and "his heirs"; 27 Abb. N. C. 437.

Where a legacy is given to a class it is generally held that the death of one of the class before the testator does not create a lapse, but simply reduces the number of the class; 2 Bradf. 172; in such a case, when one in whom the right is vested dies before distribution, his interest goes to his representatives; 2 Dev. & B. L. 125; 3 Metc. (Ky.) 463. See LAPSED DEVISE.

Where a residue was devised in trust for four sons, the intention was clear that their enjoyment was to be several and not joint, and the share of one who died before the testator was held not to go to the survivors, but to be disposed of as intestate real estate; 5 Allen 249; but where an estate was bequeathed to all the children in a family by name, the tenor of the whole will indicating that they were intended to take as a class, the share of one who died without issue before the testator went to the survivors; 14 *id.* 528. It was early provided by statute in Alabama that the death of a devisee or legatee, leaving a descendant, before the testator, should not cause a lapse, but the gift would vest in the descendant; 37 Ala. 646.

Under a Maine statute making an adopted child the same as a lawful child, such child is a lineal descendant of its adopting parents within the meaning of the statute to prevent the lapse of legacies to such descendants; 84 Me. 483.

Where there was a legacy to executors in trust for a person for life, afterwards to be divided into four equal parts for four named residuary legatees, the title to the residue vested subject to the trust estate, and the share of a residuary legatee did not lapse on his death before the time of distribution; 140 N. Y. 122.

Where separate sums are bequeathed to two named persons who take also the residuary estate, no intention appearing on the will to make them joint tenants, the separate estate and the share of the residue of the one who died before the testator were held to lapse; 84 Me. 366.

Where property is bequeathed to collateral relatives named, shares of those who died during the lifetime of the testator lapse; 62 Conn. 140.

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The doctrine of lapse applies to an appointment by will; 2 Ves. Sen. 61; L. R. 3 Eq. 658; 47 L. J. Ch. 65; or an appointment under a covenant; 3 Ch. 182; or a gift to a debtor of his debt,—whether the debt be given or forgiven; 1 P. Wms. 83; 3 Ves. 231; 2 Pr. 34.

If there is a gift to a charitable society by name and it has existed, but at the time of the testator's death has ceased to do so, the legacy fails; 1 Drew 642; 29 Ch. Div. 560; [1895] 1 Ch. 19. If the charity existed at the death of the testator and expired before administration of the estate, the *cy pres* doctrine is applied; 5 Russ. 113; [1891] 2 Ch. 236. A gift for a clearly defined and particular charitable use will fail if the subject becomes impossible; 1 Myl. & C. 123; 56 L. T. 147; and see as to the limits of the doctrine, L. R. 6 P. C. 96; 35 Ch. 460; 58 L. T. 538. See, generally, as to failure of charitable bequests, Theobald, Wills 304; and see CHARITABLE USE.

By the English law a residuary bequest operates upon all the personal estate which the testator is possessed of at the time of his death, and will include such as would have gone to pay specific legacies which lapse or are void; 4 Ves. Jr. 708, 732; 4 Paige 115; 4 Hawks 215; 1 Dana 206; 1 D. & B. Eq. 115; 82 Pa. 428; 1 Jarm. Wills, 6th Am. ed. *716.

See LAPSED DEVISE; LEGACY; WILL.

**LARBOARD.** The left side of a ship or boat when one stands with his face towards the bow. The opposite term is starboard, which is the right-hand side looking forward. The word is now, however, no longer used, the term port having been substituted for it. The change was made by order of the English admiralty, for the very obvious reason that larboard was apt to be confused with the opposite term.

**LARCENOUS.** Thieving; pertaining to, characterized by, or tainted with, larceny; as a larcenous taking.

*Larcenous purpose*, an intention to commit larceny. See LARCENY.

**LARCENY.** The felonious taking of the property of another without his consent and against his will, with the intent to convert it to the use of the taker. 2 Leach 1089.

The felonious taking and carrying away of the personal goods of another. 4 Bla. Com. 299.

The appropriation, either to the use of the taker or to that of any other person, of money or personal property with intent to deprive or defraud the true owner of its use and benefit, or the withholding or secreting of the same. 71 Hun 72.

The wrongful and fraudulent taking and carrying away by one person of the mere personal goods of another from any place, with a felonious intent to convert them to his, the taker's, use, and make them his property without the consent of the owner. 2 East, Pl. Cr. 553; 4 Wash. C. C. 700; 37 Mo. 463.

This definition was criticised by Parke, B., who said: "Perhaps this was the more accurate definition; but it needed some addition; the taking should be not only wrongful and fraudulent, but also 'without any color of right';" 1 Den. C. C. 370; but the words "felonious intent" are considered by an authoritive text writer to exclude any color of right; 2 Russ. Cr., 9th Am. ed. 146.

That this offence is the most technical in its distinctions of all the common-law felonies is, perhaps, to be found in the fact that inasmuch as the higher grade of the offence was, until Blackstone's time, punishable capitally, the courts were inclined to find technical reasons to avoid the infliction of that penalty for mere wrong done with reference to the property. By reason of the depreciation of money and the consequent appreciation of the money value of property which took place within two centuries and a half after the passage of the Statute of Westminster I. (A.D. 1275), ch. 15; which made grand larceny to consist of the stealing of property above the value of twelve pence, cases of larceny became capital which would not have been such at the time the statute was passed; and therefore Lord Coke suggests that the valuation of property in determining whether the offence was grand larceny ought to be reasonable; 1 McClain, Cr. L. § 534.

Larceny was formerly in England, and still is, perhaps, in some states, divided into *grand* and *petit* or *petty* larceny, according as the value of the property taken was great or small; 2 East, Pl. Cr. 736; 3 M'Cord 187; 3 Hill, N. Y. 395; 1 Hawks 463; 8 Blackf. 498. In England this distinction is now abolished, by 7 & 8 Geo. IV. c. 29, § 2; and the same is true of many of the United States, although in some a difference is made, similar in theory, between cases where the amount stolen is more and where it is less than one hundred dollars or some fixed sum.

*Compound larceny* is larceny under circumstances which, in view of the law, aggravate the crime. The law in relation to this branch of larceny is to a great extent statutory.

The property of the owner may be either general; 2 Den. Cr. Cas. 449; or special; 10 Wend. 165; 14 Mass. 217; 13 Ala. N. S. 153; 21 Me. 14; 8 Tex. 115; 4 Harring. 570; 6 Hill 144; 9 C. & P. 44.

There must be an actual removal of the article; 1 Leach 236, n. 320; 7 C. & P. 552; 9 Yerg. 198; 63 Miss. 58; and at least a temporary possession in the thief; 94 Ala. 534; 65 N. C. 305; 88 Mo. 354; 35 Ga. 207; 16 Tex. App. 435; 64 Miss. 77; 71 Hun 72; 75 Cal. 383; but the having the property under control even for a short space of time is sufficient, though it is abandoned before being effectually appropriated by the wrong-doer; 106 N. C. 734; 22 W. Va. 779; 1 Moody 14; 20 Ohio St. 508; 30 Mo. 92; 88 *id.* 354. The taking and carrying away may be committed by setting in motion an agency, innocent or otherwise, by which the property is asported from the possession of the owner to that of the thief or his accomplice; 125 Mass. 390; 4 Allen 308; 11 Q. B. D. 21; 2 C. & B. 423; 45 Ia. 673.

A person who is seen to thrust his hand into the pocket of another and withdraw it empty can be convicted of an attempt to commit larceny, even though the pocket is empty; 123 N. Y. 54, reversing 7 N. Y. S. 582. See ATTEMPT.

The mere unlawful taking and carrying away of the property of another is not larceny unless it is done with criminal intent or *animo furandi*; 44 Ala. 396; 55 Ill. 334; 108 Mo. 611; 34 Neb. 250; 24 Tex. App. 35; 95 Cal. 227; but see 38 S. C. 348. The

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question whether the goods were taken *animo furandi* is one of fact for the jury; [1895] 2 Q. B. 484. If the taking is under a *bona fide* claim of right, there can be no larceny; 4 Col. 182; as where the purpose of taking is to test a right; 2 Doug. 517; or to protect one's own property; 4 B. & S. 189; 9 Tex. App. 164. One is not guilty of larceny in selling an article under the belief that it is his own property, though it belong to another; 41 S. W. Rep. (Tex.) 606. See 11 Fla. 295; 47 Ia. 684; 62 Miss. 108; or in taking property in the belief that he has a right so to do; 25 Tex. App. 333; 79 Ga. 564; 25 Neb. 444; 24 Fla. 358; but the belief of ownership of right which will constitute a defence must be an honest belief and not a mere impression or pretence; 8 Ia. 540; 9 Tex. App. 70; 95 N. C. 596; 77 Ala. 71. Secrecy is not such an essential accompaniment of larceny that an attempt to conceal the taking must be shown; 114 N. C. 780; 103 *id.* 424.

An intent to convert to the thief's own use is not necessary; all that is required is the intent to deprive the owner of his property; 28 Cal. 380; 17 Tex. 521; 4 Dutch. 28; 35 Miss. 214; 10 Gratt. 758; 14 Ind. 36; but see 1 McAll. 196, where the accused took and carried away muskets to prevent others from using them against himself and his friends, and it was held larceny.

It is not an essential element of the crime that the taking should be *lucri causa*, for the sake of gain; 35 W. Va. 73.

The property must be of some value, though but slight; 4 Rich. 356; 3 Harring. 563; 7 Metc. 475. See 8 Pa. 260; 6 Johns. 103; 9 C. & P. 347; 89 Ill. 233; 20 Fla. 841; 68 Mo. 98; but the fact that the thief treated the property as of value will amount to proof of such value by inference; 64 N. C. 127; 3 Heisk. 120; 13 Ark. 66. Any intrinsic value whatever is sufficient; 1 Bailey 330; 14 Gray 376; and it is not necessary that the value should be of some particular coin; 75 Va. 909.

There must be a taking against the consent of the owner; 8 C. & P. 291; 1 Den. Cr. Cas. 381; 9 Yerg. 198; 20 Ala. N. S. 428; 1 Rich. 30; 2 N. & M'C. 174; Coxe, N. J. 439; 106 Mo. 635; 36 Kan. 416; 18 Tex. App. 358; and the taking will not be larceny if consent be given, though obtained by fraud; 15 S. & R. 93; 9 C. & P. 741; 7 Cox, Cr. Cas. 289; but see 85 Ala. 17. But where one retains money paid by mistake, it is larceny, for the consent of the owner in parting with his property was only apparent, not real; 8 Ore. 394; s. c. 34 Am. Rep. 590; 6 Hun 121.

Whenever the defendant can be regarded in the light of the servant or agent of the owner, he is guilty of larceny; 1 Den. 120; Whart. Cr. Law, 9th ed. §§ 956-970; 86 Ala. 64; 94 Cal. 573. Where a master paid his servant a £10 note, thinking it was a £1 note, and the servant took it innocently, but afterwards discovered the mistake and made up his mind to appropriate the note, it was held by a divided court that this was not larceny; [1895] 2 I. R. 709.

By stat. 24 and 25 Vict. c. 96, a bailee who fraudulently converts the property entrusted to him to his own use is guilty of larceny; Cox & Saunders, Cr. L. 26. The possession of the bailee is the possession of the owner, and a larceny thereof from the former is a larceny from the owner; 101 Mo. 316. When the *possession* of an article is entrusted to a person, who carries it away and appropriates it, this is no larceny; 4 C. & P. 545; 1 Pick. 375; 20 Ala. N. S. 428; 17 N. Y. 114; see 2 M'Mull. 382; 4 Mo. 461; 33 Me. 127; 11 Cush. 483; 13 Gratt. 803; 11 Tex. 769; but when the *custody* merely is parted with, such misappropriation is a larceny; 6 T. B. Monr. 130; 1 Den. 120; 11 Q. B. 929. One who obtains possession of property by fraud, from one who intends to retain the ownership, and subsequently carries it away, is guilty of larceny, though he would not be if he obtained both possession and ownership by fraud; 49 La. Ann. 1337. The crime of larceny may be committed by a finder of lost money or goods, who, knowing or having reason to know who is the owner of the same, instead of restoring them to him, conceals or fraudulently appropriates them to his own use; 6 Houst. 46; 87 Va. 554. See 116 Mass. 42; 23 Minn. 104; 16 Tex. App. 122. Abandoned property having no owner cannot be the subject of larceny; 6 Sawy. 640; 36 Tex. 375; 43 *id.* 650. See FINDER.

The decisions have not been entirely uniform as to whether the fraudulent retention of money delivered to be changed is larceny. It has been held in England not to be so, but here the contrary view has been taken; 56 N. Y. 394; 25 Minn. 66; s. c. 33 Am. Rep. 455, n. See 9 C. & P. 741; 11 Cox, Cr. Cas. 32.

The taking must be in the county where the criminal is to be tried; 9 C. & P. 29. But when the taking has been in the county or state, and the thief is caught with the stolen property in another county than that where the theft was committed, he may be tried in the county where arrested with the goods; as, by construction of law, there is a fresh taking in every county in which the thief carries the stolen property; 7 Metc. 175; 42 La. Ann. 228; 48 Ill. 397; 76 Mo. 236; and the circuit court of the latter county has jurisdiction of the offence; 15 S. W. Rep. (Ky.) 861. One who steals property in a foreign country, and brings it into this, is guilty of larceny here, on the ground that as the legal possession remains in the owner when the first taking is felonious, every asportation of the property is a fresh taking; and on a prosecution for such an offence the courts will presume that the laws of the foreign country are the same as our own, and that the original taking there was criminal, upon proofs of acts which would make it criminal here; 33 Atl. Rep. (Vt.) 1070. Whether an indictment for larceny can be supported where the goods were proved to have been originally stolen in another state, and brought thence into the state

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where the indictment was found, is a point on which the decisions are contradictory. Where property was stolen in one of the British Provinces and brought by the thief into Massachusetts, it was held not larceny there; 3 Gray 434. See *contra*, 11 Vt. 650.

The property must be personal, and there can be no larceny of things fixed to the soil; 1 Hale, P. C. 510; but as the taking and carrying away would necessarily terminate the character of the property as realty even if it were such, the important point of this distinction is that if the severance from the realty of anything which is a part thereof, or annexed thereto so as to go with the realty by descent, or in case a conveyance is made by the wrongdoer himself, so that the taking and carrying away is a continuous act, the offence is not larceny, because the taking and carrying away is not of the personal property of another, that which was severed not having been in his possession as a chattel, but only as the portion of a realty; and ore which has not been mined or otherwise severed, so as to convert it into a chattel, is not the subject of larceny; 64 N. C. 619; 8 Nev. 262; nor is water or ice, unless the ice is cut or stored in an ice-house; 6 Hill 144; 33 Ind. 402; or the water is pumped into supply pipes; 11 Q. B. D. 21; sea-weed lying ungathered on the shore is part of the realty and not the subject of larceny; 4 Ir. R. C. L. 6 (but see 156 Pa. 400, where waste coal was carried upon land by a stream and deposited there and the appropriator was held guilty of larceny). It is not larceny to detach any portion of a building and carry it away; 5 Harr. 492; 14 Bush 31; 22 La. Ann. 77; 96 Ala. 44; 3 Taunt. 48; but the courts have expressed their disapproval of a doctrine so technical even while compelled to follow it; 35 Cal. 671; and in many cases of constructive annexation have held the taking and carrying away to be larceny, such as window sashes not permanently annexed to the building; 1 Leach 20; chandeliers; 14 Bush 31; doors taken from their hinges; 84 Tex. 155; rails in a fence; 4 Tex. App. 26; belts belonging to a mill; 11 Ohio St. 104; valves in a portable pump; 96 Ala. 44; the key of a door; 5 Blackf. 417; 1 McClain, Cr. L. § 536.

If once severed by the owner, a third person, or the thief himself, as a separate transaction, any part of the realty becomes the subject of larceny; Cl. Cr. L. 245; 11 Ired. 70; 3 Hill, N. Y. 395; 7 Taunt. 188. The common-law rule has been modified from time to time in England, so as to afford protection to things fixed to the freehold. The rule was never satisfactory, and the courts in modern times have been inclined to confine it within the narrowest limits; 30 Am. Rep. 159, n.; s. c. 4 Tex. Ct. App. 26; 11 Ohio 104. At common law there can be no larceny of animals, in which there is neither an absolute nor a qualified property, as beasts *ferœ naturœ*; 1 Greene 106; 7 Johns. 16; 1 C. & K. 494; 9 Pick. 15; 78 N. C. 481; but otherwise of animals reclaimed or confined, as deer, or rabbits in a park, fish in a tank, pheasants, etc., in a mew; 65 N. C. 315; all valuable domestic animals, and all animals *domitœ naturœ*, which serve for food. But all other animals which do not serve for food, as dogs, unless taxed, are not subjects of larceny. But oysters, when planted for use, are so, as is the flesh of dead animals; 1 Whart. Cr. Law § 864. But under statute in some of the states there may be a larceny of dogs, and actions may be maintained for injury to them; 4 Parker, C. C. 386; 27 Ala. 480; 11 Kan. 480; s. c. 15 Am. Rep. n.; 84 Ky. 681; a horse is a subject of larceny, although at the time he has been removed or strayed from the premises of his owner; 88 Ala. 36. By statutes passed in 1897, stealing electric currents from wires is made a crime in Connecticut, Montana, New Jersey, Tennessee, and Washington.

See Hale; Hawkins, Pleas of the Crown; Wharton; Bishop; Gabbett; Clarke; McClain, Criminal Law; Roscoe, Criminal Evidence; 14 Crim. Law Mag. 705; 2 Alb. L. J. 101; 6 Harv. Law Rev. 244; Russell, Crimes.

**LARD.** The clarified semi-solid oil of hog's fat. Cent. Dict. The pure fat of healthy swine. 81 Ia. 642.

An act making a regulation for the sale of lard by which the public may know by inspection of the package the ingredients used in its preparation is not an unwarranted interference with trade and does not violate the constitutional provisions as to due process of law; *id.* See HEALTH.

**LARDING MONEY.** A small yearly rent paid by the tenants in the manor of Bradford in Wilts, for liberty to feed their hogs with the masts (acorns) of the lord's wood. Also a commutation for some customary service in connection with the word larder as carrying salt or meat. Whart. Lex.

**LARGE** (L. Fr.). Broad; having much size; complete; ample; *at large*, free from restraint or confinement; at liberty. It was formerly written *at his large*.

**LAS PARTIDAS.** The name of a code of Spanish law. It is sometimes called *las siete partidas*, or the seven parts, from the number of its principal divisions. It is a compilation of the civil law, the customary law of Spain, and the canon law. It was compiled by four Spanish jurisconsults, by the direction of Alfonso X., A. D. 1250, and published in Castile in 1263, but first promulgated as the law by Alfonso XI., A. D. 1348. The maritime law contained in it is given in vol. 6 of Pardess. Col. of Mar. Law. He follows the editions of 1807, at Paris. It has been translated into English. Such of its provisions as are applicable are in force in Florida, Louisiana, and Texas. 1 Bla. Com. 66; 1 White, Rec. 354.

**LASCIVIOUS CARRIAGE.** A term including those wanton acts between persons of different sexes, who are not married

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to each other, that flow from the exercise of lustful passions, and which are not otherwise punished as crimes against chastity and public decency. 2 Swift, Dig. 343; 2 Swift, Syst. 331. It includes, also, indecent acts by one against the will of another. 5 Day 81.

**LASCIVIOUS COHABITATION.** The act or state of a man and woman, not married, who dwell together in the same house, behaving themselves as man and wife.

In statutes forbidding unlawful cohabitation that term involves the idea of habitual sexual intercourse, or living together in such a way as to hold out the appearance of being husband and wife, and it is the scandal resulting therefrom which constitutes the mischief against which the statutes are directed; 23 Fla. 339; and proof of occasional acts of illicit intercourse is not sufficient; 82 Va. 115; 42 W. Va. 215; 8 So. Rep. (Miss.) 257; but it has been held that such occasional acts may constitute the offence, unless there was no intention of continuing the intercourse, as desire and opportunity might arise; 18 So. Rep. (Ala.) 941. To constitute the offence there must be both lewd and lascivious intercourse and living together; 80 Va. 20; 28 Fla. 735; though it is said that there need not be actual assertion of the existence of marriage; 57 Miss. 132; 32 Ark. 187; and where the dwelling together is a lawful relation, as that of master and servant, the offence is not established; 39 Mo. App. 372. It is not sustained by evidence of acts of secret adultery or mere familiarity; 49 Mo. App. 325; nor where a man and woman stopped for one night only at a house and assumed marital relations; 60 Ark. 259; 10 Mass. 153; 56 Mo. 147; but it is said that it is not necessary that the cohabitation should be notorious; 2 Humph. 414. General reputation in the neighborhood is not admissible to prove the fact of cohabitation; 3 How. 328. Whether the facts proved constituted a living together in such relation is a question for the jury; 28 Fla. 735.

There must be averment and proof of habitual sexual intercourse which is the gist of the offence; 69 Miss. 393. In Massachusetts, the words "abide and cohabit" are sufficient where the statute used the word "associated"; 159 Mass. 61. An indictment alleging fornication and adultery, and that the parties lived together and were not married, was held sufficient, the language of the statute that they should "lewdly and lasciviously associate" being implied; 108 N. C. 774. The offence may be proved by admission made out of court, and proved by two witnesses; 6 Utah 381. Evidence of previous lascivious cohabitation is sometimes admitted in support of other crimes, as on prosecution for incest; 96 Mich. 449; 102 Cal. 229; 32 Tex. Cr. R. 98. It is not essential in a prosecution against one to prove that both parties had a guilty intent; 109 N. C. 764. When the charge is of such cohabitation of a married man with an unmarried woman, the marriage must be strictly proved, and it cannot be established by reputation; 39 Mo. App. 56. It has been held that a man and woman living together as man and wife, in the belief that they are married, cannot be convicted of "open lewdness"; 127 Mass. 459; 57 N. J. L. 209. See 111 U. C. 725.

Under the United States anti-polygamy act of March 22, 1882, Stat. L. p. 31, § 33, on prosecution for cohabitation with two women as wives, proof of the existence of the marriage relation is pertinent, and it may be proved by general reputation; 46 Fed. Rep. 750; 5 Utah 436; but evidence of general repute of guilt is not sufficient; the facts must be proved, and inferences left to the jury; 21 Pac. Rep. (Ida.) 409. In an indictment under the act it is sufficient to use the word cohabit and not to set out its meaning; *id.* 407, 409; it need not allege that defendant was a male person; 4 Utah 122.

**LASCIVIOUS LEWDNESS.** Lewd and lascivious conduct in public, or at least practised with such publicity as to be punishable as *contra bonos mores*.

It is an offence sometimes distinguished from lascivious cohabitation (*q. v.*), and is described as *open* and lascivious lewdness; McClain, Cr. L. § 1135. The specific characterization of the offence is the openness and publicity of the act as distinct from a secret act; 128 Mass. 52; 88 Wis. 180. The offence need not be a joint one,—one person only may be guilty therein; 8 Baxt. 576; and when two are charged so that both must have been guilty if one was, one may be convicted and the other acquitted; 81 Ia. 72.

An indictment should follow the statute; 4 Allen 313; and it must be averred that the parties were not married to each other and that the offence was open and public; 1 Swan 136. The crime cannot be established by general reputation; 4 Coldw. 171; but it may be by circumstantial evidence; 10 Humph. 98; and proof has been admitted of similar acts proved at a previous trial for the same offence; 8 Lea 47.

**LASCIVIOUSNESS.** Lascivious desires or conduct; lustfulness; wantonness; lewdness.

That form of immorality which has reference to sexual impurity; 51 Fed. Rep. 41. See the titles next preceding.

Lasciviousness and lewdness are generally treated as interchangeable if not synonymous terms. In both cases the principal use of the two words is now in each case in a secondary or derived meaning. The primary meaning of *lascivus*, from which the first is derived, is sportiveness, and its use in a bad sense is said to be *post*-Augustine, and never by Cicero; the other is derived from the Anglo-Saxon *laewed*, lay or unlearned.

**LASHBITE.** The ordinary Danish forfeiture, which was twelve ores, every ore being about 16 pence. M. & W. Also written Lashite, Lashlite. Encyc. Lond.

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**LAST.** The same as last court (*q. v.*). Cent. Dict. A burden; and a measure of weight for bulky commodities, such as leather, wool, corn. Whart. L. Lex.

Where the plaintiff added new defendants after answer, the last answer was held to mean the last answer of the original defendants; 13 L. J. Ch. 99; 2 Hare 632.

**LAST COURT.** A court held by the twenty-four jurats in the marshes of Kent and summoned by the bailiffs. It made orders for levying taxes, and imposing penalties for the preservation of marshes. M. & W.; Ency. Lond.

**LAST HEIR.** He to whom the lands come if they escheat for want of lawful heirs: viz., sometimes the lord of whom the lands are held, sometimes the king. Bract. lib. 5, c. 17.

**LAST RESORT.** The highest court in any jurisdiction, beyond which there is no appeal, is termed court of last resort.

**LAST SICKNESS.** That of which a person dies.

The expenses of this sickness are generally entitled to a preference in payment of debts of an insolvent estate; La. Civ. Code, art. 3166.

To prevent impositions, the statute of frauds requires that nuncupative wills shall be made during the testator's last sickness. Roberts, Frauds 556; 20 Johns. 502.

**LAST WILL** (Lat. *ultima voluntas*). A disposition of real estate to take effect after death.

Generally speaking, last will means the one latest in date, though there may be two or more wills, all speaking from the death of the testator; 35 L. J. Ch. 389; L. R. 1 Eq. 510; 55 Bea. 321. The phrase "This is my last will, and testament" does not, of itself, revoke a former will; 9 Moo. P. C. 131; but may be confirmatory proof of an intention to revoke; 16 Bea. 173; 22 L. J. Ch. 185; 1 W. R. 3. "My last will dated," etc., giving the date of the first will, was held to mean the last will in fact, the date given been rejected as a mistake; 46 L. J. P. D. & A. 30; 2 P. D. 111; 37 L. J. P. & M. 72, n.

It is strictly distinguishable from testament, which is applied to personal estate; 1 Wms. Exec., 7th Am. ed. *4, n.; but the words are generally used together, "last will and testament," in a will, whether real or personal estate is to be disposed of. See WILL.

**LASTAGE.** A custom anciently exacted in some fairs and markets to carry things where one will; also a custom paid for goods sold by the last (a certain weight or measure); the ballast of a ship. Cow. Stowage room for goods in a vessel. Young, Naut. Dict.

**LATA CULPA.** Gross neglect. See BAILMENT.

**LATCHING.** An underground survey. Whart. L. Lex.

**LATE.** "Existing not long ago, but now departed this life." 17 Ala. 190. See 7 Cal. 215; 16 N. J. L. 47; 3 Pa. 328.

**LATELY.** This word has come to have "a very large retrospect," as we say, lately deceased of one dead ten or twenty years; 2 Show. 294.

**LATENS** (Lat.). Latent (*q. v.*).

**LATENT.** Hidden; concealed; not appearing on the surface or face of a thing.

**LATENT AMBIGUITY.** One which does not appear on the face of the instrument. A latent ambiguity is where words apply equally to two different things or subject-matters; 15 M. & W. 561; but where the parties may have intended either of the two things in dispute, the term does not apply. 10 Ohio 534.

It is settled both in England and in this country that extrinsic evidence is admissible to explain a latent ambiguity, but there has been some difficulty in defining precisely when and under what circumstances such evidence may be introduced to show the intention. Two rules are laid down in 2 Eng. Rul. Cas. 718, 726, as illustrated by two leading English cases. The first rule is: "Where a determinate intention appears to be expressed by the written instrument, extrinsic evidence is admissible to show that the description of an object contained in the instrument is applicable with legal certainty to either of two objects; and, a latent ambiguity having been thus disclosed, evidence of the surrounding circumstances is admissible to show which of the objects was meant by the description; and if, on this evidence, one of the objects is indicated with sufficient certainty, direct evidence of declarations of intention is not admissible." 9 L. J. Ex. 27; s. c. 5 M. & W. 363. In that case the language of the court was: "If, therefore, by looking at the surrounding facts to be found by the jury, the court can clearly see, with the knowledge which arises from those facts alone, that the testator meant either the lessor of the plaintiff or the defendant, it may so decide, and direct the jury accordingly; but we think that, for this purpose, they cannot receive declarations of the testator of what he intended to do in making his will." A good illustration of the uncertainty as to the person was, "where a testatrix gave a share of her residue to her 'cousin, Harriet Cloak,' and the testatrix had no cousin of that name, but had a married cousin, Harriet Crane, whose maiden name was Cloak, and a cousin T. Cloak, whose wife's name was Harriet; evidence was admitted to show the testatrix's knowledge of an intimacy with the members of the Cloak family. In the event 'cousin' was read in the secondary sense of 'wife of a cousin,' and the claim of Harriet, the wife of T. Cloak, allowed." 34 Ch. D. 255; 56 L. J. Ch. 171. Cited in the American note to the above case as "a good type of

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the American doctrine," was a devise to "the four boys," where the testator had seven sons, of whom three were shown to be minors living at home; 113 Ill. 327. And in the case of Hardy *v.* Warren reported, Browne, Parol Evidence 461, there was a bequest by a woman to her "husband" when she had obtained a void divorce and was living with another man as his wife. These were held to be cases of latent ambiguity to explain which extrinsic evidence was admissible to determine the persons who were to take.

The other rule laid down by the work referred to is: "Assuming that the intention appears on the face of the instrument to be determinate, if, after exhausting such evidence of the surrounding circumstances as is necessary to place the court at the point of view of the maker of the instrument, there is still an ambiguity as to which of two objects is meant,—the description being sufficient to point with legal certainty to either if there were no other,—the intention as between those objects may be proved by direct evidence outside the instrument." 2 M. & W. 129; s. c. 6 L. J. Ex. 59. It is said that courts of law are very jealous of the admission of extrinsic evidence to explain the intention of the testator, and that it should be permitted only where an ambiguity is introduced by extrinsic circumstances; 4 Dow 65; in this case illustrations are given of ambiguity both as to person and subject-matter, as a devise of an estate called Blackacre when the testator had two estates so called; or if a devise be given to a son, naming him, and there are two sons by that name; or to a nephew "William" where the testator had no nephew of that name. The rule as laid down by the American cases has been stated to be that where the terms describing the object of the testator's bounty apply indifferently to more than one person or thing, evidence may be introduced of any material fact relating to the property claimed, and the circumstances and affairs of the testator, his family, and of the claimant, "and the testator's declarations made before, at, or after the making of the will, are admissible in this view, but no evidence of mere mistake on the part of the testator or the draftsman is admissible." Browne, Par. Ev. § 126; 124 Mass. 314; 2 Dall. 70; 43 Pa. 102; 45 Wis. 211; 1 Wend. 549.

It was held by the United States supreme court that a bequest "to be equally divided between the board of foreign and the board of home missions," may be shown by parol to have been intended for the Presbyterian boards thus named, there being similar boards controlled by other religious denominations; 120 U. S. 586. See also, as to the admissibility of parol evidence to show intention, LEGACY.

See Chamberlayne's Best, Ev. 221; Tayl. Ev., Chamberlayne's ed. §§ 1206–26; Stark. Ev., Sharsw. ed. 652–5 and notes; AMBIGUITY; MAXIMS, *Ambiguitas, etc.*; PATENT AMBIGUITY.

**LATENT DEED.** One kept for twenty years or more in a person's strong box. See 7 N. J. L. 177.

**LATENT DEFECT.** A defect or blemish in any article sold, known to the seller but not apparent to the purchaser, and which cannot be discovered by mere observation, which, not being discoverable from mere observation, was concealed from the purchaser. See 21 N. Y. 552.

**LATENT FAULT.** Latent defect (*q. v.*).

**LATERAL RAILROAD.** A branch railroad. One running from some point on a main line intended as a connecting line or feeder.

A lateral road is said to be "one proceeding from some point on the main trunk between its termini." 14 Ill. 273. "The general route of the lateral road must lie at an acute angle with the main trunk;" *id.* "A lateral road is another name for a branch road;" *id.* The definition of such a structure does not depend on its length or direction, it may be a "direct extension" from the terminus as well as "merely an offshoot of the main road;" 107 Pa. 548; and it may run in the same direction as the main line so as to be in effect an extension; 66 Mo. 228; it may be an elevated road over a wharf; 107 Pa. 548. When authorized, the necessity and the location are in the discretion of the directors; *id.*; but the lateral railroad cannot be constructed without authority expressly granted or necessarily implied from the charter; 48 Pa. 355. When it is authorized, the right to acquire lands by the exercise of the power of eminent domain is implied as on the main line; 14 Ill. 273; 72 Mich. 206; 59 Ia. 563. Where there is a limitation of time for completing the main line, it does not apply to a branch road, certainly not to one for which the land has been acquired within the time limited; 66 Mo. 228.

The power is as large as the power granted for construction of the main line; 48 Pa. 355; and a power to construct such roads in the discretion of the directors is a continuing one, not to be abridged by a subsequent act giving to the company a time limited for completing the main line with sidings, appurtenances, etc.; 159 *id.* 331. The word appurtenances does not include branches; *id.*

The same reasonable rules as to furnishing, and having proper switches, turnouts, etc., apply to lateral roads as to other railroads; 2 Pittsb. 444; so also the same statutory requirements apply as to crossing highways; 1 B. & Ad. 441.

Words permitting the construction of such lines are not obligatory; 2 Macq. H. L. Cas. 514; and impose no duty which will be enforced by mandamus; 1 El. & Bl. 874. A charter power to construct branch or lateral roads includes the right to build one running in the same general direction and connecting the main line with another

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railroad; 86 Va. 618. When a railroad company has power to construct lateral or branch roads and purchases another road under an act authorizing its use under the charter of the purchaser, the latter may extend the purchased road; 94 Pa. 435. The mere fact that the building of a lateral railroad may add to the earnings of the main line will not authorize its construction in the absence of power in the charter; 116 Ill. 449; 138 *id.* 453.

A power "to construct such roads from the main line to other points or places in the several counties through which said road may pass," is limited to such as begin and end in the same county; 5 McLean 425. A lateral railroad may cross an ordinary railroad to reach a navigable river to which its construction is authorized and the continuity of the lateral road is not thereby destroyed; 74 Pa. 373. A statute authorizing a railroad company to subscribe to and acquire an interest not exceeding one-fifth, in any lateral or connecting road, confers a distinct privilege or franchise which renders the gross receipts derived from such interest liable to a state tax, notwithstanding an exemption of the principal company from such tax on its own gross receipts; 48 Md. 49. Branch railroads, under the Missouri act of March 21, 1868, are practically independent lines and not included in an exemption from taxation in the charter of the main line; 120 U. S. 569; 99 Mo. 30. Reduction of the number of trains on a branch road of which the business is lessened by charter of a competing line, will not operate as a forfeiture of the charter of the main line; 12 Gray 180.

The Pennsylvania acts of 1832, May 5, and 1865, April 18, limit the width of lateral railroads to 20 feet, whether single or double track, and under these acts the width has been held to be a jurisdictional fact, which may be taken advantage of at any stage of the proceedings; 111 Pa. 95. See RAILROAD; EMINENT DOMAIN.

**LATERAL SUPPORT.** The right of having one's land and the structures erected thereon supported by the land of a neighboring proprietor.

Each of two adjoining land-owners is entitled to the support of the other's land. The right of lateral support exists only with respect to the soil in its natural condition; 90 U. S. 635; and it is an incident to the land in that condition; 19 Barb. 383. If any excavation cause damage whilst the soil remains in this condition, an action will lie, but in the absence of negligence in excavating, or prescription, or grant, in favor of the neighbor, no action will lie for injury occasioned to the latter if he has increased the lateral pressure by building on the land; 122 Mass. 207; 2 Thomp. & C. 277; 10 H. L. Cas. 333; 22 Mo. 566; 58 Mo. App. 586; 37 Vt. 99. A land-owner has a right to assume that the soil will be permitted to remain in its natural state, and for a violation of this right, an action will lie independently of the question of negligence; 2 Rolle, Abr. 565; 25 Vt. 465; 25 N. J. L. 362. But see 47 La. Ann. 814, where it was held that an adjoining land-owner was liable for weakening his neighbor's wall, by the construction of a building on his own land.

A person's right to the support of the land immediately around his house is not so much an easement, as it has been called, as it is the ordinary right of enjoyment of property. Professor Washburn characterizes the right as "of a nature somewhat akin to the easement of light."

The doctrine of lateral support has been thus carefully stated by this eminent author: "This right exists independently of grant or prescription, and is also an absolute right; so that, if his neighbor excavates the adjoining land, and in consequence A's land falls, he may have an action, although A's excavation was not carelessly or unskilfully performed. This natural right does not extend to any buildings A may place upon his land; and therefore, if A builds his house upon the verge of his own land, he does not thereby acquire the right to have it derive its support from the land adjoining it until it shall have stood and had the advantage of such support for twenty years. In the meantime such adjacent owner may excavate his own land for such purposes as he sees fit, provided he does not dig carelessly or recklessly; and if, in so doing, the adjacent earth gives way, and the house falls by reason of the additional weight thereby placed upon the natural soil, the owner of the house is without remedy. It was his own folly to place it there. But if it shall have stood for twenty years with the knowledge of the adjacent proprietor, it acquires the easement of a support in the adjacent soil. . . . But this right of a land-owner to support his land against that of the adjacent owner does not, as before stated, extend to the support of any additional weight or structure that he may place thereon. If, therefore, a man erect a house upon his own land, so near the boundary line thereof as to be injured by the adjacent owner's excavating his land in a proper manner, and so as not to have caused the soil of the adjacent parcel to fall if it had not been loaded with an additional weight, it would be *damnum absque injuria*,—a loss for which the person so excavating would not be responsible in damages;" 2 Washb. R. P., 5th ed. 380.

It is settled law that "the unquestionable right of a land-owner to remove the earth from his own premises adjacent to another's building is subject to the qualification that he shall use ordinary care to cause no unnecessary damage to his neighbor's property in so doing." 110 Mo. 234; 25 N. Y. 334; 2 Allen 131; 76 Ill. 240; and as it is put by another author: "In exercising his rights over his land, the owner is bound to use ordinary care and skill for the purpose of avoiding injury to his neighbor. Thus, while, as a general rule, he is

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not bound to continue the support his land gives to a structure upon, or other artificial arrangement of, adjoining land, and is, therefore, not liable for the natural consequences of his withdrawing this support, yet in doing so, he must act with such care and caution that (as nearly as by reasonable exertion it is possible to secure such a result) his neighbor shall suffer no more injury than would have accrued if the structure had been put where it is without ever having had the support of his land."

The principle underlying this rule is that "if a man in the exercise of his own rights of property do damage to his neighbor, he is liable if it might have been avoided by the use of reasonable care;" 22 Mo. 573; 54 Kan. 323. In the absence of a statutory rule it is said that "the care required of a party so excavating is that of a man of ordinary prudence in the circumstances of the particular situation. . . . The particular circumstances so largely shape and indicate the duty that any attempt to reduce the rule to greater certainty would probably tend to impede rather than to promote the administration of justice;" 110 Mo. 234. It has been recently held that prior notice to the neighbor whose property may be endangered by the excavation is an essential part of the ordinary care referred to: 53 N. J. L. 442; 13 L. R. A. 569. In this case there was so emphatic a dissent that, standing alone, it could hardly be considered sufficient authority for the proposition. On this point it is said that "one who digs away land which affords support to an adjoining house ought to give the owner reasonable notice of his intention to do so, and he must allow the latter all reasonable facilities for obtaining artificial support, including a temporary privilege of shoring up the house by supports based upon the former owner's land;" 2 Shearm. & Redf. Neg., 4th ed. § 701. A more recent text writer says: "Thus the authorities are agreed that one who proposes to excavate, or make other alterations or improvements upon his own land, which may endanger the land or house of his neighbor, is bound to give the latter reasonable notice of what he proposes to do, to enable him to take the necessary measures for the preservation of his own property. But, after giving such notice, he is bound only to reasonable and ordinary care in the prosecution of the work." 1 Thomp. Neg. 276. In many cases it is held that after notice from the owner who proposes to excavate, it is the duty of his neighbor to shore up his own building; 44 Md. 268; 4 Paige 169; 9 B. & C. 725. And where a neighbor has no right to support by grant or by prescription, it is said that he must shore up his own house; 8 B. Monr. 353; but there is no obligation on the part of the owner of a building about to be removed to shore up the other buildings; Goddard, Easem., Bennett's ed. 43.

The owner of land cannot be deprived of his right to excavate his own land by the action of his neighbor in building at or near the boundary line, and if he conduct his operations with due care, and no right by grant or prescription has been acquired by his neighbor, he is not liable, even though the building of the latter be ruined; 3 B. & Ad. 871; 76 Ill. 237; 18 Pick. 117; 4 N. Y. 201; 20 Conn. 533.

In the case of a party wall (*q. v.*) the joint owners of it have no easement of reciprocal support from each other's buildings, and if one proposes to remove the building, and injury to his neighbor is liable to result from it, he must notify him of his intention that he may look to his own protection, at the same time using reasonable care and precaution to protect the neighbor, and if this is done, and still injury results, no action will lie; 93 Ky. 284.

With respect to a right by prescription for the support of buildings, there is a difference between the tendency of judicial opinion in England and the United States. In the former country the tendency, "as in the case of all rights affecting real estate, is strongly in favor of the recognition of this right as acquired by prescription;" L. R. 6 App. Cas. 740; 19 Ch. Div. 281; 2 C. & K. 250. See 1 El. Bl. & El. 622; 9 H. L. Cas. 503. The American doctrine, after some fluctuation, is now considered as settled that an easement for the support of a building cannot be acquired by prescription; 98 Cal. 346; 42 Mo. App. 551 (overruling 13 *id.* 575); 49 Ga. 19; 7 Watts 460; 80 Va. 1 (overruling 27 Gratt. 77); 12 Mass. 230. See note on this branch of the subject, 20 L. R. A. 730.

The measure of damages in actions for removing the lateral support of another's land is the amount required to restore the property to its former condition with as good, means of lateral support, and special damages must be specially pleaded; 7 Houst. 219; or the diminution of the value of the land by falling, caving, or washing, as the natural result of the excavation; 25 N. J. L. 356; 57 Minn. 493; 64 *id.* 123; 149 Pa. 155; 155 *id.* 256; 3 S. Dak. 44; 3 Sutherland, Damages 417. See 121 Ind. 195; s. c. 6 L. R. A. 449.

The right of lateral support may be asserted as well against a municipal corporation's making excavations in changing the grade of a street as against private individuals; 88 Va. 992. But see 28 Abb. N. C. 154. So where a city built a sewer in a public street opposite land, under which and the street was a stratum of silt and quicksand which flowed into the sewer trench so that a building on the land was damaged, the city was held liable; 44 N. E. Rep. (Mass.) 344. In this case three judges dissented on the authority of 4 L. R. Exch. 244, in which it was held that there is no right of recovery for damages occasioned by the sinking in of land, and that this doctrine extended to a quicksand flowing so freely as to be raised by a pump.

Where a house is injured as an indirect effect of the improper working of mines, the right of action arises at the time the mischief is felt, and the statute of limita-

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tions runs from that time; 9 H. L. Cas. 503.

For a collection of cases depending on particular facts and illustrating the right of lateral support, see 67 Vt. 630.

In California it is made unlawful by statute for a land-owner to remove the lateral support of adjoining land without taking reasonable precautions to support it; Cal. Civ. Code § 832. It was held that this liability was not avoided by proof that the work was done by a contractor, but that where the excavation was done under contract, and no precaution was taken with respect to lateral support, both the owner and the contractor were liable to the owner of adjoining land which fell in; 105 Cal. 52.

See, generally, 13 L. R. A. 569, note; Ray, Neg. Imp. Dut. 190; EASEMENT; PRESCRIPTION.

**LATERAN COUNCILS.** The general name given to the numerous councils held in the Lateran Church at Rome.

The first of these was convened A. D. 649 to consider the doctrine of the Monothelites. This council held five sessions, during which the writings of the leading advocates of the theory were examined and condemned, and all persons anathematized who did not confess their belief in the existence of both the divine and the human will in the person of Jesus Christ. The second of the councils, held in the years 1105, 1112, 1116, and 1123, settled the controversy between the pope and the emperor as to the investiture of bishops, prescribed the methods of ordinations and elections, by which, although the pope apparently made large concessions to the emperor, he was, in fact, able to practically control the elections, and passed additional decrees to enforce the celibacy of the clergy. The third council, convened in 1139, condemned the antipope and deposed all who received office under him and promulgated thirty canons of discipline among which were several against simony, marriage, and immorality among the clergy. The fourth council (1179) decreed that the election of the popes should be confined to the college of cardinals, two-thirds of the votes of which should be requisite for an election, instead of a majority, as had previously been necessary. It condemned the Albigenses and the Waldenses. The fifth council convened in the year 1215. It is usually called the fourth Lateran and was the most important as marking the summit of the papal power. It decreed that the doctrine of transubstantiation be one of the articles of faith, required all persons who had reached the age of discretion to confess once a year, arranged for the place of assembly and the time for the next crusade, and anathematized all heretics whose belief was opposed to the faith, decreeing that after their condemnation they should be handed over to the secular authorities, excommunicating all who received, protected, or maintained them, and threatening all bishops with deposition who did not use their utmost endeavors to clear their dioceses of them. The sixth council (1512-17) abolished the Pragmatic Sanction and substituted a concordat agreed upon by Leo X. and Francis I. in which the liberties of the Church were greatly restricted.

Some authorities recognize five only, omitting the first above stated and numbering the others from one to five.

**LATHE, LATH** (L. Lat. *laestrum* or *leda*. Law Fr. and Eng. Dict.). A division of certain counties in England, intermediate between a county or shire and a hundred, sometimes containing three or four hundreds, as in Kent and Sussex. Cowel. But in Sussex the word used for this division is *rape*. 1 Bla. Com. 116. There was formerly a lathe-reeve or bailiff in each *lathe*. *Id.* This division into *lathes* continues to the present day. In Ireland, the *lathe* was intermediate between the tything and the hundred. Spencer, Ireland. See T. L.

**LATHREEVE, LEDGREEVE, or TRITHIN-GREVE.** An officer under the Saxon government who had authority over a lathe. Cowel.

**LATIFUNDIUM** (Lat.). **In Civil Law.** Great or large possessions; a great or large field; a common. Ainsworth. A great estate made up of smaller ones (*fundis*), which began to be common in the latter times of the empires. Schmidt, Civ. Law, Introd. p. 17.

**LATIFUNDUS** (Lat. *late possidens*). A possessor of a large estate made up of smaller ones. Du Cange.

**LATIN.** The language of the ancient Romans. See LANGUAGE.

**LATIN UNION.** A monetary alliance of France, Belgium, Switzerland, and Italy for the establishment of a mutual and uniform monetary policy and the maintenance of a uniform and interchangeable coinage of gold and silver based on the French franc. Greece and Roumania joined the association in April, 1867.

The convention was made at Paris, Dec. 23, 1865, and provided that certain named gold and silver coins and no others should be used by each state, and that they should be received interchangeably when not worn to one-half per cent. or the devices effaced. Silver coins were made a legal tender between individuals of the state which issued them to the sum of fifty francs; but the state itself should receive them in any amount and the public banks of each country to the sum of one hundred francs. The contracting governments agreed to redeem the small coins in gold or five-franc silver pieces, when presented in sums of not less than one hundred francs. It was agreed that of silver coins of two francs and less there should not be issued more than six francs for each inhabitant, the amount for each country being specified according to the estimated population in 1855. Provision was made for any other nation to join the convention by accepting its obligations and adopting the monetary system of the union. The treaty was limited to remain in force till Jan. 1, 1880.

January 30th, 1874, a supplementary treaty was made, further limiting the coinage of 1874, and the same limitations were made for 1875 and 1876. In the conference of 1877 the coinage of five-franc pieces was suspended except nine million francs for Italy. In 1873 Belgium passed a law to suspend the coinage of silver entirely, and France did the same in 1876, and the law of Switzerland was to the same effect. Separate legislation to limit the coinage was permissible, as the treaty of 1865 only limited the maximum but did not make any coinage obligatory.

In 1878 through a conference in Paris the same nations renewed the monetary treaty as it was "in all that relates to fineness, weight, denomination, and currency of their gold and silver coin." The free coinage of gold (excepting five-franc pieces, of which the coinage was suspended) was guaranteed each state, and the coinage of silver five-franc pieces was provisionally suspended to be resumed only by unanimous agreement. This treaty was in force, by its terms, until January 1st, 1886.

In November, 1885, France, Greece, Italy, and Switzerland renewed the convention for five years, absolutely, with the further agreement that after Jan. 1, 1891, it should be subject to termination on one year's notice. Belgium after some hesitation gave her assent. Silver coinage was made redeemable and no addition to it permitted.

See, generally, Int. Cyc. tit. *Latin Union*.

Another group of European nations acting under

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a joint monetary convention includes Norway, Sweden, and Denmark, which have had a treaty known as the Scandinavian Monetary Convention, dated in 1873, for the mutual regulation of their coinage. In addition to the countries named as belonging to the Latin Union, Spain, Austria-Hungary, Finland, Roumania, Servia, Bulgaria, and Monaco have also coined large amounts of either or both gold and silver into money of weight, fineness, and value exactly proportionate to or identical with that of the countries included in the Latin Union.

**LATINER.** An interpreter. Co. 2 Inst. 515.

**LATINI COLONIARII.** The free inhabitants of a colony founded with the *jus latii*, or of a country upon which the *jus latii* had been conferred. By the *constitutio Antoniana*, Caracalla extended to them the privilege of full Roman citizenship.

**LATINI JUNIANI.** Such freedmen as enjoyed their liberty *tuitione prætoris*, and who, under the *lex junia norbana*, were made legally free, their freedom, however, being only of the kind enjoyed by the *latini coloniarii*. They possesssed only the *jus commercii* and not the *jus connubii*, and even in regard to the former they were restricted, in that they had the *commercium inter vivos*, but not the *commercium mortis causa*. They could neither make a will nor take anything under a will, and when a *latinus junianus* died, his property reverted to his master as though he had remained a slave all his life. The privilege of Roman citizenship conferred upon the *latini coloniarii* did not include the *latini juniani*. See Sohm, Rom. L. § 22.

**LATINS.** See JUS LATII.

**LATITAT** (Lat. he lies hid). **In English Law.** The name of a writ calling a defendant to answer to a personal action in the king's bench. It derives its name from a supposition that the defendant lurks and lies hid, and cannot be found in the county of Middlesex (in which the said court is holden) to be taken there, but is gone into some other county, and therefore requiring the sheriff to apprehend him in such other county. Fitz. N. B. 78. Abolished by stat. 2 Wm. IV. c. 39.

**LATTER-MATH.** A second mowing; the aftermath.

**LATOR.** A bearer; a messenger. Whart. L. Lex.

**LAUDARE.** To advise or persuade; to arbitrate. Whart.

**In Civil Law.** To cite or quote; to name; to show one's title or authority. Calv. Lex.

*Laudamentum.* The finding or award of a jury. 2 Bla. Com. 285.

**LAUDATIO.** Testimony delivered in court concerning an accused person's good behavior and integrity of life. It resembled the practice which prevails in our trials, of calling persons to speak to a prisoner's character. Wharton.

**LAUDATOR.** A witness to character. A person to decide some point at issue between others.

**LAUDEMEO. In Spanish Law.** Taxes paid by possessors of land held by quit-rent or emphyteusis to the owner of the estate when the tenant alienates his right in the property. Escriche.

It was provided that "the tenant may aliene the land, acquanting the lord who has the right of preemption (*tanteo*), with the price that another has offered; and he not giving that price, or being silent with respect thereto, for two months the tenant may sell, but to a person from whom the lord may recover the rent, in order that he shall execute a new deed of lease, and for which he is entitled to a relief (*laudemio*), which is the fiftieth part of the price or value." L. 29, tit. 8 p. 5; 1 White, Rec., 87; Schmidt, Civil Law of Spain and Mexico 74.

**LAUDEMIUM** (Lat. *a laudando domino*). **In Roman Law.** A fiftieth part of the purchase-money or (if no sale) of the value of the estate paid to the landlord (*dominus*) by a new *emphyteuta* on his succession to the estate, not as heir, but as singular successor. Voetius, Com. ad Pand. lib. 6, tit. 3, §§ 26–35; Mack. R. L. § 328.

**In Old English Law.** The tenant paid a *laudimium* or acknowledgment-money to the new landlord on the death of the old. Called also *laudativum*. See Blount, *Acknowledgment-Money*.

**LAUDUM.** Award or arbitrament.

**In Scotch Law.** Judgment or sentence; dome or doom. 1 Pitc. Cr. Tr. pt. 2, p. 8.

**LAUGHE.** Frank-pledge. 2 Reeves, Hist. Eng. L. 17.

**LAUNCEGAY or LAUCEGAY.** A spear or javelin, the use of which was prohibited by 7 Ric. III. c. 13.

**LAUNCH.** The movement by which a ship or boat descends from the shore into the water when she is first built, or afterwards.

A vessel already in the water cannot be launched; 70 Me. 352.

A large, long, low, flat-bottomed boat. Mar. Dict. The long boat of a ship. R. H. Dana. A small vessel employed to carry the cargo of a large one to and from the shore.

The goods on board of a launch are at the risk of the insurers till landed; 5 Mart. La. N. S. 387. The duties and rights of the master of a launch are the same as those of the master of a lighter.

When the master of a vessel agreed to take cotton on board his vessel from the cotton-press, and employed a steam-lighter for that purpose, and the cotton was lost by an explosion of the steam-boiler of the lighter, it was held that his vessel was liable *in rem* for the loss; 23 Bost. L. Rep. 277.

**LAUREATE or LAUREAT.** An officer of the English sovereign. His duty formerly consisted only in composing an ode annually, on the sovereign's birthday, and on the New Year; sometimes also, though rarely, on occasions of any remarkable victory. The annual birthday ode has been discontinued since the conclusion of the reign of George III. The title has

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been said to be derived from the circumstance that in classical times and in the middle ages, the most distinguished poets were solemnly crowned with laurel. Out of this association of ideas sprang the custom of the presentation of a laurel wreath to graduates in rhetoric and versification at the English universities, the king's laureate simply meaning a rhetorician in his service. In allusion to this custom Selden, in his Titles of Honor, speaks of the laurel crown as an ensign of the degree of mastership in poetry. A relic of the old university practice of crowning distinguished students of poetry exists in the term "laureation," which is still used at one of the Scotch universities (St. Andrews), to signify the taking of the degree of Master of Arts.

**LAUREL.** An English gold coin worth twenty shillings, or about five dollars, coined in 1619 by James I., so-called because the head of the king was wreathed with laurel, and not crowned as on English coins.

**LAW.** That which is laid down; that which is established. A rule or method of action, or order of sequences.

The rules and methods by which society compels or restrains the action of its members.

The aggregate of those rules and principles of conduct which the governing power in a community recognizes as those which it will enforce or sanction, and according to which it will regulate, limit, or protect the conduct of its members.

The aggregate of rules set by men as politically superior or sovereign, to men as politically subject. Aust. Jur., Campbell's ed. 86.

A rule of civil conduct prescribed by the supreme power in the state, commanding what is right and prohibiting what is wrong. 1 Bla. Com. 44.

A rule of civil conduct prescribed by the supreme power in a state. 1 Steph. Com. 25.

The general body of rules which are addressed by the rulers of a political community to the members of that society, and which are generally obeyed. Markby, Elements of Law 3.

A rule of conduct contained in a command of a sovereign addressed to the subject. Encyc. Brit.

A general rule of human action, taking cognizance of external acts only, enforced by a definite authority, which authority is human, and among human authorities is that which is paramount in a political society. More briefly, a general rule of external human action enforced by a sovereign political authority. Holland, Jur. 37.

All other rules for the guidance of human action are called laws merely by analogy; and any propositions which are not rules for human action are called laws by metaphor only. *Id.*

A rule or enactment promulgated by the legislative authority of a state; a long-established local custom which has the force of such an enactment. 10 Pet. 18.

The doctrines and procedure of the common law of England and America, as distinguished from those of equity.

An oath. So used in the old English practice, by which wager of law was allowed. See WAGER OF LAW.

Perhaps few terms whose use requires equal precision serve in so many diverse meanings as the term law. In its root it signifies that which is laid down; that which is established. "In the largest sense," says Montesquieu (*Esprit des Lois*, b. 1, ch. 1), "laws are the necessary relations which arise from the nature of things; and, in this sense, all beings have their laws, God has his laws, the material universe has its laws, intelligences superior to man have their laws, animals have their laws, man has his laws. In this sense, the idea of a command proceeding from a superior to an inferior is not necessarily involved in the term law. It is frequently thus used to denote simply a statement of a constant relation of phenomena. The laws of science, thus, are but generalized statements of observed facts." "It is a perversion of language," says Paley, "to assign any law as the efficient operative cause of anything. A law presupposes an agent: this is only the mode according to which an agent proceeds."

It has been said that "the one idea that is common to all meanings of the word law is that of order or regularity in the happening of events. Starting from this, the meanings divide into two groups which may be distinguished as law in the scientific and in the jural sense." Terry, Anglo-Am. L. 1. The author cited continues that "the former seems to contain no elements in addition to the one above mentioned. A scientific law can be expressed as a mere formula," but law in the jural sense involves the further ideas that the regularity manifested is the result of an act or omission of a rational being, produced by an attempt to conform his conduct to some standard or ideal more or less clearly conceived. The result of this process is the evolution in any community of individuals of common principles of action, which as soon as reason takes cognizance of them become laws in the most general, jural sense of the word. With the advance of civilization new elements come into being: (1) The idea of force is added to that of order and is applied to compel obedience, or, going one step further, to change, modify, or add to these rules of action. (2) The primitive law becomes differentiated from other bodies of rules with which it is at first confounded, so that in the end what is termed law in the stricter sense may conflict with other recognized principles of action which are termed laws in the more general sense, as the natural or the moral law. *Id.*

In its relation to human affairs there is a broad use of the term, in which it denotes any of those rules and methods by which a society compels or restrains the action of its members. Here the idea of a command is more generally obvious, and has usually been thought an essential element in the notion of human law.

A distinction is to be observed in the outset between the abstract and the concrete meaning of the word. That which is usually intended by the term "laws" is not coextensive with that which is intended by the term "law." In the broadest sense which it bears when used in the abstract, law is a science. It treats of the theory of government, the relation of states to each other and to individuals, and the rights and obligations of states, of individuals, and of artificial persons and local communities among themselves and to each other.

An analysis of the science of law presents a view, *first*, of the rights of persons, distinguishing them as natural persons and artificial persons, or bodies

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politic or corporations. These rights are deemed either *absolute*, as relating to the enjoyment of personal security, liberty, and of private property, or, on the other hand, as *relative*,—that is, arising out of the relation in which several persons stand. These relations are either (1) *public* or *political*, viz.: the relation of magistrates and people; or, (2) *private*, as the relations of master and servant, husband and wife, parent and child, guardian and ward, to which might be added relations arising out of private contracts, such as partnership, principal and agent, and the like. Under the head of the rights of persons as arising out of public relations may be discussed the constitution and polity of the state, the distribution of powers among the various departments of the government, the political status of individuals, as aliens, citizens, and the like.

In the *second* place, the analysis presents the rights of property, which is divided into personal property or chattels, viz., that which is movable, and real property, or that which is immovable, viz., lands, including nearly all degrees of interest therein, as well as such chattels as by a peculiar connection with land may be deemed to have lost their character as legally movable: these rights of property are viewed in respect to the origin of title, the transmission of title, and the protection of the enjoyment thereof.

In the *third* place, the analysis presents a view of private wrongs, or those injuries to persons for which the law provides a redress for the aggrieved party; and under this head may be considered the tribunals through which the protection of rights or the redress of wrongs may be obtained, and the various modes of procedure to those ends.

*Lastly*, the analysis presents a view of public wrongs, or crimes and misdemeanors, in which may be considered the theory of crime and punishment, the persons capable of committing crimes, the several degrees of guilt of principals and accessaries, the various crimes of which the law takes cognizance,—as, those against religion, those against the state and its government, and those against persons and property,—with the punishment which the law affixes to each, and also the tribunals and procedure by which crimes threatened may be prevented, and crimes committed may be punished. Bla. Com.

In a stricter sense, but still in the abstract, law denotes the aggregate of those rules and principles of conduct which the governing power in a community recognizes as those which it will enforce or sanction, and according to which it will regulate, limit, or protect the conduct of members of the community.

It is the *aggregate* of legal rules and principles, as distinguished from any particular rule or principle. No one statute, nor all statutes, constitute the law of the state; the principles laid down by the courts and the regulations of municipal bodies, as well as, to some extent, the universal principles of ethics, go to make up the body of the law. It includes *principles*, which rest in the common sense of justice and right, as well as positive rules or regulations, which rest in ordinance. It is the aggregate of the rules or principles only which the *governing power* in the community recognizes, because that power, whether it be deemed as residing in a monarch, an aristocracy, or in the people at large, is the source of the authority and the sanction of those rules and principles. It is the aggregate of those rules and principles which are *recognized* as the law by that power, rather than those which are actually enforced in all cases; for a statute is none the less a law because the community forbear to enforce it, so long as it is officially recognized by them as that which, in theory at least, should be enforced; nor does a departure from the law by the governing power in itself abrogate the law. It comprises not only those rules and principles which are to be enforced, but also those which are simply permissive; for a very large part even of modern statute-law —which is commonly defined as a rule commanding or prohibiting—in reality neither commands nor prohibits, except in the most distant and indirect sense, but simply authorizes, permits, or sanctions; and this is much more generally true of those principles of the law which rest in custom and the adjudications of the courts. It is only those which relate to the *members of the community* in question; for laws, as such, have no extra-territorial operation.

The state has in general two, and only two, articulate organs for law-making purposes—the legislature and the tribunals. The first organ makes new law; the second attests and confirms old law, though under cover of doing so it introduces many new principles. Holland, Jur. 65. "The statute law is the fruit of the conscious power of society, while the unwritten and customary law is the product of its unconscious effort. The former is indeed to a certain extent a creative work; but, as we have already seen, the condition of its efficacy is that it must limit itself to the office of aiding and supplementing the unconscious development of the unwritten law." Address of James C. Carter, Rep. (1890) Am. Bar Assn. 236.

The earliest notion of law was not an enunciation of a principle but a judgment in a particular case. When pronounced in the early ages, by a king, it was assumed to be the result of direct divine inspiration. Afterwards came the notion of a custom which a judgment affirms or punishes its breach. In the outset, however, the only authoritative statement of right and wrong is a judicial sentence rendered after the fact has occurred. It does not presuppose a law to have been violated, but is enacted for the first time by a higher form into the judge's mind at the moment of adjudication. Maine, Anc. Law (Dwight's ed.) pp. xv, 5. See PRECEDENT. As to Primitive Notions of Law, see 10 Am. L. Rev. 422.

The idea of law has commonly been analyzed as composed of three elements: (1) a *command* of the lawgiver, which command must prescribe not a single act merely, but a series or class of acts; (2) an *obligation* imposed thereby on the citizen; (3) a *sanction* threatened in the event of disobedience; Benth. Frag. on Gov.; Austin, Prov. Jur.; Maine, Anc. Law. Hamilton declared a sanction essential to the idea of law. Federalist, No. 15.

The latter clause of Blackstone's definition has been much criticised. Mr. Chitty modifies it to "commanding what shall be done or what shall not be done"; 1 Bla. Com. 44, note; and Mr. Stephen omits it in his definition. See *supra*. As to Law and Command, see 1 Law Mag. & Rev. N. S. 189.



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These definitions, though more apt in reference to statutes and edicts than to the law in general, seem, even in reference to the former sort of law, to look rather at the usual form than the invariable essence of the thing. The principle of law, that a promise without a consideration is void, neither commands men to provide a consideration for every promise nor forbids them to promise without consideration, for this is lawful; nor does it forbid them to fulfil such promises. It simply amounts to this, that if men choose to break such promises, society will not interfere to enforce them. And even many statutes have no form of a command or prohibition; and, moreover, some that are such in form are not in reality. An enactment that no action shall be brought on a simple contract after the lapse of six years from the time the cause of action accrued cannot aptly be said to command men to bring actions within six years, nor even, in fact, to forbid them to bring such actions after that time; for it is still lawful to sue on an outlawed demand, and, if the defendant do not object, the plaintiff may succeed. It may be deemed a command in so far as it is a direction to the court to dismiss such actions; but as a rule of civil conduct it amounts simply to this, that when an obligation has become stale to a certain degree, society will sanction the debtor in repudiating it.

A recent work on legal history disclaims philosophical analysis and definition of law, as belonging neither to the historical nor to the dogmatic science of law, but to the theoretical part of politics. Legal science is said to be "not an ideal or ethical result of political analysis; it is the actual result of facts of human nature and history." Accordingly, "law may be taken for every purpose save that of strictly philosophical inquiry to be the sum of the rules administered by courts of justice." When, therefore, "a man is acquainted with the rules which the judges of the land will apply to any subject of dispute between citizens or to any act complained of as against the common weal, and is further acquainted with the manner in which the decisions of the common court can be enforced, he must be said to know the law to that extent." It is not necessary that he should "have opinions on the metaphysical analysis of laws or legal duty in general, or the place of the topic in hand in a scientific arrangement of legal ideas." 1 Poll. & Maitl. Introd.

As to philosophy of the law, see 1 Law Mag. & Rev. N. S. 577.

The difficulty of defining law is nowhere more clearly shown than in a late work on English and American law, in which the leading definitions are enumerated and criticised. It is truly said that the expression "our law," adopted by the author, does not mean moral law, although rules regulating civil conduct may "be *imported* by the tribunals when necessary for the purposes of the actual decision of causes, from the field of morality," when they become invested with the quality of law to the extent that they are recognized and enforced by the judges. The author referred to agrees with Mr. Justice Markby (Elem. of Law § 12) that no greater service was rendered by Austin than the definition of the boundaries of jurisprudence which separate it from ethics or morality. This separation was too much overlooked by continental jurists, with the result, particularly in Germany, of merging "the scientific treatment of law in the larger region of ethical inquiry." (Amos, Science of Law ch. i., ii., iii.) Nor does the law include the science of politics or government, which falls "within the domain of the statesman or legislator" (see also Pollock, Hist. Science of Politics). So law and legislation are not synonymous; the latter is the usual and effective instrument for changing and amending the former or making additions to it. Leaving behind him what the law is not and pausing before undertaking to define what it is, the author remarks, "It requires a bolder man than I to propound a definition of the law of the land which is both comprehensive and accurate." He criticises the definitions of Blackstone, Markby, and Austin (*supra*) as being defective in that the words "prescribed," "command," "addressed," "set," would require an elasticity not consonant with their general or appropriate use. These definitions are apt and accurate as describing the *ordained* or *enacted* law of a state, but would exclude a large body of what is, unquestionably, law. He adopts Holland's as sufficiently accurate for his purpose, "although with a conscious sense of its inadequacy." It answers the purpose because "law, as the lawyer has to deal with it, is concerned only with the legal rights . . . coercion by the state is the essential quality of the law, distinguishing it from morality or ethics." The conclusion is, "If you ask me to define law, I can, speaking as a lawyer, do no better than to adopt Professor Holland's definition already given. If you ask me to enumerate all the ultimate sources whence legal rights and duties originate and how these are evolved, I hide my diminished head and confess my inability to satisfactorily formulate an answer." Dillon, Laws and Jur. Lect. I.

This emphatic statement gathers added force when the thoroughness of the author's research, as shown by his notes, is considered. Among them is found a reference to the elaborate and learned examination of the subject by Professor Clark, who devotes sixteen chapters each to "The Definition and Origin of Law" and "The Form of Law" in his "Practical Jurisprudence: A Comment on Austin." See, as to definition of law, 10 L. Quart. Rev. 228.

This criticism of the most frequently quoted definitions leads naturally up to a reference to the clear and forcible views of Mr. James C. Carter in his address upon The Ideal and The Actual in the Law. Reference has already been made to another address of Mr. Carter in the title International Law (*q. v.*), to which subject much of what is here said is particularly applicable. Concluding his discussion of the sources of law generally, he thus states the result of his argument against the conception of Austin: "Law is not a body of commands imposed upon society from without, either by an individual sovereign or superior, or by a sovereign body constituted by representatives of society itself. It exists at all times as one of the elements

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of society springing directly from habit and custom. It is, therefore, the unconscious creation of society or a growth. For the most part it needs no interpreter or vindicator. The members of society are familiar with its customs and follow them, and in following custom they follow the law. It is only for the exceptional instances that judicial tribunals or legislative enactments are needed. In those cases where the customs are doubtful or conflicting, the expert is needed to ascertain or reconcile them, and hence the origin of the judicial establishment. . . . New customs, new modes of dealing, must be contrived to meet new exigencies, and society by the unconscious exercise of its ordinary forces proceeds to furnish itself with them. But this is a gradual and slow process attended with difficulty and loss. Another agency is needed to supplement and assist the work of society, and legislation springs into existence to supply the want." Rep. Am. Bar Assn. (1890) 217.

It has been very truly said that much of the obscurity involving the origin of law and the mutual relations and proportions of customary, statute, and case law is caused by ambiguous uses of the term source. It is employed (1) to indicate whence we obtain our knowledge of the law; (2) the mode in which or the person through whom have been formulated rules which have acquired the force of law; (3) the authority which gives them that force. The last two uses are most frequently confused. Recognition by the state is the sole source of laws in the sense of that which impresses upon them their legal character. Their sources, in the sense of the causes to which they owe their existence as rules, are thus classified: (1) usage which becomes law at the moment at which it receives the *imprimatur* of the state; (2) religion, the influence of which cannot be left out of account in studying the development of any secular system of law; (3) adjudication, whatever theory be accepted as to its nature as a source of law; (4) scientific discussion; (5) equity, as particularly exemplified in the administrations of law by the Roman prætor and the English chancellor; (6) legislation, whether by the supreme power of the state or by subordinate authorities exercising a delegated function. Holland, Jur. Ch. 5.

When used in the concrete, the term law usually has reference to statutes or expressions of the legislative will. "The *laws* of a state," observes Mr. Justice Story, "are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws." 16 Pet. 18. Hence, he argues, "in the ordinary use of language it will hardly be contended that the decisions of courts constitute laws." In the Civil Code of Louisiana they are defined to be "the solemn expression of the legislative will." See 145 U. S. 454.

The constitution of a state is a law of the state, within the meaning of the United States constitution; 148 U. S. 137; but a municipal ordinance is not; 146 U. S. 258.

But, as has already been said, "law" in the abstract involves much more. Thus, a reference in a statute to "the cases provided by law" includes not only those cases provided by former statutes, but also those contemplated by the common or unwritten law; 18 N. Y. 115.

The law of the land, an expression used in Magna Charta and adopted in most of the earlier constitutions of the original states, means, however, something more than the legislative will; it requires the due and orderly proceeding of justice according to the established methods. See 8 Gray 329; 21 Cent. L. J. 147; DUE PROCESS OF LAW.

When the term law is used to denote enactments of the legislative power, it is frequently confined, especially by English writers, to permanent rules of civil conduct, as distinguished from other acts, such as a divorce act, an appropriation bill, an estates act. Report of Eng. Stat. L. Com., March, 1856.

In the United States, the organic law of a state is termed the constitution, and the term "laws" generally designates statutes or legislative enactments, in contradistinction to the constitution. See STATUTES.

Law, as distinguished from equity, denotes the doctrine and procedure of the common law of England and America, from which equity is a departure. As to where separate courts of law and equity are maintained, see EQUITY.

Law is also used in contradistinction to fact. Questions of law are, in general, for the decision of the court; while it is for the jury to pass upon questions of fact. See JURY; JUDICIAL POWER.

In respect to the ground of the authority of law, it is divided as natural law or the law of nature or of God, and positive law.

The *classification and arrangement* of the law is a subject as to which the lack of systematic discussion is in striking contrast to the measureless volume of treatises upon particular legal topics. The extent to which the latter overlap each other, and thus add to the labor of the patient investigator of any given title, has been frequently suggested, but there is to be found in legal literature little more than the merest recognition of the necessity of a remedy. As to Legal Chaos, see 2 Pol. Sci. Quart. 91.

The familiar analysis based on the arrangement of Blackstone's Commentaries remains after the lapse of more than a century without the recognition of a substitute which warrants the omission of its substance from the place heretofore assigned to it in this title, inadequate as it is.

Like the classification of Blackstone, of much suggestive interest, but inadequate for modern purposes, is Sir Matthew Hale's Analysis of the Law, a posthumous tract frequently bound with the History of the Common Law.

The subject of classification forms a large part of the able work on jurisprudence by

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Professor Holland, but it is there dealt with in sections, and without any attempt to present as a whole a comprehensive analysis or classification. The work does furnish most valuable material to be used in making one. Of value for similar use will be found Digby's Introduction to the History of the Law of Real Property, appendix to Part I. with tables; papers by O. W. Holmes, Jr., 5 Am. L. Rev. 1; 7 *id.* 46; Hammond's Blackstone, notes on Book I. Ch. I., and Introduction to Sandars' Justinian. See also an article by Sir Frederick Pollock, "Divisions of Law," 8 Harv. L. Rev. 188, in which he contends that "it is not possible to make any clear-cut division of the subject-matter of legal rules." He discusses some of the more obvious general divisions of the law, but his view as to a complete classification is thus expressed: "Ambitious writers have sometimes gone to work as if it were possible to reduce the whole contents of a legal system to a sort of classified catalogue where there would be no repetition or cross references, and the classification would explain itself. Ambition on that scale is destined to disappointment by the nature of things." The subject was brought to the attention of the American Bar Association in 1888 by a letter of Professor Henry T. Terry, which is printed in the annual report of 1889, p. 327. A committee was appointed, and made a report in 1891, which discussed with much ability the importance of the subject and the difficulty of its practical accomplishment. The conclusion reached was that a classification could only be successfully attempted with respect to one legal system, and that it must be made in harmony with the spirit of the law as it grows and in the light of legal history. The objects are, first, arrangement to enable the mind to comprehend the law as a whole; second, the cataloguing of topics, to the end that authorities may be collected under a well recognized title of each principal topic of the law. The two methods are not consistent, one being required for the jurist and the scholar and the other for the judge and the lawyer. Both, therefore, are needed, but the last is of more general importance. The committee reported a tentative classification under the first head only, leaving the other for a further report, which has not yet been made. Rept. Am. Bar Assn. (1891) 379–402. In 1896, the subject was revived, and a brief report expressed the belief that it was possible "to determine more definitely the sphere of each of the ordinary topics of the law and determine where each subject may be looked for." Rept. Am. Bar Assn. (1896) 405. Nothing further has been done by the committee, which has been continued with the promise of further attention to the subject. Report (1897) 53.

For more elaborate discussions of the subject, see, generally, Austin Lect. Jur. outline of the course; Amos, Science of Jurisprudence; Terry, Anglo-American Law, Ch. XVI.; 24 Am. L. Rev. 211, 874, 1027; 25 *id.* 317, 322.

*Arbitrary law.* A law or provision of law so far removed from consideration of abstract justice that it is necessarily founded on the mere will of the law-making power, so that it is rather a rule established than a principle declared. The principle that an infant shall not be bound by his contract is not arbitrary; but the rule that the limit of infancy shall be twenty-one years, not twenty nor twenty-two, is arbitrary.

The term is also sometimes used to signify an unreasonable law,—one that is in violation of justice.

*Irrevocable laws.* All laws which have not in their nature or in their language some limit or termination provided are, in theory, perpetual: but the perpetuity is liable to be defeated by subsequent abrogation. It has sometimes been attempted to secure an absolute perpetuity by an express provision forbidding any abrogation. But it may well be questioned whether one generation has power to bind their posterity by an irrevocable law. See this subject discussed by Bentham, Works, vol. 2, 402–407; and see Dwarris, Stat. 479.

*Municipal law* is a system of law proper to any single state, nation, or community. See MUNICIPAL LAW.

A *penal law* is one which inflicts a penalty for its violation.

*Positive law* is the system naturally established by a community, in distinction from natural law. See POSITIVE LAW.

*Private law* is a term used to indicate a statute which relates to private matters which do not concern the public at large.

A *prospective law* or statute is one which applies only to cases arising after its enactment, and does not affect that which is already past.

A *public law* is one which affects the public, either generally or in some classes.

A *retrospective law* or statute is one that turns backward to alter that which is past or to affect men in relation to their conduct before its enactment. These are also called *retroactive laws.* In general, whenever a retroactive statute would take away vested rights or impair the obligation of contracts, it is in so far void, because opposed to the constitution of the United States; 3 Dall. 391. But laws which only vary the remedies, or merely cure a defect in proceedings otherwise fair, are valid; 10 S. & R. 102, 103; 15 *id.* 72; 2 Pet. 380, 627; 8 *id.* 88; 11 *id.* 420. See RETROSPECTIVE.

As used in the 5th amendment to the constitution, it embraces all legal and equitable rules defining human rights and duties, and providing for their enforcement; not only as between man and man, but also between the state and its citizens; 30 Pac. Rep. (Utah) 760.

See AGRARIAN LAWS; BANKRUPT LAWS; BREHON LAW; CANON LAW; CIVIL LAW; CODE; COLONIAL LAWS; COMMERCIAL LAW; COMMON LAW; CONSTITUTIONAL; CONSUETUDINARY LAW; CORN LAWS; CRIMINAL LAW; CROWN LAW; CUSTOM; DICTUM; DUE PROCESS OF LAW; ECCLESIASTICAL LAW; EDICT; EQUITY; EX POST FACTO;

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FECIAL LAW; FEUDAL LAW; FICTION; FOREIGN LAW; FOREST LAW; GAME LAWS; HINDU LAW; INTERNATIONAL LAW: JUDGE-MADE LAW; JUS; LAW MERCHANT; LAW OF NATURE; LEX; MARTIAL LAW; MILITARY LAW; MOHAMMEDAN LAW; MUNICIPAL LAW; POSITIVE LAW; PRECEDENT; REPORTS; STATUTES; STARE DECISIS.

**LAW AGENTS. In Scotch Law.** Solicitors whose qualifications are provided for by 36 and 37 Vict. and several acts of sederunt.

A law agent has a right to retain his client's papers (not being part of a process), which have come lawfully into his possession in the course of his employment, in security of his business account, though incurred before the possession. This is the only case in which writs may be held in pledge as things distinct from the property to which they relate. It gives no active right. The purpose of the possession is immaterial, unless there be an express obligation to surrender the writs when that purpose has been accomplished. They are no security for payment of cash advances or salary or commissions. If the client becomes bankrupt, the agent must surrender the documents to the trustee or liquidator under reservation of his lien. The right gives a preference against all and sundry—the client, his successors, universal and singular, his trustee in bankruptcy, or an inhibitor, but not as against one who has a better title to the writs than the client. A law agent is subject like a counsel to certain unwritten rules of the legal profession. One of these is that in the conduct of a cause he shall follow the directions of counsel, with the resulting benefit of escaping personal liability.

The courts are so jealous of the purity of this important and powerful class of men that they will direct a return of a gift made by a client in excess of the sums fixed for professional charges; and will demand proof of the utmost independence and freedom from undue influence before allowing a testator's legacy to his solicitor to pass. Ersk. Prin. pp. 272, 323, 376.

**LAW AND ORDER ASSOCIATIONS.** Societies formed for the preservation of the public health and morals and the prosecution of those who offend against them.

Knowledge and approval of the members of such a league that one of its officers had retained counsel to prosecute violations of the law, will not render them personally liable for his services, if they believed the expenses incurred would be paid from a fund contributed for that purpose and placed at the disposal of the officers; 133 N. Y. 89.

**LAW BORGH. In Old Scotch Law.** A pledge or surety for appearance.

**LAW-BURROWS. In Scotch Law.** Security for the peaceful behavior of a party; security to keep the peace. This process was much resorted to by the government of Charles II. for political purposes.

The action for contravention of law-burrows is penal. It proceeds on a decree of law-burrows (from borgh, a cautioner). The decree is obtained in the sheriff's or justice of the peace court, after service of a petition setting forth dread of bodily harm, and after proof taken—in which parties are competent witnesses. Failing caution, the decree orders imprisonment for not more than six months or fourteen days, according as the case is brought before a sheriff or a justice. The complainer does not require to aliment the defender in prison. Instead of caution being ordered, the defender may be directed, on pain of imprisonment, to give his own bond. So that the old rules are annulled whereby letters of law-burrows (not now issued) did not require the previous citation of the party complained upon, on the ground that the caution which the law required was only for doing what was every man's duty; and that before the letters were executed against him the complainer had to make oath that he dreaded bodily harm from him. These proceedings can only be quashed by suspension or by suspension and liberation on proof of malice and want of probable cause. Ersk. Prin. p. 492.

**LAW CHARGES.** Costs incurred in court in the prosecution of a suit, to be paid by the party cast. 17 La. 206; 11 Rob. La. 28. See 3 Mart. La. 282.

**LAW COURT OF APPEALS. In American Law.** An appellate tribunal, formerly existing in the state of South Carolina, for hearing appeals from the courts of law.

**LAW DAY.** The day fixed in a mortgage or defeasible deed for the payment of the debt secured. 24 Ala. N. S. 149; 10 Conn. 280; 21 N. Y. 345. This does not occur now until foreclosure, and the use of the term is confusing; 21 N. Y. 343.

**In Old English Law.** A leet or sheriff's tourne. *Termes de la Ley.* Law day or lage day denoted a day of open court; especially the more solemn courts of a county or hundred. The court-leet, or view of frankpledge.

**LAW FRENCH.** See LANGUAGE.

**LAW LATIN.** See LANGUAGE.

**LAW LIBRARY.** A collection of books, manuscripts, pamphlets, etc., relating to legal subjects. Under a bequest of "Law Library and books of antiquity," Dugdale's Monasticon, Domesday Book, and State Trials were held to pass. 4 L. J. O. S. Ch. 74.

**LAW LIST. In English Law.** An annual publication of a quasi-official character, comprising various statistics of interest in connection with the legal profession. The present law list is *prima facie* evidence that the persons therein named as solicitors or certified conveyancers are such. 23 & 24 Vict. c. 127.

**LAW LORDS. In English Law.** Peers who have held high judicial office, or have been distinguished in the legal profession. Moz. & W.

**LAW MARTIAL.** See MILITARY LAW.

**LAW MERCHANT.** The general body of commercial usages in matters relative to commerce. Blackstone calls it the *custom of merchants*, and ranks it under the head of the particular customs of England, which go to make up the great body of the common law. 1 Bla. Com. 75. Since, however, its character is not local, nor its obligation confined to a particular district, it cannot with propriety be considered as a *custom* in the technical sense: 1 Steph. Com. 54. It is a system of law which does not rest exclusively on the positive institu-

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tions and local customs of any particular country, but consists of certain principles of equity and usages of trade which general convenience and a common sense of justice have established, to regulate the dealings of merchants and mariners in all the commercial countries of the civilized world. 3 Kent 2.

These usages, being general and extensive, partake of the character of rules and principles of law, not of matters of fact, as do usages which are local or special. They constitute a part of the general law of the land, and, being a part of that law, their existence cannot be proved by witnesses, but the judges are bound to take notice of them *ex officio;* Winch 24; and this application is not confined to merchants, but extends to all persons concerned in any mercantile transaction. See Beawes, *Lex Mercatoria Rediviva;* Caines, *Lex Mercatoria Americana;* Comyns, Dig. *Merchant* (D); Chitty, Com. Law; Pardessus, *Droit Commercial; Collection des Lois maritimes antérieure au dix-huitième Siècle, par Dupin;* Capmany, *Costumbres Maritimas; Il Consolato del Mare; Us et Coutumes de la Mer;* Piantandia, *Della Giurisprudenze Marittima Commerciale, Antica e Moderna;* Valin, *Commentaire sur l'Ordonnance de la Marine, du mois d'Août,* 1681; Boulay-Paty, *Droit Comm.;* Boucher, *Institutions au Droit Maritime;* Parsons, Marit. Law; Smith, Merc. Law.

**LAW OF ARMS.** Ordinances which regulated proclamations of war, leagues, treaties, etc. Cowel.

**LAW OF CITATIONS. In the Civil Law.** The most important of the laws of citation were those enacted by Valentinian III. A. D. 426, which enacted that the writings of the jurists Papinian, Paulus, Ulpian, Gaius, and Modestinus, as well as of all those who were cited by these writers (the limits of classic literature being thus determined), should possess quasi-statutory force so that their opinions should be binding on the judge. If the opinions differed on the same question, that opinion should prevail which was supported by the largest number of the jurists; if the numbers were equal, Papinian's opinion should prevail, or, if Papinian had expressed no opinion on the subject, the judge was to exercise his discretion. Valentinian the Third's law of citations marks the completion, for the time being, of that development which had commenced with the *responsa* of the old pontifices and the *jus respondendi* of Augustus. See Sohm. Inst. Rom. L. 84.

**LAW OF MARQUE.** See LETTER OF MARQUE AND REPRISAL.

**LAW OF NATIONS.** See INTERNATIONAL LAW.

**LAW OF NATURE.** That law which God, the sovereign of the universe, has prescribed to all men, not by any formal promulgation, but by the internal dictate of reason alone. It is discovered by a just consideration of the agreeableness or disagreeableness of human actions to the nature of man; and it comprehends all the duties which we owe either to the Supreme Being, to ourselves, or to our neighbors: as, reverence to God, self-defence, temperance, honor to our parents, benevolence to all, a strict adherence to our engagements, gratitude, and the like; Erskine, Pr. Sc. Law 1. 1. 1. See Ayliffe, Pand. tit. 2, p. 2; Cicero, de Leg. lib. 1.

The divine will, or the dictate of right reason, showing the moral deformity or moral necessity there is in any act, according to its suitableness or unsuitableness to a reasonable nature. Sometimes used of the law of human reason, in contradistinction to the revealed law, and sometimes of both, in contradistinction to positive law.

They are independent of any artificial connections, and differ from mere presumptions of law in this essential respect, that the latter depend on and are a branch of the particular system of jurisprudence to which they belong; but mere natural presumptions are derived wholly by means of the common experience of mankind, without the aid or control of any particular rule of law, but simply from the course of nature and the habits of society. These presumptions fall within the exclusive province of the jury, who are to pass upon the facts. 3 Bouv. Inst. n. 3064; Greenl. Ev., 15th ed. § 44.

The primitive laws of nature may be reduced to six, namely: comparative sagacity, or reason; self-love; the attraction of the sexes to each other; the tenderness of parents towards their children; the religious sentiment; sociability.

When man is properly organized, he is able to distinguish moral good from moral evil; and the study of man proves that man is not only an intelligent but a free being, and he is, therefore, responsible for his actions. The judgment we form of our good actions produces happiness; on the contrary, the judgment we form of our bad actions produces unhappiness.

Every animated being is impelled by nature to his own preservation, to defend his life and body from injuries, to shun what may be hurtful, and to provide all things requisite to his existence. Hence the duty to watch over his own preservation. Suicide and duelling are, therefore, contrary to this law; and a man cannot mutilate himself, nor renounce his liberty.

The attraction of the sexes has been provided for the preservation of the human race; and this law condemns celibacy. The end of mariage proves that polygamy and polyandry are contrary to the law of nature. Hence it follows that the husband and wife have a mutual and exclusive right over each other.

Man from his birth is wholly unable to provide for the least of his necessities; but the love of his parents supplies for this weakness. This is one of the most powerful laws of nature. The principal duties it imposes on the parents are to bestow on

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the child all the care its weakness requires, to provide for its necessary food and clothing, to instruct it, to provide for its wants, and to use coercive means for its good, when requisite.

The religious sentiment which leads us naturally towards the Supreme Being is one of the attributes which belong to humanity alone; and its importance gives it the rank of the moral law of nature. From this sentiment arise all the sects and different forms of worship among men.

The need which man feels to live in society is one of the primitive laws of nature whence flow our duties and rights; and the existence of society depends upon the condition that the rights of all shall be respected. On this law are based the assistance, succors, and good offices which men owe to each other, they being unable to provide each every thing for himself. See JUS NATURALE; INTERNATIONAL LAW.

**LAW OF THE FLAG.** See FLAG.

**LAW OF THE LAND.** The general law; a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty and property, and immunities under the protection of the general rules which govern society. 4 Wheat. 518; 49 Fed. Rep. 833. See DUE PROCESS OF LAW.

**LAW OF THE ROAD.** See RULE OF THE ROAD; NAVIGATION RULES.

**LAW OF THE STAPLE.** See LAW MERCHANT.

**LAW REPORTS.** See REPORTS.

**LAW SOCIETY.** See INCORPORATED LAW SOCIETY.

**LAW SPIRITUAL.** Ecclesiastical law (q. v.).

**LAW STUDENT.** See PRIVILEGED COMMUNICATIONS.

**LAW TERMS.** Those periods of the year during which the law courts sit in banc or in full court. See TERM.

**LAWFUL.** Legal. That which is not contrary to law. That which is sanctioned or permitted by law. That which is in accordance with law. The terms "lawful," "unlawful," and "illegal" are used with reference to that which is in its *substance* sanctioned or prohibited by the law. The term "legal" is occasionally used with reference to matter of *form* alone: thus, an oral agreement to convey land, though void by law, is not properly to be said to be unlawful, because there is no violation of law in making or in performing such an agreement; but it is said to be not legal, or not in lawful form, because the law will not enforce it, for want of that written evidence required in such cases.

**LAWFUL AGE.** Majority. This usually means twenty-one years, but in some of the states, for certain purposes, a woman attains lawful age at eighteen. 4 Md. Ch. 228.

**LAWFUL AUTHORITIES.** The expression "lawful authorities," used in our treaty with Spain, refers to persons who exercised the power of making grants by authority of the crown. 9 Pet. 711.

**LAWFUL CAUSE.** Under a statute forbidding a priest to deny the communion without lawful cause, that the person was an open and notorious evil liver was held such a cause. 45 L. J. P. C. 1; 1 P. D. 80.

Whether a coroner's absence is from any lawful or reasonable cause is a question for the judge. Such a cause was his taking a vacation, even though part of it was spent in shooting; 42 L. J. M. C. 41; L. R. 2 C. C. R. 15.

**LAWFUL DISCHARGE.** Such a discharge in insolvency as exonerates the debtor from his debts. 12 Wheat. 370.

**LAWFUL GOODS.** Whatever is not prohibited to be exported by the positive law of the country, even though it be contraband of war, for a neutral has a right to carry such goods at his own risk. 1 Johns. Cas. 1; 2 *id.* 77; *id.* 120.

**LAWFUL HEIR.** See HEIR; NEXT OF KIN.

**LAWFUL ISSUE.** In a devise to A for life, and on her death to her lawful issue, etc., these words are to be given the same effect as "heirs"; 3 Edw. I.; 21 Tex. 804. Under the term lawful issue, bastards cannot take a remainder in a life estate to the mother; 10 B. Mon. 188. See ISSUE.

**LAWFUL MONEY.** Money which is a legal tender in payment of debts: *e. g.* gold and silver coined at the mint. 2 Salk. 446; 5 Mod. 7; 3 Ind. 358; 2 How. 244; 3 *id.* 717; 16 Ark. 83. See Hempst. 236. See GOLD; MONEY.

**LAWFUL TRADE.** A clause in an insurance policy against loss "in lawful trade" was construed to mean during employment *by the owner* in lawful trade; 51 L. J. Q. B. 472.

**LAWFULLY BEGOTTEN.** In a will such a limitation creates an entail. 7 Taunt. 85; 51 L. J. Q. B. 472; 9 Q. B. D. 463; 8 App. Cas. 393.

**LAWFULLY POSSESSED.** In a statute concerning forcible entry and detainer, it is equivalent to peaceably possessed. 45 Mo. 35.

**LAWING OF DOGS.** Mutilating the fore-feet of mastiffs, to prevent them from running after deer. 3 Bla. Com. 71. See EXPEDITATION; COURT OF REGARD.

**LAWLESS COURT.** An ancient local English court, said to have been held in Essex once a year, at cock-crowing, without a light or pen and ink, and conducted in a whisper.

**LAWLESS MAN.** An outlaw.

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**LAWMAN.** A man authorized to declare the law.

Anciently the particular citizen of a Scandinavian community, who acted as a popular spokesman against the king and the court at public assemblies, etc., and the guardian of the law, president both of the legislative bench and of the law courts. The president of the supreme court of Orkney and Shetland while the islands remained under Norse rule. Cent. Dict.

**LAWND or LOUND.** Synonymous with frythe (*q. v.*).

**LAWS OF OLERON.** See CODE.

**LAWS OF WAR.** See MILITARY LAW.

**LAWSUIT.** An action at law, or litigation. This is, however, only the vernacular expression for a case before the courts in which there is a controversy between two parties. Technically we speak of a suit in admiralty or equity, an action at law, a prosecution in a criminal court, etc. The term lawsuit may include an arbitration ; 7 Cow. 434.

**LAWYER.** One skilled in the law.

Any person who, for fee or reward, prosecutes or defends causes in courts of record or other judicial tribunals of the United States, or of any of the states, or whose business it is to give legal advice in relation to any cause or matter whatever. Act of July 13, 1866, § 9, Stat. L. 121. See ATTORNEY ; BARRISTER ; PROCTOR ; SOLICITOR.

**LAY. In English Law.** That which relates to persons or things not ecclesiastical. In the United States, the people are not by law divided, as in England, into ecclesiastical and lay. The law makes no distinction between them. The word is also used in the sense of opposed to professional. Also applied to a share of the profits of a fishing or whaling voyage, allotted to the officers and seamen, in the nature of wages ; 3 Story 108.

**In Pleading.** To state or to allege. The place from whence a jury are to be summoned is called the venue, and the allegation in the declaration of the place where the jury is to be summoned is, in technical language, said to *lay the venue.* 3 Steph. Com. 574 ; 3 Bouvier, Inst. n. 2830.

*To lay damages.* To state at the conclusion of the declaration the amount of damages which the plaintiff claims. And. Steph, Pl. § 220.

**LAY CORPORATION.** See CORPORATION.

**LAY DAYS. In Maritime Law.** The time allowed to the master of a vessel for loading and unloading the same. In the absence of any custom to the contrary, Sundays are to be computed in the calculation of lay days at the port of discharge ; 10 M. & W. 331. See 3 Esp. 121 ; 3 Kent 202 ; 2 Steph. Com. 141; 65 Hun 625. See DEMURRAGE.

**LAY FEE.** A fee held by ordinary feudal tenure, as distinguished from the ecclesiastical tenure of *frankalmoign*, by which an ecclesiastical corporation held of the donor. The tenure of *frankalmoign* is reserved by stat. 12 Car. II., which abolished military tenures. 1 Bla. Com. 101.

**LAY IMPROPRIATOR.** Lay rector, to whom the greater tithes are reserved, the lesser going to the vicar. 1 Burn. Eccl. Law 75, 76.

**LAY INVESTITURE.** See INVESTITURE ; ANNULUS ET BACULUS.

**LAY OUT.** This term has come to be used technically in highway laws as embracing all the series of acts necessary to the complete establishment of a highway. 28 Conn. 363 ; 121 Mass. 382 ; 83 Me. 514. See 11 Ired. 94.

**LAY PEOPLE.** Jurymen. Finch, Law 381.

**LAYING THE VENUE.** See LAY.

**LAYMAN. In Ecclesiastical Law.** One who is not an ecclesiastic nor a clergyman. One who is not a member of the legal profession. One who is not a member of any profession.

**LAZARET, LAZARETTO.** A place, selected by public authority, where vessels coming from infected or unhealthy countries are required to perform quarantine. See HEALTH.

**LEA.** Pasture. Co. Litt. 4 *b.*

**LE ROI S'AVISERA, or LA REINE S'AVISERA.** The king will consider of it. This phrase is used by the English monarch when he gives his dissent to an act passed by the lords and commons. This power was last exercised in the year 1707, by Queen Anne ; May, P. L. ch. 18. The same formula was used by the king of the French for the same purpose. 1 Toullier, n. 52. See VETO.

**LE ROI LE VEUT.** The king assents. This is the formula used in England, and formerly in France, when the king approved of a bill passed by the legislature. 1 Toullier, n. 52.

**LE ROI VEUT EN DELIBERER.** The king will deliberate on it. This is the formula which the king of the French used when he intended to veto an act of the legislative assembly. 1 Toullier, n. 42.

**LEADING A USE.** A term applied to a deed executed before a fine is levied, declaring the use of the fine: *i. e.* specifying to whose use the fine shall enure. If executed after the fine, it is said to *declare* the use. 2 Bla. Com. 363. See DEED.

**LEADING CASE.** A case decided by a court of last resort, which decides some particular point in question, and to which reference is constantly or frequently made, for the purpose of determining the law in similar questions.

Many elements go to the constitution of a case as a leading case : among which are,

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the priority of the case, the character of the court, the amount of consideration given to the question, the freedom from collateral matters or questions. The term is applied to cases as leading either in a particular state or at common law. A very convenient means of digesting the law upon any subject is found to be the selection of a leading case upon the subject, and an arrangement of authorities illustrating the questions decided. See B. & H. Lead. Cr. Cas. 2 v.; Sm. Lead. Cas.; Sm. L. Cas. Comm. L.; Hare & W. Sel. Dec. 2 v.; Tudor, Cas. R. P. 1 v.; Tudor, L. Cas. Merc. L. 1 v.; Sedgwick, Damages; Bigelow, L. C. Torts; Redf. & Bigel. Bills & Notes; Redfield, Railw. Cas.; English Ruling Cases; Lawyers' Reports Annotated; Lawson, L. Crim. Cas. Simplified; Lawson, L. Eq. & Const. Cas. Simplified; Lawson, L. Law Cas. Simplified; Sharsw. & Budd, L. Cas. R. P.; Brett, L. Cas. Mod. Eq.; Langdell, Sel. Cas. Cont.; Thayer, Cas. Const. L.; Shirley, L. Cas. Com. L.; Shirley, L. Cas. Crim. L.; Ames, Cas. Bills & Notes; Bigelow, Life and Acc. Ins. Cas.; Pattee, Cas. Contr.; Pattee, Cas. Realty; Pattee, Cas. Personalty & Sales; Langdell, Sel. Cas. Sales, and a variety of others.

The French *Causes Célèbres* correspond to the English state trials.

**LEADING COUNSEL.** That one of two or more counsel employed on the same side in a cause who has the principal management of the cause. Sometimes called the leader. So called as distinguished from the other, who is called the *junior counsel*.

**LEADING QUESTION. In Practice.** A question which puts into the witness' mouth the words to be echoed back, or plainly suggests the answer which the party wishes to get from him. 7 S. & R. 171; 4 Wend. 247. In that case the examiner is said to *lead* him to the answer. It is not always easy to determine what is or is not a leading question.

Such questions cannot, in general, be put to a witness in his examination in chief; 3 Binn. 130; 1 Phill. Ev. 221; 1 Stark. Ev. 123; unless he is a hostile witness; 43 Ill. App. 180. But, in an examination in chief, questions may be put to lead the mind of the witness to the subject of inquiry; and they are allowed when it appears that the witness wishes to conceal the truth or to favor the opposite party, or where from the nature of the case the mind of the witness cannot be directed to the subject of inquiry without a particular specification of such subject; 1 Campb. 43; 1 Stark. 100; 49 Ill. App. 357; 53 Mo. App. 383. The permitting of such questions is within the discretion of the trial court: 35 Neb. 351; 97 Ala. 681; 75 Hun 17; 85 Wis. 615; 91 Ga. 319; 154 U. S. 134; 52 Mo. App. 102. Where the answers of a witness have taken by surprise the party calling him, the court may permit such party to put leading questions to the witness; 154 U. S. 134.

In cross-examinations, the examiner has generally the right to put leading questions; 1 Stark. Ev. 132; Whart. Ev. § 501; but not perhaps when the witness has a bias in his favor; Best, Ev. 805. See WITNESS.

As the allowance of leading questions to a witness is largely in the discretion of the trial judge, the appellate court will reverse for such cause only where it appears that this discretion has been abused; 91 Mich. 611; 139 Ill. 644.

While it cannot be safely said that in no case can a court of errors take notice of an exception of the trial court in permitting leading questions, such conduct must appear to be a plain case of the abuse of discretion; 158 U. S. 271.

**LEAGUE.** A measure of length, which consists of three geographical miles. The jurisdiction of the United States extends into the sea a marine league. See Acts of Congress of June 5, 1794, 1 Story, Laws 352; and April 20, 1818, 3 Story, Laws 1694; 1 Wait, State Papers 195.

A conspiracy to do an unlawful act. The term is but little used.

An agreement or treaty between states. Leagues between states are of several kinds: *First*, leagues offensive and defensive, by which two or more nations agree not only to defend each other, but to carry on war against their common enemies. *Second*, defensive, but not offensive, obliging each to defend the other against any foreign invasion. *Third*, leagues of simple amity, by which one contracts not to invade, injure, or offend the other: this usually includes the liberty of mutual commerce and trade, and the safeguard of merchants and traders in each other's domain. Bacon, Abr. *Prerogative* (D 4). See CONFEDERACY; CONSPIRACY; PEACE; TRUCE; WAR.

**LEAKAGE.** The waste which has taken place in liquids, by their escaping out of the casks or vessels in which they were kept. See 107 Mass. 140, 145.

By the act of March 2, 1799, s. 59, it is provided that there be an allowance of two per cent. for leakage on the quantity which shall appear by the gauge to be contained in any cask of liquors subject to duty by the gallon, and ten per cent. on all beer, ale, and porter in bottles, and five per cent. on all other liquors in bottles, to be deducted from the invoice quantity, in lieu of breakage; or it shall be lawful to compute the duties on the actual quantity, to be ascertained by tale, at the option of the importer, to be made at the time of entry.

Where in a bill of lading a clause is inserted exempting the owner of the ship from loss caused by "rust, leakage, or breakage," he will be liable if damage from these causes be occasioned by the negligence of himself or his servants in stowing; L. R. 2 A. & E. 375; 38 L. J. Adm. 63; 37 L. J. C. P. 3; L. R. 3 C. P. 14; 52 L. J. Q. B. 230; 10 Q. B. D. 521. The primary and natural meaning of the stipulation is that the shipowner will not be answerable if the thing comprised in the bill of lading shall itself rust, leak, or break, and therefore it

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furnishes him no protection against his liability to compensate for consequential damage happening to that thing by reason of some other thing's rusting, leaking, or breaking; 46 L. J. C. P. 402; 2 C. P. D. 432.

**LEAL.** Loyal; that which belongs to the law.

**LEAP YEAR.** See BISSEXTILE.

**LEARNING.** Doctrine. 1 Leon. 77.

**LEASE.** A species of contract for the possession and profits of lands and tenements either for life or for a certain period of time, or during the pleasure of the parties.

A conveyance by way of demise, always for a less term than the party conveying has in the premises. Tayl. Landl. & Ten. § 16; 47 Minn. 189.

One of its essential properties is, that its duration must be for a shorter period than the duration of the interest of the lessor in the land; for if he disposes of his entire interest it becomes an *assignment*, and is not a lease. In other words, the granting of a lease always supposes that the grantor reserves to himself a reversion in the leased premises.

And a distinction is to be noted between a lease and a mere agreement for a lease. The whole question, however, resolves itself into one of construction, and an instrument is to be considered either a lease or an agreement for a lease, according to what appears to be the intention of the parties; 26 Pick. 401; 16 Barb. 621; 9 Ad. & E. 644; 81 Me. 56; 75 N. C. 154; though, generally, if there are apt words of demise followed by possession, the instrument will be held a lease; 8 N. Y. 44; 3 C. & P. 441; 102 Mass. 392; 4 Ad. & E. 225; otherwise, if a fuller lease is to be prepared and executed before the demise is to take effect and possession to be given; 21 Vt. 172; 24 Wend. 201; 3 Stor. 325; 4 Conn. 238; 75 Ill. 44; L. R. 2 Ex. Div. 355; 5 B. & C. 41.

The party who leases is called *the lessor*, he to whom the lease is made *the lessee*, and the compensation or consideration of the lease is *the rent*. The words *lease* and *demise* are frequently used to signify the estate or interest conveyed; but they properly apply to the instrument of conveyance. When a lessee parts with the estate granted to him, reserving any portion thereof, however small, he makes an *underlease*; Tayl. L. & T. § 16; 5 Den. 454; 36 N. Y. 569; 12 Iowa 319; 16 Johns. 159.

The estate created by a lease, when for years, is called *a term* (*terminus*), because its duration is limited and determined,—its commencement as well as its termination being ascertained by an express agreement of the parties. And this phrase signifies not only the limitation of time or period granted for the occupation of the premises, but includes also the estate or interest in the land that passes during such period. A term, however, is perfected only by the entry of the lessee; for previous to this the estate remains in the lessor, the lessee having a mere right to enter, which right is called an *interesse termini*; 1 Washb. R. P. 292, 297; 5 Co. 123 *b*; Co. Litt. 46 *b*; 1 B. & Ald. 593.

Any thing corporeal or incorporeal lying in livery or in grant may be the subject-matter of a lease; and therefore not only lands and houses, but commons, ways, fisheries, franchises, estovers, annuities, rent charges, and all other incorporeal hereditaments, are included in the common-law rule; Shepp. Touchst. 268; 110 Mass. 175; 24 Mich. 279; 33 N. Y. 251; 66 Me. 229; 17 C. E. Green 130; 27 Conn. 164. Rent cannot properly be said ever to issue out of chattels; 3 H. & M. 470; 35 Barb. 295; 15 Ohio, N. S. 186; 5 Rep. 16; but goods, chattels, or live stock upon or about real property may be leased with it and a rent contracted for, to issue from the whole, upon which an action for rent in arrear may be maintained as upon such lease; Co. Litt. 57 *a*; 31 Pa. 20; 24 Wend. 76; 9 Paige 310.

Leases are made either by *parol* or by *deed*. The former mode embraces all cases where the parties agree either orally or by a writing not under seal. The technical words generally made use of in the written instrument are, "*demise, grant, and to farm let*;" but no particular form of expression is required in any case to create an immediate demise; 9 Ad. & E. 650; 15 Wend. 379; 111 Mass. 30; 71 Ill. 317; 7 Blackf. 403; 12 Me. 135; 6 Watts 362; 1 Den. 602; Will. R. P. 327; 83 Ind. 536; see 72 Pa. 286; 66 Mo. 430. An ordinary receipt expressing the nature and terms of the tenancy may be considered a lease; 111 Mass. 30; 78 Ill. 317. Any permissive holding is, in fact, sufficient for the purpose, and it may be contained in any written memorandum by which it appears to have been the intention of one of the parties voluntarily to dispossess himself of the premises for any given period, and of the other to assume the possession for the same period; Tayl. L. & T. § 26; 1 Washb. R. P. 300.

By the English statute of frauds of 29 Car. II. c. 3, §§ 1, 2, 3, it is declared that "all leases, estates, or terms of years, or any uncertain interest in lands, created by livery only, or by parol, and not put in writing and signed by the party, should have the force and effect of leases or estates at will only, except leases not exceeding the term of three years, whereupon the rent reserved during the term shall amount to two third parts of the full improved value of the thing demised." "And that no lease or estate, either of freehold or term of years, should be assigned, granted, or surrendered unless in writing." The principles of this statute have been adopted, with some modifications, in nearly all the states of the Union. 4 Kent 95; 1 Hill, Abr. 130. For a summary of the provisions of the statutes in the various states, see Browne, Frauds, App.; 1 Stims. Am. Stat. L. §§ 4143, 1471; and for the provisions as to a particular state, reference

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should be made to its statutes. See STATUTE OF FRAUDS.

It has been held that a lease to take effect *in futuro* is not within the statute of frauds; 5 N. Y. 463; 64 *id.* 518; 52 Mich. 462; *contra*, 19 Ill. 576; 78 *id.* 125; 8 Ore. 251; and see note on these authorities, 23 Am. L. Reg. N. S. 387. A tenancy from year to year is not a lease or a "term" exceeding one year within the statute; 60 Wis. 1.

As to the surrender or assignment of parol leases for less than three years, it is said that with the exception of Connecticut, perhaps, Pennsylvania stands alone in denying the English rule which holds such parol assignments invalid: Browne, Frauds § 46. See also 16 Am. L. Reg. N. S. 641, where both the English and Pennsylvania cases are collected.

A lease signed by an agent who had no written authority to do so, and also executed by the lessee, was held void within the statute of frauds; 2 Cal. 603; and such a lease cannot be effective as evidence until the agency is shown by evidence of equal dignity; 19 La. Ann. 158.

A written agreement is generally sufficient to create a term of years. But in England, by statute, all leases that are required to be in writing must also be under seal; 8 & 9 Vict. c. 106. See 77 Cal. 286. In *Massachusetts* and *Maryland*, leases for more than seven years must be by deed. So in *Virginia*, of those for more than five, and in *Delaware*, *Rhode Island*, and *Vermont*, of those for more than one. A letting by parol for a sum certain per month, without anything being said about a year, constitutes a lease from month to month, and not a lease from year to year; 100 Pa. 206. A lease is valid and binding on the lessee, who has signed the same and occupied the premises under it, though it is not signed by the lessor; 71 Hun 536.

All persons seized of lands or tenements may grant leases of them, unless they happen to be under some legal disability: as, of unsound mind, immature age, or the like: 8 C. & P. 679. See as to infants, 10 Pet. 65; 7 Cow. 179; 11 Johns. 539; 3 Mod. 310. Contracts by them are voidable only and not void, and may be affirmed or disaffirmed by them on attaining their majority; 17 Wend. 119; 29 Vt. 465; 11 Johns. 539; 6 Conn. 494. As to persons of unsound mind, see 3 Camp. 126; 51 N. Y. 384; 11 Pick. 304; 8 C. & P. 679; intoxicated persons, 2 Paige 30; 18 Ves. 16; 4 Harring. 285; married women, Sm. L. & T. 48; 1 Tayl. L. & T. § 101. The execution of a lease by an authorized agent of a corporation is valid and effectual to create a term without the use of the corporate seal; 43 N. J. L. 329; 87 Ind. 505. A lease made by one railroad corporation to another, neither of which is expressly authorized by law to enter into the lease, is *ultra vires* and void; 131 U. S. 371; 130 *id.* 1. See PARTIES; CONTRACTS. But it is essential to the validity of a lease that the lessor has, at the time he undertakes to make the grant, possession of the premises; otherwise, whatever he does will amount to nothing more than the assignment of a *chose in action*; Cro. Car. 109; Shep. Touchst. 269. But possession is always presumed to follow the title unless there is a clearly marked adverse possession.

And although a lease may not be sufficient to authorize a lessee to demand possession for the want of a possessory title in his lessor, it will still operate by way *of estoppel*, and enure to his benefit if the lessor afterwards comes into possession of the land before the expiration of the lease; Bacon, Abr. *Leases* (I 4); 61 N. Y. 6; 7 M. & G. 701; 3 Pick. 52; 18 How. 82; 6 Watts 60; 2 Hill N. Y. 554; 16 Johns. 110, 201; 5 Ark. 693. See 8 Wash. 603.

The power to lease will, of course, depend upon the extent of the lessor's estate in the premises; and if he has but an estate for life, his lease can only be coextensive therewith; when for a term of years, its commencement as well as its termination must be ascertained, for certainty in these respects is of the essence of a term of years. But although this term may not at first appear to be certain, it may be rendered so by reference to some fact or event; *id certum est quod certum reddi potest.* Thus, if a lease be made to a man for so many years as he has in the manor of Dale, and he happens to have a term of two years in that manor, the lease will be good for that period; Co. Litt. 45 *b*; 1 M. & W. 533; 3 Co. 346; 97 Mass. 206; 102 *id.* 93; 10 R. I. 355.

Lord Coke states that, originally, express terms could not endure beyond an ordinary generation of forty years, lest men might be disinherited; but the doctrine had become antiquated even in his day, and at the present time there is no limitation to a term of years except in the state of New York, where land cannot be leased for agricultural purposes for a longer period than twelve years; see Co. Litt 45 *b*, 46 *a*; 13 Ohio 334; 1 Washb. R. P. 310; 41 N. Y. 480; 62 N. Y. 524.

In all leases of uncertain duration, or if no time has been agreed upon for the continuation of the term, or if after the expiration of a term the tenant continues to hold over, without any effort on the part of the landlord to remove him, the tenancy is at the will of either party. And it remains at will until after the payment and receipt of rent on account of a new tenancy, or until the parties concur in some other act which recognizes the existence of a tenancy, from which event it becomes a tenancy from year to year, invested with the qualities and incidents of the original tenancy. After this, neither party has a right to terminate it before the expiration of the current year upon which they have entered, nor then without having first given due notice to the other party of his intention to do so. See 126 Pa. 390; 85 Ky. 260; 62 Mich. 141. The length of this notice is regulated by the statutes of the different states; 11 Wend. 616; 4 Ired. 294; 3 Zabr

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111. Where a person enters in possession under a verbal lease for one month and continues in possession thereafter, paying rent monthly, in contemplation of law a new letting commences with each monthly term; 37 Ill. App. 160. See LANDLORD AND TENANT.

When leases provide for the renewal of the term, such renewal is a mere continuance of the old term, for the preservation and protection of rights acquired therein; 49 N. J. Eq. 619. See 61 Hun 521. A lease for a term exceeding the period prescribed by the statute against perpetuities is not void on that account, as it does not suspend the power of alienation; 81 Hun 566.

The *formal parts* of a lease by deed are: *first, the date*, which will fix the time for its commencement, unless some other period is specified in the instrument itself for that purpose; but if there is no date, or an impossible one, the time will be considered as having commenced from the delivery of the deed; 2 Johns. 230; 4 B. & C. 908; 17 Wend. 103; 12 N. H. 52. *Second, the names* of the parties, with respect to which the law knows but one Christian name; and therefore the middle letter of the name of either party is immaterial, and a person may always show he is as well known by one name as another; 14 Pet. 322; 36 Ill. 362; 55 N. Y. 380. The entire omission of the lessee's name from a lease will render the instrument simply void; 8 Md. 118; 24 N. Y. 336; 6 Allen 305; 19 Iowa 290; 2 Wall. 24. See 25 Hun 136; 116 Mass. 155; 33 Ind. 94; 40 Conn. 522. *Third, recitals of title* or other circumstances of the case. *Fourth*, some *consideration* must appear, although it need not be what is technically called *rent*, or a periodical render of compensation for the use of the premises: but it may be a sum in gross, or the natural affection which one party has for the other. It may also consist of grain, animals, or the personal services of the lessee; 3 Hill N. Y. 345; 1 Spears 408; Tayl. L. & T. § 152; 29 Barb. 171: or a promise to pay rent; 107 Ill. 33; and when the lease does not stipulate for the cessation of rent upon the destruction of a building by fire, or that the lessor shall repair, a tenant is not relieved from the payment of rent by a partial destruction of the building; 85 Ala. 99. See LANDLORD AND TENANT. *Fifth*, the *operative* words of the lease are usually "*demise, grant, lease, and to farm let;*" 50 N. Y. 414; 53 N. H. 513; 27 Md. 173. *Sixth*, the *description* of the premises need not specify all the particulars of the subject-matter of the demise, for the accessories will follow the principal thing named: thus, the garden is parcel of a *dwelling-house*, and the general description of *a farm* includes all the houses and lands appertaining to the farm; 9 Conn. 374; 11 C. E. Green 82; 4 Rawle 330; 9 Cow. 747; 72 Mich. 438; 41 N. H. 337; and a building includes the land on which it stands; 37 Minn. 4. But whether certain premises are parcel of the demise or not is always matter of evidence; 14 Barb. 434; 3 B. & C. 870; 14 B. Mon. 8. *Seventh*, the rights and liabilities of the respective parties are regulated by law in the absence of any particular agreement in respect thereto; but express covenants are usually inserted in a lease, for the purpose of limiting or otherwise defining their rights and duties in relation to repairs, taxes, insurance renewals, residence on the premises, modes of cultivation, fixtures, and the like. Certain covenants are also implied in law from the use of certain technical terms in leases. The intention of the parties to a lease must be gathered from the instrument taken as a whole; 83 Va. 319.

In every well-drawn lease, provision is made for a *forfeiture* of the term in case the tenant refuses to pay rent, commits waste, or is guilty of a breach of the covenant to repair, insure, reside upon the premises, or the like. This clause enables the lessor or his assigns to *re-enter* in any such event upon the demised premises and eject the tenant, leaving both parties in the same condition as if the lease were a nullity: but in the absence of a proviso for re-entry the lessor would possess no such power, the mere breach of a covenant enabling him to sue for damages only; 3 Wils. 127; 2 Cow. 591; 2 Overton 233; 1 Dutch. 285; 15 Cal. 233. The forfeiture will generally be enforced by the courts, except where the landlord's damages are a mere matter of computation and can be readily compensated by money; 7 Johns. 235; 4 Munf. 332; 2 Price 200; 44 Vt. 285; 9 Hare 688; 5 R. I. 144; 60 Pa. 131; 20 Vt. 415; 31 Conn. 468; 40 N. H. 434. One condition essential to the forfeiture of a lease by the lessor is a demand of the rent; 140 U. S. 25; 35 Neb. 766. But in case of a forfeiture for the non-payment of rent, the proviso is allowed to operate simply as a security for rent, and the tenant will be relieved from its effects at any time by paying the landlord or bringing into court the amount of all arrears of rent, with interest and costs. The right to terminate the lease for the non-payment of rent will not give the lessee any right to avoid the lease or his liability for agreed rent; 150 U. S. 665; 11 Tex. Civ. App. 701.

Where under a provision in a lease that if the lessee keeps all its conditions he may purchase the land, the acceptance of the landlord of the rent after it is due, without objection, waives a breach of the condition as to the time of its payment; 30 Atl. Rep. (Vt.) 686.

A lease may be surrendered by any agreement between the parties that the term shall be terminated, which is irrevocably acted upon by both; 34 Neb. 455; but a mere agreement, unless accompanied by the act, is inoperative; 41 Ill. App. 223.

A lease may also be *terminated* before the prescribed period if the premises are required to be taken for public uses or improvements, or the subject-matter of demise wholly perishes or is turned into a house of ill-fame: 29 Barb. 116; 119 Mass. 28; 46 N. Y. 297; 38 Mo. 143; 58 Pa. 271; 118 Mass. 125; 38 Cal. 259; 5 Ohio 303. A lessor who

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knows that the premises are to be used for gambling cannot recover rent; 62 Ill. App. 134. The same result will follow when the tenant purchases the fee, or the fee descends to him as heir at law; for in either case the lease is *merged* in the inheritance; since there would be a manifest inconsistency in allowing the same person to hold two distinct estates immediately expectant on each other, while one of them includes the time of both, thus uniting the two opposite characters of landlord and tenant; 2 C. & P. 347; 26 Ill. 19; 6 Johns. Ch. 417; 13 Pa. 16; Tayl. L. & T. § 502. A lease of land is not terminated by the death of the lessee, but an action will lie against his admistrator for rent during the remainder of the term; 68 Miss. 664.

A provision in a lease that the lessee may buy the land "at the option of the parties" means that the lessee may buy at his own option; 30 Atl. Rep. (Vt.) 686.

The general rule that a deed cannot be varied by parol applies to leases, and it has been enforced with respect to their date; 3 Scott, N. R. 48; the amount of the rent; 1 Man. & Gr. 589; the contemporaneous grant of rights and privileges inconsistent with the terms of the lease; 19 Cal. 354; 17 La. Ann. 153; time of payment of rent; 7 Blackf. 308; that the lessee agreed to pay taxes; 6 Ves. Jr. 334, n.; or that the lessor, at the time of the lease, agreed to repair; 2 E. D. Sm. 248; though a subsequent agreement for a consideration may be proved; 5 Sandf. 542; 67 N. W. Rep. (Minn.) 1026; but an allegation that the lessee was induced to occupy the premises by the lessor's promise to put in fixtures, made after the execution of the lease, does not show such consideration; 32 S. W. Rep. (Tex.) 426. See as to this rule, generally, and the exceptions to it, PAROL EVIDENCE; CONTRACT; DEED. It was held that the question whether there had been a modification, as between lessor and lessee, was for the jury unless it was admitted by the pleadings; 57 Mo. App. 454.

An assignment of a lease does not become complete and valid until there is consent by the proposed assignee: 7 Mont. 320.

An agreement not to assign without the written consent of the lessor does not bind the lessee where he signs the lease, and at the request of the lessor assigns it to a third person, to whom it is never, in fact, delivered; 114 Cal. 511.

There is no implied warranty on the part of a landlord that a building is adapted for the purposes for which it is leased; 70 Tex. 727; 132 N. Y. 306; 156 Mass. 348.

A corporation authorized to hold real estate may *lease* its real estate, to be used in a business different to that which the corporation is authorized to carry on; 6 A. & E. Corp. Cas. N. S. (Mass.) 247. A corporation may lease a portion of its real estate to its directors subject to ratification by the stockholders; *id.* See also 122 N. Y. 91; 49 Minn. 483. As to the nature of the interest and liability for rent under gas and oil leases, see GAS; OIL. See, generally, LANDLORD AND TENANT.

**Lease of railroad.** A lease by a railroad company of all its road, rolling stock, and franchises, for which no authority is given in its charter, is *ultra vires* and void; 101 U. S. 71, the leading case. The decision is based upon the ground that such a company exercises its functions in a large measure for the public good, and that it is forbidden by public policy to disable itself to perform its duties to the public without the consent of the state; *id.* The ordinary clause in a charter authorizing the company to contract with other transportation companies for the mutual transfer of goods and passengers over each other's roads does not authorize a lease of the road and its franchises; *id.* Unless specially authorized by its charter or some legislative action, a railroad company cannot, by lease or other contract, turn over to another company for a long period of time its road and appurtenances or the use of its franchises and the exercise of its powers, nor can any other railroad company make a contract to run and operate such road, property, and franchises. Such a contract is not among the ordinary powers of a railroad company; 118 U. S. 290. See also 130 *id.* 1; 88 Ala. 572; 115 Mass. 347; 24 Neb. 143; 24 N. J. Eq. 455; 63 Me. 68; 93 N. Y. 609; 68 Tex. 49. If it were otherwise, a railroad company, by leasing its road to irresponsible persons, might enjoy all the benefits conferred by its charter and practically leave the public generally, as well as individuals, without any of the protection which the obligations imposed by its charter, as well as the general law of the state, were designed to afford; 28 S. C. 401. The authority to the lessee company to make such lease is not authority to the lessor company for that purpose; 130 U. S. 1. Where a railroad company of New Jersey leased its franchises and roads to a railway corporation of another state, the lease being not only not authorized, but expressly forbidden by law, and its effect being to combine coal producers and carriers of anthracite coal, it was held to be an excess of corporate power which tended to monopoly and the public injury; 51 Am. & Eng. R. Cas. 1; 24 Atl. Rep. (N. J.) 964; and the lessor road is subject to forfeiture; 32 Am. & Eng. R. Cas. 388.

A valid lease will not release the lessor from the obligation to discharge its charter obligations, unless the law authorizing it contains a provision to this effect; 63 Me. 68; 28 Am. & Eng. R. Cas. 50.

Power under the law to mortgage or sell property, or lease it for a term, does not extend to the franchises of a corporation, including the right of way and other property essential to such franchises; 1 Tex. App. 163.

A corporation of one state lawfully leasing a railroad in another state is, as to it, subject to local legislation to the extent to which the lessee would have been subject had there been no lease; 116 U. S. 347.

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The laws of a state granting to a railroad company authority to lease its roads do not authorize a lease of a part of it which runs in the Indian country, without the consent of the United States expressly given; 40 Fed. Rep. 280.

A lease is not necessarily void because it extends beyond the time of the lessor's corporate existence, it may be valid for the period of the company's corporate existence; 19 Abb. N. C. 193. The fact that the majority of the directors of a lessor company are personally interested in the lessee company will not make the lease void, but merely voidable at the election of the lessor, or at the suit of stockholders brought within a reasonable time; 43 Fed. Rep. 483.

Where the rental was reduced by directors who were substantially the same in both companies, it was held that this action was voidable at the election of either company, so far as the power of the directors was concerned, but that as their act had been approved by the stockholders, it was valid; 11 N. Y. S. R. 732. But where the rental was reduced on account of the financial embarrassment of the lessee, it was held within the power of the board of directors; 39 Am. & Eng. R. Cas. 199.

A lessee is not estopped to deny the validity of a lease by the fact that he has paid rental under it for three years; 145 U. S. 52; but see 93 N. Y. 609; but a stockholder who has waited nineteen years cannot then object; 33 Fed. Rep. 440.

Two railroads contracted that one should operate the other for a term of years, the operating road to receive 65 per cent. of the gross earnings of the line so operated, and out of the remaining 35 per cent. pay interest on the road's bonds, and pay the residue to the company owning the road; this was held not to be a lease; 7 Am. & Eng. R. Cas. 249; 102 Ill. 492.

A corporation in debt cannot transfer its entire property by lease so as to prevent the application of the property at its full value to the satisfaction of its debts; 134 U. S. 276; where a company which was in debt had transferred its entire property by lease so as to prevent the application of it to the satisfaction of its debts, equity may decree the payment by the lessee of a judgment debt of the lessor; 113 U. S. 116; 118 *id.* 276; 26 Fed. Rep. 320.

A lease requires the consent of a majority of the stockholders, which must be expressed at a stockholders' meeting; 12 Fed. Rep. 513; 37 *id.* 307; 138 Mass. 122; 14 Abb. N. C. 103; 15 Am. & Eng. R. Cas. 1; so also does a modification of a lease; *id.*; and the action of a majority of the stockholders in favor of a lease will not be upheld where it appears that the interests of the minority will be seriously prejudiced by it; 41 N. J. Eq. 1. But it has been held that if power to lease its railroad is conferred upon a corporation by its charter or by statute, the board of directors may execute a lease thereof; 39 Am. & Eng. R. Cas. 199. Where one company owns substantially all the stock and bonds of another, a lease of the latter's line is not void for want of consideration; 51 Am. & Eng. R. Cas. 162; 51 Fed. Rep. 309. The mere fact that the same persons were directors of both corporations is not of itself sufficient to avoid the lease at the instance of stockholders against the will of the corporation. The fact alone might entitle either corporation to avoid the lease, but does not give the right to a stockholder; 12 Hun 460. The lease of a railroad does not dissolve the corporation, and it remains liable for debts incurred prior to the lease; 1 Fed. Rep. 700. A lessee assumes all the duties of the lessor in relation to the property as well as its rights and privileges, but this would not include the payment of the debts of lessor; 131 U. S. 371; 35 Fed. Rep. 444.

Where a lease of a railroad provided for the payment of the net earnings to mortgage bondholders who were creditors of the lessor, the agreement between the lessor and lessee, having been assented to by the bondholders, operated as an irrevocable assignment to them of the net earnings; 78 Fed. Rep. 690.

Without a law authorizing it, railroads cannot guarantee the performance of a lease of a road entered into by two other roads, the leased road being outside of the states creating the guaranteeing roads, and not connecting with their lines; 24 Am. & Eng. R. Cas. 58; 118 U. S, 290.

Where, under a void lease, the property had been used for a time, the railroad company may recover compensation for the use of its property; 2 Fed. Rep. 117; 118 U. S. 290; see 139 U. S. 24; but a lessee, who had received nothing, but had been paying out money under a void contract, cannot be compelled to pay more money under the same contract; 118 U. S. 290; but relief in such case must be based on the invalidity of the contract, and not in aid of its enforcement; 118 U. S. 290. The lessee of a railroad under a lease which all parties admit to be illegal, cannot be compelled by *mandamus* to operate the road; 42 Fed. Rep. 638.

Where a railroad lease for ninety-nine years contained covenants for monthly instalments of rent to keep the road in repair, etc., a bill which shows failure to pay rent, depreciation of the road, and a combination between the guarantors of the lease and the lessee to divert the earnings of the road to the benefit of the guarantors, presents a case of equitable jurisdiction when it prays for the specific performance of the obligations of the lease. A suit at law on each instalment of rent is not an adequate remedy; 118 U. S. 290.

A lease does not vest in the lessee the right of eminent domain as to the lessor company; 109 Mass. 103; 14 Neb. 389; 117 Ill. 611.

A receiver does not become liable upon the covenants of a lease because of his position of receiver, but only by virtue of an election to adopt the lease, if he sees fit to make such election; and even if the lessee is solvent, the lessor cannot force upon the

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receiver the adoption of the lease; 77 Fed. Rep. 700. It is well settled that a receiver may take and retain possession of leasehold interests for such period as will enable him to elect intelligently whether it is best to adopt the lease or return the property; 74 Fed. Rep. 91; 142 U. S. 331; 145 *id.* 82; 150 *id.* 287; 58 Fed. Rep. 257, 268; and he is not required to pay rental for a depot property as stipulated by the railway company, and is liable only for a reasonable rental if he occupies the property; 74 Fed. Rep. 88; 145 U. S. 82. He takes possession of leasehold property and holds for the court; *id.* The appointment of a receiver is not an eviction of a lessee; 8 Biss. 456.

As to the relative liability of the lessor and lessee for injuries committed in the operation of the road, the following rules have been laid down in a recent work on the law of railroads: 1. The lessee is liable for all injuries resulting from the negligent operation of the road. 2. Where the lease is void the liability of the lessor continues. 3. Where the lease is valid, some authorities hold that the lessor is relieved from liability for injuries resulting from the negligent operation of the road; 86 Va. 629; 14 Ore. 436; 63 Tex. 549; 14 S. W. Rep. (Ky.) 346. But the last rule admits of serious question, unless the lease contains a specific provision for the lessor's exemption from liability; 70 Ga. 464; 119 Ill. 68; 26 Neb. 159; 145 Mass. 64. Some of the cases hold that the lessor cannot be relieved from liability unless there is express authority in the statute; 57 Fed. Rep. 165; 21 Am. & Eng. R. Cas. 226; 25 *id.* 497; 119 Ill. 68; 26 Neb. 159. See also Wood, Railroads 2054. In 80 Me. 62, the rule was thus laid down: "An unauthorized lease without any exemption clause absolves the lessor from the torts of the lessee resulting from negligence in the general management of the leased road over which the lessor could have no control. But for an injury resulting from the negligent omission of some duty owing to the public, such as the proper construction of its road, station-houses, etc., the charter company cannot, in the absence of statutory exemption, discharge itself of legal responsibility," and a covenant in the lease to save the lessor harmless does not affect the case. The lessee is liable whether the lease is valid or invalid; 49 Am. & Eng. R. Cas. 603. But it has been held that though the lease is void, a servant of the lessee company cannot recover against the lessor company for injuries sustained in the operation of the road; 72 Fed. Rep. 745; 80 N. Y. 27; 72 Tex. 375; 88 Tenn. 310. While the lessor may be liable to a party injured by the negligence of its lessee's servants, the lessee is also liable; 35 Am. & Eng. R. Cas. 440.

In some states statutes provide for the joint and several liability of both lessor and lessee; 43 Ind. 354; 36 Ia. 327; 46 Me. 95; 145 Mass. 64; 27 Mo. App. 394.

See Patterson, Railw. Acc. Law § 1301, which lays down the rule that where the lease is valid, the lessor is not liable for the lessee's torts in the operation of the road.

**LEASE AND RELEASE.** A species of conveyance much used in England, consisting theoretically of two instruments, but which are practically united in the same instrument.

It was invented by Sergeant Moore, soon after the enactment of the statute of uses. It is thus contrived: a lease, or rather bargain and sale upon some pecuniary consideration for one year, is made by the tenant of the freehold to the lessee or bargainee. This, without any enrolment, makes the bargainor stand seised to the use of the bargainee, and vests in the bargainee the use of the term for one year, and then the statute immediately annexes the *possession*. Being thus in possession, he is capable of receiving a release of the freehold and reversion, which must be made to the tenant in possession, and accordingly the next day a release is granted to him.

The lease and release, when used as a conveyance of the fee, have the joint operation of a single conveyance; 2 Bla. Com. 339; 4 Kent 482; Co. Litt. 207; Cruise, Dig. tit. 32, c. 11.

**LEASEHOLD.** The estate held by virtue of a lease. In practice the word is generally applied to an estate for a fixed term of years. A lease of chattels is not a leasehold interest; 48 L. J. Ex. 35.

**LEASING-MAKING. In Scotch Law.** Verbal sedition, viz.: slanderous and untrue speeches to the disdain, reproach, and contempt of his majesty, his council and proceedings, etc. Bell, Dict.; Erskine, Inst. 4. 4. 29.

**LEAVE AND LICENSE.** A defence to an action of trespass setting up the consent of the plaintiff to the trespass complained of. Whart. Lex.

**LEAVE OF COURT.** Permission granted by the court to do something which, without such permission, would not be allowable.

The statute of 4 Anne, c. 16, s. 4. provides that it shall be lawful for any defendant or tenant in any action or suit, or for any plaintiff in replevin, in any court of record, with *leave of the court*, to plead as many several matters thereto as he shall think necessary for his defence. The principles of this statute have been adopted by most of the states of the Union.

When the defendant, in pursuance of this statute, pleads more than one plea in bar to one and the same demand or thing, all of the pleas except the first should purport to be pleaded with *leave of the court*. But the omission is not error nor cause of demurrer; Lawes, Pl. 132; 2 Chitty, Pl. 421; And. Steph. Pl. 167; Story, Eq. Pl. 72, 76; Gould, Pl. c. 8, § 21; Steph. Pl. 272; 3 N. H. 523.

Asking leave of court to do any act is an implied admission of jurisdiction of the court, and in those cases in which the ob-

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jection to the jurisdiction must be taken, if at all, by plea to the jurisdiction, and it can be taken in no other way, the court, by such asking leave, becomes fully vested with the jurisdiction. Bacon, Abr. *Abatement* (A); Bacon, Abr. *Pleas, etc.* (E 2); Lawes, Pl. 91; 6 Pick. 391. But such admission cannot aid the jurisdiction except in such cases.

**LEAVE TO DEFEND.** The bills of exchange act 1855 (18 & 19 Vict. c. 67) allowed actions on bills and notes commenced within six months after being due to be by writ of summons in a form provided by the act, and unless the defendant should within twelve days obtain leave to appear and defend the action, allowed the plaintiff to sign judgment on proof of service. This procedure was retained by the judicature act, but abolished in 1880. It is now provided that in all actions where the plaintiff seeks merely to recover a debt or liquidated demand in money or possession where a tenancy has expired or been determined by notice to quit, the writ of summons may be specially indorsed with the particulars of the amount sought to be recovered after giving credit for any payment or set-off; in which case, if the defendant fail to appear, judgment may be signed for the amount claimed; and it is further provided that where the defendant appears on a writ of summons especially indorsed, the plaintiff may, on affidavit verifying the cause of action and swearing that in his belief there is no defence to the action, call on the defendant to show cause before the court or a judge why the plaintiff should not be at liberty to sign final judgment for the amount so indorsed, together with interest, if any, and costs; and the court or judge may, unless the defendant, by affidavit or otherwise, satisfy the court or judge that he has a good defence on the merits or disclose sufficient facts to entitle him to be permitted to defend the action, make an order empowering the plaintiff to sign judgment accordingly. Whart. Lex.

**LECCATOR.** A debauched person. Cowel.

**LECTOR DE LETRA ANTIQUA. In Spanish Law.** The person duly authorized by the government to read and decipher ancient documents and titles, in order to entitle them to legal effect in courts of justice.

**LECTRINUM.** A pulpit. Mon. Ang. iii. p. 243.

**LECTURER.** An instructor; a reader of letters who has the copyright in them if he be an author by 5 & 6 Wm. IV. c. 65. See COPYRIGHT.

A clergyman who assists rectors in preaching. 7 & 8 Vict. c. 59; 18 & 19 Vict. c. 127. Whart. Lex.

Assistants appointed to the rectors of churches. They are chosen by the vestry or chief inhabitants. Within the meaning of the term a readership is not an ecclesiastical preferment; 4 D. & R. 726; 3 B. & C. 49; nor is it included under the definition of benefice given by 1 & 2 Vict. c. 106. The power of the bishop over the lecturer is limited to the right to judge of his qualification and fitness for the office; he may not determine his right to a particular lectureship; 13 East 419; 3 Salk. 87. In the absence of a custom to employ a lecturer, and where the lectureship is to be supported by voluntary contributions, and where the rector has refused his consent to the person applying for the lectureship, the ordinary is the proper judge as to whether or not a lecturer should be admitted; 1 Wils. 11; 1 Term 331; 4 *id.* 125. In the language of Lord Mansfield, "No person can use the pulpit of another unless he consents. But if there has been an immemorial usage, the law supposes a good foundation for it; and if the lectureship be endowed, that furnishes a strong argument to support the custom." 1 Term 331.

The court will not grant a *mandamus* to compel a bishop to grant a licence to a clergyman to preach as lecturer to a parish; 1 Wils. 11; 2 Str. 1192. Trustees of a lecture to be preached at a convenient hour may appoint any hour they please and vary their appointment; 1 W. Bla. 210. As to the right of and qualification for voting in the nomination of a lecturer, the usage of the parish is, if consistent with the deed of trust, a safe criterion; 1 Ves. 43; 14 *id.* 7; 3 Atk. 599; 2 Vern. 387; but no person can be a lecturer, although elected by the parishioners, without the rector's consent, unless there be an immemorial custom to such effect; 1 Add. 97; 4 B. & C. 569. See 2 Burn, Eccl. L. 398.

**LEDGER. In Commercial Law.** A book in which are inscribed the names of all persons dealing with the person who keeps it, and in which there is a separate account, composed generally of one or more pages for each. There are two parallel columns, on one of which the party named is the debtor, and on the other the creditor, and presents a ready means of ascertaining the state of the account. As this book is a transcript from the day-book or journal, it is not evidence *per se*.

**LEDGER BOOK. In Ecclesiastical Law.** The name of a book kept in the prerogative courts in England. It is considered as a roll of the court, but, it seems, it cannot be read in evidence. Bacon, Abr.

**LEEMAN'S ACTS.** Acts 30 Vict. c. 29 and 35 & 36 Vict. c. 91, by which contracts for the sale of bank shares are void unless the number of the shares are set forth in the contract; 9 Q. B. D. 546; and by which are authorized the application of the funds of municipal corporations and other governing bodies under certain conditions towards promoting or opposing parliamentary and other proceedings for the benefit or protection of the inhabitants.

**LEGA or LACTA.** The alloy of money. Spelman.

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**LEGACY.** A gift of personal property by last will and testament.

A gift or disposition in one's favor by a last will. Schoul. Ex. & Ad. § 459. The term is more commonly applied to a bequest of money or chattels, although sometimes used with reference to a charge upon real estate; 2 Wms. Ex. 1051; see 9 Cush. 297; 13 Ired. Eq. 450; 7 Ves. 391, 522. A direction to the executor to support and maintain a person during his life gives him a legacy; 4 Mass. 634; but a recommendation "to give from time to time some little assistance to A" does not; 5 La. Ann. 390. It is said that the word legacy in a will may include real as well as personal property; 1 Law Repos. N. C. 107.

An *absolute legacy* is one given without condition, to vest immediately; 1 Vern. 254; 19 Ves. 86; Comyns, Dig. *Chancery* (I 4); they are usually absolute; Schoul. Ex. & Ad. § 466; 19 Ves. 86; Comyns, Dig. *Chancery* (I 4).

An *additional*, or, more technically, a *cumulative legacy* is one given to a legatee to whom a legacy has already been given. It may be given by the same will in which a legacy has already been bequeathed, or by a codicil thereto; 1 Bro. C. C. 90; 17 Ohio 597; 22 Conn. 371.

An *alternate legacy* is one by which the testator gives one of two or more things without designating which.

A *conditional legacy* is a bequest the existence of which depends upon the happening or not happening of some uncertain event; 1 Rop. Leg. 645. The condition may be either *precedent;* 2 Conn. 196; 9 W. & S. 103; 17 Wend. 393; 14 N. H. 315; 10 Cush. 129; or *subsequent;* 25 Me. 529; 33 N. H. 285; 3 Pet. 376; 55 Md. 575.

A *demonstrative legacy* is a bequest of a certain sum of money, stock, or the like, payable out of a particular fund or security; Wms. Ex. 360; 23 N. H. 154; 19 Gratt. 438; 10 Pa. 387; 2 Dev. & B. Eq. 453; 16 N. Y. 365. See DEMONSTRATIVE LEGACY.

A *general legacy* is one so given as not to amount to a bequest of a particular thing or money, of a particular fund, distinguished from all others of the same kind; 1 Rop. Leg. 170; 8 N. Y. 516; 6 Madd. 92.

An *indefinite legacy* is a bequest of things which are not enumerated or ascertained as to numbers or quantities: as, a bequest by a testator of all his goods, all his stocks in the funds; Lownd. Leg. 84; Swinb. Wills 485; Ambl. 641; 1 P. Wms. 697; of this class are generally residuary legacies.

A *lapsed legacy* is one which, in consequence of the death of the legatee before the testator or before the period for vesting, has never vested. See LAPSED LEGACY.

A *legacy for life* is one in which the legatee is to enjoy the use of the legacy for life.

A *modal legacy* is a bequest accompanied with directions as to the mode in which it should be applied for the legatee's benefit: for example, a legacy to Titius to put him an apprentice; 2 Vern. Ch. 431; Lownd. Leg. 151.

A *pecuniary legacy* is one of money. Pecuniary legacies are in most cases general legacies, but there may be a specific pecuniary legacy, for example, of the money in a certain bag; 1 Rop. Leg. 150, n. In Maryland pecuniary legacies are by statute to be paid out of the real estate if the personal is insufficient; Laws 1894, ch. 438.

A *residuary legacy* is a bequest of all the testator's personal estate not otherwise effectually disposed of by his will; Lownd. Leg. 10; Bacon, Abr. *Legacies* (I); 6 H. L. Cas. 217. An ordinary residuary bequest cannot be treated as specific, but from its very nature must be considered as a general legacy; L. R. 3 Ch. D. 309; even though some of its particulars are enumerated in the will; 4 Hare 628; but a bequest of the remainder of a particular thing or fund after the payment of other legacies or of all one's estate in a particular locality may be specific so long as the identity of the thing or fund is not destroyed; 5 Ves. 150; Schoul. Ex. & Ad. § 462.

A *specific legacy* is a bequest of a specified part of the testator's personal estate, distinguished from all others of the same kind; 3 Beav. 349; 20 Me. 105; 3 Rawle 237; 23 N. H. 154; 49 *id.* 107; L. R. 20 Eq. 304; 35 N. J. Eq. 461; 128 Mass. 433; 13 Pa. 189. Such a legacy may be the undistributed balance of a partnership or a goodwill; Amb. 309; 31 Beav. 602; or debt due testator; 2 Del. Ch. 200; 122 Mass. 282; 15 Co. Ct. Rep. Pa. 285; in such case it is rendered worthless by insolvency; Schoul. Ex. & Ad. § 461. A specific legacy may be of animals or inanimate things, provided they are specified and separated from all other things, as money in a bag, or money marked and so described: as, I give two eagles to A B, on which are engraved the initials of my name. Such a legacy may also be given out of a general fund; Ambl. 310; 4 Ves. 565; 3 V. & B. 5. If the specific article given be not found among the assets of the testator, the legatee loses his legacy.

All natural persons and all corporations are capable of becoming legatees, unless prohibited by statute or alien enemies. The statute under which it is created must be resorted to in order to ascertain whether a corporation has legal capacity to take a legacy, but the act of incorporation or legislative confirmation of the rights may be secured after the legacy takes effect; 53 Md. 466; 4 Dem. 271; 6 W. & S. 218. The right of a corporation to take by will is subject to the general laws of the state passed after the incorporation; 79 N. Y. 327. See CORPORATION; FOREIGN CORPORATION. A bequest to the United States from which came the Smithsonian Institute was held valid in the English chancery court; Schoul. Ex. & Ad. § 460, note; but under the terms of the state statute a devise of lands in New York to the United States was held void; 94 U. S. 315; 52 N. Y. 530. As to the difference of the law applicable to real and personal property, see CONFLICT OF LAWS. Legacies to the sub-



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scribing witnesses to a will are by statute often declared void. See 2 Wms. Ex. 1053; Rop. Leg. 201; 3 Russ. 437; L. R. 13 Eq. 381; 106 Mass. 474; 1 Moo. & R. 288. It was held in England that a subscribing witness to whom a legacy was given was incompetent by reason of interest, and that the will would fail unless there was enough witnesses without him; 2 Stra. 1253. To save the will it was enacted that the legacy should be void; 25 Geo. II. c. 6. Similar statutes have been enacted in most of the states; Schoul. Wills § 357 and note; 1 Stims. Am. St. L. § 2650. In most of these, if there are enough witnesses without the legatee, the legacy is saved, but in a few states it is said that it seems that it may be void in any case; *id.* Bequests to superstitious uses are prohibited by many of the English statutes; 2 Beav. 151; 5 Myl. & C. 11. But in the United States the free toleration of all religious opinions would seem to make it almost impossible to hold any use superstitious; 1 Watts 218; 2 Dana 170. Legacies by Roman Catholics for masses for the repose of the soul were held in England void as for superstitious uses; 2 Myl. & K. 684; but in this country have been held valid; 2 Dem. 87; 134 Mass. 426; *contra*, McHugh will case, Wis. Sup. Ct. Oct. 22, 1897. But the courts will not intervene to support and maintain a legacy for any purpose which is illegal or subversive of public policy; 63 Pa. 465. Bequests to charitable uses are favored both in England and the United States. See CHARITABLE USE.

*Construction of legacies.* *First*, the technical import of words is not to prevail over the obvious intent of the testator; 6 Ad. & E. 167; 7 M. & W. 1, 481; 1 M. & K. 571; L. R. 11 Eq. 280; 11 Pick. 257, 375; 1 Root 332; 1 Nott & M'C. 69; 12 Johns. 389; 36 Me. 216; 58 Pa. 427; 51 N. H. 443; 64 Me. 490; 86 Tenn. 81; 70 Tex. 522. *Second*, where technical words are used by the testator, or words of art, they are to have their technical import, unless it is apparent they were not intended to be used in that sense; 3 Brown, Ch. 68; 1 Younge & J. 512; 5 Mass. 500; 2 M'Cord 66; 5 Denio 646; 75 Pa. 220; 3 Green 218; 1 Sumn. 239; 18 N. Y. 417; 25 Wend. 119. Words are to be construed with reference to the surrounding of the testator when the will was made; 70 Tex. 522. The particular intent will always be sacrificed to the general intent; 11 Gray 469; 70 Pa. 335; 106 Mass. 24; 26 Mo. 590; 6 Pet. 68. *Third*, the intent of the testator is to be determined from the whole will; 1 Coll. Ch. 681; 3 Pet. 377; 4 Rand. 213; 8 Blackf. 387; 100 Mass. 342; 51 N. H. 83; 78 Pa. 40; 35 Ind. 198; 52 N. Y. 450; 22 Me. 413; 83 Va. 343. In ascertaining this intention, courts should not seek it in particular words and phrases, or confine it by technical objections, but should find it by construing the provisions of the will with the aid of the context and by considering what seems to be the entire scheme of the will; 113 N. Y. 115; 69 Tex. 227; 84 Ky. 206; 86 *id.* 354; and should put itself in the position occupied by a testator; 134 U. S. 572. See 3 C. C. App. 649. *Fourth*, every word shall have effect, if it can be given without defeating the general purpose of the will, which is to be carried into effect in every reasonable mode; 2 B. & Ald. 448; 3 Pick. 360; 7 Ired. Eq. 267; 10 Humphr. 368; 2 Md. 82; 6 Pet. 68; 9 H. L. Cas. 420; 40 N. H. 500; 53 Pa. 106; 12 Gratt. 196; 19 N. Y. 348. But where it is impossible to form a consistent whole the latter part will prevail; 5 Beav. 100; 52 Me. 287; 52 N. Y. 12; 29 Pa. 234; 78 *id.* 484; 73 Iowa 564; 40 La. Ann. 284. *Fifth*, the will will be favorably construed to effectuate the testator's intent, and to this end words may be transposed, supplied, or rejected; 21 Beav. 143; 7 H. L. Cas. 68; 8 Sim. 184; 30 Iowa 294: 4 Rich. Eq. 22; 63 N. C. 381; 105 Mass. 338; 22 Me. 429; L. R. 14 Eq. 54; 10 Wheat. 204; 35 Md. 198; 54 Pa. 245; 20 Ohio St. 416; 84 Va. 523; 50 N. J. Eq. 547; it will be so construed when not inconsistent with rules of law; 127 U. S. 300; 74 Cal. 98; 77 Ga. 636; 24 Neb. 215. *Sixth*, in the case of a will of personalty made abroad, the *lex domicilii* must prevail, unless it appear the testator had a different intent; Story, Confl. Laws § 479 *a*, 490; 1 De G. F. & J. 404; L. R. 1 H. L. 401; 99 Mass. 136; 52 Me. 165; 84 N. Y. 584; 14 How. 426. *Seventh*, a will of personalty speaks from the time of testator's death; 8 De G. M. & G. 391; 34 N. Y. 201; 22 N. H. 434; 21 Conn. 610; 41 Barb. 50. In interpreting a will several of the states provide by statute that they are to be construed and take effect, as of the date of the death of testator, with respect to both real and personal property, unless a contrary intention appear in the will. It is so provided in Pennsylvania, Virginia, West Virginia, North Carolina, Kentucky, and Tennessee. And in Georgia words of survivorship refer to the death of the testator in order to vest remainders. In Louisiana a legacy must be delivered with everything appertaining to it in the condition in which it was on day of testator's decease. In some states where death or survivorship are referred to, the words relate to the time of testator's death unless possession is actually postponed, in which case they refer to time of possession. Such is the statute law in California, the Dakotas, Montana, and Utah; Stims. Am. Stat. L. § 2806.

In interpreting a will, the true inquiry is not what the testator meant to express, but what the words used express; 29 W. Va. 784; 83 Va. 724; and effect cannot be given to unexpressed intention; 11 Ky. L. Rep. 87; 84 Va. 880. As to the weight to be given to previous decisions upon the construction of certain words, it may be said that if the words are identical they are not strictly binding, much less so if the words are only similar; L. R. 10 Ch. 397; 22 Ch. D. 488; and this is true even of the decision of the appeal court; 23 Ch. D. 111.

The general policy of the law and the rules of interpretation require that legacies

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in all cases, unless clearly inconsistent with the intention of the testator, should be held to be vested rather than contingent; 45 N. J. Eq. 473; 124 Pa. 10; 84 Ky. 317.

*Whether cumulative or repeated.* Where a testator has twice bequeathed a legacy to one person it becomes a question whether the legatee is entitled to both or one only. Where there is *internal evidence* of the intention of the testator, that intention is to be carried out; 2 Beav. 215; 7 *id.* 107; 3 Hare 620; 2 Drur. & W. 133; 3 Ves. 462; 5 *id.* 369; 2 Sim. & S. 145; 4 Hare 219; L. R. 3 Ch. Div. 738; 10 Johns. 156; 4 Harr. N. J. 127; 1 Zabr. 573; and evidence will be received in support of the apparent intention, but not against it; 5 Madd. 351; 2 Beav. 115; 1 My. & K. 589; 2 Bro. Ch. 528; 4 Hare 216; 1 Drur. & W. 94, 113. Where there is no such internal evidence, certain presumptions are recognized; 10 Sim. 453; and the following positions of law appear to be established. *First*, if the same specific thing is bequeathed twice to the same legatee in the same will, or in the will and again in a codicil, in that case he can claim the benefit of only one legacy; Toll. Ex. 335; 2 Hare 432. *Second*, where two legacies of quantity of equal amount are bequeathed to the same legatee in one and the same instrument, there also the second bequest is considered a mere repetition, and he is entitled to one legacy only; 1 Bro. C. C. 30; 4 Ves. 75; 3 Myl. & K. 29; 16 Johns. 156. See 4 Gill 280; 1 Zabr. 573; 16 Pa. 127; 5 De G. & S. 698; 16 Sim. 423. *Third*, where two legacies of quantity of unequal amount are given to the same person in the same instrument, the one is not merged in the other, but the latter shall be regarded as cumulative, and the legatee entitled to both; Finch 267; 2 Bro. C. C. 225; 3 Hare 620. Legacies not of the same kind are presumed to be cumulative; 2 Russ. 257; otherwise the presumption is slight and easily shaken; 17 Ves. 84, 41. *Fourth*, where two legacies are given *simpliciter* to the same legatee by different instruments, in that case also the latter shall be cumulative, whether its amount be equal; 1 Cox 392; 17 Ves. Ch. 34; 1 Coll. Ch. 495; 4 Hare 216; or unequal to the former; 1 Ch. Cas. 801; 1 P. Wms. 423; 5 Sim. 431; 1 Myl. & K. 589; 4 H. L. Cas. 393; 1 De G. F. & J. 183; L. R. 12 Eq. Cas. 525; 7 Ch. App. 448. And see 1 Bro. Ch. 272; 2 Beav. 215; 2 Drur. & W. 133; 1 Bligh, N. S. 491; 1 Phil. 294. For recent cases where they were held cumulative, see 63 N. H. 129; 55 Vt. 317; 107 Pa. 95. See, generally, on this subject notes to Hooley *v.* Hatton, 2 Lead. Cas. Eq. *846; Schoul. Ex. & Ad. § 468, n. 3.

*Description of legatee.—Children.* This may have reference to the time of the testator's death, or that of making the will. The former is the presumed intention, unless from the connection or circumstances the latter is the apparent intent, in which case it must prevail; 2 Cox 191; 11 Sim. 42; 2 Wms. Ex. 1089; 11 Gill & J. 185; 21 Conn. 16; 59 Me. 325; 3 Dev. & B. 30; 101 Mass. 132; 54 N. Y. 83; 110 Mo. 164; 44 La. Ann. 605; 2 Jarm. Wills 154, 156, and Bigelow's notes. And this rule extends to grandchildren, issue, brothers, nephews, and cousins; 3 De G. M. & G. 649; 1 Houst. 561; 146 Mass. 345; Schoul. Wills § 529. The judicial disposition to let in subsequent issue and near relations of a class as generously as possible has resulted in a rule thus stated by the author last cited: "Hence the English rule, confirmed by many American precedents, that the devise or bequest of a corpus or aggregate fund to children as a class, where the gift is not immediate, vests in all the children in existence at the testator's death, but so as to open and let in children who may come into existence afterwards, at any time before the fund is distributable." *Id.* § 530; 1 Bro. C. C. 537; 2 Madd. 129; 72 Md. 67; 5 R. I. 129; 37 Miss. 65; 38 Ill. 206. This rule also extends to grandchildren, issue, brothers, nephews, and cousins; 3 De G. M. & G. 649.

This term will include a child *en ventre sa mère;* 2 H. Bla. 399; 1 Sim. & S. 181; 1 Meigs 149; 15 Pick. 255; 30 Pa. 173; 124 *id.* 10; L. R. 1 Ch. Div. 460; 84 Ala. 48; 80 Ga. 681; see 109 N. C. 675. Such a child is included in a devise by a father to his children "living" at his death; 2 Ired. Eq. 226. The rule of construction by which a child *en ventre sa mère* is in law considered as a child *in esse* is not confined to cases in which the unborn child is benefited by its application; [1895] 2 Ch. 497; 13 Reports 689.

Where the division of a fund to legatees is postponed until a certain event or period, the word "child" will apply to all those answering that description when the fund is to be divided; 8 Ves. 38; 9 Leigh 79; 1 Hill, Ch. 322; 1 McCart. 159; 4 Sandf. 86; 101 Mass. 138; 19 So. Rep. (Ala.) 435. But it will sometimes have a more restricted application, and thus be confined to children born before the death of the testator. But children born after the period of distribution take no share; L. R. 12 Eq. 427; 45 N. H. 270; 8 Conn. 49; 5 Jones Eq. 208; 1 Houst. 561. See 147 Pa. 121. And it will make no difference that the bequest is to children begotten, or to be begotten, or which "may be born"; 2 Myl. & K. 46; 14 Beav. 453; 5 R. I. 318; 1 Rop. Leg. 51; unless such be the testator's clear intent; 19 Ves. 566; 16 Gray 305; 4 Sneed 254; 4 R. I. 121; 3 Head 493; 3 Jones Eq. 490; 2 Jarm. Wills 84.

"Children," when used to designate one's heirs, may include grandchildren; 12 B. Monr. 115, 121; 5 Pa. 365; 37 N. Y. 42; 63 Mass. 289; 33 Me. 464; Rop. Leg. 68; 5 Binn. 606; 73 Cal. 594; 28 Atl. Rep. (Vt.) 319; but see 71 Md. 175. But if the word children is used, and there are persons to answer it, then grandchildren cannot be comprehended under it; 4 My. & C. 60; L. R. 11 Eq. 91; 29 Md. 443; 14 Allen 205; 6 C. E. Green 85; 2 Whart. 376; 5 Ired. Eq. 421. The general rule is, that a bequest to a man and his children, he having children living

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at the time the will takes effect, creates a joint estate in the father and children; but if he have no children, he takes an absolute estate; 5 Sim. 548; L. R. 12 Eq. 316; L. R. 14 Eq. 415; L. R. 7 Ch. App. 253; 5 Gray 336. But in both cases slight circumstances will warrant the court in holding the limitation to be for life to the father, with remainder over to the children; 4 Madd. 361; 13 S. & R. 68; 16 B. Mon. 309; 1 Bailey Eq. 357; 5 Jones Eq. 219; 23 Ala. 705.

The term children will not include illegitimate children, if there are legitimate to answer the term; 98 Pa. 479; 14 N. J. Eq. 159; 2 Russ. & M. 336; see 2 Wms. Ex. 1100 (but see 117 Ind. 380; 113 N. C. 301); otherwise, it may or may not, according to circumstances; 1 Ves. & B. 422; 1 Bail. Eq. 351; 6 Ired. Eq. 135; 9 Paige 88; 2 Sneed 625; 31 N. J. Eq. 398; L. R. 10 Eq. 160; L. R. 1 Ch. Div. 644; 37 Conn. 429; L. R. 7 H. L. 576; L. R. 4 P. C. 164. See Schoul. Wills § 534 and notes. Nor will it include a child adopted after the will was made; 84 Ala. 48. In a recent English case it is said that although, *prima facie*, the word "children" in a will means legitimate children, there may be sufficient explanation, in the light of surrounding circumstances, that the word is not used in its primary meaning, and the word was held to mean stepchildren; 13 Reports 627. But a legacy to a natural child of a certain man still *en ventre sa mère* was held void, as contravening public morals and decency; 1 P. Wms. 529; 2 My. & R. 769; *contra*, L. R. 3 Ch. Div. 773; 5 Harr. & J. 10. It is said that the term grandchildren will not usually include great-grandchildren; 3 Ves. & B. 59; 4 My. & C. 60; 8 Beav. 247; but it has been held otherwise in the absence of anything to show a contrary intent; 2 Pittsb. L. J. Pa. N. S. 403. See CHILD. The same rule applies to adopted children who are not *prima facie* included; 54 Pa. 304.

It is held that a bequest to "my beloved wife," not mentioning her by name, applies exclusively to the wife at the date of the will, and is not to be extended to an after-taken wife; 8 Hare 131; L. R. 8 Eq. Cas. 65; 31 Beav. 398. One not lawfully married may, nevertheless, take a legacy by the name or description of the wife of the one to whom she is reputed to be married; 9 Sim. 615; 1 De G. J. & S. 177; 11 W. R. 614; but not if the reputed relation is the motive for the bequest; 4 Ves. 802; 5 My. & C. 145; L. R. 2 Ex. 319. But see 1 Keen 685.

*Nephew* and *niece* are terms which, in the description of a legatee, will receive their strict import, unless there is something in the will to indicate a contrary intention; 14 Sim. 214; 27 Beav. 480; 2 Yeates 196; 3 Barb. 475; 3 Halst. Ch. 462; 10 Hare 63; 7 De G. M. & G. 494; L. R. 6 Ch. App. 351; 2 Jones Eq. 302. "All my nephews and nieces" was held to include only those of the testatrix and not those of her husband; 42 Pa. 25; but "nephews and nieces on both sides" was held to include those by marriage; 3 De G. F. & J. 466; and such was the inference where a testator had no nephews or nieces of his blood; L. R. 8 Ch. 928; L. R. 15 Eq. 305; great-nephews and great-nieces are not usually included; 43 Ch. D. 569; but may be if such intention is shown by the context; 57 Conn. 24. A provision that the residue was to be divided among the testator's grand-nephews and grand-nieces does not include the nephews and nieces; 27 Abb. N. C. 437.

The term *cousins* will be restricted in its signification, where there is something in the will to limit its meaning; 9 Sim. 457. A rule of convenience limits the term to first cousins only, if there be such, or if there are cousins of different degrees, to the nearer rather than the more remote; 6 De G. M. & G. 68; 31 Beav. 305; and "first cousins" does not include first cousins once removed; 4 Myl. & C. 56; but "all the first and second cousins" embraced equally first cousins once removed and first cousins twice removed; 2 Bro. C. C. 125; 1 Sim. & Stew. 301; 3 Russ. 140.

Terms which give an estate tail in lands will be construed to give the absolute title to personalty; 8 H. L. Cas. 571; 3 Md. Ch. 36; 10 Yerg. 287; 23 Pa. 9; 4 Dev. & B. 478; L. R. 5 Eq. Cas. 383.

A legacy to one and his heirs, although generally conveying a fee-simple in real estate and the entire property in personalty, may, by the manner of its expression and connection, be held to be a designation of such persons as are the legal heirs of the person named, and thus they take as purchasers by name; 4 Bro. C. C. 542; 10 B. Mon. 104; 108 Mass. 579; 64 Me. 490; 15 N. J. 404; 15 Ohio 559. But the authority of these cases is doubtful. The word "*heirs*," when used to denote succession or substitution, is understood in the case of a legacy to mean persons entitled under the intestate law; 63 Me. 368; 59 N. Y. 151; 9 Pet. 483; L. R. 9 Eq. 258; 100 Mass. 348; 3 Pa. 305. But if not so used, the word heir is construed in its ordinary and legal sense; 63 Me. 379; 59 N. Y. 149; 37 Pa. 9; 108 Mass. 579; 3 H. L. Cas. 557; L. R. 7 Eq. Cas. 151; see 51 N. J. Eq. 1; 26 S. W. Rep. (Ky.) 187; 87 Ga. 239; the words heir and heirs are interchangeable, and embrace all legally entitled to partake of the inheritance; 83 Va. 724. See HEIR.

The word "*issue*," used as a word of purchase, comprises all descendants of him to whose issue the bequest is made; 23 Beav. 40; 7 Allen 76; 63 Pa. 484; 103 Mass. 288; 26 Atl. Rep. (R. I.) 38; 65 Hun 155. It may mean heirs at law; 3 Misc. Rep. 192; children and not descendants generally; 69 Hun 228. See 155 Pa. 628. See ISSUE.

The word descendants cannot be construed to include any but lineal heirs without clear indications in the will of a different purpose; Schoul. Wills § 535; 2 Bradf. 413; 8 Gray 101; a sister's child is not a descendant; 1 Bradf. 314; this word, like issue, is very general, but is said to be less flexible in construction, requiring a stronger context to confine it to such;

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Schoul. Wills § 535; 2 Jarm. Wills 98–100. See DESCENDANTS.

The term "*relations*" includes those only who would otherwise be entitled under the statute of distributions; 1 Bro. C. C. 31; 54 Me. 291; 20 N. H. 431; 8 S. & R. 45; and so of the word "*family*"; 9 Ves. 323; 19 Beav. 580; L. R. 9 Eq. Cas. 622; 9 R. I. 412; see 63 Conn. 324. The term family is very flexible and may mean, according to circumstances, a man's household, consisting of himself, his wife, children, and servants; it may mean his wife and children, or his children, excluding the wife; or if he has no wife and children, it may mean his brothers and sisters, or his next of kin; or it may mean the genealogical stock from which he sprung, since all these applications of the word and even others are found in common parlance; 1 Keen 181. The word family may include an illegitimate child; L. R. 6 Ch. 597. See FAMILY; RELATIONS. Nearest relations means brothers and sisters to the exclusion of nephews and nieces: 45 N. J. Eq. 97. "Poor relations, equally," was held to include testator's brothers and sisters, and the mother of his wife *per capita*, as if the word "poor" were not used; 8 S. & R. 43.

A legacy to A and his *executors and administrators*, *legal representatives* or *personal representatives* (which titles see), gives A an absolute interest in the legacy; 15 Ves. 537; 118 Mass. 198; 18 Gratt. 529; L. R. 4 Eq. 359. But in some instances these words will be taken as words not of limitation but of purchase; L. R. 4 Eq. 359; 2 Beav. 67; 25 Md. 401. Generally when persons take under this description they will be bound to apply the legacy as the personal estate of the testator or intestate; 3 Bro. C. C. 224; 2 Yeates 587; 8 Sim. 328.

Mistakes in the name or description of legatees may be corrected whenever it can be clearly shown by the will itself what was intended; 10 Hare 345; 8 Md. 496; 15 N. H. 317; 4 Johns. Ch. 607; 23 Vt. 336; 7 Ired. Eq. 201; 15 Gray 347; 59 N. Y. 441; L. R. 10 Eq, 29.

The only instances in which parol evidence is admissible to show the intention of the testator as to a legatee imperfectly described, is that of a strict equivocation: that is, where it appears from extraneous evidence that two or more persons answer the description in the will; 5 M. & W. 363; L. R. 2 P. & D. 8; L. R. 11 Eq. Cas. 578; 15 N. H. 330; 49 Me. 288; 24 Pa. 199; 59 N. Y. 441; 133 U. S. 216; see 120 *id.* 586; and to explain names in the will, which the testator has used and which are peculiar or incomprehensible owing to testator's idiosyncrasies or other reasons; 2 P. Wms. 141; 4 John. Ch. 607; 5 H. L. Cas. 168. See 50 N. J. Eq. 554. Extrinsic evidence is admissible to remove latent ambiguity in a will: but as to the character and extent of such evidence see LATENT AMBIGUITY.

By statute in Massachusetts legacies may be distributed by order of court to such persons as seem indicated by will. Laws 1895, ch. 134.

*Interest of legatee.* Property given specifically to one for life, and remainder over, must be enjoyed specifically during the life of the first donee, although that may exhaust it; 4 My. & Cr. 299; 2 My. & K. 703; L. R. 11 Eq. 80; 45 N. H. 261; 6 Gill & J. 171; 17 S. & R. 293; 2 Md. Ch. 190. But where the bequest is not specific, as where personal property is limited to one for life, remainder over, it is presumed that the testator intended the same property to go over, and if any portion of it be perishable, it shall be sold and converted into permanent property, for the benefit of all concerned; 2 My. & K. 699; 7 Ves. 137; 4 My. & C. 298; L. R. 4 Eq. Cas. 295. See 76 Iowa 336.

In personal property there cannot be a remainder in the strict sense of the word, and therefore every future bequest of personal property, whether it be preceded or not by any particular bequest, or limited on a certain or uncertain event, is properly an executory bequest, and falls under the rules by which that mode of limitation is regulated; Fearne, Cont. Rem. 401, n. An executory bequest cannot be prevented or destroyed by any alteration whatsoever in the estate, out of which or after which it is limited; 8 Co. 96 *a*; 10 *id.* 476. And this privilege of executory bequests, which exempts them from being barred or destroyed, is the foundation of an invariable rule, that the event on which a limitation of this sort is permitted to take effect must be such that the estate will necessarily vest in interest from the time of its creation within a life or lives in being and twenty-one years thereafter and the fraction of another year, allowing for the period of gestation, afterwards; Fearne, Cont. Rem. 431.

Where the legacy is payable at a future time a question often arises as to when the legacy vests. The rule seems to be that if a legacy is *payable* or *to be paid* at a future time, then a vested interest is conferred on the legatee *eo instanti* the testator dies, transmissible to his executors or administrators; 31 Beav. 425; 44 N. H. 281; 1 Ves. 217; 2 Sim. & S. 505; 48 Me. 257; 9 Cush. 516; 2 Edw. Ch. 156. But if it be payable *at*, *if*, *when*, *in case*, or *provided* a certain time comes or contingency arrives, then the legatee's right depends upon his being alive at the time fixed for payment; 62 Me. 449; 37 Pa. 105; 3 R. I. 226; 106 Mass. 28; 4 Dana 572; 5 Beav. 391. For exceptions to this rule see 2 Will. Ex. 1224.

No particular form of words is requisite to constitute one a *residuary* legatee. It must appear to be the intention of the testator that he shall take the residue of the estate, after paying debts and meeting all other appointments of the will; 2 Jac. & W. 399; 44 N. H. 255; 9 Leigh 361; 40 Conn. 264. The right of the executor to the residue of the estate when there is no residuary legatee is well established, both at law and in equity, in England, except so far as it is controlled by statute; 2 P. Wms. 340; 3 Atk. 228; 7 Ves. 288; but the rule has been controlled in equity by aid of

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slight presumptions in favor of the next of kin; 1 Bro. C. C. 201; 14 Sim. 8, 12; 2 Sm. & G. 241; 14 Ves. 197; and is now altered by stat. 11 Geo. IV. and 1 Wm. IV. c. 40. The rule never obtained in this country, it is believed, to any great extent; 3 Binn. 557; 9 S. & R. 424; 6 Mass. 153; 2 Hayw. 298; 4 Leigh 163; 1 Penning. 44.

A general residuary clause carries property, a gift of which has failed by reason of misdescription; 53 N. W. Rep. (Ia.) 345; and though a general residuary clause carries lapsed or void legacies, it does not include any part of the residue itself which fails; 15 R. I. 138. See, generally, 9 Lawy. Rep. Ann. 200, n.

The assent of the executor to a legacy is requisite to vest the title in the legatee; 1 Bail. 504; 4 Fla. 144; 19 Ala. 666; 11 Humphr. 559; 11 Gratt. 724; 8 How. 170; 2 Dev. & B. 254. But this seems to be merely a necessary requirement to adjust the matter to the reasonable convenience of the executor; Schoul. Ex. & Ad. § 488. This will often be implied or presumed; 23 Ala. 326; 6 Pick. 126; 1 Bail. Ch. 517; 10 Hare 177; 9 Exch. 680; as where the legatee was in possession of the thing at the decease of the testator, and the executor acquiesces in his right; 47 Fed. Rep. 250. See 6 Call 55. The premature assent of an executor named where another qualifies will not avail; 4 Dev. & B. 401; nor will an assent before the issue of letters testamentary; 19 Ala. 666; otherwise in England where the doctrine was that the authority of the executor was derived from the will; Wms. Exrs. 303, 1378. If the assent is unreasonably withheld, it may be compelled by a court of equity; 2 Md. Ch. Dec. 162; 6 Dana 148; 1 Ind. 570; 3 Redf. 514; Crosw. Ex. & Ad. 491.

A legatee cannot sue for his legacy until the time given to the executor for payment has expired. This time is commonly one year; 16 Beav. 298; 15 Ala. 507; 2 Edw. Ch. 202. So also the assent of the legatee is required to complete the gift, although it is presumed, after the will is proved, unless the legacy is actually declined, and in that case the bequest is subject to distribution as intestate property; 15 Me. 207; Schoul. Ex. & Ad. § 489. Of cumulative legacies one onerous and the other beneficial, the latter cannot be accepted and the former declined; 3 Myl. & K. 254; but an intention will control if expressed in the will; 11 Jur. N. S. 824; Wms. Ex. 1448.

*Abatement.* The general pecuniary legacies are subject to abatement whenever the assets are insufficient to answer the debts and specific legacies. The abatement must be upon all *pro rata;* 4 Bro. Ch. 349, 350; 106 Mass. 100; 71 Pa. 333; but a residuary legatee has no right to call upon general legatees to abate proportionally with him; 1 Dr. & S. 623; L. R. 3 Ch. App. 537; 1 Story, Eq. Jur. § 555. And, generally, among general legatees there is a preference of those who have relinquished any right in consideration of their legacy over mere volunteers; 106 Mass. 100; L. R. 3 Ch. Div. 714. Specific legatees must abate, *pro rata*, when all the assets are exhausted except specific devises, and prove insufficient to pay debts; 1 P. Wms. 679; 2 Bla. Com. 513; but in ordinary cases of a deficiency of assets, the specific legacy will not be liable to abate with the general legacies; 1 Vern. 31; 1 P. Wms. 422; 3 *id.* 365; 3 Bro. C. C. 160; 3 Wms. Ex. 436. See 1 Rop. Leg. 150; 1 Belt, Supp. Ves. 209, 231; 2 *id.* 112. Specific bequests and devises cannot be forced to abate in relief of a pecuniary legacy by contributing to payment of costs of administration and funeral expenses; Moore's Estate (O. Ct.), 19 Pa. Co. Ct. 459. A bequest to a widow in lieu of dower is not subject to abatement in case of a deficiency of assets, but will be preferred to other general legacies; 5 Misc. Rep. 123. Demonstrative legacies will not abate with general legacies; 11 Ves. 607; 11 Cl. & F. 509; 25 N. Y. 128. Where an estate is insufficient to pay all the legacies, the general will abate before the specific legacies; 115 N. C. 398. Demonstrative legacies are subject to abatement, but specific legacies are not; 40 W. Va. 349. Demonstrative legacies are a prior claim on the fund out of which they are payable, but if it is insufficient the legacies must be reduced proportionally; 22 S. E. Rep. (Va.) 853. In default of special provision the following order is observed in calling upon the estate to supply a deficiency of assets; (1) General residuary estate; (2) Estate devised for payment for debts; (3) Real estate descended; (4) Real estate devised subject to debts; (5) General legacies; (6) Specific legacies and devises *pro rata;* 11 Pa. 72. Legacies given by a codicil are on the same footing as legacies in the original will, when the estate is insufficient to pay them all in full; 16 R. I. 98. See ABATEMENT; DEMONSTRATIVE LEGACY.

*Ademption of legacies.* A specific legacy is revoked by the sale or change of form of the thing bequeathed: as, by converting a gold chain into a cup, or wool into cloth, or cloth into garments; 2 Bro. C. C. 110; 7 Johns. Ch. 262; see 113 N. Y. 560; so if a debt specifically bequeathed be received by the testator the legacy is adeemed; 3 Bro. C. C. 431; 7 Johns. Ch. 262; 23 N. H. 218; 10 Ohio 64; 48 La. Ann. 278; and so of stock, which is partially or wholly disposed of by testator before his death; 6 Pick. 212; 28 Pa. 363; 1 Ves. Sen. 426; 7 Johns. Ch. 258.

A demonstrative legacy is not adeemed by the sale or change of the fund; 15 Ves. 384; 6 H. L. Cas. 883; 11 Cl. & F. 509; 16 Pa. 275; 25 N. Y. 128; 13 Allen 256; 118 Ind. 147.

The doctrine of ademption does not apply to demonstrative legacies inasmuch as they are payable out of the general estate, if the fund out of which they are payable fail; 3 Pom. Eq. Jur. § 1131; 2 Wms. Ex. 632. Where a legacy is given for a specified purpose, it is in the nature of a specific legacy, and if such purpose is accomplished by the testator in his lifetime there is an

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ademption of the legacy; 38 N. J. Eq. 91; so where a legacy was given expressly to pay a debt, the legacy was held adeemed or satisfied; 39 Barb. 507; 6 Ch. App. 136. Where the payment made by the testator subsequent to the execution of a will is equal to or exceeds the amount of the legacy, it will be deemed a satisfaction or an ademption thereof, but where it is less than the amount of the legacy, it is deemed a satisfaction *pro tanto*, and if the difference between the amounts be slight, it may be deemed a complete satisfaction or ademption; 2 Story, Eq. Jur. § 1111; 47 N. E. Rep. (Ill.) 376. A bequest to a son of a certain sum payable out of the shares of the daughter's children, and providing that on such payment the son shall surrender an agreement of the daughter to pay him the amount of such legacy, is a bequest for a particular purpose, and hence is adeemed by payment by the testator, during his life of the daughter's debt to the son; 47 N. E. Rep. (Ill.) 376. See ADEMPTION.

A legacy to a child is regarded in courts of equity as a portion for such child: hence, when the testator, after giving such a legacy, settles the child and gives a portion, it is regarded as an ademption of the legacy. And it will make no difference that the portion given in settlement is less than the legacy: it will still adeem the legacy *pro tanto;* 5 My. & C. 29; L. R. 14 Eq. 236; 16 N. Y. 9; 15 Pa. 212; 5 Rand. 577; 2 Story Eq. Jur. § 1111. See 81 Ga. 734; 126 Ill. 37. The principle of the ademption of legacies by gifts made during testator's life is applicable to a residuary legacy, where such appears to be the clear intent; 1 Misc. Rep. 58.

*Payment of legacies.* A legacy given generally, if no time of payment be named, is due at the death of the testator, although not payable until the executor has time to settle the estate in due course of law. See DEVISE. Legacies are not due by the civil law or the common law until one year after the decease of the testator and from that time interest is chargeable on them. The same term is generally allowed the executor in the American states to dispose of the estate and pay debts, and sometimes, by special order of the probate court, this is extended, from time to time, according to circumstances; 12 N. Y. 474; 41 N. H. 391; 21 Md. 156; 105 Mass. 431; Rop. Leg. 856; 4 Cl. & F. 276; 5 Binn. 475.

The great rule in legacies is, that if the testator's estate is not sufficient for paying all his debts and legacies, *first*, the debts must be paid in full; *secondly*, the specific legacies are to be paid; *thirdly*, general legacies are to be paid, in full if possible, if not, *pro rata*.

If given by will, an annuity is a legacy; 61 Miss. 372; and under a charge of legacies, an annuity will be included unless the testator expressly distinguishes between annuitants and legatees; 3 App. Cas. 989; 3 De G. & G. 601; 2 Ves. Jr. 216. See CHARGE.

An annuity given by will shall commence at the death of the testator, and the first payment fall due one year thereafter; 3 Madd. 167; 1 Sumn. 19; 42 Barb. 533; 5 W. & S. 30.

In the civil law a distinction is made between an annual legacy and the legacy of a usufruct in that whereas the legacy of a usufruct was only one legacy of a right to enjoy as long as it shall last, an annual legacy contained as many legacies as it may last years; Dom. Civ. L. § 3572; Mack. Rom. L. § 763; and a similar distinction is made between gifts of the income and profits of particular funds and annuities payable from time to time, in that the latter are at each time of payment gross sums to be regarded as separate legacies at each recurring period. In this respect it is often difficult to determine to which particular class a gift belongs. A bequest of the income of certain shares of bank stock during life was held not an annuity, and the devisee was required to pay the tax on the stock, the court admitting the difficulty and citing 18 Pick. 123, as an authority for the opposite view; 10 R. I. 455.

The importance of the distinction is evident when it is remembered that the gift of the produce of a fund, without limit as to time, has been held to amount to a gift of the fund itself whether the gift be made directly or through a trustee; 44 N. J. Eq. 450; 50 *id.* 522; 151 Mass. 241; while an annuity charged upon personalty is usually dependent on the legatee's life, the fund reverting to the residuary legatee; 6 Johns. Ch. 70; 125 Mass. 83.

It has been held that there is no substantial difference between the gift of an annuity for life and of the interest or income of a fund for life; nor between the gift simply of interest and of interest payable annually; 136 Pa. 374; 170 *id.* 242.

A distinction is taken between an annuity and a legacy, in the matter of interest. In the latter case, no interest begins to accumulate until the end of one year from the death of the testator; 1 Sch. & L. 301; 17 S. & R. 396; 2 Rop. Leg. 1253; 25 Atl. Rep. (R. I.) 652. In cases where a legacy is given a child as a portion, payable at a certain age, this will draw interest from the death of the testator; L. R. 1 Eq. 369; 11 Ves. 2; 5 Binn. 477, 479; 4 Rawle 113; but this rule does not apply when any other provision is made for the child; 9 Beav. 164; 19 Pa. 49; 16 N. J. Eq. 243; 41 N. H. 393; 14 Allen 239. The qualified recognition of a legacy by an executor will not carry with it the right to interest thereon, prior to demand for its delivery; 45 La. Ann. 962. See INTEREST.

Where legatees are under disabilities, as infancy or coverture, the executor cannot discharge himself by payment, except to some party having a legal right to receive the same on the part of the legatee, which in the case of an infant is the legally-appointed guardian; 1 Johns. Ch. 3; 106 Mass. 586; 1 P. Wms. 285; and, at common law, in the case of a married woman, the husband; 1 Vern. 261; but in the latter case the executor may decline to pay the legacy un-

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til the husband make a suitable provision out of it for the wife, according to the order of the court of chancery; 8 Bligh 224; Bisph. Eq. § 109. By statute in England and in some of the United States the executor is allowed in such cases to deposit the money on interest, subject to the order of the court of chancery; 2 Will. Ex. 1407.

The executor is liable for interest upon legacies, whenever he has realized it by investing the amount; L. R. 5 Ch. App. 233; 114 Mass. 404; 16 How. 542; and usually with annual rests; 29 Beav. 586; 23 N. J. Eq. 192; 109 Mass. 541. Where an executor was compelled to pay money out of his own funds on account of the *devastavit* of a co-executor, and the matter had lain along for many years on account of the infancy of the legatees, no interest was allowed under the special circumstances until the filing of the bill; 9 Vt. 41.

The better opinion is that at common law no action lay against an executor for a general legacy; 5 Term 690. But in case of a specific legacy it will lie after the assent of the executor; 5 Gray 67; 114 Mass. 26; and in the United States *assumpsit* will generally lie for all legacies even before assent by the executor; 30 N. H. 505; 6 N. J. L. 432; 12 Pa. 341; 2 Johns. 243; 6 Conn. 176; 2 Hayw. 153; 63 Me. 537.

The proper remedy for the recovery of a legacy is in equity; 5 Term 690; 35 N. H. 349; 71 N. C. 281; 35 N. H. 339; Wms. Ex. 2005. See 64 Vt. 598. In most of the United States statutory proceedings to recover legacies are provided in the orphans' or probate courts. As to federal jurisdiction over the administration of estates, see EXECUTOR.

By a recent statute in Louisiana it is provided that a legatee who has paid a debt for which bequeathed realty was mortgaged has no recourse against heirs or legatees under universal title; Laws 1896, ch. 72.

Doubtful points in the settlement of an estate are sometimes settled by mutual agreement of all parties interested, if *sui juris;* Schoul. Ex. & Ad. § 475. This right is sometimes extended by legislation permitting the executor, etc., in cases deemed proper by a court of equity, to bind future contingent interests of persons not capable of acting for themselves; *id.* See FAMILY ARRANGEMENT.

*Satisfaction of debt by legacy.* In courts of equity, if a legacy equal or exceed the debt, it is presumed to have been intended to go in satisfaction; but if the legacy be less than the debt, it shall not be deemed satisfaction *pro tanto;* 16 Vt. 150; 12 Mass. 391; 3 S. & R. 54; 8 Cow. 246; 1 Lowell 418. This rule, founded on a series of equity precedents, was said by Judge Redfield to maintain "a kind of dying existence;" 2 Redf. Wills 185, 186; and it is termed by a later author "whimsical and unsatisfactory"; Schoul. Ex. & Ad. § 469. See Bronson, J., in 2 Hill 576; Wms. Ex. 1297. The courts allow very slight circumstances to rebut this presumption of payment: as, where the debt was not contracted until after the making of the will; 2 P. Wms. 343; 3 P. Wms. 353; 4 Madd. 325; or the debt is unliquidated; 1 P. Wms. 299; or due upon a bill or note negotiable; 3 Ves. 561; 1 Root 159; 1 Allen 129; where the legacy is made payable after the debt falls due; 3 Atk. 96; where the intention appears otherwise; 2 Ves. 635; 2 G. & J. 185; 1 P. Wms. 410; or where the legacy is of a different nature from the debt; 1 Atk. 428; 3 *id.* 65; 2 Sto. Eq. Jur. § 1110. Satisfaction is not favored in America.

*Release of debt by a legacy.* If one leave a legacy to his debtor, it is not to be regarded as a release of the debt unless that appears to have been the intention of the testator; 4 Bro. C. C. 226; 15 Sim. Ch. 554; 5 Ala. 245; 153 Pa. 402; and parol evidence is admissible to prove this intention; 5 Ves. 341; 23 Beav. 404; 2 Dev. Ch. 488.

Where one appoints his debtor his executor, it is at law regarded as a release of the debt; Co. Litt. 264; 8 Co. 136 *a*; but this is now controlled by statute in England and in many of the United States; 116 Mass. 552; 15 Pa. 533; 9 Conn. 470; 7 Cow. 781. But in equity it is considered that the executor is still liable to account for the amount of his own debt; 13 Ves. Ch. 262, 264.

Where one appoints his creditor executor, and he has assets, it operates to discharge the debt, but not otherwise; 2 Will. Ex. 1316; 1 Salk. 304. See CHARGE; DEVISE; LAPSED LEGACY; WILL.

**LEGACY DUTY.** A legacy tax in Great Britain, the rate of which rises according to the remoteness of the relationship of the legatee, and reaches its maximum where he is not related to the testator. See 53 L. J. Ch. 645; 26 Ch. Div. 538; COLLATERAL INHERITANCE TAX; TAX.

**LEGAL.** That which is according to law. It is used in opposition to equitable: as, the legal estate is in the trustee, the equitable estate in the *cestui que trust.*

**LEGAL ASSETS.** Such property of a testator in the hands of his executor as is liable to debts in temporal courts and to legacies in the spiritual, by course of law; equitable assets are such as are liable only by help of a court of equity. 2 Will. Ex. 1408–1431. The distinction is not important in the United States; 1 Ashm. 347. See Story, Eq. Jur. § 551; 2 Jarm. Wills, 543; Crosw. Ex. & Ad. 421, 423.

**LEGAL CONSIDERATION.** See CONSIDERATION.

**LEGAL CRUELTY.** Such conduct on the part of a husband as will endanger the life, health, or limb of his wife, or create a reasonable apprehension of bodily hurt; such acts as render cohabitation unsafe, or are likely to be attended with injury to the person or to the health of the wife; 36 Ga. 286; 2 Curt. Eccl. 281; 19 Cal. 626; 44 Ala. 698; 103 Ill. 477; 50 Wis. 254; 60 How. Pr. 151; 73 N. Y. 369; 33 N. J. Eq. 458. That which merely wounds the feelings without being accompanied by bodily

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injury or actual menace does not amount to legal cruelty; 30 Gratt. 307; 3 Metc. 257; 9 C. E. Greene 338; 10 Neb. 144; as the infliction of mental suffering cannot constitute cruelty unless it endangers the life or health of the person injured; [1895] Prob. 315; 61 N. W. Rep. (Minn.) 566; 48 La. Ann. 1194; 32 S. W. Rep. (Tex.) 328; but it has been held that there may be such legal cruelty as to endanger the health of the wife without threats of bodily injury; as where a husband subjected his wife to a severe course of what he deemed to be affectionate moral discipline, and by so doing broke down her health and rendered a serious malady imminent; L. R. 2 P. & M. 31; 111 Mass. 327; so compelling a wife to live at times in an attic without any conveniences whatever, leaving her for a period of six weeks without means to pay her board, and using insulting and abusive language to her is legal cruelty; 106 Mich. 646; and falsely accusing her of unchastity; 8 Ore. 100; 45 Mich. 150; 60 How. Pr. 151 (but *contra* where the husband has reason to suspect his wife of infidelity; 73 N. Y. 369). A public accusation of unchastity, either in or out of the presence of the wife, is a greater degree of legal cruelty than one made in private; 76 Ind. 136; 34 La. Ann. 611; 45 Pac. Rep. (Ore.) 761; and it is legal cruelty for a wife to accuse her husband constantly, publicly, and without cause, of unfaithfulness to her, thereby disgracing him and endangering his means of livelihood; 49 Mich. 417; but it has been held that adultery itself is not cruelty; 54 Cal. 262. Where acts of violence have been condoned, wilfully depriving a wife of her proper position in the household, neglecting her, degrading her to the level of a servant, and compelling her to do the menial work of the house, and to take her meals and to sleep apart from the rest of the household, was held, in itself, legal cruelty; 72 L. T. 295. The husband is responsible for the ill-treatment of his wife by persons whom he supports in his house in spite of her remonstrances, and where she is justified in apprehensions of personal violence from them, she is entitled to a divorce on the ground of cruel and inhuman treatment and personal indignities; 9 Ore. 452; excessive sexual intercourse is legal cruelty, and it may be shown by the wife's testimony; 58 N. H. 569. See 32 N. J. Eq. 475. A husband who unreasonably and brutally effects sexual intercourse with his wife to the injury of her health, when he knows that it will cause her injury and suffering, is guilty of intolerable cruelty such as will authorize a divorce; 61 Conn. 233. The refusal of a husband to have sexual intercourse with his wife is not cruel and inhuman treatment or ground for a divorce *à vinculo*; 83 Wis. 553.

Desertion and failure to support a wife when during the time she had been seriously ill and greatly in need of the assistance, and of the society, nursing, and comfort of her husband, was held legal cruelty on the ground that it inflicted on her mental suffering and public disgrace; 79 Ind. 363. A wife is entitled to a divorce for legal cruelty where the acts complained of are the result of insane delusion; 33 N. J. Eq. 458. But it has been held that a single act of personal violence does not constitute cruelty; 51 Md. 72; and that insulting and degrading language to her is not ground for a divorce, although in case of actual cruelty it may be shown in aggravation; 69 Ala. 84; and misunderstandings and difficulties between husband and wife will not afford a foundation for a divorce; 34 La. Ann. 135; nor will a succession of petty annoyances, complaints, fault-finding, and disparagement of the husband's common sense constitute legal cruelty to him; 49 Mich. 639. In the case of Russell *v.* Russell the English court of appeal held that: (1) A false charge of having committed an unnatural crime circulated by a wife against her husband, although published to the world and persisted in after she did not believe its truth, is not sufficient evidence of legal cruelty to entitle the husband to a judicial separation; (2) but was enough to justify the court in refusing a petition of the wife for a restitution of conjugal rights; [1895] Prob. 315. This case had been tried before Pollock, B., and a special jury in April, 1895, and on questions put by the court to the jury, the latter found that Lady Russell had been guilty of cruelty, and that in her conduct and correspondence she had not acted *bona fide*. The judge (1) made a decree for judicial separation in favor of the husband and (2) dismissed the petition of the wife for restitution. On appeal of Lady Russell the decision was as stated *supra*, reversing on (1) and affirming on (2). Both parties appealed to the House of Lords, when the appeal of the countess was withdrawn and a motion for reinstatement denied, leaving the refusal of restitution by the court of appeal the final decision; while the decision that a judicial separation was not warranted was affirmed by the Lords; [1897] App. Cas. 395. See 23 Am. L. Reg. 640; CRUELTY; DIVORCE.

**LEGAL DUTY.** That which the law requires to be done or forborne to a determinate person, or to the public at large, and is correlative to a right vested in such determinate person. 111 N. C. 94. See DUTY.

**LEGAL ESTATE.** One the right to which may be enforced in a court of law.

It is distinguished from an equitable estate, the right to which can be established only in a court of equity.

The party who has the legal title has alone the right to seek a remedy for a wrong to his estate, in a court of law, though he may have no beneficial interest in it. The equitable owner is he who has not the legal estate, but is entitled to the beneficial interest.

The person who holds the legal estate for the benefit of another is called a trustee; he who has the beneficiary interest and does not hold the legal title is called the

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beneficiary, or, more technically, the *cestui que trust*.

When the latter has a claim, he must enforce his right in a court of equity, for he cannot sue any one at law in his own name; 1 East 497; 8 Term 322; 1 Saund. 158, n. 1; 2 Bingh. 20; still less can he in such court sue his own trustee; 1 East 497.

**LEGAL FRAUD.** See FRAUD.

**LEGAL HEIRS.** See HEIR, LEGAL.

**LEGAL INCAPACITY.** See INCAPACITY; LIMITATIONS.

**LEGAL INTEREST.** See INTEREST.

**LEGAL IRREGULARITY.** See IRREGULARITY.

**LEGAL MALICE.** An expression used as the equivalent to constructive malice or malice in law. 52 Me. 502. See MALICE.

**LEGAL MERCHANDISE.** Under the words "other legal merchandise" in a charter party, the charterer is at liberty to ship any lawful article he pleases, but is bound to pay the same amount of freight the vessel would have earned if loaded within the terms of the charter. 18 L. J. C. P. 74; 6 C. B. 791.

**LEGAL MORTGAGE.** A first mortgage. This is unquestionably so as regards land, because it is only the first mortgage which can grant the legal estate in land; and it has been held that where there was an agreement to give a legal mortgage of a ship, the expression signified a first mortgage. 11 W. R. 23.

**LEGAL NEGLIGENCE.** See NEGLIGENCE.

**LEGAL NOTICE.** Such notice as is adequate in point of law, such notice as the law requires to be given for the specific purpose or in the particular case. A legal notice to quit is a notice provided by law as distinguished from one provided by contract. 57 L. J. Q. B. 225; 20 Q. B. D. 374.

**LEGAL OBLIGATION.** See DUTY; OBLIGATION.

**LEGAL PERSONAL REPRESENTATIVES.** See LEGAL REPRESENTATIVES.

**LEGAL PROCESS.** See PROCESS.

**LEGAL REPRESENTATIVES.** The primary meaning of the terms "representatives," "legal representatives," "personal representatives," or "legal personal representatives," is executors and administrators in their official capacity; 36 L. J. Ch. 793; L. R. 4 Eq. 359; and it cannot be construed as excluding them; 99 Mass. 342; see 45 N. Y. 563; 83 Me. 295; but the meaning may be controlled by the context; 32 Mo. App. 211. It may mean the next of kin; 8 W. N. C. Pa. 209; 4 De G. & J. 477; 26 Beav. 26; 61 N. W. Rep. (Minn.) 331; 28 L. J. Ch. 835; 16 Sim. 329. It has been held to mean next of kin *according to the statute of distribution;* 13 L. J. Ch. 147; Willard, Ex.; and heirs or legal descendants; 71 Ill. 91; and heirs, assignees or receivers; 26 Cal. 23; 78 Md. 59; 15 Ill. 574; 45 Ohio St. 133; 92 U. S. 724; see 117 U. S. 591, where the term was said to be not necessarily restricted to the personal representatives of the deceased, but is sufficiently broad to cover all persons who with respect to his property stand in his place and represent his interests, whether transferred to them by his act or by operation of law, reversing 11 Fed. Rep. 573. When used with reference to land, it ordinarily means those to whom the land descends; 130 Ind. 251. See PERSONAL REPRESENTATIVES; LAPSED LEGACY.

Within the meaning of a life insurance policy it has been held to mean wife and children rather than administrators; 125 N. Y. 411, reversing 56 Hun 12; 28 Ill. App. 608; and the widow, orphan, heir, assign, or legatee of the member; 2 Mackey 70; but it has been held, where nothing shows that the words were used with a different meaning, the words legal representatives make the proceeds a part of the assets of the insured; 78 Ill. 147. The words families, heirs, or legal representatives are held to include those who would take property as in cases of intestacy; 112 N. Y. 627, reversing 43 Hun 472; and where the benefit appears to have been intended for the family it may mean heirs or next of kin; 41 Mo. 583.

The rule that devises lapse by the death of the devisee is not changed by adding to the devise the words "to have and to hold the same to them, their heirs and assigns forever;" 113 N. Y. 396. See LAPSED DEVISE; LAPSED LEGACY.

**LEGAL TENDER.** That currency which has been made suitable by law for the purposes of a tender in the payment of debts.

The following descriptions of money are legal tender in the United States:—

*All the gold coins* of the United States are a legal tender in all payments at their nominal value when not below the standard weight and limit of tolerance provided by law for the single piece, and, when reduced in weight below such standard tolerance, they are a legal tender at valuation in proportion to their actual weight.

*Treasury notes* and *standard silver dollars* for all payments.

*Silver coins* of a smaller denomination than one dollar, for all sums not exceeding ten dollars.

The *minor coins*, five, three, two, and one cent pieces, for all amounts not exceeding twenty-five cents.

As to trade dollars, see DOLLAR. See EAGLE; HALF EAGLE.

By acts of Feb. 25, 1862, July 11, 1862, and March 3, 1863, congress authorized the issue of notes of the United States, declar-

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ing them a legal tender for all debts, public and private, except duties on imports and interest on the public debt. 12 Stat. L. 345, 532, 709. These notes are obligations of the United States, and are exempt from state taxation; 7 Wall. 26; but where a state requires its taxes to be paid in coin, they cannot be discharged by a tender of these notes. A debt created prior to the passage of the legal tender acts, and payable by the express terms of the contract in gold and silver coins, cannot be satisfied by a tender of treasury notes; 7 Wall. 229, 258; 12 *id.* 687. The legal tender acts are constitutional as applied to pre-existing contracts, as well as to those made subsequent to their passage; 12 Wall. 457, per Strong, J., overruling the previous opinion of the court in 8 Wall. 604, per Chase, C. J. See 17 Am. L. Reg. 198; 19 *id.* 73; 25 *id.* 601. Congress has the constitutional power to make the treasury notes of the United States a legal tender in payment of private debts, in time of peace as well as in time of war; 110 U. S. 421.

A postage currency has also been authorized, which was receivable in payment of all dues to the United States less than five dollars. They were not, however, a legal tender in payment of private debts. (Act of Congress, approved July 17, 1862.) See GOLD; MONEY; SILVER.

**LEGALIS HOMO** (Lat.). A person who stands *rectus in curia*, who possesses all his civil rights. A lawful man. One who stands *rectus in curia*, not outlawed nor infamous. In this sense are the words *probi et legales homines*.

**LEGALIZATION.** The act of making lawful.

By legalization is also understood the act by which a judge or competent officer authenticates a record, or other matter, in order that the same may be lawfully read in evidence.

**LEGALIZE.** To confirm acts already done, not to authorize new proceedings in the future. 102 Mass. 128.

**LEGANTINE CONSTITUTIONS.** The name of a code of ecclesiastical laws, enacted in national synods, held under legates from Pope Gregory IX. and Clement IV., in the reign of Hen. III., about the years 1220 and 1268. 1 Bla. Com. 83. Burn says, 1237 and 1268. 2 Burn, Eccl. Law, 30 *d.*

**LEGATARY.** One to whom anything is bequeathed; a legatee. This word is sometimes though seldom, used to designate a legate or nuncio.

**LEGATEE.** The person to whom a legacy is given.

The court will apply the popular rather than the technical meaning to the term "legatee" in a will, and read it as if it were "distributee," when, after looking at all the circumstances, and all the clauses of the will, the alternative is between this disposition and a total failure of the dispository scheme for want of certainty, and that seems to have been the testator's meaning; 23 Ga. 571. See LEGACY.

**LEGATES.** Legates are extraordinary ambassadors sent by the pope to catholic countries to represent him and to exercise his jurisdiction. They are distinguished from the ambassadors of the pope who are sent to other powers.

*Legates à latere* hold the first rank among those who are honored by a legation; they are always chosen from the college of cardinals, and are called *à latere*, in imitation of the magistrates of ancient Rome, who were taken from the court or *side* of the emperor.

*Legati missi* are simple envoys.

*Legati nati* are those who are entitled to be legates by birth.

*Legati dati* are those who have authority from the pope by special commissions. See A LATERE.

**LEGATION.** An embassy; a mission. All persons attached to a foreign legation, lawfully acknowledged by the government of this country, whether they are ambassadors, envoys, ministers, or attachés, are protected by the act of April 30, 1790, from violence, arrest, or molestation; 1 Dall. 117; 1 Wash. C. C. 232; 11 Wheat. 467; 1 Miles 366; 1 N. & M'C. 217; 1 Baldw. 240. See AMBASSADOR; ARREST; PRIVILEGE.

**LEGATORY.** The third part of a freeman's personal estate, which by the custom of London, in case he had a wife and children, the freeman might always have disposed of by will. Bacon, Abr. *Customs of London* (D 4). See DEAD MAN'S PART.

**LEGATUM.** A legacy given to the church or an accustomed mortuary. Cowel.

**LEGEM HABERE.** Capable of giving evidence upon oath.

**LEGEM SCISCERE** (Lat.). To give consent or authority to a proposed law.

**LEGES** (Lat.). **In Civil Law.** Laws proposed by a magistrate of the senate and adopted by the whole people in *comitia centuriata*. See POPULISCITUM; LEX.

**In English Law.** Laws.

*Leges scriptæ*, written or statute laws.

*Leges non scriptæ*, unwritten or customary laws; the common law, including general customs, or the common law properly so called; and also particular customs of certain parts of the kingdom, and those particular laws that are, by custom, observed only in certain courts and jurisdictions. 1 Bla. Com. 67. "These parts of law are therefore styled *leges non scriptæ*, because their original institution and authority are not set down in writing, as acts of parliament are, but they receive their binding force from long and immemorial usage." 1 Steph. Com. 40, 46. See LAW; JUS; LEX.

**LEGES JULIÆ.** Laws enacted during the reign of Augustus or of Julius Cæsar which, with the *lex abutia*, effectually abolished the *legis actiones*.

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*Lex Julia Ambitus*. A law to repress illegal methods of seeking office. Inst. 4, 18.

*Lex Julia cessio Bonorum*. A law allowing debtors to make a voluntary assignment of their property. Inst. 3, 12; Sohm, Rom. L. 211.

*Lex Julia de Adulteriis*. The law relating (1) to divorce, requiring the presence of seven witnesses and a *libellus repudii* to show the fact of repudiation and (2) prohibiting the husband from alienating or mortgaging any *fundus italicus* comprised in the *dos*. This provision was extended by Justinian to any *fundus dotalis* whatever. Sohm, Rom. L. 374, 383.

*Lex Julia de Annona*. A law to repress combinations for heightening the price of provisions.

*Lex Julia de Maritandis Ordinibus*. A law forbidding senators and their children to intermarry with freedmen or infames, and freedmen to marry infames. Inst. 2, 9.

*Lex Julia de Residuis*. A law punishing those who gave an incomplete account of public money committed to their charge. Inst. 4, 18.

*Lex Julia et Papia Poppæ*. See LEX PAPIA POPPÆA.

*Lex Julia Majestatis*. A law which inflicted the punishment of death on all who attempted anything against the emperor or state, and condemning the wrongdoer after his death. Inst. 4, 18.

*Lex Julia Peculatus*. A law punishing those who had stolen public money or property or anything sacred or religious. Magistrates and those who had aided them in stealing public money during their administration were punished capitally; other persons were deported. Inst. 4, 18, 9.

*Lex Julia Repetundarum*. A law for the punishment of magistrates and judges who received bribes. Inst. 4, 18.

**LEGIOSUS.** Subjected to a course of the law. Cow.

**LEGIS ACTIO.** *Actio* represented a right of the plaintiff not only as against the defendant, but also against the magistrate—a right to have a judicium placed at his disposal or to have a private individual appointed for the purpose of deciding by his judgment the question at issue between him and his adversary. The *actio* rested in early times on *lex* or on custom with the force of *lex*, and for this reason it was called *legis actio*.

There were five of the *legis actiones*: (1) the *legis actio sacramenti*, (2) the *legis actio per judicis postulationem*, (3) the *legis actio per condictionem*, (4) the *legis actio per manus injectionem*, (5) the *legis actio per pignoris capionem*. Private law granted a *legis actio* either directly or indirectly, and a private right which was not directly enforceable by the ordinary civil procedure could nevertheless secure a trial or *actio* by a solemn affirmation or a solemn act of execution, which latter could be either personal or real. The general form of action was *actio sacramenti*, the other forms being restricted to such cases as were determined by statute (*lex*) or ancient custom with statutory force. The special *legis actiones* were all modes of enforcing obligatory rights, or, in other words, they were forms of so-called personal actions. But whenever the claim was not personal, but real, the *legis actio sacramenti* was the sole form available. Sohm, Rom. L. 153.

The procedure in these actions was open only to Roman citizens and the parties were almost always obliged to appear personally, but an *assertor liberatus* could appear to claim the freedom of a person wrongfully treated as a slave. The necessity of adherence to the prescribed forms was so rigid that if, in an action for damage to a vineyard, the plaintiff used the word *vites* instead of the general word *arbores* employed in the law of the Twelve Tables, he lost his action, and if an action failed, even on the most technical ground, the plaintiff had no further legal remedy. The sentence was ordinarily to give the thing demanded, not a pecuniary equivalent. Sand. Just. Introd. § 96.

**LEGISLATION.** The act of giving or enacting laws. See STATUTE; CONSTITUTIONAL; LEGISLATIVE POWER.

**LEGISLATIVE POWER.** Authority exercised by that department of government which is charged with the enactment of laws as distinguished from the executive and judicial functions. The law-making power of a sovereign state.

The authority conferred by or exercised under the constitution of a state or of the United States, to make new laws or to alter or repeal existing ones.

A law in the sense in which the word is implied in these definitions is a rule of civil conduct, or a statute described by the legislative will, and not law in the more general sense in which the term is applicable to that which owes its origin, either wholly or in part, to the judicial power. See LAW; JUDGE-MADE LAW; JUDICIAL POWER. The separation of the three powers of government which underlie all modern civilized government has been discussed under the title EXECUTIVE POWER, in which, as well as in the title JUDICIAL POWER, many of the questions arising in connection with the difference of the spheres of action of these three powers have been discussed, and to these titles reference should be made and they should be read in connection with this title.

"Legislation is essentially an act of sovereign power; . . . the very definition of law, . . . shows the intrinsic superiority of the legislature. It may be said, the power of the legislature, also, is limited by prescribed rules. It is so. But it is nevertheless the power of the people and sovereign as far as it extends." Gibson, J., in 12 S. & R. 330.

"Plenary power in the legislature for all the purposes of civil government is the rule. A prohibition to exercise a particular power is the exception." 15 N. Y. 532.

"The legislative power of a state extends to everything within the sphere of such power, except as it is restricted by the Federal Constitution or that of the state." Swayne, J., in 19 Wall. 576.

"The state does not act by its people in their collective capacity, but through such political agencies as are duly constituted and established. The legislative power is the supreme authority except as limited by the constitution of the state, and the sovereignty of the people is exercised through their representatives in the legislature, unless, by the fundamental law, power is elsewhere reposed." Fuller, C. J., in 146 U. S. 25. "Irrespective of the operation of the Federal Constitution and restrictions asserted to be inherent in the nature of American institutions, the general rule is that there are no limitations upon the legislative power of the legislature of a state, except those imposed by its written constitutions." Fuller, C. J., in 148 U. S. 661.

It is in the legislative department that the supreme and absolute authority is vested; 1 Bla. Com. 52, 142; Locke, Govt. ch. xii. xiii. par. 153.

"The legislative power is that which has

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the right to direct how the force of the community shall be employed for preserving the community and the members of it." Locke, Govt. ch. xii. par. 143. But it was only upon the ruins of the royal prerogative, so far as concerned the right to dispense with any statute, that the foundations were laid on which by a steady, if at times an interrupted growth, was built up the final omnipotence of parliament. The power of the king was defined by the decision in Godden *v.* Hales, Comb. 21; S. C. Show. 475. See also 1 Thayer, Cas. Const. L. 29, n.

A state constitution, adopted before that of the United States, is a result of all the plenary legislative power of the people untrammelled by any higher law; 154 N. Y. 61.

It has always been understood that the sovereignty of the federal government is in congress, though limited to specified objects. "The wisdom and the discretion of congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse." 9 Wheat. 187, per Marshall, C. J.

Legislative discretion is of two kinds, legal and political. "Legal discretion is limited. It is thus defined by Lord Coke: *Discretio est discernere per legem quid sit justum.* Political discretion has a wider range. It embraces, combines, and considers all circumstances, events, and projects, foreign or domestic, that can affect the national interests. Legal discretion has not the means of ascertaining the grounds on which political discretion may have proceeded." Hall, Am. L. J. 255.

While each of the three departments of government is essential to the existence of a state, as modern government is understood, it is undoubtedly true that the strongest is the legislative. That would result from its control of the public purse, if from nothing else; but notwithstanding this fact, the judiciary which is in theory the weakest of the departments has held its own place as a co-equal and co-ordinate department, and after the lapse of a century it is said "that the three departments still retain their balance, each with its prerogatives unimpaired." 1 Fost. Const. § 45.

Besides the vantage ground which the legislative department naturally occupies as contrasted with the other two by reason of the character of its functions, it has been said that it is the branch of the government which has grown the most. And it is suggested, that coming as it does from the people, much is tolerated which would not be permitted in the other departments; Miller, Const. U. S. 95. It has been maintained by some writers that congress has encroached permanently upon the other departments, but this opinion is controverted; 1 Fost. Const. § 45, n. 11. There is no question as to the importance of the constitutional restraint upon the power of congress. Montesquieu said that the English constitution would perish if the legislative power should become more corrupt than the executive; and a later writer considered that while it was important to restrain the executive power, it was still more important to restrain the legislative; De Lolme, Const. 190.

It has been said that: "in the United States, all legislative power exists in two forms, viz.:—1st. As political or sovereign power, the nation as a whole embodying the political sovereignty supreme and unlimited; 2d. As civil or delegated power, the legislature representing the legal sovereignty as bounded by constitutional limitations. Political legislation, therefore, being among the powers of sovereignty, belongs exclusively to the people as a nation.

Civil legislation, being morally an act of agency performed by the delegates or representatives of the people, belongs to the legislature proper, and indirectly to the judiciary in the exercise of a supervisory power arising out of actual controversy. In the hierarchy of government the people frame the constitution, the constitution creates the legislature, and the legislature enacts the laws." Ordron. Const. Leg. 15.

The legislative institutions of England are considered by the best constitutional historians to have been of Teutonic origin; *id.* 62; Freeman, Eng. Const. 18.

The ancient Teutonic assembly in its twofold operation is thus described by Tacitus: "About minor matters the chiefs deliberate; about the more important, the whole tribe. Yet even when the formal decision rests with the people, the affair is always thoroughly discussed by the chiefs. They assemble, except in the case of sudden emergency, on certain fixed days, either at new or at full moon, for this they consider the most auspicious season for the transaction of business. Their freedom has this disadvantage, that they do not meet simultaneously, or as they are bidden, but two or three days are wasted in the delays of assembling. When the multitude think proper, they sit down armed. Silence is proclaimed by the priests, who have on these occasions the right of keeping order. Then the king or the chief, according to age, birth, distinction in war, or eloquence, is heard, more because he has influence to persuade, than because he has power to command. If his sentiments displease them, they reject them with murmurs; if they are satisfied, they brandish their spears. The most complimentary form of assent is to express approbation with their weapons." Church and Brodribb's translation of *Agricola* and *Germania*, 95, 96.

"Such," it is said, "was the earliest form of our racial legislature of which there is record. And in it were the germs of all that came after it. The essential features of Saxon markmoot, shiremoot, folkmoot and witenagemot; of Norman great council; of parliament; of colonial and state legislature; and of the American congress, were historically derived from this ancient and original Teutonic source." Stevens, Sources of the Constitution 60.

The same view of the origin of our legislative institutions is taken by another writer on the subject who says: "The present congress of the United States is a national legislature, and its source may be traced through the British parliament to the meetings in the woods described by Tacitus." 1 Fost. Const. 307. So also it was said by the great Frenchman by whom first was given verbal expression to the modern system of government: "Ce beau système a été trouvé dans les bois." (This splendid system was found in the forest.) Montesquieu, *L'Esprit des Lois*, xi. ch. vi. Foster gives an interesting account of some primitive legislative assemblies of a whole people which are still in existence; of which probably no more perfect democracy

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has ever existed than the town meeting of New England. See 1 Fost. Const. § 47; Spencer, Pol. Inst. § 491; TOWN MEETING.

Going back still further it is said that the Aryan instinct of popular government finds expression in representative government, and confides the law-making power to a legislature rather than to a personal sovereign, the latter system being always adhered to among the Oriental nations and those of Europe not affected by Aryan origin or admixture: Ordronaux, Const. Leg. 5.

The legislative system of America is undoubtedly derived from that of England; the senate being a development from the house of lords and the privy council, and the house of representatives confessedly from the house of commons. The earliest impressions which were received of legislative authority in England, reflected the characteristic powers "of ancient Teutonic assemblies,—the exercise of authority over tribal or national affairs, and the combining of judicial with legislative functions." Stevens, Sources of the Constitution 86. This authority gives an interesting and instructive sketch of the growth of legislative power as it is known in England and America. Prior to Edward the Confessor, the powers of the witenagemot were very great, extending to the making and unmaking of kings; including lease, taxation, treaties, land grants, control of military and naval forces, and ecclesiastical officers, including also the functions of a supreme court of justice. It survived the Norman conquest theoretically with the same powers, but practically they were minimized by the conqueror and his successors at the same time that they observed the formality of professing to act by its counsel and advice. With the Plantagenets the legislative power increased, and under Edward I. parliament attained the perfected organization of the two houses, and the essentials of its subsequent authority which was subject to fluctuations. Subsequent alternations of power and weakness led up to the contest with the Stuarts and the final overthrow both of the throne and the lords, which, it is said, was "so disastrous that neither has since fully recovered the place once held in the fabric of the state." After a partial reaction, the revolution of 1688 finally established the legislative power in England, and through the opposing forces of the rise of the cabinet system, the feebleness of the first two Georges, and on the other hand, the assertion of the royal power by George III., there happened to be at the period of colonial growth in America, and the establishment of American independence, that condition of distinct and independent executive and legislative power which left its impress upon the American constitutions; although in England the result of the cabinet system was the development of the final domination of the crown by parliament; *id.* ch. 4.

The same author finds several points in which the legislative procedure in the United States is traced naturally to that of England. The system of originating legislation by bills passed by both houses and submitted to the approval or veto of the executive, he traces back to the period when parliament began to take the initiative, and legislation arose from its petitions to the king. A like origin is attributed to certain privileges possessed by each house, such as, on the one hand, the judicial rights of the senate and the power of impeachment and of initiating money bills in the house. So also the privileges of members of both houses of freedom of speech, freedom from arrest, and the provision that each house is the judge of the election and qualification of its members; *id.*

Most of the American constitutions provide, in express though in different terms, for the separation of the three powers of government. See EXECUTIVE POWER. The constitutions of the United States, and a few of the states, do not have such a formal provision, but simply vest in the legislature, the legislative power; in the courts, the judicial power; in the executive, the executive power. These various constitutional provisions are collected in Stimson, Am. Stat. L. § 200. In most of them there is not only an express separation of powers, but also a prohibition against the assumption or discharge of the functions of any one department by a person or persons exercising the functions of another. And the Ohio constitution, Art. 2, § 32, provides that the legislature can exercise no judicial power not expressly conferred by the constitution. It is generally conceded, however, that those constitutions which simply vest the three powers in three distinct departments operate as clearly and distinctly as enjoining the separation of the departments as those in which there is an express provision, and this may be accepted as a settled principle of American constitutional law. In an early case it was said that "no power can be properly a legislative and properly a judicial power at the same time; and as to mixed powers, the separation of the departments in the manner prescribed by the constitution precludes the possibility of their existence." 2 D. Chip. 77. It is true, as suggested by another court, that there are many minor duties devolving upon a government which cannot be assigned, strictly speaking, to any one of the three departments; 34 Cal. 520. A suggestion has been made to characterize these nondescript duties as "administrative," but it is very truly remarked that this "does not much mend the matter, for it is at once obvious that this does not make a fourth department, but merely gives a name to a group of duties taken from the legislative and executive departments." 31 Am. L. Reg. N. S. 438. It might be added that the term administrative in this sense might have an application under the systems of continental Europe, where the executive exercises certain legislative functions not belonging to the office as we understand it. See EXECUTIVE POWER. The three departments are not merely equal, but exclusive, in respect to their duties, and absolutely independent of each other; 109 Ind. 8; one cannot inquire into the motives underlying the action of another; 8 *id.* 298. The executive power is much more easily defined than the other two. The greater difficulty of determining the boundary line between legislative and judicial power has been already alluded to under the latter title, as also have some of the reasons why the legislature has continued to exercise some powers which in their nature are judicial, even after the general acceptance of the theory that they should be separated. The difficulties of the subject arise more particularly in the determination of what are legislative and what are judicial acts, rather than in the scientific definition of the distinctive powers. The statement of the principles upon which the definitions rest is comparatively easy, and the cases abound in statements which in varying terms express the difference with sufficient accuracy; some of these cases have been cited in the other titles referred to. A terse expression is that of Mr. Justice Field: "The distinction between a judicial and a legislative act is well defined. The one determines what the law is, and what the rights of the

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parties are, with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it." 99 U. S. 761. Another early statement of the distinction is: "A marked difference exists between the employment of judicial and legislative tribunals. The former decide upon the legality of claims and conduct, and the latter make rules upon which, in connection with the constitution, those decisions should be founded. It is the province of judges to determine what the law is upon existing cases. In fine, the law is applied by the one and made by the other. To do the first, therefore, to compare the claims of the parties with the law of the land before established, is, in its nature, a judicial act. But to do the last, to pass new rules for the regulation of new controversies, is, in its nature, a legislative act." 1 N. H. 204. "The distinction between legislative and judicial acts is that the former establishes a rule regulating and governing matters occurring after its passage, while the latter determines rights and obligations concerning matters which already exist, and have transpired before the judicial power is invoked to pass upon them." 68 Cal. 197; 4 Ill. 238; 1 N. H. 204. In cases where the doubt can be otherwise resolved, probably the best solution of the difficulty may be found in the suggestion that: "Since the legislative department is the broadest in scope, and perhaps corresponds most nearly to the original depositary of all the powers," or, it might be added, of the ultimate sovereignty, "it seems logical to leave to it the residuum, and say that everything not clearly executive or clearly judicial is legislative." 31 Am. L. Reg. N. S. 438. "And, in general, it is to be borne in mind that the question always is, not what is the etymological meaning of legislative and judicial, but what were in fact the functions of legislature and courts, respectively, at the time the constitution in question was framed." *Id.*; 30 W. Va. 482; 55 N. H. 179.

It is of course to be borne in mind that this question is to be dealt with, so far as the states are concerned, solely with reference to the state constitution. There is nothing in the constitution of the United States which forbids the legislature of a state to exercise judicial functions; 2 Pet. 413.

In the earlier development of constitutional government in the United States the separation of the powers of government was less strictly observed than has been necessarily done under the later constitutions, in which it is expressly provided for and insisted upon; it may be remarked that the provisions of later constitutions on this subject are directed more particularly to the restraint of the legislative power within what are considered its proper bounds, with the view to abolish or avoid the abuses thought to attend the exercise of it in the past.

Mr. Justice Miller, in alluding to the settlement of the principle that the courts under the United States constitution are purely judicial bodies, observes that, under United States laws, the converse of this proposition does not hold good as to legislative bodies. He illustrates this by a case in which it was held that a territorial statute of Oregon divorcing a husband and wife, the former being a resident of Oregon and the latter with her children residents of Ohio, where they had been left by the husband under a promise to return or send for them, was a legitimate exercise of legislative power according to the then prevailing judicial opinion of the country, and the understanding of the legal profession at the date of the act creating the territorial government; 125 U. S. 190; and he adds by way of comment: "So extreme a case as this, where manifest injustice was done under the form of law, shows that legislatures ought not to exercise judicial powers; or, at least, if they do exercise them, should be required to cite in all interested parties before they do it." Miller, Const. U. S. 356. The passage of divorce bills by legislatures has, at times, been very frequent in some states; but the tendency of public opinion is decidedly in the line of the comment of Mr. Justice Miller above cited. It is undoubtedly the most extreme case of exercise of legislative power which verges nearly upon the judicial.

In many of the later state constitutions the legislature is expressly prohibited from passing divorce bills, but in the absence of such provision it has been held that the legislature has the power; 2 Kelly 191; 8 Yerg. 77; 125 U. S. 190. The recognition of this power in the United States was simply a continuance of the rule which was in force in England at the time of our independence; and it was treated as a matter of history that the power existed. The English parliament has always passed such bills, and may do so at the present time, except so far as the power may be considered modified by the divorce act of 1857; L. R. 11 App. Cas. 294; 12 *id.* 312, 361, 364; 13 *id.* 741.

In states where there was an express division of governmental powers the question has arisen in several cases whether the power to grant a divorce was so far judicial as to make its exercise by the legislature unconstitutional. It has been so held in several cases; 4 Mo. 147; 12 *id.* 498; 17 *id.* 590; 28 *id.* 192; 4 Fla. 23; see 12 Pa. 351. In some cases it has been held that a legislative divorce was valid where the court had no jurisdiction; 51 Me. 480; 2 G. Greene 604; but not otherwise, under a constitution separating the powers; 16 Me. 479. On the other hand it has been held that such action by the legislature is not an invasion of the judicial power; 8 Conn. 547; 2 Md. 429; 2 Wash. Ter. 3; and the United States supreme court in a case cited *supra* held that the separation of governmental powers, and the implied prohibitions resulting therefrom were not intended to exclude the legislative power over the marriage relation; 125 U. S. 190.

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In Delaware, where the practice of legislative divorces has always prevailed, while as an original question it was considered that the power might be doubted, it was considered that too many rights of person and property would be disturbed to warrant the court in doing otherwise than to uphold legislative divorces; 4 Harring. 442. And in Kentucky there have been a number of intimations on the subject, the result of which seems to be that the separation of the governmental powers would be violated by legislative divorces; 3 B. Monroe 90; at least after the commencement of a suit in the courts; 9 *id.* 295; that where it was founded on the application of one party for breach of contract by the other, it was judicial; 7 Dana 184; but not where it was for the benefit of and acquiesced in by both parties; 1 Metc. (Ky.) 319. The theory of the last case would seem to violate the doctrine which underlies divorce as a judicial proceeding, that no divorce should be obtainable by collusion. It is very well understood that this principle is constantly violated, but usually *sub silentio* and certainly without formal recognition by the court. See also 18 L. R. A. 95, where cases arising under different constitutional provisions are collected; DIVORCE.

In some early cases efforts were made to obtain legislative relief from what were considered "hard cases" in the courts, and acts granting an appeal in a special case were held to be an encroachment upon the judicial power; 2 D. Chip. 77; 3 Greenl. 298; but in a similar case from Connecticut it was held an act of judicial and not legislative authority, but was sustained upon the ground that under the then existing constitution of Connecticut, judicial power was not forbidden to the legislature; 3 Dall. 398. Though the idea of the effect of the constitutional separation of powers was not at first easily understood, it was made apparent as cases were passed upon by the courts that their judgments were subject to no control by the other departments of the government except such as might be given to them by constitutional provisions concerning pardons; 31 Gratt. 105; nor is interference by the legislature permissible "to change the decision of cases pending before the courts, or to impair or set aside their judgments, or to take cases out of the general courts of judicial proceedings;" 2 Allen 361. It has been held that the legislature cannot regulate the issuing of injunctions; 5 Cal. 73; interpret such existing laws as do not apply to its own duties; 43 Mo. 410; 16 N. Y. 424; grant a new trial, or direct the court to order it; 15 Pa. 18; open a judgment to let in garnishees to amend and set aside a verdict obtained against them; 4 R. I. 324; make a judgment of a justice of the peace final and conclusive (under the constitution of the state); 5 Ark. 358; authorize the sale and conversion into personalty of land devised in perpetuity for a charitable use; 1 Houst. 580; give construction to a charter; 64 Miss. 378; legalize defective pleadings without first requiring them to be amended; 31 Cal. 196; remit fines and forfeitures; 26 Ala. 439; provide by resolution that a criminal should be discharged by a court; 7 Humph. 152; validate a transaction which the courts have held void; 129 Mass. 559; or ascertain indebtedness and direct payment between parties; 10 Yerg. 59; 4 Ill. 238. In short, the determination of a question of right, or obligation, or of property as the foundation of a proceeding is a judicial act and not within the legislative power; 68 Cal. 197; 99 U. S. 761. The legislature cannot declare what the law was, but what it will be; 2 Cra. 272.

"It is perhaps true that the lines which separate the legislative and the judicial power are sometimes not very clearly defined, but they are becoming more and more so. That is a judicial power which, in a controversy, decides the right to property between citizens or proper parties. Such a determination is not a legislative power. If a legislature, or at least such a body acting within the dominion of the government of the United States, should undertake to declare that certain property which belonged to A should become the property of B, it would be an invasion of the judicial function, and therefore wholly inoperative and void. No court would hesitate to declare that such a determination was within the province of the courts alone; that the legislature could not effect it, because of this separation of the judicial and legislative powers which is made by the constitution." Miller, Const. U. S. 348. See 1 De Tocqueville, Dem. in America 83.

The legislature has power when unrestrained by a constitutional provision to make a void thing valid by a curative statute; 18 Ind. 258; to declare that executions provisionally issued by justices of the peace, more than two and less than five years after the judgments on which they were issued were rendered, shall not be invalid on that account; 19 Miss. 17; or to authorize the reopening of judgments in which the state is plaintiff for the purpose of setting up a new defence; 26 Cal. 135. But it cannot overthrow judgments by legislative mandate, curative statutes, or otherwise; 107 Ind. 31; nor render valid a judgment which would otherwise be void, since the effect would be the rendition of a judgment by the legislature which is beyond its power; 58 Mich. 364; 40 N. J. L. 383; even if expository statutes be held effective from their date, being practically a new enactment to give them retroactive effect would reverse decisions already made, and they cannot control the interpretation of the courts in dealing with causes of action already accrued; 2 Cra. 194; 11 Mass. 396; 11 Pa. 489; Cooley, Const. Lim. [94]; 31 Am. L. Reg. N. S. 440. See RETROSPECTIVE; STATUTE; EX POST FACTO.

In most of the cases above referred to the distinction between judicial and legislative power is sharply defined, but the cases which present difficulty are of a dif-

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ferent character. Cases of a class presenting more difficulty arise under statutes authorizing the organization of municipal corporations and the change of their boundaries by the courts. Such acts have been held to present judicial questions; 43 Ia. 252; 23 Neb. 426; 42 Kan. 627; 44 *id.* 577; 46 *id.* 738; 5 *id.* 673. A critical examination of these cases and the authorities upon which they were based results in the conclusion that they did not "afford a very secure foundation for a decision that needs authority to rest on and . . . will be generally regarded as out of harmony with the principles heretofore laid down as settled." The real nature of the proceedings it is said are "more apparent in the Kansas cases because they masquerade less in the guise of an ordinary lawsuit." 31 Am. L. Reg. N. S. 443. The writer just cited suggests that the mere necessity of determining facts does not constitute a judicial act, nor is a question judicial simply because it calls for judgment and discretion. The subdivision of a state for the purpose of local government is preeminently a subject for legislative action. The practical effect of the Kansas statute was said by the court to be the submission to a judge in advance of its enactment the question of the legality of a city ordinance; 43 Kan. 633; and this it is suggested was sufficient to cast doubt upon its validity.

The decision of questions of public policy relating to the organization of municipal corporations cannot be exercised by a judge, but properly belongs to the legislative department; 54 N. J. L. 288; in this case it was held that a justice of the supreme court could not be authorized by an act of assembly to decide within what territory resident voters should be permitted to assume municipal existence and authority. It is well settled that mere abstract questions or moot cases cannot be submitted for the decision of the court; Cooley, Const. L. 139; 1 Ind. 21; 8 Mo. 313; accordingly it has been held that: "Whether cities, towns or villages should be incorporated, whether enlarged or contracted in their boundaries, presents no question of law or fact for judicial determination. It is purely a question of policy to be determined by the legislative department." 75 Ill. 153; 32 Minn. 540; 29 Mich. 451; 34 N. Y. 86; 70 Cal. 461. Upon the same principle it was held that the division of a state into drainage districts and their organization was a legislative function and could not be delegated to executive officers if it could be delegated at all; 58 Cal. 624. So an act authorizing a court upon petition of taxpayers to supersede, revoke, and annul municipal ordinances was a grant of legislative power and void; 30 W. Va. 479; there is no legislative power to confer upon the judiciary the power of taxation; 43 N. J. L. 348; or to require courts to state in writing the reasons of their decisions; 13 Cal. 24; or to appoint surveyors; 58 Mich. 364; or judges to write headnotes for their opinions; 118 Ind. 83; or to fix railroad rates of transportation; 72 N. W. Rep. (Minn.) 713.

But courts have no power to inquire into the necessity for an act creating a new judicial district, as that is purely a legislative question; 32 Pac. Rep. (Wyo.) 850.

The question whether a law is wise or just is a legislative and not a judicial question; 130 U. S. 581. So congress can determine whether claims upon the public treasury are founded upon moral and honorable obligations, and upon principles of right and justice; and having decided such questions in the affirmative, and having appropriated public money for the payment of such claims, its decision can rarely, if ever, be the subject of review by the judicial branch of the government; 168 U. S. 427.

The courts have no power to inquire whether notice of an application to the legislature for local or special legislation required by the state constitution, and legislation defining it, has been given. But the legislature is the sole judge of that, and the passage of an act is a legislative judgment that it was properly done; 29 Fla. 1.

The provision of the Chinese Deportation Act of May 6, 1892. which puts the burden of proof upon a Chinese laborer arrested for having no certificate, and requires proof by one capable white witness that he was a resident of the United States at the time of the passage of the act, is within the legislative power to prescribe rules with respect to the admissibility and effect of evidence; 149 U. S. 698.

Legislative power to pass a statute is not established by the enactment of previous statutes of the same character, unless such legislation has been uniform and its validity acquiesced in; 6 App. Div. N. Y. 277.

The legislative power has been held to authorize acts—to make conspiracy to do an act punishable more severely than the doing of the act itself; 159 U. S. 590; to prohibit the removal into a court of errors and appeals of cases of contested elections; 33 Atl. Rep. (N. J.) 380; to provide that courts shall be open at any place in the district where the judge may be; 42 Pac. Rep. (N. M.) 167; to deprive individuals of the right to engage in liquor traffic, though such power is not expressly granted by the constitution, and there is a general reservation to the people of all rights not enumerated; 42 S. C. 222; to prohibit the manufacture and sale of intoxicating liquors; 123 U. S. 623; to authorize a particular person to act as guardian without bond; 116 N. C. 795; to convert real into personal estate for purposes beneficial to those interested. not *sui juris*; 16 Mass. 326; but not for those who are *qui juris*; 53 N. Y. 245; 2 Seld. 358.

A provision in the charter of a railroad company authorizing the guardian of a minor to agree upon the amount of damages for taking the land of a minor is not an invasion of the judicial power but is an exercise of legislative power only; 69 Miss. 939.



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The legislature has no power to reimburse a public officer for money lost in his official capacity, particularly where the money belonged to the state school fund, and was not raised by taxation; and the officer repaid the money lost out of his private funds; 188 Ind. 321.

A question which has given rise to much discussion is the authority of the legislature to require what are known as advisory opinions from courts or judges upon general questions submitted as distinguished from the questions naturally arising in a litigated case. As to the effect of such opinions as precedents, see PRECEDENT. It was early settled as to the federal judges that their judicial duties did not require or empower them to answer such questions; see 4 Am. Jur. 293: 2 Dall. 410, n.; 13 How. 52, n. In some states there are constitutional provisions authorizing the request for such opinions, and in other states there are statutes merely, at least one of which has been held unconstitutional; 10 Minn. 78; s. c. 1 Thayer, Cas. Const. L. 181–3, and notes; and it has been said, "one would expect the same decision with regard to the others if they were contested;" 31 Am. L. Reg. N. S. 456.

In Massachusetts, where there is a constitutional authority for such questions (with reference to a statute making education compulsory), the justices declined to give an opinion when "required" to do so by the legislature, assigning the reason that the legislature had power to ask for such opinions only "upon important questions of law and upon solemn occasions;" 148 Mass. 623. This decision is criticised in an elaborate article, which discusses the power historically and reviews the opinions given by judges in all the states having constitutional provisions on the subject; 24 Am. L. Rev. 369. See also 126 Mass. 557; Thayer, Legal Effect of Opinions of Judges (Pamphlet).

Not only is it beyond the power of the legislature to confer non-judicial functions upon courts and judges, but also, to vest judicial power in any one else. Hence a statute authorizing the election, by agreement of parties, of a member of the bar to try a case in which a judge is interested, was held void; 39 Wis. 390.

Congress can neither withdraw from judicial cognizance any matter which from its nature is the subject of a suit at common law, or in equity, or admiralty, nor bring under the judicial power a matter which, from its nature, is not a subject for judicial determination; 18 How. 272.

As to the legislative power to provide for taking private property for public use, and the legislative function of determining what is a public use, see EMINENT DOMAIN.

As to the authority of the courts to declare statutes unconstitutional and invalid, see CONSTITUTIONAL and JUDICIAL POWER. In the former is also discussed the theory sometimes advanced, but having no substantial basis of authority, that upon some higher ground than that of constitutionality the acts of the legislature may be reviewed by the courts. In a line with the authorities there cited on this subject, and speaking upon the point that the legislative power operating upon proper subject-matter is uncontrolled otherwise than by constitutional restriction, it was said by Storrs, J., speaking for the supreme court of Connecticut: "The defendant insists that we should pronounce the law now in question to be void, on the ground that it is opposed to natural right, and the fundamental principles of civil liberty. We are by no means prepared to accede to the doctrine involved in this claim, that, under a written constitution like ours, in which the three great departments of government, the executive, legislative, and judicial, are confided to distinct bodies of magistracy, the powers of each of which are expressly confined to its own proper department, and in which the powers of each are unlimited in its appropriate sphere, except so far as they are abridged by the constitution itself, it is competent for the judicial department to deprive the legislature of powers which they are not restricted from exercising by that instrument. It would seem to be sufficient to prevent us from thus interposing, that the power exercised by the legislature is properly legislative in its character, which is unquestionably the case with respect to the law we have been considering, and that the constitution contains no restriction upon its exercise in regard to the subject of it." 25 Conn. 290. "I am opposed to the judiciary attempting to set bounds to legislative authority, or declaring a statute invalid upon any fanciful theory of higher law or first principles of natural right outside the constitution. If the courts may imply limitation, there is no bound to implication except judicial discretion, which must place the courts above the legislature and also the constitution itself. This is hostile to the theory of the government. The constitution is the only standard for the courts to determine the question of statutory validity." Hubbard, J., in 18 N. Y. 378; 13 N. Y. 430; Iredell, J., in 3 Dall. 386.

It is well settled that the validity of an exercise of legislative power is presumed, and must be sustained by the court unless it can be clearly shown to be in conflict with the constitution. The principle is thus well stated: "But it is to be borne in mind, that in determining the question whether a statute is within the legitimate sphere of legislative action, it is the duty of courts to make all reasonable presumptions in favor of its validity. It is not to be supposed that the law-making power has transcended its authority, or committed, under the form of law, a violation of individual rights. When an act has been passed with all the requisites necessary to give it the force of a binding statute, it must be regarded as valid, unless it can be clearly shown to be in conflict with the constitution. It is therefore incumbent on those who deny the validity of a statute, to show that it is a plain and

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palpable violation of constitutional right." 16 Gray 417. It is a well-settled principle of American constitutional law that the legislative power of the state is unlimited except by constitutional prohibition, while that of the Federal congress, though equally unlimited within the scope of its granted powers, is limited to the exercise of these powers. "The distinction between the United States constitution and our state constitution is, that the former confers upon congress certain specified powers only, while the latter confers on the legislature all legislative power. In the one case the powers specifically granted can only be exercised. In the other, all legislative powers not prohibited may be exercised." Church, C. J., in 46 N. Y. 401, 404.

"With as full respect for the authority of former decisions as belongs, from teaching and habit, to judges trained in the common-law system of jurisprudence, we think that there may be questions touching the powers of legislative bodies, which can never be finally closed by the decisions of a court, and that the one that we have here considered is of this character." 16 How. 369.

Among the administrative rules laid down by Judge Cooley and quoted with great approval by Professor Thayer, is this: "When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made. And what is true of an act void *in toto* is true also as to any part of an act which is found to be unconstitutional, and which, consequently, is to be regarded as having never, at any time, been possessed of any legal force." Cooley, Const. Lim. 188 and cases cited; 1 Thayer, Cas. Const. L. 175. Other authorities, however, have taken a different view, and the expression that a law is declared by the courts to be unconstitutional and void has been characterized as a common misapprehension as to the effect of a judicial decision upon the constitutionality of a law. It is said that what the court really does in such a case is to ignore the statute and decide the case in hand as if it did not exist; 30 W. Va. 479; the question is simply whether the act furnishes the rule to govern the particular case, and the general abstract question of the constitutionality of an act cannot be directly presented; 9 Ohio St. 543; "The act is not stricken from the statute book, and it is not superseded, revoked, or annulled. If the courts afterwards change their minds, as did the Supreme Court of the United States in the legal tender cases, the statute is just as effective as if it had never been pronounced unconstitutional." 31 Am. L. Reg. N. S. 448. The latter view is undoubtedly correct. It was an early custom for the legislature to repeal laws which had been held to be unconstitutional; 19 Am. L. Rev. 188. It is nevertheless true that the practice of the government would rather have seemed to have settled down to the view expressed by Judge Cooley as it is customary where serious doubt is expressed regarding the constitutionality of a law, to have presented to a court a test case and when a decision has been rendered by the court of last resort adverse to the statute, it is acquiesced in by the other departments of the government. Familiar and recent instances of this were the decisions adverse to the federal income tax law and the Pennsylvania alien tax law, each of which were held to be unconstitutional and thereupon no further attempt was made to enforce them.

It is a familiar principle that one legislature cannot limit or control the legislative actions of its successors and needs no citation to support it; 5 Cow. 538. In a late case this principle was reiterated and it was said to be necessary that each successive body should be left untrammelled except by the restraints of the fundamental law; 111 N. Y. 132; 153 U. S. 628.

The legislature has power to make a contract binding on the state; it is a necessary attribute of sovereignty; 16 How. 369; and it may by such contract, based on a consideration, exempt the property of an individual or corporation from taxation, either for a specified period or permanently; 8 Wall. 430, 439; see also 3 How. 133. In these cases there was a line of very vigorous dissenting opinions in one of which Mr. Justice Miller said: "We do not believe that any legislative body sitting under a state constitution of the usual character has a right to sell, to give, or to bargain away forever the taxing power of the state." 8 Wall. 441.

Nor can the police power be bartered away or shackled by any one legislature. It may, for example, create a corporation with power to do the business of handling and slaughtering live stock, but it cannot continue that right so that no future legislature can repeal or modify it, or grant similar privileges to others; it cannot by contract with an individual restrain the power of a subsequent legislature to legislate for the public welfare and to that end to suppress practices tending to corrupt public morals; 111 U. S. 746; 48 Miss. 147; 34 N. Y. 657, 663; 97 U. S. 25, 28; 101 *id.* 814; 197 U. S. 659.

When its power has not been exceeded and the state is bound by its action, a legislature has no power to revoke its own grants; 6 Cra. 87; 8 Wheat. 1.

Some of the most important questions under this title relate to the subject of the delegation of power. The general doctrine as to delegation of governmental powers has been briefly stated, and some authorities cited, elsewhere. See DELEGATION.

The general principle that the legislative power cannot be delegated is thus tersely expressed by Chief Justice Gibson: "Under a well-balanced constitution the legislature can no more delegate its proper function

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than can the judiciary." 5 W. & S. 283. And see Locke, Civ. Govt. § 142.

It has very often been said,—that legislative power cannot be delegated is elementary law. The difficulty is in determining what authority or discretion may be conferred on a body other than the legislature without contravening constitutional principle. The general question was the subject of extended discussion in a case sustaining the validity of an act conferring upon railroad commissioners the power to determine what are reasonable rates for transportation; 38 Minn. 281.

In that case the court quotes from a previous decision (29 Minn. 474) the general rule against the delegation of legislative power, as requiring the legislature to pass upon two things, the authority to make, and the expediency of, the enactment. The court then proceeds to lay down a limitation for the rule growing out of the necessity of the exercise of discretion and judgment in the exercise of certain powers. Attention is directed to the difficulty in many cases of discriminating between what is properly legislative and what may be executive or administrative duty, and it is said that, while still recognizing the difference between the departments of government, "the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry into which a court will not necessarily enter. (10 Wheat. 1, 46.) The principle is repeatedly recognized by all courts that the legislature may authorize others to do things which it might properly, but cannot conveniently or advantageously, do itself. All laws are carried into execution by officers appointed for the purpose; some with more, others with less, but all clothed with power sufficient for the efficient execution of the law. These powers often necessarily involve in a large degree the exercise of discretion and judgment even to the extent of investigating and determining the facts, and acting upon and in accordance with the facts as thus found. In fact, this must be so, if the legislature is to be permitted effectually to exercise its constitutional powers. If this was not permissible, the wheels of government would often be blocked and the sovereign state find itself hopelessly entangled in the meshes of its own constitution." A number of examples are given of statutes granting discretionary powers to officers charged with the execution of the laws; power given to boards in control of public institutions to make contracts, adopt rules, etc.; the assessment of property for the purpose of taxation; the exercise of the police power in requiring and granting licenses, and the conclusion is stated in the exact words of Judge Ranney, quoted *infra*.

The decision of the Minnesota case was reversed by the Supreme Court of the United States upon grounds not affecting this general statement of the doctrine of the delegation of legislative power; 134 U. S. 418.

This question was elaborately considered by the supreme court in Field *v.* Clark, 143 U. S. 649. In this case it was held that the authority conferred by a tariff act upon the president to suspend by proclamation the free introduction of sugar, etc., when he should be satisfied that any country producing such articles imposed duties or other exactions upon agricultural or other products of the United States, did not conflict with the recognized principle that congress could not delegate its legislative power to the president. The law was complete when it was declared that the suspension should take effect upon a named contingency, the president was the mere agent to ascertain the event upon which the legislative will was to take effect. The court quotes with approval the language, often cited, of Ranney, J., in 1 Ohio St. 88: "The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made." Two Pennsylvania cases are quoted with approval as follows: "Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that the exercise of such discretion is the making of the law." 21 Pa. 188, 202. "To assert that a law is less than a law, because it is made to depend on a future event or act, is to rob the legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet developed, or to things future and impossible to fully know." The proper distinction, the court said, was this: "The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and must, therefore, be subject to inquiry and determination outside of the halls of legislation." 72 Pa. 491, 498.

The authority given by congress to the secretary of war to prescribe rules and regulations for the use, administration, and control of canals, etc., owned or operated by the United States, is held not to be a delegation of legislative power, and rules made pursuant thereto have the force of law; 74 Fed. Rep. 207. So also an act is valid which authorizes the secretary of war in his discretion to require the alteration of bridges which are obstructions to navigation; 82 Fed. Rep. 592.

A very important branch of this subject is the question of legislative power to make the enactment of a law depend in one form or another upon the result of a submission to a popular vote. There have been many cases upon the subject and some conflict of opinion, but the right of the legislature to refer to the voters of a district or territory, such as a county or municipality, a question local in its nature would seem to be quite well settled. Such questions are the division of a county or township and the formation of a new one; 5 Gill 1; see also 24 Wis. 149; 55 Mo. 295; the reuniting of two separate ones which were formerly one; 8 Pa. 391; 51 Ill. 94; 46 Me. 206; 49 Cal. 478; whether a general school law shall be operative in a particular municipality; 45 Mo. 458; as to the location of a county seat; 10 Pa. 214; 38 Wis. 504; 51 Ill. 37; or its removal; 82 Md. 526; so

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whether a municipality may make an improvement or incur a debt; 8 Leigh 120; 45 Ala. 696; 23 N. Y. 439; 12 Ohio N. S. 596, 634; 21 How. 539, 547; 23 *id.* 381; 3 Wall. 327, 654; 44 Mo. 504; 17 Cal. 23; 24 Ill. 75; or have a revision of its charter; 54 Ga. 317; or the regulation of live stock in a subdivision of a county; 87 Tex. 598. Such questions as these, it is said, may always with propriety be referred to the voters of a municipality for decision; Cooley, Const. Lim. [120], where a very large number of cases are collected.

Upon the question whether this principle may be applied to the state at large and the operation of a law be made to depend upon the result of a popular vote, the weight of judicial opinion is decidedly to the effect that it is an unlawful delegation of legislative power; 2 Ia. 165; 9 *id.* 203; 48 Cal. 279, 313; 26 N. Y. 470; 17 Mo. 529; 45 *id.* 458; 93 *id.* 606; 17 Tex. 441; 4 Ore. 132; 73 Ga. 604; 25 Md. 562; 73 *id.* 428.

Earlier cases, however, have maintained this view more strongly than later ones. The ground upon which the doctrine of the invalidity of such legislation is based is very well stated in the leading case of Bartow *v.* Himrod, 8 N. Y. 489. In that case it was said by Ruggles, C. J., that the exercise of such power by the people is forbidden by necessary implication. The entire power of legislation is vested in the legislature, and it has no power to submit a proposed law to the people who voluntarily surrendered the power of direct legislation when they adopted as a form of government a representative democracy.

There are, however, opposing opinions expressed with much force. Redfield, C. J., considers the arguments by which the doctrine is sustained to be "the result of false analogies and so founded upon a latent fallacy," though he admits that he was "at first, without much examination, somewhat inclined to the same opinion." 26 Vt. 357.

The argument pressed as against the prevailing doctrine is that it is competent for the legislature to pass a law which shall only take effect upon the happening of a contingency and that it is no extension of this principle to provide that the contingency shall be a popular vote in its favor; Dixon, C. J., in 26 Wis. 291. In the Vermont case the act held valid was to take effect in any contingency; but in case of a popular vote being against it, the time when it should take effect was postponed to a later day; and in the Wisconsin case an act taxing shares in national banks was to take effect only after approval of a majority of the electors voting on the subject at a general election. In another case similar to that in Vermont the court was equally divided; 3 Mich. 343.

This question of the submission of the legislation to a popular vote has been specially considered in connection with so-called local option laws as to which there has been strong pressure of public opinion tending towards the relaxation of the strictness of the earlier rule and the tendency to hold that the question, whether a general police regulation should be of force in a particular locality, might be submitted to the voters of the district. As to cases on this subject, see DELEGATION; LIQUOR LAWS; LOCAL OPTION.

With respect to any subject matter proper to be submitted to a popular vote it is held that the expression of the sovereign will of the legislature that a particular proposition or question be so submitted need not take the form of a law, but it may be in the form of a joint resolution; the secretary of state must certify to the proper officers of the various counties in the state a joint resolution passed by the legislature, that the question whether a constitutional convention should be held should be submitted to the people; and in case of his refusal he may be compelled by mandamus to do so; 68 N. W. Rep. (N. Dak.) 418.

Acts held invalid as an improper delegation by the legislature of the police power are a provision that a boiler inspector's act shall not apply to boilers inspected by insurance companies and certified by their authorized inspectors to be safe; 68 N. W. Rep. (Minn.) 77; an act providing that hogs shall not run at large in a county, if the county courts on petition of voters direct that the act be enforced therein: 23 S. E. Rep. (W. Va.) 666; an act directing the insurance commissioner to prescribe a standard policy and forbidding the use of any other; 166 Pa. 72; acts authorizing insurance commissioners to adopt a printed form of fire policy with conditions indorsed thereon, which, as nearly as possible, in type and form shall conform to that adopted by another state; 65 N. W. Rep. (Wis.) 738; 59 Minn. 182. In the last case it was admitted that an act similar to that of Pennsylvania would be invalid, but it was unsuccessfully contended that the legislative direction to conform as nearly as possible to a specified policy would take the case out of the principle laid down by the Pennsylvania court. So also was an act permitting a justice to put a person charged with drunkenness as a disorderly person under recognizance to take the treatment of a private corporation administering a cure for drunkenness, and providing that on reports showing compliance, he should be acquitted and discharged; 99 Mich. 117.

A law providing for the adjustment of state bonds, and authorizing judges to decide which of two sections of the act should take effect, gives them legislative power and is void; 29 Minn. 474; in this case the subject was very elaborately argued, and the distinction between legislative and judicial power is very clearly stated by the court. See *supra*.

The legislature cannot leave to commissioners the power to decide in what proportion the expense of laying out and opening a public avenue should be imposed on townships of a county or wards of a city; 37 N. J. L. 12.

Acts held not to be a delegation of legis-

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lative power and therefore valid, are authorizing the fish commissioners to give permits to take fish for propagation at times and by methods otherwise prohibited; 101 Mich. 98; requiring carriers of passengers to furnish their agents with certificates of authority to sell tickets, on which a license shall be issued by the state; 57 Minn. 347; authorizing a court to issue certificates of incorporation to municipalities; 39 W. Va. 179; permitting the board of supervisors of counties to determine whether a county shall come within or remain without the provisions of an act to establish law libraries; 99 Cal. 571; providing that an act in relation to public roads shall not go into effect until recommended by the grand jury; 91 Ga. 770; authorizing railroad and warehouse commissioners to make a schedule of a maximum rate of charges for each railroad company in the state; 149 Ill. 361; authorizing the union of two railroad companies and that the united company may discontinue such operations of the road as the directors deem necessary; 66 N. H. 569; authorizing railroad commissioners to regulate freights; 70 Ga. 694; or to make reasonable regulations for the prevention of excessive charges and unjust discrimination; 111 N. C. 463; or to order a company to remove grade crossings and on its failure to do so to determine the portion of the expense thereof which is to be paid by the company; 62 Conn. 527; to provide that the mayors of cities of a certain class may be elected by the people or appointed by the council as provided by ordinance; 30 S. W. Rep. (Ky.) 629; to authorize park commissioners to determine where and of what material sidewalks and road beds shall be constructed; 62 N. W. Rep. (Mich.) 405; to authorize a state medical board to exercise powers of registration and examination; 38 Ohio L. J. 239; s. c. 47 N. E. Rep. (Ohio) 1041.

Authority to transfer cases pending in a territorial court to the federal courts may be delegated to a constitutional convention, upon the admission of the territory as a state; 82 Fed. Rep. 340.

The legislature cannot delegate its lawmaking power, but it has the power to create municipal corporations and to invest them with the powers of local government, including particularly local taxation and police regulation; Cooley, Const. Lim. [191]. Judge Cooley considers that local self-government being a part of the English and American system, it is to be understood that even if it is not expressly recognized in a constitution, the instrument is presumed to contemplate its existence and continuance; *id.* [35]; 28 Mich. 228; 55 N. Y. 50. It is a legitimate exercise of sovereignty belonging to the legislative power of a state to create corporate bodies for municipal purposes with the means of self-government; 8 Humph. 1; or to delegate to municipal assemblies the *power* of enacting ordinances relating to local matters; 164 U. S. 471. This is not regarded as a delegation of legislative power, because the local board or municipal body which is invested with such powers is regarded as exercising them as an agency for local legislation of the sovereign power of the state. The settled judicial opinion is thus well expressed: "It seems to be generally conceded that powers of local legislation may be granted to cities, towns, and other municipal corporations. And it would require strong reasons to satisfy us that it could have been the design of the framers of our constitution to take from the legislature a power which has been exercised in Europe by governments of all classes from the earliest history, and the exercise of which has probably done more to promote civilization than all other causes combined; which has been constantly exercised in every part of our country from its earliest settlement, and which has raised up among us many of our most valuable institutions." Bell, J., in 10 Fost. 292; 114 Mass. 214; 65 Pa. 76; 29 Wis. 415; 15 N. Y. 532; 45 Mo. 458; 50 Ala. 486. The creation of such corporations and the grant to them of powers of local legislation do not divest or impair the general legislative power and control of the state legislature, which may increase, diminish, or take away such powers, amend the charter, overrule their legislative action, or abolish them altogether. There can be acquired by the municipal corporation as against the state no vested right in the rights and franchises granted to it, and the municipal charter does not constitute a contract, so that such legislation would be considered in violation of the constitutional provision protecting the obligation of contracts; Cooley, Const. Lim. [192]. This principle is recognized in the Dartmouth College case; 4 Wheat. 518; Dillon, Municipal Corporations §§ 24, 30, 37; see 24 Mich. 87; and it may be affirmed that it is supported by a uniform current of authority. It is true that here and there may be found expressions by courts and judges, which, to the casual reader, would give the impression that there may be some inviolable character attached to a grant of municipal franchises, but an examination of such cases will usually, if not invariably, disclose the fact that the expressions referred to go beyond the proper consideration of the case in question, and in any case are unsupported by authority. The true principle is thus stated: "Public corporations are but parts of the machinery employed in carrying on the affairs of the state; and they are subject to be changed, modified, or destroyed as the exigencies of the public may demand. The state may exercise a general superintendence and control over them and their rights and effects, so that their property is not diverted from the uses and objects for which it was given or purchased;" 13 Ill. 30. The complete legislative control over municipal corporations is said to be subject to some limits, of which some are "expressly defined; others spring from the usages, customs, and maxims of our people; they are a part of its history,

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a part of the system of local self-government, in view of the continuance and perpetuity of which all our institutions are framed, and of the right to which the people can never be deprived through express renunciation on their part." Cooley, Const. Lim. [230]. See IMPAIRING THE OBLIGATION OF CONTRACTS.

Such is the right of choosing under forms and restrictions prescribed by the legislature, officers of local administration, and the determination by the local administration of the pecuniary burdens it will assume; Cooley, Const. Lim. [230]; so it has been held that the legislature cannot divest a municipal corporation, of property legally acquired by it; R. M. Charlt. 342. As the rule is sometimes expressed, municipal powers may be changed by the legislature if vested rights acquired thereunder are saved; 13 Cal. 343; 27 How. Pr. 342.

Where the legislature uses its power to change or modify the political rights and privileges of municipal corporations, a distinction is drawn between those rights and mere property rights acquired by the corporation, which are protected for the same reasons and upon the same principle as are similar rights in individuals; Cooley, Const. Lim. [237], where the cases are collected.

In any state the legislative power must spend its force within its own territorial limits. It cannot make laws by which people outside of the jurisdiction must govern their actions except as they choose to resort to the remedies provided by the state or deal with property situated within it. See FOREIGN CORPORATIONS; LEX FORI. It can have no authority upon the high seas beyond state lines because that is the point of contact with other nations and brings into operation and consideration the principles of international law with which the federal government alone can deal. See FISHERY; SEA. As a general rule the state cannot provide for the punishment of acts committed beyond the state boundary, because such acts, if offences at all, are such only against the sovereignty within whose limits they have been done; Cooley, Const. Lim. [128]. In some cases, however, where "the consequences of an unlawful act committed outside the state, have reached their ultimate and injurious result within it, it seems that the perpetrator may be punished as an offender against such state." *Id.* Such cases arise most frequently where property is stolen in one jurisdiction and carried into another, or where a homicide is committed by a mortal blow in one jurisdiction while death results in another; see 8 Mich. 320; 11 *id.* 327; 2 Park. Cr. R. 590; 36 Miss. 593; 16 Wis. 398; 35 N. C. 603.

The legislative power over a place purchased by the United States with the consent of the legislature of the state, is transferred from the state to the federal government, except as restrained by some qualification in the expression of state consent; 53 Pa. 482. See JURISDICTION.

See, generally, CONTRACT; CONSTITUTIONAL; CORPORATION; DELEGATION; DUE PROCESS OF LAW; EMINENT DOMAIN; EXECUTIVE POWER; FOREIGN CORPORATIONS; IMPAIRING THE OBLIGATION OF CONTRACTS; JUDICIAL POWER; LIBERTY OF CONTRACT; LIQUOR LAWS; POLICE POWER; STATUTE; and titles on the different subjects of legislation.

**LEGISLATURE.** That body of men which makes the laws for a state or nation. See LEGISLATIVE POWER.

**LEGITIM.** (Called otherwise Bairn's Part of Gear.) **In Scotch Law.** The legal share of the father's free movable property due on his death to his children. See BAIRN'S PART; DEAD MAN'S PART; LEGITIME.

**LEGITIMACY.** The state of being born in lawful marriage. See BASTARD; PRESUMPTION; INTENDMENT OF LAW; CHILD.

**LEGITIMACY DECLARATION ACTS.** English statutes which provide that any natural born subject of the queen, being domiciled in England or Ireland, or claiming any real or personal estate in England, may apply to the high court of justice for a decree declaring that the petitioner is the legitimate child of his parents, and that the marriage of his father and mother, or of his grandfather and grandmother, was a valid marriage, or for a decree declaring that his own marriage was valid. 21 & 22 Vict. c. 93.

**LEGITIMATE.** That which is according to law.

To make lawful; to confer legitimacy; to place a child born before marriage on the same footing as those born in lawful wedlock. 26 Vt. 653.

**LEGITIMATION.** The act of giving the character of legitimate children to those who were not so born.

Legitimation is a fiction of the law, whereby one born out of lawful wedlock is considered the offspring of the marriage between the parents. 24 La. Ann. 580.

In Louisiana, the Civil Code, art. 217, enacts that "children born out of marriage, except those who are born of an incestuous or adulterous connection, may be legitimated by the subsequent marriage of their father and mother, whenever the latter have legally acknowledged them for their children, either before their marriage, or by the contract of marriage itself."

The legitimation of natural children was permitted in none of the earlier German codes, except the Lombard, and was strongly opposed to the whole spirit of German family law, but that the father could, by symbolic forms, acknowledge his natural child and give him a place and protection within his household is proved from German and Scandinavian sources. Among the Anglo-Saxons, a child born in unlawful marriage had no rights of inheritance, and it may be inferred that all other rights of kindred were denied to it except that of protection, even when acknowledged by the father. Essays, Ang.-Sax. L. 126. In the conflict between the church and the law at the Merton parliament in regard to the question whether a bastard could be legitimized, the barons declared with one voice that they would

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not change the laws of England, and that nothing could make a bastard legitimate, although it was contended that the old English custom authorized legitimation by allowing the parents on the occasion of their marriage to place such children beneath the cloak under which they stood whilst the marriage ceremony was performed, the children thereby becoming "mantle children," but this practice the king's court of Henry II. had rejected and that of Henry III. refused to retreat from the precedent. 2 Poll. & Maitl. 395.

In Maine, Pennsylvania, Illinois, Michigan, Iowa, Minnesota, California, Oregon, Nevada, Washington, the Dakotas, Idaho, Montana, and New Mexico, marriage of the parents legitimatizes an illegitimate child.

In Massachusetts, Vermont, Illinois, Indiana, Wisconsin, Nebraska, Maryland, Virginia, West Virginia, Kentucky, Missouri, Arkansas, Texas, Colorado, Idaho, Wyoming, Georgia, Alabama, Mississippi, and Arizona, in addition to the marriage of the parents the father must have acknowledged or recognized the child as his.

In New Hampshire, Connecticut, and Louisiana, both parents must acknowledge, but in the last named state the acknowledgment is made either by an authentic act before marriage or by the contract of marriage, and an exception is made of those children born of an incestuous or adulterous connection. In California, Nevada, the Dakotas, and Idaho, a public acknowledgment by the father of an illegitimate child, receiving such child (with the consent of his wife, if married) into his family, and otherwise treating it as if it were legitimate, thereby renders it legitimate for all purposes. Acknowledgment by either or both parents, or by the father with the consent of his wife, or by the mother with the consent of her husband, will legitimatize a child. In Michigan, if the father, by writing executed, acknowledged, and recorded like deeds of real estate, but with the judge of probate, acknowledge such child, he is legitimate for all purposes. In North Carolina, Tennessee, Georgia, and New Mexico the putative father of a bastard has a process in court by which he may legitimatize the child.

A question considerably discussed in England is where one who is domiciled in a country sustaining the doctrine *legitimatio per subsequens matrimonium* marries a woman who had before the marriage a child by him, the husband having been domiciled prior thereto in a country where the doctrine does not prevail. In one case the exact question arose where the husband domiciled in England went to France, and before changing his domicile cohabited with a French woman who had by him a daughter, and afterwards becoming domiciled in France, he married the woman at the British Embassy in English form, and later in French form with recognition of the child, but the latter was held not to be legitimate; 2 K. & J. 595; s. c. 25 L. J. Ch. 621. This case is the subject of severe criticism in an article in 22 Law Mag. & Rev., 4th. 171. where the English cases touching upon the subject are carefully reviewed, with the conclusion that "it is not rash to say that before the case last mentioned such authority as existed on the point was in favor of the legitimacy." See 7 Cl. & F. 817, 842; 11 Eq. 474; 17 Ch. Div. 266; 24 Ch. Div. 637; [1892] 3 Ch. 88; L. R. 1 H. L. Sc. 441. See BASTARD; DESCENT AND DISTRIBUTION; CHILD.

**LEGITIME.** In Civil Law. That portion of a parent's estate of which he cannot disinherit his children without a legal cause.

The civil code of Louisiana declares that donations *inter vivos* or *mortis causa* cannot exceed two-thirds of the property of the disposer, if he leaves at his decease a legitimate child; one-half if he leaves two children; and one-third if he leaves three or a greater number. Under the name of children are included descendants of whatever degree they may be: it must be understood that they are only counted for the child they represent.

In Holland, Germany, and Spain, the principles of the Falcidian law, more or less limited, have been generally adopted; Coop. Just. 516.

In the United States, other than Louisiana, and in England, there is no restriction, except as to the widow's rights, on the right of bequeathing. But this power of bequeathing did not originally extend to *all* a man's personal estate: on the contrary, by the common law, as it stood in the reign of Henry II., a man's goods were to be divided into three equal parts, one of which went to his heirs or lineal descendants, another to his wife, and the third was at his own disposal; or, if he died without a wife, he might then dispose of one moiety, and the other went to his children; and so *e converso* if he had no children, the wife was entitled to one moiety, and he might bequeath the other; but if he died without either wife or issue, the whole was at his own disposal; Glanville, l. 2, c. 5; Bracton, l. 2, c. 26; 2 Poll. & Maitl. 346. The shares of the wife and children were called their reasonable part: 2 Bla. Com. 491. See DEAD MAN'S PART; BAIRN'S PART; FALCIDIAN LAW.

**LEGITIMI HÆREDES.** *Agnati*, because the inheritance was given to them by the laws of the Twelve Tables, whereas the *cognati* only received it from the prætor. Sand. Just. 280.

**LEGENITA.** A fine for criminal conversation with a woman. Whart. Lex.

**LEGULEIUS.** One skilled in the law. Calvinus, Lex.

**LEHURECHT.** The German feudal law. 1 Poll. & Maitl. 214.

**LEIDGRAVE.** See LATHREEVE.

**LEIPA.** A fugitive; one who escapes or runs away from service. Spelman.

**LEND.** In a will, the words "I do *lend* to B's four children, C, D, E, and F, all my estate, real and personal," with a further direction that the estate should be

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kept together until C arrived at 21 years, when it was to be equally divided among the children, their heirs and assigns forever, the word lend was held not to tie up the estate to the time of the death of the children. 5 Ired. L. 361.

**LENT.** The annual forty days of penitence and fast from Ash Wednesday until Easter.

**LEOD.** The people; the nation; the country. Spelman, Leodes.

**LEODES.** A vassal or liege man; service; a were gild. Spelman.

**LEOHT-GESCEOT.** A tax for supplying a church with lights. Anc. Inst. Eng.

**LEONINA SOCIETAS.** An attempted partnership in which one party was to bear all the losses, and have no share in the profits. This was a void partnership in the Roman law. Brown.

**LEP AND LACE.** A custom in the manor of Writtle in Essex, that every cart, except that of a nobleman, which went over Greenbury within that district should pay 4d. to the lord. Blount.

**LEPROZO AMOVENDO.** An ancient writ that lay to remove a leper or lazar who thrust himself into the company of his neighbors in any parish. Reg. Orig.

**LENDER.** He from whom a thing is borrowed. The bailor of an article loaned. See BAILMENT; LOAN.

**LESION. In Civil Law.** A term used to signify the injury suffered, in consequence of inequality of situation, by one who does not receive a full equivalent for what he gives in a commutative contract.

The remedy given for this injury is founded on its being the effect of implied error or imposition; for in every commutative contract equivalents are supposed to be given and received. Persons of full age, however, are not allowed in point of law to object to their agreements as being injurious, unless the injury be excessive; Pothier, Obl. p. 1, c. 1, s. 1, art. 3, § 4. But minors are admitted to restitution, not only against any excessive inequality, but against any inequality whatever; Pothier, Obl. p. 1, c. 1, s. 1, art. 3, § 5; La. Code. art. 1858. See FRAUD; GUARDIAN; SALE.

**LESPIGEND.** An inferior officer in the forests who cared for the vert and venison.

**LESS.** In a mining lease, a covenant to pay certain royalties where "less than" a stated quantity is gotten, is applicable to a case where none is gotten. 26 L. J. Ex. 41: 1 H. & N. 195. The words "less than" have been held synonymous with "not exceeding"; 21 L. J. Ex. 160; 7 Ex. 591.

**LESSA.** A legacy. Mon. Ang., t. 1, p. 562.

**LESSEE.** He to whom a lease is made. He who holds an estate by virtue of a lease. The word has been held to include the assignee of a lease. Cab. & El. 348. See LANDLORD AND TENANT.

**LESSOR.** He who grants a lease. See LEASE; LANDLORD AND TENANT.

**LESTAGE, LASTAGE** (Sax. *last*, burden). A custom for carrying things to fairs in markets. Fleta, l. 1, c. 47; T. L. See LASTAGE.

**LESWES.** Pastures. Co. Litt. 4 *b*.

**LET.** Hindrance; obstacle; obstruction.

To lease; to grant the use and possession of a thing for compensation. It is the correlative of hire. As an operative word in a lease, it is synonymous with demise; 12 M. & W. 68; 13 L. J. Ex. 135; 1 C. P. D. 152; 45 L. J. C. P. 405. See DEMISE; HIRE. To award a contract of some work to a proposer, after proposals have been received. 35 Ala. 33.

**LETTER.** He who, being the owner of a thing, lets it out to another for hire or compensation. Story, Bailm. § 369. See HIRING.

**LETTER.** An epistle; a despatch; a written message, usually on paper, folded up and sealed, and sent by one person to another. 1 Cai. 582. It will include the envelope in which it is sent. 19 Blatchf. 10.

*Property in.* Letters written by one person to another are the property of the latter, and he has a right not only to have them produced for use in litigation, but delivered up to him as the true owner. A writer of letters has a special property in them to prevent their publication or communication to other persons; 50 How. Pr. 194; 2 Story 100; 6 McLean 128; 5 Blatchf. 285. See 7 Alb. L. J. 19.

Letters written to a wife by a former husband belong to her and not to his estate, or to her second husband; 2 Bush 480; see 64 Vt. 450; and the recipient of a letter has no such property in it as passes to his executor as an asset of the estate; 22 How. Pr. 198.

Where a bill in equity charged that the defendant surreptitiously and illegally took from the trunk of the plaintiff's son and from the plaintiff's own bureau certain letters written by the plaintiff to her son, and by her son to her, it was held that the special right in the letters written by plaintiff was one that could only be adequately protected in equity, and that the court having jurisdiction for discovery should go on and order all the letters to be restored; 180 Pa. 14. See INJUNCTION; PRIVACY.

*Letters in evidence.* A letter is not admissible in evidence without proof of its being genuine, and such proof cannot be supplied solely by what appears on its face, as its contents, the letter head, etc.; 93 Ga. 648; but letters received in the regular course of business responsive to letters on the same subject, with proper letter-heads,

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envelopes, etc., are presumably authentic, according to their purport; 61 Fed. Rep. 804. In order to prove a memorandum, under the statute of frauds, a letter and envelope are considered as one document; 76 L. T. Rep. 441.

Letters in themselves inadmissible are so if they communicate any fact to the party against whom they are read which either affects the right in question or explains his subsequent conduct; 22 E. C. L. R. 273, 845. A letter stating particular facts cannot be read in evidence merely because it was sent, but if the party to whom it was addressed wrote an answer, such answer might be read as evidence against the party who wrote it, and the letter to which it was an answer would be admissible for the purpose of explaining such answer. A letter and answers thereto are subject to the same rule as applies to a conversation; if part is given in evidence by one party, the other party is entitled to have the whole produced; 4 Rob. 12; 41 Miss. 81. Failure to answer a letter is not generally deemed an admission of its contents; 97 N. Y. 1.

Letters in evidence fall within the general rule as to written documents; 27 L. J. C. P. 193; their construction is for the court unless extrinsic circumstances be capable of explaining them; 27 L. J. Ex. 34; but if they are written in so dubious a manner as to be capable of different constructions, or to be unintelligible without the aid of extrinsic circumstances, their meaning becomes a question for the jury; 1 Term 182; 8 C. B. 44; so the jury must deal with the whole question, where a contract is made partly by letter and partly oral; 17 C. B. N. S. 107.

It is a general *prima facie* presumption that all *documents were made on the day they bear date*, and this presumption obtains where the document is a letter; 2 Ex. 191, 196; 6 Bing. N. C. 301; 2 B. & Ad. 502; 2 M. & H. 853; but the date of a letter is not evidence that it was forwarded on that day; 53 Fed. Rep. 485; 102 Mass. 177; nor can the date of the receipt of a letter be established by witnesses who base their calculations upon its date; the date of a letter does not prove the date of its receipt, or the time of mailing it, or that it was ever mailed; 53 Fed. Rep. 485. In an action for criminal conversation, where the letters offered are those of a wife to a husband, to show the terms on which they lived; evidence must show when they were written; 1 B. & Ald. 90; 9 C. & P. 198; 2 Stark. 196.

Postmarks on letters are *prima facie* evidence that the letters were in the post at the time and place specified; 3 Stark. 64; 7 East 65; 29 How. St. Tr. 103; 3 Fed. Rep. 484; 1 Camp. 215; 2 *id.* 620; 7 M. & W. 515; 7 H. L. Cas. 646; although it be shown that in aid of justice, postmasters sometimes furnish empty envelopes bearing the post-office stamp, where they have never in fact been in the mail; 1 Fed. Rep. 126. Postmarks are evidence that the letter was mailed and sent, rather than that it was merely put in the post office; 15 Conn. 206; 16 Vt. 63; 4 R. I. 525; 3 Dill. 571.

The burden of proving the receipt of a letter rests upon the party who asserts it; 105 Mass. 391; 111 U. S. 185, If a letter properly directed is proved to have been either put in the post office or delivered to the postman, it is presumed to have reached its destination at the regular time, and to have been received by the person to whom it is addressed; 2 H. Bla. 509; 16 M. & W. 124; 1 H. L. Cas. 381; 48 L. J. Ex. 577; 6 Wheat. 102; see 4 R. I. 525, where it is held that any further evidence of the receipt of a letter than that it was properly directed and mailed would be wholly unnecessary, always difficult and often impossible. But this presumption is not one of law, but solely one of fact; 148 Pa. 405; 45 Me. 50; founded upon the probability that the officers of the government will do their duty, and the usual course of business; 105 Mass. 391; 111 U. S. 185. It may be rebutted by evidence showing that it was not received; 69 N. Y. 571; 93 Ala. 215; 12 Col. 539; 148 Pa. 405. But the fact of non-return of a letter bearing a request for return in case of failure to deliver so strengthens the presumption of receipt from mailing that it becomes well-nigh conclusive; 154 Pa. 323. On proof of the posting of a letter, properly addressed, the fact that it was not returned to the dead letter office is evidence of its receipt; 16 M. & W. 124. The facts that all letters put in a certain place were in the proper course of business put in the mail, and that a particular letter was put in such place, are evidence that it was despatched; 4 Campb. 193. See L. R. 3 Ch. Div. 574; 61 N. Y. 362; 58 N. H. 97.

In the absence of evidence that a letter was stamped before mailing, no presumption arises as to its receipt; 31 S. W. Rep. (Mo.) 938; but when one alleges that he duly mailed a letter, the court will presume that the requirements of the law as to stamping, etc., were complied with; 80 Fed. Rep. 337. The question of the receipt of the letter is for the jury; 115 Pa. 539; 148 *id.* 405; 130 Mass. 186; 138 N. Y. 473. See Taylor, Ev., Chamberlayne ed. 183. See PRESUMPTION.

*Contract by letter.* The rule that a contract is complete at the instant when the minds of the parties meet is subject to modification where the negotiation is carried on by letter, for it is in that case impossible that both parties should have knowledge of the moment it becomes complete. The offer and acceptance cannot occur at the same moment of time; nor can the meeting of the minds of the parties on the subject be known by each at the moment of concurrence. The acceptance must succeed the offer after the lapse of some interval of time, and if the process is to be carried further in order to complete the bargain, a notice of the acceptance must be received; the only effect is to reverse the position of the parties, changing

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the knowledge of the completion from one party to the other; Benj. Sales § 69. When an offer is made by letter, it is presumed to continue during such period as is determined by, or is reasonable with regard to, the terms of the offer, or until notice of its recall has reached him to whom the offer is made; 1 B. & Ald. 681; 6 Eng. Rul. Cas. 80; even if, through fault of the sender, the letter containing the offer is delayed; 6 Wend. 103; 12 Conn. 436; provided the offer is standing at the time of the acceptance; 6 Wend. 104; and where a proposal is made by letter, the *mailing* of a letter containing an acceptance of the proposal completes the contract; 6 Wend. 104; 1 B. & Ald. 681; 1 H. L. Cas. 381: 5 Pa. 339; 9 How. 390; 149 U. S. 411; 63 Ia. 484; 55 Ga. 438; 32 Md. 196; 67 Tex. 163; 42 Wis. 152; 15 R. I. 380; 16 Fed. Rep. 646; L. R. 7 Ch. 587; 20 Q. B. Div. 640: although the acceptance may be delayed or may not be received through fault of the mail: 9 How. 390; 36 N. Y. 307; 48 N. H. 14; 3 Metc. (Ky.) 80; 4 Ga. 1; 31 Md. 99; 161 Mass. 496; and this seems to be the general rule both in this country and in England, although it has been held that the contract is not complete until the letter of acceptance has been received by the party who makes the offer; 1 Pick. 281; L. R. 6 Ex. 108, overruled in 4 Ex. D. 216; but if undue delay or failure of delivery of the letter of acceptance is caused by the acceptor, there is no contract; 10 Pick. 326; 55 Ga. 438. Placing the acceptance in a letter box at the defendant's place of business completes the contract; 61 N. Y. 362; but entrusting it to a messenger for delivery is not sufficient, where there is no evidence that it was received; 4 Misc. Rep. 614.

The acceptance must be unconditional and in accordance with the terms of the offer and within the time prescribed by the offer; 21 Minn. 155; 53 Me. 20; 3 Johns. 534; 4 Wheat. 225; 43 N. Y. 240; 37 Ia. 186; 59 Wis. 315; 159 Pa. 612; even where the offer called for reply by return mail, compliance was held essential; 90 Ill. 525; 67 Ia. 678; and where in answer to a letter of proposal, the accepting party merely writes that he is willing to make arrangements on the terms proposed, it was held to be not an unconditional acceptance; 47 Hun 494; 49 N. E. Rep. (Ind.) 40; 22 Fed. Rep. 596.

Where there is no limitation as to time in the offer, the acceptance must be within a reasonable time; 63 Ia. 484; 50 Am. Rep. 752; the following day will suffice; 1 H. L. Cas. 381; but four months will not; 43 N. Y. 240. See 6 Eng. Rul. Cas. 91.

In the leading case of Cooke *v.* Oxley the rule was laid down that one who gives time to another to accept or reject an offer is not bound to wait until the specified time expires, if no consideration has been given for the offer; 3 Term 783; see Pothier, *Contrat de Vérité*, No. 32; 3 Cush. 158; 5 Stew. & P. 264; 43 N. H. 16; but in this case the offer was not by letter, and the question as to the revocation of such an offer (when the offer was made by mail) was for a long time unsettled. In 1 Pick. 278 it was held that a revocation of an offer not then accepted takes effect from the time it is posted, although not received by the other party until after he had mailed his acceptance, and that no contract existed because, at the moment the acceptance was sent, the mind of the party offering had changed; in L. R. 6 Ex. 108; the same doctrine is laid down, but this case was doubted in 7 Ch. App. 592; and the English and American rule is now well settled that the offer cannot be withdrawn, unless the withdrawal reaches the party to whom it is addressed before the letter of acceptance has been mailed; 9 How. 390; 49 L. J. C. P. 816; 5 Q. B. D. 351. The withdrawal of the offer after the acceptance has been posted is inoperative; as a state of mind not notified cannot be regarded in dealings between man and man, and an uncommunicated revocation is, for all practical purposes, no revocation at all; 5 C. P. D. 344; 5 Q. B. D. 346; 2 App. Cas. 666; 46 N. Y. 467. The posting a letter of withdrawal is not a communication to the person to whom it is sent; 5 C. P. D. 344. See Wald, Poll. Contr. 26; Benj. Sales § 65; 6 Eng. Rul. Cas. 80. A revocation of an offer is not complete till it is brought to the mind of the offeree; merely mailing a letter of revocation is not a revocation; [1892] 2 Ch. 27, C. A. Nor is the mere posting of a letter allotting shares in a company to an applicant such a communication as to bind the applicant; L. R. 11 Eq. 86; 20 L. T. R. N. S. 729.

It is said to be an open question in England as to the effect of a revocation of an accepting letter communicated to the other party before the accepting letter is received by him; Chit. Contr., 13th ed. 15, where it is submitted that in such case there should be no contract; see also, 4 Ex. D. 235; 9 Shaw & Dun. 109. Other writers are of opinion that the mailing of an accepting letter fixes the contract, and that a revocation by telegram or a messenger, outstripping the accepting letter, would have no effect; Poll. Contr. 35; see, also, Ans. Contr. 27; Story, Contr. § 198; and it was so held in 2 Dutch. N. J. 268.

Contracts by telegraph, under most of the authorities, obey the same rule as contracts by mail; Hare, Contr.; 3 Dill. 571.

Payments may be made by letter at the risk of the creditor, when the debtor is authorized, expressly or impliedly, from the usual course of business, and not otherwise; Peake 67; 1 Ex. 477; Ry. & M. 149; 3 Mass. 249.

See, generally, as to contracts by letter, 32 Am. Rep. 40, n.; Wald, Poll. Contr. 26; 6 Eng. Rul. Cas. 80, n.; Benj. Sales §§ 44, 69; 9 Jurid. Rev. 291; 3 Add. Contr. App. 4–13; Smith, Contr. 164; 9 L. Quart. Rev. 185, 265, n.: Langd. Contr. 15; Story, Contr. § 198. See SALE; DECOY LETTER; MAIL; OFFER.

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**LETTER BOOK.** A book containing the copies of letters written by a merchant or trader to his correspondents.

A press copy in a letter book stands in the same relation to the original as a copy taken from the letter book; both are secondary evidence, and are receivable on the loss of, or after notice to produce, the original; but the decisions are not entirely uniform on this point; 3 Camp. 305; 37 Conn. 555; 102 Mass. 362; see 1 Whart. Ev. §§ 72, 93, 133; 1 Greenl. Ev. § 116; 44 N. Y. 116; 35 Md. 123; 73 Ill. 161. See COPY; EVIDENCE; PRESS COPY.

**LETTER CARRIER.** A person employed to carry letters from the post-office to the persons to whom they are addressed. See various provisions in U. S. Rev. Stat.

Eight hours constitute a day's labor for letter carriers; 1 Supp. R. S. p. 587. For time employed in excess of eight hours a day, he is entitled to extra pay; 148 U. S. 124; and time worked in excess of eight hours in one day cannot be set off against a deficiency on another when he worked less than eight hours; 148 U. S. 134. See EIGHT-HOUR LAWS.

**LETTER CLAUS.** See LETTERS CLOSE.

**LETTER MISSIVE. In English Law.** A letter from the king or queen to a dean or chapter, containing the name of the person whom he would have them elect as bishop. 1 Steph. Com. 666. See CONGE D'ELIRE. A request addressed to a peer, peeress, or lord of parliament, against whom a bill has been filed, desiring the defendant to appear and answer to the bill. It is issued by the lord chancellor, on petition, after the filing of the bill; and a neglect to attend to this places the defendant, in relation to such suit, on the same ground as other defendants who are not peers, and a subpœna may then issue; 2 Madd. Ch. Pr. 196; Coop. Eq. Pl. 16; 1 Dan. Ch. Pr. 366–369.

**LETTER OF ADVICE.** A letter containing information of any circumstances unknown to the person to whom it is written; generally informing him of some act done by the writer of the letter.

It is usual and perfectly proper for the drawer of a bill of exchange to write a letter of advice to the drawee, as well to prevent fraud or alteration of the bill, as to let the drawee know what provision has been made for the payment of the bill. Chitty, Bills 185.

**LETTER OF ADVOCATION. In Scotch Law.** The decree or warrant of the supreme court or court of sessions, discharging the inferior tribunal from all further proceedings in the matter and advocating the action to itself. This proceeding is similar to a *certiorari* issuing out of a superior court for the removal of a cause from an inferior.

**LETTER OF ATTORNEY. In Practice.** A written instrument, by which one or more persons, called the constituents, authorize one or more other persons, called the attorneys, to do some lawful act by the latter for or instead, and in the place, of the former; 1 Moody, 52, 70. It may be parol or under seal. See POWER OF ATTORNEY.

**LETTER OF CREDENCE. In International Law.** A written instrument addressed by the sovereign or chief magistrate of a state to the sovereign or state to whom a public minister is sent, certifying his appointment as such, and the general object of his mission, and requesting that full faith and credit may be given to what he shall do and say on the part of his court.

When it is given to an ambassador, envoy, or minister accredited to a sovereign, it is addressed to the sovereign or state to whom the minister is delegated; in the case of a *chargé d'affaires*, it is addressed by the secretary or minister of state charged with the department of foreign affairs to the minister of foreign affairs of the other government; Whart. Int. L. §§ 217–321; Picquefort, de l'Ambassadeur, l. 1, § 15.

**LETTER OF CREDIT.** An open or sealed letter, from a merchant or bank or banker, in one place, directed to another, in another place or country, requiring him, if a person therein named, or the bearer of the letter, shall have occasion to buy commodities, or to want money to any particular or unlimited amount, either to procure the same, or to pass his promise, bill, or other engagement for it, the writer of the letter undertaking to provide him the money for the goods, or to repay him by exchange, or to give him such satisfaction as he shall require, either for himself or the bearer of the letter. Pars. N. & B. 108; Byles, Bills, Wood's ed. 173; 3 Chitty, Com. Law 336.

These letters are either general or special: the former is directed to the writer's correspondents generally, wherever the bearer of the letter may happen to go; the latter is directed to some particular person. When the letter is presented to the person to whom it is addressed, he either agrees to comply with the request, in which case he immediately becomes bound to fulfil all the engagements therein mentioned; or he refuses, in which case the bearer should return it to the giver without any other proceeding, unless, indeed, the one to whom the letter is directed is a debtor of the one who gave the letter, in which case he should procure the letter to be protested; 3 Chitty, Com. Law 337; 1 Beaw. Lex Mer. 607; Hall, Adm. Pr. 14; 4 Ohio 197.

A letter requesting one person to make advances to a third person on the credit of the writer is a letter of credit: 4 Duer 480; 13 N. Y. 599; 5 Hill 634; 7 L. R. A. 209.

In England it seems questionable whether an action can be maintained by one who advances money on a general letter of credit; 2 Story 214; 11 M. & W. 383; the

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reason given being that there is no privity of contract between the mandant and the mandatory. But in this country the contrary doctrine is well settled; 3 N. Y. 214; 5 Hill, N. Y. 643; 58 Pa. 102; 54 Miss. 1; s. c. 28 Am. Rep. 347, n. In England, a letter of credit is not negotiable; 1 Macq. 513; Grant, Bank. ch. 15; except when it relates to bills of exchange; L. R. 2 Ch. App. 397; 3 *id.* 154. The same rule has been generally followed here, but it has been held that a general letter of credit, if it authorize more than a single transaction with the party to whom it is granted, may be honored by several persons successively, keeping within the specified aggregate; 3 N. Y. 203; 23 Vt. 160. A telegram authorizing the use of a person's name for a certain sum of money is not in the nature of a general or continuing letter of credit, and does not extend the right to use the name beyond the amount specified; 139 Ill. 633.

The debt which arises on such letter, in its simplest form, when complied with, is between the mandatory and the mandant; though it may be so conceived as to raise a debt also against the person who is supplied by the mandatory. *First*, when the letter is purchased with money by the person wishing for the foreign credit, or is granted in consequence of a check on his cash account, or procured on the credit of securities lodged with the person who granted it, or in payment of money due by him to the payee, the letter is, in its effects, similar to a bill of exchange drawn on the foreign merchant or banker. The payment of the money by the person on whom the letter is granted raises a debt, or goes into account between him and the writer of the letter, but raises no debt to the person who pays on the letter, against him to whom the money is paid. *Second*, when not so purchased, but truly an accommodation, and meant to raise a debt on the person accommodated, the engagement generally is, to see paid any advances made to him, or to guaranty any draft accepted or bill discounted; and the compliance with the mandate, in such case, raises a debt both against the writer of the letter and against the person accredited; 1 Bell, Com. 371, 5th ed. The bearer of the letter of credit is not considered bound to receive the money; he may use the letter as he pleases, and he contracts an obligation only by receiving the money; Pothier, *Contr. de Change*, 237.

**LETTER OF EXCHANGE.** See BILL OF EXCHANGE.

**LETTER OF LICENSE.** An instrument or writing made by creditors to their insolvent debtor by which they bind themselves to allow him a longer time than he had a right to, for the payment of his debts, and that they will not arrest or molest him in his person or property till after the expiration of such additional time. Since the general abolition of imprisonment for debt, and under the modern system of laws for settling insolvents' estates, it is seldom, if ever, used.

**LETTER OF MARQUE AND REPRISAL.** A commission granted by the government to a private individual, to take the property of a foreign state, or of the citizens or subjects of such state, as a reparation for an injury committed by such state, its citizens or subjects. The prizes so captured are divided between the owners of the *privateer*, the captain, and the crew. A vessel loaded with merchandise, on a voyage to a friendly port, but armed for its own defence in case of attack by an enemy, is also called a *letter of marque*. 1 Boulay-Paty, tit. 3, § 2, p. 300.

Letter of marque is now used to signify the commission issued to a privateer in time of war.

By the constitution, art. 1, § 8, cl. 11, congress has power to grant letters of marque and reprisal. And by another section of the same instrument this power is prohibited to the several states. The granting of letters of marque is not always a preliminary to war or necessarily designed to provoke it. It is a hostile measure for unredressed grievances, real or supposed; Story, Const. § 1356. This is a means short of actual war, well recognized in international law, for terminating differences between nations; Wheat. Int. Law § 290. Special reprisals are when letters of marque are granted in time of peace, to particular individuals who have suffered an injury from the government or subjects of another nation; they are to be granted only in case of clear and open denial of justice; *id.* § 291. As the constitution empowers congress to grant letters of marque and reprisal, it has been doubted whether it could abrogate this provision by joining in a treaty by which privateering is abolished; 24 Am. L. Rev. 902; 28 *id.* 615; 19 L. Mag. & Rev. (4th ser.) 35. See REPRISAL; PRIVATEER; DECLARATION OF PARIS.

**LETTER OF RECALL.** A written document addressed by the executive of one government to the executive of another, informing the latter that a minister sent by the former to him has been recalled.

**LETTER OF RECOMMENDATION. In Commercial Law.** An instrument given by one person to another, addressed to a third, in which the bearer is represented as worthy of credit. 1 Bell, Com., 5th ed. 371; 3 Term 51; 7 Cra. 69; Fell, Guar. c. 8; 6 Johns. 181; 13 *id.* 224; 1 Day Conn. 22. See 13 How. 198; RECOMMENDATION.

**LETTER OF RECREDENTIALS.** A document delivered to a minister by the secretary of state of the government to which he was accredited. It is addressed to the executive of the minister's country. This is in reply to the *letter of recall*.

**LETTER PRESS COPIES.** See PRESS COPIES.

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**LETTERS CLOSE.** Those letters commonly sealed with the royal signet, or privy seal, so called in contradistinction to letters patent which were left open and sealed with the broad seal. They are sometimes called *Letters Claus.* Whart. Lex. See CLOSE ROLL.

**LETTERS AD COLLIGENDUM BONA DEFUNCTI. In Practice.** In default of the representatives and creditors to administer to the estate of an intestate, the officer entitled to grant letters of administration may grant to such person as he approves, *letters to collect the goods of the deceased,* which neither make him executor nor administrator; his only business being to collect the goods and keep them in his safe custody. 2 Bla. Com. 505.

**LETTERS OF ABSOLUTION.** Letters whereby, in former times, an abbot released a monk *ab omni subjectione et obedientia,* etc., and enabled him to enter some other religious order. Jacob.

**LETTERS OF ADMINISTRATION.** An instrument in writing, granted by the judge or officer having jurisdiction and power of granting such letters, thereby authorizing the person or persons to whom they are granted to administer upon the personal estate of an intestate. According to the usual form there is given to the administrator (naming him) "full power to administer the goods, chattels, rights, and credits, which were of the said deceased," in the county or district in which the said judge or officer has jurisdiction; "as also to ask, collect, levy, recover, and receive the credits whatsoever of the said deceased, which at the time of his death were owing, or did in any way belong, to him, and to pay the debts in which the said deceased stood obliged, so far forth as the said goods and chattels, rights and credits, will extend, according to the rate and order of law." Original and general administration granted by a probate court corresponds to letters testamentary issued to an executor. As to the various limited and special forms of administration, see that title.

Generally in England the crown claimed the right of administering the personal property of intestates, and the ecclesiastical persons who were entrusted with the duty, appropriated large portions of them upon the pretext of pious uses, until they were required by stat. 31 Edw. III. c. 11, § 1, to grant administration to "the next and most lawful friends of the person intestate," who were held accountable in the common law court as executors were. The administration of personal estates then became assimilated to the exclusion of wills, and the function of the ecclesiastical courts was merely the grant of letters and the supervision of their execution. The jurisdiction in England was taken away from the ecclesiastical court by stat. 20 & 21 Vic. c. 77, and in the United States, what is known as probate jurisdiction of letters of administration is exercised generally by courts known as probate courts.

The method of procuring letters of administration is similar to that by which letters testamentary are issued to executors. Application is made by the person claiming the right to administer (see ADMINISTRATION) to the probate officer, and in most of the states this application is made by a petition and is followed by a citation to be served upon parties interested or published according to law; any person interested in the estate may appear and show cause against the appointment of the applicant, who is required to show the facts essential to the grant of letters. In England, parties contesting the right must proceed *pari passu,* and propound their several interests. Before letters are granted a satisfactory bond is usually required from the person selected. The grant of letters is entered as a judicial record, and the letters themselves should be duly authenticated under the seal of the court; Schoul. Ex. & Ad. § 118. For the form of letters, see Smith, Prob. Pract. App.; 22 Ga. 112. The grant of letters has been held to be *prima facie* evidence of all the essential jurisdictional facts; 56 Ala. 31; but it is generally considered that the probate court, in granting letters of administration does not adjudicate that the person is dead, but that letters shall be granted to the applicant; 60 N. Y. 121; 10 Pick. 515; and the letters are not legal evidence of the death; 91 U. S. 238. Letters of administration upon the estate of a person who is in fact alive have no validity or effect as against him; 154 U. S. 34. A statute authorizing the grant of letters of administration upon the estate of a person who has not been heard from for seven years is held to deprive a living person of property without due process of law, and therefore unconstitutional; 38 L. R. A. (R. I.) 294.

A grant of letters which includes two estates under one administration would be irregular and objectionable, but it has been held not to be void; 15 Tex. 333; the letters should be signed by the judge or other probate officer; 26 La. Ann. 329; but see 85 N. C. 258; and they are not void if the seal of the court is affixed in the wrong place; 64 Cal. 9. The effect of letters of administration, and the powers and duties of those to whom they are issued are similar to those arising under letters testamentary, which title see. See also ADMINISTRATION.

**LETTERS OF BAILERY. In Scotch Law.** Commissions by which a heritable proprietor appointed a baron-bailie, to hold courts, appoint officers under him, etc.

**LETTERS OF CAPTION.** See CAPTION.

**LETTERS OF COLLECTION.** Letters issued for the temporary purpose of enabling some one to collect and hold the assets pending a controversy as to the right to have letters of administration or letters testamentary.

**LETTERS OF EJECTION. In Scotch Law.** Letters under the royal

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signet authorizing a sheriff to eject a tenant who had been decreed to remove, and who had disobeyed the charge to remove, proceeding on letters of horning on the decree. Cent. Dict.

**LETTERS OF FIRE AND SWORD.** See FIRE AND SWORD.

**LETTERS OF HORNING.** See HORNING.

**LETTERS OF INTERCOMMUNING. In Scotch Law.** Letters from the privy council prohibiting all persons from holding any kind of intercourse or communication with those therein denounced.

**LETTERS OF REQUEST. In English Ecclesiastical Law.** An instrument by which a judge of an inferior court waives or remits his own jurisdiction in favor of a court of appeal immediately superior to it.

Letters of request, in general, lie only where an appeal would lie, and lie only to the next immediate court of appeal, waiving merely the primary jurisdiction to the proper appellate court, except letters of request from the most inferior ecclesiastical court, which may be direct to the court of arches, although one or two courts of appeal may by this be ousted of their jurisdiction as courts of appeal; 2 Add. Eccl. 406. The effect of letters of request is to give jurisdiction to the appellate court in the first instance. See a form of letters of request in 2 Chitty, Pr. 498, note *h*; 3 Steph. Com. 306. The same title was also given to letters formerly granted by the Lord Privy Seal preparatory to granting letters of marque.

**LETTERS OF SAFE CONDUCT.** See SAFE CONDUCT.

**LETTERS PATENT.** The name of an instrument granted by the government to convey a right to the patentee: as, a patent for a tract of land; or to secure to him an exclusive right to a new invention or discovery. Letters patent are matter of record. They are so called because they are not sealed up, but are granted open. See PATENT.

**LETTERS ROGATORY.** An instrument sent in the name and by the authority of a judge or court to another, requesting the latter to cause to be examined, upon interrogatories filed in a cause depending before the former, a witness who is within the jurisdiction of the judge or court to whom such letters are addressed.

They are sometimes denominated commissions *sub mutuæ vicissitudinis obtentu, ac in juris subsidium*, from a clause which they generally contain. Where the government of a foreign country, in which witnesses purposed to be examined reside, refuses to allow commissioners to administer oaths to such witnesses, or to allow the commission to be executed unless it is done by some magistrate or judicial officer there, according to the laws of that country, *letters rogatory* must issue.

These letters are directed to any judge or tribunal having jurisdiction of civil causes in the foreign country, recite the pendency of the suit in court, and state that there are material witnesses residing there, whose names are given, without whose testimony justice cannot be done between the parties, and then *request* the said judge or tribunal to cause the witnesses to come before them and answer to the interrogatories annexed to the letters rogatory, to cause their depositions to be committed to writing and returned with the letters rogatory; 1 Greenl. Ev. § 320. In letters rogatory there is always an offer, on the part of the court whence they issued, to render a mutual service to the court to which they may be directed, whenever required. The practice of such letters is derived from the civil law, by which these letters are sometimes called letters requisitory. A special application must be made to court to obtain an order for letters rogatory, and it will be granted in the first instance without issuing a commission upon satisfactory proof that the authorities abroad will not allow the testimony to be taken in any other manner; 1 Hoffman, Ch. Pr. 482; 2 Dan. Ch. Pr., 3d Am. ed. 953.

Though formerly used in England in the courts of common law; 1 Rolle, Abr. 530, pl. 13; they have been superseded by commissions of *dedimus protestatem*, which are considered to be but a feeble substitute. Dunl. Adm. Pr. 223, n.; Hall, Adm. Pr. 37. The courts of admiralty use these letters; and they are recognized by the law of nations. See Fœlix, *Droit Intern.* liv. 2, t. 4, p. 300; Denisart; Dunlap, Adm. Pr. 221; Bened. Adm. § 533; 1 Hoffm. Ch. 482.

In Nelson *v.* United States, 1 Pet. C. C. 236, will be found a copy of letters rogatory, issued to the courts of Havana, according to the form and practice of the civil law, on an occasion when the authorities there had prevented the execution of a commission, regarding any attempts to take testimony under it as an interference with the rights of the judicial tribunals of that place. See also, 8 Paige 446; 2 Ves. Sr. 336; 6 Wend. 475.

The United States revised statutes provide for the taking of testimony of witnesses residing within the United States to be used in any suit for the recovery of money or property depending in any court, in any foreign country, with which the United States are at peace, and in which the government of such foreign country shall be a party or shall have an interest. Where a commission of letters rogatory to take such testimony upon interrogatories has been issued from the court in which such suit is pending, it may be produced before the district judge of the district in which the witness resides or is found, and on proof to the judge that the testimony of a witness is material, he shall issue summons to the witness requiring him to appear before the officer or commissioner named in the commission or letters rogatory. The summons must specify the time and place, which shall be within one hundred miles of the place where the witness resides or is served. In case of neglect of a witness to attend and testify he is liable to the same penalties incurred for the like offence in the trial of a suit in the district court of the United States, and he is entitled to the same fees and mileage as are allowed to witnesses in that court. No witness

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shall be required to criminate himself on such examination; U. S. Rev. Stat. §§ 4072–4. When letters rogatory are addressed from a foreign court to any circuit court of the United States the commissioner appointed by the latter court shall have power to compel witnesses to appear and testify; *id.* § 875, as amended by U. S. Stat. 1 Supp. 266.

When a commission or letter rogatory is issued to take testimony of a witness in a foreign country, in a suit in which the United States are parties or have any interest, after being executed by the commissioner it is to be returned to the minister or consul of the United States nearest the place where it is executed, and by him transmitted to the clerk of the court from which it was issued; and when so taken and returned the testimony shall be read as evidence, without objection to the method of returning the same; U. S. Rev. Stat. § 875.

Among the class of cases held not to be within the statutes are criminal proceedings; 1 Ben. 225; and proceedings relating to an investigation as to the smuggling of some cases of cotton; 36 Fed. Rep. 306. See, generally, 1 Fost. Fed. Prac., 2d ed. § 290, in the notes to which will be found a great deal of interesting matter relating to the diplomatic correspondence on this subject. See, also, 1 Gall. 166; 1 Hall, Adm. Pr. 37, 38, 55–60; Clerke, Praxis, tit. 27; 3 Whart. Int. L. § 413; 1 Oughton, *Ordo Judiciorum* 150–152; 1 Rolle, Abr. 530, pl. 15.

**LETTERS TESTAMENTARY.** An instrument in writing granted by the judge or officer having jurisdiction of the probate of wills, after the probate of a will, to an executor, authorizing him to act as such.

It is issued by the probate officer under his hand and official seal, making known that at a certain date the last will and testament of A B (naming the testator) was duly proved before him; that the probate and grant of administration was within his jurisdiction, and certifying accordingly "that the administration of all and singular the goods, chattels, and credits of the said deceased, and any way concerning his will, was granted" to C D, "the executor named in the said will," "he having been already sworn well and faithfully to administer the same, and to make a true and perfect inventory, etc., and to exhibit the same, etc., and also to render a just and true account thereof."

In England, the original will is deposited in the registry of the ordinary or metropolitan, and a copy thereof made out under his seal; which copy and the letters testamentary are usually styled the probate. This practice has been followed in some of the United States; but where the will needs to be proved in more than one state, the impounding of it leads to much inconvenience. In other states, the original will is returned to the executor, with a certificate that it has been duly proved and recorded, and the letters testamentary are a *separate* instrument. The letters are usually general; but may be limited as to the locality within which the executor is to act, as to the subject-matter over which he is to have control, or otherwise, as the exigencies of the case or the express directions of the testator may require.

Letters testamentary are granted in case the decedent dies testate; letters of administration, in case he dies intestate, or fails to provide an executor; see ADMINISTRATION, EXECUTOR; but in regard to all matters coming properly under the heads of letters of administration or letters testamentary, there is little or no difference in the law relating to the two instruments.

Letters testamentary and of administration are, according to their terms and extent, conclusive as to personal property while they remain unrevoked. They cannot be questioned in a court of law or of equity, and cannot be impeached, even by evidence of fraud or forgery. Proof that the testator was insane, or that the will was forged, is inadmissible; 12 Ves. 298; 21 Wall. 503; 27 Me. 17; 49 N. H. 295; 75 Pa. 503; 16 Mass. 433; 19 Johns. 386; 10 Ala. 977; 18 Cal. 499; 60 N. Y. 123; 14 Ga. 185; 33 Neb. 509; 113 N. Y. 511; 24 Fla. 237. But if the nature of the plea raise the issue, it may be shown that the court granting the supposed letters had no jurisdiction, and that its action is therefore a nullity; 3 Term 130; see 77 Hun 230; or that the seal attached to the supposed probate has been forged, or that the letters have been revoked, or that the testator is alive; 15 S. & R. 42; 9 Dana 41; 8 Cra. 9; 3 Allen 87; 25 Ala. 408; 70 Tex. 538. Where an executor qualified and acted for many years under his appointment, he will not be allowed to dispute the recitation in his appointment that citation to the heirs was issued and served; 95 Cal. 34.

At common law the executor or administrator has no power over real estate; nor is the probate even admissible as evidence that the instrument is a will, or is an execution of a power to charge land; Wms. Ex. 562. By statute, in some states, the probate is made *prima facie* or conclusive evidence as to realty; 17 Mass. 68; 23 Conn. 1; 10 Wheat. 470; 3 Pa. 498; 8 B. Monr. 340; 5 La. 388. In some states the probate is made after the lapse of a certain time conclusive as to realty; 9 Pet. 180; 75 Pa. 512; 8 Ohio 246; 26 Ala. 524; 6 Gratt. 564; 8 Wright 189. Land in England under the Land Title and Transfer Act of 1897 goes to the executor or administrator. See LAND TITLE AND TRANSFER.

Though the probate court has exclusive jurisdiction of the grant of letters, yet where a legacy has been obtained by fraud, or the probate has been procured by fraud on the next of kin, a court of equity would hold the legatee or wrong-doer as bound by a trust for the party injured; Wms. Ex. 552. While a court of equity cannot remove an executor, it may restrain him from acting, and even take the estate out of his hands and place it in the custody of a receiver; 44 N. J. Eq. 385.

Letters may be revoked by the court which made the grant, or an appeal to a higher tribunal, reversing the decision by which they were granted. Special or limited administration will be revoked on the occasion ceasing which called for the grant. An executor or administrator will be removed when the letters were obtained improperly; Wms. Ex. 571.

*Of their effect in a state other than that in which legal proceedings were instituted.*

In view of the rule of the civil law, that *personalia sequuntur personam*, certain effect has been given by the comity of nations to a foreign probate granted at the place of the domicil of the deceased, in respect to the personal assets in other states. At common law, the *lex loci rei sitæ* governs as to real estate, and the foreign probate has no validity; but as to personalty the law of the domicil governs both as to

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testacy and intestacy. It is customary, therefore, on a due exemplification of the probate granted at the place of domicil, to admit the will to probate, and issue letters testamentary, without requiring original or further proof.

A foreign probate at the place of domicil has in itself no force or effect beyond the jurisdiction in which it was granted, but on its production fresh probate will be granted thereon in all other jurisdictions where assets are found. This is the general rule, but is liable to be varied by statute, and is so varied in some of the states of the United States.

Letters testamentary or of administration confer no power beyond the limits of the state in which they are granted, and do not authorize the person to whom they are issued to maintain any suit in the state or federal courts in any other state; 139 U. S. 156; 108 *id.* 256; the executor or administrator has therefore, as such, no right of control over property in another state or country; 32 Ga. 260; 27 Ind. 432; 4 McLean 577; 41 Barb. 431; 5 Ired. Eq. 365; he cannot interfere with assets, collect or discharge debts, control lands, sue or be sued; Schoul. Ex. & Ad. § 173, and cases cited. The principle is, that a grant of power to administer the estate of a decedent operates only as of right within the jurisdiction which grants the letters, and in order that a foreign representative may exercise any such function he must be clothed with authority from the jurisdiction into which he comes, and conform to the requirements imposed by local law; *id.*; 42 Pa. 467; 64 N. C. 464; 5 McLean 4; 38 Ala. 678; 25 S. C. 1; 143 U. S. 215; 41 Fed. Rep. 68; 55 Mich. 568. In most, probably all, of the American states there is statutory provision, either for the grant of ancillary letters or for authorizing and regulating suits by foreign executors and administrators. In many of them these officers properly qualified abroad are permitted to sue for and recover local assets without other qualification, within the new jurisdiction, than putting on record their authority as conferred by the home jurisdiction, and such authority must be strictly followed. In many of the states there is authority to sue and defend without ancillary administration; 147 U. S. 557; 15 N. J. Eq. 97; 91 Ky. 88; 70 Cal. 403; 32 S. C. 598; and this right to sue has been extended to a foreign corporation duly authorized to act in its own jurisdiction; 5 Houst. 416; in some statutes there is express authority to defend suits; 3 Bush 505; but it has been held that statutory authority to sue does not imply capacity to be sued; 77 Ga. 149; nor to sue for intestate lands where they were made by statute assets in the hands of a domestic administrator; 54 Ark. 324; but to sue for the grant of local administration; 40 *id.* 195; where no suit is necessary a foreign executor or administrator has been permitted to remove personal property and carry it away for the purpose of administration; 32 N. Y. 21; 45 Minn. 242; 62 Ga. 200; 46 Conn. 370; and in the absence of local administration payment to a foreign representative is recognized; 108 U. S. 256; 109 *id.* 656; 20 N. Y. 103.

The latter may assign choses in action belonging to the estate, and the assignee may sue thereon in his own name in another state, unless prevented by its laws respecting assignments from so doing; 108 U. S. 256; 64 Ia. 425; 82 Tex. 244; 32 N. Y. 21; he may also sue in another state on a judgment there recovered; 16 Mass. 71; 1 Pet. 686; 4 Mason 16; 41 Md. 539; or he may sue in his individual capacity in another state, on a judgment recovered by him in his official capacity in his own state; 107 Mo. 500; 33 Pac. Rep. (Ariz.) 555; upon a contract made with himself as such a foreign executor or administrator may sue; 8 Greenl. 346; 30 Ark. 230; Sto. Confl. L. §§ 513–516. The term foreign as applied to executors and administrators refers to the jurisdiction from which their authority is derived and not to residence; 86 Va. 1045; 125 N. Y. 400. The estate of a deceased person is substantially one estate, in which those entitled to the residue are interested as a whole, even though situated in various jurisdictions, and though each distinct part of it must be settled in the jurisdiction by which letters were granted whether for the purpose of ancillary or principal administration; Schoul. Ex. & Ad. § 174; ordinarily it is the practice to recognize the person appointed executor or administrator at the domicil of the deceased as the person to whom ancillary letters will be granted; 4 Redf. 151; Whart. Confl. L. § 608; but there is no privity between persons appointed in different jurisdictions whether they be different or the same, and the executor or administrator in one state is not concluded in a subsequent suit by the same plaintiff in another state against a person having administration on the estate of the deceased; 139 U. S. 156; 143 Ill. 367; 36 Pac. Rep. (Mon.) 38; 39 S. C. 247. But a different rule has been applied where different executors are appointed by the will in different states, and they are held to be in privity with each other, and a judgment against those in one state is evidence against those in another; 13 How. 458, 469.

When any surplus remains in the hands of a foreign or ancillary appointee after the discharge of all debts in that jurisdiction, it is usually, as a matter of comity, ordered to be paid over to the domiciliary appointee; 56 Ala. 69; 50 L. J. Ch. 740; and in his hands becomes applicable to debts, legacies, and expenses; Schoul. Ex. & Ad, § 174, note 2. It is the policy of the law with respect to these matters to encourage the spirit of comity in subordination to the rights of local creditors who are considered to be entitled to the benefit of assets within their own jurisdiction, rather than to be driven to the assertion of their claims in a foreign state or country; *id.*; but see LEX FORI.

As a general rule it is the duty of the principal personal representative to collect



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and make available to the estate all such assets as are available to him consistently with foreign law; 4 M. & W. 171; 1 Cr. & J. 157; even to the extent of seeing that foreign letters are taken out for the collection of foreign assets; or of collecting and realizing upon property and debts so far as it may be done by him, without resort to a foreign jurisdiction; 4 Mason 33; 38 N. Y. 397; 12 Metcalf 421; 103 Mass. 245; but the domestic representative is not to be held in this respect to too onerous a responsibility with respect to foreign property which he cannot realize by virtue of his appointment. See Sto. Confl. L. § 514 *a*; Schoul. Ex. & Ad. § 175.

There is some difference of opinion as to whether a voluntary surrender of assets to the domiciliary representative protects the debtor against claims made by virtue of an administration within his own jurisdiction. The United States supreme court, supported by the current of American authority, maintains that, as between the states such payment or delivery of assets is sufficient to discharge the local debtor in the absence of local administration; 18 How. 104; 9 Wall. 741; 108 U. S. 256; 65 Ala. 39; 20 N. Y. 103.

The English doctrine is otherwise; Whart. Confl. L. § 626; Schoul. Ex. & Ad. § 176; Sto. Confl. L. § 515 *a*. See Dicey, Confl. L. ch. X. (*c*), ch. XVII. (B) with Moore's American notes.

See, generally, Williams; Crosswell, Executors; Wharton; Story, Confl. L.; LETTERS OF ADMINISTRATION; EXECUTOR; ADMINISTRATOR; CONFLICT OF LAWS; LEX LOCI; ADMINISTRATION.

**LETTING OUT. In American Law.** The act of awarding a contract.

This term is much used in the United States, and most frequently in relation to contracts to construct railroads, canals, or other commercial works. When such an undertaking has reached the point of actual construction, a notice is generally given that *proposals* will be received until a certain period, and thereupon a *letting out*, or award of portions of the work to be performed according to the proposals, is made. See 35 Ala. N. S. 55.

**LEVANDÆ NAVIS CAUSA** (Lat.). **In Civil Law.** For the sake of lightening the ship. See *Leg. Rhod.* tit. *de Jactu*. Goods thrown overboard with this purpose of lightening the ship are subjects of a general average.

**LEVANT AND COUCHANT** (Lat. *Levantes et cubantes*). A term applied to cattle that have been so long on the ground of another that they have lain down, and are risen up to feed, until which time they cannot be distrained by the owner of the lands, if the land were not sufficiently fenced to keep out cattle. 3 Bla. Com. 8, 9; Mozl. & W.

**LEVARI FACIAS** (Lat. that you cause to be levied). **In Practice.** A writ of execution directing the sheriff to cause to be made of the lands and chattels of the judgment debtor the sum recovered by the judgment.

Under this writ the sheriff was to sell the goods and collect the rents, issues, and profits of the land in question. It has been generally superseded by the remedy by *elegit*, which was given by statute Westm. 2d (13 Edw. I.), c. 18. In case, however, the judgment debtor is a clerk, upon the sheriff's return that he has no lay fee, a writ in the nature of a *levari facius* goes to the bishop of the diocese, who thereupon sends a sequestration of the profits of the clerk's benefice, directed to the churchwardens, to collect and pay them to the plaintiff till the full sum be raised. The same course is pursued upon a *fi. fa.*; 2 Burn, Eccl. Law, 329. See Comyns, Dig. *Execution* (c. 4); Finch, Law, 471; 3 Bla. Com. 471; Tr. & H. Pr. 967.

**In American Law.** A writ used to sell lands mortgaged after a judgment has been obtained by the mortgagee, or his assignee, against the mortgagor, under a peculiar proceeding authorized by statute.

**LEVATO VELO** (Lat.). An expression used in the Roman law, *Code*, 11. 4. 5, and applied to the trial of wreck and salvage. Commentators disagree about the origin of the expression; but all agree that its general meaning is that these causes shall be heard summarily. The most probable solution is that it refers to the place where causes were heard. A sail was spread before the door and officers employed to keep strangers from the tribunal. When these causes were heard, this sail was raised, and suitors came directly to the court, and their causes were heard immediately. As applied to maritime courts, its meaning is that causes should be heard without delay. These causes required despatch, and a delay amounts practically to a denial of justice. Emerigon, *Des Assurances* c. 26, sect. 3.

**LEVEES.** Embankments to prevent overflow in rivers. See RIVERS.

**LEVITICAL DEGREES.** Those degrees of kindred set forth in the eighteenth chapter of Leviticus, within which persons are prohibited to marry. 1 Bish. Mar. Div. & Sep. 737.

**LEVY.** To raise. Webster, Dict. To levy a nuisance, *i. e.* to raise or do a nuisance. 9 Co. 55; to levy a fine, *i. e.* to raise or acknowledge a *fine*, 2 Bla. Com. 357; 1 Steph. Com. 236; to levy a tax, *i. e.* to raise or collect a tax: to levy war, *i. e.* to raise or begin war, to take arms for attack, 4 Bla. Com. 81; to levy an execution, *i. e.* to raise or levy so much money on execution. Reg. Orig. 298.

**In Practice.** A seizure; the raising of the money for which an execution has been issued.

In order to make a valid levy on personal property, the sheriff must have it within

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his power and control, or at least within his view; and if, having it so, he makes a levy upon it, it will be good if followed up afterwards within a reasonable time by his taking possession in such manner as to apprise everybody of the fact of its having been taken into execution. See 84 Wis. 80; 99 N. C. 21; 83 Va. 459. To constitute a levy, a seizure is necessary, if from the nature of the property that is possible, but if not, then some act as nearly equivalent as practicable must be substituted for it; 97 N. C. 286. It is not necessary that an inventory should be made, nor that the sheriff should immediately remove the goods or put a person in possession; 3 Rawle 405; 1 Wash. C. C. 29; 46 Pa. 294. See 51 N. J. L. 148. A levy of an attachment effected in the night time by opening a window, or forcing an outer door of the house containing the goods, is valid; 85 Tenn. 368. A levy on a leasehold need not be in view of the premises if sufficiently descriptive; 77 Pa. 103. The usual mode of making levy upon real estate is to describe the land which has been seized under the execution, by metes and bounds, as in a deed of conveyance; 1 T. & H. Pr. § 1216. See 23 Neb. 736. The lien of an attachment on real estate levied upon, dates from the time the officer indorses the levy on the writ; 69 Tex. 198.

It is the duty of the sheriff, in Illinois, to notify the defendant in execution, before making the levy, and to apply to him for the payment of the execution; 129 Ill. 180. Property cannot be placed *in custodia legis* by an unauthorized levy; 36 Fed. Rep. 770. Retaining possession under a levy is not necessary to preserve the lien of the levy against a subsequent deed of assignment by the debtor; 102 N. C. 79; where the debt and costs are paid before seizure there is no levy; 9 L. J. Q. B. 232; 3 P. & D. 511; or where the *fi. fa.* was, after seizure but before sale, set aside for irregularity; 31 L. J. C. P. 361; or where the sale was prevented by a compromise between the parties; 5 Term 470. See POUNDAGE; EXECUTION.

It is a general rule that when a sufficient levy has been made the officer cannot make a second; 12 Johns. 208; 8 Cow. 192.

If an officer violates his duty, by making an excessive levy on property pointed out, he is liable for such special damages as the defendant may incur thereby; 77 Ga. 83; and when damages result from the wrongful seizure under judicial process of property exempt, not only the officer making the seizure but those for whom it was made and who ratified the act, as well as those who direct it, are liable in damages; 70 Tex. 661. See ATTACHMENT.

**LEVYING WAR. In Criminal Law.** The assembling of a body of men for the purpose of effecting by force a treasonable object; and all who perform any part, however minute, or however remote from the scene of action, and who are leagued in the general conspiracy, are considered as engaged in levying war, within the meaning of the constitution; 4 Cra. 473, 474; Const. art. 3, s. 3. See TREASON; Fries Trial, Pamphl. This is a technical term, borrowed from the English law, and its meaning is the same as it is when used in stat. 25 Ed. III.; 4 Cra. 471; U. S. *v.* Fries, Pamphl. 167; Hall, Am. L. J. 351; Burr's Trial; 1 East, Pl. Cr. 62; 9 C. & P. 129. Where war has been levied, all who aid in its prosecution by performing any part in furtherance of the common object, however minute, or however remote from the scene of action, are guilty of treason; 2 Abbott 364. See INSURRECTION.

**LEWDNESS.** That form of immorality which has relation to sexual impurity. 51 Fed. Rep. 41. See LASCIVIOUSNESS.

**LEX** (Lat.). A rule of law which magistrates and people had agreed upon by means of a solemn declaration of consensus. Sohm, Inst. R. L. 28.

In the later empire, which dates from the fourth century, there were two groups of the sources of the law, *jus* (*q. v.*), *i. e.* the old traditional law, and *leges* which had sprung from imperial legislation. *Jus* was based upon the law of the Twelve Tables, *plebiscite*, *senatus-consulta*, the prætorian edict, and the ordinances of the earlier emperors, which, partly owing to their language and partly on account of the bald sententiousness, and the pregnant phraseology in which they were couched, came to be mainly used, both by the prætor and by the parties, through the classic literature where their results were set forth and worked out. This resulted in identifying *jus* with jurist-made law, and on the edict of the Law of Citations (*q. v.*) by Valentinian III., the distinction between *jus* and *lex* was practically lost. See Inst. 1. 2. 3; Sohm, Inst. R. L. 82; JUS SCRIPTA.

In England there was no careful discrimination between *jus*, and *lex*, and *consuetudo*, although they were not, in all contexts, used with exactly similar meaning. *Leges* was sometimes applied by both Glanville and Bracton to the unwritten laws of England, and although Bracton contrasts *consuetudo* with *lex*, there was no general definite theory as to the relation between enacted and unenacted law—the relation between law and custom, and the relation between law as it was and law as it ought to be. The king's justices claimed a certain power of improving the law, but they might not change the law, and the king might issue new writs without the consent of a national assembly, but not where such writs were contrary to the law. *Jus commune* was used by the canonists to distinguish the general and ordinary law of the universal church from any rules peculiar to a particular national or provincial church, and from the papal *privilegia*, and the phrase was also used in the dialogue on the Exchequer, but it was not until the time of Edward I. that it was superseded by *lex communis*, or that the common law could be contrasted with the statute law, the

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royal prerogative or local custom. 1 Poll. & Maitl. 154.

**LEX ÆBUTIA.** The law which, with the *leges Juliæ*, in part abolished the *legis actiones*. It was confined to legal proceedings before the *prætor urbanus, i. e.* to those cases where a judicium was appointed to try a cause between Roman citizens within the first milestone from Rome. It provided that a judicium could be instituted in a city court without *legis actio*, merely by means of the formula or prætorian decree of appointment, and placed the *legis actio* and the formula, so far as the civil law was concerned, on a footing of equality. In cases falling under the jurisdiction of the centumviral court, cases of voluntary jurisdiction, and *damnum infectum*, the *legis actio* remained in use; as, according to the prætorian law in such cases, no judex was appointed, and consequently no formula was granted, and it was only in cases where there was no formula and no decree of appointment that the *legis actio* survived. Sohm, Rom. L. 173. See JUDEX; FORMULÆ.

**LEX ÆLIA SENTIA.** The law restraining the manumission of slaves. Morey, R. L. 99. See MANUMISSION.

**LEX AGRARIA.** See AGRARIAN LAW.

**LEX AMISSA.** The law concerning outlaws.

**LEX ANASTASIANA.** The law admitting as agnati the children of emancipated brothers and sisters. Inst. 3. 5.

**LEX APULEIA.** A law establishing a kind of partnership between the different *sponsores* or *fide promissors*, and allowing any one of them who had paid the whole debt to recover from the others what he had paid in excess of his own share by an action *pro socio*. Inst. 3. 20.

**LEX AQUILIA.** The law, superseding the earlier portions of the Twelve Tables, providing a remedy for wilful and negligent damage to corporeal property.

Although an action founded upon the text of this law could only be brought when the damage was caused by actual contact of the offending party with the body of the injured thing, the prætor subsequently extended it in the shape of an *actio utilis*, to cases where the damage was merely the indirect result of the act of the defendant, and in certain cases, he even granted an *actio in factum* after the pattern of the *lex aquilia* in cases where there was not, strictly speaking, any damage to the thing, but where the owner was deprived of it in such a manner as to make it tantamount to a destruction of the thing.

By this law, if the slave or animal were wrongfully killed, the owner could recover from the slayer, not the actual value of the property at the time of the death, but the greatest value that it had possessed during the previous year, and when the damage consisted of any other injury to corporeal things, he was obliged to pay the highest value of such property within the month immediately preceding. If the wrongdoer denied his liability and judgment was against him, he was obliged to pay double damages. This law also provided for an action against adstipulators who abused their formal rights, but this portion of it fell into disuse because the recognition by the civil law of the obligation by *mandatum* enabled the injured party to sue the fraudulent adstipulator by the *actio mandati directa* for full damages. See Sohm, Rom. L. 236; Morey, Rom. L. 361.

**LEX ATILIA.** The law which conferred upon the magistrate the right of appointing guardians. It applied only to the city of Rome; Sohm. Inst. Rom. L. 400.

**LEX ATINIA.** A *plebiscitum* named after its proposer, Atinius Labeo, 557. It provided that things stolen or seized by violence could not be acquired by use, although they have been possessed *bona fide* during the length of time prescribed by *usucapion* (*q. v.*). Inst. 2. 6. 3.

**LEX BREHONIA.** The Brehon law, which see.

**LEX BRETOISE.** The law of the Ancient Britons or Marches of Wales. Cowel.

**LEX CALPURNIA.** The law which extended the scope of the action allowed by the *lex Silia*, *q. v.*, to all obligations for any certain definite thing.

**LEX CANULEIA.** The law which conferred upon the plebeians the *connubium*, or the right of intermarriage with Roman citizens. Morey, Rom. L. 48.

**LEX CINCIA.** The law which prohibited certain kinds of gifts.

**LEX CLAUDIA.** The law abolishing agnatic guardianship over women of free birth.

**LEX COMMISSORIA.** The law which provided that the debtor and creditor might agree that if the debtor did not pay at the day, the pledge should become the absolute property of the creditor. This law was abolished by a law of the Emperor Constantine as unjust and oppressive, and having a growing asperity in practice. 2 Kent 583.

**LEX CORNELIA DE ÆDICTIS.** The law forbidding a prætor to depart during his term of office from the edict he had promulgated at its commencement. Sohm, Rom. L. 51. See PRÆTOR.

**LEX CORNELIA DE INJURIIS.** The law providing a civil action for the recovery of a penalty in certain cases of bodily injury. Sohm, R. L. 329.

**LEX CORNELIA DE FALSIS.** The law which provided that the same penalty should attach to the forgery of a testament of a person dying in captivity as to that of a testament made by a person dying in his own country. Inst. 2. 12. 5.

**LEX CORNELIA DE SPONSU.** A law prohibiting one from binding himself for the same debtor to the same creditor in the same year for more than a specified amount. Inst. 2. 20.

**LEX CORNELIA DE SICARIIS.** The law respecting assassins and poisoners, and containing provisions against other deeds of violence. It made the killing of

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the slave of another person punishable by death or exile, and the provisions of this law were extended by the Emperor Antoninus Pius to the case of a master killing his own slave. Inst. 1. 8.

**LEX DE RESPONSIS PRUDENTUM.** The law of citations (*q. v.*).

**LEX DOMICILII.** See DOMICIL; LEX LOCI.

**LEX FABIA DE PLAGIARIUS.** The law providing for the infliction of capital punishment in certain cases. Inst. 4. 18. 10.

**LEX FALCIDIA.** See FALCIDIAN LAW.

**LEX FORI** (Lat. the law of the forum). The law of the country to the tribunal of which appeal is made. 5 Cl. & F. 1.

The local or territorial law of the country to which a court, wherein an action is brought, or other legal proceeding is taken, belongs. Dicey, Confl. Laws 66.

The forms of remedies, modes of procedure; 112 U. S. 452; and execution of judgments are regulated solely and exclusively by the laws of the place where the action is instituted; 8 Cl. & F. 121; 11 M. & W. 877; 1 B. & A. 284; 5 La. 295; 2 Rand. 303; 6 Humphr. 45; 2 Ga. 158; 18 N. H. 321; 4 Zabr. 333; 9 Gill 1; 17 Pa. 91; 4 McLean 540; 11 Ind. 385; 12 Vt. 48; 91 U. S. 406; 36 Conn. 39; 2 Woods, C. C. 244; 26 Ark. 368; 83 Ill. 365; 27 Ia. 251; 42 Miss. 444; 52 N. Y. 429; 135 U. S. 309; 143 *id.* 187; 83 Ala. 462; Rorer, Int.-St. Law 69. See 44 Ill. App. 535; PARTIES.

A cause of action arising in one state, under the common law as there understood, may be enforced in another state where it would not constitute a cause of action, if the variance in these laws does not amount to a fundamental difference of policy; 160 Mass. 571.

The *lex fori* is to decide who are proper parties to a suit; 11 Ind. 485; 33 Miss. 423; Merlin, *Rép. Etrang.* § II.; Westl. Priv. Int. Law 409.

The *lex fori* governs as to the nature, extent, and character of the remedy; 17 Conn. 500; 37 N. H. 86; 2 Pat. & H. 144; as, in case of instruments considered sealed where made, but not in the country where sued upon; 5 Johns. 239; 1 B. & P. 360; 3 Gill & J. 234; 3 Conn. 523; 27 Ia. 251; 91 U. S. 406; 9 Mo. 56, 157.

Arrest and imprisonment may be allowed by the *lex fori*, though they are not by the *lex loci contractus*; 5 Cl. & F. 1; 14 Johns. 346; 3 Mass. 88; 10 Wheat. 1.

For the law of interest as affected by the *lex fori*, see CONFLICT OF LAWS. For the law in relation to damages, see DAMAGES.

The forms of judgment and execution are to be determined by the *lex fori*; 8 Mass. 88; 4 Conn. 47; 14 Pet. 67.

The *lex fori* decides as to deprivation of remedy in that jurisdiction.

Where a debt is discharged by the law of the place of payment, such discharge will, it is said, amount to a discharge everywhere; 12 Wheat. 360; 1 W. Bla. 258; 18 Mass. 1; 16 Mart. La. 297; 7 Cush. 15; 1 Woodb. & M. 115; 23 Wend. 87; 5 Binn. 332; 16 Me. 206; 2 Blackf. 366; see 6 Dak. 91; LEX LOCI; unless such discharge is held by courts of another jurisdiction to contravene natural justice; 13 Mass. 6; 1 South. 192. It must be a discharge from the debt, and not an exemption from the effect of particular means of enforcing the remedy; 14 Johns. 346; 8 B. & C. 479; 7 Me. 337; 11 Mart. La. 730; 15 Mass. 419; 5 Mass. 387.

The insolvent laws of the various states which purport to discharge the debt are, at most, allowed that effect only as against their own citizens; as between their own citizens and strangers, where the claims of the latter have not been proved, they only work a destruction in the remedy; 5 Mas. 375; 4 Conn. 47; 14 Pet. 67; 12 Wheat. 213, 358, 369; 8 Pick. 194; 3 Ia. 299; 71 Wis. 350; 128 Ill. 222; 123 Pa. 452; at least, if there be no provision in the contract requiring performance in the state where the discharge is obtained; 9 Conn. 314; 13 Mass. 18, 20; 7 Johns. Ch. 297; 1 Breese 16; 4 Gill & J. 509. In the United States and some state courts, the discharge of a citizen of the state, granting a discharge from an obligation, is not a bar against a citizen of another state, although the contract creating the obligation was to be performed in the state granting the discharge; 1 Wall. 223; 3 Keyes 30; 5 Md. 1; 25 Conn. 603; 48 Me. 9; 2 Blackf. 394; but see 2 Gray 43. If claims are proved, the submission to the jurisdiction may work a discharge; 3 Johns. Ch. 435; 3 Pet. 411; 5 How. 295, 299; 7 Cush. 45; 2 Blackf. 394. See INSOLVENCY.

Statutes of limitation affect the remedy only; and hence the *lex fori* will be the governing law; 5 Cl. & F. 1; 8 *id.* 121, 140; 11 Pick. 36; 7 Ind. 91; 2 Paine 437; 36 Me. 362; 83 Ill. 365; 68 N. Y. 33; 51 Fed. Rep. 188; 77 Ga. 202; 65 Hun 17; 111 U. S. 31; L. R. 4 Q. B. 653; 72 Tex. 306. But these statutes restrict the remedy for citizens and strangers alike; 10 B. & C. 903; 5 Cl. & F. 1; 3 Johns. Ch. 190; 6 Wend. 475; 9 Mart. La. 526. For the effect of a discharge by statutes of limitation, where they are so drawn as to effect a discharge, in a foreign state, see Story, Confl. Laws § 582; 11 Wheat. 361; 2 Bingh. N. C. 202; 6 Rob. La. 15; 3 Hen. & M. 57. The restriction applies to a suit on a foreign judgment; 5 Cl. & F. 1; 13 Pet. 312; 4 Cow. 528; 1 Gall. 371; 9 How. 407. If a statute in force in the place where the cause of action arose extinguishes the obligation, and does not merely bar the remedy, no action can be maintained in another jurisdiction after it has taken effect; 148 Pa. 146; 6 Dak. 91. In some states, by statute, where suit is brought on a contract made in another state, the statute of limitations in the jurisdiction where the cause of action arose is made to apply.

The right of set-off is to be determined

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by the *lex fori;* 2 N. H. 296; 6 B. Monr. 301; 18 Oreg. 57; 83 Ill. 365; 3 Johns. 263. See 13 N. H. 126. Liens, implied hypothecations, and priorities of claim, generally, are matters of remedy; 12 La. Ann. 289; but only, it would seem, where the property affected is within the jurisdiction of the courts of the *forum;* Whart. Confl. L. § 317; 5 Cra. 289. See L. R. 3 Ch. App. 484. A prescriptive title to personal property, acquired in a former domicil, will be respected by the *lex fori;* 17 Ves. 88; 3 Hen. & M. 57; 5 Cra. 358; 11 Wheat. 361; 1 Coldw. 43; 5 B. Monr. 521; 16 Hun 80.

Questions of the admissibility and effect of evidence are to be determined by the *lex fori;* 12 La. Ann. 410; 12 Barb. 631; 7 Ohio St. 134; 106 U. S. 124; 115 Mass. 304; also questions of costs; 36 Neb. 507. Exemption laws are ordinarily governed by the *lex fori;* 31 Kan. 180; 70 Miss. 344. See 97 Ala. 275; EVIDENCE.

The *administration* of a deceased person's movables is governed wholly by the law of the country where the administrator acts and from which he derives his authority to collect them (*lex fori*); and without regard to the domicil of the deceased; but the *distribution* of the distributable residue is governed by the *lex domicilii;* Dicey, Confl. Laws 674, 677; 28 Ch. D. 175; 72 Ala. 311; 70 Ga. 528; 152 Mass. 74; 31 W. Va. 790; 143 Ill. 25. Usually the distributable residue is remitted to the administration of the domicil for distribution; 88 Pa. 131; but it is in the discretion of the court of the ancillary administration to distribute such residue; 152 Mass. 74; 25 S. C. 1; 161 Pa. 218. See LETTERS TESTAMENTARY.

An action in *tort* for an act done in a foreign country will not lie in England unless the act was a tort both in such foreign country and in England; Dicey, Confl. Laws 660. So in the United States; 86 Tex. 68; 126 N. Y. 10; 50 Ark. 155; 72 Md. 144. But it is ordinarily assumed that the laws of the two countries are the same; 160 Mass. 571.

Whether an act constitutes an actionable wrong in England which is tortious by the law of England, and not strictly justifiable under the law of the country where it was done, though not actionable there, is doubtful; Dicey, Confl. Laws 661; 10 Q. B. D. (C. A.) 521; 1 H. & C. 219. An action lies in one state on a wrong done in another state, which is actionable there, although it would not be actionable in the state where suit is brought unless it be contrary to its own public policy; 146 U. S. 643; 81 Fed. Rep. 294.

The damages recoverable from an employer for the death of his employe, caused by the negligence of the former, are controlled by the law of the place where the contract of employment was made and the accident occurred, though the death took place and the action was brought in another state; 154 U. S. 190. The statutes of one state giving an action for wrongful death may be enforced in the federal courts of another state, if not inconsistent with the statutes and policy thereof; 145 U. S. 593. An action of tort will lie in England to be tried under the rules of the maritime law, in case of a collision on the high seas between two foreign ships; 10 Q. B. D. (C. A.) 521. See, also, the Merchants Shipping Act, 1894. In the United States, in case of a collision on the high seas between ships of different nationalities, the general maritime law governs, as administered in the courts of the country in which the action is brought, except that if the maritime law, as administered by both nations to which the respective ships belong, be the same in both in respect to any matter of liability or obligation, such law, if shown to the court, should be followed, although different from the maritime law of the country of the *forum;* 114 U. S. 355. See also 14 Wall. 170; 105 U. S. 24.

The law of the *forum* as to the validity of a bequest will be applied to a gift by will to a foreign corporation, especially when this carries out and does not frustrate the testator's intention, although the law of the state which created the corporation may be different; 35 L. R. A. (Md.) 693.

As to the proof of foreign law, see FOREIGN LAW.

**LEX FURIA CANINIA.** The law which fixed the limit of testamentary manumissions within certain limits. It was repealed by Justinian, as invidiously placing obstacles in the way of liberty. Sohm, Rom. L. 114; Inst. 7.

**LEX FURIA DE SPONSU.** The law limiting the liability of sponsors and fidepromissors to two years, and providing that as between several co-sponsors or co-fidepromissors, the debt should be *ipso jure*, divided according to the number of the sureties without taking the solvency of individual sureties into account. It applied only to Italy. Sohm, Rom. L. 299, n.; Inst. 3. 20.

**LEX FURIA TESTAMENTARIA.** A law enacting that a testator might not bequeath as a legacy more than one thousand asses.

**LEX GERNICIA.** A law declaring interest illegal. Inst. 3. 13.

**LEX HORTENSIA.** The law giving the plebeians a full share in the *jus publicum* and the *jus sacrum*. Sand. Just. Introd. § 9.

**LEX JULIA.** See LEGES JULIÆ.

**LEX JUNIA NORBANA.** The law conferring legal freedom on all such freedmen as were *tuitione prætoris*. See LATINI JUNIANI. *Lex Junia Villejani* conferred the same right on posthumous children born in the lifetime of the testator, but after the execution of the will, as were enjoyed by those born after the death of the testator. Sohm. Rom. L. 463.

**LEX KANTIÆ.** The body of customs prevailing in Kent during the time of Edward I. A written statement of these

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customs was sanctioned by the king's justices *in eyre*. They were mainly concerned with the maintenance of a form of land tenure known as gavelkind (*q. v.*). 1 Poll. & Maitl. 166.

**LEX LÆTORIA.** See LEX PLÆTORIA.

**LEX LOCI** (Lat.). The law of the place. This may be either *lex loci contractus* (the law of the place of making a contract); *lex loci rei sitæ* or *lex situs* (the law of the place where a thing is situated); *lex loci actus*, or *lex actus* (the law of the place where a legal transaction takes place); *lex loci celebrationis* (the law of the place where a contract is made); *lex loci solutionis* (the law of the place where a contract is to be performed); *lex loci delicti commissi* (the law of the place where a tort is committed).

In general, however, *lex loci* is only used for *lex loci contractus*. As will appear *infra*, *lex loci contractus* is used in a double sense in many of the cases. It is used sometimes to denote the law of the place where the contract was made, and at other times to denote the law by which the contract is to be governed, which may or may not be the same as that of the place where it was made. The earlier cases do not regard the distinction, and are to be read with this fact in mind. See *infra*, where the distinction is made clear by Dicey, Confl. of Laws.

CONTRACTS. In the older cases it is held that it is a general principle applying to contracts made, rights acquired, or acts done relative to personal property, that the law of the place of making the contract, or doing the act, is to govern it and determine its validity or invalidity, as well as the rights of parties under it, in all matters touching the modes of execution and authentication of the form or instruments of contract; and also in relation to the use and meaning of the language in which it is expressed, the construction and interpretation of it, the legal duties and obligations imposed by it and the legal rights and immunities acquired under it; 8 Cl. & F. 121; 1 Pet. 317; 2 N. H. 42; 6 Vt. 102; 7 Cush. 30; 3 Conn. 253, 472; 14 *id.* 583; 22 Barb. 118; 17 Pa. 91; 2 H. & J. 193; 3 Dev. 161; 8 Mart. La. 95; 4 Ohio St. 241; 14 B. Monr. 556; 19 Mo. 84; 4 Fla. 404; 23 Miss. 42; 12 La. Ann. 607; 3 Stor. 465; Ware 402; 91 U. S. 406; 24 N. J. L. 319; 36 Conn. 39; 2 Woods, C. C. 244; 65 Barb. 265.

This principle, though general, does not, however, apply where the parties at the time of entering into the contract had the law of another country in view, or where the *lex loci* is in itself unjust, *contra bonos mores* (against good morals), or contrary to the public law of the state, as regarding the interest of religion or morality, or the general well-being of society; 9 N. H. 271; 6 Pet. 172; 1 How. 169; 17 Johns. 511; 13 Mass. 23; 5 Cl. & F. 11; 8 *id.* 121; 6 Whart. 331; 1 B. Monr. 32; 5 Ired. 590; Story, Confl. Laws § 280; see 38 W. Va. 390; 58 Fed. Rep. 796; or the rights of citizens of the forum; 12 Barb. 631; 13 Mass. 6. And where the place of performance is different from the *locus contractus*, it is presumed the parties had the law of the former in mind; 55 Fed. Rep. 223; App. Cas. D. C. 277.

Where an oral promise was made in South Carolina to accept a draft payable in New York, it was held that matters bearing on the execution, interpretation, and validity of the contract are determined by the law of the place where it is made; those connected with its performance are regulated by the law prevailing at the place of performance, and that the contract in question was governed by the law of South Carolina; 26 U. S. App. 133.

Where residents of two different states enter into a contract which would be invalid in one state, but valid in the other, and by its terms make it a contract of the latter state, and to be there performed, it will be presumed that they intended it to be governed by the laws of such state; 83 Fed. Rep. 403.

The validity or invalidity of a contract as affected by the *lex loci* may depend upon the capacity of the parties or the legality of the act to be done.

The capacity of the parties as affected by questions of minority or majority, incapacities incident to coverture, guardianship, emancipation, and other personal qualities or disabilities, is, it has been said, to be decided by the law of the place of making the contract; Story, Confl. Laws § 103; 1 Grant 51. See *infra*.

The question of disability to make a contract on account of infancy is to be decided by the *lex loci;* 3 Esp. 163, 597; 17 Mart. La. 597; 8 Johns. 189; 1 Grant 51; 2 Kent 233. So, also, as to contracts made by married women; 8 Johns. 189; 13 La. 177; 5 East 31.

Personal disqualifications not arising from the law of nature, but from positive law, and especially such as are penal, are strictly territorial, and are not to be enforced in any country other than that where they originate; Story, Confl. Laws §§ 91, 104, 620; 2 Kent 459. See Whart. Confl. L. § 101; 67 Barb. 9.

Natural disabilities, such as insanity, imbecility, etc., are everywhere recognized, so that the question whether they are controlled by the *lex loci* or *lex domicilii* seems to be theoretic rather than practical. On principle there seems to be no good reason why they should come under a different rule from the positive disabilities.

It is said that the weight of American authority is in favor of holding that a contract which by the law of the place is recognized as lawfully made by a capable person, is valid everywhere, although the person would not, under the law of his domicil, be deemed capable of making it; 125 Mass. 374; see 84 N. Y. 393; 69 Me. 105. But Dicey (Confl. Laws) is of opinion that the capacity to contract is governed by the *lex domicilii;* and in 112 U. S. 452, it is said that "as a general rule the law of the dom-

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icil governs the status of a person." See, also, 87 Tenn. 445, 644.

The legality or illegality of the contract will be determined by the *lex loci*, unless it affects injuriously the public morals or rights, contravenes the policy, or violates a public law of the country where a remedy is sought; 2 Kent 458.

A contract illegal by the law of the place of its making and performance will generally be held so everywhere; 1 Gall. 375; 2 Mass. 88; 2 N. H. 42; 2 Mas. 459; 13 Pet. 65, 78; 2 Johns. Cas. 355; 1 N. & M'C. 173; 2 H. & J. 193, 221, 225; 17 Ill. 328; 16 Tex. 344; 2 Burr. 1077; 2 Kent 458; Story, Confl. Laws § 243. See 38 Fed. Rep. 800; 42 Ch. D. (C. A.) 321; but see 112 N. C. 59; but Dicey, Confl. Laws 560, is of opinion that this rule, though sound in principle, does not rest, in England, upon an unassailable foundation of authority.

An exception is said to exist in case of contracts made in violation of the revenue laws; Cas. *t.* Hardw. 85; 2 C. Rob. 6; 2 Cr. M. & R. 311; 2 Kent 458.

A contract legal by the *lex loci* will be so everywhere; 13 La. Ann. 117; 146 Ill. 523; unless—

*It is injurious* to public rights or morals; 2 C. & P. 347; 1 B. & P. 340; 6 Mass. 379; 2 H. & J. 193; *or contravenes the policy;* 23 Ark. 523; 60 Ala. 380; 2 Sim. Ch. 194; 16 Johns. 438; 5 Harring. 31; 1 Green, Ch. 326; 17 Ga. 253. See 82 Ga. 142; 112 N. C. 59; *or violates a positive law* of the *lex fori;* *or*, in England, *violates any English rule of procedure*; Dicey, Confl. Laws 542. The application of the *lex loci* is a matter of comity; and that law must, in all cases, yield to the positive law of the place of seeking the remedy; 18 Pick. 193; 1 Green, Ch. 326; 12 Barb. 631; 17 Miss. 247. See 10 N. Y. 53.

It is held generally that the claims of citizens are to be preferred to those of foreigners. Assignments, under the insolvent laws of a foreign state, are often held inoperative as against claims of a citizen of the state, in regard to personal property in the jurisdiction of the *lex fori;* 1 Green, Ch. 326; 5 Harring. 31; 32 Miss. 246; 13 La. Ann. 280; 21 Barb. 198; but see 12 Md. 54. But there appears to be a distinction. This rule is well settled in all cases where the assignment of the property of an insolvent is made, *in invitum*, by a court in a foreign jurisdiction, to a receiver, assignee, etc.; 6 Thomp. Corp. § 7338; 14 Allen 355; 123 Ind. 477; 81 Cal. 551. But where a *voluntary* assignment is made, if good where made and made in conformity with the law where the property is situated, it is valid in the latter state, *ex proprio vigore;* 117 Pa. 30; 10 Mo. App. 7; 6 Thomp. Corp. § 7347; Story, Confl. L. § 111.

A contract made with a view to violate the law at the place of performance is invalid; 14 R. I. 398; 62 Ind. 587. An immoral contract, *e. g.* to bribe or corruptly influence the officers of a foreign government, will not be enforced wherever made; 103 U. S. 261; or one that violates good morals; 42 Miss. 444; 37 N. J. L. 28; but Sunday laws are not considered as rules of positive morality; 67 Miss. 405; nor, ordinarily, are usury laws; 103 Mass. 328; 77 N. Y. 578. See Moore's note to Dicey, Confl. Laws 582. It was said, in a case of usury, that if a contract is valid by the law of the state where it is made, and is not immoral, the courts of another state will enforce it, although its own laws prohibit such a contract; 31 Fed. Rep. 516.

In an action in Pennsylvania on a promissory note governed as to the contract by the law of New Jersey, the question of whether parol evidence will be admitted to vary the contract must depend upon the law of New Jersey, and not upon the *lex fori*. It was said that the right to introduce proof *dehors* the instrument for the purpose of showing what, in fact, the contract was, is an essential part of the contract itself, and not a mere incident to the remedy; 6 Pa. Super. Ct. 115, citing 110 Pa. 478; 148 Pa. 146; and 154 Mass. 213.

A statute requiring a foreign corporation, as a condition of doing business within the state, to stipulate not to remove suits into the federal court, is void because it makes the right to a permit dependent on the surrender by the foreign corporation of a privilege secured to it by the constitution and laws of the United States; 121 U. S. 186; 20 Wall. 445. See JURISDICTION.

The interpretation of contracts is to be governed by the law of the country where the contract was made; 2 B. & Ad. 746; 10 B. & C. 903; 2 Hagg. Cons. 60, 61; 8 Pet. 361; 30 Ala. N. S. 253; 4 McLean 540; 2 Bla. Com. 141; Story, Confl. Laws § 270.

The *lex loci* governs as to the formalities and authentication requisite to the valid execution of contracts; Story, Confl. Laws §§ 123, 260; 11 La. 14; 2 Hill N. Y. 227; 37 N. H. 86; 30 Vt. 42. But in proving the existence of, and seeking remedies for, the breach, as well as in all questions relating to the competency of witnesses, course of procedure, etc., the *lex fori* must govern; 11 Ind. 385; 9 Gill 1; 17 Pa. 91; 18 Ala. N. S. 248; 4 McLean 540; 5 How. 83; 6 Humphr. 75; 17 Conn. 500; 9 Mo. 56, 157; 4 Gilm. 521; 26 Barb. 177; Story, Confl. Laws §§ 567, 634. See LEX FORI.

The *lex loci* governs as to the obligation and contruction of contracts; 11 Pick. 32; 8 Vt. 325; 12 N. H. 520; 12 Wheat. 213; 2 Keen 293; 1 B. & P. 138; 12 Wend. 439; 13 Mart. La. 202; 14 B. Monr. 556; 15 Miss. 798; unless, from their tenor, it must be presumed they were entered into with a view to the laws of some other state; 13 Mass. 1; 11 Colo. 118. This presumption arises where the place of performance is different from the place of making; 31 E. L. & Eq. 433; 17 Johns. 511; 13 Pet. 65; 9 La. Ann. 185; 13 Mass. 23; 91 U. S. 406; 2 Woods 244.

It has been held that a lien or privilege affecting personal estate, created by the *lex loci*, will generally be enforced wherever the property may be found: 8 Mart. 95; 5 La. 295; Story, Confl. Laws § 402;

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but not necessarily in preference to claims arising under the *lex fori*, when the property is within the jurisdiction of the court of the forum; 5 Cra. 289, 298; 12 Wheat. 361; Whart. Confl. L. § 324. It is said that the former rule that the assignment of a movable is invalid unless it be made in accordance with the *lex domicilii*, is now rejected by the English courts, which now hold that a transfer of goods in accordance with the *lex situs* gives a good title in England; Dicey, Confl. Laws 532. But it is held in this country that a transfer of movables made in the place of the owner's domicil and in accordance with its laws will be enforced by the courts of the place where the movables are situated, although the method of transfer be different from that prescribed by the latter country; but not when the statutes of the place where they are situate or the policy of its laws prescribe a different rule; Moore's note to Dicey, Confl. Laws 538; 7 Wall. 139; 147 U. S. 476. See *supra*.

A discharge from the performance of a contract under the *lex loci* is a discharge everywhere; 5 Mass. 509; 7 Cush. 15; 4 Wheat. 122, 209; 12 *id.* 213; 2 Mas. 161; 2 Blackf. 394; 24 Wend. 43; 2 Kent 394. A distinction is to be taken between discharging a contract and taking away the remedy for a breach; 3 Mas. 88; 4 Conn. 47; 12 Wheat. 347; 8 Pick. 194; 9 Conn. 314; 2 Blackf. 394; 9 N. H. 478.

As to the effect of a discharge from an obligation by a state insolvent law upon a debt due a citizen of another state, see LEX FORI.

Statutes of limitations ordinarily apply to the remedy, but do not discharge the debt; 9 How. 407; 20 Pick. 310; 2 Paine 437; 2 Mas. 751; 6 N. H. 557; 6 Vt. 127; 8 Port. (Ala.) 84. See LIMITATIONS, STATUTE OF; LEX FORI.

A question of some difficulty often arises as to what the *locus contractus* is, in the case of contracts made partly in one country or state and partly in another, or made in one state or country to be performed in another, or where the contract in question is accessory to a principal contract.

Where a contract is made partly in one country and partly in another, it is a contract of the place where the assent of the parties first concurs and becomes complete; 2 Parsons, Contr. 94; 27 N. H. 217, 244; 11 Ired. 303; 3 Strobh. 27; 1 Gray 336.

As between the place of making and the place of performance, where a place of performance is specified, the law of the place of performance governs as to the obligation, interpretation, etc.; 5 East 124; 1 Gall. 371; 12 Vt. 648; 12 Pet. 456; 1 How. 182; 8 Paige, Ch. 261; 5 McLean 448; 27 Vt. 8; 14 Ark. 189; 7 B. Monr. 575; 9 Mo. 56, 157; 4 Gilm. 521; 21 Ga. 135; 30 Miss. 59; 7 Ohio 134; 4 Mich. 450; 62 N. Y. 151; 24 Ia. 412; 150 Pa. 466. Contracts made in one place to be performed in another are, as a general rule, to be governed by the law of the place of performance: 142 U. S. 101; 38 W. Va. 390. Where there is nothing to show that the parties had in view, in respect to the execution of a contract, any other law than that of the place of performance, that law must determine the rights of the parties; 142 U. S. 115. See 81 Ga. 522.

Where the contract is to be performed generally, the law of the place of making governs; 2 B. & Ald. 301; 5 Cl. & F. 12; 1 Metc. Mass. 82; 6 Cra. 221; 6 Ired. 107; 17 Miss. 220.

If the contract is to be performed partly in one state and partly in another, it will be affected by the law of both states; 91 U. S. 406; 14 B. Monr. 556; 22 Barb. 118. But see 2 Woods 244; 24 Ia. 412. A contract of affreightment made in one country between citizens or residents thereof, and the performance of which begins there, must be governed by the law of that country, unless the parties, when entering into the contract, clearly manifested a mutual intention that it should be governed by the laws of some other country; 129 U. S. 397.

In cases of indorsement of negotiable paper, every indorsement is a new contract, and the place of each indorsement is in its *locus contractus;* 2 Kent 460; 17 Johns. 511; 9 B. & C. 208; 13 Mass. 1; 25 Ala. N. S. 139; 19 N. Y. 436; 17 Tex. 102.

The place of payment is the *locus contractus*, however, as between indorsee and drawer. See 19 N. Y. 436; 53 Fed. Rep. 474; 9 C. C. App. 261.

The place of acceptance of a draft is regarded as the *locus contractus;* 3 Gill 430; 1 Q. B. 43; 4 Pet. 111; 8 Metc. 107; 4 Dev. 124; 6 McLean 622; 9 Cush. 46; 13 N. Y. 290; 18 Conn. 138; 17 Miss. 220; 142 U. S. 116.

A bill of exchange drawn in Indiana, accepted in Michigan, to be discounted in Indiana and paid in Michigan, is an Indiana contract; 52 Fed. Rep. 291.

A note made in one state and payable in another, is not subject to the usury laws of the latter state, if it was valid in that respect in the state where it was made; 60 *id.* 730. A note executed in one state and payable in another is governed, as to defences against an indorsee, by the law of the latter state, though sued on in the state where made; *id.* 730. See PROMISSORY NOTES; BILLS OF EXCHANGE; as to what is presumed to be *lex loci*, see FOREIGN LAWS; LEX FORI.

Dicey, in his recent and very able work on the Conflict of Laws, defines *lex loci contractus* merely as the law of the place where the contract is entered into, and uses it only in that sense. To designate the law by which the contract is governed, he uses the phrase, "the proper law of the contract," which may be, and usually is, the *lex loci contractus*, or may be, by the express will of the parties, or by inference, the law of some other place. He maintains that the capacity to contract is governed by the law of the domicil (except, probably, in the case of ordinary mercantile contracts which are governed by the law of the place where the contract is made; and except, of course,

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contracts relating to land). The formal validity of the contract is governed by the law of the place where it is made, except contracts relating to land and contracts made in one country in accordance with the local form in respect of a movable situated in another country, which, he thinks, may possibly be invalid if they do not comply with the special formalities (if any) required by the law of the country where the movable is situated at the time of the making of the contract, and except, possibly, a contract made in one country, but intended to operate wholly in, and to be subject to the law of, another country, even though not made according to the local form, if made in accordance with the form required, or allowed by the law of the country where the contract is to operate. This last exception is not, however, in his opinion, supported by adequate authority.

The essential validity of a contract is governed by what he terms the "proper law of the contract," which he defines as the law, or laws, by which the parties to a contract intended, or may fairly be presumed to have intended, the contract to be governed. This may be the law of the place where the contract was made, or it may be the place of performance. But there are, he says, wide exceptions to this rule. The contract must not be opposed to English interests, or the policy of English law, or to the moral rules upheld by English law. The contract must not be unlawful by the law of the country where it is made; and its performance must not be unlawful by the law of the country where it is to be performed; and it must not form part of a transaction which is unlawful by the law of the country where the transaction is to take place, though this probably does not apply to contracts in violation of the revenue laws of a foreign country.

The interpretation of a contract, and the rights and obligations under it of the parties thereto, are to be determined by the "proper law of the contract." This law may be designated by the express words of the contract, indicating the intention of the parties, which, in general, governs; or their intention may be inferred from the terms and nature of the contract, and from the general circumstances of the case. In the absence of counteracting considerations, the proper law of the contract is, *prima facie*, presumed to be the law of the country where the contract is made; especially when the contract is to be performed in the country where it is made, or may be performed anywhere, but it may apply to a contract partly, or even wholly, to be performed in another country. Where the contract is to be performed wholly or partly in another country, the proper law of the contract, especially as to the mode of performance, may be presumed to be the law of the country where the performance is to take place. These presumptions are said to be grounded on the probable intention of the parties.

The validity of the discharge of a contract (otherwise than by bankruptcy) depends upon the proper law of the contract, that is, the law to which the parties, when contracting, intended to submit themselves. But this writer says there is a lack of decided authority on this point.

The same writer, after saying that the reports and text books of authority reiterate the rule that a contract is governed by the law of the place where it is made, points out that when English courts first began to deal with the conflict of laws, they referred everything, except matters of procedure, to the *lex loci contractus*, by which they meant the law of the place where the contract was actually entered into. When they subsequently found it necessary to give effect to other laws than those of the place where the contract was made, and especially to the laws of the place of performance, the change of doctrine was combined with a verbal adherence to an old formula not really consistent with the new theory. They retained the expression *lex loci contractus*, but reinterpreted it to mean the law of the country with a view to the law whereof the contract was made. This might be the law of the country where the contract was made, or it might be the law of some other country, and was frequently the law of the country where the contract was to be performed. The same result was sometimes attained by another method of reasoning. It was laid down that a person must be assumed to have contracted at the place where his contract was to be performed. By either method of interpretation an actual reference to the law contemplated by the parties was masked under a nominal reference to the law of the place of the contract. This adherence to the term *lex loci contractus* has produced two effects. It has until recent years concealed from English lawyers the principle that the interpretation, as contrasted with the formal validity, of a contract is governed by the law (of whatever country) contemplated by the parties, and that this law is constantly the law of the place of performance, and it has led English judges to give a preference to the *lex loci contractus*, upon which the English courts fall back in doubtful cases. But English judges, as well as foreign courts and writers, both adopt the principle that the interpretation of a contract and the obligation arising under it are, in so far as they depend on the will of the parties, to be determined in accordance with the law contemplated by the parties; Dicey, Confl. Laws 726.

The phrase *lex loci contractus* is used in a double sense, to mean, sometimes the law of a place where a contract is entered into; sometimes that of the place of its performance. And when it is employed to designate the law of the *seat of the obligation*, it is, on that account, confusing. The law we are in search of, which is to decide upon the nature, interpretation, and validity of the engagement in question, is that which the

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parties have either expressly or presumptively incorporated into their contract, as constituting their obligation; 106 U. S. 124. "In every forum a contract is governed by the law with a view to which it was made;" 10 Wheat. 1.

It is said by an able writer that the cases often fail to distinguish between formal validity and essential validity, or between the making and the performance of the contract; and not infrequently it is held, in respect of matters of essential validity, that the validity of a contract is to be determined by the law of the place where the contract is made; J. B. Moore's note to Dicey, Confl. Laws 580, citing as instances 154 Mass. 213; 55 Minn. 509.

The form of the contract is regulated by the law of the place of its celebration; 106 U. S. 124. The presumption is that a contract is to be performed at the place where it is made and to be governed by its laws, if there is nothing in its terms, or in the explanatory circumstances of its execution, inconsistent with that intention; *id.* 137. See, also, 39 S. C. 484.

In a contract the foreign law may, by the act and will of the parties, become part of their agreement; 106 U. S. 129. It is the will of the contracting parties and not the law which fixes the place of performance —whether by express words or by tacit implication—as the place to the jurisdiction of which the contracting parties elected to submit themselves; 4 Phil. Int. L. 469; approved in 106 U. S. 137. But it has been held that a stipulation in a bill of lading which would substitute the English law for our own as to the question of limited liability is invalid; 57 Fed. Rep. 403; and that stipulations which are held void, because against the public policy of the United States, are not made valid by the stipulation of the parties; 56 *id.* 602, 124; 168 U. S. 118, and cases cited; and that a clause in a shipping contract providing that all questions arising under the contract shall be settled according to English law, is a nullity, as an attempt to impress upon the contract a construction which our law rejects as contrary to publicpolicy; 50 *id.* 561. See FLAG, LAW OF.

A policy of life insurance which was delivered, and the first premium thereon paid in the state in which the assured resided, is governed by the laws of that state; 58 *id.* 541; though the policy contained a clause that it was to be a contract under the laws of the domicil of the insurer, such clause being invalid when it sought to avoid the force of statutes of the state in which the insurance was taken; 54 *id.* 580; and though signed by the insurer at the company's office in its home state; 50 *id.* 511; and a policy issued by a New York company upon an application signed in Missouri, where the first premium was paid, is subject to the Missouri statutes which cannot be waived by any stipulation of the contract: 140 U. S. 226. A domiciled Englishman effected three policies of insurance on his life in a New York company in favor of his wife and children. It was held that the intention of the parties must determine the law applicable, and that it was clearly intended here that the interests of the beneficiaries should be decided by the law of the domicil of the party insuring; 73 L. T. R. 60.

The validity of a contract cannot be secured by apparently subjecting it to a law by which it is not properly governed; 69 Miss. 770; 96 Mich. 243.

A contract executed in England, whereby an English corporation agrees to transport a citizen of the United States to this country, is to be construed according to English law; 60 Fed. Rep. 624.

A federal court assuming jurisdiction of a controversy between the master and the seaman of a foreign vessel, under a foreign flag, growing out of a contract made in their own country, will administer relief, by comity, in accordance with the law of the flag of the vessel; 35 *id.* 663. The question concerning the ultimate responsibility of the owner for the master's acts and engagements, arising out of sea damages, as one of the incidents of the voyage in the prosecution of foreign commerce, is to be determined by the law of the ship's home; *id.* 767. See FLAG, LAW OF.

It is said by a learned writer that the failure to comply with local requirement as to form, not affecting the obligation of the agreement, will not invalidate the contract; Whart. Confl. L. § 685.

A contract valid by the laws of the place where it was made, although not in writing, will not be enforced in the courts of a country where the Statute of Frauds prevails. But where the law of the forum and that of the place of the execution of the contract coincide, it will be enforced, although required to be in writing by the law of the place of performance, because the form of the contract is regulated by the law of the place of its celebration, and the evidence of it by that of the forum; 106 U. S. 135.

The general rule is that a defence or discharge, good by the law of the place where the contract is made or is to be performed, is to be held of equal validity in every place where the question may come to be litigated; 106 U. S. 132, citing Story, Confl. L. § 331.

TORTS. Damages for the commission of a tortious act are to be measured by the law of the place where the act is done; 1 P. Wms. 395; 1 Pet. C. C. 225; Story, Confl. Laws, § 307.

An action for a tort committed in a foreign country will lie only when it is based upon an act which will be considered as tortious both in the place where committed and in the *locus fori;* in such case the law of the place where the tort was committed governs; L. R. 1 P. D. 107; *id.* 6 Q. B. 1; *id.* 2 P. C. 193. See 1 H. & C. 219; Whart. Confl. L. § 478; 54 Barb. 31. See LEX FORI.

MARRIAGE. As to the conflict of laws in relation to marriage, see MARRIAGE.

As to divorce, see DIVORCE; DOMICIL.

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The law of all acts relating to real property is governed by the *lex rei sitæ*. Taking a mortgage as security does not, however, divest the *lex loci* of its force. See LEX REI SITÆ.

Touching the subjects considered in this title, see an elaborate collection of cases on conflict of laws, 5 Eng. Rul. Cas. 703–975.

**LEX LOCI ACTUS.** See LEX LOCI.

**LEX LOCI CELEBRATIONIS.** See LEX LOCI.

**LEX LOCI CONTRACTUS.** See LEX LOCI.

**LEX LOCI DELICTI COMMISSI.** See LEX LOCI.

**LEX LOCI SOLUTIONIS.** See LEX LOCI.

**LEX LONGOBARDORUM** (Lat.). The name of an ancient code in force among the Lombards. It contains many evident traces of feudal policy. It survived the destruction of the ancient government of Lombardy by Charlemagne, and is said to be still partially in force in some districts of Italy.

**LEX MERCATORIA** (Lat.). That system of laws which is adopted by all commercial nations, and which, therefore, constitutes a part of the law of the land. See LAW MERCHANT.

**LEX NATURALE.** Natural law. See JUS NATURALE.

**LEX PAPIA POPPÆ.** The law which exempted from tutelage women who had three children. It is usually considered with the *Lex Julia de maritandis ordinibus* as one law. See LEGES JULIÆ.

**LEX PETRONIA.** The law forbidding masters to expose their slaves to contests with wild beasts. Inst. 1. 8.

**LEX PLÆTORIA.** The law for the protection of young persons who had attained the age of puberty. Inst. 1. 23.

**LEX PLAUTIA.** The law which conferred the full rights of citizenship on Italy below the Po. Sand. Just. Introd. § 11.

**LEX POETELIA.** The law abolishing the right of a creditor to sell or kill his debtor. Sohm, Rom. L. 210.

**LEX POMPEIA DE PARICIDIIS.** The law which inflicted a punishment on one who had caused the death of a parent or child.

The offender was by this law to be sewn up in a sack with a dog, a cock, a viper, and an ape, and thrown into the sea or a river, so that even in his lifetime he might begin to be deprived of the use of the elements; that the air might be denied him whilst he lived and the earth when he died. Inst. 4. 18. 6.

**LEX PUBLILIA.** The law providing that the *plebiscita* should bind the whole people. Inst. 1. 2. The *lex Publilia de sponsu* allowed sponsores, unless reimbursed within six months, to recover from their principal what they had paid by a special *actio*.

**LEX REGIA.** The law of the emperor. That which he ordains by rescript, or decides in adjudging a cause, or lays down by edict, is law. Inst. 1. 2. 6.

**LEX NON SCRIPTA.** The unwritten or common law, which included general and particular customs, and particular local laws. 1 Steph. Com. 40–68. See JUS EX NON SCRIPTA.

**LEX REI SITÆ** (Lat.). The law of the country where a thing is situate. Dicey, Confl. Laws 66.

It is the universal rule of the common law that any title or interest in land, or in other real estate, can only be acquired or lost agreeably to the law of the place where the same is situated: 6 Pick. 286; 1 Paige, Ch. 220; 2 Ohio 124; 5 B. & C. 438; 6 Madd. Ch. 16; 10 Wheat. 192, 465; 1 Gill 280; 6 Binn. 559; Story, Confl. Laws §§ 365, 428; 152 U. S. 65; 134 *id.* 316; 127 *id.* 719; and the law is the same in this respect in regard to all methods whatever of transfer, and every restraint upon alienation: 12 E. L. & Eq. 206. The *lex rei sitæ* governs as to the capacity of the parties to any alienation, whether testamentary or *inter vivos*, or to make a contract with regard to a movable, or to acquire or succeed to a movable as affected by questions of minority or majority; 17 Mart. 569; of rights arising from the relation of husband and wife; Story, Confl. Laws § 454; 9 Bligh 127; 8 Paige, Ch. 261; 2 Md. 297; 1 Miss. 281; 4 Ia. 381; 3 Strobh. 562; 9 Rich. Eq. 475; 107 Mo. 422; L. R. 8 Ch. 342; see 87 Tenn. 445; parent and child, or guardian and ward; 2 Ves. & B. 127; 1 Johns. Ch. 153; 4 Gill & J. 332; 9 Rich. Eq. 311; 14 B. Monr. 544; 11 Ala. N. S. 343; 18 Miss. 529; but see 7 Paige, Ch. 236; and of the rights and powers of executors and administrators, whether the property be real or personal; 2 Hamm. 124; 8 Cl. & F. 112; 4 M. & W. 71, 192; 3 Cra. 319; 5 Pet. 518; 12 Wheat. 169; 2 N. H. 291; 4 Rand. 158; 2 Gill & J. 493; 5 Me. 261; 5 Pick. 65; 20 Johns. 229; 3 Day 74; 7 Ind. 211; 10 Rich. 393 (see EXECUTORS); of heirs; 5 B. & C. 451; 9 Cra. 151; 9 Wheat. 566; and of devisee or devisor; Story, Confl. Laws § 474; 14 Ves. 337; 9 Cra. 151; 10 Wheat. 192; 37 N. H. 114.

So as to the forms and solemnities of alienation, and the restrictions, if any, imposed upon such alienation, the *lex rei sitæ* must be complied with, whether it be a transfer by devise; 2 P. Wms. 291; 10 Wheat. 192; 4 Johns. Ch. 260; 2 Ohio 124; 37 N. H. 114; 5 R. I. 112; 2 Jones N. C. 368; 97 Mo. 223; 50 Fed. Rep. 310; 109 U. S. 608; 20 Fla. 849 (but in Maine, under statutes, an attestation made in conformity with the law of the place where the will was executed, was held valid; 85 Me. 374); or by conveyance *inter vivos*; 2

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Dowl. & C. 349; 1 Pick. 81; 1 Paige, Ch. 290; 11 Wheat. 465; 11 Tex. 755; 18 Pa. 170; 12 E. L. & Eq. 206. So as to the amount of property or extent of interest which can be acquired, held, or transferred; 3 Russ. Ch. 328; 2 Dow. & C. 393; and the question of what is real property; 1 W. Bla. 234; 6 Paige, Ch. 630; 3 Deac. & C. 704. The law of a country where a thing is situate determines whether the thing itself, or any right, obligation, or document connected with the thing is to be considered an immovable (land), or a movable; Dicey, Confl. Laws 513.

And, generally, the *lex rei sitæ* governs as to the validity of any such transfer; 4 Sandf. 352; 23 Miss. 42; 11 Mo. 314; 2 Bradf. Surr. 339; 138 Ill. 559. As to the disposition of the proceeds, see 12 E. L. & Eq. 206.

The validity, construction, and effect of wills of movables depend upon the *lex rei sitæ;* 1 N. Dak. 216; 50 Fed. Rep. 310; 112 N. C. 798; but the law of the state where the will was made may be considered by the court of the *situs* in determining the meaning of certain words in it; 73 Ga. 506. The validity of a charitable devise; 107 U. S. 174; and a direction for accumulation; 95 N. Y. 508; depend upon the *lex rei sitæ*, and so does the execution of a power of appointment of lands under a will; 132 Mass. 131; and the devolution of land, whether in case of intestacy or under a will; Dicey, Confl. Laws 519.

The acquisition of a title to land by lapse of time (prescription) must be determined by the same law, except so far as the limitation to an action to recover land depends on the *lex fori; id.* 525; and see Whart. Confl. Laws § 378.

As to whether mere contracts with regard to immovables or land are determined by the *lex rei sitæ*, as to their material validity, or by the "proper law of the contract," is doubtful; Dicey, Confl. Laws 769; but the capacity of the parties thereto and the formalities necessary to the validity of such a contract are, almost certainly, governed by the law of the *situs; id.* As to the "proper law of the contract," see LEX LOCI.

A contract for the conveyance of land, valid by the *lex fori*, will be enforced in equity by a decree *in personam* for a conveyance valid under the *lex rei sitæ;* 1 Ves. 144; 2 Paige, Ch. 606; Wythe 135; 6 Cra. 148.

An executory foreign contract for the conveyance of lands not repugnant to the *lex rei sitæ* will be enforced in the courts of the latter country by personal process; 8 Paige, Ch. 201; 23 E. L. & Eq. 288; 4 Bosw. 266.

As to the transfer of movables, while, if made at the place of the owner's domicil and in accordance with its laws, they are valid in the courts of the place where the property is situated, yet it is otherwise when the statutes, or the general policy of the law, of the latter place prescribes a different rule; 7 Wall. 139; 147 U. S. 476; 155 Mass. 112; 140 N. Y. 230. Where a special form of transfer of a movable is prescribed by the law of the *situs* a transfer not made in accordance therewith is invalid; 96 N. Y. 248; see Dicey, Confl. L. 551.

Courts of the *situs* may refuse to enforce foreign assignments for creditors as against domestic creditors; 122 Ill. 551; 96 N. Y. 248; but see *supra*, for contrary decisions.

All simple contract debts are assets at the domicil of the testator; 109 U. S. 654; but a bond is said to be assets for the purpose of administration at the place where it is found; 73 N. Y. 292. A ship at sea is presumed to be situated in the state where it is registered; 16 Wall. 610. As to the English rules relating to the *situs* of movables, see Dicey, Confl. Laws 318.

**LEX ROMANA.** See CIVIL LAW; ROMAN LAW.

**LEX SALICA.** See SALIC LAW.

**LEX SCRIBONIA.** The law abolishing the *usucapio servitutis*. Sohm. Rom. L. 265.

**LEX SCRIPTA.** Written or statute law. See JUS EX NON SCRIPTA.

**LEX SEMPRONIA.** The law forbidding senators from being judges and allowing the office to the knights. Sand. Just. Introd. § 12.

**LEX SILIA.** A law concerning personal actions. Sohm, Rom. L. 155.

**LEX SITUS.** See LEX REI SITÆ.

**LEX TALIONIS** (Lat.). The law of retaliation: an example of which is given in the law of Moses, an eye for an eye, a tooth for a tooth, etc.

*Amicable retaliation* includes those acts of retaliation which correspond to the acts of the other nation under similar circumstances.

Jurists and writers on international law are divided as to the right of one nation punishing with death, by way of retaliation, the citizens or subjects of another nation. In the United States no example of such barbarity has ever been witnessed; but prisoners have been kept in close confinement in retaliation for the same conduct towards American prisoners. See Rutherforth, Inst. b. 2, c. 9; Martens, Law of Nat. b. 8, c. 1, s. 3, note; 1 Kent 93; Wheaton, Int. Law, pt. 4, c. 1, § 1.

*Vindictive retaliation* includes those acts which amounts to war. See RETORSION.

**LEX TERRÆ** (Lat.). The law of the land. See DUE PROCESS OF LAW.

**LEX VOCONIA.** A *plebiscitum* forbidding a legatee to receive more than each heir had. Inst. 2. 22.

**LEY** (Old French; a corruption of *loi*). Law. For example, *Termes de la Ley*, Terms of the Law. In another, and an old technical, sense, ley signifies an oath, or the oath with compurgators; as, il tend sa *ley* aiu pleyntiffe. Britton, c. 27.

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**LEY GAGER.** Wager of law. An offer to make an oath denying the cause of action of the plaintiff, confirmed by *compurgators* (*q. v.*), which oath used to be allowed in certain cases. When it was accomplished, it was called the "doing of the law," "*fesans de ley.*" *Termes de la Ley;* 2 B. & C. 538; 3 B. & P. 297; 3 & 4 Will. IV. c. 42, § 16.

**LEYES DE ESTILLO. In Spanish Law.** Laws of the age. A book of explanations of the *Fuero Real,* to the number of two hundred and fifty-two, formed under the authority of Alonzo X. and his son Sancho, and of Fernando el Emplazado, and published at the end of the thirteenth century or beginning of the fourteenth; some of them are inserted in the New Recopilacion. See 1 New Recop. 354.

**LIABILITY.** Responsibility; the state of one who is bound in law and justice to do something which may be enforced by action; 36 Ia. 226; 57 Cal. 209; 36 N. J. L. 145. This liability may arise from contracts either express or implied, or in consequence of torts committed.

The state of being bound or obliged in law or justice. 36 N. J. L. 145; 36 Ia. 226.

**LIBEL** (Lat. *liber*). **In Practice.** The plaintiff's written statement of his cause of action and of the relief which he seeks, made and exhibited in a judicial process, with some solemnity of law.

A written statement by a plaintiff of his cause of action, and of the relief he seeks to obtain in a suit. Law, Eccl. Law 17; Ayliffe, Par. 346; Shelf. Marr. & D. 506; Dunl. Adm. Pr. 111. It performs substantially the same office in the ecclesiastical and admiralty courts as the bill in chancery does in equity proceedings and the declaration in common-law practice; Bish. Mar. Div. & Sep. 572–587. In the United States the practice of the ecclesiastical courts has been continued in the use of the terms libel and libellant in divorce proceedings.

The libel should be a narrative, specific, clear, direct, certain, not general nor alternative; Law, Eccl. Law 147; Dunl. Adm. Pr. 113. It should contain, substantially, the following requisites: (1) the name, description, and addition of the party, who makes his demand by bringing his action; (2) the name, description, and addition of the party against whom it is brought; (3) the name of the judge, with a respectful designation of his office and court; (4) the thing or relief, general or special, which is demanded in the suit; (5) the grounds upon which the suit is founded.

The form of a libel is either simple or articulate. The simple form is when the cause of action is stated in a continuous narration, when the cause of action can be briefly set forth. The articulate form is when the cause of action is stated in distinct allegations or articles; 3 Law, Eccl. Law 148; Hall, Adm. Pr. 123; 7 Cra. 394. The material facts should be stated in distinct articles in the libel, with as much exactness and attention to times and circumstances as in a declaration at common law; 4 Mas. 541.

Although there is no fixed formula for libels, and the courts will receive such an instrument from the party in such form as his own skill or that of his counsel may enable him to give it, yet long usage has sanctioned forms, which it may be most prudent to adopt. The parts and arrangement of libels commonly employed are:

*First*, the address to the court.

*Second*, the names and descriptions of the parties. Persons competent to sue at common law may be parties libellants. The same regulations obtain in the admiralty courts and the common-law courts respecting those disqualified from suing in their own right or name. Married women prosecute by or with their husbands, or by *prochein ami*, when the husband has an adverse interest to hers; minors, by guardians, tutors, or *prochein ami;* lunatics and persons *non compos mentis*, by tutor, guardian *ad litem*, or committee; the rights of deceased persons are prosecuted by executors or administrators; and corporations are represented and proceeded against as at common law.

*Third*, the averments or allegations setting forth the cause of action. These should be conformable to the truth, and so framed as to correspond with the evidence. Every fact requisite to establish the libellant's right should be clearly stated, so that it may be directly met by the opposing party by admission, denial, or avoidance: this is the more necessary, because no proof can be given, or decree rendered, not covered by and conformable to the allegations; 1 Law, Eccl. Law 150; Hall, Pr. 126; Dunl. Adm. Pr. 113; 7 Cra. 394. But the requirements upon these points are not so strict as in cases of declarations at common law: 7 Cra. 389; 9 Wheat. 386, 401. In no case is it necessary to assert anything which amounts to matters of defence to the claimant; 2 Gall. 485.

*Fourth*, the conclusion, or prayer for relief and process: the prayer should be for the specific relief desired; for general relief, as is usual in bills in chancery; the conclusion should also pray for general or particular process; 3 Law, Eccl. Law 149; 3 Mas. 503.

Interrogatories are sometimes annexed to the libel; when this is the case, there is usually a special prayer, that the defendant may be required to answer the libel, and the interrogatories annexed and propounded. This, however, is a dangerous practice, because it renders the answers of the defendant evidence, which must be disproved by two witnesses, or by one witness corroborated by very strong circumstances.

The libel is the first proceeding in a suit in admiralty in the courts of the United States; 3 Mas. 504.

"The requirement that a libel *in rem* must state that the property is in the district does not prevent the court from acquiring jurisdiction in the case of a vessel

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which, being within the district at the time the libel is verified, departs before it is filed, but, returning after the filing, is then seized on *alias* monition." 78 Fed. Rep. 155. (61 Fed. Rep. 213, reaffirmed.)

No *mesne* process can issue in the United States admiralty courts until a libel is filed; 1st Rule in admiralty of the U. S. supreme court. The twenty-second and twenty-third rules require certain statements to be contained in the libel; and to those, and the forms in 2 Conkling, Adm. Pract., the reader is referred. And see Parsons, Marit. Law; Dunl. Adm. Pr.; Hall, Adm. Pr.; Ben. Adm.

**In Torts.** That which is written or printed, and published, calculated to injure the reputation of another by bringing him into ridicule, hatred, or contempt. 15 M. & W. 344.

Everything, written or printed, which reflects on the character of another and is published without lawful justification or excuse, is a libel, whatever the intention may have been. 15 *id.* 435.

A malicious defamation, expressed either in printing or writing, and tending either to blacken the memory of one who is dead or the reputation of one who is alive, and expose him to public hatred, contempt, or ridicule. Bac. Abr. tit. *Libel;* 1 Hawk. Pl. Cr. b. 1, c. 73, § 1; 4 Mass. 168; 2 Pick. 115; 9 Johns. 214; 1 Den. 347; 9 B. & C. 172; 4 M. & R. 127; 85 Ala. 519; 18 S. W. Rep. (Mo.) 1134; 76 Ga. 280; 91 *id.* 494; 84 Wis. 129; 68 Hun 467; 2 Kent 13; Poll. Torts § 286.

A censorious or ridiculous writing, picture, or sign, made with a malicious or mischievous intent towards government, magistrates, or individuals. 3 Johns. Cas. 354; 9 Johns. 215; 5 Binn. 340; 68 Me. 295.

A written statement published without lawful justification or excuse, calculated to convey to those to whom it is published an imputation on the plaintiff, injurious to his trade, or holding him up to hatred, contempt, or ridicule. 7 App. Cas. 741.

There is a great and well-settled distinction between verbal slander and written, printed, or pictured libel; and this not only in reference to the consequences, as subjecting the party to an indictment, but also as to the character of the accusations or imputations essential to sustain a civil action to recover damages. To write and publish maliciously anything of another, which either makes him ridiculous or holds him out as an unworthy man, is held to be actionable, or punishable criminally, when the speaking of the same words would not be so; 1 Saund., 6th ed. 247 *a*; 4 Taunt. 355; 5 Binn. 219; Heard, Lib. & S. § 74; 6 Cush. 71; 19 Johns. 349; 6 Vt. 489.

The reasons for this distinction between libel and slander are thus stated: (1) a libel is permanent and may circulate through many hands; (2) it shows greater malignity on the part of its author than a slander; (3) it is more likely to lead to a breach of the peace; Brett, Eng. Com. 453.

The presumption that words are defamatory arises much more readily in cases of libel than in cases of slander; 152 Pa. 187.

The reduction of the slanderous matter to writing or printing is the most usual mode of conveying it. The writing may be on any substance and made with any instrument. The exhibition of a libellous picture is equally criminal; 2 Campb. 512; 5 Co. 125 *b*; 2 S. & R. 91; Odg. L. & Sl. 6, 20, 22. Fixing a gallows at a man's door, burning him in effigy, or exhibiting him in any ignominious manner, is a libel; Hawk. Pl. Cr. b. 1, c. 73, s. 2; 11 East 226; 14 Atl. Rep. (Pa.) 495. So a libel may be published by speaking or singing it in the presence of others: 7 Ad. & E. 233; or by a caricature, a chalk mark on a wall, or a statue; Brett, Eng. Com. 452.

The publication of a libel subjects the person who is legally responsible for it to both civil and criminal liability. The party may bring an action to recover damages and the offender is indictable at common law.

*Publication.* It must be shown by evidence that there was a writing and that it was published; 7 App. Cas. 741. To constitute a publication the writer must communicate the matter complained of to at least one third person; [1891] 1 Q. B. 527; and a communication to a wife containing reflections on her husband is a publication; 13 C. B. 836; but not where the communication is from her husband; 20 Q. B. Div. 635. The plaintiff must prove the publication; 4 B. & Ald. 143. To read a libellous letter to another is a publication; 16 Misc. Rep. 453; or to dictate it to a stenographer who gives it to another clerk to be copied; [1891] 1 Q. B. 524; (*contra*, 32 App. Div. N. Y. 465;) but sending a writing in an unsealed envelope is not a publication, if not shown to have been read by others; 95 Tenn. 678. The communication of libellous matter to another, requesting or intending that the latter should publish it, renders one liable as the publisher of a libel; 9 Eng. Rul. Cas. 16; see 36 L. J. Ex. 105; and a client who communicates defamatory facts to his attorney is responsible; 16 So. Rep. (La.) 856.

Where the defendant kept a pamphlet shop and the libel was sold by the defendant's servant in her absence and without her knowledge of its contents, it was held that the defendant was guilty of publishing a libel; 1 Barnardiston, K. B. 306; 2 Sessions Cases 33; see also 5 Burrows 2686, where Mansfield, C. J., said in a like case that proof of such facts was *prima facie* evidence of publication of the matter, but liable to be contradicted; see also Lofts 776.

Where the action was against news venders for publishing libel by selling a copy of a newspaper containing it, and the jury found that the defendant did not know that it contained any libel and were not negligent in failing to have such knowledge, it was held that they were not liable; 16 L. R. Q. B. Div. 354; 80 Wis. 455; so of a porter who delivers parcels containing libellous

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handbills in ignorance of the contents of the parcel and in performance of his ordinary occupation; 2 M. & R. 54.

It is well settled that the sale of a newspaper is, *prima facie*, the publication of a libel contained in it, but not if it is shown that the vendor did not know that the paper contained a libel, and that his ignorance was not due to any negligence on his part, that he had no ground for supposing that the paper was likely to contain libellous matter; 80 Wis. 455. An action against the seller of a newspaper containing a libel is not maintainable without proof that some one read the libel; 50 N. Y. Super. Ct. R. 12.

Every repetition of defamatory words is a new publication and constitutes a new cause of action. In publishing a libel one is presumed to intend the natural consequences of his act; 57 Conn. 73; 7 App. Cas. 741. It is not the law of the place where libellous articles are printed but where they are published which makes the words actionable; 25 U S. App. 99. If a sovereign of a foreign state be the subject of a libel on his character or be defamed, he is entitled to the same redress in the municipal courts of the country of the libeller as any subject of that country; but he cannot complain if the judgment, after a fair trial according to the laws of the country, be adverse to him; 2 Phill. Int. L. 135. See LEX LOCI. And an action can be sustained under a statute though the words were also actionable at common law; 25 U. S. App. 99.

Evidence of publication in order to sustain an indictment upon a libel must be to the same effect as in case of a civil action brought thereon. The publication of the libel in order to warrant either civil action or indictment must be malicious; evidence of the malice may be either express or implied. Express proof is not necessary; for where a man publishes a writing which on the face of it is libellous, the law presumes he does so from that malicious intention which constitutes the offence, and it is unnecessary, on the part of the prosecution, to prove any circumstance from which malice may be inferred; 4 B. & C. 247; 18 Md. 177; 3 How. 266; 12 Conn. 262; 16 Mich. 447. See 77 Ga. 172; 81 Wis. 353; 48 Ill. App. 294. Malice need not be shown, and absence of it will only go in mitigation of damages; 68 Hun 474.

*What constitutes a libel.* One is not liable for words not in their nature defamatory, though special damage result from their publication; 37 Atl. Rep. (R. I.) 637; 17 R. I. 388; 117 Ind. 105. The words must be defamatory in their nature and must in fact disparage the character; 17 N. Y. 57; and if they do not, no action will lie, no matter what the author intended; 119 Ind. 244; see 40 Minn. 291. If the matter is understood as scandalous, and is calculated to excite ridicule and abhorrence against the party intended, it is libellous and indictable as such, however it may be expressed; 13 Metc. 68; 9 N. H. 34; 7 Conn. 266; 10 S. & R. 173; 82 Me. 530; 1 Den. 41; 6 Houst. 52; 76 Hun 314; but wherever the words sued on are susceptible of two meanings, it is a question for the jury to decide what meaning was in fact conveyed to the readers; 7 App. Cas. 741; Newell, Slan. & L. 769.

When suit is brought on words not in themselves actionable, an allegation must be made that they contain a libellous meaning, and where the claim fails to show what that meaning was, there is a failure to show any cause of action; 7 App. Cas. 748.

Any publication which has a tendency to disturb the public peace or good order of society is *indictable* as a libel. "This crime is committed," says Professor Greenleaf, "by the publication of writings blaspheming the Supreme Being, or turning the doctrines of the Christian religion into contempt and ridicule; or tending by their immodesty to corrupt the mind and to destroy the sense of decency, morality, and good order; or wantonly to defame or indecorously to calumniate the economy, order, and constitution of things which make up the general system of law and government of the country; to degrade the administration of government or of justice; or to cause animosities between our own and any foreign government, by personal abuse of its sovereign, its ambassadors, or other public ministers; and by malicious defamations expressed in printing or writing, or by signs or pictures, tending either to blacken the memory of one who is dead, or the reputation of one who is living, and thereby to expose him to public hatred, contempt, and ridicule. This descriptive catalogue embraces all the several species of this offence which are indictable at common law; all of which it is believed are indictable in the United States, either at common law or by virtue of particular statutes." 3 Greenl. Ev. § 164. See 4 Mass. 163; 9 Johns. 214; 4 M'Cord 317; 4 Mass. 115; 34 Me. 223; 3 How. 266; 5 Co. 125; 4 Term 126; 5 Binn. 281; 81 Wis. 120; 49 Kan. 42.

Libels have been classified according to their objects: (1) libels which impute to a person the commission of a crime; (2) libels which have a tendency to injure him in his office, profession, calling, or trade; (3) libels which hold him up to scorn and ridicule and to feelings of contempt or execration, impair him in the enjoyment of general society, and injure those imperfect rights of friendly intercourse and mutual benevolence which man has with respect to man. Newell, Slan. & L. 67.

In the following cases the publications have been held to be *actionable:* to write to a person soliciting relief from a charitable society, that she prefers unworthy claims, which it is hoped the members will reject forever, and that she has squandered away money, already obtained by her from the benevolent, in printing circulars abusive of the secretary of the society; 12 Q. B. 624; to publish of the plaintiff, that, although he was aware of the death of a person

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occasioned by his improperly driving a carriage, he had attended a public ball in the evening of the same day; 1 Chit. Bail. 480; to publish of a Protestant archbishop that he endeavors to convert Roman Catholic priests by promises of money and preferment; 5 Bingh. 17; to charge in a publication that persons have confederated to mismanage the affairs of a company, so as to destroy the value of its stock and injure the other shareholders; 73 Tex. 8; to publish a ludicrous story of an individual in a newspaper, if it tend to render him the subject of public ridicule, although he had previously told the same story of himself; 6 Bingh. 409; to publish of a candidate for congress that he is a "pettifogging shyster"; 40 Mich. 241; or to write and publish of any man that he is "thought no more of than a horse thief and a counterfeiter"; 10 Mo. 648; or that he is slippery; 67 N. W. Rep. (Minn.) 646; or that he is a dangerous, able, and seditious agitator; 64 *id.* 921; or to publish of a member of congress, "He is a fawning sycophant, a misrepresentative in congress, and a grovelling office seeker;" 9 Johns. 214; or to charge one with joining the Mormons; 17 N. Y. S. 491; or in a newspaper article to call a person named Buckstaff, Bucksniff, because of its similitude to "Pecksniff"; 84 Wis. 129; or for a notary public falsely and maliciously to protest for non-payment the acceptance of a manufacturer and then send the draft with such protest to the source from whence it came; 88 Ga. 308; but see 83 Tex. 452; publications that a party was arrested and lodged in jail charged with theft; 84 Tex. 450; or words imputing want of chastity; 152 Pa. 187; 6 Ind. App. 510. See 3 Cra. 8; 42 Vt. 252; 17 Gratt. 250; 47 Cal. 207; 105 Mass. 394; 13 L. R. A. 97, note.

A declaration which alleges that the defendant charged the plaintiff, an attorney, with being guilty of "sharp practice," which is averred to mean disreputable practice, charges a libellous imputation; 4 M. & W. 446.

An advertisement describing a horse as stolen and naming the supposed thief is libellous; 32 Minn. 249; so a newspaper article setting forth that the plaintiff was living in extreme poverty and destitution was held a libel; 3 Hun 26; so words which tend to impeach the honesty and integrity of jurors in their office are libellous; 2 Col. Ter. 605; and the publication of false and malicious statements about a church member, accusing him of disturbing the peace of the church and censuring him therefor, is actionable in itself; 92 Ind. 19; and the publication of the suicide of a man falsely charging that it was induced by the actions of his wife; 59 Wis. 309.

A publication in a newspaper of symptoms of a patient who had taken a certain patent medicine, such article being used as an advertisement, is libellous where it tended to hold the person up to contempt and ridicule; 76 Ga. 280; a letter from the publisher of a newspaper, or an article published in a newspaper in the form of a letter from the publisher to the proprietor of a medicine, saying: "Your advertisement will not be received in the columns of the L. although you offer us big pay. We have repeatedly advised our readers that by the manufacture and sale of such medicines the public are swindled out of their money," was held libellous *per se*; 95 Wis. 164; a publication stating that a man has been arrested on account of his criminal evidence in a certain case is libellous; 23 W. N. C. Pa. 541; or that he would be an anarchist if he thought it would pay; 32 Atl. Rep. (Md.) 246; and a publication charging that a breach of promise suit was about to be brought against a person is libellous, the plaintiff having been at the time and a number of years before a married man with a family; 123 N. Y. 207.

An editor copying a libellous article from another paper, giving his authority but expressing his disbelief of some of the charges, although neither affirming nor denying the libellous charges, may be guilty of libel, whether malice be shown or not; 2 Hill 510. The headlines of a publication are important in determining the question of a libel, and they cannot be disregarded, for they often render a publication libellous on its face, which without them would not necessarily be so; 63 N. W. Rep. (Minn.) 615.

Libel or slander against a patent right is actionable; 20 Fed. Rep. 501; 65 Ga. 452; 119 Mass. 484; and a public denial of a patent right, if malicious, is also actionable; Big. Lead. Cas. Torts 42; but not unless special damage is caused; 5 Q. B. 624; L. R. 9 Ex. 218. A public denial that the patentee or his assignor was a true inventor is actionable if it be malicious and cause special damage to the owner of the patent; L. R. 15 Ch. Div. 514; 34 Fed. Rep. 46. But an assertion of title in such cases by way of warning or defence, if made in good faith, is not actionable; Webb's Poll. Torts 389.

A patentee may warn the public not to buy patented articles except from him; 33 Sup. Ct. N. Y. 523; 59 How. Pr. 356; and it is not a libel to issue a circular forbidding persons to buy articles claimed to be an infringement, if it is done in good faith; L. R. 25 Ch. Div. 1. There must be malice or that want of good faith which is, by legal intendment, equivalent thereto; 19 Ch. Div. 386; L. R. 4 Q. B. 730, in which it was termed "an action of a new kind." But see L. R. 9 Ex. 218, in which a declaration was held good where the disparagement was a statement that the goods were inferior, and alleging special damage. In that case Bramwell, B., said that the gist of the action which makes it maintainable is the publication of an untrue statement productive of special damage. The nature of the action was thus characterized in [1892] 2 Q. B. 527: "Such an action is not one of libel or slander, but an action on the case for damage wilfully and intentionally



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done without just occasion or excuse, analogous to an action for slander of title." The latter, it is said, having been formerly confined to real estate, has been extended "to the protection of title to chattels and of exclusive interests analogous to property, though not property in the strict sense, like patent-rights and copyright." Webb's Poll. Torts 389. The suggestion that these rights are not property in any sense is liable to provoke criticism in this country, and it may be suggested that it is their full recognition as property which affords the basis of their protection by right of action at law in such cases.

But not alone are patents within the protection of this principle. It is a general rule that for false and malicious statements respecting his personal property the owner may have an action if he show (1) that statements were made (2) which were untrue (3) to the special damage of the plaintiff; 9 Eng. Rul. Cas. 130; 5 Q. B. 624; L. R. 9 Ex. 218; 122 Mass. 235; 144 *id.* 258; 146 *id.* 219; 4 Wend. 537; 63 Pa. 46; 4 U. C. Q. B. o. s. 24; Townsh. Sl. & Lib. § 204; Newell, Defamation 216.

The rule has been applied in case of disparaging statements as to a public dinner served at a hotel; 144 Mass. 258; the "Cardiff Giant"; 122 *id.* 235; a race-horse; 35 Minn. 471; milk sold by plaintiff; 91 N. Y. 83; copyrighted books; 5 Cush. 104.

*Defences.* When publication is proved, the defendant may show either that the words complained of are true or that they are not malicious. These two defences are known as justification and privilege.

In prosecutions the common-law rule was that the person charged may not justify by pleading the truth in evidence: 11 Mod. 99; because, if the publication is malicious, it is equally to the public interest to punish the publisher of it, whether it was true or not.

By Lord Campbell's Act 6 & 7 Vict. c. 96, § 6, it is provided that in an indictment for libel, the truth may be inquired into, but shall not amount to a defence unless it is for the public benefit that the matters charged should be published. This statute does not apply to blasphemous, obscene, or seditious publications; 9 Ir. L. R. 329; 2 Cox, C. C. 45; 15 *id.* 180; 12 L. R. Ir. 29; and where the statute does not apply, truth is no defence; 10 Cox, C. C. 356; 5 Q. B. D. 1; 4 F. & F. 1089; 49 L. J. M. C. 1; 28 W. R. 133. In this country it has been held that on an indictment for libel the truth is a justification and may be given in evidence; 4 Wend. 114; 3 Johns. Cas. 336; 1 Va. Cas. 175; 30 Ohio St. 115; and that though ordinarily not a defence, it may be given to negative malice where justifiable purpose is shown; 3 Pick. 304; but the law in Massachusetts was subsequently changed by statute so that the truth, with good motives and for justifiable ends, is a complete justification; 9 Eng. Rul. Cas. 194. As to statutes in other states, see *infra.*

In a criminal prosecution, it is sufficient publication if the libel has been shown to the prosecutor and to no other person, as such a publication tends to a breach of the peace; Hob. 215; 1 Stark. 471; 7 Cox, C. C. 25.

By the Libel Law Amendment Act, 1888, § 8, the permission of a judge has to be obtained previously to the institution of criminal proceedings against a libellor, and such permission is only given when, from the circumstances of the case, a remedy by civil action will not be sufficient; [1892] 1 Q. B. 86; 61 L. J. M. C. 91; 40 W. R. 175; 17 Cox, C. C. 464. See 9 Eng. Rul. Cas. 185; LIBERTY OF THE PRESS.

*Justification.* In civil actions for libel the defendant may justify by pleading the truth in evidence; 1 R. I. 263; 6 La. Ann. 254; 5 Sandf. 54; 4 Sneed 520; 15 Wash. 542; but the truth must be as broad as the defamatory accusation in order to constitute a complete defence; 37 Minn. 285. It is not sufficient merely to allege that the charge is true; 29 Mo. 429; 5 Blatch. 332; 13 W. Va. 158; and the plea of justification is that the whole statement is substantially true; 7 Moo. 200; 3 B. & Ald. 673; gross exaggeration destroys the plea; 6 Bing. 266. The existence of a rumor to the same effect as a libel is not admissible as evidence on a plea of justification; 8 Q. B. D. 491.

It has been held that if the defendant fails to plead a complete justification, he will not be allowed to prove his defence; 1 Abb. N. C. 268; although the rule is generally established that a defendant may justify part of a libel containing several distinct charges; 7 East 493; 2 Bing. N. C. 664. Either party is entitled to a bill of particulars of any charge not set forth with sufficient detail in the pleadings to enable the party to meet it; 59 N. Y. 176; 15 Pick. 321; 126 Ill. 150; 91 Pa. 493; but see 1 Abb. N. C. 268, where it was held that the proper practice to obtain particulars of a justification is by motion to make the answer more definite.

A plea of justification is no evidence of malice; 7 Q. B. 68; 14 L. J. Q. B. 196; 18 Law Times 527. In an action for libel, under plea of not guilty, evidence is admissible in mitigation of damages that there was a general suspicion and belief of the truth of the charge, and under the plea of privileged publication such evidence is admissible as pertinent to the question of express malice; 23 Fla. 595.

*Privilege.* Publications considered privileged in actions for libel are divided into those which are absolutely privileged and those which are conditionally or qualifiedly privileged; 38 Fla. 240. All charges made before a proper church tribunal are privileged, whether made as the foundation for action or during the course of the proceedings; 51 Vt. 501; 88 Ga. 620 (but slanderous words spoken to a former pastor of a church are not privileged; 26 Atl. Rep. (Vt.) 488). A plea that an accusation against a clergyman (otherwise lebellous *per se*) is a good plea of qualified privilege

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when it asserts that it was preferred according to the usage and discipline of the church; 61 N. W. Rep. (Neb.) 588; and the collecting of evidence against a school principal and sending a copy of charges against her to the board of education and to her, is privileged and not a publication; 31 N. Y. Supp. 561. Pleadings filed in a proceeding before the Interstate Commerce Commission are privileged; 72 Fed. Rep. 808. Communications between a stockholder and the managing agent of a corporation concerning an employe are privileged; 78 Fed. Rep. 460. A commercial agency which makes it its business to pry into the affairs of another to give information thereof to others must see to it that it communicates nothing that is false, and if it does, it will be liable in damages to the party injured; 77 Ga. 172; publications of such agencies issued to their subscribers generally are not privileged communications; 72 Tex. 115; a false publication that a business house is insolvent is libellous *per se;* 116 Mo. 226. The publication of a railroad company in a monthly circular to their servants of the name of a former employe and the reason of his dismissal was held to be privileged; 2 Q. B. (1891) 189. No allegation, however false and malicious, contained in answers to interrogatories in affidavits duly made, or any other proceedings in courts of justice, or petitions to the legislature, are indictable; 4 Co. 14 *b*; 2 Burr. 807; 1 Saund. 131. n. 1; 2 S. & R. 23; 81 Ga. 238; 76 Ia. 593; 72 Tex. 585; 46 Ill. App. 313; see 97 Mo. 122; 1 Q. B. 65; 61 L. J. Q. B. 21, 727; 83 Ky. 375; 104 N. C. 575; 43 La. Ann. 454; 64 Hun 118.

In all cases of libels published confidentially, and other privileged communications, express malice must be shown, or inferred from circumstances, and this is always a question for a jury; 8 B. & C. 578; 30 Me. 466; 3 Pick. 379; 1 Hawks 472; 87 Pa. 385. See 73 Mich. 445; 40 Minn. 475; 83 Va. 106.

*Libels in special cases. The public acts of public men* may be lawfully made the subject of comment and criticism, not only by the press but also by the public; but while criticism, if in good faith, is privileged, however severe, false allegations of fact are not privileged, and if the charges are false, good faith and probable cause are no defence, though they may mitigate the damages; 16 U. S. App. 613; 4 Mass. 169; 81 N. Y. 116; 40 Mich. 307.

The freedom of criticism upon public men is confined to fair comment on their *official* acts and does not permit an assault on their private character; 55 Fed. Rep. 456. The imputation of base, unworthy, or corrupt motives is not privileged; for the falseness of the charge is *prima facie* evidence of malice, and malice will render even the truth actionable; 33 N. E. Rep. (Ohio) 921; nor does the right of criticism embrace any right to make a false statement of his acts, involving his integrity or faithfulness in the discharge of his duties; 48 N. W. Rep. (Mich.) 507. Memorials or petitions addressed to those in authority praying for the removal of inferior officers, or the redress of fancied grievances, are *prima facie* privileged, and express malice must be shown before that privilege can be taken away; 1 Lev. 140; 6 C. & P. 548; 5 El. & Bl. 844; 3 How. 266; 17 N. Y. 190; 15 R. I. 72; if presented to the wrong party under a *bona fide* mistake, it will still be privileged; 5 B. & Ald. 642; 13 U. C. Q. B. 534; *contra*, 10 Q. B. 899; but if malice be shown, the mere fact that it is vented through a petition will not privilege the publication; 21 Wend. 319; 2 S. & R. 23. Malice may be inferred when it is printed and circulated but never presented before the legislature; 9 N. H. 34; the publication of falsehood and calumny against public officers or candidates for public office is an offence most dangerous to the people and deserves punishment, because the people may be deceived and reject the best citizens to their great injury; 151 Mass. 50; 79 Mich. 266; 74 Tex. 89; 93 Ky. 347; 105 Cal. 114; 117 Pa. 620; 5 Johns. 1.

With regard to *candidates for public office*, a somewhat broader license is allowed, as it is claimed that the very fact of candidacy puts the character of the candidate in issue, so far as his qualifications and fitness for the office are concerned, and that the public have a right to be informed as to the character of those who seek their votes; 4 Mass. 168; 1 N. & McC. 347. In some cases it is held that where there is an honest belief in the truth of the charges made, and the publication is in good faith, one is not responsible, even for publishing an untruth; 46 Ia. 533; 60 *id.* 251; 64 Tex. 354; 111 Pa. 404; but the weight of authority tends to uphold the principle that false allegations are not privileged, and good faith and probable cause constitute no defence; 59 Fed. Rep. 530; 8 C. & P. 222; 21 Fla. 431; 136 Mass. 164; 36 S. W. Rep. (Tex.) 765; 66 Mich. 307; 17 Wend. 63; 16 Lea 176; 69 Pa. 103; 42 N. E. Rep. (N. Y.) 270. See JUDGE. Charging a candidate for office with having violated the laws and taken unlawful fees is libellous *per se*. Although the charge was made on a proper occasion and from a proper motive, the defendant is liable when he not only fails to show the truth of the statement, but also that it was based on probable cause. It is not enough to show that the defendant had information which led him to believe it to be true; the circumstances leading to that belief must be shown in order that it may appear whether or not his belief was well founded; 4 Pa. Super. Ct. 253.

In *criticising a publication* one may make use of ridicule however poignant, as every man who publishes a book commits himself to the judgment of the public; 1 Campb. 355; 66 N. W. Rep. (Mich.) 225; but a critic may not attack the private character of the author; 7 Car. & P. 621; 8 *id.* 311; 2 Moo. & R. 8.

If the author's writings are ridiculous he may be ridiculed; if they show him to be

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vicious his reviewer may say so; 24 Wend. 484; but to accuse one of writing and disseminating works calculated to debauch and demoralize the public mind is libellous; 6 Abb. Pr. N. S. 9; and it is a question for the jury, whether a criticism of a dramatic work is such as might be pronounced by any fair man, however prejudiced and however obstinate his views; L. R. 20 Q. B. Div. 275; and so where the criticism concerns an artistic production it is held that any man may express his opinion, however mistaken that opinion may be, and however unfavorable to the merits of the artist or architect, if fairly reasonably and temperately expressed, even though through the medium of ridicule 1 Moo. & M. 741, 187.

International law forbids a libel on a state for the same reason that municipal law forbids a libel on an individual. This right of the state is not invaded by a free discussion of, and criticism upon, the external acts of the state. A state has no complaint if it has the same protection as the individual. And courts of justice are open in both cases for the vindication of the offended party; 2 Phill. Int. L. 48.

*Extent of the liability of newspapers for libellous articles.* The proprietor of a *newspaper* is responsible for a libel therein, although inserted without his knowledge by the editor; 104 Pa. 408; and where the proprietor is also the editor he is liable for a libel inserted by his assistant editor; 19 N. Y. 175; the mere fact that he was absent, although he had left instructions not to insert libellous matter, will not exonerate him; 1 Ind. 345; see 121 N. Y. 199. The general principal is well established that the publisher is civilly liable for all that appears in his paper, whether with or without his knowledge; 60 Ill. 51; 25 La. Ann. 170; 35 Mich. 371; 48 Mo. 152; even where it is the result of mistake; L. R. 10 C. P. 502; but not where the mistake was caused innocently by the compositor in setting up illegible copy; 46 Mich. 408. The secretary and treasurer of a public corporation who is also one of the stockholders is not personally liable for a publication in the absence of anything to show that he knew of or consented to it; 10 Daly 202; but if the stockholder is also the general manager of the paper he will be liable if the publication is unjustifiable: 3 Cent. Rep. (Pa.) 301. This liability is not affected by the fact that he does not know of the publication of the article, for it is his business to know, and mere want of knowledge is no defence; 65 N. W. Rep. (Wis.) 744; one of the partners is liable for what is done by the others in publishing libellous matter; 2 Dill. 244; and the malicious intent of one partner renders his co-partner liable; 133 Mass. 471. Where the libellous matter is inserted by a reporter without the knowledge or consent of the proprietor, the latter is liable only to the extent of compensatory damages and he will be visited with punitive damages only upon proof by which his approval of his employes' conduct can be legally inferred; 50 N. J. L. 481.

In Massachusetts when the truth of the publication is established there must be shown, in order to render the proprietor liable, that he, in a legal sense, actually participated in or authorized the publication with an actual malicious intent; 136 Mass. 441.

During the present decade there has been a tendency towards legislation mitigating the rigor of the common-law liability for libel on the part of publishers of newspapers, and the agitation on this subject has resulted in the passage of statutes in several states having this purpose in view. The demand for this legislation has been in no sense the result of popular recognition of a general grievance, but an effort on the part of the newspaper press to escape liability for the natural results of the modern tendency to the violation of the most ordinary rights of privacy.

Utah provides in behalf of newspapers of that state, that if it appears that the libel was published in good faith or by mistake, and a retraction was published in full as conspicuously and in the same place as the libel, within a specified time, the plaintiff can recover only actual damages; but this does not apply to a statement about a candidate for public office unless retraction is made by an editorial a certain time before election. Laws 1896, ch. 32. By a statute of Indiana the publisher is protected against punitive damages by a full retraction; it also requires that before bringing action a notice must be served upon the publisher specifying the matter complained of; Laws 1895, ch. 45. A Michigan statute makes the granting of punitive damages dependent on a request for retraction; Laws 1895, ch. 216. In New York the delivery of a libellous statement for publication is constituted a misdemeanor. Laws 1890, ch. 340. A statute in Missouri requires that in actions of libel justification and mitigation shall be stated separately by the defendant. Laws 1891, ch. 70. Georgia limits the common-law liability of newspaper publishers in actions of libel by enacting that "a fair and honest report of the proceedings of legislative or judicial bodies, or court proceedings, or a truthful report of information received from any arresting officer or police authorities, shall be deemed privileged communication, and in any action brought for newspaper libel the rule of the law as to privileged communications shall apply." Laws 1894, ch. 131.

By the Pennsylvania Libel Act of July 1, 1897, it is enacted: § 1. That in criminal prosecutions for libel "if the matter charged as libellous is in the opinion of the court proper for public information, the truth may be given in evidence." § 2. That no defendant can be convicted of the same libel upon the same individual in more than one county. § 3. A plea of justification shall be adequate when it alleges "that the publication is substantially true

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in every material respect and is proper for public information; and if such plea shall be established to the satisfaction of the court and jury there shall be no recovery. Damages in a civil action are limited to just restitution actually sustained." Laws 1897, ch. 204.

It is for the jury to say what the defendant charged against the plaintiff, and what the reading public might reasonably suppose he intended to charge; 59 Fed. Rep. 530. Where the purport of the publication is plain and not ambiguous, the question in a civil action whether it is libel or not is a question for the court; 60 Fed. Rep. 592.

On a plea of justification, evidence is admissible to prove that the character of the plaintiff is bad; 4 Watts 347; this testimony is admissible for the purpose of establishing a measure of justice between the parties, because the extent of the injury, if any, which the plaintiff sustains, depends in some degree at least upon the goodness or badness of his general character before the publication of the libel, and the amount of compensation ought to be commensurate with, and bear some proportion to, the extent of the injury; 178 Pa. 481; but evidence as to reputation upon the question of damages must be confined to the reputation for that particular trait of character which is involved in the libellous charge; 16 U. S. App. 613.

A publisher cannot be charged with the personal malice of his employe; 2 Moo. & R. 101; and he is not liable for exemplary damages for the actual malice of his subordinate unless he participated in or ratified and confirmed the act; 57 Wis. 570. Express malice in libel cases may be shown not only in the existence of animosity against the plaintiff, but also by a reckless and wanton carelessness,—a wanton neglect to ascertain the truth of the publication. In a newspaper the means of ascertaining are readily attainable, and in such cases punitive damages may be awarded; 26 C. S. 167. Evidence that plaintiff had recovered judgment against another newspaper for the publication of the same libel is immaterial and inadmissible; 78 Fed. Rep. 769, citing the following: Printing Association *v.* Smith, 14 U. S. App. 173; s. c. 5 C. C. A. 91; 55 Fed. Rep. 240.

An offer to publish an interview with or a letter from the plaintiff is not a retraction; 38 U. S. App. 394.

*Injunction to restrain libels.* The power to restrain by injunction, or even by interlocutory injunction, the publication of an alleged libel, on the ground of injury to character and reputation, was a jurisdiction considered unknown to the law of England. Recently, however, it has been held that jurisdiction was conferred by the Common Law Procedure Act, 1854, to prevent by injunction the publication of "atrocious" libels. This alleged jurisdiction has shared with the use of the equitable remedy in connection with labor troubles the credit of giving rise to the phrase, lately so much in vogue,—"government by injunction." Under the English decisions, it is said to be conceded that the power exists, and that prior to 1882, except in cases where there was injury to property alleged, no such power was ever claimed or exercised; 22 Law Mag. & Rev., 4th ser. 67; Folkhard, Lib. & Sl., ed. 1897, 579; 3 Va. Law Reg. 629; 13 Law Quart. Rev. 361. Speaking with precision, the only case in which an injunction had been granted to restrain the publication of a libel as such was that by Chief Justice Scroggs, in 1680, in a decision which was one of the grounds of his impeachment. See 8 How. St. Tr. 198. In 2 Campb. 511, a *dictum* of Lord Ellenborough states that an injunction would have been granted against the exhibition of a libellous picture, but it was expressly disapproved in 20 How. St. Tr. 799.

The nearest later approach to it was in the decisions of Malins, V. C., in Springhead Spinning Co. *v.* Riley, L. R. 6 Eq. 551, and Dixon *v.* Holden, 7 *id.* 488, so much discussed in connection with labor troubles (see STRIKE), and which were distinctly overruled by the court of appeal as in conflict with settled equity practice, in Prudential Assurance Co. *v.* Knott, L. R. 10 Ch. App. 142.

It was five years after this that Jessel, M. R., gave expression to his opinion that the Procedure Act gave jurisdiction to the common-law courts to enjoin the publication of libels, an opinion which in that case has been characterized as a *dictum*, but later the court of appeal held that the power did exist, and the same judge, then sitting, said that an interlocutory injunction might be granted against the publication of a libel however atrocious it might be, and for injuring only character and reputation. The reasoning by which this conclusion was supported was that the Procedure Act, 1854, and the Judicature Act, 1873, transferred all the jurisdiction of the separate courts to the high court and authorized an interlocutory injunction in any case in which it should appear to the court "just or convenient." This he considered gave "unlimited power to grant an injunction in any case where it would be right or just to do so, according to settled legal reasons, or on any legal, settled principle." 20 Ch. Div. 501. The court of appeal again declared in favor of the jurisdiction, but said that it was such "as to require exceptional caution in its use;" [1891] 2 Ch. 269. And this expression was emphasized not only by the refusal of the injunction but also by a quotation from Lord Esher, M. R., that "the jurisdiction is of a delicate nature and should only be exercised in the clearest cases, where, if the jury did not find the matter libellous, the court would set aside the verdict as unreasonable." 3 Times L. R. 846; see, also, 37 Ch. Div. 170.

These cases are examined and the doctrine, admitted to have been declared in them, severely criticised by Folkhard, who

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concludes: That the jurisdiction introduces an undesirable and inconvenient degree of uncertainty into the practice and procedure of the courts; that the cautious language with which the courts have dealt with the subject is sufficient of itself to raise doubt; that the injunction is inappropriate and unconstitutional because it would deprive a defendant of a right secured by Fox's libel act to move in arrest of judgment when tried or convicted of libel. The opinion is further expressed that the manner in which the courts have dealt with the subject indicates a caution which is likely to result in making the new jurisdiction a dead letter; 22 Law Mag. & Rev., 4th ser. 63. This view is thought by him to be justified by the refusal of an injunction in a recent case where he thinks the exercise of the new jurisdiction would have seemed proper if it ever could be so, as after a verdict for heavy damages and judgment against him for libel, the defendant persisted in repetitions of it; [1891] 2 Ch. 294. But in that case the decision was that an interlocutory injunction will not be granted to restrain the publication of a libel unless the court is of the opinion that injury will be caused to the plaintiff's person or property by a continuance of the publication, and hence when the libel, though unjustifiable, is of such a character that no one would attach the slighest weight to it, the injunction would be refused. In another case an action of libel was brought in the Chancery Division and an interlocutory injunction asked which the court refused; [1891] W. N. 64. And it is said that, with the exception of a case of trade libel, the court will not grant an injunction to restrain a libel before the case has been submitted to a jury; 67 Law T. N. S. 263.

An interlocutory injunction was granted to restrain the continuance of the publication of a poster headed "A Black List," which gave the names of non-union men employed by A, it being considered that the motive was to inflict a continuous injury from day to day upon A and his men, and the order was affirmed by court of appeal; 72 L. T. 342; S. C. 11 Times L. R. 228, 180. In this case it was held that the trade union having done more than was necessary for their own protection, the injunction was properly granted.

In this country the subject has been dealt with as it originally stood in England before it was complicated by the question of statutory construction and the resulting decisions. The question in the United States is more or less affected by considerations growing out of the constitutional guaranty of liberty of the press. See *infra*. There is no authority to support the doctrine that a libel may be enjoined except in cases where some right of property is involved, and a large majority of the cases have arisen in connection with statements made or circulars issued concerning patent rights.

It has been held by authorities of great weight that equity will not enjoin the publication of a libel on a patent right; 29 Fed. Rep. 95; 28 Fed. Rep. 773. This latter case was an ancillary bill to enjoin the defendant in pending proceedings on certain patent rights from uttering libellous or slanderous statements concerning the business of the plaintiff, or the validity of their said letters patent or their title thereto. It was filed during the trial of the principal suit, which was brought to restrain the infringement of the patents. Bradley, J., in denying the injunction, said that the application was a novel one. The following cases were cited by him as ruling against it: 114 Mass. 69; 119 Mass. 484; 7 Daly 188; 8 Paige 24; 55 How. Pr. 132; 50 Ga. 70; 3 Mo. App. 173. He did not consider the contrary decision in 59 How. Pr. 356 as a sufficient authority to counteract these cases. He further said that the English authorities (L. R. 7 Eq. 488; 14 Ch. Div. 763, 864; 26 Ch. Div. 306) were based upon statutes and not upon general principles of equity jurisprudence. He cites the case in 10 Ch. App. 142, Cairns, C., as in line with the American cases referred to by him. As to the English cases, see *supra*.

This decision by Bradley, J., went so far as to hold expressly that even if malice were shown an injunction would not be granted against the wrong threatened.

This case was undoubtedly in accord with the view prevailing at the time it was decided, and there are later cases which hold that an injunction will not be granted to restrain a publication which is a libel on the plaintiff's business; 1 Ohio N. P. 266; or to restrain one who believes that he is the owner of a patent, and that no other person has title thereto, from stating his claim as a mere belief; 60 Ill. App. 372; or to restrain slander of title to property on the mere allegation of defendant's insolvency; 36 Fla. 99. So an interlocutory injunction restraining the publication of a libel until the trial of the action was refused where there were conflicting affidavits as to whether the plaintiff had or had not consented to the publication; [1894] 1 Q. B. 671, where it is considered under what circumstances an interlocutory injunction will be granted in cases of libel.

It was held that an injunction will not be granted against the circulation of a slander or libel, even where it appeared that it might tend to injure the business or employment of the person affected; 47 N. J. Eq. 519; 110 Mo. 492; nor even interlocutory until trial; *id.* The power to grant injunctions has also been denied in cases of libel or trade-mark; 55 How. Pr. 132; 56 N. Y. 115; 19 Ch. Div. 386.

But the doctrine upon which these decisions rest, that in no case would an injunction issue to restrain such publication, has not been uniformly followed, and an instructive note in which many cases are collected concludes that "the weight of authority as shown by the later cases is to the effect that such an injunction may be granted if the threats to prosecute for infringement are not made in good faith, and

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only in such cases;" 16 L. R. A. 243; 59 How. Pr. 356; 57 N. Y. 119; 88 Barb. 210; 45 N. J. L. 167. Where false circulars were issued for the purpose of intimidation, threatening suits for infringement, and a collusive decree was obtained purporting to be an adjudication on the merits, an injunction was granted against the use or publication of such decree; 92 Mich. 558; but equity will not restrain the plaintiff in a patent case from publishing a notice that the defendant therein had been enjoined; 32 Fed. Rep. 345.

And where the defendant issued circulars threatening to bring suits for infringement against persons dealing in plaintiff's patented article, and the charges of infringement were not made in good faith, but with malicious intent to injure plaintiff's business, the court distinguished the case from that in 28 Fed. Rep. 773, *supra*, because the defendant appeared to have threatened suits which he did not intend to bring, and an injunction was granted; 34 Fed. Rep. 46, per Blodgett, J.

In a still later case Mr. Justice Brown thus states the limits within which equity will permit the use of an injunction:

"It is sufficient to say that, even if it be conceded that a court of equity has power upon petition of a defendant to enjoin the plaintiff from publishing libellous statements concerning his business, there would seem to be no good reason why a patentee may not notify persons using his device of his claim, and call attention to the fact that, by selling or using it, they are making themselves liable to a prosecution. There is undoubtedly authority for holding that, if the language of such letters or circulars be false, malicious, offensive, or opprobrious, or used for the wilful purpose of inflicting an injury, the party is entitled to his remedy by injunction; and this is the extent to which the authorities go. Upon the other hand, it would seem to be an act of prudence, if not of kindness, upon the part of the patentee, to notify the public of his invention, and to warn persons dealing in the article of the consequence of purchasing from others, and in such cases an injunction has been uniformly denied." 44 Fed. Rep. 19; see, also, 81 Fed. Rep. 904.

As to whether an injunction against a publication is an interference with the constitutional guaranty of the freedom of speech and of the press, the decisions, although apparently conflicting, support the doctrine that where property rights are involved, this provision is no bar to equitable interference, where the question of libel has been determined in an action at law; 7 Daly 188; 13 Weekly L. Bul. (Ohio) 335; 8 Paige 24; 110 Mo. 892; 18 Mo. App. 173. In the last case an injunction was refused, although the statements were injurious to a property right, and it was held "that courts of justice can do nothing by way of judicial sentence which the general assembly has no power to sanction," and as the general assembly can pass no law abridging the liberty of speech or of the press, that the right to speak, write, or print cannot be suspended by the court. In 135 Ind. 471, it was expressly decided that the constitutional guaranty of freedom of the press and of speech is not a protection against equitable interference with the publication of false and injurious statements, accompanied by threats.

Where a publication is in violation of a contract it will be enjoined, and the liberty of the press will not protect the wrongdoer; 31 Mich. 490; 24 S. E. Rep. (N. C.) 212. See 32 L. R. A. 829, n. See LIBERTY OF THE PRESS.

The question what are the respective powers and duties of court and jury in trials of indictments for libel has given rise to one of the most interesting of legal controversies. For the history of the controversy upon the right of the jury to determine both law and fact in criminal cases, and the American and English authorities, see JURY.

Lord Mansfield, in 5 Burr. 2661, and in 20 How. St. Tr. 892, and Mr. Justice Buller, in the Dean of St. Asaph's case, 21 How. St. Tr. 847, charged the jury that the only questions for them were whether the defendants had printed and published the paper in question, and whether the innuendoes therein were truly intended as avowed in the indictment, and that it was for the court alone to say whether the paper was a libel or not. This was stoutly denied to be the true state of the law, and accordingly an act known as "Fox's Libel Act" was passed in 1792, declaring that the jury may give a general verdict of guilty or not guilty in all such cases upon the whole matter put at issue, and shall not be required to find defendant guilty on mere proof of publication, and of the sense ascribed to the same in the indictment.

This statute is now generally conceded to be declaratory of the common law. The judge should instruct the jury as to what a libel is, and then leave it to them to say whether the facts necessary to constitute the offence have been proved to their satisfaction; 63 Pa. 253; 18 *id.* 489; 1 Minn. 156; 23 Vt. 14; 2 Campb. 478; 13 Metc. 120; 29 Me. 323; 21 How. St. Tr. 922; see 96 Mich. 587. See, generally, Wharton; Bishop, Crim. Law; Starkie; Heard; Townsend; Odger, Lib. & Sl; 9 L. R. A. 621, note. See LIBERTY OF PRESS; JUSTIFICATION; MALICE; PRIVILEGED COMMUNICATION; INJUNCTION; NEWSPAPER; CRITICISM; SLANDER; JUDGE; JURY; SCANDALUM MAGNATUM.

**LIBEL OF ACCUSATION.** In Scotch Law. The instrument which contains the charge against a person accused of a crime. Libels are of two kinds, namely, indictments and criminal letters.

**LIBELLANT.** The party who files a libel in an ecclesiastical, divorce, or admiralty case, corresponding to the plaintiff in actions in the common-law courts.

**LIBELLEE.** A party against whom a libel has been filed in proceedings in an

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ecclesiastical court or in admiralty, corresponding to the defendant in a common-law suit.

**LIBELLUS** (Lat.). **In Civil Law.** A little book. *Libellus supplex*, a petition, especially to the emperor; all petitions to whom must be in writing. L. 15. D. *in jus voc.* *Libellum rescribere*, to mark on such petition the answer to it. L. 2, § 2, Dig. *de jur. fisc.* *Libellum agere*, to assist or counsel the emperor in regard to such petitions, L. 12 D. *de distr. pign.*; and one whose duty it is to do so is called *magister libellorum.* There were also *promagistri.* L. 1, D. *de offic præf. pract.* *Libellus accusatorius*, an information and accusation of a crime. L. 17, § 1, & L. 29, § 8, *D. ad leg. Jul. de adult.* *Libellus divortii*, a writing of divorcement. L. 7, D. *de divort. et repud.* *Libellus rerum*, an inventory. Calv. Lex. *Libellus* or *oratio consultoria*, a message by which emperors laid matters before the senate. Calvinus, Lex.; Suet. Cæs. 56.

A writing in which are contained the names of the plaintiff (actor) and defendant (reus), the thing sought, the right relied upon, and name of the tribunal before which the action is brought. Calvinus, Lex.

*Libellus appellatorius*, an appeal. Calvinus, Lex.; L. 1, § ult., D. ff. *de appellat.*

**In English Law** (sometimes called *libellus conventionalis*). A bill. Bracton, fol. 112.

**LIBELLUS FAMOSUS.** (Lat.). A libel; a defamatory writing. L. 15, D. *de pœn*; Vocab. Jur. Utr. sub "*famosus.*" It may be without writing: as, by signs, pictures, etc. 5 Rep. *de famosis libellis.*

**LIBER** (Lat.). **In Civil Law.** A book, whatever the material of which it is made; a principal subdivision of a literary work: thus, the Pandects, or Digest of the Civil Law, is divided into fifty books. L. 52. D. *de legat.*

**In Civil and Old English Law.** Free: *e. g.* a free (*liber*) bull. Jacobs. Exempt from service or jurisdiction of another. Law Fr. & Lat. Dict.: *e. g.* a free (*liber*) man. L. 3, D. *de statu hominum.*

**LIBER ASSISARUM** (Lat.). The book of assigns or pleas of the crown; being the fifth part of the Year-Books.

**LIBER AUTHENTICORUM.** The authentic collection of the novels of Justinian, so called to distinguish them from the Epitome Juliani. Sohm. Rom. L. 14.

**LIBER ET LEGALIS HOMO** (Lat.). A free and lawful man. One worthy of being a juryman; he must neither be infamous nor a bondman. 3 Bla. Com. 340, 362; Bract. fol. 14 *b*; Fleta, l. 6, c. 25, § 4; l. 4, c. 5, § 4.

**LIBER FEUDORUM** (Lat.). A code of the feudal law, which was compiled by direction of the emperor Frederick Barbarossa, and published in Milan, in 1170. It was called the *Liber Feudorum*, and was divided into five books, of which the first, second, and some fragments of the others still exist, and are printed at the end of all the modern editions of the Corpus Juris Civilis. Giannone, b. 13, c. 3; Cruise, Dig. prel. diss. c. 1, § 31.

**LIBER HOMO** (Lat.). A free man; a freeman lawfully competent to act as juror. Ld. Raym. 417; Kebl. 563.

In London, a man can be a *liber homo* either—1, by service, as having served his apprenticeship; or, 2, by birthright, being a son of a *liber homo*; or, 3, by redemption, *i. e.* allowance of mayor and aldermen. 8 Rep., Case of City of London. There was no intermediate state between *villein* and *liber homo.* Fleta, lib. 4, c. 11, § 22. But a *liber homo* could be vassal of another. Bract. fol. 25.

**In Old European Law.** An allodial proprietor, as opposed to a feudatory. Calvinus, Lex. *Alode.*

**LIBER JUDICIARUM** (Lat.). The book of judgment, or doom-book. The Saxon Domboc. Conjectured to be a book of statutes of ancient Saxon kings. See Jacob, *Domboc*; 1 Bla. Com. 64.

**LIBERA.** A delivery of so much corn or grass to a customary tenant, who cut down or prepared the said grass or corn and received some portion of it as a reward or gratuity. Cowel.

**LIBERAL** (Lat. *liberalis*, of or belonging to a freeman—from *liber*, free). Free in giving; generous; not mean or narrow-minded; not literal or strict.

Where a jury was instructed that in the award of compensation "it should be liberal," an exception to the remark was overruled; no request had been made for a different instruction, and the expression objected to was preceded by a caution to the jury against crediting any extravagant statement of the injuries. And as if to qualify this caution, it was added that it should be liberal; 9 Otto 659.

By *liberal interpretation* is meant not that the words should be forced out of their natural meaning, but simply that they should receive a fair and reasonable interpretation with respect to the objects and purposes of the instrument; 2 How. 183.

An offer of a *liberal reward* for information leading to the apprehension of a fugitive and a specified sum for his apprehension entitles the party giving information leading to the arrest to the liberal reward, but not to the sum named where the arrest was not in fact make by him or by his agent; 92 U. S. 73.

**LIBERATE** (Lat.). **In English Practice.** A writ which issues on lands, tenements, and chattels, being returned under an extent on a statute staple, commanding the sheriff to deliver them to the plaintiff, by the extent and appraisement mentioned in the writ of extent and in the sheriff's return thereto. See Comyns, Dig. *Statute Staple* (D 6).

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**LIBERATION. In Civil Law.** The extinguishment of a contract, by which he who was bound becomes free or liberated. Wolff, *Dr. de la Nat.* § 749. Synonymous with payment. Dig. 50. 16. 47.

**LIBERIA.** A republic of western Africa. The president is elected for two years. The senate consists of eight members and is elected for four years, and a house of representatives elected for two years. In every inhabited district there is an "administrator of justice." The code of law is based on English and American law.

**LIBERTI, LIBERTINI. In Roman Law.** The condition of those who, having been slaves, had been made free. 1 Brown, Civ. Law 99.

There is some distinction between these words. By *libertus* was understood the freedman when considered in relation to his patron, who had bestowed liberty upon him; and he was called *libertinus* when considered in relation to the state he occupied in society subsequent to his manumission. *Lec. El. Dr. Rom.* § 93. See Morey, Rom. L. 236.

**LIBERTIES.** In colonial times this term was used as meaning laws or legal rights resting upon them. The early colonial ordinances in Massachusetts were termed laws and liberties, and the code of 1641 the "Body of Liberties"; 7 Cush. 70.

The term is also used in the expression, rights, liberties, and franchises, as a word of the same general class and meaning with those words and privileges. This use of the term is said to have been strictly conformable to its sense as used in Magna Charta and in English declarations of rights, statutes, grants, etc.; 7 Cush. 70.

It was intended to secure to corporations as well as to individuals the rights enumerated in the bill of rights; 1 Murphy 58.

**LIBERTY** (Lat. *liber*, free; *libertas*, freedom, liberty). Freedom from restraint. The faculty of willing, and the power of doing what has been willed, without influence from without.

A privilege held by grant or prescription, by which some men enjoy greater privileges than ordinary subjects.

The place within which certain privileges or immunities are enjoyed, or jurisdiction is exercised, as the liberties of a city. See FREEDOM OF THE CITY.

Liberty, "on its positive side, denotes the fullness of individual existence; on its negative side it denotes the necessary restraint on all, which is needed to promote the greatest possible amount of liberty for each." Amos, Science of Law p. 90.

*Civil liberty* is the greatest amount of absolute liberty which can in the nature of things be equally possessed by every citizen in a state.

The right to do everything permitted by the laws. Ordr. Const. Leg. 37.

The term is frequently used to denote the amount of absolute liberty which is actually enjoyed by the various citizens under the government and laws of the state as administered. 1 Bla. Com. 125.

The fullest political liberty furnishes the best possible guarantee for civil liberty.

Lieber defines civil liberty as guaranteed protection against interference with the interests and rights held dear and important by large classes of civilized men, or by all the members of a state, together with an effectual share in the making and administration of the laws, as the best apparatus to secure that protection, including Blackstone's divisions of civil and political under this head.

Under the Roman law, civil liberty was the affirmance of a general restraint, while in our law it is the negation of a general restraint; Ordr. Const. Leg.

*Natural liberty* is the right which nature gives to all mankind of disposing of their persons and property after the manner they judge most consistent with their happiness, on condition of their acting within the limits of the law of nature and so as not to interfere with an equal exercise of the same rights by other men. Burlam. c. 3, § 15; 1 Bla. Com. 125. It is called by Lieber *social* liberty, and is defined as the protection or unrestrained action in as high a degree as the same claim of protection of each individual admits of.

*Personal liberty* consists in the power of locomotion, of changing situation, of removing one's person to whatever place one's inclination may direct, without imprisonment or restraint unless by due course of law. 1 Bla. Com. 134: Hare, Const. L. 777.

*Political liberty* is an effectual share in the making and administration of the laws. Lieber, Civ. Lib.

Liberty, in its widest sense, means the faculty of willing, and the power of doing what has been willed without influence from without. It means self-determination, unrestrainedness of action. Thus defined, one being only can be absolutely free,—namely, God. So soon as we apply the word liberty to spheres of human action, the term receives a relative meaning, because the power of man is limited; he is subject to constant influences from without. If the idea of unrestrainedness of action is applied to the social state of man, it receives a limitation still greater, since the equal claims of unrestrained action of all necessarily involves the idea of protection against interference by others. We thus come to the definition, that liberty of social man consists in the protection of unrestrained action in as high a degree as the same claim of protection of each individual admits of, or in the most efficient protection of his rights, claims, interests, as man or citizen, or of his humanity, manifested as a social being. (See RIGHT.) The word liberty, applied to men in their political state, may be viewed with reference to the state as a whole, and in this case means the independence of the state, of other states (see AUTONOMY); or it may have reference to the relation of the citizen to the government, in which case it is called political or civil liberty; or it may have reference to the status of a man as a political being, contradistinguished from him who is not considered master over his own body, will, or labor—the slave. This is called personal liberty, which, as a matter of course, includes freedom from prison.

For purposes of convenience and justice alike, in all well governed communities, the natural right of citizens are held in abeyance and subject to conditional limitations as having lost some portion of their absolute character. This is but an affirmance of the doctrine that every individual in order to

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live peacefully in society must submit to some abridgment of his natural right; for any acknowledgment of government, says Brownson, implies that the citizen consents to submit his will to that of a governing will located in the administration of the state; Am. Republic; Ord. Const. Leg.

Constitutional guarantees are the last and best fruits of civil liberty. The bulwarks of civil liberty consist of public acts passed for the purpose of defining and regulating the exercise of the sovereign powers of the state. It is only in this way that the personal rights of the citizen can be secured against invasion by the supreme authority. These acts are the guarantees of the good faith of the citizens towards each other and towards the common sovereignty under which they are united. They consist of grants of power together with limitations upon its exercise. Part of these rules being unwritten form the common law of the land, and part consist of positive laws known as constitutional provisions which may be enforced in competent tribunals; Ord. Const. Leg. 168.

Liberties are nothing until they have become rights—positive rights formally recognized and consecrated. Rights, even when recognized, are nothing so long as they are not entrenched within guarantees. And guarantees are nothing so long as they are not maintained by forces independent of them in the limit of their right. Convert liberties into rights—surround rights by guarantees—entrust the keeping these guarantees to forces capable of maintaining them. Such are the successive steps in the progress of free government. 1 Guizot, Rep. Gov. Lect. 6.

"As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it." Mill, Liberty, c. 4.

Lieber, in his work on Civil Liberty, calls that system which was evolved in England, and forms the basis of liberty in the countries settled by English people, Anglican liberty. The principal guarantees, according to him, are:—

1. National independence. There must be no foreign interference. The country must have the right and power of establishing the government it thinks best.

2. Individual liberty, and, as belonging to it, personal liberty, or the great habeas corpus principle, and the prohibition of general warrants of arrest. The right of bail belongs also to this head.

3. A well-secured penal trial, of which the most important is trial for high treason.

4. The freedom of communion, locomotion, and emigration

5. Liberty of conscience. The United States constitution and the constitutions of all the states have provisions prohibiting any interference in matters of religion.

6. Protection of individual prorerty, which requires unrestrained action in producing and exchanging, the prohibition of unfair monopolies, commercial freedom, and the guarantee that no property shall be taken except in the course of law, the principle that taxation shall only be with the consent of the tax-payer, and shall be levied for short periods only, and the exclusion of confiscation.

7. Supremacy of the law. The law must not, however, violate any superior law or civil principle, nor must it be an *ex post facto* law. The executive must not possess the power of declaring martial law, which is merely a suspension of all law. In extreme cases, parliament in England and congress in the United States can pass an act suspending the privilege of habeas corpus.

8. Every officer must be responsible to the person affected for the legality of his act; and no act must be done for which some one is not responsible.

9. It has been deemed necessary in the Bill of Rights and the American constitution specially to refer to the quartering of soldiers as a dangerous weapon in the hands of the executive.

10. The military force must be strictly submitted to the law, and the citizen should have the right to bear arms.

11. The right of petitioning, and the right of meeting and considering public matters, and of organizing into associations for any lawful purposes, are important guarantees of civil liberty.

The following guarantees relate more especially to the government of a free country and the character of its polity:—

12. Publicity of public business in all its branches, whether legislative, judicial, written, or oral.

13. The supremacy of the law, or the protection against the absolutism of one, of several, or of the majority, requires other guarantees. It is necessary that the public funds be under close and efficient popular control; they should therefore be chiefly in the hands of the popular branch of the legislature, never of the executive. Appropriations should also be for distinct purposes and short times.

14. It is further necessary that the power of making war reside with the people, and not with the executive. A declaration of war in the United States is an act of congress.

15. The supremacy of the law requires, also, not only the protection of the minority, but the protection of the majority against the rule of a factious minority or cabal.

16. The majority, and through it the people, are protected by the principle that the administration is founded on party principles.

17. A very important guarantee of liberty is the division of government into three distinct functions,—legislative, administrative, and judicial. The union of these is absolutism or despotism on the one hand, and slavery on the other.

18. As a general rule, the principle prevails in Anglican liberty that the executive may do what is positively allowed by fundamental or other law, and not all that which is not prohibited.

19. The supremacy of the law requires that, where enacted constitutions form the fundamental law, there be some authority which can pronounce whether the legislature itself has or has not transgressed it. This power must be vested in courts of law.

20. There is no guarantee of liberty more important and more peculiarly Anglican than the representative government. See Lieber, Civ. Lib. p. 168.

In connection with this, a very important question is, whether there should be direct elections by the people, or whether there should be double elections. The Anglican principle favors simple elections; and double elections have often been resorted to as the very means of avoiding the object of a representative government.

The management of the elections should also be in the hands of the voters, and government especially should not be allowed to interfere.

Representative bodies must be free. They must be freely chosen, and, when chosen, act under no threat or violence of the executive or any portion of the people. They must be protected as representative bodies; and a wise parliamentary law and usage should secure the rights of each member and the elaboration of the law.

A peculiar protection is afforded to members of the legislature in England and the United States by their freedom from arrest, except for certain specified crimes.

Every member must possess the right to propose any measure or resolution.

Not only must the legislature be the judge of the right each member has to his seat, but the whole internal management belongs to itself. It is indispensable that it possess the power and privileges to protect its own dignity.

The principle of two houses, or the bicameral system, is an equally efficient guarantee of liberty, by excluding impassioned legislation and embodying in the law the collective mind of the legislature.

21. The independence of the law, of which the independence of the judiciary forms a part, is one of the main stays of civil liberty. It requires "a living common law, a clear division of the judiciary from other powers, the public accusatorial process, the independence of the judge, the trial by jury, and an independent position of the advocate." See Lieber, Civil Liberty and Self-Government 208-250.

22. Another constituent of our liberty is local and institutional self-government. It arises out of a willingness of the people to attend to their own affairs, and an unwillingness to permit of the interference of the executive, and administration with them beyond what it necessarily must do, or which cannot or ought not to be done by self-action. A pervading self-government, in the Anglican sense, is organic; it consists in organs of combined self-action, in institutions, and in a systematic connection of these institutions. It is, therefore, equally opposed to a disintegration of society and to despotism.

American liberty belongs to the great division of Anglican liberty, and is founded upon the checks, guarantees, and self-government of the Anglican race. The following features are, however, peculiar to American liberty: republican federalism, strict separation of the state from the church

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greater equality and acknowledgment of abstract rights in the citizen, and a more popular or democratic cast of the whole polity. With reference to the last two may be added these further characteristics:—

We have everywhere established voting by ballot. The executive has never possessed the power of dissolving or proroguing the legislature. The list of states has not been closed. We admit foreigners to the rights of citizenship, and we do not believe in inalienable allegiance.

There is no attainder of blood. We allow no *ex post facto* laws. American liberty possesses, also, as a characteristic, the enacted constitution,—distinguishing it from the English polity, with its accumulative constitution. Our legislatures are, therefore, not omnipotent, as the British parliament theoretically is; but the laws enacted by them may be declared by the courts to conflict with the constitution.

The liberty sought for by the French, as a peculiar system, was founded chiefly, in theory, on the idea of equality and the abstract rights of man. Rousseau's Social Contract. See FREEDOM; PERSONAL LIBERTY, and titles here following.

**LIBERTY OF CONTRACT.** Liberty of contract consists in having the ability at will, to make or abstain from making, a binding obligation enforced by the sanctions at the law. Judson, Liberty of Contract, Rep. Am. Bar Assn. (1891) 233. Whilst closely allied with property and essential to its use and enjoyment, liberty of contract is really broader in its scope. Ownership of property is a right residing in a person, and property is any right of a person over a thing (*in rem*) indefinite in point of user. It is through the abridgment of the right of free contract by denying or restraining the *use* of property that so-called property rights are invaded in the exercise of the police power; *id.* 232.

The term liberty is used in the fourteenth amendment of the constitution to comprehend in one the right of freedom from physical restraint, and also the right in one to pursue any livelihood or calling, and for that purpose to enter into all contracts which may be proper; 165 U. S. 578; 71 Fed. Rep. 931; and to have their contracts enforced; 115 Mo. 307.

The privilege of contract is both a liberty and a property right of which one cannot be deprived without due process of law; 154 Ill. 98. And the right of individuals to contract cannot be limited by arbitrary legislation which rests on no reason on which it can be defended, since this would subvert the right to enjoy liberty; 58 Ark. 407; but whenever a statute can be seen to be in the substantial interest of public health, safety, and morals, it may legitimately be upheld even though it incidentally interfere with liberty of contract; 46 Pac. Rep. (Utah) 756.

Among the statutes which, although interfering with the right to contract, have been held constitutional either under the police power of a state or under the power vested in the legislature for the public welfare, are: fixing the maximum of charges for the storage of grain; 94 U. S. 113; 117 N. Y. 1; giving a city power to regulate the price of bread; 3 Ala. 140; prohibiting the manufacture and sale of any article in imitation of the substance of butter; 105 N. Y. 123; 127 U. S. 678; or of oleomargarine colored to imitate butter; 50 N. J. L. 534; or of oleomargarine unless stamped; 68 Md. 592; or of any article designed to take the place of butter or cheese; 12 Mo. App. 214; prohibiting the sale of cotton in the seed between the hours of sunset and sunrise; 68 Ala. 58; 76 *id.* 60; 104 N. C. 714; forbidding the sale of baking powder containing alum without a label so stating; 44 Minn. 271; making it unlawful for the vendor of personal property, sold on condition that the title should remain in him until payment in full had been made, to take possession of such property without tendering or refunding to the purchaser the sums already paid by him, after deducting a reasonable compensation for the use; 46 Ohio St. 450; forbidding the sale of stamped and registered bottles without the consent of the person whose stamp it thereon; 139 N. Y. 132; forbidding any one not authorized by law to issue a note, check, or ticket to circulate as money; 63 Mo. 570; reducing the rate of interest on judgments; 145 U. S. 162 (Harlan, Field, and Brewer, JJ., dissenting); giving priority to a mechanic's lien over a mortgage of an earlier date; 62 Mo. 433; limiting the amount of property which incorporated colleges might take by devise, grant, etc.; 156 U. S. 152, affirming 111 N. Y. 66; forbidding the importation of foreign labor; 28 Fed. Rep. 795; 36 *id.* 303; or the employment of Chinese labor; 85 Cal. 274; providing that a failure to perform any condition of an insurance policy shall not be a valid defence of an action unless such condition is printed in type as large as or larger than that known as long primer, or is written with pen and ink in or on the policy; 63 Fed. Rep. 680; restricting insurance business to corporations; 164 Pa. 306; prohibiting foreign insurance companies from carrying on business within its limits; 155 U. S. 648; but see 165 U. S. 578, where a provision in a statute forbidding the insurance of property within the state in a foreign insurance company which has not complied with the laws of such state was held a violation of the right of the individual to contract; the contract having been made in another state; prohibiting citizens from selling intoxicating liquors; 42 S. C. 222; or forbidding the selling or giving of intoxicating liquors to Indians; 105 Cal. 344; or a prohibition act; 123 U. S. 623. Making it a misdemeanor for an attorney to receive more than a specified amount for prosecuting a claim for a pension is valid, as a pension is a bounty over which congress has control; 157 *id.* 60.

Much of the legislation which has been questioned as interfering with the liberty of contract secured to the citizens of the United States under the fourteenth amendment to the constitution, is in relation to the acts passed which aimed to benefit the laborer in his relations to his employer. Although lacking the powers vested in the courts in this country to declare an act unconstitutional, yet the principle on which much of this class of legislation on the liberty of contract rests in the United States is clearly stated by an English court, "When two classes of persons are dealing together

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and one class is, generally speaking, weaker than the other, and liable to oppression either from natural or incidental causes, the law should as far as possible redress the inequality by protecting the weak against the strong." 2 B. & S. 66. Obviously, the intention of the legislature in passing this class of acts was to protect the employes against fraud and oppression on the part of employers, but the objection to statutes prescribing a limitation upon hours of labor and regulating the mode of payment for it are (1) that they interfere with the right secured to every citizen of acquiring and possessing property or with the right to pursue happiness; (2) they are in conflict with that clause of the bill of rights which declares that no one shall be deprived of life, liberty, or property without due process of law; 27 Am. L. Rev. 857.

In many cases the restriction by statute of contracts between employers and employes is held unconstitutional; 58 Ark. 407; 41 Neb. 187; 154 Ill. 198; 8 Ohio Cir. Ct. R. 658; 39 Pac. Rep. (Colo.) 328; 115 Mo. 307; 162 Pa. 153; 113 *id.* 431; and the liberty to enter into contracts by which labor may be employed in such way as the laborer may deem most beneficial and to others to employ such labor is held to be necessarily included in the constitutional guaranty of the right to property; 147 Ill. 66, where the act prescribed that wages be paid weekly. But in Massachusetts a statute requiring manufacturers to pay the wages of their employes weekly is held within the power of the legislature, as the constitution of that state extends legislative power to "all manner of wholesome and reasonable laws, statutes, and ordinances," and does not, in terms, make any provisions as to liberty of contract; 163 Mass. 589; so in Rhode Island a weekly payment law; 25 Atl. Rep. (R. I.) 246; and in Indiana a bi-weekly payment law, were held constitutional; 22 N. E. Rep. (Ind.) 253.

In New York a law forbidding city contractors to accept more than eight hours for a day's work except in cases of necessity is held not to abridge the privileges or rights of any citizens; 30 N. Y. Sup. 473 (White, J., dissenting); so with a law limiting hours of service on railroads; 136 N. Y. 554; and one forbidding the employment of women and children for more than ten hours a day; 120 Mass. 383; and an act providing that ten hours in twelve consecutive hours shall be a day's labor for railroad laborers and that an employe shall receive proportionate compensation for extra time was held constitutional where the rate of wages was not prescribed by the act and contracts other than by the day were not prohibited by it; 20 N. Y. Supp. 461. But an act prescribing a limit of ten hours for a day's work has been held unconstitutional; 8 Ohio Cir. Ct. R. 658; 39 Pac. Rep. (Colo.) 328; as is an ordinance prescribing eight hours; 85 Cal. 274; 41 Neb. 187; 154 Ill. 198 (where the act limited the restriction of hours to women); and an act forbidding the execution of a contract between a corporation and an employe whereby the latter agrees in consideration of certain benefits from the company, that if he elect to accept benefits when injured he will not look to the company for damages; 1 Ohio N. P. 213.

A statute providing that corporations engaged in manufacturing or in operating a railroad should pay the wages of their employes in legal tender money of the United States, was held valid on the ground that such legislation was necessarily incident to the power of the legislature to amend or alter the corporate charter; 55 Md. 74; and a similar statute regarding payment of wages otherwise than by paper redeemable in lawful money, and prescribing a method of weighing coal at the mouth of the mine, was upheld on the ground that the business of the defendants was one over which the state had supervision, and that the state had power to protect laborers against fraud on the part of employers in the payment of wages and in the mode of ascertaining the amount of the wages earned; 36 W. Va. 802; *contra* as to the last point, 39 Pac. Rep. (Colo.) 431, on the ground that the act attempted to deprive persons of the right to fix by contract the manner of ascertaining compensation, and *contra* as to the payment of wages by any order or script not negotiable and redeemable in lawful money of the United States, 115 Mo. 307; 113 Pa. 431; 33 W. Va. 179, 188; 147 Ill. 66. A statute forbidding the waiving of payment of money in contracts between employer and employe was held constitutional on the ground that it protected and maintained the medium of payment established by the sovereign power of the United States; 123 Ind. 365.

As to the constitutionality of acts forbidding an employer to discharge his employe on account of his membership in a labor union, see LABOR UNION.

See, generally, 32 L. R. A. 789, note; 29 Am. L. Rev. 236; 27 *id.* 857; Rep. Am. Bar Assn. (1891) 231; 32 Am. L. Reg. 816. See LABOR; LABOR UNION; STORE ORDERS; DUE PROCESS OF LAW; FACTORY ACTS POLICE POWER.

**LIBERTY OF SPEECH.** The right to speak facts and express opinions. Whart. Dict.

The liberty of speech which both the federal and state constitutions protect is (1) Liberty of speech of legislators in public assemblies, and while engaged in discussing public matters, or in writing reports, or in the exercise of the functions of their office. This is an official privilege: 4 Mass. 1. (2) Liberty of speech of counsel in judicial proceedings, and while confining himself to matters that are strictly pertinent to the issue. This is also an official privilege: 3 Metc. 194; 1 Binn. 178.

In the discharge of his professional duty, counsel may use strong epithets, however derogatory to other persons they may be, if *pertinent* to the cause, and stated in his instructions, whether the thing were true or false. But if he were maliciously to

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travel out of his case for the purpose of slandering another, he would be liable to an action, and amenable to a just, and often more efficacious, punishment, inflicted by public opinion; 3 Chitty, Pr. 887.

No action will lie against a witness at the suit of a party aggrieved by his false testimony, even though malice be charged; 50 N. Y. 309; 21 La. Ann. 375; 28 Ia. 51. The remedy against a dishonest witness is confined to the criminal prosecution for perjury; but false accusations, contained in affidavits or other proceedings by which a prosecution is commenced for supposed crime, render the party liable to action if actual malice be averred and proven; 4 Cal. 624; Cooley, Const. Lim. 522.

An act forbidding the use of profane language is not an undue interference with free speech; 113 N. C. 683; 50 Fed. Rep. 921; 16 Blatch. 338; or one taxing itinerant venders of a drug; 60 N. W. Rep. (Ia.) 486; or an ordinance prohibiting a public address upon any of the public grounds of a city; 162 Mass. 510; but an act which makes it unlawful for certain specified officers to participate in politics by making political speeches or participate in political meetings is unconstitutional; 79 Va. 196.

Maliciously enticing employes of a receiver to leave his employ in pursuance of a combination to prevent the operation of the road is not protected by the constitutional guaranty of free speech; 62 Fed. Rep. 803. Congress has no power to punish individuals for disturbing the assemblies of peaceful citizens. That is a police power belonging to the state alone; 92 U. S. 524. See 32 L. R. A. 829, n.; Cooley, Const. Lim.; Ord. Const. Leg.; LABOR UNION; MALICE; SLANDER; LIBEL; LIBERTY OF THE PRESS.

**LIBERTY OF THE PERSON.** See PERSONAL LIBERTY.

**LIBERTY OF THE PRESS.** The right to print and publish the truth, from good motives and for justifiable ends. 3 Johns. Cas. 394.

The right in the publisher of a newspaper to print whatever he chooses without any previous license, but subject to be held responsible therefor to exactly the same extent that any one else would be responsible. 13 W. Va. 182.

The right to print without any previous license, subject to the consequences of the law. 3 Term 431.

The right to publish in the first instance as the publisher pleases, and without control; but for proceeding to unwarrantable lengths he is answerable both to the community and to the individual. 4 Yeates 267. Liberty of the press means not only liberty to publish, but complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords; Cooley, Const. Lim. [422]. See Story, Const. §§ 1870, 1888, 1891. It is said to consist in this "that neither courts of justice nor any judges whatever are authorized to take notice of writings *intended* for the press, but are confined to those which are actually printed." De Lome, Const. 254.

At common law liberty of the press was neither well protected nor well defined, and not until after many struggles was it so far recognized in England as to permit the publication of current news without the permission of government censors. May, Const. Hist. c. 7, 9, 10. The general publication of parliamentary debates dates only from the American revolution, and even then was considered a technical breach of privilege; Cooley, Const. Lim. [418]. A fair publication of a debate is now held to be privileged, and comments on public legislative proceedings are not actionable, so long as a jury shall think them honest and made in a fair spirit, and such as are justified by the circumstances; L. R. 4 Q. B. 78.

In the colonial period the English practice was followed in this country. In 1649 the general laws were published for the first time in Massachusetts under protest by the magistrates, and in Virginia and New York printing was specially prohibited. The constitutional convention of 1787 sat with closed doors, as did the senate until 1793. By the constitution liberty of the press is secured against restraint in the United States, but he who uses it is responsible for its abuse. Like the right to keep firearms, it will not protect the user from annoyance and destruction caused by him; 3 Pick. 313. The Sedition Act, July 14, 1798, attempted a restriction upon the freedom of the press, but by its terms it was self-limited; its constitutionality was always doubted by a large party, and its impolicy was beyond question. See Whart. St. Tr. 333, 659, 688; 2 Rand. Life of Jefferson 417; 5 Hildr. Hist. U. S. 247; Ord. Const. Leg.

Liberty of the press is allowed in publishing (1) naked and impartial statements of judicial proceedings involving a trial and not a mere *ex parte* examination; and when the nature of the case does not render it improper that the same should be published, or constitute such a publication an offence at law; 4 Sandf. 21, 120; 5 *id.* 256; 10 Ohio St. 548; 4 Wend. 138; 2 Hill 513; (2) in publishing news; Ord. Const. Leg. 239. Acts which have been held not in conflict with the constitutional guaranty of liberty of the press are:—An act making the publication of a grossly false and inaccurate report of the proceedings of any court a criminal offence and a contempt; 17 Mont. 140; an act taxing the selling of Sunday papers; 17 Tex. App. 253; an act forbidding the use of the mails for obscene matter; 45 Fed. Rep. 414; or for printed matter deemed by the government to be injurious to the people; 143 U. S. 110; 96 *id.* 727; or for sending threatening letters; 135 Mo. 450 (see LIBEL); an act forbidding the publication and sale of a newspaper devoted to the publication of scandal and immorality; 136 Mo. 227; an act directed against blasphemy; 20 Pick. 206; and a by-law of the Associated Press of New York, prohibiting a member from receiving or publishing the regular news despatches of any other news organization covering a like territory; 136 N. Y. 333, aff'g 15 N. Y. Suppl. 887.

A city cannot pass an ordinance declaring a certain named newspaper a public nuisance and forbidding its sale; 22 S. W. Rep. (Tex.) 923; nor can the advertisement of a dramatic production be prevented where the play is based upon the facts of

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a pending trial, as disclosed at a preliminary hearing and the coroner's inquest; 44 Pac. Rep. (Cal.) 458; and the constitutional guaranty of liberty of the press will not protect one who breaks a contract with a purchaser not to publish or be connected with another paper in the same locality; 24 S. E. Rep. (N. C.) 212.

As to whether an injunction may be issued to restrain the publication of an alleged libel, see LIBEL.

See, generally, NEWSPAPER; LETTER; INJUNCTION.

**LIBERUM MARITAGIUM** (Lat.). **In Old English Law.** Frank-marriage (*q. v.*). 2 Bla. Com. 115; Littleton § 17; Bract. fol. 21.

**LIBERUM SERVITIUM.** Free service. Service of a warlike sort by a feudatory tenant; sometimes called *servitium liberum armorum*. Somner, Gavelk. p. 56; Jacob, Law Dict.; 4 Co. 9.

Service not unbecoming the character of a freeman and a soldier to perform: as, to serve under the lord in his wars, to pay a sum of money, and the like. 2 Bla. Com. 60. The tenure of free service does not make a villein a free man, unless homage or manumission precede, any more than a tenure by villein services makes a freeman a villein. Bract. fol. 24.

**LIBERUM TENEMENTUM.** Freehold. Frank-tenement. 2 Bouv. Inst. n. 1690; 1 Washb. R. P. 46.

**In Pleading.** A plea in justification by the defendant in an action of trespass, by which he claims that he is the owner of the close described in the declaration, or that it is the freehold of some third person by whose command he entered. 2 Salk. 453; 7 Term 355; 1 Wms. Saund. 299 *b*, note.

It has the effect of compelling the plaintiff to a new assignment, setting out the abuttals where he has set forth the *locus in quo* only generally in his declaration; 11 East 51, 72; 16 *id.* 343; 1 B. & C. 489; or to set forth tenancy in case he claims as tenant of the defendant, or the person ordering the trespass; 1 Saund. 299 *b*. It admits possession by the plaintiff, and the fact of the commission of a trespass as charged; 2 M'Cord 226; McKel. Pl. 2033; see Greenl. Ev. § 626.

**LIBLAC.** Witchcraft, particularly that kind which consisted in the compounding and administering of drugs and philters. Leg. Athel. 6; Wharton.

**LIBRA PENSA.** A pound of money by weight.

**LIBRIPENS.** A neutral person or balance holder, who was present at a conveyance of real property. He held in his hand the symbolic balance, which was struck by the purchaser with a piece of bronze as a sign of the completion of the conveyance. The bronze was then transferred to the seller as a sign of the purchase money. Morey, Rom. L. 21, 80.

**LICENCIADO. In Spanish Law.** Lawyer or advocate. By a decree of the Spanish government of 6th November, 1843, it was declared that all persons who have obtained diplomas of "Licentiates in Jurisprudence" from any of the literary universities of Spain are entitled to practice in all the courts of Spain without first obtaining permission by the tribunals of justice.

**LICENSE** (Lat. *licere*, to permit).

**In Real Property Law.** A permission. A right, given by some competent authority to do an act, which without such authority would be illegal, or a tort or trespass.

A permission to do some act or series of acts on the land of the licensor, without having any permanent interest in it; it is founded on personal confidence, and not assignable. It may be given in writing or by parol; it may be with or without consideration, but in either case it is usually subject to revocation, though constituting a protection to the party acting under it until the revocation takes place. 24 Mich. 282; 89 *id.* 315; 3 Wyo. 513.

An authority to do a particular act or series of acts on another's land without possessing any estate therein. 11 Mass. 533; 4 Sandf. Ch. 72; 60 Vt. 702; 1 Washb. R. P. *398.

The written evidence of the grant of such right.

An *executed license* exists when the licensed act has been done.

An *executory license* exists where the licensed act has not been performed.

An *express license* is one which is granted in direct terms.

An *implied license* is one which is presumed to have been given from the acts of the party authorized to give it.

It may be granted by the owner, or, in many cases, by a servant; Cro. Eliz. 246; 2 Greenl. Ev. § 427.

The distinction between an easement and a license is often so metaphysical, subtle, and shadowy as to elude analysis. The adjudications upon this subject are so numerous and discordant that taken in the aggregate they cannot be reconciled. But there are certain fundamental principles underlying most cases which enable courts to distinguish an easement from a license when construed in the light of surrounding circumstances; 32 N. J. Eq. 254; 94 Tenn. 397. An easement implies an interest in land which can only be created in writing or constructively its equivalent—prescription; 1 Washb. R. P. 629. A license may be created by parol; 13 M. & W. 838; 4 M. & S. 562; 7 Barb. 4; 61 Me. 422; 60 Tex. 267; by specialty; Pars. Con. 222; or by implication of circumstances; Hob. 62; 2 Greenl. Ev. § 427.

Licenses are of two kinds, simple or revocable, and coupled with a grant or irrevocable. Simple licenses are revocable at the will of the grantor; 11 Mass. 433; 15 Wend. 380; 81 Ga. 461; 78 Cal. 95; 24 N. H.

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364; they are revoked *ipso facto* by the grantor's conveying the land to another; 4 M. & W. 538; 119 U. S. 561; or by his doing any other act preventing the user; 13 M. & W. 838; although the licensee has incurred expense; 10 Conn. 378; 24 N. H. 364; 4 Johns. 418; 37 E. L. & Eq. 489; 3 Wis. 117; 2 Gray 302; 1 Dev. & B. 492; 41 Minn. 56; 40 Ill. App. 641; 111 Mo. 387; 63 Hun 634; 90 Mich. 234; but see 14 S. & R. 267; and it is not so with a license closely coupled with a transfer of title to personal property; 8 Metc. 34; 11 Conn. 525.

A license is irrevocable when it is coupled with a grant or when the licensee has on the faith of the license spent money in executing works of a permanent character on the land; 2 B. & Ald. 724; 11 A. & E. 34; 8 East 302; 33 Ala. 600; 7 N. H. 237; 13 M. & W. 838 (but see comments on this case in 4 Del. Ch. 195, note); and in some states even parol licenses without consideration are held irrevocable when executed, on the ground of equitable estoppel; 33 Pa. 169; 59 Ill. 337; 45 Ga. 33; 60 Vt. 702; 40 Mo. App. 134.

The nature of the interest in the land of another which might be created by a parol license is thus stated by Bates, Ch., in Jackson & Sharp Co. *v.* P. W. & B. R. R. Co., 4 Del. Ch. 180, where the subject is carefully considered and the authorities collected: "It must be admitted that a license or permission to exercise some privilege upon the land of the licensor can create no estate or interest in the land, such as binds the land and is transmissible from the licensee, the utmost effect of a license being to confer a personal privilege, which is not assignable or transmissible, and is revocable at the licensor's pleasure. Nor does it matter whether the license be oral or in writing, so long as it remains a mere license, not converted into a conveyance, grant, or contract, nor rendered irrevocable by estoppel, as under some circumstances . . . it may be in equity though not at law. Few points have undergone more discussion, and have at length come to be better settled, than the insufficiency of a license at law to create or transfer an interest in land." It was also said that "at law a license can under no circumstances become irrevocable by estoppel when the effect would be to create an interest in land," there not having been "such conduct as would render the assertion of the legal right a fraud." See an extended note to this case, *id.* 195–8. See also 94 Tenn. 428, where it was held that the privilege to discharge water from an ore wash into a stream, given without words of grant by a lower proprietor to an iron company, with an agreement to accept a certain sum as the full amount of damages done by such water, is a license, not an easement, and does not extend to the grantees of the iron company.

The revocation of a license will not be permitted where such a revocation will amount to a fraud upon the licensee; 166 Pa. 507; 67 Vt. 272; 27 Ore. 349; but revocation may be presumed from a long period of non-user; 125 Mo. 647. Courts of equity will interfere to restrain the exercise of a legal right to revoke a license on the ground of preventing fraud; 4 Del. Ch. 180; and will do so on no other ground; *id.;* but in such case they will construe the license as an agreement to give the right and compel specific performance by deed; 4 C. E. Green 153; 66 N. C. 546; 1 Washb. R. P. 400; but this does not give the licensee an unqualified right to treat the license as unrevoked; 1 H. & C. 593; 23 Ex. 87; 11 W. R. 119. An occupancy of land under a contract void as against public policy cannot be treated as a possession under a license for the purpose of obtaining relief in equity; 62 N. W. Rep. (Mich.) 1003. An executed license which destroys an easement enjoyed by the licenser in the licensee's land cannot be created without deed; 5 B. & C. 221; and the rule that an executed license cannot be revoked; 2 Gill 221; 3 Duer 255; 7 Bingh. 682; 129 Ind. 475; is not applicable to licenses which, if given by deed, would create an easement, but to those which, if so given, would extinguish or modify an easement; 2 Gray 302. See 47 Ill. App. 296. A license must be established by proof and is not to be inferred by equivocal declarations of a land owner; 31 Atl. Rep. (Pa.) 310.

The effect of an executed license, although revoked, is to excuse the licensee from liability for acts done properly in pursuance thereof and their consequences; 22 Barb. 336; 2 Gray 302; 10 Conn. 378; 13 N. H. 264; 7 Taunt. 374; 5 B. & C. 221.

**In Contracts.** A permission to do some act which, if lawful, would otherwise be a trespass or tort; the evidence of such permission when it is in writing.

A covenant not within the statute of frauds may be released or discharged wholly or in part by a parol license; 10 Ad. & E. 65; 2 Add. Cont. [1218].

A license by a debtor to a creditor to seize and sell a specific chattel in discharge of a debt not paid at maturity. This is what is termed in civil law imperfect hypothecation. Such license is confined to the parties and is terminated when rights of third parties intervene; and it is not assignable. It gives no title to the chattel until executed, but possession taken under the license clothes the creditor with the ownership. It is annulled by bankruptcy; 2 Add. Cont., 8th Am. ed. [637]. See HYPOTHECATION.

Under a license in a lease to a lessor to enter and eject the lessee, he was authorized as between themselves to eject the tenant by main force, and the license was a good plea in bar of an action of trespass; 7 Man. & G. 316; 7 Sc. N. R. 1025.

**In International Law.** Permission granted by a belligerent state to its own subjects, or to the subjects of the enemy, or to neutrals to carry on a trade interdicted by war. 2 Hall. Int. Law 343.

Licenses operate as a dispensation of the

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rules of war, so far as their provisions extend. They are *stricti juris*, but are not to be construed with pedantic accuracy. 2 Hall. Int. Law 343; 1 Kent 163, n.; 4 C. Rob. 8. They can be granted only by the sovereign authority, or by those delegated for the purpose by special commission; 1 Dods. 226; Stew. Adm. 367; 8 Term 548; 1 C. Rob. 196; and they must be granted or assented to by both belligerents; Snow. Int. L. xxxi. The Act of Congress, authorizing the president to license certain commercial intercourse with the states in rebellion, did not contemplate the exercise of that authority by subordinate officers of the executive department without the express order of the president; 5 Wall. 580. Licenses constitute a ground of capture and confiscation *per se* by the adverse belligerent party; Wheat. Int. Law 475. They legalize the commerce, and the alien licensee may sue and be sued in respect thereto as a natural-born subject: 2 Add. Cont. 134, 8th Am. ed. [1156]; 15 East 426; 12 *id.* 340, 3 Taunt. 568. See 2 Halleck, Int. L., Sir S. Baker's ed. ch. xxx.

**In Pleading.** A plea of justification to an action of trespass, that the defendant was authorized by the owner of the freehold to commit the trespass complained of.

A license must be specially pleaded to an action of trespass; 2 Term 166; but may be given in evidence in an action on the case; 2 Mod. 6; 8 East 308. See JUSTIFICATION.

**In Governmental Regulation.** Authority to do some act or carry on some trade or business, in its nature lawful but prohibited by statute, except with the permission of the civil authority or which would otherwise be unlawful.

A license to carry on a business or trade is an official permit to carry on the same or perform other acts forbidden by law except to persons obtaining such permit; 85 Tex. 228.

A license of this sort is a personal privilege, and one issued to a partner individually does not extend to his co-partner or to the firm; 27 Ala. 32. It has been held that even the servant of the licensee is not protected by his master's license; 63 Pa. 168; 4 B. Monr. 37; 7 Dana 337; its terms cannot be varied or extended by the licensee, although he may do every thing that is necessary and proper for his enjoyment of it; 3 Lea 328; 30 La. Ann. 1094; 31 *id.* 210; 78 Va. 438.

In some cases it is held that where a license is for the protection of the public and to prevent improper persons from engaging in a particular business, and the license is for revenue merely, a contract made by an unlicensed person in violation of an act is void; 64 Miss. 221; 4 C. B. N. S. 405; 103 Pa. 501; 27 Ill. App. 270. An innkeeper who fails to secure a license cannot establish a lien upon the goods of his guest: 38 Mo. 92; an attorney cannot recover for his services; 61 Ill. 189; or a surgeon; 37 Eng. L. & Eq. 475; or a physician; 81 Cal. 370 (where a statute made the failure to procure a license a misdemeanor); 105 N. C. 95; L. R. 10 Q. B. 66. But the contracts of unlicensed persons have, in some cases, been held valid; 85 Pa. 329; 23 N. H. 209; 45 Me. 402. See 65 Miss. 365.

A license fee is a tax; 41 La. Ann. 665; which a state may impose upon all citizens within its borders; 16 S. C. 47; but it cannot discriminate between residents and non-residents of the state; 57 Md. 251; or of a city or county; 182 Pa. 630; 5 Coldw. 554; 52 Cal. 606; 107 Ind. 502. Subject to this restriction, a license tax may be imposed upon particular classes of business men; 49 Tex. 279; 6 Sawy. 295; 12 Nev. 263; 9 Baxt. 518; 97 Ga. 114; but a fixed and definite license fee must be named, which all persons engaged in the business specified shall pay; 117 Ind. 221. An occupation tax must be levied only as a means of regulation not of revenue; 42 Neb. 223. Where an act authorizes the granting of licenses, but provides that they may be revoked at the pleasure of the authority granting them, a license granted under the act is not such a contract between the state and the individual that a revocation of it deprives the licensee of any property, immunity, or privilege within the meaning of the constitution; 133 Mass. 579; but in some cases it has been held that a license cannot be revoked without refunding the fee for the unexpired time; 27 N. H. 289; 3 Harring. 441.

The repeal of the act under which the license was granted does not thereby revoke the license; 46 Ala. 329; 1 Ohio St. 15; 119 Pa. 417; but an act prohibiting the business operates at once to revoke the license; 5 Gray 597.

When the power is exercised by municipal corporations, a license is the requirement, by the municipality, of the payment of a certain sum by a person for the privilege of pursuing his profession or calling, whether harmful or innocent, for the *general* purpose of producing a reliable source of revenue; Tied. Lim. Pol. Pow. 271.

If the occupation is *harmful*, the sum paid for its prosecution may be said to be a license fee; but if *innocent*, it is a license tax; 25 Minn. 248; 11 Mich. 49. See 32 N. Y. 261; 26 N. J. L. 298; 60 Pa. 445; 50 Ga. 475; 1 Ohio St. 268. Mere taxation of an unlawful business does not legalize it; 8 L. R. A. Tenn. 280. Where the occupation is not dangerous to the public, either directly or incidentally, it cannot be subjected to any police regulation which does not fall within the power of taxation; Tied. Lim. Pol. Pow. 273. In the regulation of occupations harmful to the public, it is constitutional to require those who apply for a license to pay a reasonable sum to defray the expense of issuing the license and maintaining the proper supervision. What is a reasonable sum must be determined by the facts of each case; but where it is a plain case of police regulation, the courts are not compelled to be too exact in determining the expense of regulation and supervision, so long as the sum demanded is not alto-

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gether unreasonable; Tied. Lim. Pol. Pow. 274; 9 Pick. 415; 39 Conn. 140; 60 Pa. 445; 11 Mich. 347; 31 Ia. 102.

A police regulation is not necessarily invalid because in its incidental operations the receipts of the municipality are augmented; 60 Pa. 445; an ordinance which does not fix a definite fee for the pursuit of any occupation, and permit all persons to engage therein, upon payment of such fee, is invalid; 3 L. R. A. 261.

The fact that the income derived from a license is not directly applied to payment of the municipal expenses of regulation and supervision of the business, does not affect the validity of the license, if the amount is not disproportionate to the cost of issuing the license and regulating the business; 42 Neb. 323.

Revenue derived from licensing a harmful occupation with a view to its partial suppression, in excess of that required to maintain proper supervision of it, is not a tax, since its primary object is to restrict an occupation and not to raise revenue; 32 Mich. 406; 16 Wis. 566.

The courts are said by Tiedman, Lim. Police Power, to be not harmonious as to the grounds justifying a license for all kinds of employment; yet the right to impose a license is generally recognized; 9 Pick. 415; 57 N. Y. 591; 42 N. J. L. 364; 60 Pa. 445; 7 Md. 1; 50 Ga. 530; 27 Ala. 55; 15 Ohio 625; 11 Mich. 43; 29 Ia. 123; 101 Ill. 475. The same author cites the following cases: licensing of hucksters has been held unreasonable; 5 Cow. 462; 42 N. J. L. 364; 29 Wis. 307; 25 Minn. 248; and a license tax upon lawyers and physicians is held to be reasonable; 20 S. W. Rep. (Tex.) 580; 12 Mo. 268; 5 Ohio 21; 36 Ga. 460; 17 Fla. 169; on bakers; 3 Ala. 137; on places of public amusement; 2 La. Ann. 550; 7 Md. 1; on hacks and draymen; 57 N. Y. 591; 58 Pa. 119; 70 Mo. 562; 15 Ohio 625; 122 Mass. 60; 27 Minn. 164; on peddlers; 57 Ind. 74; 57 Cal. 92; 51 Miss. 13; on the sale of milk; 82 N. Y. 324; 100 Ill. 57; on auctioneers; 68 Ill. 372; 38 Ia. 96; on selling liquor; 22 Minn. 312; 21 Vt. 456; 19 Fla. 563; 39 Ind. 429; 11 Neb. 547; 10 Ia. 441; 25 Md. 541; 20 Ohio St. 308; 78 Mo. 302; 92 Ill. 669; 32 Mich. 406; on bicycles; 19 C. C. A. R. 491; on street railway cars; 60 Pa. 445; and on book canvassers; 31 Cent. L. J. 3.

A city ordinance imposing a pole and wire tax upon a telegraph company doing interstate business, in excess of the reasonable expense to the city in the supervision and regulation thereof, is void; 82 Fed. Rep. 797, following 40 Fed. Rep. 615, between the same parties; see 48 Pa. 117; 167 Pa. 406; but an ordinance compelling a telegraph company to pay five dollars per annum "for the privilege of using the streets, alleys and public places," was upheld in 148 U. S. 92. See 156 U. S. 210; 71 Wis. 560. See PRECEDENT, for comments on these federal cases.

A license tax upon an agent of a railroad company doing interstate business is unlawful; 136 U. S. 104, diss. Fuller, C. J., Gray and Brewer, JJ.; 136 U. S. 114; and so is one upon drummers soliciting orders for firms in another state; 120 U. S. 489; 128 U. S. 129; 9 L. R. A. Ky. 556; 129 U. S. 141; and upon a telegraph company doing interstate business; 127 U. S. 640. A license can be imposed upon peddlers if there is no discrimination as to residents or products of the state and other states; 156 U. S. 296, where the subject of licenses is fully discussed (by Gray, J.). An office license tax upon a foreign corporation is not a tax upon the business or property of the corporation and is constitutional; 114 Pa. 256; and licensing transient, non-resident merchants is not a discrimination against them merely because there may be no resident merchants who are compelled to pay the license; 29 L. R. A. Ia. 734.

As to licenses for the sale of liquor, see LIQUOR LAWS; licenses to marry, see MARRIAGE; licenses on imported goods, see COMMERCE; in patent law, see PATENTS. See also PEDDLER; HAWKER; POLICE POWER; DELEGATION; LOCAL OPTION.

**LICENTIA CONCORDANDI** (Lat. leave to agree). One of the formal steps in the levying a fine. When an action is brought for the purpose of levying a fine, the defendant, knowing himself to be in the wrong, is supposed to make overtures of accommodation to the plaintiff, who accepts them, but, having given pledges to prosecute his suit, applies to the court, upon the return of the writ of covenant, for leave to make the matter up: this, which is readily granted, is called the *licentia concordandi*. 5 Co. 39; Cruise, Dig. tit. 35, c. 2, 22.

**LICENTIA LOQUENDI.** Imparlance.

**LICENTIA SURGENDI. In Old English Law.** Liberty of rising. A liberty or space of time given by the court to a tenant, who is essoined, *de malo lecti*, in a real action, to *arise* out of his bed. Also, the writ thereupon. If the demandant can show that the tenant was seen abroad before leave of court, and before being viewed by the knights appointed by the court for that purpose, such tenant shall be taken to be deceitfully essoined, and to have made default. Bract. lib. 5; Fleta, lib. 6, c. 10.

**LICENTIA TRANSFRETANDI.** A writ or warrant directed to the keeper of the port of Dover, or other seaport, commanding him to let the person who has this license of the king pass over sea. Reg. Orig. 93.

**LICENTIOUSNESS.** The doing what one pleases, without regard to the rights of others.

It differs from liberty in this, that the latter is restrained by natural or positive law, and consists in doing whatever we please not inconsistent with the rights of others, whereas the former does not respect those rights. Wolff, Inst. § 84.



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Lewdness. 28 Fla. 303. See LEWDNESS; LASCIVIOUSNESS.

**LICET** (Lat.). It is lawful; not forbidden by law.

*Id omne licitum est, quod non est legibus prohibitum, quamobrem, quod, lege permittente, fit, pœnam non meretur. Licere dicimus quod legibus, moribus, institutisque conceditur.* Cic. Philip. 13.

Although. Calvinus, Lex. An averment that, "although such a thing is done or not done," is not implicative of the doing or not doing, but a direct averment of it. Plowd. 127.

**LICET SÆPIUS REQUISITUS** (although often requested). **In Pleading.** A formal allegation in a declaration that the defendant has been often requested to perform the acts the non-performance of which is complained of.

It is usually alleged in the declaration that the defendant, *licet sæpius requisitus*, etc., did not perform the contract the violation of which is the foundation of the action. This allegation is generally sufficient when a request is not parcel of the contract. Indeed, in such cases it is unnecessary even to lay a general request; for the bringing of the suit is itself a sufficient request; 1 Saund. 33, n. 2; 2 *id.* 118, note 3; 2 H. Bla. 131; 1 Johns. Cas. 99, 319; 3 M. & S. 150. See DEMAND.

**LICITACION. In Spanish Law.** The sale made at public auction by co-proprietors, or co-heirs, of their joint property which is not susceptible of being advantageously divided in kind.

**LIDFORD LAW.** See LYNCH LAW.

**LIEGE** (from *liga*, a bond, or *litis*, a man wholly at command of his lord. Blount).

**In Feudal Law.** Bound by a feudal tenure; bound in allegiance to the lord paramount, who owned no superior.

The term was applied to the lord, or liege lord, to whom allegiance was due, since he was *bound* to protection and a just government, and also to the feudatory, liegeman, or subject bound to allegiance, for he was *bound* to tribute and due subjection. 34 & 35 Hen. VIII. So *lieges* are the king's subjects. Stat. 8 Hen. VI. c. 10; 14 Hen. VIII. c. 2. So in Scotland. Bell, Dict. But in ancient times private persons, as lords of manors, had their *lieges*. Jacob, Law Dict.; 1 Bla. Com. 367.

Liege, or *ligius*, was used in old records for full, pure, or perfect: *e. g. ligia potestas*, full and free power of disposal. Paroch. Antiq. 280. So in Scotland. See LIEGE POUSTIE.

**LIEGE POUSTIE** (*Legitima Potestas*). **In Scotch Law.** That state of health which gives a person full power to dispose of, *mortis causa* or otherwise, his heritable property. Bell, Dict.

A deed executed at time of such state of health, as opposed to a death-bed conveyance. *Id.* A person is in liege poustie, or *in legitima potestati*, who is in health and capacity, and *sui juris*. 1 Bell, Com. 85; 6 Cl. & F. 540; Ersk. Prin. III. VIII. 46.

**LIEN.** A hold or claim which one person has upon the property of another as a security for some debt or charge.

The right which one person possesses, in certain cases, of detaining property placed in his possession belonging to another, until some demand which the former has be satisfied. 2 East 235.

A qualified right which, in certain cases, may be exercised over the property of an other. 6 East 25, n.

A right to hold. 2 Campb. 579.

A right, in regard to personal property, to detain the property till some claim or charge is satisfied. Metc. Yelv. 67, n.

The right of retaining or continuing possession till the price is paid. 1 Parsons, Mar. Law, 144.

A lien is defined by statute in California, Utah, New Mexico, and the Dakotas, to be a charge imposed upon specific property by which it is made security for the performance of an act.

In its most extensive signification, the term lien includes every case in which real or personal property is charged with the payment of a debt or duty; every such charge being denominated a lien on the property. It differs from an estate in or title to the property, as it may be discharged at any time by payment of the sum for which the lien attaches. It differs from a mortgage in the fact that a mortgage is made and the property delivered, or otherwise, for the express purpose of security; while the lien attaches as incidental to the main purpose of the bailment, or, as in case of the lien of a judgment, by mere act of the law, without any act of the party. In this general sense the word is commonly used by English and American law writers to include those preferred or privileged claims given by statute or by admiralty law, and which seem to have been adopted from the civil law, as well as the security existing at common law, to which the term more exactly applies. In its more limited as well as commoner sense, the word lien indicates a mere right to hold the property of another as security until some claim is satisfied.

The *civil law* embraces, under the head of mortgage and privilege, the peculiar securities which, in common and maritime law, and equity, are termed liens. See MORTGAGE; PRIVILEGE; HYPOTHECATION.

In *Scotch law* what corresponds to the common law lien is included under the rights termed hypothec and retention, though certain rights of retention are also called liens; Ersk. Prin. 374. See RETENTION; HYPOTHECATION.

**Common Law Lien.** As distinguished from the other classes, a lien at common law consists in a mere right to retain possession until the debt or charge is paid. 2 Story 131; 24 Me. 214; 5 Ohio 88; 10 Barb. 626; 43 Ill. 424; 66 Tex. 159.

In the case of a factor an apparent exception exists, as he is allowed a lien on the proceeds of goods sold, as well as on the goods themselves. But this seems to result from the relation of the parties and the purposes of the bailment; to effectuate which, and at the same time give a security to the factor, the law considers the possession, or right to possession, of the proceeds, the same thing as the possession of the

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goods themselves; 1 Wall. 166; 9 Bosw. 660; Story, Ag. § 111.

*A particular lien* is a right to retain the property of another on account of labor employed or money expended on that specific property.

*A general lien* is a right to retain the property of another on account of a general balance due from the owner. 3 B. & P. 494.

Of course, where a general lien exists, a particular lien is included.

Particular liens constitute the oldest class of liens, and the one most favored by the common law; 4 Burr. 2221; Dougl. 97; 3 B. & P. 126. But courts ceased to originate liens at an early period; 9 East 426; while general liens have been looked upon with jealousy, being considered encroachments upon the common law and founded solely in the usage of and for the benefit of trade; 3 B. & P. 42, 26, 494.

Liens either exist by *law*, arise from *usage*, or are created by *express agreement*.

*Liens which exist by the common law* generally arise in cases of bailment. Thus, a particular lien exists when goods are delivered to a handicraftsman of any sort for the execution of the purposes of his trade upon them; see *infra;* or where a person is, from the nature of his occupation, under a legal obligation to receive and be at trouble or expense about the personal property of another; 3 B. & P. 42; 3 Vt. 245; 5 B. & Ald. 350.

A lien sometimes arises where there is no bailment, as the maritime liens such as salvage, and a finder's lien for a reward, as to both of which, see *infra*. But this principle does not apply, generally, it is said, to the preservation of things found upon land, where no reward is offered; 2 H. Bl. 254; 2 W. Bl. 1107; 7 Barb. 113; 4 Watts 63; 10 Johns. 102; Story, Bailm. § 621, note a.

*Liens which arise by usage* are usually general liens, and the usage is said to be either the general usage of trade, or the particular usage of the parties; 3 B. & P. 119; 4 Burr. 2222; 1 Atk. 228; Ambl. 252.

The usage must be so general that the party delivering the goods may be presumed to have known it, and to have made the right of lien a part of the contract; 4 C. & P. 152; 3 B. & P. 50. And it is said that the lien must be for a general balance arising from similar transactions between the parties, and the debt must have accrued in the business of the party claiming the lien; 1 W. Bla. 651; and it seems that more decisive proof of general usage is required in those occupations in which the workmen are required to receive their employment when offered them, such as carriers; 6 Term 14; 6 East 519. But where a general lien has been once established, the courts will not allow it to be disturbed; 1 Esp. 109.

A general lien from particular usage between the parties is presumed from proof of their having before dealt upon that basis; 6 Term 19. If a debtor, who has already pledged property to secure a loan, borrow a further sum, the lien is for the whole debt; 2 Vern. 691.

Liens, general or particular, may be created by *express agreement of parties;* Cro. Car. 271; 6 Term 14; as when property is delivered under such agreement for repair or the execution of any purpose upon it or in case of pawns; 2 Kent 637. And an agreement among tradesmen to require such lien; if known to the bailor, will bind him as by a lien of this kind. A tradesman obliged to accept employment from all comers cannot by mere notice create such lien by implication; express assent must be proved; 3 B. & P. 42; 5 B. & Ald. 350.

LIENS EXISTING BY THE COMMON LAW, IN THE ABSENCE OF ANY SPECIAL AGREEMENT. Every *bailee for hire* who has, by his labor or skill, conferred value on specific chattels bailed to him for that purpose has a particular lien upon them; 2 W. & S. 392; 3 Selw. N. P. 1163; 6 Term 14; 86 Pa. 486; 95 *id.* 345; 26 Miss. 182; 4 Wend. 292; 60 Wis. 26; 44 N. J. L. 105; so also have *wharfingers;* 7 B. & C. 212; 43 N. Y. 554; 2 Gall. 483; *warehousemen;* 18 Ill. 286; 13 Ark. 437; 1 Minn. 408; 31 Miss. 261; 34 E. L. & Eq. 116; see 26 Abb. N. C. 134; who are entitled to a lien on goods remaining in the warehouse for a general balance of storage due on all goods stored under a single contract; 53 Fed. Rep. 401; *dyers* and *tailors;* Cro. Car. 271; 9 East 433; 4 Burr. 2214; but a tailor making cloth into clothing as a sub-contractor, under a contract with one who received the cloth from the owner, has no lien on the clothing for his services; 174 Pa. 119; the *finder* of lost property for which a reward is offered; 3 Metc. 352; 8 Gill 213; 7 Barb. 113; 52 Pa. 484; a *vendor* of goods, for the price, so long as he retains possession; 1 H. Bla. 363; 8 H. L. Cas, 338; 6 McLean 472; 83 Wis. 388; 36 W. Va. 391; 131 U. S. 287; Benj. Sales, § 796; *pawnees*, from the very nature of their contract; 15 Mass. 408; 2 Vt. 309; 9 Wend. 345; 3 Mo. 219; 39 Me. 45; but only where the pawner has authority to make such pledge; 2 Campb. 336, n. A pledge, even where the pawnee is innocent, does not bind the owner, unless the pawner has authority to make the pledge; 1 Mas. 440; 4 Johns. 103; 1 M. & S. 140; 20 How. 343; 98 Mass. 303; 57 Ga. 274; see, as to stock, 4 Allen 272; 100 Mass. 382; 48 Cal. 99. The pawnee does not have a general lien; 15 Mass. 490; 27 La. Ann. 110; 37 N. Y. 540; and he does not lose his particular lien by a re-delivery for a special and limited purpose; 47 Ill. 198; 18 C. B. N. S. 315; 12 Gray 465. Other liens recognized with respect to the particular property which is the subject matter of the dealings between the parties are as follows:

*Common carriers*, for transportation of goods; 6 East 519; Wr. Ohio 216; 25 Wis. 241; 1 Minn. 301; 51 Ala. 512; 10 Wall. 15; 104 Mass. 156; 42 Me. 438; but not if the goods are taken tortiously from the owner's possession, where the carrier is in-

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nocent; 1 Dougl. Mich. 1; 5 Cush. 137; 6 Whart. 418; 1 B. & Ad. 450; nor if the carrier transport them for a mere hire; 107 Mass. 126. Part of the goods may be detained for the whole freight of goods belonging to the same person; 6 East 622. A carrier has a lien on baggage for the fare of the passenger, which includes the transportation of both; Sto. Bailm. § 604; Hutch. Car. § 719; 2 Campb. 631; 30 Fed. Rep. 94. In the last case it was held by Deady, J., that this lien extended so far as to warrant the detention of the baggage to enforce the payment of an additional fare for the last part of the journey, covered by the ticket, charged by the conductor after the passenger had stopped over without permission; but this decision is challenged by Professor Ewell, in a note which collects and reviews cases considered as bearing upon the question; 26 Am. L. Reg. N. S. 293. If property is damaged while in charge of a common carrier to a greater amount than the bill for freight, his lien is extinguished; 38 S. C. 78. The lien of a carrier and warehouseman for keeping property is superior to that of a pledgee who has secured the property to be transported and stored; 53 Minn. 327. Where a company refuses to deliver freight to the proper owner or consignee, on the ground that it has a lien thereon for freight charges and storage, and the owner resorts to a suit to recover possession of the property, it cannot claim judgment on the ground that it has a lien for storage, where it has been decided that it had no lien for freight charges; 15 Blatchf. 525.

The carriers' common law lien did not include any right of sale; 6 East 21; 20 Wend. 267; but the right to the lien is recognized and a power of sale given by statute in most states. In some states this right of sale is given to other bailees, as innkeepers, factors, etc. For the statutes on this subject see 1 Stims. Am. Stat. L. §§ 4353–6.

*Innkeepers* may detain a horse for his keep; 6 Term 141; 9 Pick. 280, 316, 332; though, perhaps, not if the person leaving him be not a guest; 68 Me. 489; 11 Barb. 41; but not sell him; Bacon, Abr. *Inns* (D); 8 Mod. 173; 3 Gray 382; Schoul. Bail. 294; except by custom of London and Exeter; F. Moo. 876; but see *supra;* and cannot retake the horse or any other goods on which he has a lien, after giving them up; 8 Mod. 173; Metc. Yelv. 67; L. R. 3 Q. B. Div. 484. They may detain the goods of a traveller, but not of a boarder; 43 Vt. 30; 27 Misc. 202; L. R. 7 Q. B. 711; 36 Ia. 651; 8 Rich. S. C. 423; 52 Minn. 516. See, generally, 1 Smith, L. Cas., 9th Am. ed. 253, 259. The innkeeper's common law lien is now generally regulated by statutes, many of which also confer on boarding-house keepers all the privileges of innkeepers; 43 N. H. 332; 42 Barb. 623; 27 Wis. 406; 110 Mass. 158. See 52 N. J. L. 277. For reference to these statutes see 1 Stims. Am. Stat. L. § 4393. An innkeeper's lien is a particular lien; 9 East 433; Cro. Car. 271; 2 E. D. Sm. 195; it attaches to goods in the possession of his guest, though they belong to a stranger, provided the innkeeper has no notice of such fact; 52 Minn. 516; 13 Or. 482; but if he owes the guest for labor more than she does for board, he has no lien; 3 Colo. App. 519. Where a husband and wife were guests at a hotel, although credit was given to the husband who made payments on account, yet the wife's luggage which was her separate property, was subject to a lien for the balance of the hotel bill; 25 Q. B. Div. 491. See a full note on the innkeeper's lien, 21 L. R. A. 229. In holding that an innkeeper has a lien on goods which a traveller brings to the inn as luggage, the English court of appeal said that it would not disturb a well-known and very large business carried on in England for centuries, by holding otherwise; [1895] 2 Q. B. 501.

*Agistors of cattle* and *livery-stable keepers* have no lien; Cro. Car. 271; 7 Gray 183; 35 Me. 153; 23 Cal. 364; 36 Vt. 220; 78 N. C. 96; 6 East 509; except by statute; 3 Colo. App. 335; 66 Hun 627; 34 Neb. 482; 19 Or. 217; 62 Vt. 436.

An agistor's lien cannot be based upon a breach of the contract of agistment; 58 Mo. App. 1; and when the owner of stock allows it to remain in the hands of the agistor longer than the contract time, the latter may claim a lien for their keeping during such term; *id.* One who boards a horse under contract with a person not the owner thereof has no right to a lien unless it is shown that such person had authority to act for the owner; 63 N. W. Rep. (Mich.) 525. Persons who have been held entitled to a lien for keeping animals are: ranchmen; 7 Mont. 385; stable keeper; 155 Mass. 481; 23 Mo. App. 598; but not a groom merely employed to take charge of the horse; 67 N. W. Rep. (Minn.) 203. Such lien accrues only to one in possession; 57 Conn. 547; s. c. 6 L. R. A. 82; 46 Ohio St. 560; 12 Wash. 46; 43 Minn. 148; 89 Ia. 350; 26 Ill. App. 315; *contra*, see 23 Mo. App. 617. One wrongfully converting an animal to his own use has no lien; 44 Kan. 543; nor one receiving from a bailee with notice; 41 Mo. App. 416. A liveryman's lien, under the Pennsylvania act, 1807, for boarding a horse does not extend to a carriage and harness kept with it; 14 Lanc. L. Rev. Pa. 255. This lien depends solely upon statutes; 64 Minn. 472.

*Factors, brokers,* and *commission agents,* on goods and papers; 3 Term 119; 1 Johns. Cas. 437, n.; 8 Wheat. 268; 28 Vt. 118; 34 Me. 582; 150 Pa. 481; 38 W. Va. 158; on part of the goods for the whole claim; 6 East 622; or on the proceeds of sale of the goods; 5 B. & Ald. 27; 72 Ill. 226; 15 Mass. 389; but only for such goods as come to them as factors; 11 E. L. & Eq. 528; but not such as are delivered directly by the owner to the purchaser and do not come into possession of the factor; 149 Ill. 9; s. c. 25 L. R. A. 746. If a factor disobey instructions he loses his lien upon money deposited with him as security; 40 Ill. 313; 114 *id.* 196.

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*Bankers*, on all securities left with them by their employers; 5 Term 488; 1 How. 234; 8 Ill. 233; see 130 U. S. 354. But see also 11 Pa. 291. But not on securities collateral to a specific loan; L. R. 4 App. Cas. 413; 47 Barb. 395; 137 Mass. 262; or for debts not due; 98 Ill. 558; 74 N. Y. 467; or on the account of a firm for the debt of a partner; 35 N. Y. 320; 11 Beav. 546

The lien of mechanics and material men upon a building or improvement in the construction of which labor or material is used, exists only by virtue of the statutes creating it; 22 Neb. 126. See Mechanics' Lien, *infra*.

As to the lien of attorneys and other court officers for fees, see Attorneys' Lien, *infra*.

As to liens on the assets of insolvent persons or corporations for wages of labor or service, which are purely statutory, having no relation to the common law idea of lien, see LABORER.

REQUISITES. There must have been a delivery of the property into the possession of the party claiming the lien, or his agent; 3 Term 119; 6 East 25, n.

Where a person, in pursuance of the authority and directions of the owner of property, delivers it to a tradesman for the execution of the purposes of his trade upon it, the tradesman will not have a general lien against the owner for a balance due from the person delivering it, if he knew that the one delivering was not the real owner; 1 East 335; 2 Campb. 318. Thus, a carrier, who, by the usage of trade, is to be paid by the consignor, has no lien for a general balance against the consignee; 5 B. & P. 64. Nor can a claim against the consignee destroy the consignor's right of stoppage *in transitu;* 3 B. & P. 42. But a particular lien may undoubtedly be derived through the acts of agents acting within the scope of their employment; 9 East 233; 3 B. & P. 119. And the same would be true of a general lien against the owner for a balance due from him.

No lien exists where the party claiming it acquires possession by wrong; 2 Term 485; or by misrepresentation: 1 Campb. 12; or by his unauthorized and voluntary act; 8 Term 310, 610; 2 H. Bla. 254; 3 W. Bla. 1117 (but see 4 Burr. 2218).

Or where the act of the servant or agent delivering the property is totally unauthorized, and the pledge of it is tortious against the owner, whether delivered as a pledge or for the execution of the purposes of a trade thereupon; 5 Ves. 111; 6 East 17.

A delivery by a debtor for the purpose of preferring a creditor will not be allowed to operate as a delivery sufficient for a lien to attach; 4 Burr. 2239; 3 Ves. 85; 2 Campb. 579; 11 East 356.

A mere creditor happening to have in his possession specific articles belonging to his debtor, has no lien upon them; 15 Mass. 490; nor is a lien created by advancing money to enable a purchaser of land to complete his purchase; 3 Johns. Ch. 56; 6 G. & J. 4; nor by an advancement of money to an administrator to pay debts of the intestate; 4 Ohio 495; the owner of land has no lien on property cast upon it by drift; 16 Pa. 393. A lien cannot be created upon a mere right of action for a personal tort; 53 Minn. 249. No lien upon a particular fund is acquired by a creditor by reason of a promise to pay a debt out of it; 18 Wend. 319; nor upon land by the promise to pay out of the proceeds of its sale; 46 Ill. App. 541. Nor can parties contract to extend the area of property to be covered by a lien; 149 U. S. 574. A mere loan or advancement of money to pay the debt of another creates no lien; 72 Ia. 550; 47 Ark. 111; 124 Ind. 545. See 9 L. R. A. 173, note; SUBROGATION. At common law a corporation has no lien upon the stock of one of its nembers for an indebtedness due to it by him; 50 Pac. Rep. (Wash.) 575; 15 Ore. 413; but see 99 Pa. 513; 75 Va. 327; 77 *id.* 445, in which cases such lien seems to have been enforced under general statutes. By-laws creating such lien are common and are valid; 23 N. J. Eq. 325; 61 Mo. 319; 58 Miss. 421; 48 Ia. 339; 9 R. I. 308; 2 Sawy. 108; 3 Cliff. 429; not, however, against innocent purchasers; 18 Wall. 589; 59 N. Y. 96; 102 Pa. 488; 63 Cal. 359; 8 Mo. App. 249; 33 La. Ann. 1286. A statutory lien of a corporation on its stock for debts due by a stockholder is good against all the world. A sale of the stock to an innocent third party does not discharge it; 73 N. W. (Minn.) 635. Such is declared to be "the weight of authority" by a work which is itself an authority; 1 Thomp. Corp. § 1032.

WAIVER. Possession is a necessary element of common-law liens; and if the creditor once knowingly parts with it after the lien attaches, the lien is gone; 5 Ohio 88; 6 East 25, n.; 42 Me. 50; 2 Edw. Ch. 181; 5 Binn. 398; 4 Denio 498; 42 Me. 50; 11 Cush. 231; 2 Swan 561; 23 Vt. 217; 48 Fed. Rep. 480; Benj. Sales § 799; Trick. Liens 11, 16, 616; the abandonment of his privilege by a vendor need not be in absolute terms, but it is enough if it can be inferred from the acts of the parties; 40 La. Ann. 615. Parting with possession, if consistent with the contract, the course of business, and the intention of the parties, will not discharge a lien created by a contract; 32 Me. 211. There may be a special agreement extending the lien, though not to affect third persons; 36 Wend. 467. Delivery may be constructive; Ambl. 252; and so may possession; 5 Ga. 153. A lien cannot be transferred; 8 Pick. 73; but property subject to it may be delivered to a third person, as to the creditor's servant, with notice, so as to preserve the lien of the original creditor; 2 East 529. But it must not be delivered to the owner or his agent; 2 East 529; 4 Johns. 103. But if the property be of a perishable nature, possession may be given to the owner under proper agreements; 8 Term 199. Generally a delivery of part of goods sold is not equivalent to a delivery of the whole, so as to

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destroy the vendor's lien, but the lien will remain on the part retained for the price of the whole, if the intention to separate the goods delivered from the rest is manifest; Benj. Sales § 805. A grantor's lien on the premises conveyed for the purchase price is a personal privilege not assignable with the debt, nor can the creditor of the grantor be subrogated to the same; 39 Fed. Rep. 89; 78 Ga. 173; 128 Ill. 178. See 84 Ala. 281.

Neglect to insist upon a lien, in giving reasons for a refusal to deliver property on demand, has been held a waiver; 1 Campb. 410, n.; 7 Ind. 21; 13 Ark. 437.

Where there is a special agreement made, or act done, inconsistent with the existence of the lien, such as an agreement to give credit, or where a distinct security is taken, or the possession of the property is acquired for another distinct purpose, and for that only, or where the property is attached by the creditor, no lien arises; 2 Marsh. 339; 5 M. & S. 180; 8 N. H. 441; 17 Pick. 140; 4 Vt. 549; 10 Conn. 103. But such agreement must be clearly inconsistent with the lien; 1 Dutch. 443; 32 Me. 319. See 109 U. S. 702.

The only remedy or use of the lien at common law is to allow the creditor to retain possession of the goods; 33 Me. 438; 1 Mas. 319. And he may do this against assignees of the debtor: 1 Burr. 489.

A waiver of exemption by a debtor as to any lien will enure to the benefit of all prior liens, on the principle that a debtor cannot alter the precedence settled by law; 124 Pa. 347.

Attorney's Lien. This, under English law, was a lien for costs taxed in the cause. In the early cases the attorney or solicitor was put upon the same footing as other court officers, such as clerks who had a lien on papers; 2 Ves. 25; Beames. Costs 311. The doctrine of attorney's lien as originally held was that it was confined to costs, and the plaintiff might settle the case in the absence of notice from the attorney; 4 Term 124; 13 Ves., Sumn. ed. 59, n.; there was also a lien on papers; 6 Madd. 66; but none on the fund; 4 *id.* 391. There were two classes of liens recognized, active and passive, the former being on the fund for costs, and the latter a right to retain papers; 4 Myl. & Cr. 354. The attorney was not *dominus litis*; 12 M. & W. 440; and his lien would not prevail over a garnishment; 1 H. & M. 171. In the United States many cases sustain the lien upon the fruits of the judgment for fees; 66 Ala. 29; 42 Ark. 402; 6 Fla. 214; 51 Conn. 105; 14 Ga. 89; 17 Kan. 20; 39 Minn. 373; 1 Heisk. 503; 16 W. Va. 378; 10 Wis. 112. Some cases sustain the lien for a fee agreed upon as being within the principle of the common law lien for costs; 51 N. Y. 140; 70 *id.* 98; but the lien is waived by consent to a payment to the client; 112 *id.* 157. Others recognize a retaining lien on papers; 128 Ill. 631; 10 Wall. 483; and as between solicitor and client for reasonable compensation on money collected; 105 U. S. 527; 71 Ia. 32; but none, in either of these cases, upon a judgment, or unliquidated damages; 5 Bush 601; or in an action of tort; 66 Me. 237.

In some states the cases sustain a statutory lien for fees; 10 Col. 228; paramount to set off; 86 Ind. 172; 10 Neb. 574; 15 Johns. 406; 1 Rich. 207; 40 Mich. 218; the lien binds money or papers in possession of the attorney for all professional services, but for them only; 56 *id.* 135.

In others, statutory liens are held to apply only to taxable fees; 69 Me. 381; 11 Mass. 238; and only after final judgment and execution issued; 103 *id.* 33. So in New York prior to the code, the common law lien was confined to taxed costs; 1 Paine & Duer, Prac. 190; and did not affect damages recovered until they came into his hands; 12 Wend. 261.

Some cases sustain a lien on papers for a general balance; 11 N. H. 163; and on the recovery in the cause, but not those due in other causes; 4 *id.* 347; 48 Fed. Rep. 145; others, for costs, but subordinate to set-off; 14 Vt. 247; and ineffective as against an assignment; *id.* 485.

Liens may be defeated by settlement: 39 Ga. 5; 21 Ia. 523; if there is no collusion; 41 Ill. 136.

The lien is denied absolutely in some states; 1 Bland 98; 43 Md. 46, 212; 44 Miss. 530; 18 Mo. 18; 35 Ohio St. 581; 3 Watts 357; though some cases, denying the lien, hold that fees may be deducted from money in hand; 19 Pa. 95; 30 Tex. 180; see 12 Op. Atty. Gen. 216; but in another case it was said that in the absence of an express agreement, an attorney's lien is not acquired upon a judgment rendered in a suit prosecuted by him, nor upon the money recovered by means of his legal services; 163 Ill. 384.

An attorney has a lien on land for sums expended for his client's benefit in obtaining full title; 48 La. Ann. 54; but not for fees in maintaining title; 40 *id.* 135; also on a judgment in favor of defendant for costs; 16 Misc. Rep. 515; and the attorney of a stockholder in a suit to set aside a fraudulent conveyance by the officers of the corporation, has a lien for his fees on the property recovered; 93 Tenn. 691; also on money collected for his client until paid the general balance due him for his services; 66 Vt. 510. An attorney for plaintiff in an action by an administrator to recover damages for the death of his intestate has a lien on the amount recovered; 78 Hun 575; but one retained by a legatee to procure the establishment of a will has none, for his services, on the legacy to his client; 29 Fla. 476. In proceedings to compel an attorney to deliver up property where his claim is indefinite, a reference is properly ordered to ascertain the amount, giving plaintiff the option of making a deposit sufficient to secure whatever amount may be established on the reference, and he is not deprived of his lien simply because his claim is indefinite; 66 Hun 626; 137 N. Y. 605. An equitable lien is acquired by an attorney where, by an agreement with the owner of property

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condemned for a city street, he procures an increase in the amount of damages awarded: 66 Hun 626. He has a lien upon the cause of action for agreed compensation, which attaches to the judgment and the proceeds thereof, superior to the rights of a receiver appointed in supplementary proceedings; 11 App. Div. N. Y. 286.

It has been held that an attorney has no lien, at common law, on his client's cause of action; 72 Fed. Rep. 565; or, independently of a statute, for services; 65 N. W. Rep. (Ia.) 413; or in a proceeding by a guardian for the removal of funds of his ward to a foreign state, for fees incurred in the proceeding; 36 S. W. Rep. (Tenn.) 188. The lien cannot be asserted against money appropriated by a legislative act, while it is in the hands of the state treasurer; 40 Neb. 854. The attorney employed by a pledgee of notes, impounded in an equity suit, to sue on them at law, has no lien upon the fund realized, as against the other parties to the equity suit; 67 Fed. Rep. 857. An agreement on the settlement of certain cases that the fees of an attorney should be included in the fees to be paid in another case, if a judgment be recovered, does not create a lien on the judgment for fees on the cases settled; 59 Fed. Rep. 750. Where an attorney received money for bail, to be returned on final disposition of the charge, it was held that an attorney's lien did not exist on the money, his agreement being to return it on receiving it back from the magistrate; 24 Ore. 168.

An attorney's lien for services in procuring a judgment is limited to the attorney of record and does not extend to attorneys employed to assist him; 59 Fed. Rep. 750; nor does it extend to prospective services; 48 *id.* 145.

An attorney whose services are employed merely in defending the title to land has no lien upon the land for his services; 56 Ark. 324; nor is there a lien on land recovered; 36 W. Va. 200. The attorney for defendant is not entitled to any lien so as to prevent a settlement by defendant, where the answer simply sets up a defence and not a counterclaim; 16 App. Div. N. Y. 70. And the right of an attorney to a lien on his client's papers is lost by the substitution of another attorney in his place on his refusal to go on with the case without the payment of fees which he claims to have already earned; 16 App. Div. N. Y. 126. No lien can accrue in favor of the attorney for plaintiff where the action is settled by plaintiff before defendant has notice of the attorney's claim for a lien; 50 Neb. 373. But acceptance of a client's note for his fee is not a waiver of his statutory lien; 86 Ga. 138.

Where an attorney having a lien on a judgment takes an assignment thereof to himself, and claims the absolute ownership of the judgment, he relinquishes whatever rights he might have been entitled to by virtue of his lien; 43 Pac. Rep. (Colo.) 1042; and taking an independent security to secure payment of his fee waives his lien, even though the security proves unavailable; 7 Houst. 182.

It has been held that, where a judgment requires the claim of an intervening creditor of the plaintiff to be first paid out of the amount for which the plaintiff has judgment, the right of the creditor is superior to the lien of an attorney; 65 N. W. Rep. (Ia.) 413. An attorney's lien is subordinate to the right of the adverse party to any proper set-off, or other available defences; 44 Neb. 900; 3 S. D. 477.

See, generally, Weeks, Attys.; Beames, Costs; Cross, Liens; 26 Alb. L. J. 271; 31 Am. Dec. 755–9; 20 Am. L. Rev. 727, 821; 21 *id.* 70; 10 Am. L. Rec. 200; 18 Abb. N. C. 23; 19 Centr. L. J. 394; 27 *id.* 194; 23 Ir. L. T. 351; 12 Fed. Rep. 518; 17 Wkly. L. Bul. 16; 2 Silvern. N. Y. 159–211.

**Equitable Liens** are such as exist in equity, and of which courts of equity alone take cognizance.

A court of equity will raise equitable liens for the purpose of justice, and if a lien could not be created otherwise, could even make a company execute a conveyance for that purpose; 3 Hughes 320.

A lien is neither a *jus in re* nor a *jus ad rem*; it is not property in the thing, nor does it constitute a right of action for the thing. It more properly constitutes a charge upon the thing. In regard to these liens, it may be generally stated that they arise from constructive trusts. They are, therefore, wholly independent of the possession of the thing to which they are attached as an incumbrance; and they can be enforced only in courts of equity; Story, Eq. Jur. § 1215.

An equitable lien on a sale of realty is very different from a lien at law; for it operates after the possession has been changed, and is available by way of charge instead of detainer. Ad. Eq. 127.

Every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund therein identified, a security for a debt or other obligation, or whereby the party promises to convey, assign, or transfer the property as security, creates an equitable lien upon the property so indicated which is enforceable against the property; 30 W. Va. 790.

Vendor's Lien. First in importance among equitable liens is the vendor's lien for unpaid purchase money. The principle upon which it rests is that where a conveyance is made prematurely before payment of the price, the purchase money is a charge on the estate in the hands of the vendee; 4 Kent 151; Story, Eq. Jur. § 1217; Bisph. Eq. 353; 15 Ves. 329; 1 Bro. C. C. 420, 424, n. There has been some discussion as to its exact nature and whether it is to be classed in any sense as an implied trust, but the more reasonable view seems to be that it is not, at least in such sense as to carry with it the idea of any title, but that it is strictly a mere charge, the true nature of which perhaps cannot be better expressed than by the use of the term equitable lien. "The principle upon which such a lien rests

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has been held to be that one who gets the estate of another ought not, in conscience, to be allowed to keep it without paying the consideration." 147 U. S. 133. As to the nature and origin of the lien see also 1 Bisph. Eq. 354; Story, Eq. Jur. § 1219; 2 Sugd. Vend. & P. 376; 1 Mas. 191; 1 Pingr. Mort. 319; 1 Wh. & Tud. L. Cas. 366; 118 Mass. 261; 22 Am. St. Rep. 279.

"No other single topic belonging to the equity jurisprudence has occasioned such a diversity and even discord of opinion among the American courts as this of the grantor's lien. Upon nearly every question that has arisen as to its operation, its waiver or discharge, the parties against whom it avails, and the parties in whose favor it exists, the decisions in the different states and even sometimes in the same state, are directly conflicting." 3 Pom. Eq. Jur. § 1251.

Unless waived the lien remains till the whole purchase money is paid; 15 Ves. 329; 1 Vern. 267.

In order to create a vendor's lien there must be a fixed amount of unpaid purchase money due to the vendor. A vendee's obligation to a vendor on a collateral covenant made at the time of a purchase will not give rise to a vendor's lien, unless the vendor expressly reserves such a lien in his deed; 36 Fed. Rep. 577.

A grantor's lien on the premises conveyed, for the purchase price, is a personal privilege not assignable with the debt; nor can the creditor of the grantor be subrogated to the same; 39 Fed. Rep. 89; 78 Ga. 173; 128 Ill. 178; but see 84 Ala. 281; 4 N. Mex. 347; 70 Tex. 132; 87 Tenn. 41. The lien exists against all the world except *bona fide* purchasers without notice; 1 Johns. Ch. 308; 9 Ind. 490; 12 R. I. 92; it is good against the land in the hands of heirs or subsequent purchasers with notice; 3 Russ. 488; 1 Sch. & L. 135; against assignees in bankruptcy; 2 B. R. 183; 1 Bro. Ch. 420; and whether the estate is actually conveyed or only contracted to be conveyed; 2 Dick. Ch. 730; 12 Ad. & E. 632. But as a general rule the lien does not prevail against the creditors of the purchaser; 7 Wheat. 46; 10 Barb. 626; 2 Sudg. Vend. & P. [681] n.; but whether it will do so it is said "depends upon the relative equities and rights of the disputants in comparison with one another." 1 Wh. & Tud. L. Cas. 374; and see 1 Story, Eq. Jur. § 1228. See as to assignability, 25 Am. L. Reg. N. S. 393, where the cases are collected by states. The question is involved in too much confusion for any successful effort to state a general rule.

The doctrine of vendor's lien, firmly settled in England, has been received with varying degrees of favor in the United States, some of them refusing to accept it. This would be in accord with the disfavor shown in this country to secret liens which has naturally resulted from the universal habit of requiring title papers and charges on real estate to be matters of record. In a general way the American cases may be grouped as follows: (1) Those which follow the English doctrine of Mackreth *v.* Symmons, 15 Ves. 329, sustaining the lien as already defined. In this class are included a majority of the states, though it is to be noted that in the classification of states frequently made with reference to this subject, there is a failure to note an important distinction between those states where the lien is recognized before a conveyance, and those in which the English doctrine is carried to its fullest extent and a *grantor's* lien sustained. A careful examination of the cases would probably leave the states which go to this extent in a considerable minority, as the lien is frequently recognized in favor of a vendor who has only executed a contract of sale and put the vendee in possession; 29 Neb. 672; 3 Ired. Eq. 117; while the lien is not recognized after a deed; *id.* 182. So in a state usually included among those recognizing the lien; 14 Ore. 268; it has been recently held that "where real estate is granted by absolute deed, followed by delivery of possession to the grantee, no implied equitable lien for the unpaid purchase money remains in the grantor:" 45 Pac. Rep. (Ore.) 290. (2) The implied vendor's lien is abolished by statute in Vermont, Iowa, Virginia, West Virginia, and Georgia. It is recognized and process provided for it in Tennessee, California, the Dakotas, Louisiana, and Arizona. And in Arkansas and Alabama the lien passes to an assignee of the note or bond for purchase money; 1 Stims. Am. Stat. L. § 1950. (3) The doctrine has been expressly disavowed in several states; 29 Me. 410; 13 Kan. 245; 49 Pa. 9; 2 Dessaus. 509; 10 R. I. 334; 118 Mass. 261; 44 N. H. 102; 17 Conn. 575. In Delaware the question remains without direct decision but with judicial expressions strongly adverse; 1 Harring. 69; 3 Del. Ch. 189; 36 Fed. Rep. 860. (4) The federal courts recognize and enforce the lien "if in harmony with the jurisprudence of the state in which the case is brought;" 147 U. S. 133. Classifications of cases in the state courts on this subject may be found in Bisph. Eq. § 353, notes; 1 Pingr. Mortg. 318, notes; Tiedm. R. P. 292, notes; 25 Am. L. Reg. N. S. 393.

In a rather unusual case, it was held that where a vendee, as a consideration, assumes debts of the vendor and settles them at a compromise, the vendor has a lien for the amount of the rebate; 150 Ill. 212.

*Waiver.* The lien may be waived by agreement; but postponement of the day of payment is not a waiver, not being inconsistent with the nature of the lien; nor taking personal security; Ad. Eq. 128; 1 Johns. Ch. 308; 2 Humphr. 248; 1 Mas. 192; 2 Ohio 383; 1 Blackf. 246; 3 Ga. 333; 1 Ball & B. 514. An acknowledgment of the payment of the purchase-money in the body of the deed, or by a receipt, will not operate as a waiver or discharge of the vendor's lien if the purchase-money has not in fact been paid; 30 N. J. Eq. 569; 50 Ala. 228; 29 Ark. 357. Taking the note or other personal security of the vendee payable at a future day is generally held merely a means of payment, and not a security de-

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stroying the lien; 1 Sch. & L. 185; 2 V. & B. 306; 12 W. Va. 575; 50 Ala. 84; 26 N. J. Eq. 311; 44 Miss. 508; 25 Ark. 510; 21 Vt. 271; 1 Johns. Ch. 308. Where notes were taken of which part were not due and of those due payment had been made or tendered there was no vendor's lien; 24 Ore. 212. And if it be the note of a third party, or an independent security on real estate, it would generally be a waiver; Story, Eq. Jur. § 1226, n.; 4 Kent 151; 4 Wheat. 290; 1 Mas. 213; 4 Mo. App. 292; 67 Ill. 599; 10 R. I. 334; 10 Heisk. 477; 43 Miss. 570; 46 Texas 204; 30 Md. 422; 20 Ohio 546; 15 Ind. 435; 16 N. H. 592; 17 Cal. 70; 2 Mich. 243; 4 N. Y. 312; 66 Mo. 44. And, generally, the question of relinquishment will turn upon the facts of each case; 3 Russ. Ch. 488; 3 Sugd. Vend. c. 18; 8 J. J. Marsh. 553. As to waiver see 4 West. Rep. 780; extinguishment, see 14 Am. St. Rep. 61; estoppel, 5 Cent. L. J. 221.

See, generally, Herman, Mortg.; Miller, Eq. Mortg.; Perry, Trusts § 232; 2 Washb. R. P. 509, n. 6; EQUITABLE MORTGAGE.

OTHER EQUITABLE LIENS. In a case analogous to the vendor's lien, where money has been paid prematurely before conveyance made, the purchaser and his representatives have a lien; 3 Y. & J. 264; 11 Price 58; 1 P. Wms. 278.

So where the purchase money has been deposited in the hands of a third person, to cover incumbrances; 1 T. & R. 469; 1 Ves. 478. Yet a lien will not be created for a third party, who was to receive an annuity under a covenant as a part of the consideration for the conveyance; 3 Sim. 499; 1 M. & K. 297; 2 Keen 81.

The deposit of the title-deeds of an estate gives an equitable lien on the estate; 4 Bro. C. C. 269; s. c. 1 Lead. Cas. Eq. 931; L. R. 3 P. C. C. 299; Bisph. Eq. 357; without any express agreement either by parol or in writing. But not when the circumstances of the deposit were such as to show that no such lien was intended; 36 Beav. 27. This equitable lien has been recognized in 2 Sandf. Ch. 9; 2 Hill, Ch. 166; 12 Wisc. 413; 10 Sm. & M. 418; but denied in 2 Disn. 9; 1 Rawle 325. See 8 B. Monr. 435; 18 N. J. Eq. 104. This lien is not favored, and is confined strictly to an actual, immediate, and *bona fide* deposit of the title-deeds with the creditor, as a security, in order to create the lien; 12 Ves. 197; Story, Eq. Jur. § 1020; 4 Kent 150. It would not be valid under the recording acts as against a *bona fide* purchaser from the owner of the title, without notice.

One who has a lien for the same debt on two funds, on one only of which another person has a lien, may be compelled in equity by the latter to resort first to the other fund for satisfaction; 8 Ves. 388; 1 Johns. Ch. 318; 1 Story, Eq. § 633; but not where there are prior liens on both funds; 184 Pa. 318.

When a single lien covers several parcels of land, such of them as still belong to the real debtor will be primarily charged, to the exoneration of lands transferred to third parties; and if the purchasers are called upon to pay, they will be charged successively in the reverse order of time of transfers to them; 5 Johns. Ch. 440; 1 Pa. 275; but see *contra*, 2 Story, Eq. Jur. § 1233.

One joint tenant has, in many cases, a lien on the common estate for repairs put on by himself above his share of the liability; 1 Ball & B. 199; Story, Eq. Jur. § 1236; Sugd. Vend. 611.

And equity applies this principle even to cases where a tenant for life makes permanent improvements in good faith; 1 Sim. & S. 552. So where a party has made improvements under a defective title; 6 Madd. 2; 9 Mod. 11.

An agreement between two legatees whereby one purchases the interest of the other and agrees that the executor shall hold his own interest in the estate as security for the payment of the consideration, and shall pay to the vendor any sum due under the will to the vendee, creates an equitable lien on the personal property or its proceeds, to which the vendee is entitled under the will, but not on the real estate; 20 S. Rep. (Ala.) 456.

So, too, there is a lien where property is conveyed *inter vivos*, or is bequeathed or devised by last will and testament, subject to a charge for the payment of debts; or to other charges in favor of third persons; Story, Eq. Jur. § 1244. A distinction must be kept in mind between a devise in trust to pay certain sums, and a devise subject to charges.

An equitable lien may be given by express contract upon future property; 50 Pac. Rep. (Cal.) 546; but it is not created by a mere promise to pay a debt from a particular fund if it should ever come into existence; 78 Fed. Rep. 417.

An acknowledgment in a deed to a firm that a judgment in favor of the grantor against a member of the firm is to stand against a fractional portion of the property conveyed, creates a lien by deed; 38 Atl. Rep. (Pa.) 519.

A covenant to convey and settle lands does not give the covenantee a lien; but was held to do so in case of a covenant to settle lands in lieu of dower; 3 Bro. Ch. 489; 1 Ves. 451; 1 Madd. Ch. Pr. 471.

A court of equity cannot create a lien upon lands to secure a party for a breach of contract, whether under seal or not, when there is no agreement for a lien between the parties; 74 Mich. 57.

A bargain and sale of personal property, accompanied by delivery, divests the vendor of any lien for payment, unless such lien is secured by chattel mortgage or by agreement between the parties; 131 U. S. 287.

An equitable lien upon real estate does not result from the sale of personal property, even though it is used in the erection of buildings thereon; 42 N. E. Rep. (Ind.) 910. As to equitable liens on personalty, see 14 Cent. L. J. 42; on chattels, 19 *id.* 2, 24.

Where the owner of an equity of redemp-

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tion in mortgaged lands agreed to charge a certain lot with the payment of two mortgages held upon other property, and agreed to execute proper mortgages on said land, or to pay off the mortgage already given, the agreement created an equitable charge in favor of the mortgagees named in the instrument; 26 Can. S. C. R. 41.

The holder of a mere equitable lien cannot compel the owner of the legal estate to account for the rents and profits received by him while occupying the premises; 88 Me. 479.

The holder of the legal title to land cannot, by private sale to a corporation having the right of eminent domain, defeat inchoate liens which would otherwise attach as the result of legal proceedings; 109 Ala. 448.

As to equitable liens generally, see Jones, Liens; 38 Alb. L. J. 188; 4 L. R. A. 247.

**Maritime Liens.** Maritime liens do not include or require possession. The word lien is used in maritime law, not in the strict legal sense in which we understand it in courts of common law, in which case there could be no lien where there was no possession, actual or constructive; but to express, as if by analogy, the nature of claims which neither presuppose nor originate in possession; 22 E. L. & Eq. 62. See 15 Bost. Law Rep. 555; 16 *id.* 1, 264; Ben. Adm. § 271. A distinction is made in the United States between qualified maritime liens, which depend upon possession, and absolute maritime liens, which do not require nor depend upon possession; 7 How. 729; 21 Am. Law Reg. 1. The sole essentials of admiralty jurisdiction in a suit *in rem* for breach of contract are that the contract is maritime and that the property proceeded against is within the lawful custody of the court. The existence of a maritime lien is not jurisdictional, but is a matter going to the merits; 168 U. S. 137. To sustain a maritime lien there must be, either in fact or by presumption of law, a credit of the ship; 60 Fed. Rep. 766.

*The shipper of goods* has a lien upon the ship, for the value of the goods sent, which can be enforced in admiralty; 1 Blatchf. & H. 300; 22 How. 491; 3 Blatchf. 271, 289; and, generally, every act of the master binds the vessel, if it be done within the scope of his authority; 1 W. Rob. 392; 18 How. 182; where the possession of the master is not tortious, but under a color of right; 6 McLean 484. This does not apply to contracts of material men with the master of a domestic ship; 1 Conkl. Adm. 73; and the act must have been within the scope of the master's employment; 18 How. 182. See 1 C. Rob. 84. This lien follows the ship even in the hands of a purchaser, without notice, before the creditor has had a reasonable opportunity to enforce his lien; 1 Ware 188. If the master borrow money for the ship's necessity, the lender has a lien on the ship for the amount; 4 Dall. 225; 8 Me. 298; 36 Fed. Rep. 197. A sale of the vessel by the master through necessity cuts out the lien of the shipper of the cargo in the vessel; 6 Wall. 18.

*The owner of a ship* has a lien on the cargo carried for the freight earned, whether reserved by a bill of lading or not; 4 B. & Ald. 630; 6 Pick. 248; 5 Sandf. 97; 5 Ohio 88; 8 Wheat. 605; 2 W. & M. 178.

Where freight has been earned for the transportation of goods before the United States declares them forfeited for a fraudulent custom house entry, and sells them, the freight has a lien on the proceeds, if the vessel owners were innocent; 9 Fed. Rep. 595.

This lien is, at most, only a qualified maritime lien; see 1 Pars. Mar. Law 174, n. The lien exists in case of a chartered ship; 4 Cow. 470; 1 Paine 358; 4 B. & Ald. 630; 8 Wheat. 605; to the extent of the freight due under the bill of lading; 1 B. & Ald. 711; 1 Sumn. 551. But if the charterer takes possession and management of the ship, he has the lien; 8 Cra. 39; 6 Pick. 248; 4 Cow. 470; 4 M. & G. 502. No lien for freight attaches before the ship has broken ground; 1 B. & P. 634; 5 Binn. 392; 3 Gray 92. But see, as to the damages for removing goods from the ship before she sails, 28 E. L. & Eq. 210; 2 C. & P. 334; 2 Gray 92.

No lien exists for dead freight; 3 M. & S. 205. The lien attaches only for freight earned; 3 M. & S. 205; Ware 149. The lien is lost by a delivery of the goods; 38 Fed. Rep. 528; 34 *id.* 909; 6 Hill 43; but not if the delivery be involuntary or procured by fraud; *id.* So it is by stipulations inconsistent with its exercise; 17 How. 53; 10 Conn. 104; 6 Pick. 248; 4 B. & Ald. 50; as, by an agreement to receive the freight at a day subsequent to the entire delivery of the goods,—a distinction being, however, taken between the unloading or arrival of the ship, and the delivery of the goods; 18 Johns. 157; 14 M. & W. 794; 2 Sumn. 589; 10 Mass. 510.

A third person cannot take advantage of the existence of such lien; 3 East 85. A vendor, before exercising the right of stoppage *in transitu*, must discharge this lien by payment of freight; 15 Me. 314; 3 B. & P. 42.

*Master's lien.* In England, the master had no lien, at common law, on the ship for wages, nor disbursements; 4 De Gex & J. 334; 1 B. & Ald. 575; 6 How. 112; 15 U. S. App. 229; but by the act of 1854 he has the same lien for his wages as a seaman; and this may be enforced in the admiralty courts of the United States; 22 Bost. L. Rep. 150; 9 Wall. 435; 3 Fed. Rep. 577; 7 *id.* 247, 674. The district court may, but is not bound to exercise jurisdiction in favor of a British subject against a British ship; 22 Bost. L. Rep. 150. Its enforcement is only a question of comity; 9 Wall. 435.

In the United States, he has no lien for his wages; 2 Paine 201; 14 Pa. 34; 18 Pick. 530; 36 Fed. Rep. 493. This does not apply to one not master in fact; Bee 198. As to lien for disbursements, see 2 Curt. C. C.

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427; 14 Pa. 34; 11 Pet. 175. He may be substituted if he discharge a lien; 1 Pet. Adm. 223; Bee 116; 3 Mas. 255. But he has a lien on the freight for disbursements; 4 Mass. 91; 5 Wend. 315; for wages in a peculiar case; Ware 149; and on the cargo, where it belongs to the ship-owners; 14 Me. 180. He may, therefore detain goods against the shipper or consignee, even after payment to owner, if the master give reasonable notice; 11 Mass. 72; 5 Wend. 315. But see 5 D. & R. 552. The master may retain goods till a contribution bond is signed; 11 Johns. 23; 11 Me. 150.

Admiralty has jurisdiction of a libel *in rem* by a master for his wages, where that lien is given by a state statute; 18 Sup. Ct. Rep. 114.

*The seamen's* lien for wages attaches to the ship and freight, and the proceeds of both, and follows them into whosesoever hands they come; 2 Sumn. 443; and lies against a part, or the whole, of the fund; 3 Sumn. 50, 286; but not the cargo; 5 Pet. 675. It applies to proceeds of a vessel sold, under attachment in a state court; 2 Wall. C. C. 592, overruling 1 Newb. 215; and to a vessel while in the hands of a receiver of a state court, for wages accruing during the receivership; 168 U. S. 437.

Seamen discharged by the breaking up of a voyage are entitled to no lien for services not performed, when they could have obtained other employment of like character and at as good or better wages; 37 Fed. Rep. 696.

This lien of a seaman is of the nature of the *privilegium* of the civil law, does not depend upon possession, and takes precedence of a bottomry bond or hypothecation; 2 Pars. Mar. Law 62, and cases cited; 15 Bost. L. Rep. 555; Ware 134; or over subsequent collision liens; 35 Fed. Rep. 665. Taking the master's order does not destroy the lien; Ware 185. And see 2 Hagg. Adm. 136. For services for bringing a vessel into port, moving her about, drying her sails, etc., there is a lien; 59 Fed. Rep. 299; but not for services of a watchman in the home port; 65 Fed. Rep. 236; nor for men hired to watch the cargo of a vessel, by a contractor; 58 Fed. Rep. 908. Generally, all persons serving in a way directly and materially useful to the navigation of the vessel have a lien for their services; Gilp. 505; 3 Hagg. Adm. 376; Ware 83; 1 Blatchf. & H. 423; 1 Sumn. 384. A woman has it if she performs seaman's service; 1 Hagg. Adm. 187; 18 Bost. L. Rep. 672; 1 Newb. 5. Men hired for service on a barge without sails, masts, or rudder, with no duties upon land except in loading and unloading, have a lien on the vessel; 36 Fed. Rep. 607. The lien exists against ships owned by private persons, but not against government ships employed in the public service; 9 Wheat. 409; 3 Sumn. 308. See as to lien for seamen's wages, 4 Can. L. T. 153, 213.

Under the law of England no maritime lien is recognized for personal injuries received by a seaman on board ship; 36 Fed. Rep. 773. The question is unsettled in America, as to whether admiralty has jurisdiction over actions for personal injuries, either *in rem* or even against the owner; Bened. Adm. § 309 *a*. See 119 U. S. 199.

*A ship broker*, who obtains a crew, has been held to have a lien for his services and advances for their wages; 1 Blatchf. & H. 189. One who performs towage service on the navigable waters of the United States acquires a lien, which may be enforced by proceedings *in rem*, and cannot be destroyed by the sale of the vessel under a state law; 9 Fed. Rep. 777.

*Stevedores* are said to have no lien; Olcott 120; 1 Wall. Jr. 370. A stevedore would not have it, for services on a vessel in the home port; 37 Fed. Rep. 209; *id.* 696; 36 *id.* 493; 81 *id.* 216; and see 35 *id.* 916; 58 *id.* 908; 6 C. C. App. 313; s. c. 57 Fed. Rep. 224; but would in other than the home port; 2 U. S. App. 349; it is said to be a maritime contract when the service is rendered in a foreign port. Benedict is of the opinion that the tendency of the authorities is now to favor a stevedore's lien. See Bened. Adm. § 285; but the latest decision is that in the home port they have not. See a critical review of the cases "incorporated" by the court in its opinion; 81 Fed. Rep. 216.

*Material men.* By the civil law those who build, repair, or supply a ship have a lien upon the ship for the debt thus contracted, but the courts of the common law do not recognize the lien as a maritime lien, but only recognize the common law lien of the mechanic who by virtue of his possession, and not otherwise, was allowed a lien; Bened. Adm. § 271. It is well settled that material men furnishing supplies and materials to a vessel in her home port do not thereby acquire any lien upon the vessel by the general maritime laws in the United States; 21 Wall. 558; 89 Me. 512; 42 U. S. App. 267; but admiralty will enforce a lien given by a state law; 21 Wall. 558; 52 Fed. Rep. 652. The supreme court has decided, 4 Wheat. 438, that unless the local law of the particular state where the supplies are furnished gives a lien, there is no lien in the case of domestic vessels; 94 U. S. 520. Material men are those whose trade it is to build, repair, or equip ships, or to furnish them with tackle and provisions necessary of any kind; see Bened. Adm. § 268; 3 Hagg. Adm. 129; 49 Fed. Rep. 383. In regard to foreign ships, it has been held that material men have a lien on the ship only when the supplies were necessary and could be obtained only on the credit of the ship; 19 How. 359; 13 Wall. 329; 61 Fed. Rep. 514; 79 Fed. Rep. 365; which must appear either in fact or by presumption of law; 60 *id.* 766. The lien for repairs continues only as long as possession is retained, on domestic ships; Wright (Ohio) 669; 4 Wheat. 438; 1 Story 68; and is gone if possession is lost; 14 Conn. 404; 4 Wheat. 438; 4 Wash. C. C. 453. When the supplies are furnished to a vessel in a foreign port by order of her master, a lien is implied,

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but for work done by order of the owner no lien will be held to exist unless proved by the agreement of the parties; 50 Fed. Rep. 944. Necessary supplies furnished to a vessel which has not obtained a registry in any port, at a port other than that which is the owner's residence, on the credit of the vessel, and not of the owner, are supplies furnished at a foreign port, for which a lien lies in admiralty; 81 Fed. Rep. 964; 9 Am. L. Rev. 638. There is a maritime lien for coal furnished to a foreign steamer at the wharf for daily use in the presence of the master; 75 Fed. Rep. 684; but not when supplied on the order of a charterer who was required by the charter to provide and pay for the coal and had an office at the port of supply; 165 U. S. 264.

The several states of the United States are foreign to each other in this respect. Where repairs are made at the home port of the owner, the maritime law of the United States gives no maritime lien, the rights of the parties being altogether governed by the local law. The liens given by the state laws have, however, been enforced by the federal courts, not as rights which they were bound to enforce, but as discretionary powers which they might lawfully exercise, when the controversies were within the admiralty jurisdiction; 1 Black 522; 21 Wall. 558; 95 U. S. 69; 1 Fed. Rep. 218; 2 *id.* 364; 8 *id.* 866. The state legislatures cannot create a maritime lien, nor can they confer jurisdiction upon a state court to enforce such a lien by a proceeding *in rem;* but they can authorize their enforcement by common-law remedies; Bened. Adm. 270; 4 Wall. 430, 571; 16 *id.* 534; 9 Am. L. Rev. 638; 24 Ia. 192; 43 N. Y. 554; 21 Am. L. Reg. N. S. 88; 7 Am. L. Rev. N. S. 193. A lien under a state statute for repairs or supplies, furnished to a vessel in a home port is a right of property in the vessel and enforceable by process *in rem* exclusively in the federal district courts; 167 U. S. 606, reversing 157 Mass. 525. When a right, maritime in its nature and to be enforced by process in the nature of admiralty, has been given by the statute of a state, the admiralty courts of the United States have exclusive jurisdiction to enforce that right according to their own rules of procedure; 148 U. S. 1. When a lien is created by a general maritime law for repairs or supplies in a foreign port, the admiralty jurisdiction *in rem* of the courts of the United States is exclusive; 4 Wall. 411. That there is admiralty jurisdiction to enforce liens given by a state statute was also held in 36 Fed. Rep. 197; 40 *id.* 253; 46 *id.* 797; but see *id.* 136; 53 *id.* 599; 61 *id.* 860. And it is said that if a maritime lien upon a foreign vessel can be conferred by a state statute, a statute giving a lien for repairs, not furnished upon the credit of the vessel, cannot be enforced in a federal court of admiralty; 45 U. S. App. 16.

It is held by the Circuit Court of Appeals that a court of admiralty may entertain jurisdiction *in rem* against a vessel for the death of a passenger caused by a maritime collision; 70 Fed. Rep. 874. This right is based on a state statute giving not only a right of action for death, but a lien and preference over other demands in favor of such cause of action. This statutory provision distinguishes the case from 145 U. S. 335, where the right to a libel *in rem* in such case is denied, although the local law gave a right of action for death, but did not expressly create any lien on the vessel. See 1 L. R. A. 505.

As to the order of precedence of these liens, see Daveis 199; Ware 565; 2 Curt. C. C. 421; 8 Fed. Rep. 331, 833. In the distribution of funds to pay liens, wages claims will rank first; claims for materials and supplies next; and claims under contracts of affreightment thereafter; 36 Fed. Rep. 493. Maritime liens for necessary advances made or supplies furnished to keep a vessel fit for sea, take precedence of all prior claims upon her, unless for seaman's wages or salvage; 148 U. S. 1. They take priority over a mortgage on the vessel, although it has been duly recorded; 36 Fed. Rep. 501. Liens for damages arising from collision take precedence of the lien for a seaman's wages accruing prior to the collision; 40 Fed. Rep. 331; 49 *id.* 577; 50 *id.* 224. Among the holders of liens equal in dignity, the one who first instituted proceedings to enforce his claim is preferred; 48 Fed. Rep. 835.

Giving credit will not be a waiver of a lien on a foreign ship, unless so given as to be inconsistent with the right to a lien; 7 Pet. 324; 1 Sumn. 73; 5 Sandf. 342; 4 Ben. 151. A delay of nine months after midsummer repairs before proceeding to enforce a lien therefor, is not laches, but a year's delay is; 35 Fed. Rep. 665; see 48 *id.* 839. A lien for repairs is in the nature of a proprietary right and is not lost by merely delivering the vessel to the owner before payment; 49 Fed. Rep. 383. A note does not extinguish the lien of the claim for which it is given, unless such is the understanding of the parties at the time; 20 Fed. Rep. 923; 50 *id.* 703; 60 *id.* 926; 3 U. S. App. 109.

Builders' liens may be placed on the common-law ground that a workman employing skill and labor on an article has a lien upon it; 2 Rose 91; 4 B. & Ald. 341; Wright (Ohio) 660; 4 Wheat. 438; 1 Stor. 68; also a lien for the purpose of finishing the ship, where payments are made by instalments; 5 B. & Ald. 942.

*Collision.* In case of collision the injured vessel has a lien upon the one in fault for the damage done; 22 E. L. & Eq. 62; Crabb 580; and the lien lasts a reasonable time; 18 Bost. L. Rep. 91; 1 Pars. Sh. & Ad. 531.

A *salvage* lien exists when a ship or goods come into the possession of a person who preserves them from peril at sea, to be reimbursed his expenses and compensated; Sprague 57; Daveis 20; Edw. Adm. 175.

A *salvage* service carries with it a maritime lien on the things saved, whether the vessel is foreign or domestic; 38 Fed. Rep. 671.

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A *part-owner*, merely as such, has no lien whatever, but acquires such a lien when any of the elements of partnership or agency, with bailment upon which his lien may rest, enter into his relation with the other part-owners; 1 Pars. Sh. & Ad. 115. See 35 Fed. Rep. 785.

A part-owner who has advanced more than his share towards building a vessel has no lien on her for such surplus; 6 Pick. 46; and none, it is said, for advances on account of a voyage; 4 Pick. 456; 7 Bingh. 709. The relation of partners must exist to give the lien; 20 Johns. 61; 4 B. Monr. 458; 8 B. & C. 612; 6 Pick. 120; 5 Mann. & R. 25. And part-owners of a ship may become partners for a particular venture; 1 Ves. Sr. 497; 3 W. & M. 193; 10 Mo. 701; 9 Pick, 334. But see 14 Pa. 34.

*The ship's husband*, if a partner, has a partner's lien; if not, he may have a lien on the proceeds of the voyage; 8 B. & C. 612; 16 Conn. 12, 23; 3 W. & M. 193; or of the ship herself, if sold, or on her documents, if any of these have come into his actual possession. And the lien applies to all disbursements and liabilities for the ship. But it is doubtful if his mere office gives him a lien; 2 Curt. C. C. 427; 2 V. & B. 242.

Under the general maritime law, there is no lien on a vessel for marine insurance premiums due from her owner; 49 Fed. Rep. 279; but there is for wharfage for a foreign vessel; 56 Fed. Rep. 609. See 60 *id.* 766.

*Deposit of a bill of lading* gives a lien for the amount advanced on the strength of the security; 5 Taunt. 558; 2 Wash. C. C. 283.

These liens of part-owners and by deposit of a bill of lading are not maritime liens, however, and could not be enforced in admiralty.

See ADMIRALTY; SALVAGE; JETTISON; BOTTOMRY; RESPONDENTIA; IN REM; COLLISION; SEAMEN; MARSHALLING OF ASSETS; MASTER; MARITIME CAUSE; MARITIME CONTRACT; CAPTAIN; PRIVILEGE.

**Statutory Liens.** Under this head it is convenient to consider some of those liens which subsist at common law, but have been extensively modified by statutory regulations, as well as those which subsist entirely by force of statutory regulations.

The principal liens of this class are judgment liens, and liens of material men and builders, but there have also been provided by legislation in recent years in many states, liens specially designed for the protection of leading local business interests, such as logging liens, and various agricultural liens intended to facilitate the obtaining of money or credit on the faith of crops unmatured.

JUDGMENT LIEN. At common law, a judgment is merely a general security and not a specific lien on land; 2 Sugd. Vend. *517; but by stat. 1 & 2 Vict. c. 110, it is made a charge upon all lands, tenements, etc., of which the debtor is owner or in which he is in any way interested, and it binds all persons claiming under him after such judgment, including his issue, and other persons whom he could bar; *id.* *528. By stat. 27 & 28 Vict. c. 112, judgments are not liens upon lands until such lands have been actually delivered in execution.

In the United States generally judgments are liens on lands within the county from the date on which they are docketed or entered. In New Jersey a judgment of the supreme court is a lien throughout the state. In a few of the states the lien attaches immediately when the judgment is recovered. In others it is necessary, in order to make a judgment a lien in any county, that a transcript of the judgment be recorded.

In many states, it requires an execution to create a lien by judgment, which, in some states, must issue within a specific period after judgment, *e. g.* one year in Virginia, and two years in West Virginia, while in Delaware the common-law rule that an execution must issue within a year and a day is enforced by the systematic entry on the judgment docket by the prothonotary of the issue of an execution *vice comes* (*q. v.*), which is, in fact, never issued and is a fiction in all respects except as to the prothonotary's fee.

Judgments in the federal courts have the same lien as those in the respective state courts wherein they are held, except that they extend to all lands of defendant in the district. Judgments in the circuit court for the eastern district of Pennsylvania have been decided to be liens against land in both the eastern and western districts of Pennsylvania.

The time during which a judgment lien continues in force varies in the several states; it is one year in Tennessee; two years in Idaho and Nevada; three years in Arkansas and Missouri; four years in Georgia; five years in Kansas, Nebraska, Ohio, Pennsylvania, Utah, Washington, California, Wyoming and Oklahoma Territory; six years in Colorado and Montana; seven years in Illinois; ten years in Alabama, Indiana, Iowa, Minnesota, New York, North Carolina, North Dakota, Oregon, South Carolina, Texas, Wisconsin, South Dakota, Virginia and West Virginia; twelve years in Maryland; twenty years in New Jersey. There is no statutory limitation in Florida, Louisiana, Mississippi, New Mexico and the District of Columbia, and in Delaware, except in New Castle County, where there is a limitation of ten years. In these latter states the only limitation of the lien is the presumption of payment. In Delaware a judgment is presumed to be paid in twenty years, that being the period which bars proceedings affecting land or actions on specialties. Judgments are no lien in Kentucky, Maine, Massachusetts, Michigan, New Hampshire, Rhode Island, Vermont, Arizona and Indian Territory. A verdict is a lien in Pennsylvania.

MECHANICS' LIENS. The lien of mechanics and material men on buildings and for work done and materials furnished is unknown either at common law or in equity; 13 Pa. 167; 6 Wall. 561; but it ex-

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ists in all of the United States by statute, to a greater or less extent. Each state has its own mechanic's lien law, differing often in minor particulars, but alike in the general provisions. These statutes are remedial and should be liberally construed; 22 Neb. 656, 126. In most of the states, this lien is equal to that of a judgment or mortgage, and can be assigned and enforced in a similar manner; 26 Conn. 317. The lien affects only real estate, and attaches to the materials only when they become real estate by being erected into a building and attached to the land; 2 Vroom 477; but should the building be removed or destroyed, the lien does not remain upon the land; 26 Pa. 246; nor upon any portion of the materials of which the building was composed; 28 Pa. 161.

In many cases a single lien is allowed upon separate buildings; 148 Mass. 104; 76 Md. 337; 120 Mo. 38; 96 Mich. 175; 101 U. S. 721; *contra*, 61 Conn. 578; 167 Pa. 614; 153 *id.* 293; but see 151 Pa. 153; 158 *id.* 238. Two owners of contiguous lots may by their acts connect them so as to constitute one lot and make them subject to lien for work or material; 51 Minn. 364. See note on this subject 17 L. R. A. 314, and a later collection of cases, 3 Gen. Dig. N. S. 891.

The benefits of the statute apply only to the class of persons named therein. The contractor seems to be universally secured by the lien, and in most of the states the sub-contractor and material man are also protected by a lien. In some states these provisions extend to workmen, but generally they do not; Phill. Mech. Liens, 53. A contractor's lien is not defeated by the fact that the work was only partly performed, where such part performance has been accepted; 85 Ala. 211; 74 Wis. 163. A contract by which a contractor agrees that he will not suffer or permit to be filed any mechanics' lien or liens against a building waives the right to file a lien in his own favor; 121 Pa. 593.

Mechanics' lien laws extend to non-residents as well as residents; 2 Swan 130; 17 Minn. 353.

A New York statute giving a lien to "any person" who has furnished materials for a building in the state is available under a contract made and payable in another state; 38 L. R. A. (N. Y.) 410.

Where the statute was silent on the subject of assigning a mechanic's lien, it was held that an assignee could not prosecute in his own name and avail himself of its privileges; 10 Wisc. 331; 36 Me. 384; but in other states it has been held that the lien may be assigned precisely as any other *chose in action*, the assignee taking subject to the equities of the parties; 15 Gratt. 83; 12 Pa. 339; 14 All. 139; 14 Abb. Pr. N. S. 281. The right of lien survives to an executor or administrator; 14 Minn. 145.

A mechanic's lien is not released by taking a note on account of it, to be credited when paid, even if the note be discounted; 68 Fed. Rep. 778; 32 U. S. App. 435; but taking a note which will mature after the expiration of the statutory period for enforcing a lien, operates as a waiver of it even under a statute providing that the taking of a note shall not discharge the lien; 64 Minn. 269. Taking a note as security has been held in many cases to affect the right to a lien; 42 N. J. Eq. 282; 85 Ga. 109; 78 Wis. 150; 121 Ill. 571; 21 Can. S. C. 406; 2 N. Dak. 53; 94 Mich. 299; see 96 *id.* 113; in others it has been held that the lien is not affected; 76 Md. 337; 7 Misc. Rep. 79, 609; 91 Ga. 651; 6 S. Dak. 160; 67 Hun 109; 157 Mass. 584; 83 Fed. Rep. 593.

A lien cannot be acquired against certain classes of property which are exempted on the ground of public policy. See 38 Fed. Rep. 565. Thus public school-houses; 37 How. Pr. 520; 10 Pa. 275; 13 Utah 211; 13 Ore. 283; 51 Ia. 70; 89 Cal. 160; court-houses, public offices, or jails, are exempt; 7 W. & S. 197; 47 N. Y. 666; 112 N. C. 335; 38 W. Va. 691; 70 Ia. 479; 89 Wis. 264; 105 N. Y. 139; 110 Ala. 539; 83 Tex. 202, 291; but see 52 Kan. 250; so also are graveyards; 3 Pa. L. J. 343; but a church has been held subject to a mechanic's lien; 44 Pac. Rep. (Ore.) 354. Such a lien cannot extend to the valves constituting part of the water works of a corporation organized to furnish a city with water; 89 Wis. 264; 142 Pa. 610; 60 *id.* 27; or to the plant of such corporation; 89 Wis. 264; or a street railway; 68 Fed. Rep. 966; 29 U. S. App. 698; 2 Wash. 112; but see 10 Lanc. L. Rev. Pa. 73; or a power house connected with the same; 29 U. S. App. 698; 16 Co. Ct. Rep. (Pa.) 13; or to the property of an electric light company having a franchise to occupy streets; 48 Kan. 187; 19 Ore. 61. Some question has arisen whether mechanics' lien laws apply to railroads. When the statute gives a lien on "buildings" they are said not to be covered; 2 Jones, Liens § 1618; otherwise if the word used is "structure," "erection," "improvement"; *id.* § 1624; and a lien has been upheld against ties used in construction; 44 Ia. 71.

The same doctrine of public policy which forbids mechanics' liens on public buildings, etc., has been said to apply to railroads, so far that such a lien, if given by statute, is generally held to attach only to the entire line and not to a section of it; 2 Jones, Liens § 1619 and cases cited; but Deady, J., challenges this statement; 42 Fed. Rep. 470; s. c. 8 L. R. A. 700, where will be found a collection of cases by states on mechanics' liens on railroads; see also 101 U. S. 443. Railroad depots are not exempt; 11 Wis. 214; 10 Ohio St. 372; 37 N. H. 410.

As to mechanic's lien on vessels under state statutes see subtitle Maritime Liens, *supra*.

In some cases it is held that the equitable title of a purchaser of land, who has not fully acquired the title, may be subject to a statutory lien; 38 Fla. 305; 118 Pa. 634; 52 Fed. Rep. 32; 46 Kan. 24, 543; 3 S. Dak. 440; *contra*, 160 Mass. 48; 45 N. J. Eq. 494; 148 N. Y. 673. In such case the lien has been held to be subordinate to the right of

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the vendor for unpaid purchase money; 48 Neb. 138. A mechanic's lien in such case attaches only to the interest of the purchaser; 46 Kan. 24. That the lien attaches on the completion of the contract of sale was held in 52 Minn. 484.

On the foreclosure of a mortgage, the fund raised takes the place of the land and is subject to a lien; 17 Abb. Pr. 256; so also is a balance in court on the sale of a lessee's interest in land and buildings; 62 Pa. 405.

The remedy is by *scire facias* in some states; 14 Ark. 370; 14 Tex. 87; 22 Mo. 140; 3 Md. Ch. Dec. 186; 14 How. 434; 12 Pa. 45; by petition, in others; 11 Cush. 398; 4 Wis. 451; 14 Ala. N. S. 33; 11 Ill. 519; 1 Ia. 75. When the proceeding is by *scire facias*, obviously it can have no more effect than belongs to that writ, which is substantially a proceeding *in rem*.

Questions constantly arise under the statutes giving liens to mechanics and material men as to the respective priority of their liens over those of mortgagees. Questions as to the respective priority, as between such liens and mortgage liens, must be considered with reference to the statutes. Such liens have been held entitled to priority over a previous mortgage so far as a building is concerned; 15 Ind. App. 392; 42 S. W. Rep. (Tenn.) 19; and also where the labor and materials were furnished upon the mortgagee's agreement that his lien should be subordinated; 49 Neb. 495; but the mere fact that the mortgagee told the contractor to go ahead with the work of building upon the mortgaged premises is not a waiver of priority; 11 Tex. Civ. App. 430. As between mortgages and subsequently filed mechanics' liens, the mortgage was held superior in 92 Ia. 732; 94 Ala. 240; 51 N. J. Eq. 605; 42 Hun 465; and the mechanic's lien was held superior in 109 N. C. 658; 152 Pa. 621; 30 Fed. Rep. 332; 155 Mass. 549; 106 Cal. 224; 53 N. J. L. 445. For collections of cases upon this question of priority see 3 Gen. Dig.; 14 L. R. A. 305.

For statutes relating to mechanics' liens see Stimson, Am. Stat. Law art. 196. See Houck; Nott; Phillips; Richey; Sergeant; Snyder, Mech. Liens.

LOGGING LIENS. In some states, persons employed in logging have a lien for services. It exists in favor of a cook and his assistant at a logging camp; 64 Minn. 420; a blacksmith employed in shoeing horses and mending tools at the camp; *id.*; persons contracting to cut, skid, and haul logs and to peel bark to be paid for by the thousand; 1 Pa. Super. Ct. 367; one who blasts rocks to make a passage for logs; 10 Wash. 84; one who furnishes supplies; 78 Wis. 14; a rafter of logs; 101 Mich. 267; a mill owner; 105 N. Y. 234. But mere contractors have not a lien; 77 Mich. 45; or one who furnishes a horse, harness, and sleds at a specified price per month; 90 Me. 227; or one who employs men to do the work but does not directly labor himself; 11 Wash. 204; or one cutting without right; 70 Mich. 309; or the owner of an ox hired to haul the logs; 87 Wis. 227. Such liens have been held to include not only manual labor of the lienor, but also that performed by his teams and servants, under a contract for a gross sum per month for both; 64 Minn. 420.

The amount of the lien is a question for the jury; 65 N. W. Rep. (Mich.) 235; and so is the question whether a levy under such lien is excessive; *id.* 379; and the lien is not vitiated by an excessive levy; *id.*

The lien of a boom company attaches to part of a single bailment for charges on logs previously delivered, but it is confined to logs of the same mark and not a general lien upon all logs of the same owner; 64 Minn. 108; recording is not required to bind an innocent purchaser, possession being equivalent to notice; *id.* It may be waived either by contract or a course of dealing inconsistent with its existence, or by an extension of time for payment of charges; *id.*

One who cuts and rafts logs under a contract which, by reasonable construction, entitles him to retain possession until paid for his services, has a common-law lien thereon; 101 Mich. 267; but one with whom the owner of timber contracts for its cutting and delivery in his mill-pond has not; 162 Pa. 118.

The execution and performance of a contract for the sale of standing timber at so much per acre, to be cut and hauled by the purchaser who owns a sawmill, is held under the Georgia Civil Code, not to give the seller a lien on the sawmill and products; 27 S. E. Rep. (Ga.) 730.

AGRICULTURAL LIENS. Among these are, a lien of laborers upon crops for their wages, which is held superior to the lien of a mortgage of the crop, executed prior to the laborer's lien; 35 S. W. Rep. (Ark.) 1108; 16 So. Rep. (Miss.) 678; such a lien applies in favor of the overseer of a farm; 71 Miss. 933. Of a similar character is a statutory lien, given in some states, to persons furnishing agricultural supplies; such liens are held to be superior to a conveyance of the property in payment of debt; 47 La. Ann. 742; or to the claim of a mortgage; 114 N. C. 284; or a chattel mortgage on the crop previously executed; 57 Minn. 84.

A statutory lien on crops for advances to a farmer may be secured by agreement recorded, in Florida, Virginia, North Carolina, and Alabama; it has priority in the first named state against all except laborers' liens, and in the two last named on all except a landlord's claim for rent, and in Alabama advances by landlord. An agreement merely in writing is sufficient in Tennessee, South Carolina, and Georgia; 1 Stims. Am. Stat. L. § 1954.

The order of liens on crops in Louisiana is as follows: (1) labor; (2) lessor; (3) overseer; (4) pledges, in the order of record; (5) furnisher of supplies or money, and physician; Laws, 1887, § 89. In Washington, farm laborers have a lien on crops su-

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perior to the landlord, who also has a lien on crops for rent; Laws, 1886, 115.

In North Dakota a person furnishing grain for seed, or potatoes for planting, has a lien on the crop.

As to the landlord's lien for rent, see LANDLORD AND TENANT, and for special statutory provisions, see 1 Stims. Am. Stat. L. §§ 2034–39.

For various special liens created by statute, see 1 Stims. Am. Stat. L. art. 464.

See Cross; Jones; Overton; Whittaker, Liens; MORTGAGE; JUDGMENT; RECOGNIZANCE; IN REM; INNKEEPER; BAILMENT; BAILEE.

**LIEUTENANT.** This word has now a narrower meaning than it formerly had: its true meaning is a deputy, a substitute, from the French *lieu* (place or post) and *tenant* (holder). Among civil officers we have *lieutenant-governors*, who in certain cases perform the duties of governors (see the names of the several states), *lieutenants of police*, etc. Among military men, *lieutenant-general* was formerly the title of a commanding general, but now it signifies the degree above major-general. *Lieutenant-colonel* is the officer between the colonel and the major. *Lieutenant*, simply, signifies the officer next below a captain. In the navy, a *lieutenant* is the second officer, next in command to the captain of a ship.

**LIFE.** "The sum of the forces by which death is resisted." Bichat.

A state in which energy of function is ever resisting decay and dissolution.

It commences, for many legal purposes, at the period of quickening, when the first motion of the fœtus *in utero* is perceived by the mother. 1 Bla. Com. 129; Co. 3d Inst. 50. It ceases at death. See DEATH.

But physiology pronounces life as existing from the period of conception, because fœtuses *in utero* do die prior to quickening, and then all the signs of death are found to be perfect; Dean, Med. Jur. 129, 130.

For many important purposes, however, the law concedes to physiology the fact that life commences at conception, *en ventre sa mère*. See FŒTUS. Thus, it may receive a legacy, have a guardian assigned to it, and an estate limited to its use; 1 Bla. Com. 130. It is thus considered as alive for all beneficial purposes; 1 P. Wms. 329.

But for the transfer of civil rights the child must be born alive. The ascertainment of this, as a fact, depends upon certain signs which are always attendant upon life; the most important of these is crying. As to conditions of live birth, see BIRTH; INFANTICIDE.

Life is presumed to continue for one hundred years; 9 Mart. La. 257. As to the presumption of survivorship in case of the death of two persons, at or about the same time, see 14 Cent. L. J. 367, a full article reprinted from the Irish L. Times; DEATH.

**LIFE-ANNUITY.** See ANNUITY.

**LIFE-ASSURANCE.** See INSURANCE; POLICY; LOSS.

**LIFE-ESTATE.** See ESTATE FOR LIFE; TENANT FOR LIFE.

**LIFE-PEERAGE.** See PEERS.

**LIFE-RENT. In Scotch Law.** A right to use and enjoy a thing during life, the substance of it being preserved. See FEE AND LIFE RENT; TERCE; CURTESY.

**LIFE-RENTER. In Scotch Law.** A tenant for life without waste. Bell, Dict.

**LIFE TABLES.** Statistical tables exhibiting the probable proportion of persons who will live to reach different ages. Cent. Dict.

Such tables are used for many purposes, such as the computation of the present value of annuities, dower rights, etc., and for the computation of damages resulting from injuries which destroy the earning capacity of a person, or those resulting from the death of a person to those who are dependent upon him.

The principal mortality tables in ordinary use are:

(1) The Carlisle Table, which takes its name from the city of Carlisle and the calculations for which were made by Joshua Milne in 1815. (2) The Northampton Table, based on statistics of that town, in England. This shows a higher rate of mortality than any other, and it has been said that it more nearly shows the mortality of the negro race in the United States than any other life table; G. & McC. Tables 187, n. 1. (3) The Farr Tables, prepared by Dr. Wm. Farr, of the English registrar general's office, from the census returns of England and Wales. A synopsis of the results of these tables may be found in 2 Ins. Cyc. 516–36. (4) Combined Experience, or actuaries' seventeen office experience tables of mortality, prepared by a committee from 62,537 risks, and published in 1843 by Jenkins Jones. This has been characterized as very accurate; Willey, Life Ins., 4th ed. 35, 73. As the calculations of this table are made upon actual life insurance risks its accuracy would have relation rather to that subject than to dower and annuities, and purposes involving merely the average expectation of sound life. (5) The American Experience tables of mortality by Sheppard Homans, an insurance actuary. This is a legal standard in several states for valuations of life insurance policies, having been adopted in New York in 1868. (6) The Thirty Offices Experience table of mortality published in 1873: "Not yet accepted as a standard table"; G. & McC. Tables 190.

Courts can take judicial notice of the Carlisle Tables, and can use them in estimating the probable length of life, whether they were introduced in evidence or not; 151 U. S. 436. Standard life and annuity tables showing probable duration of life and present value of a life annuity are competent evidence; 91 Ga. 87; or as bearing on the question of compensation for permanent injury, or in case of death to show the deceased's expectation of life at the

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time of accident; 33 Minn. 125; 66 N. Y. 50; 63 Ia. 487. The Carlisle tables have been admitted; 76 *id.* 310; 74 Ga. 737; and also Johnson's Encyclopedia, to show these tables; 78 Ia. 509. The fact that the deceased was in poor health only affects the weight to be given them; 29 S. W. Rep. (Tex.) 955; they ought not absolutely to control the jury; 118 U. S. 545, citing approvingly judicial utterances strongly deprecating the use of them by a jury, from 49 L. J. Q. B. 237. In a recent case it was said that they are admissible in actions for personal injuries, but the court should instruct the jury that their value in a particular case depends very much on the plaintiff's state of health, habits, and social condition; 172 Pa. 205.

See Giauque & McClure, Present Value Tables, which also contains Bowditch's Table and Chisholm's Commutation Tables; Jones, Value of Annuities and Reversionary Payments; Lawton & Griffiths, Life Tables.

**LIGAN, LAGAN.** Goods cast into the sea tied to a buoy, so that they may be found again by the owners. When goods are cast into the sea in storms or shipwrecks, and remain there, without coming to land, they are distinguished by the barbarous names of jetsam, flotsam, and ligan. 5 Co. 108; Hargr. St. Tr. 48; 1 Bla. Com. 292. See 38 Fed. Rep. 509.

**LIGEANCE.** The true and faithful obedience of a subject to his sovereign, of a citizen to his government. It signifies, also, the territory of a sovereign. See ALLEGIANCE.

**LIGHT AND AIR.** See ANCIENT LIGHTS; AIR. See, also, 3 Eng. Rul. Cas. 1.

**LIGHTERMAN.** The owner or manager of a lighter. A lighterman is considered a common carrier. See LIGHTERS.

**LIGHTERS.** Small vessels employed in loading and unloading larger vessels.

Boats plying for hire and carrying passengers or goods. 23 L. J. M. C. 156; 3 E. & B. 889.

The owners of lighters are liable like other common carriers for hire. It is a term of the contract on the part of the carrier or lighterman, implied by law, that his vessel is tight and fit for the purpose or employments for which he offers and holds it forth to the public; it is the immediate foundation of the contract that it is so: the law presumes a promise to that effect on the part of the carrier, without actual proof; and every principle of sound policy and public convenience requires it should be so; 5 East 428; Abb. Sh. 225; Bened. Adm. § 284.

If a vessel, to earn greater freight, gets the shipper to furnish, at a deeper anchorage, cargo in addition to that furnished at the agreed place, the cost of lightering must be borne by the vessel. Delivery to the lighter is delivery to the vessel; 48 Fed. Rep. 921. See LAUNCH; VESSEL.

**LIGHTHOUSE.** An act authorizing the secretary of the treasury to acquire lands for a lighthouse by condemnation is constitutional; 160 U. S. 499. See NAVIGATION RULES; EMINENT DOMAIN.

**LIGHTNING.** A sudden discharge of electricity from a cloud to the earth or from the earth to a cloud or from one cloud to another, or from a body positively charged to one negatively charged. 54 Wis. 433.

Any sudden and violent discharge of electricity occurring in nature. *Id.*

A stroke of lightning is an act of God; 26 Me. 181; 26 L. R. A. (Wis.) 101; but one cannot be excused on that ground from the consequences of his own negligence in causing lightning to be conveyed to a building by a wire; 26 L. R. A. (Wis.) 101. See WIRES.

In a policy of insurance against loss by lightning, it is the province of the jury, not reviewable on appeal, to decide how much damage is caused by lightning and how much by other forces; 47 N. Y. S. R. 406; 54 Wis. 433. Where the insurance was against loss by fire and lightning, damages caused by wind accompanying the storm were held not within it; 15 Ins. L. J. 478; nor was damage caused by lightning without combustion covered by a clause against fire by lightning; 4 N. Y. 326. See 37 Me. 256. Where the damage was caused by an explosion of powder resulting from a stroke of lightning, the loss was held to be protected by a fire insurance policy which covered damage by lightning but stipulated against loss by explosion; 36 L. R. A. (Ohio) 236. See INSURANCE.

**LIGHTS.** Those openings in a wall which are made rather for the admission of light than to look out of. 6 J. B. Moore 47; 9 Bingh. 305. See ANCIENT LIGHTS.

Lamps carried on board vessels, under statutory regulations or otherwise, for the purpose of preventing collisions at night.

Lamps or lights placed in lighthouses, or other conspicuous positions, as aids to navigation at night. See NAVIGATION RULES.

**LIGNAGIUM** (from the Lat. *lignor*, to get fuel). The right which a person has to cut or gather fuel out of the woods; sometimes it is said to signify a pecuniary payment due for the same. Cowel.

**LIKE.** Equal in quantity, quality, or degree, exactly corresponding. 79 N. C. 387. Like does not necessarily mean the same in all parts; 2 Cush. 145. *Like offence.* Sameness in all the essential parts. 147 Mass. 452.

**LIKEWISE.** In like manner; also; moreover; too. 17 Ind. 71. When used at the beginning of a sentence in a will the word sometimes denotes a severance of what follows from a contingency previously expressed, but the context of the will may rebut this presumption; 1 Jarm. Wills 832. See 5 De G., M. & G. 122; 24 Beav. 105.



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**LIMIT.** A bound, a restraint, a circumscription, a boundary. 22 N. Y. 429. See 11 C. B. N. S. 637. In a deed the words limit and appoint may operate as words of grant so as to pass a reversion; 5 Term 124.

**LIMITATION IN LAW.** A limitation in law, or an estate limited, is an estate to be holden only during the continuance of the condition under which it was granted, upon the determination of which the estate vests immediately in expectancy. 2 Bla. Com. 155.

**LIMITATIONS. Of Civil Remedies.** In general, by the theory and early practice of the common law, a party who had any legal ground of complaint against another might call the latter to answer in court at such time as suited his convenience; 13 East 449. This privilege, however, it was soon found, might be productive of great inconvenience, and not unfrequently of great injustice. Parties might, and often did, wait till witnesses were dead or papers destroyed, and then proceeded to enforce claims to which at an earlier date a successful defence might have been made. Titles were thus rendered uncertain, the tenure of property insecure, and litigation fostered. To prevent these evils, statutes were passed limiting the time within which a party having a cause of action should appeal to the courts for redress,—hence called statutes of limitation. The doctrine of *fines*, of very great antiquity in the history of the common law, the purpose of which was to put an end to controversies, grew out of the efforts to obviate these evils, and frequent attempts, prior to the accession of James I., by statutes of restricted application, were made to the same end. But till the reign of that prince no general enactment applicable alike to personal and real actions had been passed.

In 1623, however, by stat. 21 Jac. I. c. 16, entitled "An Act for Limitation of Actions, and for avoiding of Suits in Law," known and celebrated ever since as the *Statute of Limitations*, the law upon this subject was comprehensively declared substantially as it exists at the present day in England, whence our ancestors brought it with them to this country; and it has passed, with some modifications, into the statute-books of every state in the Union except Louisiana, whose laws of limitation are essentially the prescriptions of the civil law, drawn from the *Partidas*, or Spanish Code.

In 1 Bla. 287, Wilmot, J., declared it to be a "noble beneficial act," which should be construed liberally; quoted in 1 Yeates 331.

The similarity between the statutes of the several states and those of England is such that the decisions of the British courts and those of this country are for the most part illustrative of all, and will be cited indiscriminately in this brief summary of the law as it now stands. *Vide* 5 B. & Ald. 204; 4 Johns. 317; 2 Caines, Cas. 143. One preliminary question, however, has arisen in this country, growing out of the provision of the national constitution prohibiting states from passing laws impairing the obligation of contracts, for which there is no English precedent. Upon this point the settled doctrine is that unless the law bars a right of action already accrued without giving a reasonable time within which to bring an action, it pertains to the remedy merely, and is valid; 4 Wheat. 122; 3 Dall. 386; 11 Pet. 420; 3 Whart. 15; 2 Gall. 141; 19 Pick. 578; 2 Mas. 169. Subject to this qualification, a law may extend or reduce the time already limited. But a cause of action already barred by pre-existing statutes will not be revived by a statute extending the time; 7 Pa. 292; 25 Vt. 41; 8 Blackf. 506; 2 Sandf. Ch. 61; 18 Pick. 532; 2 Greene Ia. 181; 11 Wisc. 432; 1 Oreg. 176; though if it be not already barred, a statute extending the time will apply; 21 Ark. 95; 24 Vt. 620; 1 T. B. Monr. 424. The fact that a statute continues in force a previous period of limitation for past contracts, and provides a different period for future contracts, does not render it invalid, as lacking a uniform operation, or as being in the nature of special legislation; 52 Fed. Rep. 791.

Whatever may have been the disposition in the past, the courts are now inclined to construe these statutes liberally, so as to effectuate their intent; they are little inclined to fritter away their effect by refinements and subtleties; 1 Pet. 360; 8 Cra. 84; Ang. Lim. § 23. The statute of limitations is a statute of repose and does not rest merely on presumption of payment; 122 U. S. 231.

Courts of equity, though not within the terms of the statute, have nevertheless uniformly conformed to its spirit, and have, as a general rule, been governed by its provisions, unless special circumstances of fraud or the like require, in the interests of justice, that they should be disregarded; 12 Pet. 56; 7 Johns. Ch. 90; 9 Pick. 242; 17 Ves. 96; 10 Wheat. 152; 10 Ohio 424; 9 N. J. Eq. 425; 28 Ill. 44; 3 R. I. 237; 7 C. C. App. 308; 133 Ind. 169; 12 U. S. App. 137; 130 U. S. 43; 82 Va. 518; 111 N. Y. 214. Courts of equity will apply the statute by analogy; 1 App. D. C. 44; 36 Fed. Rep. 722; 136 U. S. 386; and in cases of concurrent jurisdiction, they are bound by the statute which governs actions at law; 149 U. S. 436; 169 *id.* 189. Some claims, not barred by the statute, a court of equity will not enforce because of public policy, and the difficulty of doing full justice when the transaction is obscured by lapse of time and loss of evidence. This is termed the doctrine of laches (*q. v.*); 94 U. S. 806; Bisph. Eq. § 260.

But in a proper case where there are no laches and where there is fraud undiscovered till the statute has become a bar, or it is the fault and wrong of the defendant that the plaintiff did not enforce his legal rights within the limited time, courts of equity will not hesitate to interfere in the interest of justice, and entertain suits long since barred at law; 4 How. 503; 11 Cl. &

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F. 714; 23 Ia. 467; 12 Minn. 522; Bisph. Eq. § 203; L. R. 8 Ch. App. 398; 11 Wall. 443. See 21 Neb. 413; 28 *id.* 479; 10 U. S. App. 519. But here, again, courts of equity will proceed with great caution; 7 How. 819; and hold the complainant to allegation and proof of his ignorance of the fraud and when and how it was discovered; 1 Curt. C. C. 390; 1 Watts 401.

And courts of admiralty are governed by substantially the same rules as courts of equity; 3 Mas. 91; 3 Sumn. 286; 2 Gall. 477; Sprague 163; 3 Salk. 227; 36 Fed. Rep. 560; 1 U. S. App. 101. And, although the statute does not apply in terms to probate courts, there seems to be no reason why it should not be applied according to the principles of equity; 1 Bradf. Surr. 1. It is so applied in Pennsylvania by the orphans' court.

State statutes of limitation do not apply to a libel *in rem* to enforce a maritime lien for breach of a contract of affreightment; 57 Fed. Rep. 608.

As to Personal Actions. Generally personal actions must be brought within a certain specified time—usually six years or less—from the time when the cause of action accrues, and not after; 3 Binn. 374; 3 T. B. Mon. 113; 13 La. Ann. 161; and hereupon, the question at once arises when the cause of action in each particular case accrues.

*Cause of action accrues when.* The rule, that the cause of action accrues when and so soon as there is a right to apply to the court for relief, by no means solves the difficulty. When does the right itself so to apply accrue? Upon this point the decisions are so numerous and so conflicting, or, perhaps more accurately speaking, so controlled by particular circumstances, that no inflexible rule can be extracted therefrom. In general, it may be said that in actions of contract the cause of action accrues when there is a breach of the contract. It is also said that whenever there is a plaintiff who can sue and a defendant who can be sued, the statute begins to run; 30 S. C. 291.

*When a note* is payable on demand, the statute begins to run from its date: 2 M. & W. 467; 9 Pick. 488; 10 N. H. 489; 5 Jones N. C. 139; 39 Me. 492; 7 Halst. 247; 50 Barb. 334; 17 Ohio 9; 3 Rich. S. C. 182; 32 W. Va. 387; 113 N. Y. 243. If payable immediately or when requested or called for, it commences to run immediately; 81 Me. 434. The deposit of securities as collateral to demand notes does not prevent the running of the statute from the date of maturity of such notes; 153 Pa. 530. The rule is the same if the note is payable "at any time within six years;" 39 Me. 492; or borrowed money is to be paid "when called on;" 1 Harr. & G. 439. But this is not true of a premium note payable in such portions and at such times as may be necessary to cover losses. There the statute only runs from the time of loss, and the assessment thereof: 40 N. Y. 320: and the statute runs in the case of an ordinary bank note only from demand and refusal; 2 Sneed 482. Until a demand is made for funds deposited in a bank the statute does not begin to run: 19 Pac. Rep. (Ariz.) 225; and so a demand must first be made by the owner of bank stock for dividends; 84 Ky. 565. If a note be payable in certain days after demand, sight, or notice, the statute begins to run from the demand, sight, or notice; 13 Wend. 267; 8 Dowl. & Ry. 374; 5 Halst. 114; 4 Harring. 246; 24 Am. Rep. 605; s. c. 36 Mich. 487; demand of a note payable on demand should be made within the time limited for bringing the action on the note; else a note limited to six years might be kept open indefinitely by a failure to make a demand; 10 Pick. 120. Demand of a bill payable "after sight" or "after notice" should be within a reasonable time; 4 Mas. 336; 9 M. & W. 506. And when the note is on interest, this does not become barred by the statute till the principal, or some distinct portion of it, becomes barred; 2 Cush. 92. Demand upon a note or due bill, payable on demand, is not a condition precedent to a right of action; 11 W. N. C. (Pa.) 294. The rule, that a promissory note payable on demand with interest, is a continuing security, does not apply between holder and maker; 41 N. Y. 581; s. c. 1 Am. Rep. 461. If the note be entitled to grace, the statute runs from the last day of grace; 1 Shepl. 412; 13 La. Ann. 602. The indorsement of a promissory note past due, for a valuable consideration, is a new contract, and the statute begins to run in favor of the indorser only from the date of the indorsement; 79 Ga. 72. The statute begins to run in favor of the drawer of a check at latest after the lapse of a reasonable time for the presentment of the check; 37 Neb. 644. Where money is deposited with a person for safe custody, a right of action does not accrue until demand is made therefor: [1893] 3 Ch. 154.

*Where money is payable in instalments* the statute runs as to each instalment from the time of the failure to pay it; 10 Shepl. 400; 71 Pa. 208. But if the contract provides that on failure to pay one instalment the whole amount shall fall due, the statute runs as to the whole from such failure; 3 G. & D. 402.

*Where money is paid by mistake*, the statute begins to run from the time of payment; 9 Cow. 674; 25 Pa. 164; see 7 Misc. Rep. 444; also in case of usury; 6 Ga. 228; 35 Vt. 503; 98 N. C. 244 (but a shorter time is frequently limited by statute); and where money is paid for another as surety; 45 N. Y. 268; 110 Mass. 245. Where money is paid by a bank on a forged check, the right of action to recover the same accrued immediately upon such payment; 128 U. S. 26. An action to recover *overpayments* made on a contract to deliver logs accrues when the amount delivered was ascertained, rather than at the date of payment; 94 Mich. 223.

The limitation of a right of action for compensation for trespass in removing coal from the mine of another by an adjoining

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land owner, does not begin to run until the trespass is discovered or its discovery is reasonably possible; 166 Pa. 536.

*Where a contract takes effect upon some condition* or contingency, or the happening of some event, the statute runs from the performance of the condition; 17 Pick. 407; Ang. Lim. § 113; or the happening of the contingency or event; 3 Pa. 149; 9 Wend. 287; 22 Ct. Cls. 284; and not from the date of the contract. On an agreement to devise, the statute runs from the death of the promissor; 9 Pa. 260. When money is paid, and there is afterwards a failure of consideration, the statute runs from the failure; 14 Mass. 425; 9 Bing. 748.

*Where continuous services are rendered*, as by an attorney in the conduct of a suit, or by a mechanic in doing a job; 7 Allen 274; 55 Pa. 434; 36 N. Y. 255; 16 Ill. 341; 1 B. & Ad. 15; the statute begins to run from the completion of the service. On a promise of indemnity, when the promissee pays money or is damnified, the statute begins to run; 12 Metc. 130; 8 M. & W. 680; 14 Johns. 368; 3 Rawle 275; 7 Pet. 113.

As to torts *quasi ex contractu*, the rule is that in cases of *negligence, carelessness, unskilfulness*, and the like, the statute runs from the time when these happen respectively, and not from the time when damages accrue therefrom; 4 Pet. 172; 4 Ala. 495; 36 Md. 501; 61 Barb. 136; 2 Strobh. 344; 44 Ill. App. 132. Thus, where an attorney negligently invests money in a poor security, the statute runs from the investment; 2 Brod. & B. 73; so, where a party neglected to remove goods from a warehouse, whereby the *plaintiff* was obliged to pay damages, the statute runs from the neglect, and not from the payment of damages; 3 Johns. 137; so, where the defendant agreed to go into another state and collect some money, and on his return to pay off a certain judgment, the statute was held to run from the return and demand upon him; 3 Ired. 481. A cause of action for an act which is in itself lawful, as to the person who bases thereon an action for injury subsequently accruing, from and consequent upon the act, does not accrue until the injury is sustained; 70 Tex. 233.

The breach of a contract is the gist of the action, and not the damages resulting therefrom; 5 B. & C. 259; 1 Sandf. 98; 3 B. & Ald. 288. Thus, where the defendant had contracted to sell the plaintiff a quantity of salt, but was unable, by reason of the destruction of the salt, to deliver on demand, and prolonged negotiations for settlement till the statutory limitation had expired, and then refused, the statute was held to run from the demand, the non-delivery being a breach of the contract; 1 E. L. & Eq. 44. So, where *a notary public* neglects to give seasonable notice of non-payment of a note, and the bank employing him was held responsible for the failure, upon suit brought by the bank against the notary to recover the damages it had been obliged to pay, the action was held to be barred, it not being within six years of the notary's default, though within six years of the time when the bank was required to pay damages; 6 Cow. 278.

So, where *an attorney* makes a mistake in a writ, whereupon, after prolonged litigation, non-suit follows, but not till an action against the indorser on the note originally sued has become barred, the mistake is held to set the statute in motion; 4 Pet. 172; 4 Ala. 495. Where he collects money for a client and uses no fraud or falsehood in regard to its receipt, the statute runs from the time of its collection; 46 Ohio St. 349. When the attorney dies before the legal proceedings are terminated the statute runs from his death; 145 Pa. 531. The statute does not begin to run against an attorney's claim for services until the termination of the action in which they are rendered; 25 N. Y. S. 134.

*A captain* who barratrously loses his vessel is freed from his liability to the underwriter in six years after the last act in the barratrous proceeding; 1 Campb. 539. *Directors of a bank* liable by statute for mismanagement are discharged in six years after the insolvency of the bank is made known; 16 Mass. 68.

In some states a distinction has been taken in cases where a public officer has neglected duties imposed on him by law, and the statute is in such cases said to run only from the time when the injury is developed; 26 Conn. 324; but see 8 Shepl. 314; 97 Pa. 47; and it has been held that if a *sheriff* make an insufficient return, and there is in consequence a reversal of judgment, the statute runs from the return, and not from the reversal of judgment; 16 Mass. 456. So where a sheriff collects money and makes due return but fails to pay over, the statute runs from the return; 11 Ala. 679; or from the demand by the creditor; 10 Metc. 244. If he suffers an escape, it runs from the escape; 2 Mod. 212; if he takes insufficient bail, from the return of *non est inventus* upon execution against the principal debtor; 17 Mass. 60; 20 Me. 93; if he receive money on a *scire facias*, from its reception; 9 Ga. 413; if he neglects to attach sufficient property, on the return of the writ, and not from the time when the insufficiency of the property is ascertained; 27 Me. 443. The statute runs on a cause of action for wrongful attachment from the time thereof; 77 Cal. 208; 78 Ia. 115; 45 La. Ann. 1221. An action by a sheriff upon the bond of his deputy for a default accrues when the sheriff has paid the debt occasioned by the default; 38 W. Va. 519, 557.

The same principle applies in cases of *torts* pure and simple; 24 Pa. 186; 16 Pick. 241; 1 Rawle 27; 4 Ohio 331; 6 Ohio St. 276.

An action against a *recorder of deeds* for damages caused by a false certificate of search against incumbrances on real property, must be brought within six years from the date of the search, and not from the date of the discovery of the lien overlooked, or of the loss suffered by the plain-

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tiff; 97 Pa. 47; 54 N. W. Rep. (Ia.) 212; 95 Cal. 317.

The statute only begins to run as against a surety claiming *contribution* when his own liability is ascertained; [1893] 2 Ch. 514.

*In cases of nuisance*, the statute begins to run from the injury to the right, without reference to the question of the amount of the damage, the law holding the violation of a right as some damage; 8 East 4; 16 Pick. 241; 1 Rawle 27; 10 Wend. 260; 73 Tex. 95. And so when a party having a right to use land for a specific purpose puts it to other uses, or wrongfully disposes of property rightfully in possession, the statute begins to run from the perversion; 24 Pa. 186. *In trover*, the statute runs from the conversion; 4 H. & J. 393; 21 Ga. 454; 15 Mass. 82; 5 B. & C. 149; *in replevin*, from the unlawful taking or detention. The limitation, in the statute of James, of *actions for slander* to two years next after the words spoken, applies only to cases where the words are actionable in themselves, and not when they become actionable by reason of special damage arising from the speaking thereof; 1 Salk. 206; 10 Wend. 167; 5 Watts 308; 32 Wkly. Law Bul. 52. The limitation extends neither to slander of title; Cro. Car. 140; nor to libel; Arch. Pl. 29. In cases of trespass, crim. con., etc., the statute runs from the time the injury was committed; 5 N. H. 314.

*Adverse possession of personal property* gives title in six years after the possession becomes adverse; 16 Vt. 124; 1 Brev. 111; 16 Ala. N. S. 696; 3 Metc. 137; 17 Tex. 206. But one who holds by consent of the true owner is not entitled to have the statute run in his favor until denial of the true owner's claim; 34 Ala. 188; Ang. Lim. 304, n.; 55 N. H. 61. But different adverse possessions cannot be linked together to give title; 3 Strobh. 31; 11 Humphr. 369. The statute acts upon the title to property, and, when the bar is perfect, transfers it to the adverse possessor: but in contracts for payment of money there is no such thing as adverse possession, the statute simply affects the remedy, and not the debt; 18 Ala. N. S. 248.

*Computation of time.* In computing the time limited, much discussion has been had in the courts whether the day when the statute begins to run is to be included or excluded, but without any satisfactory result. It is most generally held that when the computation is from an act done, the day upon which the act is done is to be included, and when it is from the date simply, then if a present interest is to commence from the date, the day of the date is included; but if merely used as a terminus from which to compute time, then the day of the date is excluded; 9 Cra. 104; 3 Term 623; 17 Pa. 48; 15 Mass. 193; 2 Cow. 605. This rule, however, of including the day upon which an act is done, is subject to so many exceptions and qualifications that it can hardly be said to be a rule, and many of the cases are wholly irreconcilable with it. It has been well said that whether the day upon which an act is done or an event happens is to be included or excluded, depends upon the circumstances and reasons of the thing, so that the intention of the parties may be effected; and such a construction should be given as will operate most to the ease of the party entitled to favor, and by which rights will be secured and forfeitures avoided; 1 Tex. 107; Ang. Lim. c. VI. Fractions of a day are not regarded, unless it becomes necessary in a question of priority; 2 Story 571; 4 Gilm. (Ill.) 499; 8 Ves. 83; 3 Den. 12; 6 Gray 316; and then only in some cases, usually in questions concerning private acts and transactions; 20 Vt. 653. See FRACTION OF A DAY; DAY; TIME.

*Exceptions to general rule.* If, when the right of action would otherwise accrue and the statute begin to run, *there is no person who can exercise the right*, the statute does not begin to run till there is such a person; 8 Cra. 84; for this would be contrary to the intent of the various statutes. Thus, if a note matures after the decease of the promisee, and prior to the issue of letters of administration, the statute runs from the date of the letters of administration unless otherwise specified in the statute; 5 B. & Ald. 204; 13 Wend. 267; 9 Leigh 79; 7 H. & Johns. 14; 4 Whart. 130; 32 Vt. 176; 15 Conn. 145; and there must be a person in being to be sued, otherwise the statute will not begin to run; 12 Wheat. 129.

But the courts will not recognize exemptions, where the statute has once begun to run; 126 Pa. 643; 16 Or. 173. So where the statute begins to run before the death of the testator or intestate, it is not interrupted by his death; 4 M. & W. 43; 3 M. & C. 455; 4 Edw. Ch. 733; 3 McLean 568; 30 W. Va. 195; 24 Neb. 670; nor by the death of the administrator; 17 Ala. N. S. 291; nor by his removal from the state; 15 Ala. N. S. 545; nor by the subsequent mental incapacity of a party; 151 U. S. 483. So an insolvent's discharge as effectually removes him from pursuit by his creditor as absence from the state; but it is not an exception within the statute, and cannot avail; 1 Whart. 106; 1 Cow. 356; 6 Gray 517. See 85 Tenn. 278. A creditor's absence makes it inconvenient for him to return and sue; but as he can so do, he must, or be barred; 17 Ves. Ch. 87; 1 Johns. 165. And it has ever been held that a *statutory impediment* to the assertion of title will not help the party so impeded; 2 Wheat. 25; but when a state of war exists between the governments of the debtor and creditor, the running of the statute is suspended; 22 Wall. 576; Chase, Dec. 286; 29 Ark. 238; 55 Ga. 274; 62 Mo. 140; 11 Bush 191; 13 Wall. 158; and it revives in full force on the restoration of peace. See 103 N. C. 159. The courts cannot create an exception to the operation of the statute not made by the statute itself, where the party designedly eludes the service of process: 130 U. S. 320.

There are many authorities, however, to show that if, by the interposition of courts, the necessity of the case, or the provisions of a statute, a person cannot be sued for a

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limited time, the running of the statute is suspended during that period. In other words, if the law interposes to prevent suit, it will see to it that he who has a right of action shall not be prejudiced thereby; 4 Md. Ch. Dec. 368; 5 Ga. 66; 3 McLean 568; 12 Wheat. 129. But see 21 Pa. 220. Thus, *an injunction* suspends the statute; 1 Md. Ch. Dec. 182; 12 Gratt. 579; 2 Stockt. 347; 10 Humphr. 365; 31 N. Y. 345; 13 La. Ann. 57; 106 Mass. 347; as does the presentation of a claim against the United States to the treasury department for examination and allowance; 75 Fed. Rep. 648. And so does an *assignment of an insolvent's effects*, as between the estate and the creditors; 7 Metc. 435; 7 Rich. S. C. 43; 12 La. Ann. 216; though not, as has just been said, as between the debtor and his creditor; 6 Gray 517. But *when the statute does not in terms exclude and limit* a particular case, the court will not extend it, although the case comes within the reason of the statute; 15 Ala. 194; 2 Curt. 480; 17 Ohio St. 548; 53 Pa. 382. See 31 W. Va. 571.

By the special provisions of the statute, *infants*, *married women*, *persons* non compos mentis, *those imprisoned*, and *those beyond seas*, *out of the state*, *out of the realm*, or *out of the country*, are regarded as affected by the incapacity to sue, or, in other words, as being under disability, and have, therefore, the right of action secured to them until the expiration of the time limited, after the removal of the disability. The statute of limitations cannot be pleaded in bar to an action by a wife against a husband to recover present and future maintenance; 6 Ind. App. 377. But these personal exceptions have been strictly construed, and the party alleging the disability has been very uniformly held to bring himself exactly within the express words of the statute to entitle himself to the benefit of the exception. To bring himself within the spirit or supposed reason of the exception is not enough; 1 Cow. 356; 3 Green, N. J. 171; 2 Curt. C. C. 480; 17 Ves. Ch. 87; 4 Ben. 459. And this privilege is accorded although the person laboring under the statute disability might in fact bring suit. Thus, an infant may sue before he arrives at his majority, but he is not obliged to, and his right is saved if he does not; 2 Saund. 117. The time during which a negro was held as a slave should not be counted in determining whether an action by him is barred by the statute; 22 S. W. Rep. (Ky.) 654. The disability must, however, be continuous and identical. One disability cannot be superadded to another so as to prolong the time; 37 U. S. App. 129; and if the statute once begins to run, whether before a disability exists or after it has been removed, no intervention of another and subsequent disability can stop it; 29 Pa. 495; 15 B. Mon. 30; 54 Ill. 101; 2 McCord 269; 24 Neb. 670; 87 Tenn. 172; 117 Ind. 539; 147 U. S. 647. When, however, there are two or more coexisting disabilities at the time the right of action accrues, suit need not be brought till all are removed; Plowd. 375; 20 Mo. 530; 1 Atk. Ch. 610; 1 Shepl. 397; 3 Johns. Ch. 129.

The time during which a debtor is absent residing out of the state of his own free will and accord, is to be deducted in estimating the time in which an action must be brought against him; 74 Mich. 235; 52 Kan. 706; notwithstanding that he continues to have a usual place of residence in the state where service of the summons could be made on him; 147 U. S. 647; but a foreign corporation is a person out of the state: 86 Wis. 285. See BEYOND SEAS.

The word return, as applied to an absent debtor, applies as well to foreigners, or residents out of the state coming to the state, as to citizens of the state who have gone abroad and have returned; 3 Johns. 267; 11 Pick. 36; 3 R. I. 178. And in order to set the statute in motion the return must be open, public, and such and under such circumstances as will give a party, who exercises ordinary diligence, an opportunity to bring his action; 1 Pick. 263; 3 Gill & J. 158; 15 Vt. 727; 26 Barb. 208. Such a return, though temporary, will be sufficient; 8 Cra. 174. But if the return is such and under such circumstances as to show that the party does not intend that his creditor shall take advantage of his presence, or such, in fact, that he cannot without extraordinary vigilance avail himself of it,—if it is secret, concealed, or clandestine,—it is insufficient. The absence of one of several joint-plaintiffs does not prevent the running of the statute; 4 Term 516; but the absence of one of several joint-defendants does; 29 E. L. & Eq. 271. This at least seems to be the settled law of England; but the cases in the several states of the Union are conflicting upon these points. See 1 Dutch. 219; 18 N. Y. 567; 18 B. Mon. 312; 4 Sneed 99. If a claimant beyond seas when the claim accrued returned to this country, the statute began to run and was not suspended by his departure to foreign parts; 23 Ct. Cls. 255.

*Commencement of process.* The question sometimes arises as to what constitutes the bringing an action or the commencement of process, and this is very uniformly held to be the delivery or transmission by mail in due course of the writ or process to the sheriff, in good faith, for service; 14 Wend. 649; 15 Mass. 859; 1 S. & R. 236; 26 Md. 479; 8 Greenl. (Mo.) 447; 1 W. Chip. 94. The date of the writ is *prima facie* evidence of the time of its issuance; 17 Pick. 407; 7 Me. 370; but is by no means conclusive; 2 Burr. 950; 15 Mass. 364. The suit is not "brought" or "commenced" in a federal court, to stop the running of the statute, until there is a *bona fide* attempt to serve the process; 80 Fed. Rep. 309.

If the writ or process seasonably issued *fail of a sufficient service* or return by any unavoidable accident, or by any default or neglect of the officer to whom it is committed, or is abated, or the action is otherwise avoided by the death of any party thereto, or for any matter of form, or judgment for plaintiff be arrested or reversed,

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the plaintiff may, either by virtue of the statutory provision or by reason of an implied exception to the general rule, commence a new action within a reasonable time; and that reasonable time is usually fixed by the statute at one year, and by the courts in the absence of statutory provision at the same period; 1 Ld. Raym. 434; 2 Pa. 383; 1 Bail. S. C. 542; 10 Wend. 278. See 78 Ga. 790. *Irregularity of the mail* is an inevitable accident within the meaning of the statute; 8 Me. 447. And so is a *failure of service* by reason of the removal of the defendant, without the knowledge of the plaintiff, from the county in which he had resided and to which the writ was seasonably sent; 12 Metc. 15. But a mistake of the attorney as to time of the sitting of the court, and consequent failure to enter, is not; 29 Me. 458. *An abatement by the marriage* of the female plaintiff is no abatement within the statute; it is rather a voluntary abandonment; 8 Cra. 84. And so, generally, of any act of the party or his attorney whereby the suit is abated or the action fails; 3 M'Cord 452; 29 Me. 458; 1 Mich. 252; 6 Cush. 417. The statute cannot be pleaded to an amended count when it contains only a restatement of the case as contained in the original counts; 42 Ill. App. 126. The filing of a petition will bar the running of the statute, though stricken out because it does not contain the formal allegations required, where it was subsequently amended; 86 Tex. 560. In Pennsylvania a citation to an executor to file an account is equivalent to the commencement of process.

A *nonsuit* is in some states held to be within the equity of the statute; 13 Ired. 123; 4 Ohio St. 172; 12 La. Ann. 672; see 47 Mo. App. 218; but generally otherwise; 1 S. & R. 236; 3 M'Cord 452; 3 Harr. N. J. 269; 6 Cush. 417. *If there are two defendants*, and by reason of a failure of service upon one an alias writ is taken out, this is no continuance, but a new action, and the statute is a bar; 6 Watts 528. So of an amending bill introducing new parties; 6 Pet. 61; 10 B. Mon. 84; 3 Me. 535. A dismissal of the action because of the *clerk's omission seasonably to enter* it on the docket is for matter of form, within the Massachusetts statute, and a new suit may be instituted within one year thereafter; 7 Gray 165; and so is a dismissal for want of jurisdiction, where the action is brought in the wrong county; 1 Gray 580. In Maine, however, a wrong venue is not a matter of form; 38 Me. 217. The statute is a bar to an action at law after a dismissal from chancery for want of jurisdiction; 1 Vern. 74; 16 Wend. 572; 2 Munf. 181. Upon the dismissal of an action the court cannot extend the statutory period of limitation for bringing a new action; 39 Minn. 115.

*Lex fori governs.* Questions under the statute are to be decided by the law of the place where the action is brought, and not by the law of the place where the contract is made or the wrong done. If the statute has run against a claim in one state, the remedy is gone, but the right is not extinguished; and therefore the right may be enforced in another state where the remedy is still open, the time limited by the statute not having expired; 15 East 439; 11 Pick. 36, 522; 7 Md. 91; 23 How. 132; 13 Gray 535. So if the statute of the place of the contract is still unexpired, yet an action brought in another place is governed by the *lex fori*, and may be barred; 1 Cai. 402; 5 Cl. & F. 1. But statutes giving title by adverse possession are to be distinguished from statutes of limitation. Adverse possession gives title; lapse of time bars the remedy only. And a right acquired by adverse possession in the place where the adverse possession is had is good elsewhere; 11 Wheat. 361; 9 How. 407; Story, Confl. Laws 582. In Pennsylvania, by a recent statute an action is barred whenever it is so by the law of the state where the cause of action accrued. See LEX FORI.

*Public rights not affected.* Statutes of limitation do not, on principles of public policy, run against the state or the United States, unless it is expressly so provided in the statute itself; 130 U. S. 263; 147 *id.* 508; 38 Fed. Rep. 1; but the United States is entitled to take the benefit of them; 147 U. S. 508. No laches is to be imputed to the government; 2 Mas. 312; 18 Johns. 228; 4 Mass. 528. But this principle has no application when a party seeks his private rights in the name of the state; 4 Ga. 115; but see 6 Pa. 290; 127 U. S. 338; 132 *id.* 239; 142 *id.* 510. Counties, towns, and municipal bodies not possessed of the attributes of sovereignty have no exemption; 4 Dev. 568; 22 Me. 445; 12 Ill. 38; 13 Wall. 62; 38 W. Va. 1; 41 Ark. 45; 133 Ind. 700; but see 8 Ohio 298. And it is held that municipalities are excluded from the operation of the statute, in regard to the title to land, 101 Pa. 27; 51 Pac. Rep. (Cal.) 950; but it is said that municipalities may be estopped from disputing title where justice and equity so require; Dill. Mun. Corp. § 675. If, however, the sovereign becomes a party in a private enterprise, as, for instance, a stockholder in a bank, it subjects itself to the operation of the statute; 3 Pet. 30; 2 Brock. 393. See, generally, 147 U. S. 508.

*Particular classes of actions.* Actions of *trespass, trespass quare clausum, detinue, account, trover, replevin,* and *upon the case* (except actions for slander), and actions of *debt for arrearages of rent*, and of *debt* grounded upon any lending or contract *without specialty*, or simple contract debt, are usually limited to six years. Actions for *slander, libel, assault*, and the like, are usually limited to a less time, generally two years. Judgments of courts not of record, as courts of justices of the peace and county commissioners' courts, are in some states, either by statute or the decisions of the highest courts, included in the category of debts founded on contract without specialty, and accordingly come within the statute; 13 Metc. 251; 2 Bail. 58; 37 Me. 29; 2 Grant, Cas. 353; 6 Barb. 583; 3 Living. 367. In others, however, they are excluded upon the ground that the statute applies only to debts

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founded on contracts in fact, and not to debts founded on contracts implied by law; 14 Johns. 480.

Actions of *assumpsit*, though not specifically named in the original statute of James I. as included within the limitation of six years, were held in England, after much discussion, to be fairly embraced in actions of "trespass"; 4 Mod. 105; 4 B. & C. 44; 4 Ad. & E. 912. The same rule has been adopted in this country; 5 Ohio 444; 3 Pet. 270; 1 Morr. Ia. 59. 8 Cra. 98; but see 12 M. & M. 141; and, in fact, assumpsit is expressly included in most of the statutes. And it has also been held in this country that statutes of limitation apply as well to motions made under a statute as to actions; 11 Humphr. 423. Such statutes are in aid of the common law, and furnish a general rule for cases that are analogous in their subject-matter, but for which a remedy unknown to the common law has been provided by statutes; as where compensation is sought for land taken for a railroad; 23 Pa. 371; 32 Conn. 521.

But it must be remembered that in all such cases the debt is not discharged, though the right of action to enforce it may be gone; 13 U. S. App. 57. So, where a creditor has a lien on goods for a balance due, he may hold them, though the statute has run against his debt; 3 Esp. 81; 11 Conn. 160; 26 Me. 330; 28 Ill. 44. And an acceptor may retain funds to indemnify him against his acceptances, though the acceptances may have been outstanding longer than the time limited by statute; 3 Campb. 418.

A *set-off* of a claim against which the statute has run cannot usually be pleaded in bar; 5 East 16; 3 Johns. 261; 5 Gratt. 360; 14 Pa. 531; though when there are cross-demands accruing at nearly the same time, and the plaintiff has saved the statute by suing out process, the defendant will be allowed to set off his demand; 2 Esp. 569; 2 Green, N. J. L. 545; and, generally, when there is any equitable matter of defence in the nature of set-off, or which might be the subject of a cross-action, growing out of the subject-matter for which the action is brought, courts will permit it to be set up although a cross-action or an action on the claim in set-off might be barred by the statute; 8 Rich. S. C. 113; 9 Ga. 398; 11 E. L. & Eq. 10; 8 B. Monr. 580; 3 Stockt. 44. A set-off is barred by the statute only when the original claim is barred; 134 Ind. 494.

*Debts by specialty*, as contracts under seal, judgments of courts of record (except foreign judgments, and judgments of courts out of the state, upon which the decisions are very discordant), liabilities imposed by statute, awards under seal, or where the submission is under seal, indentures reserving rent, and actions for legacies, are affected only by the general limitation of twenty years; Ang. Lim. § 77. But a mortgage, though under seal, does not take the note, not witnessed, secured thereby, with it, out of the limitation of simple contracts; 7 Wend. 94. And though liabilities imposed by statute are specialties, a liability under a by-law made by virtue of a charter is not; 6 E. L. & Eq. 309; on the ground that by becoming a member of the company enacting the by-laws, the party consents and agrees to assume the liabilities imposed thereby.

In Massachusetts, Vermont, and Maine, the statute is regulated in its application to witnessed promissory notes. In Massachusetts an action *brought by the payee of a witnessed promissory note*, his executor or administrator, is excepted from the limitation of simple contracts, and is only barred by the lapse of twenty years. But the indorsee of such a note must sue within six years from the time of the transfer to him; 4 Pick. 384; though he may sue after that time in the name of the payee, with his consent; 1 Gray 261; 2 Curt. C. C. 448. If there are two promissees to the note, and the signature of only one is witnessed, the note as to the other is not a witnessed note; 115 Mass. 599; 18 Shepl. 49. And the attestation of the witness must be with the knowledge and consent of the maker of the note; 8 Pick. 246; 1 Williams Vt. 26. An attested indorsement signed by the promissee, acknowledging the note to be due, is not a witnessed note; 23 Pick. 282; but the same acknowledgment for value received, with a promise to pay the note, is; 1 Metc. Mass. 21. If the note be payable to the maker's own order, witnessed and indorsed by the maker in blank, the indorsement being without attestation, an action by the first indorsee is barred in six years; 4 Metc. Mass. 219. And even if the indorsement be attested, a second indorsee or holder by delivery, not being the original payee, is barred; 13 Metc. 128.

*Statute bar avoided, when.* Trusts in general are not within the operation of the statute, where they are direct and exclusively within the jurisdiction of a court of equity, and the question arises between the trustees and the *cestui que trust*; 7 Johns. Ch. 90; 23 Pa. 472; 1 Md. Ch. Dec. 53; 5 R. I. 79; 9 Pick. 212. See 31 W. Va. 810; 149 Mass. 253. And of this character are the trusts of executors, administrators, guardians, assignees of insolvents, and the like. The claim or title of such trustees is that of the *cestui que trust*; 2 Story, Eq. Jur. 608; 2 Sch. & L. 607, 633; 4 Whart. 177; 71 Pa. 106; 1 Johns. Ch. 314; 4 Pick. 283. The relation between directors and a corporation has the elements of an express trust, to which the statute does not apply; 20 N. E. Rep. (Ill.) 671. Special limitations to actions at law are made in some states in favor of executors and administrators, modifying or abrogating the rule in equity: and as these laws are made in the interest of the trust funds, it is the duty of the executor or administrator to plead the special statute which applies to him as such, and protects the estate he represents, though he is not bound to plead the general statute; 13 Mass. 203; 15 N. H. 6; 15 S. & R. 231; 2 Dessaus. 577; 4 Wash. C. C. 639.

If, however, the trustee deny the right of his *cestui que trust*, and claim adversely to

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him, and these facts come to the knowledge of the *cestui que trust*, the statute will begin to run from the time when the facts become known; 9 Pick. 212; 10 Pet. 223; 22 Md. 142; 52 Mo. 182; 11 Pa. 207; 32 W. Va. 184; 142 U. S. 326. See 77 Cal. 330. Long lapse of time will defeat the enforcement of a resulting trust; 32 W. Va. 14. The rule exempting trusts from the operation of the statute does not apply to a resulting trust in favor of creditors; 39 Minn. 330; 116 Ind. 78.

*Principal and agent.* The relation of an agent to his principal is a fiduciary one, and the statute does not begin to run so long as there is no breach of the trust or duty; 85 Ky. 322. When, however, there is such a breach, and the principal has knowledge of it, the statute will begin to run; 3 Gill & J. 389; 5 Cra. 560; 4 Jones N. C. 155; 12 Barb. 293; 32 Conn. 520. In many cases a lawful demand upon the agent to perform his duty, and neglect or refusal to comply, are necessary to constitute a breach. As when money is placed in the hands of an agent with which to purchase property, and the agent neglects to make the purchase, there must be a demand for the money before the statute will begin to run; 5 Ired. 507; 6 Cow. 376; 24 Pa. 52; so where property is placed in the hands of an agent to be sold, and he neglects to sell; 2 Gill & J. 389. If, however, the agent's conduct is such as to amount to a declaration on his part that he will not perform his duty, or if he has disabled himself from performing it, it is tantamount to a repudiation of the trust, or an adverse claim against the *cestui que trust*, and the same consequences follow. No demand is necessary; the right of action accrues at once upon the declaration, and the statute then begins to run; 10 Gill & J. 422.

But where a demand is necessary, it should itself be made within the limited time; otherwise an agent might be subject all his lifetime to demands, however stale; 15 Wend. 302; 17 Mass. 145; 66 Pa. 192; unless the agent, by his own act, prevents a demand; 6 Cush. 501. The rendering an untrue account by a collection or other agent would seem to be such a breach of duty as to warrant an action without demand, and would therefore set the statute in motion; 17 Mass. 145. If the custom of trade or the law makes it the clear duty of an agent to pay over money collected without a demand, then if the principal has notice, the statute begins to run from the time of collection; and when there is no such custom or law, if the agent having funds collected gives notice to his principal, the statute will begin to run after the lapse of a reasonable time within which to make the demand, though no demand be made; 4 Sandf. 590.

In equity, as has been seen, *fraud practised* upon the plaintiff so that the fact of his right to sue does not come to his knowledge till after the expiration of the statute of limitations, is held to open the case so that he may bring his action within the time limited, dating from the discovery of the fraud; Bisph. Eq. 203; 83 Va. 451. But herein the courts proceed with great caution, and require not only a clear case of fraudulent concealment, but the absence of negligence on the part of the party seeking to obviate the statute limitation by the replication of fraud; 7 How. 819; 12 Pa. 49; 1 Curt. C. C. 390; 2 Denio 577; 11 Ohio 194; 20 N. H. 187. See 130 U. S. 505. The concealment must be something more than silence or mere general declarations or speeches; it must appear that some trick or artifice has been employed to prevent inquiry or elude investigation, or calculated to mislead or hinder the party from obtaining information by the use of ordinary diligence; or it must appear that the facts were misrepresented to or concealed from the party by some positive act or declaration when inquiry was made; 116 Ind. 78; 145 U. S. 317. In some states, fraudulent concealment of the cause of action is made by statute a cause of exemption from its effect in courts of law as well as of equity. And the courts construe the saving clause with great strictness, and hold that means of knowledge of the concealment are equivalent to knowledge in fact; 8 Allen 130; 39 Me. 404. In the absence of statutory provision, the admissibility of the replication of fraud in courts of law has been the subject of contradictory decisions in the different states. In New York (20 Johns. 30), in Virginia (4 Leigh 474), and in North Carolina (3 Murph. 115), it is inadmissible. But in the United States courts (1 McLean 185; 130 U. S. 684), Pennsylvania (12 S. & R. 128), Indiana (4 Blackf. 85), New Hampshire (8 Fost. 26), South Carolina (8 Rich. Eq. 130), Virginia (83 Va. 451), it is held to be admissible; 5 Mas. 143; and this is the rule generally prevalent in the United States.

*Running accounts.* Such accounts as concern the trade of merchandise between merchant and merchant were by the original statute of James I. exempted from its operation. The earlier statutes of limitation in this country contained the same exception. But it has been very generally omitted in late revised codes. Among the accounts excepted from the operation of the statute all accounts current were early held to be included; 6 Term 189; if they contained upon either side any item upon which the right of action accrued within six years, whether the accounts were between merchant and merchant or other persons. And this construction of the law, based, as is said in some cases, upon the ground that such accounts come within the equity of the exception in respect to merchants' accounts, and in others upon the ground that every new item and credit in an account given by one party to another is an admission of there being some unsettled account between them, and as an acknowledgment, sufficient to take the case out of the statute, has taken the form of legislative enactment in many states in this country, and, in the absence of such enactment, has been generally fol-

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lowed by the courts; 20 Johns. 576; 6 Pick. 364; 6 Me. 308; 6 Conn. 246; 4 Rand. 488; 12 Pet. 300; 11 Gill & J. 212; 4 M'Cord 215; 3 Harr. N. J. 266; 5 Cra. 15; 1 Md. 333; 25 Pa. 296; 30 Cal. 126.

But there must be a reciprocity of dealing between the respective parties, and the accounts must be such that there may be a fair implication that it is understood that the items of one account are to be a set-off so far as they go, against the items of the other account; 2 Sumn. 410; 40 Mo. 244; 2 Halst. 357; 4 Cra. 696; 1 Edw. Ch. 417; 25 Pa. 296. Where the items of account are all on one side, as between a shopkeeper and his customer, or where goods are charged and payments credited, there is no mutuality, and the statute bars the account; 4 M'Cord 215; 1 Sandf. 220; 17 S. & R. 347; 18 Ala. 274. See 37 Fed. Rep. 394. And where, in the case of mutual account, after a statement, the balance has been struck and agreed upon, the statute at once applies to such balance as a distinct demand; 2 Saund. 125; 6 Me. 308; 1 Daveis 294; 12 Pet. 300; 7 Cra. 147; unless it was made the first item of a new mutual account; 3 Pick. 96; 8 Cl. & F. 121; but see 54 Mo. App. 543.

The statute begins to run against mutual accounts from the date of the last credit and not from the last debit; 65 Vt. 287; and if the last item on either side of a mutual account is not barred, the whole account is saved from the operation of the statute; 115 Mo. 581; 27 Atl. Rep. (R. I.) 214.

A closed account is not a stated account. In order to constitute the latter, an account must have been rendered by one party, and expressly or impliedly assented to by the other; 8 Pick. 187; 6 Me. 308; 13 Pet. 300. Accounts between merchant and merchant are exempted from the operation of the statute, if current and mutual, although no item appears on either side within six years; 19 Ves. 180; 2 Saund. 124; 8 Bligh 352; 6 Pick. 364; 5 Cra. 15; 13 Pa. 310; 1 Smith (Ind.) 217. A single transaction between two merchants is not within the exception; 17 Pa. 238; nor is an account between partners; 3 R. I. 87; 75 Cal. 566; nor an account between two joint-owners of a vessel; 10 B. Monr. 112; nor an account for freight under a charter-party, although both parties are merchants; 6 Pet. 151.

*Surety.* The statute begins to run against a surety paying a debt only from the time of payment; 99 N. C. 559; 82 Va. 751.

As to limitation in patent cases, see PATENTS.

*New promise to pay debt barred.* There is another important class of exceptions, not made by the statute, but by the courts, wherein, although the statutory limitation may have expired, parties bringing themselves within the exception have always been allowed to recover. In actions of assumpsit, a new express promise to pay, or an acknowledgment of existing indebtedness made under such circumstances as to be equivalent to a new promise and within six years before the time of action brought, will take the case out of the operation of the statute, although the original cause of action accrued more than six years before that time; Poll. Contr. 625; 3 Tex. Civ. App. 445. And this proceeds upon the ground that as the statutory limitation merely bars the remedy and does not discharge the debt, there is something more than a merely moral obligation to support the promise,—to wit, a pre-existent debt, which is a sufficient consideration for the new promise; 2 Mas. 151; 8 Gill 155; 19 Ill. 109; 26 Vt. 230; Ans. Contr. 100; 9 S. & R. 128; 85 Tenn. 561. The new promise upon this sufficient consideration constitutes, in fact, a new cause of action; 4 East 399; 6 Taunt. 210; 1 Pet. 351; Hare, Contr. 259.

This was undoubtedly a liberal construction of the statute; but it was early adopted, and has maintained itself, in the face of much adverse criticism, to the present time. While, however, at an early period there was an inclination of the courts to accept the slightest and most ambiguous expressions as evidence of a new promise, the spirit and tendency of modern decisions are towards greater strictness, and seem to be fairly expressed in the learned judgment of Mr. Justice Story, in the case of Bell *v.* Morrison, 1 Pet. 351. "It has often been matter of regret, in modern times, that, in the construction of the statute of limitations, the decisions had not proceeded upon principles better adapted to carry into effect the real objects of the statute; that, instead of being viewed in an unfavorable light, as an unjust and discreditable defence, it had [not] received such support as would have made it, what it was intended to be, emphatically a statute of repose. It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against stale demands after the true state of the transactions may have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses. It has a manifest tendency to produce speedy settlement of accounts, and to suppress those prejudices which may rise up at a distance of time and baffle every honest effort to counteract or overcome them. Parol evidence may be offered of confessions (a species of evidence which, it has been often observed, it is hard to disprove and easy to fabricate) applicable to such remote times as may leave no means to trace the nature, extent, or origin of the claim, and thus open the way to the most oppressive charges. If we proceed one step further, and admit, that loose and general expressions, from which a probable or possible inference may be deduced of the acknowledgment of a debt by a court or jury, that, as the language of some cases has been, any acknowledgment, however slight, or any statement not amounting to a denial of the debt, that any admission of the existence of an unsettled account, without any specification of amount or balance, and however indeterminate and casual, are yet

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sufficient to take the case out of the statute of limitations, and let in evidence, *aliunde*, to establish any debt, however large and at whatever distance of time; it is easy to perceive that the wholesome objects of the statute must be in a great measure defeated, and the statute virtually repealed." . . . "If the bar is sought to be removed by the proof of a new promise, that promise, as a new cause of action, ought to be proved in a clear and explicit manner, and be in its terms unequivocal and determinate; and, if any conditions are annexed, they ought to be shown to be performed."

And to the same general purport are the following cases, although it is undeniable that in the application of the rule there seems in some cases to be a looseness and liberality which hardly comport with the rule: 32 Me. 260; 14 N. H. 422; 7 Hill N. Y. 45; 121 Pa. 649; 12 Ill. 146; 4 Fla. 481; 5 Ga. 486; 79 *id.* 700; 9 B. Monr. 614; 10 Ark. 134; 11 Ired. 445; 8 Gratt. 110; 20 Ala. N. S. 687; 4 Zabr. 427; 12 Ill. 146; 4 Gray 606; 33 Vt. 9; 5 Nev. 206; 54 Pa. 172; 11 How. 493; 8 Fost. 26; 51 Minn. 482; 159 Mass. 245; 7 Misc. Rep. 264; 86 Tex. 560; 82 Va. 518.

The promise must be made to the party in interest or his agent, in order to toll the statute; 122 Pa. 358; as an acknowledgment to a third person and not intended to be communicated to the creditor will not suffice; 6 Mackey 485.

*A new promise to pay the principal* only does not except the interest from the operation of the statute; 29 Pa. 189. Nor does an agreement to refer take the claim out of the statute; 1 Sneed 464; nor the insertion, by an insolvent debtor, of an outlawed claim in a schedule of his creditors required by law; 10 Pa. 129; 7 Gray 274 (but this is not so in Louisiana; 14 La. Ann. 612); 12 Metc. 470; nor an agreement not to take advantage of the statute; 29 Me. 47; 17 Pa. 232; 8 Md. 374; 9 Leigh 381. If such an agreement were valid, it might be made part of the contract, and thus the object of the law would be defeated; 32 Me. 169. Nor will a devise of property to pay debts exempt debts upon which the statute has run prior to the testator's death; 13 Ala. 611; 4 Pa. 56; 13 Gratt. 329; 4 Sandf. 427.

Nor, in general, will any statement of a debt, made officially, in pursuance of special legal requirement, or with another purpose than to recognize it as an existing debt; 12 E. L. & Eq. 191; 9 Cush. 390; 30 Me. 425; 32 Ala. 134. Nor will a deed of assignment made by the debtor for the payment of certain debts, and of his debts generally, and a partial payment by the assignor to a creditor; 1 R. I. 81; 6 E. L. & Eq. 520; nor the entry of a debt in an unsigned schedule of the debtor's liabilities, made for his own use; 30 Me. 425; nor an undelivered mortgage to secure a debt against which the statute has run, though duly executed, acknowledged and recorded; 6 Cush. 151. But if the mortgage be delivered, it will be a sufficient acknowledgment to exempt the debt secured thereby from the operation of the statute; 4 Cush. 559; 18 Conn. 257; 14 Tex. 672. And so will the answer to a bill in chancery which expressly sets forth the existence of such a debt; 4 Sandf. 427; 3 Gill 166. An acknowledgment by a mortgagor to a stranger of the existence of the debt secured by the mortgage, without an express promise to pay the debt, will not prevent the bar of the statute; 64 Cal. 354.

If there is any thing said to repel the inference of a promise, or inconsistent therewith, the statute will not be avoided; 1 Harr. & J. 219; 23 Pa. 452; 6 Pet. 86; 5 Blackf. 436; 11 La. Ann. 712; 14 Me. 300; 4 Mo. 100; 15 Wend. 137. A promise to pay is implied from an acknowledgment of a debt as an existing debt; 159 Mass. 245. "The account is due, and I supposed it had been paid, but did not know of its being ever paid," is no new promise; 8 Cra. 72. If the debtor admits that the debt is due, but intimates his purpose to avail himself of the bar of the statute, the acknowledgment is insufficient; 2 Dev. & B. 82; 2 Browne 35; 29 Conn. 457. So if he says he will pay if he owes, but denies that he owes; 3 Me. 97; 2 Pick. 368; 70 Tex. 327. So if he states his inability to pay; 22 Pick. 291; 13 N. H. 486. So if he admits the claim to have been once due, but claims that it is paid by an account against the claimant; 3 Fairf. 72; 5 Conn. 480; 11 Conn. 160. See 84 Wis. 240; 65 Vt. 287. "I am too unwell to settle now; when I am better, I will settle your account;" held insufficient; 9 Leigh 381. So of an offer to pay a part in order to get the claim out of the hands of the creditor; 2 Bail. So. C. 283; and of an admission that the account is right; 4 Dana 505. An indorsement on a note dated the day before it would outlaw, that "the within note shall not be outlawed," written and signed by the party thereto, will take it out of the statute; 67 Mich. 243; 94 *id.* 411; 85 Tenn. 678. Letters which merely acknowledge an indebtedness, but do not refer to any particular account, or mention the amount of the debt, and which are not written to serve as an acknowledgment, are not sufficient; 69 Miss. 225.

If the new promise is subject to conditions or qualifications, is indefinite as to time or amount, or as to the debt referred to, or in any other way limited or contingent, the plaintiff will be held to bring himself strictly within the terms of the promise, and to show that the condition has been performed, or the contingency happened, and that he is not excluded by any limitation, qualification, or uncertainty; 11 Wheat. 309; 8 Metc. 432; 15 Johns. 511; 3 Bingh. 638; 3 Hare 299; 85 Tenn. 214. If the promise be to pay when able, the ability must be proved by the plaintiff; 4 Esp. 36; 18 N. H. 486; 9 Pa. 410; 11 Barb. 254. But see 19 Vt. 308; 30 Ill. 429; 7 Hill 45; 15 Ga. 395; 85 Tenn. 214; 70 Tex. 718. So if it be to pay as soon as convenient, the convenience must be proved; 2 Cr. & M.; or, "if E will say that I have had the

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timber," the condition must be complied with; 1 Pick. 370.

And if there be a promise to pay in specific articles, the plaintiff must show that he offered to accept them; 8 Johns. 318. The vote of a town to appoint a committee to "settle the dispute" was held to be a conditional promise, requiring, to give it force as against the statute, proof that the committee reported something due; 11 Mass. 452. If the original promise be conditional, and the new promise absolute, the latter will not alter the former; 3 Wash. C. C. 404. But where the promise by A was to pay if the debtor could not prove that B had paid it, it was held that the onus was upon A to prove that B had paid it; 11 Ired. 445. The offer must be accepted altogether or rejected altogether. The liability of the defendant is to be tried by the test he has himself prescribed; 4 Leigh 603; 10 Johns. 35; 1 Gill & J. 497.

It must appear clearly that the promise is made with reference to the particular demand in suit; 6 Pet. 86; 6 Ga. 21; 1 Kay 650; 11 Ired. 86; though a general admission would seem to be sufficient, unless the defendant show that there were other demands between the parties; 4 Gray 606; 8 Gill 82; 19 Pa. 388; 23 Conn. 453. If the admission be broad enough to cover the debt in suit, according to some authorities, the plaintiff can prove the amount really due *aliunde*. But the authorities are not at one on this point; 12 C. & P. 104; 6 N. H. 367; 22 Pick. 291; 27 Me. 433; 1 Pet. 351; 9 Leigh 381; 2 Dev. & B. 390; 23 Pa. 413.

*Part payment* of a debt is evidence of a new promise to pay the remainder; 2 Dougl. 552; 19 Vt. 28; 6 Barb. 583; 23 Or. 106. See 65 Hun 625. It is, however, but *prima facie* evidence, and may be rebutted by other evidence; 28 Vt. 642; 27 Me. 370; 4 Mich. 508; L. R. 7 Q. B. 493; 18 Wall. 254; 53 N. Y. 442; 33 Miss. 41; 5 Ark. 638; 7 Ind. App. 417. The payment must be voluntary and made with the intent that it should be applied upon the debt; 60 Vt. 453. Payment of the interest has the same effect as payment of part of the principal; 8 Bingh. 309; 7 Blackf. 537; 17 Cal. 574; 14 Pick. 387; 60 Vt. 566. And the giving a note for part of a debt; 2 Metc. 168; 40 Kan. 1; or for accrued interest, is payment; 13 Wend. 267; 6 Metc. 553; and so is a second mortgage given as payment of interest on the first mortgage; 75 Mich. 167; and so is the credit of interest in an account stated; 6 Johns. 267; and the delivery of goods on account; 4 Ad. & E. 71; 30 Me. 253; 11 How. 493. But the payment of a dividend by the assignee of an insolvent debtor is no new promise to pay the remainder; 7 Gray 387; 6 E. L. & Eq. 520; and it has been held by respectable authorities that new part payment is no new promise, but that in order to take the case out of the statute, the payment must be made on account of a sum admitted to be due, accompanied with a promise to pay the remainder; 6 M. & W. 824; 6 E. L. & Eq. 520; 20 Miss. 663; 7 Gray 274. Payments of part of the sum sued for do not take the case out of the statute, when the evidence does not show that at the time of such payment, the party knew that he owed the sum in suit and the payments were apparently made on account of bills that accrued after the accrual of the debt in suit; 141 N. Y. 489. And a payment intended to cover the whole amount due is ineffectual as part payment to defeat the operation of the statute; 5 Misc. Rep. 213.

Part payment by a surety in the presence of his principal, and without dissent, is payment by the principal; 2 Fost. 219; but part payment by the surety after the statute has barred the debt, is not a new promise to pay the other part; 18 B. Monr. 643. A payment by the maker of a note cannot be relied on to take the note out of the statute as to the surety; 43 Ill. App. 301. A general payment on account of a debt for which several notes were given, without direction as to the application of the payment, may be applied by the creditor to either of the notes, so as to take the note to which the payment is applied out of the statute; but the payment cannot be apportioned to the several notes with the same effect; 19 Vt. 26; 31 E. L. & Eq. 55; 1 Gray 630. With respect to promissory notes and bonds, the general proof of part payment or of interest is the indorsement thereon; 1 Ad. & E. 102; 9 Pick. 42; 42 Barb. 18; 17 Johns. 182. But it must be made *bona fide*, and with the privity of the debtor; 2 Campb. 321; 7 Wend. 408; 45 Mass. 578; 4 Leigh 519.

The payment may be made to an agent, or even a stranger not authorized to receive it, but erroneously supposed to be authorized. It is as much an admission of the debt as if made to the principal himself; 1 Bingh. 480; 10 B. & C. 122. And so with reference to acknowledgments or new promises; 4 Pick. 110; 11 Me. 152; 21 Barb. 351; 36 Iowa 576; 19 Ill. 189. And the weight of authority is in favor of the rule that part payment of a witnessed note or bond will avoid the statute; 30 Me. 164; 9 B. Monr. 438; 12 Mo. 94; 18 Ark. 521. Whether the new promise or payment, if made after the debt is barred by the statute, will remove the bar, is also a mooted point, the weight of authority perhaps being in favor of the negative; 14 Pick. 387; 10 Ala. N. S. 959; 13 Miss. 564; 2 Comst. 523; 2 Kern. 635; 18 La. Ann. 353, 635; 14 Ark. 199. In Ohio it is so, by statute; 17 Ohio 9. For the affirmative, see 18 Vt. 440; 20 Me. 176; 5 Ired. 341; 2 Tex. 501; 8 Humphr. 656; 47 Pa. 333; 6 Barb. 583.

It was long held that an acknowledgment or part payment by one of several joint-contractors would take the claim out of the statute as to the other joint-contractors; Steph. Ev. § 17; 2 Greenl. Ev. 438; 2 H. Bla. 340; and such is the law in some parts of the Union; 4 Pick. 382; 25 Vt. 390; 19 Conn. 37; 1 R. I. 88; 3 Munf. 240; 1 M'Cord 541; 7 Ired. 513; 30 Me. 310; 45 Miss. 367;

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18 N. Y. 559. See 85 Wis. 328. But in other courts the contrary rule prevails; 1 Pet. 351; 6 N. H. 124; 7 Yerg. 534; 1 M'Mullin 397; 12 Md. 223; 17 S. & R. 126; 41 Ala. 222. See 69 Md. 499.

An acknowledgment or part payment made by an agent acting within the scope of his authority is, upon the familiar maxim, *qui facit per alium facit per se*, an acknowledgment or part payment by the principal; see Tayl. Ev. 606; and hence if a partner has been appointed specially to settle the affairs of a dissolved partnership, his acknowledgment or part payment by virtue of his authority as such agent will take the claim out of the statute; 6 Johns. 267; 1 Pet. 351; 20 Me. 347; 3 S. & R. 345; as will part payment by a partner without special authority; 156 Mass. 314. A written acknowledgment to take a barred demand out of the statute must be made to the creditor or his agent, and it must be made with knowledge of his agency; 50 Mo. App. 194. And the wife may be such agent as to a claim for goods sold to her during the absence of her husband; 3 Bing. 119; but a wife during coverture, not made specially or by implication of law an agent, cannot make a new promise effectual to take a claim to which she was a party *dum sola* out of the statute; 1 B. & C. 248; 24 Vt. 89; 12 E. L. & Eq. 398; not even though the coverture be removed before the expiration of six years after the alleged promise; 2 Pa. 490.

Nor is the husband an agent for the wife for such a purpose; 15 Vt. 471; but he is an agent for the wife, payee of a note given to her *dum sola*, to whom a new promise or part payment may be made; 6 Q. B. 937; nor is the widow of the maker of notes, although she made payments before the cause of action was barred; 10 Ky. L. Rep. 458. So a new promise to an executor or administrator is sufficient; 8 Mass. 134; 17 Johns. 330; 7 Comst. 179; and the weight of authority seems to be in favor of the binding force of a promise or part payment made by an executor or administrator; 12 Cush. 324; 12 B. Monr. 408; 9 Ala. 502; 17 Ga. 96; 9 E. L. & Eq. 80; 10 Md. 342; 4 B. Monr. 36; particularly if the promise be express; 15 Johns. 3; 15 Me. 360; 36 N. J. L. 44. But see contrary; 7 Ind. 442; 9 Md. 317; 14 Tex. 312; 35 Pa. 259; 11 Sm. & M. 9; 7 Conn. 172; see 12 Wheat. 565. A promise by the life tenant to pay taxes may be relied upon as against a remainderman, to remove the bar of the statute; 77 Md. 582.

To put an end to all litigation in England as to the effect of a new promise or acknowledgment, it was enacted by stat. 9 Geo. IV. c. 14, commonly known as Lord Tenterden's Act, that the new promise or acknowledgment by words only, in order to be effectual to take a case out of the statute of limitations, should be in writing, signed by the party chargeable thereby; and this statute has been substantially adopted by most of the states in this country. This statute affects merely the mode of proof. The same effect is to be given to the words reduced to writing as would, before the passage of the statute, have been given to them when proved by oral testimony; 7 Bingh. 163. See 76 Ga. 371. If part payment is alleged, "words only," admitting the fact of payment, though not in writing, are admissible to strengthen the proof of the fact of payment; 2 Gale & D. 59. See Ang. Lim. § 298.

In construing these statutes it has been held that the return, under citation, by an administrator of the maker of a note, showing the note as one of his intestate's debts, is in writing within the meaning of this statute; 12 Sim. 17; and so is the entry by an insolvent debtor of the debt in his schedule of liabilities; 12 Metc. 470. It was held in the last case that the mere entry was not in itself a sufficient acknowledgment, but being in writing, within the meaning of the statute, it might be used with other written evidence to prove a new promise. But the making one note and tendering it in payment of another is not a new promise in writing; 8 Cush. 855; not even if the note be delivered, if it be redelivered to the maker for the purpose of restoring matters between the parties to the state they were in before the note was given; 1 Metc. 394. An entry in a ledger of a balance due the owner's wife, made by the husband or under his direction, is such an admission that the amount is due as will raise an implied promise to pay the same and will bar the statute; 47 Ill. App. 20; but see 140 N. Y. 150.

A and B had an unsettled account. In 1845, A signed the following: "It is agreed that B, in his general account, shall give credit to A for £10, for books delivered in 1834." Held, no acknowledgment in writing, so as to give B a right to an account against A's estate more than six years before A's death; 35 E. L. & Eq. 195. The writing must be signed by the party himself. The signature of the husband's name by the wife, though at his request, is not a signing by the party to be charged; 2 Bingh. N. C. 776. Nor is the signature by a clerk sufficient; 8 Scott 147. Nor is a promise in the handwriting of the defendant sufficient; it must be signed by him; 12 Ad. & E. 493. And a request by the defendant to the plaintiff to get certain moneys due the defendant from third parties, does not charge the party making the request, because it is not apparent that the defendant intended to render himself personally liable; 8 Ad. & E. 221; 5 C. & P. 209. Since this statute, mutual accounts will not be taken out of the operation of the statute by any item on either side, unless the item be the subject of a new promise in writing; 2 Cr. M. & R. 45; 116 Mass. 529. The effect of part payment is left by the statute as before; 10 B. & C. 122. And the fact of part payment, it is now held, contrary to some earlier cases, may be proved by unsigned written evidence; 4 E. L. & Eq. 514; or by oral testimony; 9 Metc. 482.

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As to Real Property and Rights. The general if not universal limitation of the right to bring an action or to make entry, is to twenty or twenty-one years after the right to enter or to bring the action accrues, *i. e.* to twenty or twenty-one years after the cause of action accrues. As the rights and interests of different parties in real property are various, and attach at different periods, and successively, it follows that there may be a right of entry in a particular person, accruing after the expiration of antecedent rights at a period from the beginning of the adverse possession, much exceeding twenty or twenty-one years.

Thus, if an estate be limited to one in tail, and the tenant in tail be barred of his remedy by the statute, yet, as the statute only affects the remedy, and the right or estate still exists, the right of entry in the remainder man does not accrue until the failure of the issue of the tenant in tail, which may not happen for many years. The estate still existing in the tenant in tail or his issue supports and keeps alive the remainder man's right of action till the expiration of twenty years after his right of entry accrues; 1 Burr. 60; 3 Binn. 374; 5 Bro. P. C. 689; 15 Mass. 471.

The laches of the owner of a prior right in an estate cannot prejudice the owner of a subsequently accruing right in the same estate; 4 Johns. 390; 3 Cruise, Dig. 403; 2 Stark. Ev. 887. And where there exist two distinct rights of entry in the same person, he may claim under either. He is not obliged to enter under his earlier right; 1 Pick. 318; 5 C. & P. 563; 29 Ga. 355; 2 Gill & J. 173.

Where it is necessary to prove that an actual entry has been made upon the land within a certain time before bringing suit, such entry must be proved to have been made upon the land in question; 3 Me. 316; Doug. 477; 4 Cra. 367; 11 Gill & J. 283; unless prevented by force or fraud, when a *bona fide* attempt is equivalent; 4 Johns. 389. If the land lie in two counties, there must be an entry in each county; though if the land be all in one county an entry upon part, with a declaration of claim to the whole, is sufficient; Co. Litt. 419; 3 Johns. Cas. 115. The intention to claim the land is essential to the sufficiency of the entry; and whether this intention has existed is to be left in each case to the jury; 9 Watts 567; 4 Wash. C. C. 367; 21 Ga. 113; 27 Ala. 364. An entry may be made by the guardian for his ward, by the remainder man or reversioner for the tenant, and the tenant for the reversioner or remainder man, being parties having privity of estate; 9 Co. 106; 2 Pa. 180. So a *cestui que trust* may enter for his trustee; 1 Ld. Raym. 716; and an agent for his principal; 11 Pa. 212; even without original authority, if the act be adopted and ratified; 9 Pa. 40. And the entry of one joint-tenant, coparcener, or tenant in common will inure to the benefit of the other; 10 Watts 296.

*Adverse possession* for the necessary statutory period gives title against the true owner; but it must be open, uninterrupted, and with intent to claim against the true owner. The possession must be an actual occupation, so open that the true owner ought to know it and must be presumed to know it, and in such manner and under such circumstances as amount to an invasion of his rights, thereby giving him cause of action; 11 Gill & J. 371; 5 Cow. 219; 2 Pa. 438; 9 Cush. 476; 5 Pet. 438; 4 Wheat. 280; 149 Mass. 201; in Pennsylvania this rule has been announced with special distinctness. "The owner of land," says the supreme court in 1 Watts 341, "can only be barred by such possession as has been actual, continued, visible, notorious, distinct, and hostile or adverse." See 95 Mich. 410; 97 Ala. 588; 144 U. S. 533; 69 Tex. 375; 39 Kan. 706; 84 Ky. 124; 23 Neb. 75.

Title by adverse possession for a period such as is required by statute to bar an action is a fee simple title, and is as effective as any otherwise acquired; 7 Mackey 1. See 144 U. S. 533.

A possession not actual, but constructive, not exclusive, but in participation with the owner or others, falls short of that kind of adverse possession which deprives the true owner of his title; 150 U. S. 597.

Adverse possession must be *open*, so that the owner may know it or might know of it. Many acts of occupation would be unequivocal, such as fencing the land or erecting a house on it; 7 Wheat. 59; 5 Pet. 402; 42 N. W. Rep. (Neb.) 915; actual improvement and cultivation of the soil 1 Johns. 156; building on land and putting a fence around it; 6 Pick. 172; digging stones and cutting timber from time to time; 14 East 332; 6 S. & R. 21; driving piles into the soil covered by a mill-pond, and thereon erecting a building; 6 Mass. 229; cutting roads into a swamp, and cutting trees and making shingles therefrom; 1 Ired. 56; and setting fish-traps in a non-navigable stream, building dams across it, and using it every year during the entire fishing-season for the purpose of catching fish; 1 Ired. 535. But entering upon uninclosed flats, when covered by the tide, and sailing over them with a boat or vessel for the ordinary purposes of navigation, is not an adverse possession; 1 Cush. 395; though the filling up the flats, and building a wharf there, and using the same, would be if the use were exclusive; 1 Cush. 313; 10 Bosw. 249; nor is the entering upon a lot and marking its boundaries by splitting the trees; 14 N. H. 101; nor the getting rails and other timber for a few weeks each year from timber-land; 4 Jones 295; nor the overflowing of land by the stoppage of a stream; 4 Dev. 158; nor the survey, allotment, and conveyance of a piece of land, and the recording of the deed; unless there is open occupation; 22 Me. 29. As a rule the nature of the acts necessary to constitute adverse possession varies with the region and character of the ground. If the latter is uncultivated and the region sparsely populated, much less unequivocal acts

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are necessary on the part of the adverse holder.

It must be *continuous* for the whole period. If one trespasser enters and leaves, and then another trespasser, a stranger to the former and without purchase from or respect to him, enters, the possession is not continuous; 34 Pa. 38; 17 How. 601; 4 Md. 143; 30 Mo. 99; 20 Pick. 465; 10 Johns. 475; 71 Tex. 438; 38 Minn. 122. But a slight connection of the latter with the former trespasser, as by a purchase by parol contract, will be sufficient to give the possession continuity; 6 Pa. 355; 1 Meigs 613; 31 Me. 583; 22 Ohio St. 42; 1 Term 448. And so will a purchase at a sale or execution; 5 Pa. 126; 24 How. 284. To give continuity to the possession by successive occupants, there must be privity of estate; 5 Metc. Mass. 15; Ang. Lim. § 414; and such a privity that each possession may be referred to one and the same entry: as that of a tenant to his landlord, or of the heir of a disseisor to his ancestor; 1 Rice 10. It is not essential that one and the same person shall have been all the while the adverse holder, if the latter succeeds to the asserted rights of the preceding holders or occupants as grantee or transferee; 85 Ala. 504.

An administrator's possession may be connected with that of his intestate; 11 Humphr. 457; and that of a tenant holding under the ancestor, with that of the heir; Cheeves 200. In some states, however, it is held that whether the possession be held uniformly under one title, or at different times under different titles, can make no difference, provided the claim of title is always adverse; as in Connecticut; 3 Day 269; and in Kentucky; 1 A. K. Marsh 4.

The possession must be *adverse*. If it be permissive; 2 Jac. & W. 1; or by mistake; 3 Watts 280; or unintentional; 11 Mass. 296; or confessedly in subordination to another's right; 5 B. & Ald. 223; 9 Wheat. 241; 4 Wend. 558; 6 Pa. 210; 9 Metc. 418; 8 Shepl. 240; 2 Ad. & E. 520; it does not avail to bar the statute. The possession of a life tenant and those claiming under him, or subject to his control, is not adverse to those entitled in remainder; 37 W. Va. 634. If the occupation is such and by such a person that it may be for the true owner, it will be presumed to be for him, unless it be shown that the adverse claimant gave notice that he held adversely and not in subordination; 1 Batt. Ch. 373; 5 Barr. 2604. And this notice must be clear and unequivocal. If the act of the tenant or adverse claimant may be a trespass as well as a disseisin, the true owner may elect which he will consider it, regardless of the wishes of the trespasser, who cannot be allowed to qualify his own wrong; 1 Burr. 60; 3 Pick. 573; 12 Mass. 325; 4 Mas. 329. So that if the adverse claimant sets up his trespasses as amounting to adverse possession, the owner may reply they are no disseisin, but trespasses only; while, on the other hand, the true owner may elect, if he please, for the sake of his remedy, to treat them as a disseisin; 19 Me. 383; 8 N. H. 67. This is called a disseisin by election, in distinction from a disseisin in fact, —a distinction which was taken for the benefit of the owner of the land. Whenever the act done of itself necessarily works an actual disseisin, it is a disseisin in fact: as, when a tenant for years or at will conveys in fee. On the other hand, those acts which are susceptible of being made a disseisin by election are no disseisin till the election of the owner makes them so; 1 Johns. Cas. 36.

Evidence of adverse possession must be strictly construed and every presumption is in favor of the true owner; 73 Wis. 463. The statute does not begin to run in favor of the possession of public land until the title passes from the United States; 97 Mo. 524; 50 Ark. 141; there is no adverse possession against the state; 84 Va. 701.

The claim by adverse possession must have some definite boundaries: 1 Metc. Mass. 528; 10 Johns. 447; 10 S. & R. 334; 4 Vt. 155; 3 H. & S. 13. There ought to be something to indicate to what extent the adverse possessor claims. A sufficient inclosure will establish the limits, without actual continued residence on the land; 3 S. & R. 291; 14 Johns. 405; 3 H. & M'H. 595; 10 Mass. 93; 4 Wheat. 213. But it must be an actual, visible, and substantial inclosure; 7 N. H. 436; 2 Aik. 364; 4 Bibb 455. An inclosure on three sides, by a trespasser as against the real owner, is not enough; 8 Me. 239; 5 Md. 256; nor is an unsubstantial brush fence; 10 N. H. 397; 39 N. W. Rep. (Mich.) 747; nor one formed by the lapping of fallen trees; 3 Metc. Mass. 125; 2 Johns. 230. Natural barriers may be a sufficient enclosure; 75 Cal. 584. And where the claim is by possession only, without any color or pretence of title, it cannot extend beyond the actual limits of the inclosure; 3 H. & M'H. 621; 5 Conn. 305; 28 Vt. 142; 6 Ind. 273. And this must be fixed, not roving from part to part; 11 Pet. 53. Possession and occupancy of land not enclosed by a fence may be adverse; 71 Mich. 391.

*Extension of the inclosure* within the time limited will not give title to the part included in the extension; 2 H. & J. 391; 8 Ill. 238. Where, however, the claim rests upon *color of title* as well as possession, the possession will be regarded as coextensive with the powers described in the title-deed; 11 Pet. 41; 3 Mas. 330; 3 Ired. 578; 2 Ill. 181; 13 Johns. 406; 5 Dana 232; 4 Mass. 416; 23 Cal. 431; unless the acts or declarations of the occupant restrict it. But the constructive possession of land arising from color of title cannot be extended to that part of it whereof there is no actual adverse possession; 28 Pa. 124; 16 B. Monr. 472; 7 Watts 442; nor will a subsequent conflicting possession, whether under color of title or not, be extended by construction beyond the limits of the actual adverse possession for the purpose of defeating a prior constructive possession; 6 Cow. 677; 11 Vt. 521. Nor can there be any constructive adverse possession against the

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owner when there has been no actual possession which he could treat as a trespass and bring suit for; 8 Rich. 101. A trespasser who afterwards obtains color of title can claim constructively only from the time when the title was obtained; 16 Johns. 293. If one by mistake enclose the land of another, and claim it as his own to certain fixed monuments or boundaries, his actual and uninterrupted possession as owner for the statutory period will work a disseisin, and his title will be perfect; 25 Neb. 764; 75 Cal. 610; 87 Tenn. 575.

This doctrine of constructive possession, however, applies only to land taken possession of for the ordinary purpose of cultivation and use, and not to a case where a few acres are taken possession of in an uncultivated township for the mere purpose of thereby gaining title to the entire township; 22 Vt. 388; 1 Cow. 286; 6 B. Monr. 463; 14 Vt. 400.

In fine, with a little relaxation of strictness in the case of wild, remote, and uncultivated lands, the sort of possession necessary to acquire title is adverse, open, public, and notorious, and not clandestine and secret; possession, exclusive, uninterrupted, definite as to boundaries, and fixed as to its locality.

*Color of title* is anything in writing, however defective, connected with the title, which serves to define the extent of the claim; 2 Cai. 183; 21 How. 493; 30 Ill. 279; 34 Wis. 425; 16 N. H. 374; 19 Ga. 8; 17 Or. 532; and it may exist even without writing, if the facts and circumstances show clearly the character and extent of the claim; 17 Ill. 498; Ang. Lim. § 404.

It exists wherever there is a reasonable doubt regarding the validity of an apparent title, whether such doubt arises from the circumstances under which the land is held, the identity of the land conveyed, or the construction of the instrument under which the party in possession claims title; 148 U. S. 301.

A fraudulent deed, if accepted in good faith, gives color of title; 8 Pet. 244; so does a defective deed; 4 H. & M'H. 222; 6 Wisc. 527; unless defective in defining the limits of the land; 1 Cow. 276; so does an improperly executed deed, if the grantor believes he has title thereby; 6 Metc. 337; so does a sheriff's deed; 7 B. Monr. 236; 22 Ga. 56; 7 Hill 476; and a deed from a collector of taxes; 4 Ired. 164; 24 Ill. 577; 143 *id.* 265; 37 Neb. 353; 7 Wash. 617; 132 U. S. 239; unless defective on its face; 29 Wisc. 256; 97 Mo. 356; but see 77 Cal. 485; and a deed from an attorney who has no authority to convey; 2 Murph. 14; 28 N. Y. 9; and a deed founded on a voidable decree in chancery; 1 Meigs 207; and a deed, by one tenant in common, of the whole estate, to a third person; 4 D. & B. 54; 2 Head 674; and a deed by an infant; 4 D. & B. 289; And a deed made by a husband and wife of the wife's interest in a former husband's estate; 132 Ind. 546.

So possession, in good faith, under a void grant from the state, gives color of title; 4 Ga. 115. And if A purchases under an execution against B, takes a deed, and on the same day conveys to B, though the purchase and conveyance be at the request of B, and no money is paid, B has a colorable title; 4 D. & B. 201; 7 Humphr. 367. A will gives color of title; but if it has but one subscribing witness, and has never been proved, it does not; 5 Ired. 711. Nor does the sale by an administrator of the land of his solvent intestate, under a license of the probate court, unless accompanied by a deed from the administrator; 34 N. H. 544; 13 Md. 105. Nor does the sale of property by an intestate to his son, of which the possession is held by the wife, who is administratrix, while the son lives in the family, as against the intestate's creditors; 30 Miss. 472. A person taking possession under a judicial sale has color of title, though the judicial proceedings were void; 134 Ind. 238; 37 W. Va. 215.

If there is no written title, then the possession must be under a *bona fide* claim to a title existing in another; 3 Watts 72. Thus, if under an agreement for the sale of land the consideration be paid and the purchaser enter, he has color of title; 5 Metc. Mass. 173; 10 Fost. 531; 37 Miss. 138; 36 Ala. 308; 2 Strobh. 24; 12 Tex. 195; 17 Ga. 600; though if the consideration be not paid, or be paid only in part, he has not; 2 Bail. 59; 11 Ohio 455; 20 Ga. 311; 2 Dutch. 351; because the fair inference in such case is that the purchaser is in by consent of the grantor, and holds subordinately to him until the payment of the full consideration. There is, in fact, a mutual understanding, and a mutual confidence, amounting to an implied trust; 9 Wheat. 241; 12 Mass. 325; 1 Wash. C. C. 207; 1 Spear 291.

In New York, a parol gift of land is said not to give color of title; 1 Johns. Cas. 36; but it is at least doubtful if that is the law of New York; 6 Cow. 677; see also 5 *id.* 346; 8 *id.* 589; 9 *id.* 530. In a later case it is said that to avoid a deed given by one out of possession, the party in possession must hold adversely, "claiming under a title" and not "under a claim of title"; 39 Barb. 513. In some other states, a parol gift is held to give color of title if accompanied by actual entry and possession. It manifests, equally with a sale, the intent of the donee to enter, and not as tenant; and it equally proves an admission on the part of the donor that the possession is so taken; 13 Conn. 227; 2 B. Monr. 282; 39 Conn. 98; 52 Mo. 108; 37 Miss. 138; 15 Ark. 1; 4 Allen 425; 32 N. J. L. 239; but see, *contra*, 24 Ga. 494. The element of good faith, and the actual belief on the part of the claimant that he has title, give the claimant by color of title his advantage over the mere trespasser, who, as we have seen, is restricted carefully to his actual occupation; and it may be said, generally, that whenever the facts and circumstances show that one in possession, in good faith and in the belief that he has title, holds for himself and to the exclusion of all others; his possession must be adverse, and according to his assumed title,

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whatever may be his relations in point of interest or priority, to others; 5 Pet. 440; 1 Paine 467; 11 Pet. 41. When a man enters under such a claim of title, his entry on a part is an entry on the whole; but if he claims no such title he has no seisin by his entry but by the ouster of him who was seised, which can only be by the actual and exclusive occupation of the land; 4 Mass. 416. See Wood. Lim. § 259.

In cases of mixed possession, or a possession at the same time by two or more persons, each under a separate colorable title, the seisin is in him who has the better or prior title; 4 Wheat. 213; 20 How. 235; 3 Wend. 149; for, though there may be a concurrent possession, there cannot be a concurrent seisin; and, one only being seised, the possession must be adjudged to be in him, because he has the better right; 10 Mass. 151; 3 S. & R. 509; 1 D. & B. 5. Of course, in such a case, if one has color of title, and the other is a mere trespasser or intruder, the possession is in him who has color of title; 2 Harr. & J. 112; 4 S. & R. 465; 5 Du. 272. The possession of the true owner must prevail over the claim by constructive possession by one who holds under mere color of title; 69 Tex. 346. No length of possession of one partner of real estate paid for with partnership funds and conveyed to him, bars the other partners; 135 U. S. 621.

But, with all the liberality shown by the courts in giving color of title, it has been denied that a grant from a foreign government confers it, on the ground that the possession under such a title was rather a question between governments than individuals; 3 H. & McH. 621. Thus, the courts of New York have refused to recognize claims under a grant of the French government in Canada, made prior to the treaty between Great Britain and France in 1763; 4 Johns. 163; 12 *id.* 365; as conferring color of title. But the soundness of the exception has since been questioned in the same court; 8 Cow. 589; and the grant of another state has been expressly held to give color of title in Pennsylvania, even as against one claiming under her own grant; 2 Watts 37. For political reasons, it has been held that a grant from the Indians gives no color of title; 8 Wheat. 571; nor does a grant by an Indian in contravention of a statute; 41 Fed. Rep. 705; but a sheriff's deed for land in the Southern Confederacy was held to give color of title; 10 Fed. Rep. 531. See COLOR OF TITLE.

*One joint-tenant, tenant in common*, or *coparcener* cannot dismiss another but by actual ouster, as the seisin and possession of one are the seisin and possession of all, and inure to the benefit of all; 2 Salk. 422; 7 Wheat. 59; 12 Metc. 357; 11 Gratt. 505; 3 S. & R. 381; 4 Day 473; 116 Ind. 103; 16 Or. 173; actual ouster implies exclusion or expulsion. No force is necessary; but there must be a denial of the right of the cotenant; 5 Burr. 2604; 9 Cow. 530; 22 Tex. 663; 1 Me. 89; 12 Wend. 404; and, like a grant, after long lapse of time it may be presumed; 1 East 568; 3 Metc. 101; 29 Wisc. 226; and inferred from acts of an unequivocal character importing a denial; 3 Watts 77; 1 Me. 89; 3 A. K. Marsh. 77; 97 Mo. 426; 16 Or. 173; 37 Minn. 338; 82 Va. 759; 98 N. C. 307; 78 Ga. 142; 74 Iowa 359; but the possession of the grantee of one tenant in common is adverse to all; 13 B. Monr. 436; 4 Paige 178.

The possession of the tenant is likewise the possession of his landlord, and cannot be adverse unless he distinctly renounce his landlord's title; 2 Campb. 11; 2 Binn. 468; 10 N. Y. 9; 3 Pet. 43; 6 Watts 500; 7 Mont. 288; 84 Ala. 598; *id.* 308; 112 N. Y. 263; 40 La. Ann. 633; 70 Tex. 547.

Mere non-payment of rent during the time limited, there having been no demand, does not prejudice the landlord's right to enter and demand it, even though the lease contains a clause giving the right of reentry in case of non-payment of rent; 5 Cow. 123; 7 East 299; see 110 N. Y. 537; and payment of rent is conclusive evidence that the occupation of the party paying was permissive and not adverse; 3 B. & C. 135; 12 L. J. N. S. Q. B. 236. The defendant in execution after a sale is a quasi tenant at will to the purchaser; and his possession is not therefore adverse; 1 Johns. Cas. 153; 3 Mass. 128. And a mere holding over after the expiration of a lease does not change the character of the possession; 2 Gill & J. 173; nor does the assignment of the lease, or a sub-letting. The assignee and sub-lessees are still tenants, so far as the title by adverse possession is concerned; 4 S. & R. 467; 3 Pet. 43; 6 Cow. 751.

If the tenant convey the premises, as we have before seen, the landlord may treat the grantee as a disseisor by election; but the grantee cannot set up the act as the basis of a title by adverse possession; 5 Cow. 123; unless in the case where the relation of landlord and tenant subsists by operation of law; as where one makes a grant and by the omission of the word "heirs" an estate for life only passes. In such case, after the death of the tenant for life an adverse possession may commence; 7 Cow. 323. So in case the tenant has attorned to a third person and the landlord has assented to the attornment; 6 Cow. 133; 4 How. 289; 10 Sm. & M. 440; 4 Gilm. 336. But a mere parol disclaimer, by the lessor, of the existence of the relationship, and of all right in the premises, is not equivalent to an attornment. To admit such disclaimer would lead to fraud and perjury, and is in direct violation of the principles of the statute of frauds; 7 Johns. 186; 5 Cow. 74; but see 13 S. & R. 133.

The possession of one's agent is, within the purview of the statute of limitation, the possession of his principal; 37 Neb. 353. See 112 Mo. 527; 147 U. S. 508.

The *possession of the mortgagor* is not adverse to the mortgagee (the relation being in many respects analogous to that of landlord and tenant); 3 Pet. 43; 4 Cra. 415; 11 Mass. 125; 30 Miss. 49; 27 Pa. 504; Dougl. 275; see 112 Mo. 527; not even if the pos-



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session be under an absolute deed, if intended as a mortgage; 19 How. 289. The relation of mortgagor and mortgagee is very peculiar and *sui generis*. It is sometimes like a tenancy for years; Cro. Jac. 659; sometimes like a tenancy at will; Dougl. 275; and sometimes like a tenancy on sufferance; 1 Salk. 245; but, whatever it may be like, it is always presumed to be by permission of the mortgagee until the contrary be shown. The assignee of the mortgagor, with notice, is in the same predicament as the mortgagor; but if he purchase without notice, and particularly if the mortgage be forfeited at the date of his purchase, his possession will be adverse; 19 Vt. 526; 6 B. Mon. 479; 2 Sandf. 636; 34 Mo. 285; 32 Miss. 312; 19 How. 289.

But, although the possession of the mortgagor be not adverse so as to give title under the statute against the mortgagee, the courts have nevertheless practically abrogated this rule, by holding that where the mortgagor has held during the statutory limit, and has meantime paid no interest nor otherwise recognized the rights of the mortgagee, this raises a presumption that the debt has been paid, and is a good defence in an action to foreclose; 12 Johns. 242; 9 Wheat. 497; 8 Metc. 87. And the reasons for so holding seem to be equally cogent with those upon which rests the well-settled rule that, with certain exceptions, the mortgagee's possession for the time limited bars the mortgagor's right to redeem; 2 J. & W. 434; 6 E. L. & Eq. 355; 1 Johns. Ch. 385; 9 Wheat. 489; 3 Harr. & M'H. 328; 2 Sumn. 401; 13 Ala. 246; 20 Me. 269.

The exceptions to this rule are—*first*, where an account has been settled within the limited time; 2 Vern. 377; 5 Bro. C. C. 187; 5 Johns. Ch. 522; *second*, where within that time the mortgagee, by words spoken or written, or by deed, has clearly and unequivocally recognized the fact that he held as mortgagee; 2 Bro. 397; 1 Sim. & Stu. 347; 1 Johns. Ch. 594; 10 Wheat. 152; 3 Sumn. 160; by which recognition a subsequent purchaser, with actual or constructive notice of the mortgage, is barred; 7 Paige Ch. 465; *third*, where no time is fixed for payment, as in the case of a mortgage where the mortgagee is by agreement to enter and hold till he is paid out of the rents and profits; 1 Vt. 418; *fourth*, where the mortgagor continues in possession of the whole or of any part of the premises; Sel. Cas. Ch. 55; 1 Johns. Ch. 594; 1 Neb. 342; and, *fifth*, where there is fraud on the part of the mortgagee, or at the time of the inception of the mortgage he has taken advantage of the necessities of the mortgagor; 1 Johns. Cas. 402, 595; 2 Cruise 161.

*The trustee of real estate*, under an express trust, as well as of personal, as we have seen, holds for his *cestui que trust*, and the latter is not barred of his right unless it be denied and repudiated by the trustee; in which case the statute will begin to run from the denial or repudiation; 5 How. 233; 3 Gray 1; 2 M'Lean 376; 32 W. Va. 184; 126 Ill. 58. In cases of implied, constructive, and resulting trusts, the rule is also the same as with reference to personal property. The statute is a bar even in cases where the conduct of the trustee was originally fraudulent; 5 Johns. Ch. 184; 17 Ves. 151; 2 Bro. C. C. 438.

Where a trustee who holds the legal title to the trust property, permits his right to bring an ejectment for a certain part thereof to become barred, the beneficiary is also barred; 113 Mo. 188.

The lapse of time does not bar a defense resting upon an equitable title and possession; 38 Fed. Rep. 65; and staleness of demand cannot be urged against a right to relief in equity where plaintiff has been in continuous possession of the land; 99 N. C. 436.

The same general rules as regards *persons under disabilities* apply in cases of real estate as have already been described as applicable to personalty at the time the right descends or the cause of action accrues, and prevent the running of the statute, till their removal; but only such as existed at that time. When the statute once begins to run, no subsequent disability can stop it; 1 How. 37; 4 Mass. 182; 16 Johns. 513; 1 Wheat. 292; 2 Binn. 374; 126 Pa. 643; and there is no distinction in this respect between voluntary and involuntary disabilities; 4 Term 301; 3 Brev. 286. The disability of one joint-tenant, tenant in common, or co-parcener does not inure to the benefit of the other tenants; 8 Johns. 262, 265; 2 Taunt. 441; 10 Ohio 11; 10 Ga. 218; 5 Humphr. 117; 4 Strobh. Eq. 167; 18 S. & R. 350.

It is impracticable here to give a compend, or even an analysis, of the different statutes of the several states. Nor, indeed, would such an analysis be of much service because of the frequent revision, changes, and modifications. The state statutes are substantially the same, differing only in details, and all are derived directly or indirectly from the English statutes.

The English Statutes of Limitations, 21 James I. c. 16 and 9 Geo. IV. c. 14, and a synopsis of that of 3 and 4 Will. IV. c. 27, are printed in the last preceding edition of this work but are now necessarily omitted. A collection of the American and English statutes may be found in Wood, Limitations 2d ed. App'x.

**Of Criminal Proceedings.** The time within which indictments may be found, or other proceedings commenced, for crimes and offences varies considerably in the different jurisdictions. In general, in all jurisdictions, the length of time is adjusted in some proportion to the gravity of the offence. Indictments for murder, in most, if not all, of the states, may be found at any time during the life of the criminal after the death of the victim. Proceedings for less offences are to be commenced within periods varying from ten years to sixty days. See Whart. Cr. Pl. & Pr. § 316.

Although an offence on the face of the indictment is barred, yet the prosecution may prove, without averring it in the indictment, that the defendant, having fled

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the state, was without the statute. But the better practice is to aver in the indictment the facts relied upon to toll the statute; 23 W. N. C. Pa. 464 (S. C. of Pa.).

**Of Estates.** A description either by express words or by intendment of law of the continuance of time for which the property is to be enjoyed, marking the period at which the time of enjoyment is to end. Prest. Est. 25.

The definition or circumscription, in any conveyance, of the interest which the grantee is intended to take.

The term is used by different writers in different senses. Thus, it is used by Coke to denote the express definition of an estate by the words of its creation, so that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail; Co. Litt. 23 *b*. In Sanders on Uses, 68, the term is used, however, in a broader and more general sense, as given in the second definition above. And, indeed, the same writers do not always confine themselves to one use of the term; see Fearne, Cont. Rem. Butler's note *n*, 9th ed. 10; 1 Steph. Com. 11th ed. 364, 527. For the distinctions between limitations and remainders, see CONDITIONAL LIMITATIONS; CONTINGENT REMAINDER.

*In instruments.* A limitation in an instrument is a provision that restricts the interest or property one may have in the subject-matter of such instrument. A. & E. Encyc.

Consult, generally, Angell; Ballantine; Banning; Blanshard; Gibbons; Darby and Bonsanquet; Price; Wood; Wilkinson, on Limitations; Flintoff; Washburn, on Real Property; Barbour; Bishop; Wharton, on Criminal Law.

**LIMITED ADMINISTRATION.** An administration of a temporary character, granted for a particular period, or a special or a particular purpose. 1 Wms., Ex., 8th ed. 486.

**LIMITED COMPANY.** A company in which the liability of each shareholder is limited by the number of shares he has taken, so that he cannot be called on to contribute beyond the amount of his shares. See 1 Lindl. Part. 383; Mozl. & W. Dict.; JOINT STOCK COMPANY.

**LIMITED LIABILITY.** A principle of modern statutory law whereby those interested in a partnership or joint stock company are held liable only to the extent of their own interest in the business. See JOINT STOCK COMPANY; PARTNERSHIP.

The phrase is also used in a less technical and more colloquial sense as applied to restrictions of the liability of certain classes of common carriers, such as steamship, express, or telegraph companies, either by statute or contract.

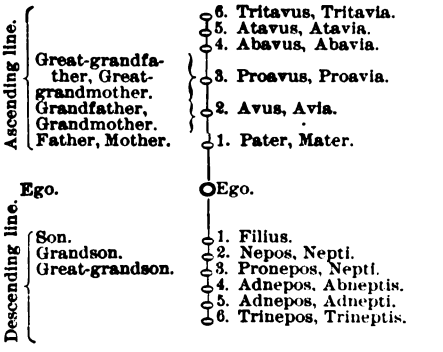
**LIMITED OWNER.** A tenant for life, in tail, or by the curtesy. The Limited Owner's Residences Acts, 33 & 34 Vict. c. 56 and 34 & 35 Vict. c. 84, enable the tenant for life of a settled estate to charge the estate with the expense of building a mansion house. Whart. Lex.

**LIMITED PARTNERSHIP.** A form of partnership created by statute in many of the United States, wherein the liability of certain special partners, who contribute a specific amount of capital, is limited to the amount so contributed, while the general partners are jointly and severally responsible as in ordinary partnership. All the partners are liable as general partners, unless the statutes upon the subject are strictly, or as some cases say, substantially complied with; 5 Allen 91; 39 Barb. 283; 3 Col. 342; 67 Pa. 330; 62 N. Y. 513; 28 Abb. N. C. 89. See 151 Pa. 79; 1 Lindl. Partn. 383, n., 2d Am. ed. (Ewell) 201, n.; Pars. Part. 424.

One who aids and assists in the organization of a limited partnership cannot thereafter hold the members liable as general partners, upon the ground that such organization was defective; 147 Pa. 111. See PARTNERSHIP.

**LINCOLN'S INN.** See INNS OF COURT.

**LINE. In Descents.** The series of persons who have descended from a common ancestor, placed one under the other, in the order of their birth. It connects successively all the relations by blood to each other. See CONSANGUINITY; DEGREE.

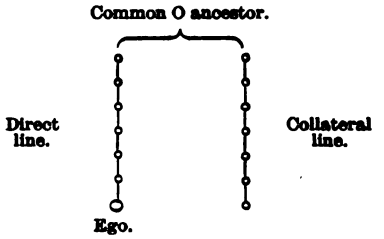



The line is either direct or collateral. The direct line is composed of all the persons who are descended from each other. If, in the direct line, any one person is assumed as the *propositus*, in order to count from him upwards and downwards, the line will be divided into two parts, the ascending and descending lines. The ascending line is that which, counting from the *propositus*, ascends to his ancestors, to his father, grandfather, great-grandfather, etc. The descending line is that which, counting from the same person, descends to his children, grandchildren, great-grandchildren, etc. The preceding table is an example.

The collateral line, considered by itself and in relation to the common ancestor, is a direct line; it becomes collateral when placed alongside of another line below the

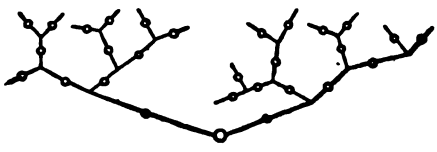
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common ancestor, in whom both lines unite. For example:—




These two lines are independent of each other; they have no connection except by their union in the person of the common ancestor. This reunion is what forms the relation among the persons composing the two lines.

A line is also *paternal* or *maternal*. In the examination of a person's ascending line, the line ascends first to his father, next to his paternal grandfather, his paternal great-grandfather, etc., so on from father to father; this is called the paternal line. Another line will be found to ascend from the same person to his mother, his maternal grandmother, and so from mother to mother; this is the maternal line. These lines, however, do not take in all the ascendants; there are many others who must be imagined. The number of ascendants is double at each degree, as is shown by the following diagram:—



See 2 Bla. Com. 200, b.; Pothier, *Des Successions*, c. 1, art. 3, § 2; ASCENDANTS; CONSANGUINITY.

**In Real Property Law.** The division between two tracts or parcels of land. Limit; border; boundary.

When a line is mentioned in a deed as ending at a particular monument (*q. v.*), it is to be extended in the direction called for, without regard to distance, till it reaches the boundary: 1 Tayl. 110, 303; 2 Hawks 219. See 106 Mo. 231; 109 N. C. 417. And a marked line is to be adhered to although it depart from the course; 7 Wheat. 7; 4 T. B. Monr. 29; 2 Bibb 261. A crooked line is just as much a line as a straight one; 7 Halst. 308. Ordinarily, if a boundary runs to or by the line of an object, the exterior limit of the object is intended; 141 Mass. 56.

Where a number of persons settle simultaneously or at short intervals in the same neighborhood, and their tracts, if extended in certain directions, would overlap each other, the settlers sometimes by agreement determine upon dividing lines, which are called *consentible lines*. These lines, when fairly agreed upon, have been sanctioned by the courts; and such agreements are conclusive upon all persons claiming under the parties to them, with notice, but not upon *bona fide* purchasers for a valuable consideration, without notice, actual or constructive; 3 S. & R. 323; 17 *id.* 57; 9 W. & S. 66. See PARALLEL LINES.

Lines fixed by compact between nations are binding on their citizens and subjects; 11 Pet. 209; 1 Ves. Sen. 450; 1 Atk. 2; 2 *id.* 592; 1 Ch. Cas. 85; 1 P. Wms. 723; 3 S. & R. 331. See BOUNDARIES.

**Measures.** A line is a lineal measure, containing the one-twelfth part of an inch.

**LINE OF DUTY.** Where a statute provides for a pension for disability or death from wound or injury received, casualty occurring, or disease contracted in the line of duty, "the performance of duty must have relation, or causation, or consociation, mediate or immediate, to the wound, injury, casualty, or disease." Opinion of Atty. Gen. Cushing, 2 Dec. Dept. Int. on Pensions 401, where the meaning of the phrase and the whole subject are very fully discussed.

**LINES AND CORNERS.** *In deeds and surveys.* Boundary-lines and their angles with each other. 17 Miss. 459; 21 Ala. 66; 10 Gratt. 445; 16 Ga. 141.

**LINEA RECTA** (Lat.). The perpendicular line; the direct line. The line of ascent, through father, grandfather, etc., and of descent, through son, grandson, etc. Co. Litt. 10, 158; Bract. fol. 67; Fleta, lib. 6, c. 1, § 11. This is represented in a diagram by a vertical line.

Where a person springs from another immediately, or mediately through a third person, they are said to be in the direct line (*linea recta*), and are called ascendants and descendants. Mackeldey, Civ. Law § 129.

**LINEA TRANSVERSALIS** (Lat.). A line crossing the perpendicular lines. See COLLATERAL KINSMAN.

**LINEAGE.** Race; progeny; family, ascending or descending.

**LINEAL.** In a direct line.

Lineal descent would be as from father or grandfather to son or grandson. 6 Pet. 112.

**LINEAL WARRANTY.** See WARRANTY.

**LINEN.** A thread or cloth made of flax or hemp. 38 Fed. Rep. 93. See 1 Blatch. 501. In an insurance policy where one insures his stock in trade, household furniture, linen, wearing apparel, and plate, linen in the policy is confined to household linen or linen used by way of apparel; 3 Camp. 422. In a bequest the clause "all my clothes and linen" passes body linen only; 3 Bro. Ch. 311. A bequest of "some of my best linen" was held void for uncertainty; 2 P. Wms. 387.

**LINK.** A single constituent part of a continuous and connected series, as a

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casual or logical sequence; as a link in a chain of evidence. Stand. Dict.

**LIQUIDATE.** To pay; to settle; to adjust and gradually extinguish all indebtedness. See 8 Wheat. 322.

**LIQUIDATED ACCOUNT.** One the amount of which is agreed upon by the parties, or fixed by operation of law. 23 Atl. Rep. (Conn.) 924; 15 Ga. 321; 43 Conn. 469; 20 *id.* 562.

**LIQUIDATED DAMAGES. In Practice.** Damages the amount of which has been determined by anticipatory agreement between the parties.

Damages for a specific sum stipulated or agreed upon as part of a contract, as the amount to be paid to a party who alleges and proves a breach of it.

Where there is an agreement between parties for the doing or not doing particular acts, the parties may, if they please, estimate beforehand the damages to result from a breach of the agreement, and prescribe in the agreement itself the sum to be paid by either by way of damages for such breach. See 1 H. Bla. 232; 2 B. & P. 335, 350; 2 Bro. P. C. 431; 4 Burr. 2225; 2 Term 32. The civil law appears to recognize such stipulations; Inst. 3. 16. 7; Toullier l. 3, n. 809; La. Civ. Code Art. 1928, n. 5; *Code Civile* 1152, 1153.

Such a stipulation on the subject of damages differs from a penalty in this, that the parties are holden by it: whereas a penalty is regarded as a forfeiture, from which the defaulting party can be relieved.

It is settled both at law and in equity that the courts will not go behind an agreement for liquidated damages, but that a penalty is only security for the sum due or damages actually sustained; 1 Sedgw. Dam. § 394. The word *penalty* in this contradistinction is not used according to its exact definition, but has acquired a settled technical meaning; *id.* note.

The sum named in an agreement as damages to be paid in case of a breach will, in general, be considered as liquidated damages, or as a penalty, according to the intent of the parties; and the mere use of the words "penalty" or "liquidated damages" will not be decisive of the question, if on the whole the instrument discloses a different intent; 6 B. & C. 216; 6 Ired. 186; 78 Me. 32; 2 Ala. N. S. 425; 8 Mo. 467; 69 N. Y. 45; 4 H. & N. 511; 47 Kan. 126; 47 Ill. App. 153; 76 Ala. 418; 86 Ill. 107; 64 Ia. 308; 58 Md. 261; 58 N. H. 326; 45 N. J. L. 525. See 68 Law T. 857; 125 N. Y. 200. It has been said, however, that if the parties use the word "penalty," it will control the interpretation of the contract; 3 B. & P. 630; 7 Wheat. 13; 38 N. Y. 75; 13 N. H. 275; but in 16 N. Y. 469, the sum named was stated to be "liquidated damages," but was held to be a penalty. Whether the sum mentioned in the agreement to be paid for a breach is to be treated as a penalty or as liquidated damages is a question of law, to be determined by the court upon a consideration of the whole instrument; 7 C. B. 716. The construction must be the same in law and equity; 5 H. L. C. 105. The tendency of the court is to regard the sum named as a penalty rather than liquidated damages; 5 Metc. Mass. 57; 2 B. & P. 346; 97 Mass. 445; yet courts seek to ascertain the intent and are governed by it; *id.* As to the distinction, see also 6 N. Y. Chy. Reprint 470; 30 Am. Rep. 28.

Such a stipulation in an agreement will be considered as a penalty, in the following cases:—

Where the parties in the agreement have expressly declared it or described it as a "penalty," and no other intent is clearly to be deduced from the instrument; 2 B. & P. 340, 350, 630; 7 Wheat. 14; 1 M'Mull. 106; 2 Ala. N. S. 425; 1 Pick. 451; 3 Johns. Cas. 297; 24 Vt. 97; 164 Mass. 457.

Where it is doubtful from the language of the instrument whether the stipulation was intended as a penalty or as liquidated damages; 3 C. & P. 240; 6 Humph. 186; 5 Sandf. 192; 24 Vt. 97; 16 Ill. 475.

Where the agreement was evidently made for the attainment of another object or purpose, to which the stipulation is wholly collateral; 11 Mass. 488; 1 Bro. C. C. 418; 11 App. Div. N. Y. 378.

Where the agreement imposes several distinct duties, or obligations of different degrees of importance, and yet the same sum is named as damages for a breach of either indifferently; 6 Bingh. 141; 7 Scott 364; 5 Sandf. 192; 21 Ore. 194; 77 Ill. 452; 41 Minn. 522; 40 Wis. 503. But see 7 Johns. 72; 15 *id.* 200; 9 N. Y. 551; 77 Ill. 452; 7 Nev. 339; L. R. 4 Ch. Div. 731; and see 19 Centr. L. J. 282, 302; where many authorities are collected.

Where the agreement is not under seal, and the damages are capable of being certainly known and estimated; 2 B. & Ald. 704; 6 B. & C. 216; 4 Dall. 150; 5 Cow. 144; 33 Neb. 126. See 95 Ill. 190; 90 U. S. 471.

Where the instrument provides that a larger sum shall be paid upon default to pay a lesser sum in the manner prescribed; 5 Sandf. 192, 640; 16 Ill. 400; 47 *id.* 41; 14 Ark. 329; 2 B. & P. 346. This case is said to be considered as settling the doctrine of liquidated damages in England; 1 Sedgw. Dam. § 398; and it is cited approvingly in 6 Ves. 815, and the doctrine applied in 6 Bingh. 141, 147. In the latter case, Tindal, C. J., said, "that a very large sum should become immediately payable in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms; the case being precisely that in which courts of equity have always relieved, and against which courts of law have in modern times endeavored to relieve by directing juries to assess the real damages sustained by the breach of the agreement." See also 12 U. C. C. P. 9; 1 Bond 319.

Where the stipulation is made in respect of a matter certain in value, as the payment of a debt or liquidated money de-

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mand, and the sum fixed upon is greater than the debt or demand; L. R. 8 Ch. 1022. If a debt be secured by a stipulation that in case of its not being paid at the appointed time, a larger sum shall become payable, the stipulation for the larger sum is in the nature of a penalty; L. R. 4 H. L. 1; Leake, Contr. 3d ed. 939.

Where a sum named is evidently to evade usury laws or statutory prohibitions, it will be treated as a penalty; 10 Mich. 188; 26 Ga. 403; but see 35 Ill. 324.

Where, by a clause in a building contract, the builder, in default of the completion of the work at a certain time, agreed to pay the owner of the property a stipulated sum for every day the building was delayed after that time, it was held to be a penalty and not an agreement to pay liquidated damages; 113 Mo. 359; but see 55 N. J. L. 132; 57 Ark. 168.

The plaintiff as well as the defendant may show that a stipulated sum is to be considered a penalty and not liquidated damages, and he may prove the actual damages even if greater than the penalty; 60 N. Y. 408.

The stipulation will be sustained as liquidated damages in the following cases:—

Where the agreement is of such a nature that the damages are uncertain, and are not capable of being ascertained by any satisfactory and known rule; 13 M. & W. 702; 1 Ex. 665; 8 Mass. 223; 87 *id.* 304; 101 *id.* 334; 12 Barb. 137, 366; 14 Ark. 315; 2 Ohio St. 519; L. R. 15 Eq. 36; 85 Ala. 552; 91 Tenn. 154; Add. Contr. 267; 36 Wis. 277; 14 Me. 250; 76 Ill. 157; 13 N. H. 351; 147 Pa. 416.

Where, under the contract, a deposit is made of a sum to be forfeited in case of default, it will be considered liquidated damages; 21 Ch. Div. 243; 99 Pa. 560; 70 Tex. 442; but this was held to be so only if the deposit was a part performance and not as security; 122 N. Y. 397.

Under contracts not to carry on a particular business within specified limits of time and place, a sum named to be paid on default is liquidated damages; 79 Pa. 336; 100 Ind. 466; 97 Mass. 445; 49 Vt. 392; 40 Ch. Div. 112; 69 Ga. 764; 110 Cal. 674; but not where the contract describes it as a "penalty"; 164 Mass. 584.

Where, in contracts for government work, provision was made for the retention of percentages, to be forfeited on non-completion, it was treated as a provision for liquidated damages; 30 Ct. Cl. 31; and so were such provisions in a building contract; 13 Wash. 364; and in one for refitting a barge $50 for each day's delay, designated in the contract a "fine," where the fair rental value of the boat was $40 per day; 65 N. W. Rep. (Wis.) 863; and generally under contracts for the payment of such daily sum upon failure of completion; 168 Mass. 10; 87 Tex. 440; 56 Ark. 405; 28 Ont. 195; 55 N. J. L. 132; but a similar provision in a contract for railroad ties was held a penalty; 34 S. W. Rep. (Tex.) 328; and see 29 Neb. 385.

Where, from the tenor of the agreement or from the nature of the case, it appears that the parties have ascertained the amount of damages by fair calculation and adjustment; 2 Story, Eq. Jur. § 1318; 2 Greenl. Ev. 259; 1 Bingh. 302; 7 Conn. 291; 11 N. H. 234; 6 Blackf. 206; 13 Wend. 507; 10 Mass. 459; 2 Ala. N. S. 425; 14 Me. 250; 49 Mo. 406.

Where a bond was given in the penal sum of $10,000 upon condition not to practise as a physician and in case of breach, to pay $500 for every month in which he practised, the $10,000 was held to be a penalty and the $500 stipulated damages; 4 Wend. 468. See 21 N. J. L. 463.

See, as to the distinguishing tests of liquidated damages and penalty, 5 Sandf. 192.

The following has been suggested as a general rule governing the whole subject: "Whenever the damages were evidently the subject of calculation and adjustment between the parties and a certain sum was agreed upon and intended as compensation, and is in fact reasonable in amount, it will be allowed by the court as liquidated damages." 1 Sedgw. Dam. § 405. To establish a liquidation of damages there must concur all the necessary elements of a valid contract, assent of parties, consideration and performance of the condition, if any; 37 N. J. L. 23. The intent of the parties must be clear, but it must appear from the contract; 1 Sedgw. Dam. § 406. The question of penalty or liquidated damages is a matter of law for the court; 1 Tayl. Ev. Chamb. ed. § 40; 7 C. B. 713. The liquidation must be reasonable; 40 Mich. 517; 13 Abb. N. S. 427; 12 Bush 249; 106 Pa. 237; hence the contract is not conclusive so far as that it would be permitted to violate this principle; 5 Mich. 123.

The penal sum in a bond is usually a penalty, but if a sum be agreed upon in the condition of a bond to be payable upon a breach, the question may arise whether it is liquidated damages or a penalty, and it will be subject to the same principles of construction as in any other forms of contract; Leake, Contr. 3d ed. 938, 1091; 2 Ves. Sen. 530. See 5 H. L. C. 105.

Where the language used is explicit, the extravagance of the sum named as liquidated damages will not be considered; 5 Sandf. 192; 11 Rich. 550. See 145 Pa. 606; 5 Sandf. 192; 75 Pa. 157; 70 Tex. 442; [1892] 1 Q. B. 127.

Some discussion has arisen as to whether the question of liquidated damages is involved in alternative contracts to do a certain thing or pay a certain sum. In such cases what is known as the rule of least beneficial alternative is applied and damages are given upon the theory that the defendant, if he performed, would have chosen the least onerous obligation; L. R. 8 C. P. 475; but in such a case it has been held that a defendant, having failed to exercise his option, must pay the sum as stipulated damages; 24 Wend. 244; 26 *id.* 630; 58 Md. 261; 7 Metc. 583. But see 47 Kan. 146 and note to it, 13 L. R. A. 671.

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See, generally, 12 Am. L. Rev. 287; 1 Am. Dec. 331; Sedgw. Dam. ch. XII.; 13 L. R. A. 671, note; Sutherland; Mayne, Damages; 13 Myer, Fed. Dec. 744; 18 Cent. L. J. 143; 4 Silvern. Sup. Ct. N. Y. 579.

**LIQUIDATED DEBT.** A debt is such when it is certain what is due and how much is due. 20 Ga. 561.

**LIQUIDATED DEMAND.** A demand the amount of which has been ascertained or settled by agreement of the parties, or otherwise. 20 Ga. 53.

**LIQUIDATION.** A fixed and determinate valuation of things which before were uncertain.

**LIQUOR LAWS.** Laws regulating, prohibiting, or taxing the sale of intoxicating liquors.

The term liquor, when used in a statute prohibiting its sale, refers only to spirituous or intoxicating liquors; 18 N. J. L. 311; 20 Barb. 246; 3 Den. 407. Alcohol is held not an intoxicating liquor; 39 Ark. 216; *contra*, 81 Ga. 753. Within the meaning of a statute restricting the sale of ardent or vinous spirits of any kind, alcohol is included; 34 Ark. 340; *contra*, 70 Miss. 241. Where a statute defines intoxicating liquor as including alcohol, etc., its sale is unlawful, however much it may be diluted; 76 Ia. 243; and so where no liquor is sold except alcohol, it being sold in the shape of toddy, punch, etc., and drunk on the premises; 43 Ark. 151.

Ale is held an intoxicating liquor; 12 Mo. 407; 2 Coldw. 323; 63 N. Y. 277; 53 Ind. 162 (*contra*, 20 Barb. 246; 44 N. H. 511); see 30 Conn. 55; 105 Mass. 480; beer; 14 Ohio 586; 16 Mo. 389; 21 N. Y. 473; 73 Ia. 98; 38 Ark. 656; 55 Ala. 159; 11 R. I. 592; 90 Ill. 218. (See BEER; JUDICIAL NOTICE.) Whisky; 23 Fla. 267; 25 Kan. 751; brandy; 30 Conn. 55; 12 Mo. 407; blackberry brandy; 100 Ind. 598; rum and gin; 30 Conn. 55; 12 Mo. 407; 2 Gray 514; toddy or sling made with brandy or gin mixed with sugar and water; 10 Metc. 14; cocktails; 23 Fla. 398; wine; 28 Ia. 467; 4 Hun 520; 12 Mo. 407; 120 Pa. 395. Champagne is included within a statute forbidding credit for liquors; 50 N. C. 428.

Medicated bitters producing intoxication are intoxicating liquors where the compound is reasonably liable to be used as an intoxicating beverage; 21 Tex. App. 353; 36 Ark. 258; 103 Mass. 452; 25 Kan. 757; 80 Mo. 303; but not where their use as a beverage is rendered practically impossible by reason of other ingredients; 87 Ala. 17; or where made and sold in good faith for medicinal purposes; 33 Vt. 656.

The test whether roots and tinctures change liquor into medicine is whether liquor loses its distinctive character by their introduction so that it is no longer desirable as a beverage; 38 Ia. 426. See 20 L. R. A. 645. The question what are vinous, spirituous, malt, or brewed liquors is one of fact for the jury; 122 Pa. 299.

The legislature of a state has plenary power over the matter of licensing the traffic in intoxicating liquors, and it may, in its discretion, fix the terms on which the license shall be granted; 64 Miss. 59; 93 Mo. 606. The intendment of law which grants such discretionary powers to license boards is that the discretionary decision shall be the result of examination and consideration; that it shall constitute a discharge of official duty and not a mere expression of personal will; 8 Mackey 99. The discretion must be a sound, legal one according to the requirements of the people, having regard to the location and the requirements of the public; 89 N. C. 171; it must be based upon the circumstances of each particular case as presented to the court, and not biased by general opinions as to the propriety of such licenses; 72 Pa. 200; favoritism and monopoly must be avoided; 103 Ill. 552; and it must not be used in an arbitrary manner; 3 Bush 147; 2 Duv. 546; 138 Ill. 401; 59 Mich. 78; 33 Fed. Rep. 117; 138 Pa. 116. It will not be assumed that the court acted in such a manner; 61 Conn. 39. Discretion cannot be used to grant licenses to act retrospectively in order to condone an offence previously committed; 22 Ark. 253. Where no discretion is given by a municipal ordinance as to the number and locality of liquor shops, it is held that the authorities can exercise none; 138 Ill. 401; see 33 Fed. Rep. 117; but where discretion is conferred, a license may be refused where the locality is already overcrowded with liquor shops; 16 N. Y. Supp. 498. Such a board must, however, consider all the merits before it can legally refuse a license; 4 Misc. Rep. 6.

A license court may not bargain with an applicant and exact a promise as a condition; nor refuse a license to one because "he made a promise last year not to apply for a license this year"; 5 Super. Ct. Pa. 1.

A statute authorizing county councils to create excise boards, which, when created, shall be vested with certain well defined powers, is not a delegation of powers, as such powers are vested by the statute in the board to be created; 42 N. J. L. 74; but when the licensing power is expressly conferred upon the council, it cannot be delegated to the mayor by ordinance: 72 Ill. 462; nor can county commissioners with statutory authority to license a saloon, confer that power on a county attorney: 16 Minn. 381; or upon the clerk of the board; 77 Ga. 662.

When the performance of an act rests, by statute, on the discretion of a person or depends on the exercise of personal judgment, mandamus will not lie to compel its performance; 59 Md. 283; 29 La. Ann. 264; 64 Mich. 597; 21 Fla. 1; 43 Ohio St. 652; 78 Ga. 120; 34 Ark. 394: and where there is no ordinance rendering it a legal obligation to grant a license, a mandamus will not lie to compel its issuance; 3 Ill. App. 465; see 119 Ind. 194; 141 Mass. 23 (distinguishing 136 *id.* 50); 93 Mo. 499; 12 Neb. 54; 1 Hill 655; 107 N. C. 335; 72 Pa. 200; a court will

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not review on *certiorari* the refusal of a board of excise commissioners to grant a license, where its action was not upon illegal grounds; 23 N. Y. S. 695.

A license to sell liquors is a privilege and not property, and the forfeiture of a license does not deprive the licensee of property without due process of law; 13 S. E. Rep. (Ga.) 197; it cannot be levied upon by the sheriff and sold; 6 Dist. Rep. Pa. 408; nor can it be transferred unless such transfer is approved by the authorities empowered to grant licenses; 125 Pa. 412.

Within the meaning of an act prescribing the qualifications of the person licensed, the word *person* is held not to embrace an incorporated club, and the sales of liquor by a *bona fide* social club with limited membership, the property of which is actually owned by its members, and admission to which cannot be obtained by persons at pleasure, are held not illegal, within the prohibition against sales by unlicensed persons; 28 S. W. Rep. (Mo.) 604; 33 S. W. Rep. (Tex.) 113; 15 Va. L. J. 226; the general rule seems to be that clubs are not subject to the license laws; 55 Md. 566; L. R. 8 Q. B. Div. 373; 146 Mass. 139; as the furnishing of liquors to the members and their friends at a club house is no more a violation of the law than it would be if such entertainment were given at a private house; 20 N. Y. S. R. 409; citing 145 Mass. 119. In Pennsylvania it is held that in view of the fact that clubs had openly and notoriously furnished liquors to the members thereof for a long period of years before the license law was passed, the supposition is that if the legislature had intended to prohibit the practice, it would have done so in direct terms; 177 Pa. 224. But other cases have held that clubs are subject to the license laws; 48 Ind. 21; 74 Mich. 250; 115 N. Y. 427; 79 Ill. 85; 7 Lea 291; 59 Ala. 34, where the steward was punished as an unlicensed seller of intoxicating liquor. And they have been required to pay the license tax imposed upon retailers; 92 Ky. 309; 41 N. W. Rep. (Mich.) 908; 12 So. Rep. (Ala.) 895; 69 Miss. 218. Any sale by a club to its members in violation of a prohibition or local option law is illegal; 73 Md. 97; 95 N. C. 633; and the club is subjected to the annulment of its charter; 73 Md. 97. Even a *bona fide* social club cannot sell on Sunday to persons not members; 153 Pa. 502.

The steward of a social club which is run as a cover for the sale of liquor without license may be punished in the same manner as the bar-tender of an unlicensed saloon; 148 Pa. 552.

A sale of intoxicating liquor to a habitual drunkard, after notification from his wife, in violation of a statute making such sale a misdemeanor, is such negligence as to enable the wife to maintain an action for injuries to him resulting from such sale; 97 Tenn. 220. Under the Illinois statutes all who furnish intoxicating liquors which contribute to the habit of drunkenness are liable for injuries resulting from habitual intoxication; 67 Ill. App. 404; and it was held that a parent had a right of action against a liquor seller and his bondsmen, both for the death of a minor son caused by intoxication resulting from the sale of liquor to him, and also for loss of his services; 48 Neb. 852. A mother who is injured in her means of support by the death of her son through intoxication may recover from the owner of the premises on which the liquor was sold, the premises having been leased for the purpose of liquor-selling; 90 Hun 43. See CIVIL DAMAGE ACTS.

Where there are statutory provisions against the sale of liquor to minors, it is no excuse that the vendor is ignorant that the buyer is a minor, even if he attempts to ascertain the truth before furnishing the liquor; 127 Pa. 330; 4 Dist. Rep. (Pa.) 461; or if the minor made affidavit that he was of age; 60 N. W. Rep. (S. D.) 853; but it is held that the vendor's knowledge of the purchaser's minority must be shown beyond a reasonable doubt; 25 S. W. Rep. (Tex.) 23.

Where the minor brings a written order from an adult by whom he is employed, the sale is to the adult; 49 Mo. App. 398, *contra*, where the order is verbal only; *id.*; and the latter is so, even if the minor has been in the habit of bringing *bona fide* orders and if he once drink the liquor himself, the sale is to him; 89 Ga. 785. It has even been held that the sale is to the minor when he actually delivered the liquor to his employer, where such sale was on a verbal order; 30 Tex. App. 391; but see 16 S. W. Rep. (Ark.) 571, where the sale is held to be to the adult if the minor is known to be doing an errand. The fact that a minor has no parent or guardian to give their written consent will not justify a sale without it; 29 S. W. Rep. (Tex.) 490.

That a state may, under its police power, regulate or even prohibit the manufacture and sale of intoxicating liquors is settled by many state and federal cases; 123 U. S. 623; 80 Fed. Rep. 786; 165 U. S. 58; it may, by statute, prohibit the gift of such liquor to one visibly affected by it though the recipient be a friend and the gift made in a social manner; 126 Pa. 602. It may prohibit the manufacture of liquor even though intended for exportation and not for use within the state; 72 Ia. 348; 128 U. S. 1.

Prior to the fourteenth amendment, no question was raised as to this right of the states; 18 Wall. 129; it is justified by the rule that while power does not exist with the whole people to control rights which are exclusively private, government may require each citizen so to conduct himself and use his own property as not necessarily to injure another; 94 U. S. 113; 123 *id.* 623.

But a state in the exercise of its police power may not interfere with commerce between the states; 116 U. S. 446; and it cannot forbid the importation of intoxicating liquors; 135 U. S. 100; 140 *id.* 564; 67

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Fed. Rep. 854; 80 *id.* 786; 82 *id.* 199; nor can it by statute impose a tax or duty on persons who, not having their principal place of business within the state, engage in the business of selling liquors therein; 116 U. S. 446; or forbid common carriers from bringing them into the state without having been furnished with a certificate that the consignee was authorized to sell liquors; 125 U. S. 465.

Under the prohibition law in Iowa, it was held that sales of liquor in the original packages were prohibited; 70 Ia. 271; but the supreme court held in the case of Leisy *v.* Hardin that, in the absence of congressional permission, a state had no right to interfere with the sale, by an importer, of liquors imported from another state in original packages, as such an action interfered with the right of congress to regulate commerce; 135 U. S. 100. This case induced the passage of the act of August 8, 1890 (the Wilson Bill); 165 U. S. 58, which provides that all fermented, distilled, or intoxicating liquors transported into any state for use therein, regardless of whether they are in the original packages or not, shall be subject to the police laws of such state. This act was held constitutional as a valid exercise of the police powers vested in congress; 43 Fed. Rep. 556; 140 U. S. 545; by it congress has declared when imported property shall be subject to state laws, but the states are not authorized to declare when such goods become the subject of their control; 43 Fed. Rep. 653. Under the South Carolina dispensary act, the state itself engages in the business of importing liquors for the purpose of profit, to the state, and thus recognizes that their use is lawful. She cannot, therefore, under her constitutional obligations to other states, control, hinder, and burden commerce in such articles between their citizens and her own; 67 Fed. Rep. 854, affirmed in 165 U. S. 58.

In this case the question whether a state could, under the constitution, confer upon certain officers or agents the sole power to buy all liquors sold in the state, and allow no other liquor to be sold, was reserved for future decision, it not being necessary to decide it at that time. And in 80 Fed. Rep. 786, under a subsequent amended statute, it was held that such officers could not seize original packages shipped into the state in violation of a provision of such statute that a sample of the contents should be first furnished to the state inspector, as such a provision could not be justified as an inspection law and was an interference with interstate commerce and in itself void. Affirmed as to this point in the supreme court; 18 Sup. Ct. Rep. 674; but reversed as to the right of the state to prohibit and regulate the sale of liquors even in the original package. (Fuller C. J., Shiras and McKenna, JJ., dissenting as to the point reversed.) See ORIGINAL PACKAGE.

In its general provisions, the dispensary act does not conflict with the constitution of the United States; 54 Fed. Rep. 969; but in so far as its provisions conflict with interstate commerce, it is void; 57 *id.* 570; 82 *id.* 19. But when once a sale has been made of an original package and it has been delivered within the state, it cannot be again sold by its recipient or by any one else without violation of the law; 82 Fed. Rep. 19.

Property used for the manufacture and sale of intoxicating liquor may be declared a common nuisance, and as such abated; 128 U. S. 1; 123 *id.* 623; and the abatement of such a nuisance is not a taking of property without due process of law; 123 U. S. 623; 128 *id.* 1. See NUISANCE.

A right of property in whisky cannot shield one from the consequences of his unlawful acts in keeping such whisky for illegal sale; 7 L. R. A. 295.

In a few of the states there are constitutional provisions respecting the liquor traffic. In Maine, Iowa, and Kansas the manufacture and sale are prohibited except for medical, scientific, and mechanical purposes; cider being excepted in the first named state. In Louisiana and West Virginia there are provisions authorizing its regulation, or, in the last named state, its prohibition. In Texas and Delaware there are constitutional provisions for local option (*q. v.*).

Acts have been passed, mainly in 1895, by which provision is made for the instruction of children in the schools as to the physiological effects of alcohol and narcotics. Such provisions are in force in New Hampshire, Vermont, New York, New Jersey, South Carolina, Tennessee, and Indiana. Of the same character are statutes prohibiting the employment of women where liquor is sold in New York, Washington, and Louisiana. They are held to be constitutional; 83 Fed. Rep. 157. So in Maryland and Arkansas clubs are prohibited from furnishing liquors without a license. Similar statutes prohibit the sale of liquor near schoolhouses in Minnesota and Georgia; or charitable institutions in Connecticut; or at the capitol in Nevada. There are acts forbidding the sale of liquor to inmates of soldiers' homes in Kansas, or within one and one half miles of same in Ohio, California, and Wisconsin, or to Indians in Nebraska, Arizona, and California. Police officers are forbidden to be interested in the manufacture or sale of liquors in New York. In Maine, Rhode Island, Illinois, and Alabama houses used for the illegal sale of intoxicating liquor are declared by statute to be nuisances for which the landlord may terminate the lease. In Connecticut a contract, part of the consideration of which is the illegal sale of liquor, is void.

See Rep. Am. Bar Ass'n (1897) 230; LOCAL OPTION; DELEGATION.

**LIRA.** The name of a foreign coin.

In all computations at the custom-house, the lira of Sardinia shall be estimated at eighteen cents and six mills; Act of March 22, 1846; the lira of the Lombardo-Venetian kingdom, and the lira of Tuscany at sixteen cents: Act of March 22, 1846.

**LIS.** A controversy; an action at law.

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**LIS ALIBI PENDENS.** A suit pending elsewhere. Where proceedings are pending in one court between plaintiff and defendant in respect to a given matter, it has been used as a ground for preventing the plaintiff from entering proceedings in another court against the same defendant and for the same cause of action. See AUTER ACTION PENDANT.

**LIS MOTA** (Lat.). A controversy begun, *i. e.* on the point at issue, and prior to commencement of judicial proceedings.

The arising of that state of facts on which the claim is founded. 6 C. & P. 552.

Such a controversy is taken to arise on the advent of the state of facts on which the claim rests; and after such controversy has arisen (*post litem motam*) no declarations of deceased members of the family as to matters of pedigree are admissible; Steph. Ev. § 31; Tayl. Ev. 554; 6 C. & P. 560; 4 Campb. 417; 2 Russ. & M. 161; Greenl. Ev. § 131; 4 M. & S. 497; 1 Pet. 337; 26 Barb. 177.

There is no *lis mota* till a dispute has arisen; it is not enough that a right of action has arisen or a cause of action accrued; 2 Sw. & Tr. 170. The dispute need not be between the same parties; 15 Q. B. D. 114.

**LIS PENDENS** (Lat.). A pending suit. Suing out a writ and making attachment (on mesne process) constitute a *lis pendens* at common law. 21 N. H. 570.

The doctrine of *lis pendens*, as usually understood, is the control which a court has over the property involved in a suit, during the continuance of the proceedings, and until its final judgment has been rendered therein.

"The established rule is that a *lis pendens*, duly prosecuted and not collusive, is notice to a purchaser so as to effect and bind his interest by the decree; and the *lis pendens* begins from the service of the subpœna after the bill is filed." 1 Johns. Ch. 566. This was said to be the "fundamental proposition" of the doctrine; 97 U. S. 106.

The purpose of the rule is to keep the subject-matter of the litigation within the power of the court until the judgment or decree shall be entered; otherwise by successive alienations pending the litigation, its judgment or decree could be rendered abortive and thus make it impossible for the court to execute its judgment or decree; 17 Or. 499. The rule will be applied even in a case where it is a physical impossibility that the purchaser could have known of the existence of the suit; 2 Rand. Va. 93. It was formulated in Lord Bacon's twelfth ordinance. There were earlier cases, the first being reported in Cro. Eliz. 677. See Bennett, *Lis Pendens*.

An alienee, during the pendency of a suit, is bound by the proceedings therein subsequent to the alienation, though before he became a party; 4 Beav. 40; 5 Mich. 456; 22 Barb. 166; 27 Pa. 418; 7 Blackf. 242.

Purchasers during the pendency of a suit are bound by the decree in the suit without being made parties; 4 Russ. 372; 1 Dan. Ch. Pr. 375; Story, Eq. Pl. § 351 *a*; 32 Ala. N. S. 451; 11 Mo. 519; 96 *id.* 271; 30 Miss. 27; 12 La. An. 776; 6 Barb. 133; 27 Pa. 418; 16 Ill. 225; 9 B. Monr. 220; 11 Ind. 443; see 130 U. S. 565; 78 Cal. 152; and will not be protected because they paid value and had no actual notice of the suit; 35 Conn. 250; 6 Ia. 258; 86 Ky. 240; 131 Ind. 455. A purchaser *pendente lite* cannot litigate, over again in an original independent suit, the matters determined in a suit to which his vendor was a party; 131 U. S. 352; a purchaser is only chargeable with notice when the purchase is from a party to the suit; 121 Pa. 130.

So also is the doctrine applied to a purchaser during a suit to avoid a conveyance as fraudulent; 5 T. B. Monr. 373; 6 B. Monr. 18.

A citizen of the United States residing in a different state from that in which the suit is pending, is bound by the rule regarding purchasers *pendente lite;* 9 Pet. 86; and actual notice of the pendency of the suit is not necessary; 9 Dana 372. See 12 Cent. L. J. 101. It is said that the doctrine has no force or operation beyond the boundaries of the state where the suit is pending; 96 Mo. 149; but this does not, of course apply to a case where the court has jurisdiction of the *res* and of the party. The doctrine cannot be made applicable by state laws or decisions to negotiable instruments so as to affect persons not residing and not being within the state; 119 U. S. 680.

*Lis pendens* by a mortgagor under a prior unrecorded mortgage is notice to a second mortgagee; 9 Ala. N. S. 921. But see 2 Rand. 93. One taking a mortgage on property while a proceeding to foreclose a vendor's lien thereon is pending, is bound by a decree in such proceedings as if a party thereto, and has no right of redemption other than that given by statute; 96 Ala. 421.

The rule does not apply where a title imperfect before suit brought, is perfected during its pendency; 4 Cow. 667; 14 Ohio 323.

The doctrine of *lis pendens* has been said to be an equitable doctrine only; 28 Conn. 593; but when one comes into possession of the subject of litigation, during proceedings in ejectment, he will be bound by the judgment, though not a party, and may be ejected under the judgment against his grantor; Wade, Notice; 1 McLean 87; 9 Cow. 233.

In law, the same effect is produced by the rule that each purchaser takes the title of his vendor only; 11 Md. 519; 27 Pa. 418; 6 Barb. 133; 30 Miss. 27; 5 Mich. 456. This doctrine was originally confined to controversies over real estate; 22 Ala. 760; 30 Mo. 462; 2 Johns. Ch. 444; but a purchaser of securities *pendente lite* has been decreed to surrender them upon receiving the sum he had paid for them; 1 Desaus. 167; and the principle has been extended to a bond and mortgage, assigned by a trustee, pend-

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ing a suit by the *cestui que trust;* 2 Johns. Ch. 441. It is now applied, in some cases to personal property; Freem. Judg. § 194; as stocks; 20 Johns. 554; 48 Barb. 649, reversed in 48 N. Y. 585. See 57 N. Y. 617; furniture; 2 Edw. Ch. 31; steamboats; 15 Mo. App. 551; choses in action, such as a bond and mortgage; 2 Johns. Ch. 441, approved in 97 U. S. 106. Some cases hold that it does not apply to personalty; 60 La. 168; 22 Ala. 760. The question is said to be unsettled as to cash and movable personalty; 2 Johns. Ch. 441; 97 U. S. 96. It does not apply to negotiable instruments; 97 U. S. 96; 119 *id.* 680; 100 *id.* 589; 147 *id.* 59; 22 Ala. 760; 38 Ga. 18; including municipal bonds; 97 U. S. 96; 111 *id.* 556; 119 *id.* 692; 54 Fed. Rep. 759; but see 37 Pa. 355 as to the latter. "Rights to real property and personal chattels, within the jurisdiction of the court, and subject to its power, may be affected by *lis pendens*, but not those acquired by the transfer of negotiable securities, or by the sale of articles in market overt in the usual course of trade;" 119 U. S. 693.

In divorce there is no *lis pendens* before decree as to the property included in the marriage settlement; 7 P. D. 228.

The doctrine does not apply to negotiable paper; 50 Fed. Rep. 155; a *bona fide* holder of which is not subject to it, even if purchased during the pendency of a suit in which its issue was finally declared invalid; 54 Fed. Rep. 759.

The proceedings must relate directly to the specific property in question; 1 Strobh. Eq. 180; 7 Blackf. 242; 7 Md. 537; Story, Eq. 13th ed. § 405; 1 Hill. Vend. 411; and the rule applies to no other suits; 1 M'Cord Ch. 252.

*Lis pendens* is said to be general notice to all the world; see Story, Eq. Jur. § 405; Ambl. 676; 2 P. Wms. 282; 3 Atk. 343; 1 Vern. 286; 3 Hayw. 147; 1 Johns. Ch. 556 (a leading case); but it has been said that it is not correct to speak of it as a part of the doctrine of notice; the purchaser *pendente lite* is affected, not by notice, but because the law does not allow litigating parties to give to others, pending the litigation, rights to the property in dispute so as to prejudice the opposite party. Per Cranworth, C., in 1 De G. & J. 566. The doctrine rests upon public policy, not notice; 2 Rand. 93; 10 W. N. C. (Pa). 389; Beach, Eq. Jur. § 374; Bisph. Eq. 274; 1 Johns. Ch. 566.

Filing a judgment creditor's bill constitutes a *lis pendens;* 4 Edw. Ch. 29. A petition by heirs to sell real estate is not a *lis pendens;* 14 B. Monr. 164. Generally, suit is not pending till service of process; 57 Mo. 362; 14 Pet. 322; 1 Sandf. 731; Wade, Notice 152; but see 30 Tex. 494; 10 Ark. 479; 64 Mo. 519. Where service is by advertising, *lis pendens* does not attach till the completion of the advertising; 4 Kan. 282.

Only unreasonable and unusual negligence in the prosecution of a suit will take away its character as a *lis pendens*; 18 B. Monr. 230; 11 *id.* 297; 10 Ky. Law. R. 750; but it is held that there must be an active prosecution to keep it alive; 1 Vern. 286; 1 Russ. & M. 617; 30 Mo. 432; 9 Paige 512; 21 Ia. 421. But as long as the court retains jurisdiction, the doctrine applies; Benn. *Lis Pend.* 172.

The court must have jurisdiction over the property involved; Benn. *Lis Pend.* 153; and the property must be sufficiently described to establish its identity; *id.;* and the party who holds the title must be before the court as a party; *id.* 162. But this would not be required in proceedings to enforce a lien on property within the jurisdiction of the court.

Filing the bill and serving a subpœna creates a *lis pendens* in equity; Tiedm. Eq. Jur. § 95; 1 Vern. 318; 7 Beav. 444; 27 Mo. 560; 4 Sneed 672; 26 Miss. 397; 9 Paige Ch. 512; 22 Ala N. S. 743; 7 Blackf. 242; 130 U. S. 565; 2 Rand. Va. 93; see 155 Pa. 10; which the final decree terminates; 1 Vern. 318. Amendment of the bill after demurrer has been sustained thereto relates back to the filing of the bill, so far as the doctrine of *lis pendens* is concerned; 61 Fed. Rep. 481. In the civil law, an action is not said to be pending till it reaches the stage of *contestatio litis.*

In equity, the *lis pendens* relates to the service of the subpœna, and not to the day on which it was issued; 30 W. Va. 687; 130 U. S. 565.

A voluntary assignment during the pendency of a suit does not affect the rights of other parties, if not disclosed, except so far as the alienation may disable the party from performing the decree of the court; Story, Eq. Pl. § 351; 15 Tex. 495; 22 Barb. 666; as in the case of mortgage by a tenant in common of his undivided interest, and subsequent partition; 2 Sandf. Ch. 98.

An involuntary assignment by a plaintiff, as under the bankrupt or insolvent laws, renders the suit so defective that it cannot be prosecuted if the defendant objects; 7 Paige Ch. 287; 4 Ves. 387; 9 Wend. 649; 1 Hare 621; Story, Eq. Pl. § 349. Not if made under the bankrupt law of 1841; 27 Barb. 252.

The same may be said of a voluntary assignment of all his interest by a sole complainant: 5 Hare 223; Story, Eq. Pl. § 349.

A debtor need not pay to either party *pendente lite;* 1 Paige 490.

The doctrine of *lis pendens* is modified in many of the states of the United States, and by statutes requiring records of the attachment to preliminary proceedings to be made, and constituting such records notice. See stat. 2 and 3 Vict. c. 11, § 7; and statutes of the various states.

The phrase is sometimes incorrectly used as a substitute for *auter action pendant*, (*q. v.*). See 1 La. An. 46; 21 N. H. 570.

"It is part of our fast decaying real property system; it belongs to the palmy days of conveyancing." 11 Law. Quart. Rev. 6.

See Wade, Notice; 4 Cent. L. J. 27; 14 Am. Dec. 774; Whitney, *Lis Pendens* (publication as a serial commenced 57 Alb. L. J. No. 17, since this title was in type). See

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also 4 Cent. L. J. 27; 26 *id.* 411; 31 *id.* 53; 14 Am. Dec. 774; 6 N. Y. Chy. Reprint 1097, note; 7 *id.* 381, note; 27 Abb. N. C. 318; 7 Can. L. T. 205; 38 Sol. J. 677; 73 Mo. 105; and a comprehensive note upon the subject generally, 2 L. R. A. 48.

**LIST.** A table of cases arranged for trial or argument; as, the trial list, the argument list.

A list may consist of a single item; 14 N. H. 85. See 83 Ky. 162. Where a notice is required to be directed to a person at his abode as described in a list of voters, it must be at the place therein mentioned, even if erroneous; L. R. 9 C. P. 233. The subscription list of a newspaper is property only as connected with the newspaper plant and not separate from it; 2 Watts 111. See 1 Pars. 270; 5 W. & S. 521. See CIVIL LIST.

**LISTERS.** This word is used in some of the states to designate the persons appointed to make lists of taxables. See Vt. Rev. Stat.

**LITE PENDENTE.** Pending suit.

**LITERÆ.** Letters. A term which in old English law was applied to instruments in writing, public and private.

**LITERÆ MORTUÆ.** Read letters; fulfilling words of a statute. Bacon, Works IV. 189.

**LITERÆ PATENTES.** Letters patent. Literally, open letters.

**LITERÆ PROCURATORIÆ** (Lat.). **In Civil Law.** Letters procuratory. A written authority, or power of attorney (*litera attornati*), given to a procurator. Vicat, Voc. Jur. Utr.; Bracton, fol. 40–43.

**LITERAL.** According to the language; following the exact words. Literal construction of a document, adheres closely to the words, making no difference for extrinsic circumstances.

**LITERAL CONTRACT. In Civil Law.** A contract the whole of the evidence of which is reduced to writing, and binds the party who subscribed it, although he has received no consideration. Lec. Elém. § 887.

**LITERAL PROOF. In Civil Law.** Written evidence.

**LITERARY PROPERTY.** The general term which describes the interest of an author in his works, or of those who claim under him, whether before or after publication, or before or after a copyright has been secured. 9 Am. L. Reg. 44; 4 Du. N. Y. 379; 11 How. Pr. 49; Curtis, Copyr.; 2 Bla. Com. 405; 4 Viner Abr. 278; Bacon Abr. *Prorogation* (F. 5); 2 Kent 306; 1 Belt Suppl. Ves. Jr. 360; 2 *id.* 469; Nickl. Lit. Prop.; 1 Chitty Pr. 98; 2 Am. Jur. 248; 10 *id.* 62; 1 Bell Com. b. 1, part 2, c. 4, s. 2, p. 115; Shortt, Copyr.; Morgan, Law of Lit. A person has a property in his literary productions, and by the common law, as long as they are kept within his possession, he has the same right of exclusive enjoyment of them as of any other species of personal property; 75 Ill. 475. See 4 H. L. C. 962; 50 How. Pr. 194. See COPYRIGHT; MANUSCRIPT.

**LITERIS OBLIGATIO. In Roman Law.** An obligation created by an entry made in one of the books kept by the head of a Roman family, called the *codex accepti et expensi*. The creditor made an entry to the effect that a certain sum had been paid by him to the debtor, and the debtor made a corresponding entry indicating such a payment to him by the creditor; but it was sufficient if the creditor's entry was made by direction of the debtor, in which case an entry by the debtor was unnecessary. The effect was to constitute an obligation under which the debtor was liable, whether the money was actually paid or not. He was said to be bound *literis*, *i. e.* by the writing in the *codex* as such. The entry itself created the obligation to pay. It was immaterial whether it was based upon an obligation to pay existing in fact.

The item in the *codex* was called the *nomen*, and this species of contract might either create an obligation or transform one, *i. e.* operate as a novation, in which case it was called *nomen transcripticium*. The *literis obligatio* was distinguished from the *nomen arcarium*, another species of entry in the *codex accepti et expensi*. This has been termed a mere cash item. It was an entry of a concrete or existing ground of obligation, in which case the obligation continued to be based on the loan or *depositum*, or whatever might be its original character, and was not converted into *literis obligatio*. In the time of the empire the literal contract fell into disuse.

The three classes of books kept by the *paterfamilias* were. (1) the *liber patrimonii*, or *libellus familiæ*, in which was kept inventories of the property, and *liber kalendarii*, which was a list of capital sums let out at interest; (2) the *codex rationum*, which was the regular account book in which were entered receipts and expenses; (3) the *codex accepti et expensi*, designed not merely to afford evidence of, but also to affect, changes in the state of a person's property.

Gaius, Inst. III. §§ 128-31, describes the *literis obligatio* as being made in two ways: (1) *A re in personam*, where the obligation was entered in the form of a debt under the name of the original purchaser or debtor; (2) *a persona in personam*, where a debt already standing under one *nomen* was transferred by novation from that one to another. Some writers lay great stress upon the fact that the obligation *a re in personam* was first entered as a memorandum in a day book or waste book (*adversaria ephemeris*), but it has been truly remarked that this fact, although indisputable, has no legal importance; and this is apparent from the nature of the two transactions.

There is some difference in the statement of these obligations by different authors, but that which is here given is the result of the more recent investigations, having been established by Voigt, Abhandl. der Koen. Saechs. Gesellschaft der Wissenschaften, vol. 10, 515.

See Sohm., Inst. Rom. L. § 68 and note 1, where reference may be found to the authors on the subject.

**LITHOGRAPH.** A print from a drawing on stone. Chromo lithographs are dutiable as printed matter and not as manufactures of paper. See 97 U. S. 368; 15 & 16 Vict. c. 12, s. 14.

**LITIGANT.** One engaged in a suit.

**LITIGATION.** A contest, authorized by law, in a court of justice, for the purpose of enforcing a right.

In order to prevent injustice, courts of

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equity formerly restrained a party from further litigation, by a writ of injunction: for example, after two verdicts on trials at bar, in favor of the plaintiff, a perpetual injunction was decreed; Stra. 404. And not only between two individuals will a court of equity grant this relief, as in the above case of several ejectments, but also, when one general legal right, as a right of fishery, is claimed against several distinct persons, in which case there would be no end of bringing actions, since each action would only bind the particular right in question between the plaintiff and defendant in such action, without deciding the general right claimed; 2 Atk. 484; 2 Ves. 587.

**LITIGIOSITY. In Scotch Law.** The pendency of a suit: it is an implied prohibition of alienation, to the disappointment of an action, or of diligence, the direct object of which is to obtain possession, or to acquire the property of a particular subject. The effect of it is analogous to that of inhibition. 2 Bell, Com., 5th ed. 152.

**LITIGIOUS.** That which is the subject of a suit or action; that which is contested in a court of justice. In another sense, litigious signifies a disposition to sue; a fondness for litigation. See VEXATIOUS ACTIONS ACT.

**In Ecclesiastical Law.** A church is said to be litigious, when two rival presentations are offered to the bishop upon the same avoidance of the living. Moz. & W.; 3 Steph. Com. 417.

**LITIGIOUS RIGHTS. In French Law.** Those which are or may be contested either in whole or in part, whether an action has been commenced, or when there is reason to apprehend one. Pothier, *Vente*, n. 584; 9 Mart. La. 183; Troplong, *De la Vente*, n. 984 à 1003; Eva. Civ. Code, art. 2623; *id.* 3522, n. 22. See CONTENTIOUS JURISDICTION.

**LITIS ÆSTIMATIO.** The measure of damages (*q. v.*).

**LITIS CONTESTATIO. In Civil Law.** The process by which a suit is contested by the opposing statements of the respective parties, to attain an issue: the issue itself.

**In Ecclesiastical Law.** The issue of an action; the general answer of the defendant denying matter charged against him in a libel. Hallifax, Civ. L. b. 3, c. 11, No. 9.

**LITIS DOMINIUM. In Civil Law.** Direction of a suit. A fiction of law authorizing the appointment of an attorney, by which appointment he was supposed to become *dominus litis*.

**LITISPENDENCIA. In Spanish Law.** Litispendency. The condition of a suit pending in a court of justice.

In order to render this condition valid, it is necessary that the judge be competent to take cognizance of the cause; that the defendant has been duly cited to appear, and fully informed, in due time and form, of the nature of the demand, or that, if he has not, it has been through his own fault or fraud.

The litispendencia produces two effects: the legal impossibility of alienating the property in dispute during the pendency of the suit; the accumulation of all the proceedings in the cause, in the tribunal where the suit is pending, whether the same be had before the same judge or other judges or notaries. This cumulation may be required in any stage of the cause, and forms a valid exception to the further proceeding, until the cumulation is effected. Escriche, Dict.

**LITRE.** A French measure of capacity. It is of the size of a cubic décimètre, or the cube of one-tenth part of a metre. It is equal to 61.027 cubic inches, or a little more than a quart. See MEASURE.

**LITTORAL** (*littus*). Belonging to shore: as of sea and great lakes. Webst. Corresponding to riparian proprietors on a stream or small pond are littoral proprietors on a sea or lake. But riparian is also used coextensively with littoral. 7 Cush. 94. See 17 How. 426.

**LITURA. In Civil Law.** An obliteration or blot in a will or other instrument.

**LITUS. In Old European Law.** A person who surrendered himself into another's power; a kind of servant.

**LITUS MARIS** (Lat.). **In Civil Law.** Shore; beach. *Qua fluctus eluderet.* Cic. Top. c. 7. *Qua fluctus adludit.* Quinct. lib. 5, c. ult. *Quousque maximus fluctus a mari pervenit.* Celsus; said to have been first so defined by Cicero, in an award as arbitrator. L. 92, D, *de verb signif. Qua maximus fluctus exæstuat.* L. 112, D, *eod. tit. Qua tenus hibernus fluctus maximus excurrit.* Inst. lib. 2, *de rer. divis. et qual.* § 3. That is to say, as far as the largest winter wave runs up. Vocab. Jur. Utr.

**At Common Law.** The shore between common high-water mark and low-water mark. Hale, *de Jure Maris*, cc. 4, 5, 6; 3 Kent 427; 2 Hill. R. P. 90.

Shore is also used of a river. 5 Wheat. 385; 20 Wend. 149. See 13 How. 381; 28 Me. 180; 14 Pa. 171. See SHORE.

**LIVE.** "Live animals" has been held to include singing birds. 7 Blatchf. 235. "Live stock" has been held not to include live fowls. 5 Blatchf. 520.

**LIVE AND RESIDE.** Where, in the gift of a house, there was a condition that the donee should "live and reside" therein, it was held that the word "live" added nothing to its point. T. & R. 530.

**LIVELIHOOD.** Means of subsistence or maintaining life; means of living. 3 Atk. 399; 1 Yeates 432. See 16 East 147; 5 L. J. Ex. 268.

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**LIVERY. In English Law.** The delivery of possession of lands to those tenants who hold of the king *in capite* or by knight's service.

The name of a writ which lay for the heir of age to obtain possession of the seisin of his lands at the king's hands; abolished by stat. 12 Car. II. c. 24. Fitzh. N. B. 155; 2 Bla. Com. 68.

The distinguishing dress worn by the servants of a gentleman or nobleman, or by the members of a particular guild. "Livery or clothing." Say. 274. By stat. 1 Rich. II. c. 7, and 16 Rich. II. c. 4, none but the servants of a lord, and continually dwelling in his house, or those above the rank of yeomen, should wear the lord's livery.

The clothes supplied by a master for his servants' use belong to the master; 3 C. & P. 470. See Stubbs, Const. Hist. 470.

Privilege of a particular company or guild. The members of such company are called liverymen. Whart. Lex.

**LIVERY IN CHIVALRY. In Feudal Law.** The delivery of the property of a ward in chivalry out of the guardian's hands, upon the heir's attaining the required age. 2 Bla. Com. 68.

**LIVERY OF SEISIN. In Estates.** A delivery of possession of lands, tenements, and hereditaments unto one entitled to the same. This was a ceremony used in the common law for the conveyance of real estate; and livery was in *deed*, which was performed by the feoffor and the feoffee going upon the land and the latter receiving it from the former; or in *law*, where the same was not made on the land, but in sight of it; 2 Bla. Com. 315.

In America livery of seisin is unnecessary, it having been dispensed with either by express law or by usage. The delivery and recording of the deed have the same effect; 1 Washb. R. P., 5th ed. *14, 34. In Maryland, until more recent times, it seems that a deed could not operate as a feoffment without livery of seisin; but under the Rev. Code of 1878, art. 44, § 6, neither livery of seisin nor indenting is necessary; 5 H. & J. 158. See 4 Kent 381; 1 Mo. 553; 1 Pet. 508; 1 Bay 107; 5 H. & J. 158; 11 Me. 318; 8 Cra. 229; Dane, Abr.; Bingh. Act. and Def. 96; SEISIN.

**LIVERY OFFICE. In Old English Law.** An office for the delivery of lands.

**LIVERY STABLE.** A place where horses are groomed, fed, and hired, and where vehicles are let. 30 La. Ann. 1095.

A liveryman who lets a horse does not warrant that it is free from defects which he does not know of, and could not have discovered by the exercise of due care; and where a person is injured through such defects, the liveryman is not liable; 157 Mass. 558.

Under the contract of bailment he is required to exercise ordinary care over the property entrusted to him. He is liable for the negligence of his servants in the performance of any duty in regard to the care and custody of the property, within the general scope of his own employment; 79 Me. 480. See LIEN.

**LIVING CHILD.** A term, it is said, less broad than "issue living." 153 Mass. 527.

**LIVING WITH ME.** In a bequest to a servant the phrase "living with me" does not mean living in the testator's house but living in his service. 22 L. J. Ch. 155.

**LIVRE TOURNOIS. In Common Law.** A coin used in France before the revolution. It is to be computed in the *ad valorem* duty on goods, etc., at eighteen and a half cents. Act of March 2, 1798, § 61, 1 Story, Laws 629. See FOREIGN COINS.

**LLOYDS.** An association in the city of London, the members of which underwrite each other's policies. 2 Steph. Com., 11th ed. 138, n.

The name is derived from Lloyd's coffee house, the great resort for seafaring men and those doing business with them in the time of William III. and Anne. The affairs of the association are managed by a committee called *Lloyd's Committee*, who appoint agents in all the principal ports of the world, whose business it is to forward all such maritime news as may be of importance in guiding the judgment of the underwriters. These accounts, which arrive almost hourly from some part of the world, are at once posted up, and are called *Lloyd's Shipping Lists*. They are subsequently copied into three books, called *Lloyd's Book*. Lloyd's shipping list, stating the time of a vessel's sailing, is *prima facie* evidence of what it contains; 11 M. & W. 116; 35 Neb. 838; 67 Ga. 697; 89 Mass. 561; 31 Ark. 373; 124 Ill. 572; 21 Md. 550; 11 Beav. 283. See Moz. & W.; Arn. Ins.

**LLOYD'S BONDS.** See BOND.

**LLOYD'S INSURANCE.** A system of insurance similar to the English Lloyds, which is carried on in the United States by unincorporated associations of individuals. It originated in connection with marine risks, but has now been extended to other kinds of insurance. The principal features of the system are, that each individual assumes a liability for a specific amount; that attorneys or managers are appointed by a power of attorney authorizing them to be sued; that suits are brought against such attorneys or managers: and that each underwriter is bound by the fundamental agreement to accept the result of such suit. Such action may be maintained against the attorneys in fact; 17 App. Div. N. Y. 38; and the agreement is not repugnant to public policy; 20 Misc. Rep. 297; it is valid to prevent the institution of separate suits where the attorney is an underwriter; 19 *id.* 239. One who signs such policy as attorney for the underwriters is a "trustee of an express trust," within New York Code Civ. Proc. § 449; 19 Misc. Rep. 239. Proofs of loss are properly served at the office of the association on one acting as its attorney, even if irregularly appointed; 21 Misc. Rep. 285. The provision for simultaneous contribution and making the liability

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several, not joint, does not prevent the collection of the full proportion from each where only a portion are served; 76 Fed. Rep. 1000.

Such associations have been held subject to prosecution for unlawfully exercising a public franchise; 19 Misc. Rep. 248; 51 Ohio St. 163, where the forms of organization, power of attorney, and policy may be referred to. They are not companies; 163 Pa. 287; 118 Mo. 388; 92 Ga. 8; and unincorporated persons may be prohibited from being insurers; 164 Pa. 306; 118 *id.* 249, three judges dissenting.

**LOAD-LINE.** The depth to which a ship is loaded so as to sink in salt water.

Every owner of a British ship before entering his ship outwards from any port of the United Kingdom shall mark, in white or yellow on a dark ground, a circular disc, twelve inches in diameter, with a horizontal line eighteen inches long, through its centre, and the centre of this disc is to indicate the maximum load-line in salt water, to which the owner intends to load the ship for that voyage; Mox. & W. Coasters under eighty tons burden, fishing ships, and yachts are excepted.

**LOADMANAGE.** See LODEMANAGE.

**LOAN.** A bailment without reward. A bailment of an article for use or consumption without reward. The thing so bailed.

A loan, in general, implies that a thing is lent without reward; but, in some cases, a loan may be for a reward: as, the loan of money. 7 Pet. 109.

It would be an inquiry too purely speculative, whether this use of the term loan originated in the times when taking interest was considered usury and improper, the bailment of money which was to be returned in kind. The supposition would furnish a reasonable explanation of the exception to the general rule that loan includes properly only those bailments where no reward is given or received by the bailee.

Within the statutory and constitutional prohibition against the loaning of public funds, with or without interest, a general deposit of such funds by a public officer subject to check is not a loan; 68 N. W. Rep. (S. D.) 165. See BUILDING ASSOCIATIONS; USURY.

**LOAN CERTIFICATES.** See CLEARING HOUSE.

**LOAN FOR CONSUMPTION.** A contract by which the owner of a personal chattel, called the lender, delivers it to the bailee, called the borrower to be returned in kind.

For example, if a person borrows a bushel of wheat, and at the end of a month returns to the lender a bushel of equal value. This class of loans is commonly considered under the head of bailments; but it lacks the one essential element of bailment, that of a *return* of the property; it is more strictly a barter or an exchange: the property passes to the borrower; 4 N. Y. 76; 8 *id.* 433; 4 Ohio St. 98; 3 Mas. 478; 1 Blackf. 353; Story, Bailm. § 439. Those cases, sometimes called *ventuum* (the corresponding civil law term), such as where corn is delivered to a miller to be ground into wheat, are either cases of *hiring* of labor and service, as where the miller grinds and returns the identical wheat ground into flour, retaining a portion for his services, or constitute a mere exchange, as where he mixes the wheat with his own, undertaking to furnish an equivalent in corn. It amounts to a contract of sale, payment being stipulated for in a specified article instead of money. See IN GENERE; IN KIND; MUTUUM.

**LOAN FOR EXCHANGE.** A contract by which one delivers personal property to another, and the latter agrees to return to the lender a similar thing, without reward for its use. Cal. Civ. Code § 1902.

**LOAN FOR USE** (called, also, *commodatum*). A bailment of an article to be used by the borrower without paying for the use. 2 Kent 573.

An agreement by which a person delivers a thing to another, to use it according to its natural destination, or according to the agreement, under the obligation on the part of the borrower, to return it after he shall have done using it. La. Civ. Code (1889) Art. 2893.

Loan for use (called *commodatum* in the civil law) differs from a loan for consumption (called *mutuum* in the civil law) in this, that the *commodatum* must be specifically returned, the *mutuum* is to be returned in kind. In the case of a *commodatum*, the property in the thing remains in the lender; in a *mutuum*, the property passes to the borrower.

The loan, like other bailments, must be of some thing of a personal nature; Story, Bailm. § 223; it must be gratuitous; 2 Ld. Raym. 913; for the use of the borrower, and this as the principal object of the bailment; Story, Bailm. § 225; 13 Vt. 161; and must be lent to be specifically returned at the determination of the bailment; Story, Bailm. § 228.

The general law of contracts governs as to the capacities of the parties and the character of the use; Story, Bailm. §§ 50, 162, 302, 380. He who has a special property may loan the thing, and this even to the general owner, and the possession of the general owner still be that of a borrower; 1 Atk. 235; 8 Term 199; 2 Taunt. 268.

*The borrower* may use the thing himself, but may not, in general, allow others to use it; 1 Mod. 210; 4 Sandf. 8; during the time and for the purposes and to the extent contemplated by the parties; 5 Mass. 104; 1 Const. S. C. 121; 3 Bingh. N. C. 468. He is bound to use extraordinary diligence; 3 Bingh. N. C. 468; 14 Ill. 84; 4 Sandf. 8; Story, Bailm. § 237; is responsible for accidents, though inevitable, which injure the property during any excess of use; 5 Mass. 194; 16 Ga. 25; see 34 Neb. 426; must bear the ordinary expenses of the thing; Jones, Bailm. 67; and restore it at the time and

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place and in the manner contemplated by the contract; 16 Ga. 25; 12 Tex. 373; Story, Bailm. § 99; including, also, all accessories; 16 Ga. 25; 2 Kent 566. As to the place of delivery, see 9 Barb. 189; 1 Me. 120; 1 N. H. 295; 1 Conn. 255; 16 Mass. 453. He must, as a general rule, return it to the lender; 7 Cow. 278; 1 B. & Ad. 450; 11 Mass. 211.

*The lender* may terminate the loan at his pleasure; 9 East 49; 8 Johns. 432; 16 Ga. 25; is perhaps liable for expenses adding a permanent benefit; Story, Bailm. § 274. The lender still retains his property as against third persons, and, for some purposes, his possession; 11 Johns. 285; 13 *id.* 141, 561; 5 Mass. 303; 1 B. & Ald. 59; 2 Cr. M. & R. 659. As to whether the property is transferred by a recovery of judgment for its value, see 26 E. L. & Eq. 328; 5 Me. 147; 1 Pick. 62. See, generally, Edwards; Jones; Story, Bailments; Kent, Lect. 46. BAILMENT.

**LOAN SOCIETIES. In English Law.** A kind of club formed for the purpose of advancing money on loan to the industrial classes. They are authorized and regulated by 3 & 4 Vict. ch. 110, and 21 Vict. ch. 19.

**LOBBYIST.** One who makes it a business to procure the passage of bills pending before a legislative body.

One "who makes it a business to 'see' members and procure, by persuasion, importunity, or the use of inducements, the passing of bills, public as well as private, which involve gain to the promoters." 1 Bryce, Am. Com. 156.

A contract for the employment of personal influence or solicitation to procure the passage of a public or private law is void; 21 Barb. 361; 16 How. 314; 34 Vt. 274; 15 Ore. 330; as contrary to sound morals and tending to inefficiency in the public service; 93 Wis. 393; if by its terms or by necessary implication, it stipulates for, or tends to, corrupt action or personal solicitations; 69 U. S. 45; 98 Ind. 238; 36 N. Y. 235; 40 *id.* 543; 127 *id.* 370; 18 Ohio St. 469; 149 Pa. 375. And if the contract is broad enough to cover services of any kind, either secret or open, honest or dishonest, the law pronounces a ban upon the contract itself; 2 McArth. 268. It is not required that it tends to corruption. If its effect is to mislead, it is decisive against the claimant. It may not corrupt all, but if it corrupt or tend to corrupt some, or if it deceive or tend to deceive some, that is sufficient to stamp its character with the seal of reprobation before a judicial tribunal; 5 W. & S. 315; 7 *id.* 152; 59 Pa. 19; 100 *id.* 561. But it has been held that though the contract contemplates the use of personal solicitation, yet if no personal influence is brought to bear upon the members, and no dishonest, secret, or unfair means employed, to accomplish the object, it is not illegal; 86 Cal. 542.

Where the agreement is for compensation contingent upon success, it suggests the use of sinister and corrupt means for the accomplishment of the desired end. The law meets the suggestion of evil and strkes down the contract from its inception; 69 U. S. 45; 98 Ind. 238; and see 60 Minn. 26. But if the contract does not by its terms or by necessary implication contain anything illegal or tend to any violation of sound morals, the fatal element should not, through an overzealous desire to fortify against the deplorable effects of lobbying contracts, be injected into it by mere suspicion and conjecture that the party intended to do an illegal act or a legal act by illegal means. Presumptions in human affairs are in favor of innocence rather than of guilt, and this rule applies in testing a contract; 93 Wis. 393. In the last two cases, brought by the same plaintiff, the contracts were somewhat similar; but in the first the decision was based mainly on what was done under and before the contract was entered into, whilst that of the latter was upon the construction of the contract.

A contract for services as an attorney before a legislative body is valid; 22 Kan. 692; and where it contains an agreement to labor faithfully before such body to effect the desired end, it is not necessarily illegal; 34 Vt. 275. It is allowable to employ counsel to appear before a legislative committee or the legislature itself to advocate or oppose a measure in which the individual has an interest; 36 N. Y. 241, followed in 52 How. Pr. 144; and an agent may be authorized by the legislature to prosecute claims on behalf of the state which require the procurement of legislation, for a contingent fee; 164 Mass. 241. Services which are intended to reach only the reason of those sought to be influenced rest on the same principles of ethics as professional services and are no more exceptionable. They include drafting the petition which sets forth the claim, attending to the taking of testimony, collecting facts, preparing arguments and submitting them orally or in writing to a committee, and other services of a like character; but such services are separated by a broad line of demarcation from personal solicitation, and though compensation can be recovered for them when they stand alone, yet when they are blended and confused with those which are forbidden, the whole is a unit and indivisible, and that which is bad destroys the good; 21 Wall. 441.

In Massachusetts by statute lawyers or agents endeavoring to secure the passage of a bill must file written authority from their principal; in California, lobbying, openly practised, is declared by the constitution a felony, and in Georgia, a crime.

**LOCAL.** Relating to place. A particular place.

**LOCAL ACTION. In Practice.** An action the cause of which could have arisen in some particular county only.

All local actions must be brought in the county where the cause of action arose.

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In general, all actions are local which seek the recovery of real property; 2 W. Bla. 1070; 4 Term 504; 7 *id.* 589; 81 Tex. 382; whether founded upon contract or not; or damages for injury to such property, as waste, under the statute of Gloucester, trespass *quare clausum fregit*, trespass or case for injuries affecting things real, as for nuisances to houses or lands, disturbance of rights of way or of common, obstruction or diversion of ancient watercourses; 1 Chitty, Pl. 271; Gould, Pl. § 105; 130 Ind. 137; but not if there was a contract between the parties on which to ground an action; 15 Mass. 284; 1 Day Conn. 263.

Many actions arising out of injuries to local rights are local: as, *quare impedit*; 1 Chitty, Pl. 241. The action of replevin is also local; 1 Wms. Saund. 247, n. 1; Gould, Pl. § 111. See Gould; Chitty, Pleading; Comyns, Dig. *Action*; TRANSITORY ACTION.

**LOCAL ALLEGIANCE.** The allegiance due to a government from an alien while within its limits. 1 Bla. Com. 370; 2 Kent 63, 64.

**LOCAL COURTS.** Courts limited to a particular territory or district. The term frequently signifies the state courts in opposition to the United States courts.

**LOCAL FREIGHT.** Freight shipped from either terminus to a way station, or *vice versa*, or from one way station to another,—that is over a part of a railroad only. 61 Ala. 579.

**LOCAL GOVERNMENT.** The government of a particular locality; the governemental authority of a municipal corporation over its individual affairs by virtue of power delegated to it by the general government.

**LOCAL GOVERNMENT BOARD.** A department of State in Great Britain created in 1871 to concentrate in one department of the government the supervision of the laws relating to public health, the relief of the poor, and local government. The president is usually a member of the cabinet and has a staff of permanent assistants. The lord president of the council, all the secretaries of state, the lord privy seal, and the chancellor of the exchequer are *ex officio* members. It has the power of making regulations which have the effect of statutes. It has complete control in poor law matters; very important powers relating to the pollution of streams; the adulteration of food, etc.; vaccination; the supervision of loans by local authorities and auditing their accounts. Local authorities may ask its advice; it may investigate as to the outbreak of diseases; and must report specially as to all bills relating to public matters. See 7 Encyc. of the Laws of England.

**LOCAL LAW.** See STATUTE.

**LOCAL OPTION.** A term often used to designate a right granted by legislative enactments to the inhabitants of particular districts, to determine by ballot whether or not licenses shall be issued for the sale of intoxicating liquors within such districts.

An act of this character passed in Delaware, in 1847, was declared unconstitutional as an attempted delegation of the power to make laws, confided to the legislature; 4 Harr. 479; so, also, in Indiana and Iowa; 4 Ind. 342; 42 Ind. 547; 5 Ia. 495. This kind of legislation has been supported, however, as falling within the class of police regulations; 108 Mass. 27. In Pennsylvania, Agnew, J., in a leading opinion on this subject, says, the true distinction is this: "The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend;" 72 Pa. 491. At this time the weight of authority is in favor of the constitutionality of local option laws; 36 N. J. L. 720; 42 Conn. 364; 42 Md. 71; 96 Mo. 44; 111 *id.* 553; 91 Mich. 504. See 12 Cent. L. J. 123; 12 Am. L. Reg. N. S. 133; Cooley, Const. Lim., 2d ed. 145. See DELEGATION; LIQUOR LAWS; LEGISLATIVE POWER.

**LOCAL PREJUDICE.** Prejudice or influence warranting the removal of a cause from a state court to a federal court. 31 Fed. Rep. 53. See REMOVAL; VENUE.

**LOCAL STATUTES.** See STATUTE.

**LOCAL VENUE. In Pleading.** A venue which must be laid in a particular county.

**LOCALITY. In Scotch Law.** This name is given to a life rent created in marriage contracts in favor of the wife, instead of leaving her to her legal life rent of terce. 1 Bell, Com. 55. See JOINTURE.

**LOCATAIRE. In French Law.** A lessee, tenant, or renter.

**LOCATARIUS.** A depositee.

**LOCATE.** To ascertain the place in which something belongs, as to locate the calls in a deed or survey; to determine the place to which something shall be assigned; to fix or establish the situation of anything. Abbott.

**LOCATIO** (Lat.). **In Civil Law.** Letting for hire. Calvinus, Lex.; Voc. Jur. Utr. The term is also used by text-writers upon the law of bailment at common law. 2 Pars. Contr., 8th ed. 121. In Scotch law it is translated location. Bell, Dict.

**LOCATIO CONDUCTIO REI.** See HIRE.

**LOCATIO CUSTODIÆ. In Civil Law.** The receiving of goods on deposit for reward.

**LOCATIO OPERIS FACIENDI** (Lat.). **In Civil Law.** Hire of services to be performed. See HIRE.



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**LOCATIO OPERIS MERCIUM VEHENDARUM** (Lat.). **In Civil Law.** The carriage of goods for hire.

**LOCATION. At Common Law.** The act of selecting and designating lands which the person making the location is authorized by law to select.

It is applied among surveyors who are authorized by public authority to lay out lands by a particular warrant. The act of selecting the land designated in the warrant and surveying it is called its location. In Pennsylvania, it is an application made by any person for land, in the office of the secretary of the late land office of Pennsylvania, and entered in the books of said office, numbered and sent to the surveyor-general's office. Act June 25, 1781, § 2. It is often applied to denote the act of selecting and marking out the line upon which a railroad, canal, or highway is to be constructed.

**In Mining Law.** A parcel of land appropriated according to certain established rules, such as placing on the ground, in a conspicious position, a notice setting forth the name of the locator, the fact that it is thus taken or located, with the requisite description of the extent and boundaries of the parcel according to the local custom. 104 U. S. 649. See also U. S. Rev. Stat. § 2324.

A location cannot be validated by subsequent discovery; a prior discovery is necessary; 7 Mont. 449. See LANDS, PUBLIC.

**In Scotch Law.** See LOCATIO; BAILMENT; HIRE.

**LOCATIVE CALLS.** Calls or requirements of a deed, etc., for certain landmarks, describing certain means by which the land to be located can be identified.

Reference to physical objects in entries and deeds, by which the land to be located is exactly described. 2 Bibb 145; 3 *id.* 414.

Special, as distinguished from general, calls or descriptions; 3 Bibb 414; 2 Wheat. 211; 10 *id.* 463; 7 Pet. 171; 18 Wend. 157; 10 Gratt. 445; Jones, Law 469; 16 Ga. 141; 5 Ind. 302; 15 Mo. 80.

**LOCATOR. In Civil Law.** He who leases or lets a thing for hire to another. His duties are, *first*, to deliver to the hirer the thing hired, that he may use it; *second*, to guarantee to the hirer the free enjoyment of it; *third*, to keep the thing hired in good order in such manner that the hirer may enjoy it; *fourth*, to warrant that the thing hired has not such defects as to destroy its use. Pothier, *Contr. de Louage*, n. 53.

One who locates, or surveys lands.

The claim of a "locator" is peculiar to Kentucky, and is for a portion of the land located in compensation for his services; 4 Pet. 446. See LANDS, PUBLIC.

**LOCK-UP HOUSE.** A place used temporarily as a prison.

**LOCO PARENTIS.** See IN LOCO PARENTIS.

**LOCOMOTIVE ENGINE.** An engine which moves cars by its own forward and backward motion. 84 N. Y. 314. An ordinance regulating the speed of cars includes a locomotive engine; 150 Ill. 587.

**LOCUM TENENS.** Holding the place. A deputy. See LIEUTENANT.

**LOCUS CONTRACTUS.** See LEX LOCI.

**LOCUS CRIMINIS.** The locality or place of a crime.

**LOCUS DELICTI.** The place where the tort, offence, or injury has been committed.

**LOCUS IN QUO** (Lat. the place in which). **In Pleading.** The place where anything is alleged to have been done. 1 Salk. 94.

**LOCUS PARTITUS. In Old English Law.** A division made between two towns or counties to make trial where the land or place in question lies. Fleta, l. 4, c. xv.

**LOCUS PŒNITENTIÆ** (Lat. a place of repentance). The opportunity of withdrawing from a projected contract, before the parties are finally bound; or of abandoning the intention of committing a crime, before it has been completed. 2 Bro. C. C. 569. Until an offer is accepted by the offeree the party making it may withdraw it at any time. So of a bid at auction. "An auction is not inaptly called *locus pœnitentiæ*." 3 Term 148. See ATTEMPT; CONTRACT; REFUSAL.

**LOCUS REI SITÆ.** See LEX REI SITÆ.

**LOCUS SIGILLI** (Lat.). The place of the seal.

In many of the states, instead of sealing deeds, writs, and other papers or documents requiring it, a scroll is made, in which the letters L. S. are printed or written, which is an abbreviation of *Locus sigilli*. This, in some of the states, has all the efficacy of a seal, but in others it has no such effect. See SCROLL; SEAL.

**LOCUS STANDI** (a place of standing). A right of appearance in a court of justice or before a legislative body, on a given question. A right *to be heard*.

It is commonly used in England in reference to parliamentary practice and usually as to the passage of private bills. There is a series of reports called Locus Standi Reports in the Court of Referees. See May, Parl. Pr. 761; 9 Jurid. Rev. 47, 206; REFEREES.

**LODE.** A body of mineral or mineral-bearing rock located within defined boundaries within the general mass of the mountain. 1 McCrary 480.

A body of mineral or mineral-bearing rock in the general mass, so far as it may continue unbroken and without interrup-

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tion, whatever the boundaries may be. 143 U. S. 394; 116 *id.* 529.

Veins or lodes as used in the statutes mean lines or aggregations of metal embedded in quartz or other rock in piece; 128 U. S. 679.

"It is difficult to give any definition of the term, as understood and used in the acts of congress, which will not be subject to criticism. A fissure in the earth's crust, an opening in its rocks, a strata made by some force of nature, in which a mineral is deposited, was said to be essential to a lode in the judgment of geologists. But to the practical miner, the fissure and its walls are only of importance as indicating the boundaries within which he may look for and reasonably expect to find the ore he seeks. A continuous body of mineralized rock lying within any other well defined boundaries on the earth's surface and under it, would equally constitute in his eyes a lode. We are of the opinion, therefore, that the term as used in the acts of congress is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock." 116 U. S. 529, citing 4 Sawy. 302.

By act of congress the owner of a mineral vein or lode is entitled not only to that which is covered by the surface lines of his established claim, as those lines are extended vertically, but also to the right to possess and enjoy that lode or vein by following it when it passes outside of those vertical lines laterally; 116 U. S. 529; but this right is dependent upon its being the same vein as that within those limits; and for its exercise, it must appear that the vein outside is identical with and a continuation of the one within these lines; *id.* See 73 Cal. 169; 58 Fed. Rep. 106; LANDS, PUBLIC.

**LODE MANAGE.** The hire of a pilot, for conducting a ship from one place to another. Cowel.

The Lodesmen had a monopoly of pilotage in the *Cinque Ports* (*q. v.*). Their society was controlled by the court of lodemanage, which was transferred to the trinity house in 1853. See Lyons, *Cinque Ports.*

**LODGE.** To make, prefer, as to lodge a complaint or information; to deposit or file with.

**LODGER.** One who inhabits a portion of a house of which another has the general possession and custody.

It is difficult to state exactly the distinctions between a lodger, a guest, and a boarder. A person may be a guest at an inn without being a lodger; 1 Salk. 388; 9 Pick. 280; 25 Wend. 653, 242; 16 Ala. N. S. 666; 8 Blackf. 535; 14 Barb. 193; 6 C. B. 132. And boarder includes one who regularly takes his meals with, and forms in some degree a part of, the householder's family; 25 E. L. & Eq. 76. A lodger does not take meals in the house as lodger; but the duration of the inhabitancy is of no importance as determining his character. The difficulty in this respect is in deciding whether a person is an under-tenant, entitled to notice to quit, or merely a lodger, and not entitled to such notice. See Woodf. L. & T., 2d ed. 132, 177; 7 M. & G. 87; BOARDER; GUEST; INN; INNKEEPER.

**LODGING HOUSE ACTS.** Various acts for the well ordering of common lodging houses, beginning in 1851 with the stat. 14 & 15 Vict. c. 28.

An act for the regulation and licensing of public lodging houses is a legitimate exercise of the police power; 180 Pa. 47.

**LODS ET RENTES.** A fine payable to the seigneur upon every sale of lands within his seigniory. 1 Low. C. 59.

Any transfer of lands for a consideration gives rise to the claim; 1 Low. C. 79; as, the creation of a *rente viagire* (life-rent); 1 Low. C. 84; a transfer under *bail emphyteotique;* 1 Low. C. 295; a promise to sell, accompanied by transfer of possession; 9 Low. C. 272. It does not arise on a transfer by a father to his son subject to a payment by the son of a life-rent to the father, and of the father's debts; 8 Low. C. 5, 84, 324; nor where property is required for public uses; 1 Low. C. 91.

**LOG-BOOK.** A ship's journal. It contains a minute account of the ship's course, with a short history of every occurrence during the voyage. 1 Marsh. Ins. 408.

The part of the log-book relating to transactions in the harbor is termed the *harbor log;* that relating to what happens at sea, the *sea log.* Young, Naut. Dic.

When a log-book is required by law to be kept, it is an official register so far as regards the transactions required by law to be entered in it, but no further. Abbott, Shipp., 13th ed. 984; 1 Sumn. 373; 4 Mas. 544; 1 Dods. 9; 2 Hagg. Eccl. 159; Gilp. 147.

All vessels making foreign voyages from the United States, or, of the burden of seventy-five tons or more, from a port on the Atlantic to a port on the Pacific, or *vice versa,* must have an official log-book; Rev. Stat. § 4290; in which must be entered:—Every offence committed by a member of the crew for which it is intended to prosecute or to enforce a forfeiture; every offence for which punishment is inflicted on board, and the punishment inflicted; a statement of the character, conduct, and qualifications of each member of the crew, or a statement that the master declines to give such particulars; every case of illness or of injury to any member of the crew, the nature thereof, and the medical treatment; every death on board and the cause thereof; every birth, with the sex of the infant, and the name of the parents; every marriage, with the names and ages of the parties; the name of any seaman who ceases to be a member of the crew, and the place, time, manner, and cause thereof; a statement of the wages due any seaman or apprentice who dies during the voyage and the gross amount of all deductions to be

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made; the sale of the effects of the deceased seaman, including a statement of each article sold and the sum received for it. *Id.* §§ 4290–4292.

In suits for seamen's wages, the log-book is to be produced if required, or otherwise the plaintiff may state its contents. The neglect of a seaman to render himself on board, and his absence without leave, are also to be entered on the log-book in certain cases, or the sailor's fault will not forfeit his wages. Acts 20 July, 1790, §§ 2, 5, & 6; 7 June, 1872; 27 Feb. 1877.

In collision actions log-books are not evidence for the ship in which they are kept, though they are against them; L. R. 1 P. C. 378; though the master and mate were both dead; 10 P. D. 31.

For the English law on the subject, see Merch. Shipp. Act 1894; Maude & Poll. Merch. Shipp.

It is the duty of the mate to keep the log-book. Dana, Seaman's Friend 145, 200.

Every entry shall be signed by the master and mate or some other one of the crew, and shall be made as soon as possible after the occurrence to which it relates. For keeping the log in an improper manner the master is punishable by fine; U. S. Rev. Stat. §§ 4291, 4292.

**LOGS.** The stems or trunks of trees cut into convenient lengths for the purpose of being afterwards manufactured into lumber of various kinds. 52 Wis. 398.

When logs are driven in a navigable stream in an ordinarily skilful and prudent manner, the owner is not liable for damages sustained by a riparian owner; 67 Wis. 569.

Such logs floating down a stream may be moored to the shore for a reasonable length of time for the purpose of making them into rafts, or for breaking up the rafts, or to enable the owner to sell them; 23 Minn. 430; 3 Ore. 445; 50 Cal. 129: 51 Me. 264. But they may not be so stored as to prevent another from entering with a drive of logs from a tributary; 78 Me. 329; nor may they be run upon adjacent lands or cause water to overflow, to the injury of the riparian proprietor; 14 Ore. 319; 81 Ala. 234; or obstruct a landing place on a navigable river; 145 Mass. 261; and where a boom obstructs navigation or interferes with the use of a dock built in aid of navigation it is a nuisance; 66 Wis. 476.

Boom companies are not insurers of the logs collected by their booms, nor are they liable for logs which escape by inevitable accident; 109 Pa. 57; except where they fail to exercise due care; 90 Me. 125. Where logs drift from a raft broken by a storm without fault of the owner, he is not obliged to re-capture and remove them, when by so doing he must resort to extraordinary methods and unreasonable expense, in order to escape liability caused by a subsequent storm, although he has not abandoned them; 49 La. Ann. 1184. See LIEN; RIVERS; NAVIGABLE WATERS; RIPARIAN RIGHTS; TIMBER; BOOM COMPANIES.

**LOG ROLLING.** Mutual compacts between members of a legislature by which one assists the passage of a bill in which he has no interest in consideration of like assistance from the interested member.

As to constitutional provisions concerning such practices, see HODGE PODGE ACT; STATUTES.

**LONDON AND MIDDLESEX SITTINGS.** The *nisi prius* sittings held at Westminster or in the Guildhall of London for the trial of causes arising for the most part in London or Middlesex. 3 Steph. Com. 514. See TERM.

**LONDON COURT OF BANKRUPTCY.** See COURT OF BANKRUPTCY.

**LONG AND SHORT HAUL.** See INTERSTATE COMMERCE COMMISSION.

**LONG PARLIAMENT.** The parliament which met November, 1640, under Charles I., and was dissolved (informally) by Cromwell on the 10th of April, 1653. The same name is also given to the parliament which met in 1661 and was dissolved Dec. 30, 1678. The latter is sometimes called, by way of distinction, the "Long Parliament of Charles II." Moz. & W.

**LONG QUINTO, THE.** An expression used to denote part II. of the year-book which gives reports of cases in 5 Edw. IV. Wallace, Reporters.

**LONG VACATION.** The recess of the English courts from August 12th to October 24th. See TERM.

**LONGEVITY PAY.** Extra compensation for longevity in actual service in the army or navy. 18 Ct. Cl. 111.

Its introduction was intended (1) to induce men to enter the service and remain in it for life; (2) to remove the depressing influence of long years of service in one grade without increase of pay; (3) to compensate for increased professional knowledge and efficiency of officers by increasing their pay in advance of promotion. *Id.*

The act relating to longevity pay deals with credit for length of service and the additional pay which arises therefrom, and not with the matter of regular salary, and it has no reference to benefits derived from promotion to different grades, but is confined to the lowest grade having graduated pay; 129 U. S. 249; 151 *id.* 362, 366.

Service as midshipman at a naval academy is service as an officer in the navy as respects longevity pay; 125 U. S. 646; 128 *id.* 254; 124 *id.* 309; so is that of a cadet at West Point; 112 U. S. 1; a private in the marine corps who was one of the members of the marine band is entitled to the benefit of the act; 124 U. S. 301; and officers retired from active service; 124 U. S. 391. It is not necessary that one should have entered the service more than once; 123 U. S. 186; but service in a volunteer regiment will not be included in computing the time of service of an officer; 157 U. S. 281.

In a suit for longevity pay, a sum pre-

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viously paid the claimant for such pay to which he was not entitled, may be deducted from the sum found to be due him; 151 U. S. 366.

**LOOK-OUT.** A person upon board a vessel, stationed in a favorable position to see, and near enough to the helmsman to communicate with him, and exclusively employed in watching the movements of other vessels. 12 How. 462. See COLLISION; VESSELS; NAVIGATION RULES.

**LOQUELA** (Lat.). **In Practice.** An imparlance, *loquela sine die*, a respite in law to an indefinite time. Formerly by *loquela* was meant the allegations of fact mutually made on either side, now denominated the pleadings. Steph. Pl., Andr. ed. § 81.

**LORD. In English Law.** A person of whom land is held by another as his tenant. Hereditary peers and lords of parliament not hereditary peers. It is not at the present time a title of honor in itself, but an appellation of some particular titles of honor or dignities. By custom it extends to the sons of dukes and marquises and the eldest sons of earls. It is also bestowed on certain official persons in respect of their offices, as mayors of cities, the lord chancellor, judges of the high court, etc. Ency. Laws of Engl.

**LORD ADVOCATE.** See ADVOCATE.

**LORD CHAMBERLAIN.** An officer in the sovereign's household, whose chief duties now consist in attending upon and attiring the sovereign at his coronation; in the care of the ancient palace of Westminster, the charge of and furnishing Westminster hall and the houses of parliament on state occasions, and attendance upon peers and bishops at their creation or doing of homage. 2 Enc. of Laws of Engl. 428.

**LORD CHANCELLOR.** See CHANCELLOR.

**LORD CHIEF BARON.** The title of the chief judge or baron of the court of exchequer. Now obsolete. See LORD CHIEF JUSTICE OF ENGLAND.

**LORD CHIEF JUSTICE OF THE COMMON PLEAS.** The title of the chief judge of the court of common pleas. Now obsolete. See LORD CHIEF JUSTICE OF ENGLAND.

**LORD CHIEF JUSTICE OF ENGLAND.** The title of the lord chief justice of the queen's bench, formerly a popular title and first fully recognized by the judicature act, 1873. He is *ex officio* a judge of the court of appeal, and president of the high court, in the absence of the lord chancellor. He has all the statutory powers of the lord chief justice of the common pleas and the lord chief baron. He alone is entitled to wear on state occasions the collar of SS.

**LORD STEWARD.** See COURT OF THE LORD HIGH STEWARD.

**LORD HIGH TREASURER.** An officer who had charge of the royal revenues and the leasing of crown lands. His functions are now vested in the lords commissioners of the treasury. Mozley & W.

**LORD IN GROSS.** He who is lord, not by reason of any manor, but as the king in respect of his crown, etc. Whart.

**LORD JUSTICE CLERK. In Scotch Law.** The second judicial officer in Scotland.

**LORD KEEPER.** Keeper of the great seal. See CANCELLARIUS.

**LORD LIEUTENANT. In English Law.** Lords lieutenants of counties were first appointed about the reign of Henry VIII. as standing representatives of the crown to keep the counties in military order. They succeeded to the duties of sheriffs and justices of the peace. Till 1871 the militia was under the command of the lord lieutenant. They still retain duties for the preservation of peace. They are appointed by the queen, and may appoint deputy-lieutenants. Enc. Laws of Engl. They exist in the countries of England and Wales.

It is also the title of the chief representative of the crown in Ireland.

**LORD MAYOR.** The chief officer of the city of London and some other cities.

**LORD MAYOR'S COURT. In English Law.** One of the chief courts of special and local jurisdiction in London. It is a court of the queen, held before the lord mayor and aldermen. In this court, the recorder, or, in his absence, the common sergeant, presides as judge; 3 Steph. Com., 11th ed. 316, n.; 2 Brett, Com. 782.

**LORD ORDINARY. In Scotch Law.** The judge who officiates in the court of session for the time being.

**LORD PRIVY SEAL.** See KEEPER OF THE PRIVY SEAL.

**LORD STEWARD.** The chief officer of a department of the queen's household.

**LORD WARDEN OF CINQUE PORTS.** See CINQUE PORTS.

**LORD'S DAY.** Sunday. Co. Litt. 135. See Maxims, *Dies Dominicus*.

**LORDS APPELLANT.** The five peers who superseded Richard II. in his government, and whom he superseded after a brief control of the government.

**LORDS COMMISSIONERS.** The persons charged with the duties of a high public office which has been put into commission in lieu of being devolved upon an individual officer.

**LORDS JUSTICES OF APPEAL. In English Law.** The titles of five of the judges of the court of appeal. Jud. Act, 1881, s. 4.

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**LORDS MARCHERS.** Those noblemen who lived on the marches of Wales or Scotland; who in times past had their laws and power of life and death, like petty kings. Abolished by 27 Henry VIII. c. 26, and 6 Edw. VI. c. 10.

**LORDS OF APPEAL.** Peers of the house of lords of whom at least three must be present to constitute a sitting of the house for judicial business.

**LORDS OF APPEAL IN ORDINARY.** Two persons who have held high judicial office, appointed to aid the house of lords in the hearing of appeals. They rank as barons for life but vote in the house of lords during the tenure of their office. App. Jur. Act, 1876, s. 6.

**LORDS OF ERECTION.** On the reformation in Scotland, the king, as proprietor of benefices, formerly held by abbots and priors, gave them out in temporal lordships to favorites. Wharton.

**LORDS OF PARLIAMENT.** See PARLIAMENT.

**LORDS OF REGALITY. In Scotch Law.** Persons to whom rights of civil and criminal jurisdiction were given by the crown. Bell, Dict.

**LORDS ORDAINERS.** Lords appointed in 1312 for the control of the sovereign and court party for the general reform of the country. Brown.

**LORDS SPIRITUAL.** See PARLIAMENT.

**LORDS TEMPORAL.** See PARLIAMENT.

**LORDSHIP.** Dominion, manor, domain; also a title of honor given to a nobleman. Also given to judges and other persons in authority.

**LOSS.** When used in a statute with reference to a loss of goods by common carriers, loss means injury or damage to the goods, as well as their destruction or disappearance, 71 Ga. 40; 88 *id.* 805.

**In Insurance.** The destruction of or damage to the insured subject by the perils insured against, according to the express provisions and construction of the contract.

These accidents, or misfortunes, or perils, as they are usually denominated, are all distinctly enumerated in the policy. And no loss, however great or unforeseen, can be a loss within the policy unless it be the direct and immediate consequence of one or more of these perils. Marsh. Ins. 1, c. 12.

Loss under a life policy is the death of the subject by a cause the risk of which is not expressly excepted in the policy, and where the loss is not fraudulent, as where one assured, who insures the life of another for his own benefit, procures the death.

Loss in insurance against fire must, under the usual form of policy, be by the partial or total destruction or damage of the thing insured by fire.

In maritime insurance, in which loss by fire is one of the risks usually included, the loss insured against may be absolutely or constructively total, or a partial or general average loss, or a particular average. See AVERAGE.

In other forms of insurance what constitutes a loss is determined by the risks or perils insured against as specified in the policy. As to the various kinds of which see the sub-titles of INSURANCE.

*A partial loss* is any loss or damage short of, or not amounting to, a total loss: for if it be not the latter it must be the former. See 4 Mass. 374; 6 *id.* 102, 122, 317; 12 *id.* 170, 288; 8 Johns. 237; 10 *id.* 487; 5 Binn. 595; 2 S. & R. 553.

Partial losses are sometimes denominated *average* losses, because they are often in the nature of those losses which are the subject of average contributions; and they are distinguished into general and particular averages. See AVERAGE.

*A total loss* is such destruction of, or damage to, the thing insured that it is of little or no value to the owner.

Total losses, in maritime insurance, are absolutely such when the entire thing perishes or becomes of no value. Constructively, a loss may become total where the value remaining is of such a small amount that the whole may be surrendered. See 2 Phill. Ins. ch. xvii.; 2 Johns. 286; Beach, Ins. § 916; 66 Tex. 103; 44 La. Ann. 714; ABANDONMENT.

It is under marine policies that questions of constructive total loss most frequently arise. Such loss may be by capture or seizure by unlawful violence, as piracy; Arn. Ins., 6th ed. 951; 1 Phil. Ins. § 1106; 2 E. L. & E. 85; or damage to ship or goods over half of the value at the time and place of loss; 1 Curt. C. C. 148; 9 Cush. 415; 5 Den. 342; 19 Ala. N. S. 108; or loss of the voyage; 4 Me. 431; 24 Miss. 461; 19 N. Y. 272; 1 Mart. La. 221; though the ship or goods may survive in specie, but so as not to be fit for use in the same character for the same service or purpose; 2 Caines, Cas. 324; Valin, tom. 2, tit. Ass. a. 46; or by jettison; 1 Caines 196; or by necessity to sell on account of the action and effect of the peril insured against; 5 Gray 154; 1 Cra. 202; or by loss of insured freight consequent on the loss of cargo or ship; 18 Johns. 208.

There may be a claim for a total loss in addition to a partial loss; 17 How. 595. A total loss of the ship is not necessarily such of cargo; 3 Binn. 287; nor is submersion necessarily a total loss; 7 East 38; nor is temporary delay of the voyage; 5 B. & Ald. 597.

A constructive total loss, and an abandonment thereupon of the ship, is a constructive total loss of freight; and a constructive total loss and abandonment of cargo has a like effect as to commissions or profits thereon; and the validity of the abandonment will depend upon the actual facts at the time of the abandonment, as the same may subsequently prove to have been; 2 Phillips, Ins. § 1630; 3 Johns Cas. 93. See ABANDONMENT.

An insured cannot recover for a total loss of a vessel, in the absence of proof of abandonment and of notice of the same on the insurer; 40 La. Ann. 553.

In determining the proportion which the cost of repairing a vessel must bear to its value, so as to justify its abandonment to

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the insurers as a constructive total loss, its value as stated in the policy controls, and not its actual value immediately before the accident; 25 N. Y. S. 414.

Under a fire insurance policy it is not necessary to show that all the material of the building was destroyed, to sustain a finding of total loss, and where it is such a loss, a provision of the policy limiting the amount to less than the sum written is invalid; 44 Neb. 549; 90 Tex. 170. The loss has been held to be total where the building was so injured as to lose its identity; 29 S. W. Rep. (Tex.) 93; 93 Wis. 526; or so that it was unsafe and was condemned by the municipal authorities; 47 La. Ann. 1563. But where the roof and interior woodwork of a building were destroyed, leaving the walls standing, it was a question for the jury whether it was a total loss within the meaning of the policy; 85 Hun 250.

PROOFS OF LOSS. It is a usual condition in all policies in insurance that immediate notice of loss shall be given by the insured, and generally some time is named within which the proofs of loss shall be given in writing to the company. Compliance with such is a condition precedent, and notice, or waiver of it, must be shown; 48 Kan. 239; 40 Neb. 700; 60 Mo. App. 673; though there is a mortgage clause; 99 Ga. 65; but where there is such clause, a mortgagee is not required to make proofs; 5 Kan. App. 137.

Failure to make proof is not excused by refusal of the company to furnish blanks; 8 Ohio Cir. Ct. 620. A statement mailed within the time is rendered to the company; 168 Ill. 286; and notice duly addressed, stamped, and mailed is presumed to have been received, if not denied; 3 Ind. App. 332. Where a statute requires notice "accompanied by an affidavit" of the circumstances, they need not be attached together or delivered at the same moment; 84 Ia. 93. Notice is conclusively shown when the company sends an adjuster; 151 Pa. 607; or telegraphs an adjuster to give it attention; 48 Mo. App. 65. A new proof of loss made long afterwards under promise of settlement if the claim was reduced, was mere surplusage and did not affect the rights of the insured; 137 N. Y. 389; and where the policy required duplicate bills, vouchers, etc., it was only necessary to show reasonable effort to obtain them; 162 Pa. 357. An itemized estimate of the cost of rebuilding is sufficient compliance with a requirement of a verified certificate of the value of the building destroyed; 65 Fed. Rep. 292; *contra*, 96 Ia. 224. A false statement in the affidavit of loss, made by mistake, will not vitiate a policy which provides that it shall be void in case of any false swearing by the insured in relation to the insurance; 107 Mich. 323; and formal defects or irregularities which cannot be obviated will not prevent recovery; 26 Ins. L. J. 695.

Formal or preliminary proofs may be waived by parol; 40 S. W. Rep. (Ky.) 670. A waiver of proofs results from a denial of all liability; 16 Ind. App. 160; 10 App. D. C. 277; 16 Wash. 155; or a denial on other grounds; 97 Tenn. 1; 69 Mo. App. 126; 13 App. Div. N. Y. 444; as from the defence that the policy was never in force; 49 Neb. 811; or the omission to object to the form; 153 Pa. 398; but they are not waived by careful investigation; 42 U. S. App. 81; s. c. 74 Fed. Rep. 507; or by reason of an irresistible conclusion that the company had determined to defend the suit, resulting from assertions made during the negotiations; *id.*; or by an offer of compromise; 42 W. Va. 426; or by a refusal after insufficient proofs are furnished to consider the loss unless a specified claim should be eliminated; 57 Kan. 576; or by the mere denial of liability on the ground that the property destroyed was not covered; 90 Me. 385; 151 Pa. 607; 96 U. S. 572; 83 N. Y. 168; or mere silence; 86 Ala. 558; or a promise by local agents, without authority to adjust, that the loss would be paid; 77 Ia. 376. The act relied on to establish a waiver must occur within the time fixed by the policy; 58 Mo. App. 225. The insured does not lose the benefit of a waiver by making proofs, and he may plead both compliance and the waiver; 98 Ia. 221. The proofs should ordinarily be made by the insured, but where he is not in a position to make them in person, they may be made by an agent; 166 Ill. 400; or mortgagee to whom the policy is made payable; 56 Hun 399; or the company's adjuster; 131 Ind. 572; 85 Wis. 229; and they may be in the name of a firm; 122 N. Y. 545. Where the policy requires proofs "as soon as possible," what is reasonable time is a mixed question of law and fact; 110 Pa. 530; 70 Ia. 704.

ARBITRATION. A common provision in policies for all kinds of insurance is one for compulsory arbitration in case of difference between the parties as to the amount of loss. Such a provision has been held void as ousting the court of its jurisdiction; 21 Misc. Rep. 124; *contra*, 112 Ala. 318; 50 N. J. L. 453. An award is not required as a condition precedent to a right of action, but a refusal for a demand of appraisal may be set up as a bar; 16 Wash. 232, in which rehearing was denied; 47 Pac. Rep. 885; but it has been held a condition precedent; 69 Mo. App. 232; 71 Tex. 5; but not unless requested in writing; 96 Ia. 70; and it is inoperative where no arbitrators are agreed upon; 57 Kan. 95; and is not applicable to a case of total loss; 50 Hun 172; or to the portion of the insured property totally destroyed; 12 App. Div. N. Y. 39; or where the insurer denies liability; 120 N. C. 302; or in case of total loss under valued policy acts; 74 Wis. 67; 36 Neb. 461; 61 Mo. App. 572. Formal notice of the proceedings of appraisers is not necessary to a party who has knowledge of them; 12 App. Div. N. Y. 218. A valuation by the company's adjuster and builders selected by the insured is an appraisal within the policy, without previous effort

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to agree upon the loss; 36 U. S. App. 327; s. c. 71 Fed. Rep. 120.

Appraisers cannot determine the construction of the policy; 17 App. Div. N. Y. 87; and the award may be set aside where it is grossly below the actual loss; 12 Tex. Civ. App. 572; but not for a mere mistake, not appearing on its face; 12 App. Div. N. Y. 218; and it need not state the manner of arriving at the result; *id.*

Consult Phillips; Arnold; May, Insurance; Pars. Mar. Law; TOTAL LOSS.

**LOST INSTRUMENT.** A document or paper which has been so mislaid that it cannot be found after diligent search.

Suits to establish lost instruments are within the jurisdiction of equity, but the proof as to the contents must be clear and satisfactory; 35 Fla. 212; and such a suit will not be entertained to establish the lost instrument merely as a piece of written evidence to sustain an action of tort; 66 Fed. Rep. 799.

This equitable jurisdiction extends to ordering the issue of bonds to replace those lost, where the loss or destruction was without fault of the party seeking relief; and it can be done without derogating from positive agreement or violating equal or superior equities in other parties. Such relief has been given in case of bonds stolen and hidden in the ground at the evacuation of Petersburg by the Confederate forces; 45 Md. 102; and for bonds stolen from the vault of a bank; 27 N. J. Eq. 408.

A copy of a deed by joint makers cannot be established without proof of execution by all; 96 Ga. 197; and wherever it is sought to establish title to real property under a lost unrecorded deed, the rule as to the amount of evidence required is very strict; 89 Me. 462.

Formerly in such cases a resort to equity was compelled by the want of any remedy at law, resulting from the necessity of making profert; 1 Ch. Cas. 77; but after profert was dispensed with, the courts of law acquired concurrent jurisdiction and the loss of a paper would not prevent recovery; 1 Ves. 341; 7 *id.* 19; 3 V. & B. 54. Nevertheless a court of equity still has jurisdiction to establish a lost deed; 142 U. S. 417.

The fact that interest on a bond is payable upon "presentation and delivery of the coupon" will not prevent recovery on a lost coupon; 21 Misc. Rep. 439. Where a note is lost pending an action while in the hands of the justice, indemnity is not required; 43 Pac. Rep. (Colo.) 904; and an allegation of loss after maturity of a note sued on, dispenses with the necessity of tender of indemnity; 141 Ind. 322. An action may be brought on a lost official bond; 57 Ill. App. 674. In an action for the breach of a lost contract, where the fact of its existence is controverted, it is a question for the jury; 24 S. E. Rep. (Va.) 241.

It is held that an action will lie upon a lost negotiable instrument; 10 Ad. & E. 616; 2 Spear, L. 193. The weight of authority seems to be that an action would not lie on a lost negotiable note; 1 Exch. 167; 9 *id.* 604; 21 Gratt. 556; 46 N. C. 78; 17 Me. 9; 20 D. C. 191 (distinguishing *id.* 26, where the action was maintained on a note accidentally lost after being in evidence in that court); *contra*, 2 Bay 495; 18 Ga. 65; 1 R. I. 401; 3 Yeates 442, but see comments on these cases, 16 L. R. A. 305, n. In some courts the suit has been permitted upon giving indemnity; 34 Conn. 546; 4 Martin La. N. S. 4; 16 Pick. 315.

In some states and in England it is provided by statute that an action may be maintained on a lost negotiable instrument. Under such statutes it is held that they may be maintained without showing the absolute destruction of the instrument; 52 Ind. App. 216; but judgment cannot be recovered without indemnity; 60 Mo. App. 671; 32 S. W. Rep. (Tex.) 248.

Where the remedy at law is denied in the case of a lost negotiable instrument and there is no statute, relief must be sought by a bill in equity to compel payment after tender of indemnity; 7 B. & C. 90; 35 Neb. 693; Pars. N. & B. 262. The loss of a bond is no objection to its payment by the company which issued it, upon indemnity; 40 Vt. 399. The title of the true owner of a lost certificate of stock may be asserted against a subsequent owner even though he be a *bona fide* purchaser; 148 N. Y. 441.

The contents of a lost deed, will, agreement, etc., may be proved by secondary evidence after proof of its existence; 150 Pa. 538; and that diligent search has been made and that it cannot be found; Tayl. Ev. 402; 147 Pa. 447; the party's own evidence is sufficient for this purpose; 1 Atk. 446; 1 Greenl. Ev. § 349; or that of any one who knows the facts; 90 Ga. 731. See WILL.

Even a will proved to be lost may be admitted to probate upon secondary evidence; 1 Greenl. Ev. §§ 84, 509, 575; 1 P. & D. 154; s. c. 17 Eng. Rep. 45, note; but this case has been characterized as going to the "verge of the law"; 11 App. Cas. 474. The fact of the loss must be proved by the clearest evidence; 8 Metc. 487; 2 Add. Eccl. 223; 6 Wend. 173; 1 Hagg. Eccl. 115. Where it has been in the custody of the testator and is not found at his death, it is presumed to have been destroyed, *animo revocandi;* 17 Moak's Engl. Rep. 511; 6 Wend. 173; 11 Biss. 265; especially where the testator knew of the loss while alive and did not produce it; 140 Pa. 242. Its absence is said to be *prima facie* evidence of cancellation; 1 Bay 457; but where no revocation is proved or presumed, declarations, written or oral, made by a testator, both before and after the execution of the will, are admissible as secondary evidence; *id.;* Steph. Ev. § 29; Beach, Wills § 73; 97 Mich. 49; Schoul. Wills § 402. And see 28 W. Va. 113, for an extended historical discussion of the subject. It is also said that chancery, on a bill suitably filed, has exercised a similar jurisdiction; *id.*

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The "copy" of a lost instrument intended by the act of congress of January 23, 1874 (for stamping unstamped instruments), is a substantial copy, or such a draft of the original instrument as will identify the subject of the tax; 82 Pa. 280.

**LOST, OR NOT LOST.** A phrase in policies of insurance, signifying the contract to be retrospective and applicable to any loss within the specified risk, provided the same is not already known to either of the parties, and that neither has any knowledge or information not equally obvious or known to the other. The clause has been adopted only in maritime insurance; though a fire or life policy is not infrequently retrospective, or, under a different phraseology, by a provision that the risk is to commence at some time prior to its date. 1 Phill. Ins. § 925. Such policy on a vessel building "to take effect as soon as water-borne," takes effect at once if she is already water-borne; 6 Gray 192.

**LOST PAPERS.** See LOST INSTRUMENT.

**LOST PROPERTY.** See FINDER, where the subject is treated, and see also 33 Ch. D. 566, where a prehistoric boat found by a gas company while excavating on land leased by it was held to belong to the lessor.

**LOT.** That which fortuitously determines what we are to acquire.

When it can be certainly known what are our rights, we ought never to resort to a decision by lot; but when it is impossible to tell what actually belongs to us, as if an estate is divided into three parts and one part given to each of three persons, the proper way to ascertain each one's part is to draw lots; Wolff, *Dr. etc., de la Nat.* § 669.

Verdicts reached by a jury by drawing lots will be set aside; 1 Ky. L. J. 500. See JURY. See also 1 Wash. Ty. 329; s. c. 34 Am. Rep. 808, n.

**LOT AND SCOT.** Duties to be paid by persons exercising the elective franchise in certain cities before being allowed to vote.

**LOT OF GROUND.** A small piece of land in a town or city, usually employed for building, a yard, a garden, or such other urban use. Lots are *in-lots*, or those within the boundary of the city or town, and *out-lots*, those which are out of such boundary and which are used by some of the inhabitants of such town or city.

**LOTHERWITE or LEYERWIT.** A liberty or privilege to take amends for lying with a bondwoman without license. See LAIRWITE.

**LOTTERY.** A scheme for the distribution of prizes by chance. 7 N. Y. 228; 59 Ill. 160.

A scheme by which a result is reached by some action or means taken, in which result man's choice or will has no part, and which human reason, foresight, sagacity, or design, cannot enable him to know or determine, until the same has been accomplished. 74 Mich. 264.

A scheme by which, on one's paying money or some other thing of value, he obtains the contingent right to have something of greater value, if an appeal to chance, by lot or otherwise, under the direction of the manager of the scheme, should decide in his favor. Bish. St. Crimes § 952.

The word *lottery* "embraces the elements of procuring, through lot or chance, by the investment of a sum of money or something of value, some greater amount of money or thing of greater value." 58 Fed. Rep. 942. It includes policy-playing, gift-exhibitions, prize concerts, raffles at fairs, etc., and various forms of gambling; *id.*

Where a pecuniary consideration is paid, and it is to be determined by chance, according to some scheme held out to the public, as to what and how much he who pays the money is to receive for it, that is a lottery; 56 N. Y. 424. It is well settled that every scheme for the division of property or money by chance is prohibited by law; 61 Ind. 39. Lotteries were formerly often resorted to as a means of raising money, by states as well as individuals, and are still authorized in many foreign countries, but have been abolished as immoral in England, and throughout this country. They were declared a nuisance and prohibited by 10 & 11 Will. III. c. 17, and foreign lotteries were forbidden to be advertised in England by the 6 & 7 Will. IV. c. 66.

Selling boxes of candy, each box being represented to contain a prize, the purchaser selecting his box in ignorance of its contents, is a lottery; 2 Tex. App. 610; so in 89 N. C. 572; 137 Mass. 250; 11 Q. B. Div. 207. Where money was subscribed which was to be invested in funds which were to be divided amongst the subscribers by lot, and divided unequally, it was held a lottery; 11 Ch. Div. 170. Although every ticket in a drawing represents a prize of some value, yet if those prizes are of unequal values, the scheme of distribution is a lottery; 40 Ill. 465.

A scheme for increasing the circulation of a newspaper, whereby all subscribers receive numbered tickets corresponding to numbered coupons, which are drawn from a box by a blindfolded person, prizes to be given to the holders of certain tickets, is a lottery under U. S. Rev. Stat. § 3894, prohibiting carrying through the mails of any newspaper containing any advertisement of any lottery, etc., 58 Fed. Rep. 942; so it was held that an issue of bonds of the Austrian government, payable at a specified time, but with a provision that bonds, as drawn, should be redeemed with a bonus, which was to increase year by year, was within that act, which related to all lotteries, the word "illegal" having been omitted from the original act by amendment in 1890; 147 U. S. 456.

A lottery for the disposal of land is within

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the prohibition of the Pennsylvania act, where the lots drawn are of very unequal value; 4 S. & R. 151; so when there is a contract for the sale of several lots of land, of unequal value, to several subscribers, which provides that each one's lot shall be determined "by lot" and a certain "prize" lot is to be given to one of the subscribers by "lot"; 42 N. E. Rep. (Ind.) 103. So where one furnished a cigar to every person who placed a five-cent piece in a slot machine, and the one after whose play the machine indicated the highest card hand was to receive all the cigars; 22 So. Rep. (Ala.) 138; and where every purchaser of dry goods received a key and was told that one key would be given out which would unlock a certain box containing twenty-five dollars, which would go to the person who received this key; 54 Kan. 711. So where every subscriber to a newspaper received a ticket which entitled him to participate in a distribution of prizes by lot; 73 Mo. 647; and of a bond investment scheme, where bonds were issued at a specified price and the value of each bond was determined by its number, the bonds being numbered in the order of application for them; 63 Fed. Rep. 426.

A "missing word" competition, in which the winners are to be those who, upon sending a shilling to the promoter of the competition, select, to fill up a named sentence, a particular word also selected by the promoter, is a lottery within the English act; [1896] 2 Ch. 154.

Raffles at fairs, etc., are as clearly violations of the criminal law as the most elaborate and carefully organized lotteries; 8 Phila. 457. Thus the American Art Union is a lottery; 8 N. Y. 228, 240; so a "gift-sale" of books; 33 N. H. 329; so "prize-concerts"; 97 Mass. 583; and "gift-exhibitions"; 32 N. J. L. 398; 12 Abb. Pr. N. S. 210; 59 Ill. 160; 62 Ala. 334; 74 N. Y. 63. The payment of prizes need not be in money; 7 N. Y. 228; as where a suit of clothing was given at a weekly drawing in a merchant tailor's club; 48 Minn. 555.

On the other hand, where the scheme affords room for the exercise of skill and judgment, it is not a lottery; 60 L. J. M. C. 116. So of a coupon competition in a newspaper, where purchasers of copies of the newspapers fill in on coupons the horses selected by them as likely to come in first, second, third, and fourth in a given race, the purchaser to receive a penny for every coupon filled up after the first, and a money prize to be given to the holder of the coupon who should name the first four horses correctly; [1895] 2 Q. B. 474; where a soap-dealer offered a prize to be drawn by lot, to the person who should most nearly guess the weight of a certain cake of soap, it was held not to be a lottery; 56 Alb. L. J. 95, S. C. of New Brunswick.

The mere determination by lot where there is no giving of prizes, is not a lottery; 8 Phila. 457. Merely determining by lot the time at which certain bonds are to be paid, is not a lottery; 30 Fed. Rep. 499; but it is otherwise if a prize is offered on the bonds so drawn; *id.* To constitute a lottery something of value must be parted with, directly or indirectly, by him who has the chance; 88 Ala. 196; 16 Am. St. Rep. 38 and note. Therefore, where every customer of a shoe store and every applicant received a ticket gratuitously, and a piano was allotted by chance among the holders, it was held not to be a lottery; 18 Colo. 321. Where the element of certainty goes hand in hand with the element of chance in an enterprise offering prizes, the former element does not destroy the existence or effect of the latter; 147 U. S. 449.

The act which forbids conveying in the mails newspapers containing anything relating to a lottery is within the power of congress to establishing postoffices, and does not abridge the freedom of the press; 143 U. S. 110. The right to operate a lottery is not a fundamental right; *id.* Under this act it is an offence to deliver in Illinois a prohibited circular mailed in the city of New York, and such an offence is triable in Illinois; 143 U. S. 207.

It is a valid exercise of power in a state to protect the morals and advance the welfare of the people by prohibiting any scheme bearing any semblance to a lottery or gambling; 74 Md. 565.

"A lottery grant is not, in any sense, a contract within the meaning of the constitution of the United States, but is simply a gratuity and license, which the state, under its police powers, and for the protection of the public morals, may at any time revoke and forbid the further conduct of the lottery; and no right acquired during the life of the grant, on the faith of, or by agreement with, the grantee, can be exercised after the revocation of such grant and the forbidding of the lottery, if its exercise involves a continuance of the lottery as originally authorized;" 168 U. S. 488, 502, following 101 U. S. 814, where it was said, referring to lotteries:—"Certainly the right to suppress them is governmental, to be exercised at all times by those in power at their discretion." A lottery charter is "in legal effect nothing more than a license. . ."

The fact that one government authorizes lotteries and the sale of lottery tickets, cannot authorize their sale in another government which forbids their sale; 147 U. S. 462.

A purchase of a ticket in a foreign lottery outside the state, is a valid contract; 13 Pa. 328. An ordinance which makes it unlawful "for any person to have in his possession, unless it be shown that such possession is innocent, any lottery ticket, "is unconstitutional, inasmuch as it places on the person accused of its violation, the burden of showing the innocence of his possession; 41 Pac. Rep. (Cal.) 693.

Where it was undisputed that the defendant was engaged in the lottery business, evidence that he received an order for lottery tickets such as were subsequently mailed with the letter; that the name used in the address of the letter was the

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same as that signed to the order; that the tickets bore his stamp, and that the letter enclosed his business card, would justify the conclusion that the defendant deposited the letter in the post-office for mailing; 1 Fed. Rep. 426.

A court of equity will not grant relief where letters addressed to the secretary of a lottery company are detained by a postmaster under the direction of the postmaster-general, if the pleadings fail to show that the letters had no connection with the lottery business; 1 Fed. Rep. 417. The act of June 8, 1872, Rev. S. § 4041, authorizes the postmaster-general to forbid the payment by any postmaster of a money order to any person engaged in the lottery business. But this does not authorize any person to open any letter not addressed to himself.

The act of March 2, 1895, provides that any person who shall cause to be brought within the United States from abroad, for the purpose of disposing of the same, or deposited in or carried by the mails from one state to another, any paper, etc., purporting to be or represent a ticket, etc., in a lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon chance, or shall cause any advertisement of such lottery, etc., to be brought into the United States, etc., shall be punishable, for the first offence, by imprisonment or fine, or both, and, for further offences, by imprisonment. See 164 U. S. 676.

**LOUAGE. In French Law.** The contract of hiring and letting. It may be of things or of labor. (1) Letting of things. (*a*) *Bail à loyer*, the letting of houses; (*b*) *Bail à ferme*, the letting of land; (2) Letting of *labor*,—(*a*) *Loyer*, the letting of personal service; (*b*) *Bail à cheval*, the letting of a horse.

**LOUISIANA.** The name of one of the states of the United States of America.

It was first explored by the French in 1682, under Robert Chevalier de la Salle, and named Louisiana, in honor of Louis XIV. In 1699, a French settlement was begun at Biloxi by Lemoyne d'Iberville. His efforts were followed up in 1712 by Anthony Crozat, a man of wealth, who upheld the trade of the country for several years. About 1717 all his interest in the province was transferred to the "Western Company," a chartered corporation, at the head of which was the celebrated John Law, whose speculations involved the ruin of one-half the French nobility. In 1732 the "Company" resigned all their rights to the crown, by whom the whole of Louisiana was ceded to Spain in 1762. By the treaty of St. Ildefonso, signed October 1, 1800, Spain re-conveyed it to France, from whom it was purchased by the United States, April 30, 1803, for $15,000,000. Louisiana was admitted into the Union by an act of congress, approved April 8, 1812.

The first constitution was adopted January 22, 1812, and was substantially copied from that of Kentucky. This constitution was superseded by that of 1845, which was in its turn replaced by the one adopted July 11, 1852. Next in order came the constitution of 1864, which yielded to that of 1868, which in turn was succeeded by the constitution adopted July 21, 1879.

A new constitution was adopted May 11, 1898, and promulgated by the convention without submission to the people, to go into effect May 12, 1898. The instrument is very long and contains a great deal of general legislation; it provides educational and property qualifications in the alternative for suffrage, and in addition the right of suffrage is specifically conferred upon every male person who was on Jan. 1, 1867, or at any date prior thereto, entitled to vote under the constitution or statutes of any state of the United States wherein he then resided, and also upon any son or grandson of such person not less than twenty-one years of age at the date of the adoption of the constitution; and it is also provided that no person of foreign birth naturalized prior to Jan. 1, 1898, shall be denied the right to vote by reason of his failure to possess the educational qualifications prescribed, provided he shall have resided in the state five years next preceding the date of his application for registration. This exceptional right of suffrage can only be exercised by persons registered prior to September 1, 1898.

THE LEGISLATIVE POWER is vested in a general assembly which consists of a senate and house of representatives elected for four years. Senators must be twenty-five years of age. A person elected to either house must have been a citizen of the state for five years, and an actual resident of the district or parish, for two years immediately preceding his election. Representation in the house of representatives is equal and uniform according to population, with an additional representative for any fraction exceeding one-half the representative number. The number of representatives cannot be more than one hundred and sixteen nor less than ninety-eight; but each parish and each ward of the city of New Orleans must have at least one representative. The state is divided into senatorial districts. The number of senators cannot be more than forty-one nor less than thirty-six, and they are apportioned by the constitution among the senatorial districts according to the total population of the several districts. The sessions are biennial on the second Monday of May in the even years.

THE EXECUTIVE POWER is vested in a governor, lieutenant-governor, auditor, treasurer, and secretary of state

The supreme executive power of the state is vested in the governor, who is elected for four years. In case of a tie between two candidates, a selection is to be made between these by the joint vote of the general assembly. The governor has the usual powers and duties, that of granting pardons, being upon the recommendation in writing of the lieutenant-governor, attorney-general, and presiding judge of the court before which conviction was had, or any two of them. The senate must confirm his appointments, and he has the veto power, which may be overcome if the bill is passed over the veto, by a vote of two-thirds of the members of each house.

The *lieutenant-governor* is elected by the people at the same time, for the same term, and must possess the same qualifications as the governor. He is president of the senate by virtue of his office, but has only a casting vote therein. In case of a vacancy in the office of governor or his disability, or absence from the state, his powers and duties devolve upon the lieutenant-governor for the residue of the term, or until the governor absent or impeached shall return or be acquitted, or the disability be removed. After the lieutenant-governor the succession to the office of governor is to the president *pro tempore* of the senate, or if none, the secretary of state shall act until one is elected.

The treasurer, auditor, secretary of state, and also the attorney-general, are elected by the qualified electors of the state for the term of four years.

THE JUDICIAL POWER is vested in a supreme court, in courts of appeal, in district courts, and in justices of the peace and in such other courts as may be established by law.

The *supreme court* is composed of one chief justice and four associate justices, appointed by the governor by and with the advice and consent of the senate, for the term of twelve years, a vacancy being filled for the unexpired term. The state is divided into four supreme court districts, and the court is composed of judges appointed from those districts. The supreme court has appellate jurisdiction, where the matter in dispute or fund to be distributed, whatever may be the amount therein claimed, exceeds two thousand dollars exclusive of interest; to suits for divorce and separation from bed and board, and to all cases in which the constitutionality or legality of any tax, toll, or impost whatever, or of any fine, forfeiture, or penalty imposed by a municipal corporation, is in contestation, whatever may be the amount thereof, and in such cases, the appeal on the law and the facts shall be directly from the court in which the case originated to the supreme

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court; and to criminal cases on questions of law alone, whenever the punishment of death or imprisonment at hard labor may be inflicted, or a fine exceeding three hundred dollars or imprisonment exceeding six months is actually imposed. Its jurisdiction extends to questions of fact affecting its own jurisdiction. It has appellate jurisdiction only, but exercises control and general supervision over all inferior courts; and may issue writs of *habeas corpus*, *certiorari*, prohibition, mandamus, *quo warranto*, and other remedial writs.

This court is also invested with the exclusive original jurisdiction touching professional misconduct of members of the bar, with power to disbar under such rules as may be adopted by the court.

*Courts of Appeal.*—The state, with the exception of the Parish of Orleans, is divided into five circuits, in each of which there is a court of appeals, composed of two judges elected by the two houses of the general assembly in joint session—one judge for eight years, and one for four years. This court has appellate jurisdiction which extends to all cases civil or probate, when the matter in dispute or fund to be distributed exceeds one hundred dollars exclusive of interest, and does not exceed two thousand dollars exclusive of interest. This jurisdiction is appellate only, but the judges have power to grant writs of *habeas corpus* within their circuits, and may also issue remedial writs in aid of their appellate jurisdiction.

No judgment shall be rendered without the concurrence of two judges. In case of disagreement the court shall appoint a district judge, or lawyer having the qualifications of a judge, to sit in the case; and this may also be done in case of the recusation, absence, or disability of one of the judges. Courts of appeal throughout the rural districts after July 1, 1900, will be composed of district judges sitting in banc. Provision is made for certifying questions or taking up cases on *certiorari* from the courts of appeal to the supreme court, by the same system as that under which such writs are issued by the supreme court of the United States to the circuit courts of appeal, the object being to keep this jurisprudence of the courts of appeal in touch with that of the supreme court.

*District Courts.*—The state (with the exception of the Parish of Orleans) is divided into twenty-nine judicial districts, in each of which there is a district court, presided over by one judge. The number may be reduced by law to twenty. The district judges are elected for the term of four years by the people of their respective districts, where they must have resided for two years next preceding their election. The district courts have original jurisdiction in all civil matters where the amount in dispute exceeds fifty dollars, exclusive of interest. They have unlimited and exclusive original jurisdiction in all criminal, probate, and succession matters, and when a succession is a party defendant, and in all cases where the state or parish or any municipality or other political corporation is a party defendant, regardless of the amount in dispute, and of all proceedings for the appointment of receivers, or liquidators of corporations, or partnerships, and to issue all writs, process, and orders necessary or proper for the purposes of their jurisdiction, and also to issue writs of *habeas corpus* in their districts. They have also jurisdiction of appeals from justices of the peace in all civil matters, and also of appeals of persons sentenced to fines or imprisonment by mayors or recorders, and in such cases trials shall be *de novo* and without juries.

By article 116 of the new constitution important changes are made in the jury system, viz.: "All cases in which the punishment may not be at hard labor shall, until otherwise provided by law, which shall not be prior to 1904, be tried by the judge without a jury. Cases in which the punishment may be at hard labor shall be tried by a jury of five, all of whom must concur to render a verdict; cases in which the punishment is necessarily at hard labor by a jury of twelve, nine of whom concurring may render a verdict; cases in which the punishment may be capital by a jury of twelve, all of whom must concur to render a verdict."

*Courts of the Parish and City of New Orleans.*—There are in the Parish of Orleans:—

1. *A court of appeals*, of three judges, the jurisdiction of which is of the same nature as, and coextensive with that of the courts of appeal in the other parishes. The appeals to this court are upon questions of law alone in all cases involving less than five hundred dollars exclusive of interest, and upon the law and the facts in other cases.

2. *Two district courts*, the *civil district court* of five judges and the *criminal district court* of two judges. The civil district court has exclusive and general probate, and exclusive civil jurisdiction in all cases where the amount in dispute exceeds one hundred dollars exclusive of interest. The criminal district court has general criminal jurisdiction only.

There are two inferior criminal courts known as the *First City Criminal Court* and the *Second City Criminal Court*, each having territorial jurisdiction over a specific portion of the city, for the trial and punishment without juries, and subject to appeal to the criminal district court, of all offences where the penalty does not exceed six months' imprisonment or a fine of three hundred dollars or both.

*Justices of the Peace.*—In each parish (that of Orleans excepted) there are justices of the peace who are elected for the term of four years. They have exclusive original jurisdiction in all civil matters when the amount in dispute does not exceed fifty dollars exclusive of interest, and original jurisdiction concurrent with the district court when the amount in dispute exceeds fifty dollars, and does not exceed one hundred dollars exclusive of interest. They have, also, criminal jurisdiction as committing magistrates, with power to bail or discharge in cases not capital, or necessarily punishable at hard labor.

They have no jurisdiction in succession or probate matters, or when a succession is a defendant, or when the state, parish, or any municipality or other political corporation is a party defendant, or when title to real estate is involved.

The justices of the peace ceased to exist in the parish of Orleans with the adoption of the constitution of 1879.

SYSTEM OF LAWS. Louisiana is governed by the civil law, unlike the other states of the Union. The first body of civil laws was adopted in 1808, and was substantially the same as the Code Napoleon, with some modifications derived from the Spanish law. It was styled the "Digest of the Civil Law," and has been afterwards frequently revised and enlarged to suit the numerous statutory changes in the law, and since 1825 has become known as the "Civil Code of Louisiana." There is no criminal offence in this state but such as is provided for by statute; the law does not define crimes, but prescribes their punishment by reference to their name; for definitions we turn to the common law of England. The civil code lays down the general leading principles of *evidence*, and the courts refer to treatises on that branch of the law for the development of those principles in their application to particular cases, as they arise in practice. Most of these rules have been borrowed from the English law, as having a more solid foundation in reason and common sense. The usages of trade sanctioned by courts of different countries at different times, or the *lex mercatoria*, also exist entirely distinct and independent of the civil code, and are recognized and duly enforced. When Louisiana was ceded to the United States, some of the lawyers from the old states spared no efforts to introduce the laws with which they were familiar, and of which they sought to avail themselves, rather than undergo the toil of learning a new system in a foreign language. But of those conversant with the common law, the most eminent did not favor its introduction as a general system to the exclusion of the civil law. 7 Ann. 395. The laws of the state on public and personal rights, criminal and commercial matters were assimilated to those of the other states; but in relation to real property and its tenures, the common law or English equity system has never had place in Louisiana.

**LOW BOTE.** A recompense for the death of a man killed in a tumult. Cow.

**LOWERS. In French Maritime Law.** Wages. Ord. Mar. liv. 1, t. 14, Art. 16.

**LOW-WATER MARK.** That part of the shore of the sea to which the waters recede when the tide is lowest; *i. e.* the line to which the ebb-tide usually recedes, or the ordinary low-water mark unaffected by drought. 26 Me. 384; 60 Pa. 339. It has been said to be the point to which a river recedes at its lowest stage; 55 Fed.

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Rep. 854. See 157 Mass. 24; HIGH-WATER MARK; RIVER; SEA; Dane, Abr.; 1 Halst. Ch. 1.

**LOYAL.** Legal, or according to law: as, loyal matrimony, a lawful marriage.

"*Uncore n'est loyal a homme de faire un tort*" (it is never lawful for a man to do a wrong). Dyer, fol. 36, § 88. "*Et per curiam n'est loyal*" (and it was held by the court that it was not lawful). T. Jones 24. Also spelled *loayl*. Dyer 36, § 38; Law Fr. & Lat. Dict. The Norman spelling is "*loyse*." Kelh. Norm. Dict.

Faithful to a prince or superior; true to plighted faith or duty. Webster, Dict.

**LOYALTY.** Adherence to law. Faithfulness to the existing government.

**LUCID INTERVALS. In Medical Jurisprudence.** Periods in which an insane person is so far free from his disease that the ordinary legal consequences of insanity do not apply to acts done therein.

A lucid interval is not a perfect restoration to reason, but a restoration so far as to be able, beyond doubt, to comprehend and do the act with such perception, memory, and judgment as to make it a legal act. 2 Del. Ch. 263; Whart. & Stillé, Med. Jur. § 2.

Lucid intervals were regarded as more common and characterized by greater mental clearness and vigor, by earlier medical writers than the later ones. This view was shared by legal authorities, who treated a lucid interval as a complete, though temporary, restoration. D'Aguesseau, in the case of the Abbé d'Orléans, concludes: "It must not be a mere diminution, a remission, of the complaint, but a kind of temporary cure, an intermission so clearly marked as in every respect to resemble the restoration of health." Pothier, Obl., Evans' ed. 579. And Lord Thurlow characterized it as "an interval in which the mind, having thrown off the disease, had recovered its general habit." 3 Bro. C. C. 234. Possibly there may be such intermissions of absolute restoration but they are of rare occurrence. Usually, with apparent clearness, there is a real loss of mental force and acuteness,—not necessarily apparent to a superficial observer, but, upon critical examination, showing confusion of ideas and singularity of behavior indicative of serious though latent disease. In this condition the patient may hold some correct notions, even on a matter of business, and yet be quite incompetent to embrace all the relations connected with a contract or a will, even though no delusion was present to warp his judgment. This conclusion is aided by the recorded experiences of patients after entire recovery. See Georget, *Des Mal. Men.* 46: Reid, Essays on Hypochondriacal Affections, Essay 21; Combe, Men. Derang. 241; Ray, Med. Jur. 376.

Of late years the interest of the courts in connection with lucid intervals both in civil and criminal cases is confined to the ascertainment of the mental capacity of the person concerned with relation to the transaction in question. This idea has even been carried to the excess of treating the reasonableness of the act itself as the test of the capacity of the individual, or the existence of a lucid interval; 1 Phill. Lect. 90; 2 C. & P. 415. But this has been said to be a mere begging of the question, inasmuch as persons undeniably insane constantly do and say things which appear perfectly rational; 2 Hagg. 433, where two wills, both perfectly reasonable, were set aside because within a short time prior to their execution there had been admitted insanity. And it was said: "When there is not actual recovery, and a return to the management of himself and his concerns . . . the proof of a lucid interval is extremely difficult."

In criminal cases this difficulty is intensified, since the very term lucid interval implies that the disease has not disappeared, but only that its outward manifestations have ceased and there remains an abnormal condition of the brain, by whatever name it may be called, whereby the power of the mind to sustain provocations, resist temptations, or withstand any other causes of excitement, is greatly weakened. Being in their nature, as temporary and of uncertain duration, there is no presumption that they will continue: 104 Ala. 642; 30 *id.* 237; *contra*, 59 Wis. 569; and see 28 Ill. 306.

Lucid intervals are not to be confounded with periods of apparent recovery between two successive attacks of mental disorder, nor with transitions from one phase of insanity to another. These are said to be equivocal conditions during which persons subjected to them labor under a degree of nervous irritability, which renders them peculiarly susceptible to many of those incidents and influences which lead to crime; Ray, Med. Jur. ch. *Luc. Int.*

Both in civil and criminal cases the burden rests upon the party who contends for a lucid interval to prove it, since a person once insane is presumed so until it is shown that he had a lucid interval or has recovered; Co. Litt. 185, n.; 3 Bro. Ch. 441; 1 Pet. 163; 15 N. J. Eq. 243; 46 Ill. 258; 8 Can. S. C. 335. This presumption may be rebutted by proof of a change of mental condition and a lucid interval at the time; 41 Miss. 291; and it arises only where habitual insanity is shown, and in cases of temporary or recurrent insanity, no burden is thrown upon the party seeking to take advantage of the lucid interval; 35 L. R. A. (Miss.) 118; 13 Abb. Pr. N. S. 207; 30 Fla. 170; 116 Mo. 96; 1 Brews. (Pa.) 356.

A contract made during a lucid interval is valid; 92 Ga. 295; 139 Mass. 177. And the same is true of deeds, wills, and of the performances of any civil act. But where a lucid interval is relied upon, it must appear to have been of such a character as to enable the person to comprehend intelligently the nature and character of the transaction; 104 Ala. 642. Proof of a lucid interval, where it is required, must be made to the satisfaction of the jury; 66

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Tex. 476. There is no presumption of continuance of a lucid interval, it is temporary in its nature; 104 Ala. 642.

Insane persons, during a lucid interval, are competent witnesses, but the question of their competency is for the court to determine when the witness is produced to be sworn; 3 Abb. N. C. 329, which see for a note on the practice in such cases.

The general rule "is that a lunatic, or person affected with insanity, is admissible as a witness, if he have sufficient understanding to apprehend the obligation of an oath, and to be capable of giving a correct account of the matters which he has seen or heard in reference to the questions at issue; and whether he have that understanding is a question to be determined by the court upon examination of the party himself, and any competent witnesses who can speak to the nature and extent of his insanity;" 107 U. S. 519; 10 Allen 64; 158 Ill. 326; L. R. 11 Eq. 420; 97 Ala. 85; 30 Tex. App. 487; 25 Gratt. 865; 28 Conn. 177; 36 W. Va. 563. In State *v.* Brown, 36 Atl. Rep. (Del.) 458 (to be reported in 2 Marvel Del.), the witness was an inmate of an insane asylum and was admitted by an equally divided court to testify in a case of homicide in the asylum. The modern doctrine is that the fact of insanity goes to the credibility rather than to the competency of the witness; 5 Eng. L. & Eq. 547; 2 Den. C. C. 254; 5 Cox, C. C. 259; 4 Heisk. 565. See Clevenger, Med. Jur. of Insan. 607.

See 35 L. R. A. 117, n.; INSANITY.

**LUCRATIVE OFFICE.** One for which "pay, supposed to be an adequate compensation, is fixed to the performance of" its "duties." 8 Blackf. 329, where, under the Indiana constitution forbidding the holding of more than one lucrative office at one time, the offices of county commissioners and county recorder were held such. So also were prison director; 35 Ind. 111; mayor of a city; 35 *id.* 111; colonel of volunteers and reporter of the supreme court; 19 *id.* 351; otherwise as to the office of councilman in a city; 44 *id.* 405.

**LUCRATIVE SUCCESSION. In Scotch Law.** The passive title of *præceptio hæreditatis*, by which, if an heir apparent receive gratuitously a part, however small, of the heritage which would come to him as an heir, he is liable for all the grantor's precontracted debts. Erskine, Inst. 3. 8. 87–89; Stair, Inst. 3. 7.

**LUCRI CAUSA** (Lat. for the sake of gain). **In Criminal Law.** A term descriptive of the intent with which property is taken in cases of larceny.

Under modern decisions this ingredient is generally considered immaterial. In many English cases there is shown a tendency to resort to sophistical reasoning to avoid directly overruling the doctrine; 1 Den. C. C. 180; *id.* 193; Russ. & R. 307. In this country these cases have not been considered as authority; 18 Ala. 461. But the question has not been much discussed and the rule is generally considered well settled that it is sufficient if the taking be fraudulent and with the intent wholly to deprive the owner of his property. See LARCENY.

See also 16 Miss. 401; 10 Ala. N. S. 814; 3 Strobh. 508; 1 C. & K. 532; C. & M. 547; Inst. lib. 4, t. 1, § 1; 2 Bish. N. Cr. L. § 842; 30 S. W. Rep. (Tex.) 227; 26 *id.* 213.

**LUCRUM.** A small slip or parcel of land.

**LUCRUM CESSANS. In Civil Law.** A cession of gain. The amount of profit lost as distinguished from *damnum emergens*, an actual loss.

The actual loss sustained for the breach of contracts other than the mere non-payment of money which was covered by interest. Damages could be recovered in particular cases for both. Howe, Stud. Civ. L. 215.

**LUGGAGE.** Such articles of personal comfort and convenience as travellers usually find it desirable to carry with them. This term is synonymous with baggage: the latter being in more common use in this country, while the former seems to be almost exclusively used in England. 70 Cal. 169. See BAGGAGE.

**LUMEN. In Civil Law.** Light of the sun or sky.

**LUMINA.** Openings to obtain light in a building.

**LUMINARE.** A lamp or candle set burning on the altar of any church or chapel, for the maintenance whereof lands and rent-charges were frequently given to parish churches. Kenn. Glos.

**LUNACY.** See INSANITY; MANIA.

**LUNAR.** Belonging to or measured by the moon.

**LUNAR MONTH.** See MONTH.

**LUNATIC.** One who is insane. See INSANITY; DE LUNATICO INQUIRENDO.

**LUPINUM CAPUT GENERE.** See CAPUT LUPINUM.

**LUSHBOROW.** A counterfeit coin, made abroad like English money, and brought in during Edward III.'s reign. To bring any of it into the realm was made treason. Cowel.

**LYEF-GELD. In Saxon Law.** Leave-money. A small sum paid by customary tenants for leave to plough, etc. Cowel; Somn. on Gavelk. p. 27.

**LUXURY.** Excess and extravagance, formerly an offence against public economy. Whart.

**LYING.** Saying that which is false, knowing or not knowing it to be so. Every deceit comprehends a lie, but a deceit is more than a lie on account of the view with which it is practised. 3 Term 56. See DECEIT; MISREPRESENTATION.

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**LYING ABOUT.** An owner is liable to a penalty for cattle found lying about a highway; 3 Q. B. 345; but not where cattle being driven along a highway lie down for a short time and are then driven on again; *id.*

**LYING AT ANCHOR.** A vessel is lying at anchor when floating upon the water but held by her cable and anchor; 19 Hun 285; but not where beached with a cable attached to an anchor sunk in the bank; *id.;* or fastened to a pier; 77 N. Y. 453; 32 Ind. 458.

**LYING IN GRANT.** Incorporeal rights and things which cannot be transferred by livery of possession, but which exist only in idea, in contemplation of law, are said to lie in grant, and pass by the mere delivery of the deed. See GRANT; LIVERY OF SEISIN; SEISIN.

**LYING IN PORT.** Where a vessel has been lying in port for a long time a policy "at and from" the port attaches as soon as preparations for the voyage are commenced, but if she changes ownership in port, it attaches only when the assured becomes owner; 1 Mas. 127; 2 Johns. Cas. 10; 1 Cai. 75; 2 Cai. Cas. 158.

**LYING IN WAIT.** Being in ambush for the purpose of murdering another.

Lying in wait is evidence of deliberation and intention. Where murder is divided into degrees, as in Pennsylvania, lying in wait is such evidence of malice that it makes the killing, when it takes place, murder in the first degree. See Dane, Abr. Index.

To constitute lying in wait, three things must concur: to wit, waiting, watching, and secrecy. 9 Humph. 651.

**LYING ON.** Where this term is used in the description of metes, bounds, and location of land, it imports in law as well as in fact that it extends to borders upon the boundary designated in the description. 4 Houst. 337.

**LYING UP.** A vessel insured against perils on the voyage or while lying up, was held to be within the meaning of this clause while she was being towed into the harbor; 5 Robt. 473.

**LYNCH LAW.** A common phrase used to express the vengeance of a mob inflicting an injury and committing an outrage upon a person suspected of some offence. In England this is called Lidford Law; in Scotland, Cowper Law, Jedburgh Justice.

The Ohio act (see *infra*) defines *lynching* and *mob* as follows: "That any collection of individuals, assembled for any unlawful purposes intending to do damage or injury to any one, or pretending to exercise correctional power over persons by violence, and without authority of law, shall for the purposes of this act be regarded as a 'mob,' and any act of violence exercised by them upon the body of any person, shall constitute a 'lynching.'" 92 Ohio Laws 136.

There are various theories as to the person from whom lynch law derived its name. That most generally accepted credits it to Col. James Lynch, a Virginian, who, in 1780, administered such law to the extent of whipping but not the death penalty against Tory conspirators. For the protection of himself and his associates an act of amnesty was passed by the Virginia legislature in October, 1782, in which their action was described as "not strictly warranted by law, although justified by the imminence of the danger." Another person mentioned in this connection was the founder of the town of Lynchburg, Virginia, and another, an Englishman, sent out in the seventeenth century under a commission to suppress pirates whom he summarily executed without trial. Another account ascribes the term to James Fitz-Stevens Lynch, mayor of Galway in 1493, who tried his son for murder and when prevented from publicly executing him, hanged him from the window of his own house. See Int. Cyc. Ht.; 5 Green Bag 116; 4 *id.* 561; 2 Inter-coll. L. J. 163.

All who consent to the infliction of capital punishment by lynch law are guilty of murder in the first degree when not executed in hot blood. The act strikingly combines the distinctive features of deliberation and intent to take life; 38 Conn. 126; 1 Whart. Cr. Law § 399.

Lynch law differs from mob law in disregarding the forms of ordinary law, while intending to maintain its substance; while mob law disregards both.

In Ohio the act for the suppression of mob violence (*supra*) provided that any person assaulted by a mob and suffering lynching should be entitled to recover from the county $500; or, if the injury was serious, $1,000; or if it resulted in permanent disability of earning a livelihood $5,000. It also gave the county the right of recovering the amount of any judgment rendered against it from any of the parties composing the mob. This provision was held unconstitutional in specifying a definite recovery regardless of the actual damages suffered, being an encroachment of the legislature upon the judicial power, and so far as the damages awarded exceeded the actual damages suffered, it taxed the county for private interests; 15 Ohio Cir. Ct. 167, affirming 4 Ohio N. P. 249. This decision was followed in another county; 39 Wkly. L. Bul. 103.

**LYON KING OF ARMS. In Scotch Law.** An officer whose duty it formerly was to carry public messages to foreign states.

**LYTÆ. In Old Roman Law.** A name given to students of civil law in the fourth year of their course. Tayl. Civ. L. 39.

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# M.

**M.** The thirteenth letter of the alphabet.

Persons convicted of manslaughter, in England, were formerly marked with this letter on the brawn of the thumb.

This letter was sometimes put on the face of treasury notes of the United States, and signifies that the treasury note bears interest at the rate of one mill per dollar, and not one per centum interest.

**MACE BEARER. In English Law.** One who carries the mace, an ornamented staff, before certain functionaries. In Scotland an officer attending the court of session, and usually called a macer.

**MACE-GREFF. In Old English Law.** One who willingly bought stolen goods, especially food. Brit. c. 29.

**MACE-PROOF.** Secure against arrest. Wharton.

**MACEDONIAN DECREE. In Roman Law.** A decree of the Roman senate, which derived its name from that of a certain usurer, who was the cause of its being made, in consequence of his exactions.

It was intended to protect sons who lived under the paternal jurisdiction from the unconscionable contracts which they sometimes made on the expectations after their fathers' deaths; another, and perhaps the principal object, was to cast odium on the rapacious creditors. It declared such contracts void. Dig. 14, 6, 1; Domat, *Lois Civ.* liv. 1, tit. 6, § 4; Fonbl. Eq. b. 1, c. 2, § 12, note. See CATCHING BARGAIN; POST OBIT.

**MACHECOLLARE.** A warlike device made over a gate or other passageway through which hot water or offensive things may be cast upon the assailants. Co. Litt. 5 *a*.

**MACHINATION.** The act by which some plot or conspiracy is set on foot.

**MACHINE.** See PATENT.

**MACHINE AND REPAIR SHOP.** These words do not include woodwork; 23 U. C. C. P. 278.

**MACHINERY.** A more comprehensive term than machine, including the appurtenances necessary to the working of a machine; 111 Mass. 540; 108 *id.* 78; as the mains of a gas company; 12 Allen 75; or even a rolling-mill. 2 Sandf. 202.

Parts of a machine considered collectively; also the combination of mechanical means to a given end, such as the machinery of a locomotive, or of a canal lock, or of a watch; 44 La. Ann. 793. Those devices and parts of a car which have no physical operation and connection with the locomotive, except by means of the cars of a train, and the couplers between them are not within the meaning of the word as used in the exemption clause of a bill of lading; 47 U. S. App. 744; 81 Fed. Rep. 289. The mains or pipes laid in streets to distribute gas are "part of the machinery by means of which the corporate business (is) carried on;" 161 U. S. 316, 325. A saw is part of the machinery of a saw-mill; 44 Vt. 629; and iron and steel dies used in the manufacture of tinware are machinery; 111 Mass. 540.

The question of what machinery will pass under a mortgage of realty has been variously decided and will be found discussed under FIXTURES. The cases are collected in 11 Am. Rep. 314, note, and 24 *id.* 726, note. See 108 Mass. 81; 44 Ia. 64.

**MACTATOR.** A murderer.

**MADMAN.** See INSANITY.

**MADE KNOWN.** Words used as a return to a writ of *scire facias* when it has been served on the defendant.

**MÆG.** A kinsman. 2 Poll. & Maitl. 241.

The larger group of individuals into which the Anglo-Saxon family were divided was called the mægth or mægburh. At her marriage the wife did not become a member of her husband's mægth but remained in her own. If she committed a wrong her own kindred were responsible therefor, and the wergild of the husband was paid to his mægth as was that of the wife to hers. The mægth of the wife entrusted to her husband the guardianship over her, but constantly watched over his administration of the trust and interfered to protect her if necessary. The children belonged to both the mægth of the father and to that of the mother. The organization of the mægth offered a natural means to the mutual guaranty of personal safety, but as civilization became more advanced both the church and the state encouraged every tendency to weaken the tie of kinship as it became so strong as to threaten the rights of the king. See Essays, Ang. Sax. Fam. L. 121; 2 Poll. & Maitl. 241.

**MÆGBOTE.** A recompense for the slaying of a kinsman. Cowel. See WERGILD.

**MÆRE.** Famous; great; noted.

**MAGIC.** Witchcraft and sorcery.

**MAGISTER AD FACULTATES** (Lat.). **In English Ecclesiastical Law.** The title of an officer who grants dispensations: as, to marry, to eat flesh on days prohibited, and the like. Bacon, Abr. *Eccles. Courts* (A 5).

**MAGISTER CANCELLARIÆ. In Old English Law.** A master in chancery.

**MAGISTER LIBELLORUM.** Master of requests.

**MAGISTER LITIS.** Master of a suit.

**MAGISTER NAVIS** (Lat.). **In Civil Law.** Master of a ship; he to whom the whole care of a ship is given up, whether

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appointed by the owner, or charterer. L. 1, ff. *de exercit.; idem* § 3; Calvinus, Lex.; Story, Ag. § 36.

**MAGISTER PALATII.** Master of the palace, an officer similar to the modern lord chamberlain. Tayl. Civ. L. 37.

**MAGISTER SOCIETATIS** (Lat.). **In Civil Law.** Managing partner. Vicat, Voc. Jur.; Calv. Lex. Especially used of an officer employed in the business of collecting revenues, who had power to call together the tything-men (*decumands*), as it were a senate, and lay matters before them, and keep account of all receipts, etc. He had, generally, an agent in the province, who was also sometimes called *magister societatis. Id.;* Story, Partn. § 95.

**MAGISTRACY.** In its most enlarged signification, this term includes all officers, legislative, executive, and judicial. For example, in some of the state constitutions will be found this provision: "the powers of the government are divided into three distinct departments, and each of these is confided to a separate *magistracy*, to wit: those which are legislative, to one; those which are executive, to another; and those which are judicial, to another." In a more confined sense, it signifies the body of officers whose duty it is to put the laws in force; as, judges, justices of the peace, and the like. In a still narrower sense, it is employed to designate the body of justices of the peace. It is also used for the office of a magistrate.

**MAGISTRALIA BREVIA** (Lat.). Writs adapted to special cases, and so called because drawn by the *masters* in chancery. 1 Spence, Eq. Jur. 239. For the difference between these and *judicial writs*, see Bracton 413 *b*.

**MAGISTRATE.** A public civil officer, invested with some part of the legislative, executive, or judicial power given by the constitution. In a narrower sense this term includes only inferior judicial officers, as justices of the peace.

The president of the United States is the chief magistrate of this nation; the governors are the chief magistrates of their respective states.

It is the duty of all magistrates to exercise the power vested in them for the good of the people, according to law, and with zeal and fidelity. A neglect on the part of a magistrate to exercise the functions of his office, when required by law, is a misdemeanor. See 15 Viner, Abr. 144; Ayliffe, Pand. tit. 22; Dig. 30. 16. 57; Merlin, *Rép.;* 13 Pick. 523.

A federal law requiring an affidavit sworn to before a magistrate, is complied when "sworn to before me, J. M., Clerk of the Municipal Court," it being presumed that it was taken in the court; 36 Fed. Rep. 684. See JUDGE; JUSTICE OF THE PEACE.

**MAGISTRATE'S COURT. In American Law.** See COURT OF MAGISTRATES AND FREEHOLDERS.

**MAGNA ASSISA ELIGENDA.** See GRAND ASSIZE.

**MAGNA CENTUM.** The great hundred or six score. Whart.

**MAGNA CHARTA.** The Great Charter of English liberties, so called (but which was really a compact between the king and his barons, and almost exclusively for the benefit of the latter, though confirming the ancient liberties of Englishmen in some few particulars), was wrung from king John by his barons assembled in arms, on the 19th of June, 1215, and was given by the king's hand, as a confirmation of his own act, on the little island in the Thames, within the county of Buckinghamshire, which is still called "Magna Charta Island."

The struggle to secure from the king some recognition of the rights of p rson and property and some settled administration of law had been going on for nearly two centuries. In fact it had begun soon after the time of William the Conqueror. That monarch had overthrown the laws he found prevailing in England and had distributed to his followers the lands of the conquered people. But the same arbitrary power which gave these estates could, at a moment's caprice, take them away, and the barons were anxious for a more stable system. The ancient baronial laws of Edward the Confessor contained all that was needed to secure their rights, and these ancient laws they petitioned to have restored. They renewed their efforts from time to time with William I., William Rufus, Henry I., and Stephen, all of whom, except Henry I., succeeded in putting them off with promises. From Henry a charter was extorted about the year 1100 declaring that the church should be free heirs, should receive their possessions unredeemed, and evil customs should be abolished. In fact it gave most of the privileges which were afterwards embodied in Magna Charta. But in the course of a hundred years nearly all the copies of it were lost and its provisions were forgotten. It was not until John came to the throne in 1199 that the barons had their best opportunity. John's right to assume the crown was weak, and in order to gain the support of the barons he had to promise them the privileges for which they clamored, and with arms in their hands they compelled him to keep his word. Thomson, Magna Charta 2.

The preliminary interview was held in the meadow of Running Mede, or Runny Mede (fr. Sax. *rune*, council), that is, council meadow, which had been used constantly for national assemblies, and which was situated on the southwest side of the Thames, between Staines and Windsor. Though such formalities were observed, the provisions of the charter were disregarded by John and succeeding kings, each of whom, when wishing to do a popular thing, confirmed this charter. There were thirty-two confirmations between 1215 and 1416, the most celebrated of which were those by Hen. III. (1225) and Edw. I., which last confirmation was sealed with the great seal of England at Ghent, on the 5th November, 1297. Confirmatio Chartarum. The Magna Charta printed in all the books as of 9 Hen. III. is really a transcript of the roll of parliament of 25 Edw. I. There were many originals of Magna Charta made, two of which are preserved in the British Museum.

An original was found early in the 17th century by Sir Robert Cotton, the antiquary, in the hands of a tailor, who was just on the point of cutting it into measuring strips, having bought it in a lot of old papers out of an apartment anciently used as a scrivener's office; 11 Am. L. Rec. 684.

It is a misunderstanding to regard the Charter either as containing new principles or as terminating a struggle. On the contrary its character is eminently conservative, setting up "the laws of Henry I." as its standard. At the same time "confirmation of the Charter" was the rallying cry of the three next generations, and the constitutional progress up to 1340 is little more than the working out of the Charter's main clauses. 1 Soc. Eng. 267.

The Magna Charta of our statute-book is not exactly the charter that John sealed at Runnymede. It is a charter granted by his son and successor,



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Henry III., the text of the title of the original document having been modified on more than one occasion. 1 Soc. Eng. 410.

**Magna Charta** consists of thirty-seven chapters, the subject-matter of which is very various. C. 1 provides that the Anglican church shall be free and possess its rights unimpaired, probably referring chiefly to immunity from papal jurisdiction. C. 2 fixes relief which shall be paid by king's tenants, of full age. C. 3 relates to heirs and their being in ward. C. 4: guardians of wards within age are by this chapter restrained from *waste* of ward's estate, "*vasto hominum et rerum*," waste of men and of things, which shows that serfs were regarded as slaves even by this much-boasted charter; and as serfs and freemen were at this time the divisions of society, and as freemen included, almost without exception, the nobility alone, we can see somewhat how much this charter deserves its name. C. 5 relates to the land and other property of heirs, and the delivering them up when the heirs are of age. C. 6: the marriage of heirs. C. 7 provides that a widow shall have quarantine of forty days in her husband's chief house, and shall have her dower set out to her at once, without paying anything for it, and in meanwhile to have reasonable estovers; the dower to be one-third of lands of the husband, unless the wife was endowed of less at the church-door; widow not to be compelled to marry, but to find surety that she will not marry without consent of the lord of whom she holds.

C. 8: the goods and chattels of crown-debtor to be exhausted before his rents and lands are distrained; the surety not to be called upon if the principal can pay; if sureties pay the debt, they to have the rents and lands of debtor till the debt is satisfied. C. 9 secures to London and other cities and boroughs and town barons of the five ports, and all other ports, to have their ancient liberties. C. 10 prohibits excessive distress for more services or rent than was due. C. 11 provides that the courts of common pleas should not follow the court of the king, but should be held in a certain place. They were, accordingly, located at Westminster. C. 12 declares the manner of taking assizes of *novel desseisin* and *mort d'ancestor*. These were actions to recover lost seisin (*q. v.*), now abolished. C. 13 relates to assizes *darrein presentment* brought by ecclesiastics to try right to present to ecclesiastical benefices. Abolished. C. 14 provides that amercement of a freeman for a fault shall be proportionate to his crime, and not excessive, and that the villein of any other than the king shall be amerced in the same manner, his farm, utensils, etc., being preserved to him. For otherwise he could not cultivate the lord's land. C. 15 and c. 16 relate to making of bridges and keeping in repair of sewers and seawalls. This is now regulated by local parochial law.

C. 17 forbids sheriffs and coroners to hold pleas of the crown. Pleas of the crown are criminal cases which it is desirable should not be tried by an inferior and perhaps ignorant magistrate. C. 18 provides that if any one holding a lay fee from the crown die, the king's bailiff, on showing letters patent of summons for debt from the king, may attach all his goods and chattels, so that nothing be moved away till the debt to the crown be paid off clearly, the residue to go to the executors to perform the testament of the dead; and if there be no debt owing to the crown, all the chattels of the deceased to go to the executors, reserving, however, to the wife and children their reasonable parts. C. 19 relates to purveyance of the king's house; C. 20, to the castle-guard; C. 21, to taking horses, carts, and wood for use of royal castles. The last three chapters are now obsolete. C. 22 provides that the lands of felons shall go to the king for a year and a day, afterwards to the lord of the fee. The day is added to prevent dispute as to whether the year is exclusive or inclusive of its last day. C. 23 provides that the *wears* shall be pulled down in the Thames and Medway, and throughout England, except on the sea-coast. These *wears* destroyed fish, and interrupted the floating of wood and the like down stream. C. 24 relates to the writ of *præcipe in capite* for lords against their tenants offering wrong, etc. Now abolished. C. 25 provides a uniform measure. See 5 & 6 Will. IV. c. 63. C. 26 relates to inquisitions of life and member, which are to be granted freely. Now abolished. C. 27 relates to knight-service and other ancient tenures, now abolished.

C. 28 relates to accusations, which must be under oath. C. 29 provides that "no freeman shall be taken, or imprisoned, or disseised from his freehold, or liberties, or immunities, nor outlawed, nor exiled, nor in any manner destroyed, nor will we come upon him or send against him, except by legal judgment of his peers or the law of the land. We will sell or deny justice to none, nor put off right or justice." This clause is very much celebrated, as confirming the right to trial by jury. C. 30 relates to merchant-strangers, who are to be civilly treated, and, unless previously prohibited, are to have free passage through, and exit from, and dwelling in, England, without any manner of extortions, except in time of war. If they are of a country at war with England, and found in England at the beginning of the war, they are to be kept safely until it is found out how English merchants are treated in their country, and then are to be treated accordingly. C. 31 relates to escheats; C. 32, to the power of alienation in a freeman, which is limited. C. 33 relates to patrons of abbeys, etc. C. 34 provides that no appeal shall be brought by a woman except for the death of her husband. This was because the defendant could not defend himself against a woman in single combat. The crime of murder or homicide is now inquired into by indictment. C. 35 relates to rights of holding county courts, etc. Obsolete. C. 36 provides that a gift of lands in *mortmain* shall be void, and lands so given go to the lord of fee. C. 37 relates to escuage and subsidy. C. 38 confirms every article of the charter.

The object of this statute was to declare and reaffirm such common-law principles as, by reason of usurpation and force, had come to be of doubtful effect, and needed therefore to be authoritatively announced, that king and subject might alike authoritatively observe them. Cooley, Const. Lim. 30.

Magna Charta is said by some to have been so called because larger than the Charta de Foresta (*q. v.*), which was given about the same time. Spelman, Gloss. But see Cowel. Magna Charta is mentioned casually by Bracton, Fleta, and Britton. Glanvill is supposed to have written before Magna Charta. The Mirror of Justices (*q. v.*) has a chapter on its defects. See Co. 2d Inst.; Barringt. Stat.; 4 Bla. Com. 423. See a copy of Magna Charta in 1 Laws of South Carolina, edited by Judge Cooper, p. 78. In the Penny Magazine for the year 1833, p. 229, there is a copy of the original seal of King John affixed to this instrument; a specimen of a *fac-simile* of the writing of Magna Charta, beginning at the passage, *Nullus liber homo capietur vel imprisonetur*, etc. A *fac-simile* has been published by Chatto & Windus, London. A copy of both may be found in the Magasin Pittoresque for the year 1834, pp. 52, 53. Magna Charta was published for the first time in America in a tract issued by William Penn called "The excellent Privilege of Liberty and Property," printed by Bradford at Philadelphia in 1687. Besides extensive extracts from Magna Charta and Coke's comments thereon, the tract contains the confirmation of the charters of the liberties of England and of the forest made in the 25 Edward I., the Statute de Tallagio, the royal charter of Pennsylvania, and Penn's charter of liberties to the freemen of the province. This tract having become very scarce, has been reprinted by the Philobiblion Club of Philadelphia, with an historical introduction by Dr. Frederick D. Stone. See 8 Encyc. Brit., 9th ed. 306, 308; 5 *id.*, 9th ed. 432; Wharton, Lex.; Thomson; Wells, Magna Charta.

**MAGNA NEGLIGENTIA. In Civil Law.** Great negligence.

**MAGNA SERJEANTIA. In Old English Law.** The grand serjeanty. Fleta, lib. 2, c. 4, § 1.

**MAGNUM CAPE.** See GRAND CAPE.

**MAGNUM CONCILIUM. In Old English Law.** The great council, afterwards called "Parliament." 1 Bla. Com. 148.

**MAGNUS ROTULUS STATUTORUM.** The Great Statute Roll. The first English statute roll which begun with Magna Charta and ended with Edward III. Hale, Com. L. 16, 17.

**MAIHEM.** See MAYHEM; MAIM.

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**MAIHEMATUS.** Maimed or wounded.

**MAHL BRIEF.** A contract for building a ship, specifying her description, quality of materials, the denomination, and size, with reservation generally that the contractor or his agent (usually the master of a vessel) may reject uncontract-worthy materials, and oblige the builder to supply others. Jac. Sea Laws 2, 3.

**MAIDEN.** A young unmarried woman. In an indictment for adultery, not necessarily a virgin. 69 Vt. 428.

An instrument formerly used in Scotland for beheading criminals.

**MAIDEN ASSIZE.** Originally an assize at which no person was condemned to die. Now a session of a criminal court at which no prisoners are to be tried. Whart.

**MAIDEN RENTS.** In Old English Law. A fine paid to lords of some manors, on the marriage of tenants, originally given in consideration of the lord's relinquishing his customary right of lying the first night with the bride of a tenant. Cowel.

**MAIL.** (Fr. *malle*, a trunk). The bag, valise, or other contrivance used in conveying through the post-office letters, packets, newspapers, pamphlets, and the like, from place to place, under the authority of the United States. The things thus carried are also called the mail. See LETTER; DECOY LETTER; POSTAL SERVICE; OBSCENITY.

**MAIL MATTER.** Letters, packets, etc., received for transmission, and to be transmitted by post to the person to whom such matter is directed. 30 Fed. Rep. 820.

**MAILABLE.** Belonging to the class of articles transmissible by mail.

**MAILE.** In Old English Law. A small piece of money. A rent.

**MAILED.** As applied to a letter, it means that the letter was properly prepared for transmission by the servants of the postal department, and that it was put in the custody of the officer charged with the duty of forwarding the mail. 67 Mo. 169. See LETTER.

**MAILS AND DUTIES.** In Scotch Law. Rents of an estate. Stair, Inst. 2. 12. 32; 2 Ross, Lect. 235, 381, 431-439.

**MAIM.** In Criminal Law. To deprive a person of such part of his body as to render him less able in fighting or defending himself than he would have otherwise been. Whart. Cr. L. § 581. In New York, under the Rev. Stat., a blow aimed at and delivered upon the head does not constitute the crime of assault and battery, with intent to maim; 50 N. Y. 598. Distinguished from wounding; 11 Cox, Cr. Cas. 125; 11 Ia. 414. See MAYHEM.

**In Pleading.** The words "Feloniously did maim" must of necessity be inserted, because no other word nor any circumlocution will answer the same purpose. 1 Chitty, Cr. L. 244.

**MAIN CHANNEL.** See CHANNEL.

**MAIN SEA.** See SEA.

**MAINAD.** A false oath; perjury. Cow.

**MAINE.** The name of one of the states of the United States of America, formed out of that part of the territory of Massachusetts called the district of Maine.

The territory embraced in the new state was not contiguous to that remaining in the state from which it was taken, and was more than four times as large. The legislature of Massachusetts, by an act passed June 19, 1819, gave its consent for the people of the district to become a separate and independent state. They met in convention, by delegates elected for the purpose, and formed a separate state, by the style of the *State of Maine*, and adopted a constitution for the government thereof, October 19, 1819, and applied to congress, at its next session, for admission into the Union.

The petition was presented in the house of representatives of the United States, December 8, 1819, and the state was admitted into the Union by the act of congress of March 3, 1820, from and after the fifteenth day of March, 1820. The constitution of 1819 is still in force but has been frequently amended.

The election of governor, senators, and representatives is on the second Monday of September.

THE LEGISLATIVE POWER.—This is vested in a senate and a house of representatives.

The *House of Representatives* consists of one hundred and fifty-one members, apportioned among the counties according to law, elected biennially for two years.

The legislature convenes on the first Wednesday of January biennially in the odd years.

The *Senate* consists of not less than twenty nor more than thirty one members, elected, at the same time, and for the same term, as the representatives, from districts into which the state shall from time to time be divided. A senator must be at least twenty-five years old, and a representative twenty-one, and each must have been five years a citizen of the United States, one year a resident of the state and three months of the district, immediately preceding his election, and such residence must continue during his term of office.

THE EXECUTIVE POWER.—The *Governor* holds his office for two years. He must, at the commencement of his term, be no less than thirty years of age, a natural-born citizen of the United States, five years a resident of the state, and at the time of his election, and during his term, be a resident of the state.

A *Council* consisting of seven persons, citizens of the United States, and resident within the state, to advise the governor in the executive part of government, is to be chosen biennially by joint ballot of the senators and representatives in convention.

The governor has the powers usually incident to the office, but his exercise of the appointing and pardoning powers is with the advice and consent of the council. He has a veto power which is overcome by a vote of two-thirds of each house.

THE JUDICIAL POWER.—The *Supreme Judicial Court* is composed of one chief and seven assistant judges, appointed by the governor and council for the term of seven years. It is the court of last resort, and also the court of general original jurisdiction,—having the jurisdiction of the former district court. It has exclusive civil jurisdiction in law and equity, except over cases involving small amounts, of which jurisdiction is given to trial justices. It is the supreme court of probate, and an appeal lies to it from the decision of the judge of probate. Five judges are necessary to constitute a quorum for the decision of questions of law. Annual law terms are held in each of the three districts into which the state is divided for the purpose. For purposes of jury trials, including civil and criminal cases, the court is held by a single judge. Two or more terms are held annually in each county in the state, as provided by statute, from time to time. The justices receive a stated salary,

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and are to give their opinions upon important questions of law upon solemn occasions when required by the governor, senate, or house of representatives.

*Superior Courts* are established in the counties of Cumberland and Kennebec with an exclusive criminal and a limited civil jurisdiction.

*Probate Courts* are held in each county by judges elected for four years. They have jurisdiction to appoint guardians; of probate and administration; the settlement of estates of persons in state prison, under sentence of death or imprisonment for life; and generally for these and similar purposes.

*Justices of the Peace and Quorum* are appointed by the governor and council for seven years. They may administer oaths, etc.; take the disclosures of poor debtors arrested on reissue process or execution; and have certain other powers of less general interest.

*Trial justices* are appointed in the same manner as justices of the peace and quorum, and have ex-officio all the powers of those officers and also have jurisdiction over all civil cases (except those involving the title to land) where the amount involved does not exceed twenty dollars. They have a limited criminal jurisdiction.

*Municipal Courts* are created by special enactment in the larger towns, with a jurisdiction substantially that of the trial justices, and exclusive thereof, except in specified cases.

*County Commissioners* are chosen by the people, three in each county, to attend to the internal police of the county. They have the care of roads, bridges, etc., the public buildings of the county, and the control of the county money. One is elected annually for the term of three years.

No city or town can create any liability exceeding five per centum of its last regular valuation.

**MAINOUR. In Criminal Law.** The thing stolen found in the hands of the thief who has stolen it. See LARCENY.

**MAINOVER or MAINŒUVRE.** A trespass committed by hand. See 7 Rich. II. c. 4.

**MAINPERNABLE.** Capable of being bailed; one for whom bail may be taken; bailable.

**MAINPERNORS. In English Law.** Those persons to whom a man is delivered out of custody or prison, on their becoming bound for his appearance.

Mainpernors differ from bail; a man's bail may imprison or surrender him up before the stipulated day of appearance; mainpernors can do neither; but are merely sureties for his appearance at the day; bail are only sureties that the party be answerable for all the special matter for which they stipulate; mainpernors are bound to produce him to answer all charges whatsoever. 6 Mod. 231; 7 *id* 77, 85, 98; 3 Bla. Com. 128. See Dane, Abr.; BAIL.

**MAINPRISE. In English Law.** The taking a man into friendly custody, who might otherwise be committed to prison, upon security given for his appearance at a time and place assigned. Wood, Inst. b. 4, c. 4. The writ of mainprise is now obsolete. See BAIL; Bish. Cr. L. Proc. § 248.

**MAINSWORN.** Forsworn, by making a false oath with *hand* (*main*) on book. Used in the North of England. Brownl. 4; Hob. 125.

**MAINTAINED. In Pleading.** A technical word indispensable in an indictment for maintenance. 1 Wils. 325.

**MAINTAINORS. In Criminal Law.** Those who maintain or support a cause depending between others, not being retained as counsel or attorney. For this they may be fined and imprisoned. 2 Swift, Dig. 328; 4 Bla. Com. 124; Bacon, Abr. *Barrator.*

**MAINTENANCE.** Aid; support; assistance; the support which one person, who is bound by law to do so, gives to another. See FATHER; CHILD; HUSBAND.

Where by the constitution it is made the duty of the state legislature to make sufficient appropriations for the maintenance of the state militia, such a constitutional provision is not intended to make the entire expense of the militia a general state charge, and a provision in the military code making the compensation of certain armorers and others a county charge is not in violation of such a provision; 46 N. E. Rep. (N. Y.) 851.

**In Criminal Law.** A malicious, or, at least, officious, interference in a suit in which the offender has no interest, to assist one of the parties to it against the other, with money or advice to prosecute or defend the action, without any authority of law. 1 Russ. Cr. 176; Archb. Cr. Pr. & Pl. 1859. See 4 Kent 446; Whart. Cr. L. § 1854.

An unlawful taking in hand or upholding of quarrels or sides to the disturbance or hindrance of common right. 51 Me. 63.

An officious intermeddling in a suit that no way belongs to one, by assisting either party to the disturbing of the community by stirring up suits. 49 Ohio St. 475.

At common law it signifies an unlawful taking in hand or upholding of quarrels, or sides, to the disturbance or hindrance of common right. The maintenance of one side, in consideration of some bargain to have part of the thing in dispute, is called champerty. Champerty, therefore, is a species of maintenance; 40 Conn. 570.

The intermeddling of a stranger in a suit for the purpose of stirring up strife and continuing the litigation. 2 Pars. Contr., 8th ed. *766. See 4 Term 340; 4 Q. B. 883.

But there are many acts in the nature of maintenance which become justifiable from the circumstances under which they are done. They may be justified, *first*, because the parties have a common interest recognized by the law in the matter at issue in the suit; Bacon, Abr. *Maintenance;* 11 M. & W. 675; 9 Metc. 489, 262; 11 Me. 111; [1895] 1 Q. B. 339; *second*, because the party is of kindred or affinity, as father, son, or heir apparent, or husband or wife; 3 Cow. 623; 90 Tenn. 673; *third*, because the relation of landlord and tenant or master and servant subsists between the party to the suit and the person who assists him; *fourth*, because the money is given out of charity; 1 Bail. 401; *fifth*, because the person assisting the party to the suit is an attorney or counsellor; the assistance to be rendered must, however, be strictly professional, for a lawyer is not more justified in giving his client money than another man; 1 Russ. Cr. 179; Bacon, Abr. *Maintenance;* Brooke, Abr. *Maintenance.* This offence is punishable criminally by

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fine and imprisonment; 4 Bla. Com. 124; 2 Swift, Dig. 328. Contracts growing out of maintenance are void; 11 Mass. 549; 5 Humphr. 379; 20 Ala. N. S. 521; 5 T. B. Monr. 413; 5 Johns. Ch. 44; 4 Q. B. 883. See 1 Me. 292; 11 Mass. 553; 3 Cow. 647; 4 Wend. 306; 3 Johns. Ch. 508; 7 Dowl. & R. 846; 5 B. & C. 188; 2 Bish. Cr. Law 122; 61 Hun 623; 70 N. H. Rep. (Minn.) 806; 22 Can. S. C. R. 437. See 14 L. R. A. 785, n.; CHAMPERTY.

**MAJESTAS. In Roman Law.** The supreme authority of the state or prince.

**MAJOR.** One who has attained his full age and has acquired all his civil rights; one who is no longer a minor; an adult. See MAJORITY.

**In Military Law.** The officer next in rank above a captain.

For the use of the word in Latin maxims, see MAXIMS.

**MAJOR-GENERAL. In Military Law.** An officer next in rank above a brigadier-general. He commands a division consisting of several brigades, or even an army.

**MAJORA REGALIA.** The king's dignity, power, and royal prerogative, as opposed to his revenue, which is comprised in the *minora* regalia. 2 Steph. Com., 11th ed. 483; 1 Bla. Com. 240.

**MAJORES** (Lat.). The male ascendants beyond the sixth degree. The term was used among the Romans, and is still retained in making genealogical tables.

**MAJORITY.** The state or condition of a person who has arrived at full age. He is then said to be a major, in opposition to minor, which is his condition during infancy. See FULL AGE.

The greater number. More than all the opponents.

Some question exists as to whether a majority of any body is *more than one-half the whole number* or *more than the number acting in opposition.* Thus, in a body of one hundred voters, in which twenty did not vote on any particular question, on the former supposition fifty-one would be a majority, on the latter forty-one. The intended signification is generally denoted by the context, and where it is not, the second sense is generally intended; a majority on a given question being more than one-half the number of those voting.

In every well-regulated society, the majority has always claimed and exercised the right to govern the whole society, in the manner pointed out by the fundamental laws; and the minority are bound whether they have assented or not, for the obvious reason that opposite wills cannot prevail at the same time, in the same society, on the same subject; 1 Tuck. Bla. Com. Appx. 168; 9 Dane, Abr. 37; 1 Story, Const., 5th ed. § 207.

As to the rights of the majority of part-owners of vessels, see 3 Kent 114; Pars. Marit. Law; PART-OWNERS. As to the majority of a church corporation, see 16 Mass. 488.

In the absence of all stipulations, the general rule in partnerships is that each partner has an equal voice, and a majority acting *bona fide* have the right to manage the partnership concern and dispose of the partnership property notwithstanding the dissent of the minority; but in every case when the minority have a right to give an opinion, they ought to be notified. See PARTNER.

As to the conflict of laws relating to majority, see 19 Am. Dec. 180.

In corporations, in the absence of any provision in the charter or constitution, the general rule is that, within the scope of the corporate affairs, the acts of a majority bind the corporation; 30 Pa. 42; 4 Biss. 78; 33 Conn. 396; see 18 Fed. Rep. 283. It is not necessary that those present at a meeting constitute a majority of all the members; 7 Cow. 42; a majority of those who appear may act; 88 Pa. 42; 104 Mass. 378; 5 Blatch. 525; 57 Ill. 416; s. c. 11 Am. Rep. 24; 33 Beav. 595. When, however, an act is to be performed by a select and definite body, such as a board of directors, a majority of the entire body is required to constitute a meeting; 9 Wend. 394; 16 Ia. 284; but if a quorum is present, a majority of such quorum may act; 23 N. H. 555; 13 Ind. 58. The minority of a committee to which a corporate power has been delegated cannot bind the majority, or do any valid act, in the absence of any special provision otherwise; 127 U. S. 579.

In political elections, a majority of the votes cast at an election on any question means the majority of those who voted on that question; 10 Minn. 107; 1 Sneed 637; 20 Ill. 159; 56 *id.* 414; 20 Wis. 544; 95 U. S. 369. "All qualified voters who absent themselves from an election duly called are presumed to assent to the express will of the majority of those voting, unless the law providing for the election otherwise declares. Any other rule would be productive of the greatest inconvenience, and ought not to be adopted unless the legislative will to that effect is clearly expressed." *Id.* (Miller and Bradley, JJ., dissenting); but the opposite view is held in 35 Mo. 103; 16 Minn. 249; 69 Ind. 505. In the last case an amendment to the constitution received less than a majority of all those who voted at the election, but had a majority of the votes cast for or against the adoption of the amendment; and it was held (two judges dissenting) that the amendment had been neither ratified nor rejected. See 22 Alb. L. J. 44.

The United States House of Representatives has power to transact business when a majority of its members is present, and may prescribe any method which is reasonably certain to determine the presence of a majority; 144 U. S. 1. See ELECTION; MEETING; QUORUM; REORGANIZATION.

**MAJUS JUS.** A writ proceeding in some customary manors to try a right to land. Cow.

**MAKE.** To perform or execute: as, to *make his law*, is to perform that which a

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man had bound himself to do; that is, to clear himself of an action commenced against him, by his oath and the oath of his neighbors. Old Nat. Brev. 161.

*To make default* is to fail to appear in proper trial; to fail in a legal duty.

To make oath is to swear according to the form prescribed by law. It is also used intransitively of persons and things, to have effect; to tend. See Hardr. 133.

**MAKER.** A term applied to one who makes a promissory note and promises to pay it when due.

He who makes a bill of exchange is called the drawer; and frequently in common parlance and in books of reports we find the word drawer inaccurately applied to the maker of a promissory note. See PROMISSORY NOTE.

**MAKING HIS LAW.** A phrase used to denote the act of a person who wages his law. Bacon, Abr. *Wager of Law.*

**MAL.** A prefix meaning wrong or fraudulent.

**MAL-TOLTE. In Old French Law.** A term supposed to have arisen from the usurious gains of the Jews and Lombards in their management of the public revenue. Steph. Lect. 372.

**MALA IN SE.** Acts morally wrong; offences against conscience. 1 Bla. Com. 57, 58; 4 *id.* 8. See MALA PROHIBITA.

**MALA FIDES** (Lat.). Bad faith. It is opposed to *bona fides*, good faith.

**MALA PRAXIS** (Lat.). Bad or unskilful practice in a physician or other professional person, whereby the health of the patient is injured. Present usage adopts rather the English term malpractice. See PHYSICIAN.

**MALA PROHIBITA** (Lat.). Those things which are prohibited by law, and therefore unlawful.

Crimes, made such, only by reason of statutory prohibition. 1 McClain, Cr. L. § 23.

The distinction was formerly made with respect to the right to recover upon a contract for doing an unlawful act between *mala prohibita* and *mala in se*, but it has been said that this "has been long since exploded," and that "it was not founded upon any sound principle,"—that it makes no difference whether an act is forbidden because it is against good morals or against the interest of the state; 5 B. & Ald. 335, 340; 13 Pick. 519; 12 Q. B. Div. 121; and "it is now well settled that every contract to do a thing made penal by statute is void as unlawful;" Sharsw. note, 1 Bla. Com. 58.

In the criminal law the distinction is important with reference to the intent with which a wrongful act is done. Thus, a man in the execution of one act, by chance, does another one for which, if he had wilfully committed it, he would be liable to punishment,—if the act that he is doing were lawful or merely *malum prohibitum*, he is not punishable for the act arising from chance; but if *malum in se*, it is otherwise. For instance, if a person unauthorized to kill game in England, contrary to the statutes, in unlawfully shooting at game, accidentally kills a man, it is no more criminal than if he were authorized; but if the accidental killing be the result of wantonly shooting at another's fowls, which is *malum in se*, as a trespass, it is manslaughter; 1 Bish. N. Cr. L. § 332; citing 1 East, P. C. 260; and see 37 Conn. 424; 114 Mass. 323; 1 Whart. Cr. L. § 25.

Mr. Bishop also considers that the rule that ignorance of the law is no excuse for crime is particularly harsh when applied to what is only *malum prohibitum*; but that at the same time this is less important because most indictable wrongs are *mala in se*; 1 Bish. N. Cr. L. § 295.

It is said that "offences which are *mala in se* attract no additional turpitude from being declared unlawful by human legislation," while "*mala prohibita* are such acts as are in themselves indifferent," and become right or wrong, just or unjust, duties or misdemeanors, as the municipal legislature sees proper for protecting the welfare of society and more adequately carrying on the purposes of civil life; Anderson, Law Dict. In 22 Pick. 476, the court speak of offences "of a high and aggravated character, tending to breaches of the peace or other great disorder and violence, being what are usually considered *mala in se*, or criminal in themselves, in contradistinction to *mala prohibita*, or acts otherwise indifferent than as they are restrained by positive law."

"The substance of the distinction between *malum in se* and *malum prohibitum* is that the former is more intensely evil than the latter." 1 Bish. N. Cr. L. § 658. Offences which have been judicially characterized in this country as *mala prohibita* are, violations of statutes against gambling and lotteries; 101 U. S. 814, 821; carrying concealed weapons; 90 Mo. 302.

Blackstone mentions as examples, game laws and laws against exercising certain trades without having served a certain apprenticeship, for not performing the statute-work on the public roads, and "for innumerable other positive misdemeanors," the subject of discussion being more particularly the effect of the mere prohibition of an act and affixing a penalty; he adds—"Now these prohibitory laws do not make the transgression a moral offence or sin: the only obligation in conscience is to submit to the penalty, if lawful. It must, however, here be observed that we are speaking of laws that are merely penal where the thing forbidden or enjoined is wholly a matter of indifference and where the penalty involved is an adequate compensation for the small inconvenience supposed to arise from the offence, but where disobedience to the law involves also indirect or public mischief or private injury, there it falls within our former distinction and is also an offence against conscience." 1 Bla. Com. 57. His "former distinction" is as to *mala in se* which we are in conscience bound to abstain from, apart from their being criminal. These views of Blackstone have been the subject of much criticism and are controverted in the notes of Christian, Sharswood, and Chase.

Aside from the considerations suggested by Bishop as above stated, the distinction between *mala prohibita* and *mala in se* is of little, if any, practical utility, and some crimes usually relegated to the former class

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are so generally recognized as such by statute as to be considered as covered by the criminal law in the same sense as *malum in se;* 1 McClain, Cr. L. § 23. Judicial notice is taken of them in a country where the common law prevails; 11 Mich. 327. See CRIME; MALUM IN SE.

**MALADMINISTRATION.** A term in law used interchangeably with mis-administration and meaning "wrong administration." 14 Neb. 183.

**MALANDRINUS.** A thief or pirate. Wals. 338.

**MALBERGE.** A hill where the people assembled at a court, similar to the English assizes. Du Cange.

**MALE.** Of the masculine sex; of the sex that begets young; the sex opposed to the female.

**MALEDICTION** (Lat.). **In Ecclesiastical Law.** A curse which was anciently annexed to donations of lands made to churches and religious houses, against those who should violate their rights.

**MALEFACTOR** (Lat.). He who has been guilty of some crime; in another sense, one who has been convicted of having committed a crime.

**MALEFICIUM** (Lat.). **In Civil Law.** Waste; damage; tort; injury. Dig. 5. 18. 1.

**MALFEASANCE.** The unjust performance of some act which the party had no right, or which he had contracted not, to do. It differs from misfeasance and nonfeasance, which titles see. See 1 Chitty, Pr. 9; 1 Chitty, Pl. 134.

**MALICE. In Criminal Law.** The doing a wrongful act intentionally without just cause or excuse. 4 B. & C. 255; 9 Metc. 104. A wicked and mischievous purpose which characterizes the perpetration of an injurious act without lawful excuse. 4 B. & C. 255; 9 Metc. 104.

A conscious violation of the law, to the prejudice of another. 9 Cl. & F. 32.

That state of mind which prompts a conscious violation of the law to the prejudice of another. 9 Cl. & F. 32.

In a legal sense malice is never understood to denote general malevolence or unkindness of heart, or enmity towards a particular individual, but it signifies rather the intent from which flows any unlawful and injurious act committed without legal justification. 15 Pick. 337; 90 Ga. 95; 33 Me. 331; 7 Ala. N. S. 728; 2 Dev. 425; 4 Mas. 115; R. & R. 26. 465; 1 Mood. C. C. 93; 30 Fla. 142. It is not confined to the intention of doing an injury to any particular person, but extends to an evil design, a corrupt and wicked notion against some one at the time of committing the crime; Bacon, Max. Reg. 15; 2 Chitty, Cr. Law 727; 3 *id.* 1104; 90 Ga. 441.

Any formed design of mischief may be called malice. Malice is a wicked, vindictive temper, regardless of social duty, and bent on mischief. There may be malice, in a legal sense, in homicide, where there is no actual intention of any mischief, but the killing is the natural consequence of a careless action; Add. 156: 11 Ired. 261; 3 Cr. Law Mag. 216.

*Express malice* exists when the party evinces an intention to commit the crime; 3 Bulstr. 171.

*Implied* malice is that inferred by law from the facts proved; 11 Humphr. 172; 6 Blackf. 299; 1 East, Pl. Cr. 871. See 24 Neb. 838. In cases of murder this distinction is of no practical value; 2 Bish. N. Cr. L. § 675.

*Malice is implied* in every case of intentional homicide; and where the fact of killing is proved, all the circumstances of accident or necessity are to be satisfactorily established by the accused, unless they arise out of the evidence produced against him to prove the homicide and the circumstances attending it. If there are, in fact, circumstances of justification, excuse, or palliation, such proof will naturally indicate them. But where the fact of killing is proved by satisfactory evidence, and there are no circumstances disclosed tending to show justification or excuse, there is nothing to rebut the natural presumption of malice. It is material to the just understanding of this rule that it applies only to cases where the killing is proved and *nothing further is shown;* for if the circumstances disclosed tend to extenuate the act, the prisoner has the full benefit of such facts; 9 Metc. 93; 3 Gray 463.

*Malice in fact* is synonymous with "express malice," as distinguished from implied malice; 5 Ind. App. 78; 109 N. C. 270.

*Malice in law* is synonymous with implied malice; 5 Ind. App. 109; it is an act done wrongfully and wilfully, without reasonable or probable cause, and not necessarily an act done from ill feeling or spite, or a desire to injure another; 32 Neb. 444.

It is a general rule that when a man commits an act, unaccompanied by any circumstances justifying its commission, the law presumes he has acted with an intent to produce the consequences which have ensued. And therefore the intent to kill is conclusively inferred from the deliberate violent use of a deadly weapon; 5 Cush. 305. See 3 M. & S. 15; 1 R. & R. Cr. Cas. 207; 1 East, Pl. Cr. 223, 232, 340; 15 Viner, Abr. 506; 98 Ala. 1; 95 *id.* 5; 89 Va. 379.

**In Torts.** A malicious act is a wrongful act, intentionally done without cause or excuse. 48 Mo. 152.

A malevolent motive for action without reference to any hope of a remoter benefit to oneself to be accomplished by the intended harm to another. 148 Mass. 368.

Malice "is improper and indirect motive;" but a better definition is said to be, "A wish to injure the party, rather than to vindicate the law." Poll. Torts 303.

The evil mind that is regardless of social duty and the rights of others. 98 Tenn. 48.

*In a libel.* In connection with a privileged communication, malice is any direct and wicked motive which induces the writer to defame the other party. 109 N. C. 270. See 27 Alb. L. J. 134, 149; LIBEL.

*In slander* it is the absence of legal excuse; 81 Ind. 527; 5 Ind. App. 78. See SLANDER.

This term, as applied to torts, does not necessarily mean that which must proceed from a spiteful, malignant, or revengeful disposition, but a conduct injurious to an-

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other, though proceeding from an ill-regulated mind not sufficiently cautious before it occasions an injury to another; 11 S. & R. 39.

Malice consists in one's wilful doing of an act or wilful neglect of an obligation which he knows is liable to injure another, regardless of the consequences, and a malignant spirit or a specific intention to hurt an individual is not an essential element; 86 Fed. Rep. 308, per Brown, J. See 15 S. C. 409; 5 B. & A. 594; 51 Neb. 301.

It has been held that an act done in the exercise of a lawful right and without negligence may be unlawful if done with express malice; 25 Pa. 522; 113 *id.* 126; 7 H. L. Cas. 387; as persuading another to do, to the prejudice of a third person, something which he has a right to do, may give that third person a cause of action if the persuasion be malicious; [1895] 2 Q. B. 21, but this decision was reversed by the house of lords; [1898] A. C. 1; and the majority of the decisions tend to support the rule that an act in itself lawful is not converted by a malicious motive into an unlawful act, so as to make the doer liable to a civil action; *id.*; 24 Pa. 308; 72 N. Y. 39; 28 Vt. 49; and that no use of property which would be legal if due to a proper motive, can become illegal because it is prompted by a motive which is improper or even malicious; [1895] A. C. 587; and see 8 Harv. L. Rev. 1. Pecuniary dishonesty is held malicious; 101 Ill. 391.

A corporation may be liable civilly for that class of torts in which a specific malicious intention is an essential element; 86 Fed. Rep. 306. See 21 How. 202. See FALSE IMPRISONMENT; LIBEL; MALICIOUS PROSECUTION.

**MALICE AFORETHOUGHT.** A technical phrase employed in indictments, which with the word murder must be used to distinguish the felonious killing called murder from what is called manslaughter. Yelv. 205; 1 Chitty, Cr. L. 242; 1 Bish. Cr. L. § 429. In the description of murder the words do not imply deliberation, or the lapse of considerable time between the malicious intent to take life and the actual execution of that intent, but rather denote purpose and design in contradistinction to accident and mischance; 5 Cush. 306; 116 Mo. 96; and the intent necessary to constitute malice aforethought need not have existed for any particular time before the act of killing, but it may spring up at the instant and may be inferred from the fact of killing; 164 U. S. 492; but premeditation may be an element showing malice when otherwise it would not sufficiently appear; 2 Bish. Cr. L. § 677. See 8 C. & P. 616; 2 Mas. 60; 1 D. & B. 121, 163; 6 Blackf. 299; 3 Ala. N. S. 497.

**MALICIOUS ABANDONMENT.** The forsaking without a just cause a husband by the wife, or a wife by her husband. See ABANDONMENT; DIVORCE.

**MALICIOUS ARREST.** A wanton arrest made without probable cause by a regular process and proceeding. See MALICIOUS PROSECUTION.

**MALICIOUS INJURY.** An injury committed wilfully and wantonly, or without cause. 1 Chitty, Gen. Pr. 136. See Whar. Cr., 9th ed. § 126 as to malice. See 4 Bla. Com. 143, 198, 206; 2 Russ. Cr. 544.

**MALICIOUS MISCHIEF.** An expression applied to the wanton or reckless destruction of property, and the wilful perpetration of injury to the person. Washb. Cr. L. 73.

The term is not sufficiently defined as the wilful doing of any act prohibited by law, and for which the defendant has no lawful excuse. To sustain to a conviction of the offence of malicious mischief, the jury must be satisfied that the injury was done either out of a spirit of wanton cruelty or of wicked revenge. Jacob, Law Dict. *Mischief, Malicious;* Alison, Sc. Law 448; 3 Cush. 558; 2 Metc. 21; 3 Dev. & B. 130; 5 Ired. 364; 8 Leigh 719; 3 Me. 177. See 72 Mich. 172; 26 S. W. Rep. (Tex.) 621; 49 Kan. 584.

This is a common-law offence; 19 Wend. 419; 1 Dall. 335; 9 Pick. 1; 48 Ark. 56; *contra,* 29 N. J. L. 96; 5 Den. 277; but there are in many states statutes on the subject, and it is now considered rather with reference to statutes; 2 McCl. Cr. L. § 811, where will be found an excellent classified collection of the statutes and cases under them. One may be convicted of maliciously injuring the property of another, without knowing who the owner is; 95 Ia. 491: but it is necessary to allege that the rightful possession of the property was in some person other than the defendant; 33 Tex. Cr. Rep. 554. In Georgia the statute is held applicable only to inanimate property and not to the case of a dog killed; 93 Ga. 111; but see 35 Neb. 638. The destruction of a boat by order of the owner of a pond, in an effort to protect his possession of the latter from trespasses of the owner of the boat who had repeatedly taken the boat back to the water after the defendant had hauled it away, is not malicious mischief; 142 N. Y. 366; and see S. C. 131 *id.* 111, where the advice of counsel was held no defence.

**MALICIOUS PROSECUTION.** A wanton prosecution made by a prosecutor in a criminal proceeding, or a plaintiff in a civil suit, without probable cause, by a regular process and proceeding, which the facts did not warrant, as appears by the result. Actions for malicious prosecution are not favored by the law; they are to be carefully guarded and their true principles strictly adhered to; 1 Ld. Raym. 374; 79 Mass. 201; 20 Ill. 354; Newell, Mal. Pros. 21.

Where the defendant commences a *criminal prosecution* wantonly, and in other respects against law, he will be responsible; 12 Conn. 219. The prosecution of a *civil suit,* when malicious, is a good cause of action, even when there has been no arrest; 11 Conn. 582; 1 Wend. 345. See 106 Mass. 300; Big. Torts 71; 65 Hun 365; 53 Minn. 439; Newell, Mal. Pros. 43. But see 1 Am. Lead. Cas. 261; 21 Am. L. Reg. N. S. 287;

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64 Ia. 741; 64 Pa. 289; 27 Ill. 489. In such cases the want of probable cause must be very palpable; very slight grounds will not justify an action; Big. Torts 71. See L. R. 4 Q. B. 730. On the whole the weight of authority seems to be against the maintenance of an action for the malicious prosecution of a civil suit in which no process other than the summons was issued; 66 Cal. 123; Newell, Mal. Pros. 37; 66 Ill. App. 516. The bringing of an ordinary action, however maliciously, and however great the want of reasonable and probable cause, will not support an action for malicious prosecution; 11 Q. B. D. 690, *contra*, 42 Vt. 209; otherwise of bankruptcy proceedings maliciously instituted, without probable cause; 11 Q. B. D. 674; brought after the adjudication in bankruptcy has been set aside; 10 App. Cas. 210; and of civil proceedings begun by attachment, or by arrest; Poll. Torts 303; also, probably, of bringing and prosecuting an action maliciously and without probable cause in the name of a third person; *id.*

The action lies against the prosecutor, and even against a mere informer, when the proceedings are malicious; 9 Ala. 367. But grand jurors are not liable for information given by them to their fellow-jurors, on which a prosecution is founded; Hard. 556. Such action lies against a plaintiff in a civil action who maliciously sues out the writ and prosecutes it; 16 Pick. 453; but an action does not lie against an attorney at law for bringing the action, when regularly retained; 16 Pick. 478. See 6 Pick. 193. The attorney, however, must act in good faith. If an attorney knows that there is no cause of action, and dishonestly and with some sinister view, for some purpose of his own, or for some other ill purpose which the law calls malicious, causes the plaintiff to be arrested and imprisoned, he is liable; 34 Eng. C. L. R. 276; Newell, Mal. Pros. 23.

The action lies against a corporation aggregate if the prosecution be commenced and carried on by its agents in its interest and for its benefit, and they acted within the scope of their authority; 6 Q. B. D. 287; 9 Phila. 189; 22 Conn. 530; 130 Mass. 443; 73 Ind. 430; Poll. Torts 301, *contra*, 11 App. Cas. 250 (a dictum, see *id.* 244, 256). See also Cooley, Torts 121; 7 C. B. N. S. 290; 55 J. P. 264.

The proceedings under which the original prosecution or action was held must have been *regular*, in the ordinary course of justice, and before a tribunal having power to ascertain the truth or falsity of the charge and to punish the supposed offender, the now plaintiff; 3 Pick. 379. When the proceedings are irregular, the prosecutor is a trespasser; 3 Blackf. 210.

The burden is on the plaintiff to prove affirmatively that he was prosecuted, that he was exonerated or discharged, and that the prosecution was both malicious and without probable cause; 11 Q. B. D. 440. Webb, Poll. Torts 392; Bish. Non-contr. L. §§ 218–250; 35 Md. 194; 48 Barb. 30; 3 Gill & J. 377; 12 Conn. 219; 3 Mass. 112.

Malice is a question of fact for the jury, and is generally inferred from a want of probable cause; 65 Hun 623; but it is not evidence of malice when the prosecutor honestly believes in the charge; [1891] 2 Q. B. 718; and such presumption is only *prima facie* and may be rebutted; 86 Ala. 250; see 41 La. Ann. 303; 45 Ill. App. 458; 65 Hun 625. Although absence of reasonable and probable cause is sometimes evidence of malice, yet it is not when the prosecutor actually believes in the charge; [1891] 2 Q. B. 718. From the most express malice, however, want of probable cause cannot be inferred; 35 Md. 194; 37 *id.* 282. Both malice and want of probable cause must concur in order to constitute a cause of action; 20 Nev. 290; 40 La. Ann. 374; 41 *id.* 311; 69 Tex. 167; 79 Ga. 637; 51 N. J. L. 391; 120 U. S. 141. The plaintiff must show total absence of probable cause, whether the original proceedings were civil or criminal; 1 Camp. 199; 7 Cra. 339; 1 Mas. 24; 11 Ad. & E. 483; 24 Pick. 81; 2 Wend. 424; 1 Hill S. C. 82; 3 G. & J. 377; 9 Conn. 309; 3 Blackf. 445; 47 Kan. 396; 158 Pa. 545.

Probable cause means the existence of such facts and circumstances as would excite the belief in a reasonable mind that the plaintiff was guilty of the offence for which he was prosecuted; 37 Md. 282; 86 Ala. 250. It is such conduct on the part of the accused as may induce the court to infer that the prosecution was undertaken from public motives; 1 Greenl. 135; s. c. 10 Am. Dec. 48. See, also, 72 Ill. 262; 83 *id.* 548; 4 Vt. 363; 62 N. Y. 525; 32 Neb. 444. Where there are grounds of suspicion that a crime has been committed and the interests of public justice require an investigation, there is said to be probable cause, however malicious the intention of the accuser may have been; Cro. Eliz. 70; 2 Term 231; 1 Wend. 140, 345; 5 Humph. 357; 3 B. Monr. 4; 55 Fed. Rep. 217. See 1 Pa. 234; 6 W. & S. 236; 1 Meigs 84; 3 Brev. 94; 37 Ill. App. 28. It is a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the accused is guilty of the offence with which he is charged; 14 U. S. App. 297. And probable cause will be presumed until the contrary appears; circumstances sufficient merely to warrant a belief by a cautious man are not sufficient, but the belief must be that also of a reasonable and prudent man; 151 Pa. 86. The plaintiff must prove affirmatively the absence of probable cause and the existence of malice, and where the defendant had a very treacherous memory, and went on with the prosecution under the impression that the plaintiff had committed perjury, yet if that was an honest impression, the result of a fallacious memory, and acting upon it, he honestly believed the plaintiff had sworn falsely, the English court of appeals held that the jury would not be justified in finding that the defendant had prosecuted the plaintiff maliciously and without probable cause; 8 Q. B. D. 174. It makes no dif-

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ference how malicious may have been the private motives of the party in prosecuting; he is protected if there was probable cause; 55 Fed. Rep. 217.

Whether the circumstances relied on are true is a question for the jury; but whether if true they amount to probable cause is a question of law for the court; 2 Q. B. 169; 93 Cal. 222; 27 Me. 266; 10 N. Y. 240; 20 Ohio 119; 10 Q. B. 272; 47 Pa. 94; 93 Cal. 222; 21 Can. S. C. 588. Evidence that the prosecution was to obtain possession of goods, is proof of want of probable cause; 47 Pa. 194; so is evidence that the plaintiff began the prosecution for the purpose of collecting a debt. See 144 Ill. 83; 86 Tex. 497. Probable cause depends upon the prosecutor's belief of guilt or innocence; 48 Barb. 30; see *supra;* rumors are not, but representations of others are, a foundation for belief of guilt; 52 Pa. 419. The foreman of the grand jury, who has testified that the criminal prosecution was dismissed, cannot be asked why it was dismissed, because his testimony merely proves that the prosecution is at an end and has no bearing on the question of probable cause; and evidence that the prosecution was dismissed at the instance of the defendant without the plaintiff's knowledge is irrelevant either in bar of suit or in mitigation of damages; 81 Md. 518. When the defendant, in instituting the prosecution, went before a magistrate with his counsel, expecting to make the complaint in writing and that the warrant would be issued in the usual manner, he is not liable for the act of the magistrate in directing the arrest of the defendant without a warrant; 63 N. W. Rep. (Mich.) 301.

A warrant for the arrest of a person issued upon an affidavit which charged such person with being "guilty of lying and misrepresentation" is void as a criminal prosecution, and it has been held that it cannot serve as the basis of an action for malicious prosecution; 27 S. E. Rep. (Ga.) 680.

Malice may be inferred from the zeal and activity of the prosecutor conducting the prosecution; 36 Md. 246. The advice of counsel who has been fully informed of the facts is a complete justification; 25 Pa. 275; 125 *id.* 453; 151 *id.* 86; 61 N. W. Rep. 390; 37 Minn. 147; 40 *id.* 413; otherwise, where it does not appear that a full disclosure of all the facts was made; 41 La. Ann. 303; 35 Fed. Rep. 466; 39 Minn. 107; 2 Misc. Rep. 303; and where the defendant acts on the advice of a magistrate or one not learned in the law; 36 Md. 246; 159 Pa. 374; 81 Ga. 668; but see 84 Me. 261; 96 Mich. 408. Where he acted on the advice of a public prosecuting officer, probable cause is established if he shows a disclosure to such officer of all the facts within his knowledge, or which he had reasonable ground to believe, though there were exculpatory facts which he might have ascertained by diligent inquiry; 49 Pac. Rep. (Oreg.) 803.

A waiver of preliminary examination by the defendant in a criminal prosecution raises a presumption of probable cause; 49 Pac. Rep. (Oreg.) 803.

The advice of counsel is not, however, conclusive of want of malice; 69 Tex. 167; and while a full and complete statement of facts to a reputable attorney is a complete defence, yet though the facts may be established beyond doubt the question of good faith is for the jury, when different minds might draw different conclusions from the evidence; 67 N. W. Rep. (Wis.) 49.

The fact that an attorney was consulted before prosecuting the plaintiff for opening his mail, is not admissible as proof of probable cause, when it also appears that the attorney gave defendant no advice, but referred him to the United States officers; 61 N. W. Rep. (Ia.) 390. See 33 Am. L. Reg. N. S. 391.

The malicious prosecution or action must be ended, and the plaintiff must show it was groundless, either by his acquittal or by obtaining a final judgment in his favor in a civil action; 1 Root 553; 7 Cow. 715; 2 Dev. & B. 492; 17 Or. 447. But see *contra*, as to civil suits; Big. Torts 73; 14 East 216; because the plaintiff in a civil suit can terminate it whenever he wishes to do so. The finding by the examining court that there was probable cause to believe the plaintiff guilty and the binding him over for trial is only *prima facie* evidence of probable cause, and probable cause cannot be shown by admission of the plaintiff after his arrest nor by the finding of property on his premises, similar to that stolen, if that fact was not known to the defendant when he began his prosecution; 13 Ind. App. 10; 63 N. W. Rep. (Ia.) 348. Any act which is tantamount to a discontinuance of a civil suit has the same effect; as where the plaintiff had been arrested in a civil suit, and the defendant had failed to have the writ returned, and to appear and file a declaration at the return term; 109 Mass. 158.

In criminal cases also, when the prosecuting officer enters a dismissal of the proceedings before the defendant is put in jeopardy, this act, in some jurisdictions, gives no right to the prisoner against the prosecutor; for instance, where, in a prosecution for arson, the prosecuting officer enters a *nolle prosequi* before the jury is sworn; 4 Cush. 217. See 56 Conn. 493; 151 Pa. 86; 73 Hun 547; 7 Ind. App. 581; 117 N. C. 31. The law on this point is unsettled. But it would seem that where the entry of the *nolle prosequi* is the mere act of the prosecuting attorney and no action of the court is had on it, the entry will not be an end of the proceedings, and for that reason would not warrant any action which could not be had before the proceedings were at an end. But when the court enters a judgment of discharge upon a *nolle prosequi* it seems to be a sufficient termination of the prosecution.

The remedy for a malicious prosecution is an action on the case to recover damages for the injury sustained; 5 Stew. & P. 367; 2 Conn. 700; 11 Mass. 500; 6 Me. 421; 3 Gill & J. 377. See CASE. The elements of

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damage in this action are very vague. The jury may consider the natural effect of the prosecution on reputation and feelings, the consequences of arrest, loss of time, injury to property, and expense; 57 Ia. 474; 52 Ill. 35; Newell, Mal. Pros. 494. If the prosecution was begun without probable cause, and persisted in for some private end, punitive damages may be given; 37 Md. 282. See full article in 21 Am. L. Reg. N. S. 281. To be relieved from an action the defendant must rebut the *prima facie* proof of implied malice against him, by showing honest belief, grounded on probable and reasonable cause; 41 La. Ann. 303. It is sufficient if the facts or appearances are sufficient to induce a reasonable probability that the acts which constitute the crime have been done; 35 Fed. Rep. 261.

**MALICIOUSLY.** With deliberate intent to injure. 30 Conn. 85.

**MALIGNARE.** To malign or slander; also to maim.

**MALITIA PRÆCOGITATA.** Malice aforethought.

**MALLEABLE.** Capable of being drawn out and extended by beating; capable of extension by hammering; reducible to laminated form by beating. 46 Fed. Rep. 845.

**MALLUM. In Old English Law.** A court of the higher kind in a county in which the more important business was dispatched by the count or earl.

**MALO ANIMO.** With an evil intention; with malice.

**MALO GRATO.** In spite; unwillingly.

**MALT-TAX.** An excise duty imposed upon malt in England. 1 Bla. Com. 313.

**MALPRACTICE.** See PHYSICIAN.

**MALUM IN SE** (Lat.). Evil in itself. A crime by reason of its inherent nature. 1 McClain, Cr. L. § 23.

An offence *malum in se* is one which is naturally evil, as murder, theft, and the like; offences at common law are generally *mala in se*. An offence *malum prohibitum*, on the contrary, is not naturally an evil, but becomes so in consequence of its being forbidden, as playing at games which, being innocent before, have become unlawful in consequence of being forbidden. See Bacon, Abr. *Assumpsit* (*a*); 1 Kent 468; MALA PROHIBITA.

**MALVEILLES.** Ill will. In some ancient records this word signifies malicious practices, or crimes and misdemeanors.

**MALVEIS PROCURORS.** Such as used to pack juries, by the nomination of either party in a cause, or other practice. Cow.

**MALVERSATION. In French Law.** This word is applied to all punishable faults committed in the exercise of an office, such as corruptions, exactions, extortions, and larceny. Merlin, *Répert.*

**MAN.** A human being. A person of the male sex. A male of the human species above the age of puberty.

In its most extended sense the term includes not only the adult male sex of the human species, but women and children: examples: "of offences against *man*, some are more immediately against the king, others more immediately against the *subject*." Hawk. Pl. Cr. b. 1, c. 2, s. 1. "Offences against the life of *man* come under the general name of homicide, which in our law signifies the killing of a *man* by a *man*." *Id.* book 1, c. 8, s. 2.

It was considered in the civil or Roman law that although *man* and *person* are synonymous in grammar, they had a different acceptation in law; all persons were men, but all men—for example, slaves—were not persons, but things. See Barringt. Stat. 216.

**MANACLE.** See FETTERS.

**MANAGE.** Direct; control; govern; administer; oversee. 144 Pa. 377.

**MANAGEMENT.** In the Harter Act, relates to management on the voyage and not to the master's acts in stowing the ship with reference to her stability and seaworthiness; 81 Fed. Rep. 665.

**MANAGER.** A person appointed or elected to manage the affairs of another. A term applied to those officers of a corporation who are authorized to manage its affairs.

One who has the conduct or direction of anything. 144 Pa. 377.

One of the persons appointed on the part of the house of representatives to prosecute impeachments before the senate.

In banking corporations these officers are commonly called directors, and the power to conduct the affairs of the company is vested in a board of directors. In some private corporations, such as railroad companies, canal and coal companies, and the like, these officers are called managers. Being agents, when their authority is limited, they have no power to bind their principal beyond such authority; 17 Mass. 29; 1 Me. 81.

In England and Canada the chief executive officer of a branch bank is called a manager. His duties are those of our presidents and cashiers combined. His signature is necessary to every contract binding on the bank, except entries in the pass-books of customers. He indorses bills, signs bills of exchange and drafts, and conducts the correspondence of the bank. He is under the control of the board of directors of the bank, and there is usually a local or branch board of directors, at which he acts as presiding officer. Sewell, Bank.

**MANBOTE.** A compensation paid the relations of a murdered man by the murderer or his friends.

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**MANCHE PRESENT.** A bribe; a present from the donor's own hand.

**MANCIPATE.** To enslave; to bind up; to tie.

**MANCIPATIO. In Roman Law.** The legal form of conveyance and of fixing the relations between parties. Morey, R. L. 2. See MANUMISSION; MANCIPIUM.

**MANCIPATORY WILL. In Civil Law.** A form of testamentary disposition of property.

"The testator, in the presence of five witnesses and a *libripens*, mancipates (*i. e.* sells) his estate (*familia pecuniaque*) to a third party, the so-called *familiæ emtor*, with a view to imposing upon the latter, in solemn terms (*nuncupatio*), the duty of carrying out his last wishes as contained and expressed in the *tabulæ testamenti*. The object of the transaction is to make the *familæ emtor* not the material, but only the formal owner of the estate. His actual duties consist in the carrying out of the testator's intentions and the handing over of the property to the persons named in the *tabulæ testamenti*, the *familæ emtor* is neither more nor less than the executor of the testator." Sohm, Rom. L. 450.

This is said by the same author to be the oldest form of the Roman contract of mandatum "a juristic act validly concluded, not indeed *consensu*, but *re* (viz. by a formal conveyance of ownership), and a juristic act giving rise to a rigorously binding obligation. The mandatum and the conveyance of ownership are not mutually incompatible. The *familæ emtor* is the mandatory of the testator, because he is, formally speaking, the owner of the *familia*." Sohm, Rom. L. 451.

**MANCIPIUM.** The power acquired over a freeman by the *mancipatio*.

To form a clear conception of the true import of the word in the Roman jurisprudence, it is necessary to advert to the four distinct powers which were exercised by the *pater familias*, viz.; the *manus*, or martial power; the *mancipium*, resulting from the *mancipatio*, or *alienatio per æs et libram*, of a freeman; the *dominica potestas*, the power of the master over his slaves, and the *patria potestas*, the paternal power. When the *pater familias* sold his son, *venum dare*, *mancipare*, the paternal power was succeeded by the *mancipium*, or the power acquired by the purchaser over the person whom he held *in mancipio*, and whose condition was assimilated to that of a slave. What is most remarkable is, that on the emancipation from the *mancipium* he fell back into the paternal power, which was not entirely exhausted until he had been sold three times by the *pater familias*. *Si pater filium ter venum dat, filius a patre liber esto.* Gaius speaks of the *mancipatio* as *imaginaria quædam venditio*, because in his times it was only resorted to for the purpose of adoption or emancipation. See 1 Ortolan, 112; Morey, Rom. L. 23, 32; Sohm, Inst. R. L. 124, 390; ADOPTION; PATER FAMILIAS.

**MANCOMUNAL. In Spanish Law.** A term applied to an obligation when one person assumes the contract or debt of another. Schmidt, Civ. L. 120.

**MANDAMIENTO. In Spanish Law.** Commission; power of attorney. A *bona fide* contract by which one person commits his affairs to the charge of another, and the latter accepts the charge. White, New Recop. b. 2, tit. 12, c. 1.

**MANDAMUS. In Practice.** This is a high prerogative writ, usually issuing out of the highest court of general jurisdiction in a state, in the name of the sovereignty, directed to any natural person, corporation, or inferior court of judicature within its jurisdiction, requiring them to do some particular thing therein specified, and which appertains to their office or duty. 3 Bla. Com. 110; 4 Bacon, Abr. 495; per Marshall, C. J., in Marbury *v.* Madison, 1 Cra. 137, 168. See 3 Wyo. 588. It is a common-law writ with which equity has nothing to do; 76 Ga. 725.

It is an extraordinary remedy in cases where the usual and ordinary modes of proceeding are powerless to afford remedies to the parties aggrieved, and when, without its aid, there would be a failure of justice; 88 Va. 942. It confers no new authority and the party to be coerced must have the power to perform the act; 129 U. S. 493. Mandamus has been termed a "criminal process relative to civil rights;" 3 Brev. 264.

Its use is well defined by Lord Mansfield in Rex. *v.* Barker, 3 Burr. 1265: "It was introduced to prevent disorder from a failure of justice and defect of police. Therefore it ought to be used upon all occasions when the law has established no specific remedy, and where, in justice and good government there ought to be one." "If there be a *right*, and no other specific *remedy*, this should not be denied." The same principles are declared by Lord Ellenborough, in Rex *v.* Archbishop of Canterbury, 8 East 219. See 6 Ad. & E. 321. The writ of mandamus is the supplementary remedy when the party has a clear right, and no other appropriate redress, in order to prevent a failure of justice. 12 Petersd. Abr. 438 (309). It is the absence of a specific legal remedy which gives the court jurisdiction; 2 Selw. N. P. *Mandamus;* 29 Pa. 131; 34 *id.* 496; 41 Me. 15; 2 Pat. & H. 385; but the party must have a perfect legal right; Beach, Pub. Corp. § 1559; 27 Mo. 225; 11 Ind. 205; 20 Ill. 525; 25 Barb. 73; 2 Dutch. 135; 3 Cal. 167; and there must be a positive ministerial duty to be performed and no other appropriate remedy; 31 S. C. 81; 126 U. S. 246; 85 Ky. 177; 23 Neb. 641.

Under the English system this writ acquired, and may probably be still said to retain, its prerogative character; but in the United States it is becoming more and more assimilated to an ordinary remedy, to the use of which the parties are entitled as of right. It was in this sense that Taney, C. J., characterized it in modern practice as "nothing more than an action at law between the parties"; 24 How. 66; see, also, 33 Conn. 298; High, Extr. Leg. Rem. § 4. There is a tendency, however, in some states to adhere to the prerogative idea; 26 N. Y. 316; 33 Ill. 134; 48 *id.* 240. Though in the last named state, the prerogative idea seems to

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have been lost under the statutory use of the writ, while the discretionary character remains; 86 *id.* 283. It may be said to remain in this country an extraordinary remedy at law in the same sense that injunction is an extraordinary remedy in equity; High, Extr. Leg. Rem. § 5. The injunction is preventive and conservative, its object being to preserve matters *in statu quo*. Mandamus is remedial, tending to compel action and redress past grievances; *id.* § 6, and cases cited. Mandamus cannot be used as a preventive remedy to take the place of an injunction; 42 Md. 203.

Mandamus is a remedial process, and is not available to compel the performance of an act that will work public or private mischief, or to compel compliance with the strict letter of the law in disregard of its spirit, or in aid of a palpable fraud, or to evade the payment of a just portion of a tax by taking advantage of a confessed mistake; 137 N. Y. 201.

The remedy extends to the control of all inferior tribunals, corporations, public officers, and even private persons in some cases. But more generally, the English court of king's bench, from which our practice on the subject is derived, declined to interfere by mandamus to require a specific performance of a contract when no public right was concerned; Ang. & A. Corp. 761; 6 East 356; Bacon, Ab. *Mandamus*; 28 Vt. 587.

Mandamus may be granted by an appellate court to require a judge of the court to settle and allow a bill of exceptions; 16 Or. 319; 30 W. Va. 58; 128 U. S. 544. See 129 Ill. 218. It will also lie to compel an inferior court to exercise a discretion; 44 La. Ann. 1031; but not to compel the court below to decide in a particular way, or to operate as a substitute for an appeal or writ of error, even if none is given by law; 155 U. S. 396.

It is a proper remedy to compel the performance of a specific act where the act is ministerial in its character; Moraw. Priv. Corp. 15; 12 Pet. 524; 34 Pa. 293; 26 Ga. 665; 7 Ia. 186, 390; but where the act is of a discretionary; 6 How. 92; 12 Cush. 403; 20 Tex. 60; 10 Cal. 376; 5 Harring. 108; 12 Md. 329; 145 N. Y. 253; 4 Mich. 187; 5 Ohio St. 528; or judicial nature; 14 La. Ann. 60; 7 Cal. 130; 18 B. Monr. 423; 7 E. & B. 366; it will lie only to compel action generally; 11 Cal. 42; 30 Ala. N. S. 49; 28 Mo. 259; 96 *id.* 75; 31 W. Va. 781; 85 Ala. 226; 40 La. Ann. 818; 119 Ind. 444; 85 Ky. 177; 51 N. J. L. 479; 120 Pa. 518; and where the necessity of acting is a matter of discretion, it will not lie even to compel action; 6 How. 92; 5 Ia. 380. A class of cases in which this distinction is constantly drawn into question is where a mandamus is applied for to control the letting of public or municipal contracts, and it is the general rule that the remedy will not be applied to compel a municipal corporation to enter into a contract with one who shows himself to have been the lowest bidder; 9 Wash. 518. The provision that the contract shall be let to the lowest responsible bidder is mandatory, but the municipal board has a discretion in determining the question of responsibility, and their decision will not be reviewed on mandamus even though erroneous; 108 Pa. 559; 62 Ill. 279; 16 Nev. 217; 91 Mo. 386, *contra*, 21 Ohio 311; 4 Neb. 150; in other cases it is held that where the contract has been entered into with another and expense incurred, a mandamus will not be issued; 27 N. Y. 378 (and see 72 *id.* 496; 46 Barb. 254); 47 Mich. 135; 91 *id.* 262; others, again, hold that, the statutes being for the public benefit, the relators have not a clear legal right; 24 Wis. 683; 76 Md. 395; 45 Vt. 7; 23 Ia. 203. The writ is also refused where the matter is left entirely to the discretion of the authorities, with no provision about the lowest bidder; 141 Mass. 74; 35 Neb. 346; 78 Ia. 97; 49 Barb. 259. Where before the application the work was readvertised and the same person made a lower bid, under which he obtained the contract, a mandamus was refused; 155 U. S. 303. See 33 Am. L. Reg. 899.

Writs of mandamus have been issued from very early times to the ecclesiastical courts to compel them to absolve an excommunicated person who wished to conform to the orders of the church; 1 Palmer 50; to compel the Dean of Arches to hear an appeal; 7 E. & B. 315; but a mandamus is refused where the judge has absolute discretion, and it is said that a mandamus has never been granted to deprive one of office; Shortt, Mand. & Pro. 289; in such cases the remedy is by *quo warranto*.

This remedy will be applied to compel a corporation or public officer; 14 La. Ann. 265; 41 Me. 15; 3 Ind. 452; see 7 Gray 280; to pay money awarded against them in pursuance of a statute duty, where no other specific remedy is provided; 6 Ad. & E. 335; 34 Pa. 496; see 69 Tex. 589; 16 Or. 355; or where the money is in an officer's official custody, legally subject to the payment of such demand; 76 Cal. 269; but if debt will lie, and the party is entitled to execution, mandamus will not be allowed; Redf. Railw. § 158; 6 C. B. 70; 13 M. & W. 628; 4 B. & A. 360; 1 Q. B. 288. But mandamus will not be granted to enforce a matter of contract or right upon which an action lies in the common-law courts, as to enforce the duty of common carriers; 7 Dowl. P. C. 566; 31 Fla. 482; or where the proper remedy is in equity; 16 M. & W. 451. But where compensation is claimed for damages done partly under the powers of a statute and partly not, mandamus is the proper remedy; 2 Railw. & C. Cas. 1; Redf. Railw. § 158. Mandamus will not issue to compel the secretary of state to pay money in his hands to one party, which is claimed by another party, and the right to which is in litigation; 127 U. S. 246. Nor will the supreme court of the United States interfere by mandamus with the executive officers of the government in the exercise of their ordinary official duties;

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128 U. S. 40; but it will issue where the law requires them to act, or when they refuse to perform a mere ministerial duty; 135 U. S. 200; 137 *id.* 636; 139 *id.* 306. It lies to compel the performance of a statutory duty only when it is clear and indisputable and there is no other legal remedy; 127 U. S. 246.

Mandamus is the appropriate remedy to compel corporations to produce and allow an inspection of their books and records, at the suit of a corporator, where a controversy exists in which such inspection is material to his interests; 2 Stra. 1223; 3 Term 141; 4 Maule & S. 162; 7 Houst. 338; s. c. 25 Am. L. Reg. N. s. 594.

It lies to compel the performance by a corporation of a variety of specific acts within the scope of its duties; 34 Pa. 496; 26 Ga. 665; 2 Metc. Ky. 56; 84 Ill. 303; s. c. 25 Am. Rep. 461; 39 Minn. 219; 31 Fla. 482; 142 U. S. 492.

But in order to permit the use of this remedy to compel corporate action, there must be a clear legal obligation on the part of the corporation to act in the manner suggested, and the coincidence of the other conditions required to warrant the issuing of the writ, such as the absence of any other adequate legal remedy. Accordingly a mandamus has been refused to compel street car companies to operate an abandoned portion of a line where the charter did not clearly require its operation; 90 Tex. 520; or to keep cars running during the whole year, as that would involve the performance of a long series of continuing acts involving personal service, and extending over an indefinite time; 28 Ont. 399. So a railroad company as purchaser of a branch railroad at a foreclosure sale, will not be compelled to maintain and operate it at a loss where the business can be otherwise handled; 26 S. E. Rep. (Va.) 943.

The general rule on this subject is, that, if the inferior tribunal or corporate body has a discretion, and acts and exercises it, this discretion cannot be controlled by mandamus; but if the inferior body refuse to act when the law requires it to act, and the party has no other legal remedy, and where in justice there ought to be one, a mandamus will lie to set them in motion, and to compel action, and in proper cases, the court will settle the legal principles which should govern, but without controlling the discretion of the subordinate jurisdiction; Dill. Mun. Corp., 4th ed. § 828; 52 Ala. 87. The writ may be issued where an inferior court refuses to take jurisdiction when by law it ought to do so, or where, having obtained jurisdiction, it refuses to proceed in its exercise; 131 U. S. 221; 147 *id.* 14; *id.* 486; 150 *id.* 150.

It is the common remedy for restoring persons to corporate offices of which they are unjustly deprived: Beach, Pub. Corp. §§ 194, 1587; 41 Kan. 122; the title to the office having been before determined by proceeding by *quo warranto;* but it will not lie to try the title to an office of which there is a *de facto* incumbent; 52 Ala. 87; 1 Burr. 402; 1 Ld. Raym. 426; 1 Salk. 314; 2 Head 650; 54 Me. 95; 17 Or. 640; see 83 Wis. 416; 49 Neb. 755; 58 N. J. L. 541; unless *quo warranto* does not lie; 3 Johns. Cas. 79; but see 20 Barb. 302; 9 Md. 83; 15 Ill. 492. And see the cases fully reviewed in Redf. Railw. § 159. Mandamus will lie to compel acceptance of municipal office by one who, possessing the requisite qualifications, has been duly appointed to the same; 145 Ill. 573. It will issue out of the supreme court to restore to his office an attorney at law illegally disbarred by the judgment of a circuit court; 30 Fla. 302.

This remedy must be sought at the earliest convenient time in those cases where important interests will be affected by the delay; 12 Q. B. 448. But it is often necessary to delay in order to determine definitely the rights and injuries of the several parties concerned, as until public works are completed; 9 Dowl. P. C. 614; 4 Q. B. 877.

It is no sufficient answer to the application that the party is also liable to indictment for the act complained of; 2 Railw. Cas. 599; 3 Q. B. 528. And where a railway company attempted to take up their rails, they were required by mandamus to restore them, notwithstanding they were also liable to indictment, that being regarded as a less efficacious remedy; 2 B. & Ald. 646. But mandamus will always be denied when there is other adequate remedy; 11 Ad. & E. 69; 1 Q. B. 288; Redf. Railw. § 159. See 97 Ala. 107; 98 Cal. 602.

It is not a proper proceeding for the correction of errors of an inferior court; 13 Pet. 279, 404; 18 Wend. 79; 13 La. Ann. 481; 7 Dowl. & R. 334; but see 140 U. S. 91; or where there is adequate remedy by appeal; 97 Mich. 620; 98 Cal. 602; 148 U. S. 107; *id.* 14; or by certiorari; 97 Mich. 637; 38 W. Va. 485. Indeed, by statute 6 & 7 Vict. ch. 67, § 2, the decisions of the English courts upon proceedings in mandamus may be revised on writ of error, and upon principle a writ of error will lie when the decision is made to turn upon a question of law and not upon discretion merely; Redf. Railw. § 159.

The writ is not demandable, as matter of right, but it is to be awarded in the discretion of the court; 1 Term 331, 396, 404, 425; 49 Barb. 259; 95 Cal. 450; Redf. Railw. § 159. But where a clear legal right to a writ is shown, the court has no discretion about granting it; 143 Ill. 434.

A petition for a mandamus to a public officer abates by his resignation of his office; 165 U. S. 28, where it was said that this principle has for years been considered as so well settled in that court "that in some of the cases no opinion has been filed and no official report published;" 9 Wall. 298, 313; 102 U. S. 378, 408; 155 *id.* 303, 306; 164 *id.* 701. The writ does not reach the office, but is against the officer as a person; 17 Wall. 604.

The power of granting this writ in England seems originally to have been exer-

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cised by the court of chancery, as to all the inferior courts, but not as to the king's bench; 1 Vern. 175; Ang. & A. Corp. § 697. But see 2 B. & Ald. 646; 2 M. & S. 80; 164 3 Ad. & E. 416. But for a great number of years the granting of the prerogative writ of mandamus has been confined in England to the court of king's bench.

In the United States the writ is generally issued by the highest court of judicature having jurisdiction at law; 34 Pa. 496; 20 Ill. 525; as relief by mandamus cannot be granted in equity; 127 U. S. 105.

The thirteenth section of the Judiciary Act of Sept. 24, 1789, gives the supreme court power to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed or persons holding office under the authority of the United States. The issuing of a mandamus to courts is the exercise of an appellate jurisdiction, and, therefore, constitutionally vested in the supreme court; but a mandamus directed to a public officer belongs to original jurisdiction, and by the constitution, the exercise of original jurisdiction by the supreme court is restricted to certain specified cases, which do not comprehend a mandamus. The latter clause of the above section, authorizing this writ to be issued by the supreme court, to persons holding office under the authority of the United States, is, therefore, not warranted by the constitution, and void; 1 Cra. 175; see 5 Pet. 190; 13 *id.* 279, 404; 5 How. 103.

The supreme court of the United States has no power to control by mandamus the discretion of the circuit court in granting or refusing a supersedeas upon an appeal to the circuit court of appeals from an interlocutory order granting or continuing an injunction; 147 U. S. 525; nor can it compel the circuit court of appeals to receive and consider new proofs in an admiralty appeal in a cause within the legitimate jurisdiction of that court; 147 U. S. 486; but it will issue to compel compliance with a mandate of the supreme court of the United States, without regard to the value of the matter in dispute; 152 U. S. 512.

The circuit courts of the United States may also issue writs of mandamus; but their power in this particular is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction; 7 Cra. 504; 8 Wheat. 598; 1 Paine 453.

The mode of proceeding in obtaining the writ is: first, to demand of the party to perform the act. And it would seem that the party should be made aware of the purpose of the demand; 3 Ad. & E. 217, 477. The refusal must be of the thing demanded, and not of the right merely; 5 B. & Ad. 978. The refusal should be absolute and unqualified; but it may be by silence only. But the party should understand that he is required to perform the duty upon pain of the legal redress being resorted to without further delay; 4 Railw. Cas. 112. But any exception to the demand should be taken as a preliminary question; 10 Ad. & E. 531; Redf. Railw. § 190. A formal demand and refusal have been held not a necessary preliminary to the filing of a petition for mandamus to compel the performance of a public duty which the law requires to be done; 127 Ill. 613.

The application for a mandamus may be by motion in court, and the production of *ex parte* affidavits, in support of the facts alleged; in which case an alternative writ issues, as matter of course, generally, and the case is heard upon the excuse alleged in the return to the alternative writ; see 2 Metc. Ky. 56. Or the party may apply for the writ by formal petition, setting forth the grounds in detail, in which case the merits of the question are determined upon the traverse of the petition, instead of the traverse of the return to the alternative writ; 9 Ohio St. 599. In the latter case a rule is granted to show cause why a mandamus shall not issue; upon the decision of this rule an alternative writ would issue at common law and upon failure to obey this or make return of an adequate legal excuse, the peremptory writ followed. This practice is entirely changed by statute, see *infra*, but the rule to show cause is in many states the usual proceeding. And in either form, if the application prevails, a peremptory mandamus issues; the only proper or admissible return to which is a certificate of compliance with its requisitions, without further excuse or delay; 1 Q. B. 616; 1 Ia. 179. See Ang. & A. Corp. § 715. The peremptory writ need not precisely follow the alternative writ in matters of detail; 39 Minn. 426. The return to an alternative writ should be made with the greatest possible certainty, as at common law the return cannot be traversed; 127 Pa. 523; 77 Cal. 34. The practice varies greatly in different jurisdictions, though resting in all cases upon the same general principles, as to all which see generally, High, Extr. Leg. Rem. ch. 8.

The English practice is, if the first writ is denied, even on the ground of defects in the affidavits, not to permit a second application to be made; 8 Ad. & E. 413; so also, if it fail for other defects of form. But a more liberal practice obtains in the American courts; Redf. Railw. § 190.

By the Common-Law Procedure Act, 17 & 18 Vict. c. 125, provision is made for statutory mandamus, incidental to an action, brief in form and enforceable by attachment, which, if awarded, will issue peremptorily in the first instance. It has been held that a plaintiff could not under this act enforce specific performance of a contract; but that the act contemplated a public duty in which the plaintiff among others was interested, and not a private obligation which the plaintiff alone could enforce; but under the judicature acts, it is allowable for the court by an interlocutory order to grant a mandamus in any cases in which it shall appear just and convenient; Mozl. & W. The prerogative writ of mandamus is still

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retained in the English practice; but it is obvious that the foregoing statute must have very essentially abridged its use, as well as that of decrees in chancery for specific performance. See 8 E. & B. 512; Redf. Railw. § 190, pl. 8.

Controverted questions of fact, arising in the trial of applications for mandamus in the English practice, are referred to the determination of a jury; 1 Railw. Cas. 377; 2 *id.* 714; 8 El. & B. 512; 1 East 114. By the American practice, questions of fact, in applications for mandamus, are more commonly tried by the court; 2 Metc. Ky. 56. See Angell & Ames, Corp.; High, Extra. Leg. Rem.; 16 N. J. L. J. 138.

Costs rest in the discretion of the court. In the English courts they are allowed when the application fails, but not always when it prevails; Redf. Railw. § 159. The more just rule in such cases is to allow costs to the prevailing party, unless there is some special reason for denying them; and this rule now generally prevails; 8 Ad. & E. 901, 905; 5 *id.* 804; 1 Q. B. 636, 751; 6 E. L. & Eq. 267.

**MANDANT.** The bailor in a contract of mandate.

**MANDATARY, MANDATARIUS.** One who undertakes to perform a mandate. Jones, Bailm. 53. He that obtains a benefice by mandamus. Cowel.

**MANDATE.** A direction or request. Thus a check is a mandate by the drawer to his banker to pay the amount to the transferee or holder of the check; 1 Q. B. Div. 33; Rapalje & Lawrence.

A power of attorney to receive payment in the extinguishment of an obligation. It may be express or implied. See Howe, Stud. Civ. L. 152.

**In Practice.** A judicial command or precept issued by a court or magistrate, directing the proper officer to enforce a judgment, sentence, or decree.

The decision of an appellate court sent down to the court whose proceedings have been reviewed.

In some jurisdictions the court of last resort is authorized to enter final judgment upon which execution may issue without further proceedings, but neither of the federal appellate courts has such power; 1 U. S. Rev. Stat. § 701; Fost. Fed. Pr. § 495. Accordingly in these courts, and in appellate courts generally, it is the practice to send down a mandate embodying the decision. In the supreme court of the United States the mandates are sent down before the February recess, and also before the conclusion of the term; but for proper cause shown a special mandate may be ordered. A mandate may be recalled from the inferior court and set aside or corrected at the term at which it is issued; 15 Pet. 119; 111 U. S. 798; but an application to recall and correct the mandate cannot be made after the close of the term; *id.*; 107 *id.* 629.

Where there is a reversal of a judgment or decree which has been executed pending the appeal, a direction of the court below to compel restitution should be included in the mandate; 6 Cra. 329; 8 Wall. 507; even where the reversal is for want of jurisdiction; 139 U. S. 216. Restitution may be enforced by contempt proceedings; 9 Wall. 605; and it may be compelled even where a third person has received the funds or property, if he is within the jurisdiction and no superior equities in his favor have intervened; *id.*; but duties or charges paid by the party from whom restitution is required may be allowed; *id.* Restitution from the United States cannot be compelled; 10 Wheat. 431.

Interest should be included in the mandate, otherwise it cannot be awarded after the affirmance; 9 Pet. 275; but after affirmance the defendant is entitled to interest at the legal rate from the date of judgment until payment; 1 U. S. Rev. Stat. § 1010; Supr. Ct. Rule 23; Cir. Ct. App. Rule 30; 14 How. 328.

When the mandate is filed in the court below, that court again acquires the jurisdiction of the case. It has been held that in some cases a state court may act upon an affirmance without awaiting the mandate; 140 U. S. 291; but it is clearly the better practice to have the proceedings below await the mandate, which may always be specially applied for if circumstances require it; see *supra*. It was held that the statute of limitations against the right of the purchaser to sue for breach of warranty of title would run from the decision of the appellate court that his title was invalid, and not from the time of filing the mandate; 42 Fed. Rep. 757.

The court below is bound by the decree of the appellate court as set forth in the mandate; 12 Pet. 488; which must be interpreted according to its subject-matter, with due consideration to the decree below as well as that above; 15 Pet. 52; 116 U. S. 45. After the case has been sent back by a mandate it has been held too late to question the jurisdiction; 6 Cra. 267; 20 How. 541; to grant a new trial; 1 Wall. 69 (except in ejectment; 143 U. S. 99); to permit the filing of a supplemental answer; 12 Pet. 339; to grant leave to file a supplemental bill suggesting new defences; 116 U. S. 45; to review the case below on its merits; 3 How. 611; 138 U. S. 595; 101 *id.* 555; 10 Wheat. 431. See, generally, Fost. Fed. Pr. § 495.

Royal mandates to judges for interfering in private causes constituted a branch of the royal prerogative, which was given up by Edward I. And the 1 W. & M. st. 2, c. 2, declared that the pretended power of suspending or dispensing with laws, or the execution of laws, by regal authority, without consent of parliament, is illegal. Whart.

**In Contracts.** A bailment of property in regard to which the bailee engages to do some act without reward. Story, Bailm. § 137. A contract whereby one party agrees to execute gratuitously a commission re-

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ceived from the other. Sohm, Rom. L. 314.

In the early Roman law (before the doctrines of agency were developed), it was a trust or commission by which one person, called the *mandator*, requested another, the *mandatarius*, to act in his own name and as if for himself in a particular transaction (*special mandate*), or in all the affairs of the former (*general mandate*). The mandatarius was the only one recognized as having legal rights and responsibilities as toward third persons in the transactions involved. As between him and the mandator, however, the latter was entitled to all benefit, and bound to indemnify against losses, etc.; but the service was gratuitous. Cent. Dict.

The contract of mandate in the civil law is not limited to personal property, nor does it require a delivery of personal property when it relates to that. Pothier, *de Mand.* n. 1; La. Civ. Code, 2954-64. It is, however, restricted to things of a personal nature at common law, and of these there must be a delivery, actual or constructive. Story, Bailm. § 142; 3 Strobh. 343.

Mandates and deposits closely resemble each other; the distinction being that in mandates the care and service are the principal, and the custody the accessory; while in deposits the custody is the principal thing, and the care and service are merely accessory. Story, Bailm. § 140; 2 Kent 569.

For the creation of a mandate it is necessary,—first, that there should exist something, which should be the matter of the contract; secondly, that it should be done gratuitously; and, thirdly, that the parties should voluntarily intend to enter into the contract. Pothier, Pand. l. 17, t. 1, p. 1, § 1; Pothier, *de Mandat*, c. 1, § 2; Ersk. Prin. 319.

There is no particular form or manner of entering into the contract of mandate prescribed either by the common law or by the civil law, in order to give it validity. It may be verbal or in writing; it may be express or implied; it may be in solemn form or in any other manner. Story, Bailm. § 160. The contract may be varied at the pleasure of the parties. It may be absolute or conditional, general or special, temporary or permanent. Wood. Civ. Law 242; 1 Domat, b. 1, t. 15, §§ 1, 6, 7, 8; Pothier, *de Mandat*, c. 1, § 3.

In Louisiana it is generally gratuitous, but not so when a contrary intention is implied from conduct of parties or nature of business; 7 La. Ann. 207; a right to compensation may be inferred from nature of services without express agreement; 5 *id.* 672.

The mandatary, upon undertaking his trust and receiving his article, is bound to perform it as agreed upon; 5 B. & Ald. 117; 1 Sneed 248; 6 Binn. 308; 5 Fla. 38; 41 Fed. Rep. 152; and is responsible only for gross negligence; 2 Kent 571; 4 B. & C. 345; 2 Ad. & E. 256; 16 How. 475; 3 Mas. 132; 17 Mass. 459; 2 Hawks 146; 34 Neb. 426; 154 Pa. 296; but in considering the question of negligence, regard is to be had to any implied undertaking to furnish superior skill arising from the known ability of the mandatary; Story, Bailm. §§ 177, 182; 20 Mart. La. 68. The fact that a gratuitous bailee has given bond for the faithful performance of his duties as such does not increase his liability; 154 Pa. 296. Whether a bank is liable for neglect of its agent in collecting notes, see 8 N. Y. 459; 4 Rawle 384; 2 Gall. 565; 10 Cush. 583; 12 Conn. 303; 6 H. & J. 146; 1 Pet. 25; 89 Mo. 240. He must render an account of his proceedings, and show a compliance with the condition of the bailment; Story, Bailm. § 191.

The *dissolution* of the contract may be by *renunciation* by the mandatary before commencing the execution of the undertaking; 2 M. & W. 145; 22 E. L. & Eq. 501; 8 B. Monr. 415; 3 Fla. 38; Story, Bailm. 192; by *revocation* of authority by the mandator; 6 Pick. 198; 5 Binn. 316; 5 Term 213; by the *death* of the mandator; 2 V. & B. 51; 2 Mass. 244; 8 Wheat. 174; by *death* of the mandatary; 2 Kent 504; 8 Taunt. 403; and by *change of state* of the parties; Story, Ag. § 481; and in some cases by operation of law; Story, Ag. § 500. The question of gross negligence is one for the jury; 2 Ad. & E. 256; 11 Wend. 25; and the plaintiff must show it; 2 Ad. & E. 80; 10 Watts 335. See 3 Johns. 170; 2 Wheat. 100; 7 B. Monr. 661; 8 Humphr. 430.

**In Civil Law.** The instructions which the emperor addressed to a public functionary, and which were to serve as rules for his conduct. These mandates resembled those of the proconsuls, the *mandata jurisdictio*, and were ordinarily binding on the legatees or lieutenants of the emperor of the imperial provinces, and there they had the authority of the principal edicts. Savigny, *Dr. Rom.* c. 3, § 42, n. 4.

**In the Canon Law.** A rescript of the pope, by which he commands some ordinary collator, or precentor, to put the person there nominated in possession of the first benefice vacant in his collation. As to their abuses, see 2 Hall. Mid. Ages 212; Rapalje & Lawrence.

**MANDATOR.** The person employing another to perform a mandate. Story, Bailm. § 138; 1 Brown, Civ. L. 382; Halif. Anal. Civ. L. 70.

**MANDATORY.** In the construction of statutes, this word is applied to such as require to be obeyed, under penalty of having proceedings under them declared void. Directory statutes must be obeyed, but, if not, do not invalidate the act. See STATUTE.

**MANDATORY INJUNCTION.** One that compels the defendant to restore things to their former condition and virtually directs him to perform an act. Bisph. Eq. § 400. See INJUNCTION, and an extended note there cited from 20 Am. Dec. 389.

**MANDATUM.** See BAILMENT; MANDATE.

**MANDAVI BALLIVO.** In English Practice. The return made by a sheriff when he has committed the execution of a writ of a liberty to a bailiff, who has the right to execute the writ.



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**MANHOOD. In Feudal Law.** A term denoting the ceremony of doing homage by the vassal to his lord. The formula used was *devenio vester homo*, I become your man. 2 Bla. Com. 54; 1 Dev. & B. Eq. 585. See HOMAGE.

**MANIA. In Medical Jurisprudence.** The most common of all forms of insanity, consisting of one or both of the following conditions, viz.: intellectual aberration, and morbid or affective obliquity.

A chronic affection of the brain, ordinarily without fever, characterized by the perturbation and exaltation of the sensibilities, the intelligence, and will. Esquirol.

A condition of exaltation which affects the emotions and the intellect, and expresses itself by increased activity,—mental and physical. 3 Witth. & B. Med. Jur. 250.

A condition in which the perversion of the understanding embraces all kinds of objects and is accompanied with a general mental excitement. 2 Misc. Rep. 329.

It is in one form mere excitement, or this may have developed into the other,—frenzy. It is the reverse of melancholia, and as well developed as the depression of the latter, is the opposite feeling which characterizes the former; *id.*

An insanity in which there is general exaltation of the mental, sensory, and motor functions. 1 Clevenger, Med. Jur. of Insan. 953.

It would appear to be of easy diagnosis, but the excitement of other forms of insanity is constantly mistaken for that of simple mania. The beginning is very gradual, and weeks, months, or even years of bad health may precede an outbreak, and the mental explosion is usually unexpected, *Id.*

The maniac either misapprehends the true relations between persons and things, in consequence of which he adopts notions manifestly absurd, and believes in occurrences that never did and never could take place, or his sentiments, affections, and emotions are so perverted that whatever excites their activity is viewed through a distorting medium, or, which is the most common fact, both these conditions may exist together, in which case their relative share in the disease may differ in such degree that one or the other may scarcely be perceived at all. According as the intellectual or moral element prevails, the disease is called *intellectual* or *moral* mania. Whether the former is ever entirely wanting has been stoutly questioned, less from any dearth of facts than from some fancied metaphysical incongruity. The logical consequence of the doubt is that in the absence of intellectual disturbance there is really no insanity,—the moral disorders proceeding rather from unbridled passions than from any pathological condition. Against all such reasoning it will be sufficient here to oppose the very common fact that in every collection of the insane may be found many who exhibit no intellectual aberration, but in whom moral disorders of the most flagrant kind present a marked contrast to the previous character and habits of life.

Both forms of mania may be either general or partial. In the latter, the patient has adopted some notion having a very limited influence upon his mental movements, while outside of that no appearance of impairment or irregularity can be discerned. Pure monomania, as this form of insanity has been often called,—that is, a mania confined to a certain point, the understanding being perfectly sound in every other respect,—is, no doubt, a veritable fact, but one of very rare occurrence. The peculiar notions of the insane, constituting insane belief, are of two kinds: *delusions* and *hallucinations*, which titles see. See also MONOMANIA.

In general intellectual mania, excepting that form of it called *raving*, it is not to be understood that the mind is irrational on every topic, but rather that it is the sport of vague and shifting delusions, or, where these are not manifest, has lost all nicety of intellectual discernment, and the ability to perform any continuous process of thought with its customary steadiness and correctness. It is usually accompanied by feelings of estrangement or indifference towards those who at other times were objects of affection and interest. A common feature of the disease is either more or less nervous exaltation, manifested by loquacity, turbulence, and great muscular activity, or depression, indicated by silence, gloom, painful apprehensions, and thoughts of self-destruction.

In moral or affective mania, the disorder is manifested chiefly, if not entirely, in the sentiments or propensities, which are essential parts of our mental constitution, and, of course, as liable to disease as the intellectual faculties. In modern classification what is termed affective insanity is a form in which the feelings and emotions are chiefly involved; it concerns the desires and the ethical side of human nature. 3 Witth. & B. 265. It may be partial or general. In the former, a single propensity is excited to such a degree of activity as to impel the person to its gratification by an irresistible force, while perfectly conscious of the nature of the act and deploring the necessity that controls him. Our limits allow us to do but little more than to indicate the principal of these morbid impulses:—propensity to kill, *homicidal monomania*; propensity to steal, *kleptomania*; sexual propensity, by various names such as *sidoiomania*, *erotomania*, *nymphomania*; propensity to burn, *pyromania*; propensity to drink, *dipsomania*; propensity to use opium, *morphiomania*. In the first, the patient is impelled by an inward necessity to take life, without provocation, without motive. The victim is often the patient's child, or some one to whom there has been a tender attachment. In most cases there has been some derangement of health, or some deviation from the ordinary physiological condition, such as delivery, or suppressed menstruation; but occasionally no incident of this kind can be detected; the patient has been, apparently, in the ordinary condition, both bodily and mental. See DIPSOMANIA; EROTIC MANIA; KLEPTOMANIA; PYROMANIA.

In general moral mania, it is not to be supposed that the sentiments and propensities are all and equally disordered. On the contrary, the propensities may not be excessively active, though occasionally one may crave unusual indulgence. The essential features of general moral mania is that the moral relations, whereby the conduct is governed, more than by the deductions of reason, are viewed through a distorting medium. This condition is usually accompanied by a perversion of some of the sentiments that inspire hope, fear, courage, self-reliance, self-respect, modesty, veracity, domestic affection. The patient is eager and sanguine in the pursuit of whatever strikes his fancy, ready with the most plausible reasons for the success of the wildest projects, viewing every prospect through a rose-colored medium, and regardless of the little proprieties and amenities of life. Love for others is replaced by aversion or indifference; the least contradiction or check is met by anger or impatience; he is restless, insensible to fatigue, and sleeps comparatively little. In some cases, and often at different periods in the same case, the very opposite moral condition occurs. Without cause, true or delusive, the person is completely wretched. The past affords him no pleasure, the future reveals not a single gleam of hope, and the ordinary sources of comfort and joy only serve to darken the cloud of doubt, apprehension, and despair in which he is enveloped.

Mania is usually a growth, rather than a sudden development (though sometimes the latter), and its incipient stages are characterized by more or less of morbid depression, or, in some cases, irritability. Then follows a period of restless but undirected and unconcentrated activity. Delusions and hallucinations are common, and may extend to an entire change of personality.

The physical condition, like the mental, indicates early an appearance of vigor with excessive appetite; and the use of alcoholic stimulants, while not in itself a cause, may hasten the attack, so that in many cases which resemble alcoholic mania it is found that the mental disorder preceded the drinking. It is said that "there is always, however, finally a failure of nutrition with loss of flesh, the tongue becomes coated and the bowels are consti-

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pated. The pulse may be somewhat rapid, but frequently, even during great excitement, there is little change, it often being slow and small. Insomnia is a marked symptom, days passing without sleep despite the ceaseless activity. There is one peculiarity about this constant activity, in that there seems to be no sense of fatigue accompanying it. There is, in fact, apparently a cerebral anæsthesia. This applies also to pain perception, as exposure to cold does not seem to be recognized, and even painful operations can be carried on without apparent suffering. Acts of self-mutilation, which are especially common where sexual disturbance is associated with the mania, are often done, which are harrowing in the extreme and yet are not appreciated by the patient." 3 Witth. & B. Med. Jur. 251.

This form of mental disorder may be acute with frenzy and raving, in which case there is entire mental confusion and delirium; or it may be chronic in which case there is usually some more or less settled delusion with periodic excitability easily aroused and liable quickly to subside. "There is almost always associated with this condition a generally happy-go-lucky state of mind. There is in fact more or less *dementia* (*q. v.*), the state toward which all cases tend which do not end in recovery." *Id.* 253.

With respect to the effect of this form of mental disorder, whether general or partial, upon criminal responsibility and civil incapacity, see INSANITY.

**MANIA A POTU.** See DELIRIUM TREMENS; Whart. & St. Med. Jur.

**MANIFEST. In Commercial Law.** A written instrument containing a true account of the cargo of a ship or a commercial vessel. It must contain a list of all packages or separate items of freight with their distinguishing marks, numbers, etc. By the United States statute it must also designate the ports of lading and of destination, a description of the vessel and the designation of its owners, and must contain the names of the consignees and passengers with a list of their baggage and an account of the sea stores remaining; U. S. Rev. Stat. § 2807. The manifest should be made out, dated, and signed by the captain at places where the goods or any part of them are taken on board.

The want of a manifest where one is required and also the making a false manifest, are grave offences.

**In Evidence.** Clear and requiring no proof; notorious; apparent by examination; open; palpable; incontrovertible. It is synonymous with evident, visible, or plain. 71 N. Y. 486.

**MANIFESTO.** A solemn declaration, by the constituted authorities of a nation, which contains the reasons for its public acts towards another.

On the declaration of war, a manifesto is usually issued, in which the nation declaring the war states the reasons for so doing. Vattel, l. 3, c. 4, § 64; Wolffius § 1187. It differs from a proclamation in that it is issued to the other belligerent and to neutral nations.

**MANKIND.** Persons of the male sex; the human species. The statute of 25 Hen. VIII. c. 6, makes it felony to commit sodomy with mankind or beast. Females as well as males are included under the term mankind. Fortescue 91; Bac. Abr. *Sodomy.*

**MANNER.** Mode of performing or exercising; method; custom; habitual practice. 139 Ill. 629.

**MANNER AND FORM. In Pleading.** After traversing any allegation in pleading, it is usual to say, "in manner and form as he has in his declaration in that behalf alleged," which is as much as to include in the traverse not only the mere fact opposed to it, but that in the *manner and form* in which it is stated by the other party. These words, however, only put in issue the substantial statement of the manner of the fact traversed, and do not extend to the time, place, or other circumstances attending it, if they were not originally material and necessary to be proved as laid. See MODO ET FORMA.

**MANNING.** A day's work of a man. Cowel. A summoning to court. Spelman, Gloss.

**MANNIRE.** To cite any person to appear in court and stand in judgment there. Du Cange.

**MANNOPUS** (Lat.). An ancient word, which signifies goods taken in the hands of an apprehended thief.

**MANOR** (French, *manoir*). A house, residence, or habitation. It includes not only a dwelling-house, but also lands. See Co. Litt. 58, 108; 2 Rolle, Abr. 121; Merlin, *Répert, Manoir;* Serg. Land Laws of Penn. 195; 11 H. L. Cas. 83.

Manor is also said to be derived originally either from Lat. *manendo*, remaining, or from Brit. *maer*, stones, being the place marked out or inclosed by stones. Webst.

**In English Law.** A tract of land originally granted by the king to a person of rank, part of which (*terræ tenementales*) was given by the grantee or lord of the manor to his followers. The rest he retained under the name of his demesnes (*terræ dominicales*). That which remained uncultivated was called the lord's waste, and served for public roads, and commons of pasture for the lord and his tenants. The whole fee was called a lordship, or barony, and the court appendant to the manor the court-baron. The tenants, in respect to their relation to this court and to each other were called *pares curiæ;* in relation to the tenure of their lands, copyholders (*q. v.*), as holding by a copy of the record in the lord's court.

Originally a manor was a "highly complex and organized aggregate of corporeal and incorporeal things. It usually involved the lordship over villeins and the right to seize their chattels. It was not a bare tract of land, but a complex made up of land and of a great part of the agricultural capital that worked the land, men and beasts, ploughs and carts, forks and flails." 2 Poll. & M. 143, 148.

The franchise of a manor; *i. e.* the right to jurisdiction and rents and services of copyholders. Cowel. No new manors were created in England after the prohibition of

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sub-infeudation by stat. *Quia Emptores*, in 1290. 1 Washb. R. P. 30.

**In American Law.** A manor is a tract held of a proprietor by a fee-farm rent in money or in kind, and descending to the oldest son of the proprietor, who in New York was called a patroon. 9 Seld. 291.

**MANQUELLER. In Saxon Law.** A murderer.

**MANSE.** Habitation; farm and land. Spelman, Gloss. Parsonage or vicarage house. Paroch. Antiq. 431; Jacob, Law Dict. So in Scotland. Bell, Dict.

**MANSION-HOUSE.** Any house of dwelling, in the law of burglary, etc. Co. 3d Inst. 64.

The term "mansion-house," in its common sense, not only includes the dwelling-house, but also all the buildings within the curtilage, as the dairy-house, the cow-house, the stable, etc.; though not under the same roof nor contiguous. Burn, Inst. *Burglary*, 1 Thomas, Co. Litt. 215, 216; 1 Hale, Pl. Cr. 558; 4 Bla. Com. 225. See 3 S. & R. 199; 4 Strobh. 372; 4 Call 409; 14 M. & W. 181; 4 C. B. 105; 1 Whart. Cr. L. § 783.

**MANSLAUGHTER. In Criminal Law.** The unlawful killing of another without malice either express or implied. 4 Bla. Com. 190; 1 Hale, Pl. Cr. 466.

Any unlawful and wilful killing of a human being, without malice, is manslaughter, and thus defined, it includes a negligent killing which is also wilful. 37 Fed. Rep. 875. See 2 Bish. N. Cr. L. § 737.

The distinction between manslaughter and murder consists in the following. In the former, though the act which occasions the death be unlawful, or likely to be attended with bodily mischief, yet the malice, either express or implied, which is the very essence of murder, is presumed to be wanting in manslaughter; 1 East, Pl. Cr. 218; Foster 290; 5 Cush. 304.

It also differs from murder in this, that there can be no accessaries before the fact, there having been no time for premeditation; 1 Hale, Pl. Cr. 437; 1 Russ. Cr. 485; but see 1 Bish. N. Cr. L. 678.

In a recent work, cases of manslaughter are divided into three classes: (1) Where there was an intent to take life and the killing would be murder but for mitigating circumstances. (2) Where death results from unintentionally doing an unlawful act. (3) Where it results from the negligent doing or omission of an act which, though not itself wrongful, was attended by circumstances which endangered life; 1 McClain, Cr. L. § 335.

There is a not uncommon division of manslaughter into two degrees, voluntary and involuntary; and these degrees are distinctly recognized by statute in several states; in other states several distinct degrees of the crime are created by statute; in some as many as four.

*Involuntary* manslaughter is such as happens without the intention to inflict the injury.

*Voluntary* manslaughter is such as happens voluntarily or with an intention to produce the injury.

It has been said that the distinction between voluntary and involuntary manslaughter is now obsolete, and unless where the terms are used in statutes defining the crimes, they are not used in indictment, verdict, or sentence. But where the distinction is made by statute, there can be no conviction of involuntary manslaughter on an indictment for voluntary; 1 Whart. Cr. L. § 307. It would seem however that it is incorrect to characterize as obsolete what is literally recognized by statute in several jurisdictions. See *supra*. It is more accurate to say that the division is purely statutory in its origin, not entering into the common-law definitions.

Homicide may become manslaughter in consequence of provocation; mutual combat; in case of resistance to public officers, etc.; killing in the prosecution of an unlawful or wanton act; or killing in the prosecution of a lawful act improperly performed, or performed without lawful authority.

The provocation which reduces the killing from murder to manslaughter is an answer to the presumption of malice, which the law raises in every case of homicide: it is, therefore, no answer when express malice is proved; 1 Russ. Cr. 440; Foster 132; 1 East, Pl. Cr. 239. And to be available the provocation must have been reasonable and recent; for no words or slight provocation will be sufficient, and if the party has had time to cool, malice will be inferred; Washb. Cr. L. 81; 4 Pa. 264; 3 N. Y. 193; 25 Miss. 383; 3 Gratt. 594; 6 Blackf. 299; 8 Ired. 344; 18 Ala. N. s. 720; 15 Ga. 223; 10 Humphr. 141; 5 C. & P. 324; 6 How. St. Tr. 769; 17 *id.* 57; 1 Leach 151; 26 Tex. App. 221, 322; 150 U. S. 62; 114 Ill. 86; it is on the assumption that passion disturbs the sway of reason and makes one regardless of its admonition; 83 Ala. 26. Words alone, however provoking or insulting, will not reduce killing to manslaughter; 98 Mo. 150; 85 Ala. 326; 26 Tex. App. 624; 64 Cal. 369; 116 Mo. 1; 147 Ill. 310. Intent to kill cannot be an element of involuntary manslaughter; 76 Ga. 473. It does not necessarily follow that homicide was not murder because done in sudden passion; 45 La. Ann. 1036.

In case of mutual combat, it is generally manslaughter only, when one of the parties is killed; 4 D. & B. 191; 1 Jones N. C. 280; 2 C. & K. 814. When death ensues from duelling, the rule is different; and such killing is murder.

The killing of an officer by resistance to him while acting under lawful authority is murder; Whart. Cr. L. § 413; but see 57 Conn. 307; but if the officer be acting under a void or illegal authority, or out of his jurisdiction, the killing will be manslaughter, or excusable homicide, according to the circumstances of the case; Washb. Cr. L. 81; 1 Mood. Cr. Cas. 80, 132; 1 Hale, Pl. Cr. 458; 84 Ky. 103; 26 Tex. App. 1.

Killing a person while doing an act of mere wantonness is manslaughter: as, if a

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person throws down stones in a coal-pit, by which a man is killed, although the offender was only a trespasser; Lew. Cr. Cas. 179; MALA PROHIBITA; or where a person in another's charge, too feeble to take care of herself, dies from lack of proper food, nursing, and medical attention, the latter is guilty of manslaughter; [1893] 1 Q. B. 450.

When death ensues from the performance of a lawful act, it may, in consequence of the negligence of the offender, amount to manslaughter. For instance, if the death had been occasioned by negligent driving; 1 East, Pl. Cr. 263; 1 C. & P. 320; 6 *id.* 129; or by negligently running an engine and thereby causing a collision by which a passenger is killed; 118 Ind. 167. Again, when death ensues from the gross negligence of a medical or a surgical practitioner, it is manslaughter.

It is no crime for any one to administer medicine; but it is a crime to administer it so rashly and carelessly, or with such criminal inattention, as to produce death; Whart. Cr. L. § 346; and in this respect there is no difference between the regular practitioner and the quack; 1 F. & F. 519, 521; 4 C. & P. 440; 1 B. & H. Lead. Cr. Cas. 46; 8 Wash. 12. And see 6 Mass. 134; 3 C. & P. 632.

**MANSTEALING.** A word sometimes used synonymously with kidnapping (*q. v.*). The latter is more technical. 4 Bla. Com. 219.

**MANTHEOFF.** A horse-stealer.

**MANTIPULATE.** To pick pockets. Bailey.

**MANTLE CHILDREN.** See LEGITIMATION.

**MAN-TRAPS.** Engines to catch trespassers, now unlawful, unless set in a dwelling-house for defence between sunset and sunrise. 24 & 25 Vict. c. 100, s. 31.

**MANU BREVI.** With a short hand.

**MANU FORTI** (Lat. with strong hand). A term used in pleading in cases of forcible entry. No other words are of equal import. It implies greater force than the words *vi et armis;* 10 Ired. 39; 8 Term 362; 4 Cush. 141; Dane, Abr. c. 132, a. 6, c. 203, a. 12.

**MANU LONGA.** With a long hand.

**MANU OPERA.** See MANNOPUS.

**MANUAL.** That which is employed or used by the hand, of which a present profit may be made. Things in the manual occupation of the owner cannot be distrained for rent. See TOOLS.

**MANUAL GIFT.** A giving of movable effects accompanied by real delivery which does not require any formality. La. Civ. Code, art. 1539.

**MANUALIS OBEDIENTIA.** Sworn obedience or submission upon oath. Cow.

**MANUCAPTIO** (Lat.). **In Old English Practice.** A writ which lay for a man taken on suspicion of felony, and the like, who could not be admitted to bail by the sheriff, or others having power to let to mainprise. Fitzh. N. B. 249.

**MANUCAPTORS.** Mainpernors, which see.

**MANUFACTORY.** A building, the main or principal design or use of which is to be a place for producing articles as products of labor. It is something more than a place where things are made. 57 Pa. 82. A steam flouring mill is a manufactory; 57 Md. 515. See FACTORY.

**MANUFACTURE.** To make or fabricate raw materials by hand, art, or machinery, and work into forms convenient for use; and, when used as a noun, anything made from raw materials by hand, or by machinery, or by art. 61 Hun 53.

Making fish lines, ropes, etc., from raw material is a manufacture; 36 La. Ann. 98; as is the making of cordage, rope, and twine; 42 *id.* 723. Cutting ice and storing it in a building is not; 135 Mass. 258.

As to its signification in patent law, see PATENT.

**MANUFACTURED ARTICLES.** Kindling wood produced by machinery from green slabs of wood, kiln dried and compressed into a bundle, is manufactured. 20 App. Div. 514. India rubber made into shapes suitable for use as shoes is manufactured within the meaning of the tariff act; 7 How. 795; also animal charcoal and bone black; 5 Blatch. 215; coral cut into the form of a cameo but not set; *id.* 195; reeds; 40 Fed. Rep. 570; shingles; 3 Cliff. 284; gun blocks planed on the sides; 42 Fed. Rep. 292; split timbers; 4 Wall. 408; pieces of wood cut or sawed into size or shape to be put together into boxes; 43 La. Ann. 226; and door sashes, and blinds; 41 La. Ann. 996.

Wool is not a manufactured article under the revised statutes; 20 Blatch. 267; nor are wool tops prepared for spinning and broken up into small fragments; 46 Fed. Rep. 461; nor copper plates turned up and raised at the edges by labor, to fit them for subsequent use in the manufacture of copper vessels; 5 Cra. 284; nor marble cut into blocks for transportation; Hunt. Merch. Mag. 167; nor firewood; 65 Cal. 273.

**MANUFACTURER.** One engaged in the business of working raw materials into wares suitable for use. 63 How. Pr. 453.

A cooper; 34 La. Ann. 596; a pork packer; 41 Ohio St. 691; a gas company; 12 Allen 75; 89 N. Y. 409; one who prepares for market and sells lumber which is the growth of his own land; 1 Low. 478; a publisher of a newspaper; 6 Bankr. Reg. 238 (*contra*, 3 McArth. 405); are manufacturers. An ice cream confectioner is not; 82 La. Ann. 1075; nor is one engaged in cutting and making coats and trousers out of cloth which is already manufactured by

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another; 41 *id.* 894; or a dry-dock company; 92 N. Y. 487; or an aqueduct corporation; 100 Mass. 183; or a mining company; 106 *id.* 131.

**MANUFACTURING CORPORATION.** A corporation engaged in the production of some article, thing or object, by skill or labor, out of raw material, or from matter which has already been subjected to artificial forces, or to which something has been added to change its natural condition. 99 N. Y. 181. The term does not include a mining corporation; 106 Mass. 135; nor one engaged in mixing teas and in roasting, mixing, and grinding coffee; 145 N. Y. 375.

**MANUMISSION.** The act of releasing from the power of another. The act of giving liberty to a slave.

The modern acceptation of the word is the act of giving liberty to slaves. But in the Roman law it was a generic expression, equally applicable to the enfranchisement from the *manus*, the *mancipium*, the *dominica potestas*, and the *patria potestas*. *Manumittere* signifies to escape from a power,—*manus*. Originally, the master could only validly manumit his slave when he had the *dominium jure quiritium* over him: if he held him merely *in bonis*, the manumission was null, according to the civil law; but by the *jus honorarium* the slave was permitted to enjoy his liberty *de facto*, but whatever he acquired belonged to his master. The status of these quasi-slaves was fixed by the *Lex Junia Norbana* under which they became *Latini Juniani*, both which titles see. At first there were only three modes of manumission, viz.: 1. *vindicta*; 2. *census*; and, 3. *testamentum*. The *vindicta* consisted in a fictitious suit, in which the *assertor libertatis*, as plaintiff, alleged that the slave was free; the master not denying the claim, the prætor rendered a decision declaring the slave free. In this proceeding figured a rod,—*festuca vindicta*,—a sort of lance (the symbol of property), with which the *assertor libertatis* touched the slave when he claimed him as free: hence the expression *vindicta manumissio*. *Census*, the second mode, was when the slave was inscribed at the instance of his master, by the censor, in the census as a Roman citizen. *Testamento* was when the testator declared in express terms that the slave should be free,—*servus meus Cratinus liber esto*,—or by a *fideicommissum*,—*heres meus rogo te ut Sanum vicini mei servum, manumittas, fideicommitto heredis mei ut iste eum servum manumittat*.

Afterwards, manumission might take place in various other ways; *in sacrosanctis ecclesiis*, of which we have a form: *Ex beneficis S.* ✠ *per Joannem episcopum et per Albertum S.* ✠ *Casatum, factus est liber Lemtbertus, teste hac sancta ecclesia. Per epistolam.* Justinian required the letter containing the manumission to be signed by five witnesses. *Inter amicos*, a declaration made by the master before his friends that he gave liberty to his slave: five witnesses were required, and an act was drawn up in which it was stated that they had heard the declaration. *Per codicillum*, by a codicil, which required to be signed by five witnesses. There were many other modes of manumission, which were enumerated in a Constitution of Justinian. C. 76, 3-12; 1 Ortolan 35 *et seq.*; 1 Etienne 78 *et seq.*; Lagrange 101 *et seq.*

*Direct* manumission may be either by deed or will, or any other act of notoriety done with the intention to manumit. A variety of these modes are described as used by ancient nations.

*Indirect* manumission was either by operation of law, as the removal of a slave to a non-slaveholding state *animo morandi*, or by implication of law, as where the master by his acts recognized the freedom of his slave.

Manumission being merely the withdrawal of the dominion of the master, in accordance with the principles of the common law the right to manumit existed everywhere, unless forbidden by law. No formal mode or prescribed words were necessary to effect manumission; it could be by parol; and any words were sufficient which evinced a renunciation of dominion on the part of the master; 6 Humphr. 189; 3 Halst. 275. No one but the owner could manumit; 4 J. J. Marsh. 103; 10 Pet. 568; and the effect was simply to make a freeman, not a citizen. But mere declarations of intention were insufficient unless subsequently carried into effect; Coxe 259; 8 Mart. La. 149; 14 Johns. 324; 19 *id.* 53. Manumission could be made to take effect in future; Coxe 4; 2 Root 364. In the meantime the slaves were called *statu liberi*.

As to the emancipation of slaves in the United States by proclamation of the president, see BONDAGE. See Cobb, Law of Slavery.

**MANURE.** Manure made upon a farm in the ordinary manner, from the consumption of its products, is a part of the realty; 1 Washb. R. P. 18; 68 Me. 204; s. c. 28 Am. Rep. 36, n.; 15 Wend. 169; 13 Gray 53; 11 Conn. 525; 44 N. H. 120; see 38 Fed. Rep. 911. It has been also held to be personalty; 4 Dutch. 581; 2 Ired. 326; especially if it be made from hay purchased and brought upon the land by the tenant; 48 N. H. 147; and where a teamster owning a house and stable sold them with a small lot on which they stood, it was held that manure in the stable was personalty; 49 N. H. 62. Manure in heaps has been held to be personalty; 11 Conn. 525; and where the owner of land gathered manure into heaps and sold it, and then the land, the manure did not pass with the land; 43 Vt. 93; 110 Mass. 94. In 1 Cr. & M. 809, a custom for a tenant to receive compensation for manure left by him on the farm was recognized. Manure dropped in the street belongs originally to the owners of the animals that dropped it, but, if abandoned by them, the first taker has a right to it; 37 Conn. 500; s. c. 9 Am. Rep. 350. See EMBLEMENTS.

**MANUS** (Lat. hand), anciently, signified the person taking an oath as a compurgator. The use of this word probably came from the party laying his *hand* on the New Testament.

Manus signifies, among the civilians, power, and is frequently used as synonymous with *potestas*. *Lec. El. Dr. Rom.* § 94. *Manus mariti*, marital power. *Manus injectio*, an executory judgment.

**MANUSCRIPT.** An unpublished writing. A writing of any kind as distinguished from any thing that is printed. Cent. Dict. The term does not include pictures and paintings; 3 Cliff. 537.

In every writing the author has a property at common law, which descends to his representative, but is not liable to seizure by creditors so that they can publish it; 1 Bell, Dict. 68; 5 McLean 32. And an unauthorized publication will be restrained in equity; 4 Burr. 2320, 2408; 2 Bro. P. C. 138; 2 Edw. Ch. 329; 2 Mer. 434; 1 Ball & B. 207; 2 Stor. 100. The passage of the copyright acts has not abrogated the common-law rights of an author to his unpublished manuscript, and for a wanton infringement of his rights, exemplary damages may be given; 73 Fed. Rep. 196. Letters are embraced within this principle; for, although the receiver has a qualified property in them, the right to object to

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their publication remains with the writer. It is held, however, that the receiver may publish them for the purposes of justice publicly administered, or to vindicate his character from an accusation publicly made; 2 V. & B. 19; 2 Stor. 100; 2 Atk. 342; 2 Bush 480; 1 Mart. La. 297; 4 Du. N. Y. 379. The receiver may destroy or give away the letters, as soon as received: 2 Bush 480. The latter proposition has been doubted; see Drone, Copyr. 137. In the United States, the Copyright Act recognizes the right of property in "any manuscript whatever," which includes private letters; 5 McLean 32; and gives a remedy for the unauthorized publication. These rights will be considered as abandoned if the author publishes his manuscripts without securing the copyright under the acts of congress. See Curtis; Copinger; Drone, Copyright; LETTER; PRIVACY; COPYRIGHT.

**MANUTENENTIA.** A writ which lay against persons for the offence of maintenance. Reg. Orig. 182.

**MANY.** Denotes multitude, but not majority. 87 Ala. 708.

**MAP.** A transcript of the region which it portrays, narrowed in compass so as to facilitate an understanding of the original. 3 Minn. 103.

When a deed conveys a lot as indicated on a recorded plat, the latter may be consulted in aid of the description in the deed; 114 Mo. 13. A map in a deed should be treated as a part of the description, when evidently intended to be so treated, though it is not expressly referred to therein; 64 Conn. 78.

Where the owner of land lays it out in lots and streets, and in the map thereof filed with the public records designates certain portions as a park and afterwards conveys lots with reference to such map, it operates as a dedication of the land for a park; 23 Or. 176. The mere recording by public authority of a map of a proposed system of highways does not of itself entitle the owner of the land to damages; 167 U. S. 548; so with reference to the streets on such a map; 44 La. Ann. 931; 96 Ala. 272; 17 R. I. 799; 133 Ind. 331; 33 Fla. 470; but see 67 Hun 546. Maps and surveys are not competent evidence unless their accuracy is shown by other evidence; 1 Black 209; as by the testimony of the surveyors who prepared them; 5 Thomp. & C. 611; but a map of public land, made by a public surveyor and duly certified and filed in a public office under a statute, is admissible for that purpose; 17 Wend. 312; and so are ancient maps to show matters of public and general right; 11 Wall. 395; but an ancient map of partition among private owners is not evidence; 2 Johns. 180.

In an action for the recovery of real estate, a map not dated or signed but shown to have been made in 1818 by a skilful surveyor long since dead, as to which other surveyors testified that they had tested it in their own work and that it was the earliest known survey of the district in question, and which was shown to have related to an actual transaction, was held admissible as an ancient map. Other maps made in 1820 and 1823 by the same surveyor and showing in detail certain of the lots in the vicinity of those in dispute were admissible as showing accuracy of the ancient map. The testimony of other surveyors as to the use of the map in their own work was admissible for the purpose of showing general accuracy of the map and deeds executed shortly after the map was made conveying the tracts described therein were admissible as ancient deeds to show that the map was made in an actual transaction; 44 N. E. Rep. (Mass.) 333.

A map or plan of land referred to in making conveyances thereof is evidence to show boundaries or location, or to explain the contract; 64 N. Y. 33; and so in dedicating land to the public; 40 Conn. 410.

**MARAUDER.** One who, while employed in the army as a soldier, commits a larceny or robbery in the neighborhood of the camp, or while wandering away from the army. Merlin, *Répert.* See Halleck, Int. Laws; Lieber, Guerrilla Parties.

**MARC-BANCO.** The name of a coin. The marc-banco of Hamburg, as money of account, at the custom-house, is deemed and taken to be of the value of thirty-five cents. Act of March 3, 1843.

**MARCHERS. In Old English Law.** Nobles who lived on the Marches, and had their own laws, and power over life and death, as if they were petty princes. Camden; Jacob, Law. Dict. Abolished by stat. 27 Hen. VIII. c. 26, 1 Edw. VI. c. 10, and 1 & 2 P. & M. c. 15. They were also called Lords Marchers (*q. v.*).

**MARCHES.** Limits; confines; borders. Especially used of the limits between England and Wales and between England and Scotland. Ersk. Inst. 2. 6. 4.

**MARCHETA.** Maiden rents (*q. v.*).

**MARE.** See HORSE.

**MARE CLAUSUM.** The sea closed. It was formerly contended that a nation could in some cases claim jurisdiction over certain parts of the open sea even beyond the immediate vicinity of its own coast; but the contention has been abandoned. There has been an attempt to extend the principle to certain inland seas not entirely enclosed within the limits of a single state. When Turkey included the shores of the Black Sea, it was *mare clausum*. But when it lost part of its shore, Russia and other nations became entitled to participate in the commerce of the Black Sea, a right which was recognized by treaty in 1820. The great inland lakes and their outlets fall under the same principle; 16 Halleck, Int. L., Baker's ed. 170. See 1 Kent 27; SEA.

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**MARE LIBERUM.** The sea free. The title of a work by Grotius against the Portuguese claims to an exclusive trade to the Indies through the South Atlantic and Indian oceans. 1 Kent 27.

**MARESCALLUS** (fr. Germ. *march*, horse, and *schalch*, master. Du Cange). A groom of the stables, who also took care of the diseases of the horse. Du Cange.

An officer of the imperial stable; *magister equorum*. Du Cange.

A military officer, whose duty it was to keep watch on the enemy, to choose a place of encampment, to arrange or *marshal* the army in order of battle, and, as master of the horse, to commence the battle. This office was second to that of *comes stabuli* or constable. Du Cange.

An officer of the court of exchequer. 51 Hen. III. 5.

An officer of a manor, who oversaw the hospitalities (*mansionarius*). Du Cange; Fleta, lib. 2, 74.

*Marescallus aulæ.* An officer of the royal household, who had charge of the person of the monarch and the peace of the palace. Du Cange.

**MARETUM** (Lat.). Marshy ground overflowed by the sea or great rivers. Co. Litt. 5.

**MARGIN.** A sum of money, or its equivalent, placed in the hands of a stock broker, by the principal, or person on whose account the purchase is to be made, as a security to the former against losses to which he may be exposed by a subsequent depression in the market value of the stock. 49 Barb. 462.

A sale on margin is a sale on time, of stock retained as security and not delivered until final payment is made. If the stock falls in value before the time of final payment, the buyer is called upon to advance more margin.

The effect of the contract is that the broker, upon the performance of certain conditions by the customer, will buy and hold a certain number of shares, and in case any advance accrues and is realized by a sale, made under the direction or authority of the customer, he shall enjoy the benefit of it, and in case a loss ensues, the broker having performed the contract on his part, the customer shall bear it; 49 Barb. 464; 66 N. Y. 518.

The circumstances attending ordinary speculations in stocks on a margin are described by Hunt, C. J., in 41 N. Y. 235; and also more fully in Dos Passos, Stock Brokers 102.

Stock purchased on a margin instantly becomes the property of the customer, with all future dividends and earnings, and the client is entitled to the possession of it upon paying the purchase money with commissions; 41 N. Y. 235, 247, 257, 258; 53 *id.* 211, 216. It was settled in New York by the leading case of Markham *v.* Jaudam that a purchase of stock on margin by brokers to be carried for the customer in their own name and with their own funds, creates the legal relation of pledgor and pledgee, and that a sale, not judicial, or upon notice and demand for payment of advances and commissions is a wrongful conversion; 41 N. Y. 23. This doctrine was finally distinctly reaffirmed in New York; 81 N. Y. 25; and in other states; 25 Md. 242, 269; 48 Cal. 99; 5 Pa. 41; 71 *id.* 76; and apparently in England; 5 Bligh N. S. 165, affirming 3 Sim. 153. See Dos Passos, Stock Brokers 112, where many other cases are cited. The pledgee is not liable for neglect to sell the stock where it depreciates in his hands or even becomes worthless, if he has not been requested to sell or refused to transfer the stock for that purpose; 87 Pa. 394; 98 Mass. 133; nor is he liable if the pledge be stolen without negligence on his part; 56 How. Pr. 68; and a stock broker is not liable where spurious securities are purchased for a customer in the regular course of business, and if he sells such and in consequence refunds the purchase money, he can recover it from his customer; 15 M. & W. 308, 486; 8 C. B. 373. It thus appears that one purchasing stock on a margin is in all essential parts the owner of the stock, entitled to the advantages and subject to the responsibilities of that relation.

The provision of the California constitution invalidating contracts for the sale of futures is held to apply to a sale of stock on margin; 89 Cal. 373. See FUTURES.

**MARGINAL NOTE.** An abstract of a reported case; a summary of the facts, or brief statement of the principle decided which is prefixed to the report of the case.

The marginal notes which appear in the statute books have not the authority of the legislature, and cannot alter the interpretation of the text; L. R. 3 C. P. 522; 22 Ch. D. 573.

**In Scotch Law.** A note inserted on the margin of a deed embodying either some clause which was omitted in transcribing or some change in the agreement of the parties. Bell; Ersk. Prin. 274.

**MARINARIUS** (L. Lat.). An ancient word which signified a mariner or seaman. In England, *marinarius capitaneus* was the admiral or warden of the ports.

**MARINE.** Belonging to the sea; relating to the sea; naval.

A soldier employed, or liable to be employed, on vessels of war, under the command of an officer of marines, who acts under the direction of the commander of the ship. See MARINE CORPS.

It is also used as a general term to denote the whole naval power of a state or country.

**MARINE CONTRACT.** One which relates to business done or transacted upon the sea and in seaports, and over which the courts of admiralty have jurisdiction concurrent with the courts of common law. See Parsons, Marit. Law; 2 Gall. 398; MARITIME CONTRACT.

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**MARINE CORPS.** A body of officers and soldiers under an organization separate and distinct from that of the army, and intended for service, in detached portions, on board of ships of war.

A military body primarily, belonging to the navy under the control of the secretary of the navy, but liable to be ordered to service in connection with the army. 120 U. S. 249.

**MARINE COURT OF THE CITY OF NEW YORK.** A local court originally established for the determination of controversies between seamen, but now a court of record, possessing general jurisdiction of controversies involving not more than $2,000, and special jurisdiction of civil actions for injuries to person or character, without regard to the amount of damages claimed. Rap. & L. Law Dict.

The name of this court was changed to city court by Laws 1883, ch. 26. See NEW YORK.

**MARINE INSURANCE.** See INSURANCE.

**MARINE INTEREST.** A compensation paid for the use of money loaned on bottomry or respondentia. Provided the money be loaned and put at risk, there is no fixed limit to the rate which may be lawfully charged by the lender; but courts of admiralty, in enforcing the contract, will mitigate the rate when it is extortionate and unconscionable. See BOTTOMRY; MARITIME LOAN; RESPONDENTIA.

**MARINE LEAGUE.** A measure equal to the twentieth part of a degree of latitude. Boucher, Inst. n. 1845. It is generally conceded that a nation has exclusive territorial jurisdiction upon the high seas for a marine league from its own shores. 1 Kent 29. See The Franconio, 2 Ex. Div. 63; TERRITORIAL WATERS; SEA.

**MARINE RISK.** See INSURANCE; RISKS AND PERILS.

**MARINER.** One whose occupation it is to navigate vessels upon the sea. Surgeons, engineers, clerks, stewards, cooks, porters, and chambermaids, on passenger-steamers, when necessary for the service of the ship or crew, are also deemed mariners, and permitted as such to sue in the admiralty courts for their wages. 1 Conkl. Adm. 107. See Gilp. 505; 80 N. Y. 71; 1 Hagg. Adm. 187.

The term includes masters, mates, sailors, surveyors, carpenters, coopers, stewards, cooks, cabin boys, kitchen boys, engineers, pilots, firemen, deck hands, and waiters—women as well as men. Bened. Adm. § 278. Those employed upon a vessel in any capacity, however humble, and whose labor contributes in any degree, however slight, to the accomplishment of the main object in which the vessel is engaged, are clothed by the law with the legal rights of mariners, "no matter what be their sex, character, station, or profession;" 77 Fed. Rep. 476 (C. C. of A.). See 7 How. 89; 3 Sumn. 115; 80 N. Y. 80; SEAMEN; LIEN; SHIPPING ARTICLES.

**MARISCHAL.** An officer in Scotland, who, with the lord high constable, possessed a supreme itinerant jurisdiction in all crimes committed within a certain space of the court, wherever it might happen to be. Wharton.

**MARITAGIO AMISSO PER DEFALTAM.** An obsolete writ for the tenant in frank marriage to recover lands, etc., of which he was deforced.

**MARITAGIUM** (Lat.). A portion given with a daughter in marriage. See FEUDAL LAW.

**MARITAGIUM HABERE.** To have the free disposal of an heiress in marriage.

**MARITAL.** That which belongs to marriage; as marital rights, marital duties. See HUSBAND; MARRIED WOMAN.

**MARITAL PORTION.** The name given to that part of a deceased husband's estate to which the widow is entitled. 3 Mart. La. N. S. 1.

**MARITIMA ANGLIÆ.** Profits and emoluments received by the king from the sea. They were anciently collected by sheriffs but were afterwards granted to the Lord High Admiral; Par. 8 Hen. III. m. 4.

**MARITIMA INCREMENTA.** Lands gained from the sea. See ALLUVION.

**MARITIME.** Pertaining to navigation or commercial intercourse upon the seas, great lakes, and rivers.

"The word *maritime* is also to have its appropriate meaning relating to the sea. The words *admiralty* and *maritime*, as they are used in the constitution and acts of congress, are by no means synonymous, although able lawyers, on the bench, as well as at the bar, seem sometimes to have so considered them. They were evidently both inserted to preclude a narrower construction which might be given to either word, had it been used alone. The English admiralty had jurisdiction of all cases arising beyond sea, although not maritime in their character. These are excluded by the use of both terms." Bened. Adm. § 40.

**MARITIME CAUSE.** A cause arising from a maritime contract, whether made at sea or on land.

In all cases of contract the jurisdiction of the admiralty courts depends upon the nature or subject-matter of the contract; but in cases of maritime tort and salvage their jurisdiction depends upon the place in which the cause of action accrued; 1 Conkl. Adm. 19, 32. In general, the courts of common law have a concurrent jurisdiction with courts of admiralty in those cases which are prosecuted on the instance side of the court. But the admiralty also has jurisdiction of prize cases, and that jurisdiction is exclusive, except where affected by special statutes; 6 Wall. 759. See PRIZE

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COURTS. The jurisdiction of the district courts in civil cases of admiralty and maritime jurisdiction is exclusive of all others; nor can a state legislature confer jurisdiction upon a state court; 4 Wall. 411; 7 *id.* 624.

The admiralty jurisdiction has been held not to extend to preliminary contracts, merely leading to the execution of maritime contracts; 3 Mas. 6; 3 Sumn. 144; nor to trusts, although they may relate to maritime affairs; Daveis 71; nor to enforcing a specific performance of a contract relating to maritime affairs; nor to a contract not maritime in its character, although the consideration for it may be maritime services; 4 Mas. 380; nor to questions of possession and property between owner and mortgagee; 17 How. 399; nor to contracts of affreightment from one port of the great lakes to another port in the same state; 21 How. 244. In the following cases (cited in Bened. Adm. § 214 *a*) actions have been sustained in admiralty: On an insurance policy; 10 Wall. 1; against an owner of cargo in general average; 12 *id.* 341; for weighing, inspecting, and measuring cargo; 2 Fed. Rep. 731; for coopering cargo; 13 *id.* 703; for compressing cargo; 26 *id.* 927; for the services of a watchman; 7 *id.* 235; a diver; 28 *id.* 429; an average adjuster; 7 *id.* 236; for the use of a dry dock; 12 *id.* 207; for removing ballast; 2 *id.* 722; for lockage in a river; 1 *id.* 218; for wharfage; 95 U. S. 75; for insurance premiums; 40 Fed. Rep. 603; for launching a vessel which had been driven ashore; 5 Hughes 125; for repairing a scow; 3 Fed. Rep. 207; on a contract to supply nets to a fishing vessel: 33 *id.* 297; for the charter of a vessel yet to be built; 44 *id.* 102; for services as watchman; 32 *id.* 300; actions to try the title to a ship; Bened. Adm. § 276; but not to enforce a merely equitable title; 135 U. S. 599.

The following cases are cited by the same author as not being within the maritime jurisdiction: For storage of sails; 2 Fed. Rep. 393 (*contra*, 2 Gall. 483); for services of a ship broker; 10 Fed. Rep. 848; for wharfage while laid up in the winter; 28 *id.* 429; for receiving and storing cargo on board a vessel during the winter; 33 *id.* 383; for obtaining a concession to dig guano; 15 *id.* 385; for lease of a "bar" on board a vessel; 2 Flipp. 427; on a contract to navigate a raft; 1 *id.* 543; a contract to store wheat for the winter; 33 Fed. Rep. 383; a contract by a master to carry cargo, sell it, and account for the proceeds; 37 *id.* 369; for services in purchasing a vessel; 39 *id.* 40.

As to passengers, it has been a question whether contracts for their transportation were within the jurisdiction; Gilp. 184; but the contrary view is now established; 4 Wall. 411.

Stevedores were formerly not considered as rendering marine services, but the contrary view appears now to obtain; Bened. Adm. § 285; 37 Fed. Rep. 209, 367; 51 *id.* 954.

As to jurisdiction over foreign ships, all persons in time of peace have the right to resort to the tribunals of the nation where they may happen to be, for the protection of their rights, unless the jurisdiction is excluded by treaty, though sometimes, as in the case of foreign seamen, they will refuse, from considerations of expediency, to exercise their jurisdiction; Bened. Adm. § 282; thus, admiralty jurisdiction does not apply to claims of bad treatment suffered by an American serving as a seaman on a Norwegian vessel; 55 Fed. Rep. 80.

As to the jurisdiction of the Lord High Admiral of England, see "A Water Court," 22 Law Mag. & Rev. 142, by Sir S. Baker; another article on "The Water Court of Saltash"; 20 Law Mag. & Rev. 195.

See ADMIRALTY; WHARFAGE; STEVEDORES; PILOTS; MARITIME; MARITIME CONTRACT; MARITIME TORT; LIEN; BOTTOMRY; RESPONDENTIA; JETTISON; RANSOM BILLS.

**MARITIME CODES.** See CODE. Much learning in relation thereto and certain lesser maritime codes not referred to under that title will be found in Bened. Adm. ch. xi.

**MARITIME CONTRACT.** One which relates to the business of navigation upon the sea, or to business appertaining to commerce or navigation to be transacted or done upon the sea, or in sea-ports, and over which courts of admiralty have jurisdiction concurrent with the courts of common law.

Such contracts, according to civilians and jurists, include, among others, charter-parties, bills of lading, and other contracts of affreightment, marine hypothecations, contracts for maritime service in building, repairing, supplying, and navigating ships or vessels, contracts and quasi contracts respecting averages, contributions, and jettisons. See 2 Gall. 398, in which Judge Story gave a very elaborate opinion on the subject; 2 Pars. Marit. Law 182. See 3 Mas. 27; 2 Story 176; 2 Curt. C. C. 322; 7 How. 729.

The contract for building a vessel is not a maritime contract; 20 How. 393; 7 Am. Law Reg. 5; 22 How. 129; *contra*, 21 Law Rep. 281.

The fact that contracts of affreightment are personal contracts between the shipper and ship owner does not prevent them from being maritime contracts on which a libel *in rem* against the ship may be maintained; 61 Fed. Rep. 213; 61 *id.* 860. See MARITIME CAUSE.

**MARITIME COURT.** See ADMIRALTY.

**MARITIME INTEREST.** See MARINE INTEREST.

**MARITIME LAW.** That system of law which particularly relates to the affairs and business of the sea, to ships, their crews and navigation, and to the marine conveyance of persons and property.

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Whilst the general maritime law is the basis of the maritime law of the United States, as well as of other countries, it is only so far operative in this, or any country, as it is adopted by the laws and usages thereof. It has no inherent force of its own. 21 Wall. 558.

In particular matters, especially such as approach a merely municipal character, the received maritime law may differ in different countries without affecting the integrity of the system as a harmonious whole.

The general system of maritime law which was familiar to the lawyers and statesmen of this country when the constitution was adopted, was intended, and referred to, when it was declared in that instrument that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction." Thus adopted, it became the maritime law of the United States, operating uniformly in the whole country.

The question as to the true limits of maritime law and admiralty jurisdiction is exclusively a judicial question, and no state law or act of congress can make it broader or narrower than the judicial power may determine those limits to be. But what the law is within those limits, assuming the general maritime law to be the basis of the system, depends on what has been received as law in the maritime usages of this country, and on such legislation as may have been competent to effect it.

The decisions of this court illustrative of these sources, and giving construction to the laws and constitution, are especially to be considered; and when these fail us, we must resort to the principles by which they have been governed.

In Bened. Adm. § 214 *a* it is said:—The maritime law is a law common to all nations which are engaged in maritime commerce; it consists of certain principles of equity and usages of trade which general convenience and a common sense of justice have established in all the commercial countries of the world, to regulate the dealing and intercourse of merchants and mariners, in matters relating to the sea.

"This maritime law does not in the least depend upon the court in which it is to be administered, but furnishes the proper rule of decision in cases to which it applies, no matter in what court they may be brought; and it has, in fact, been administered in different countries, in different courts, each constituted in its own manner In England, the court of admiralty and the court of chancery especially enforced it, while truth was required in pleading; but when, by the use of a fictitious venue, the facts might be laid as occurring in London, the king's bench took jurisdiction and prohibited the admiralty; and thus, in the king's bench more than in the court of admiralty, and especially under Lord Mansfield, the maritime law was built up and extended." Bened. Adm. § 42.

"The jurisdiction of the admiral, and the administration of the admiralty law proper—the local maritime law,—as it became a judicial function, has thus passed into the hands of the courts, and they now administer the admiralty law and the maritime law, both of which are sometimes called the admiralty law, sometimes the maritime law, and sometimes the admiralty and maritime law; and cases arising under them are cases of admiralty and maritime jurisdiction." Bened. Adm. § 43. See 2 Gall. 398.

The law of limited liability was enacted by congress as a part of the maritime law of the United States, and, in its operation, extends wherever public navigation extends; 130 U. S. 527; the act of congress of 1886, § 4, extending the limited liability act to vessels used on a river in inland navigation, is a constitutional and valid law; 141 U. S. 1. See ABANDONMENT. See ADMIRALTY; MARITIME CAUSE, and the various titles in regard to which information is sought.

**MARITIME LIEN.** See LIEN.

**MARITIME LOAN.** A contract or agreement by which one, who is the lender, lends to another, who is the borrower, a certain sum of money, upon condition that if the thing upon which the loan has been made should be lost by any peril of the sea, or *vis major*, the lender shall not be repaid unless what remains shall be equal to the sum borrowed; and if the thing arrive in safety, or in case it shall not have been injured but by its own defects or the fault of the master or mariners, the borrower shall be bound to return the sum borrowed, together with a certain sum agreed upon as the price of the hazard incurred. Emerigon, Mar. Loans, c. 1, s. 2. See BOTTOMRY; MARINE INTEREST; RESPONDENTIA.

**MARITIME PROFIT.** A term used by French writers to signify any profit derived from a maritime loan.

**MARITIME SERVICE.** A service rendered upon water in connection with some vessel, the preservation of her cargo or crew. 16 Fed. Rep. 924.

**MARITIME TORT.** A tort which by reason of the place where it is committed is within the jurisdiction of admiralty.

A tort committed upon water and which comes within the jurisdiction of a court of admiralty. 17 Fed. Rep. 387.

Admiralty courts have always had jurisdiction of torts committed upon the high seas, and there is also no question as to injuries upon waters of the sea where the tide ebbs and flows, but in the United States, where that is not the test, the jurisdiction would extend to any waters which for other purposes are held to be within the general admiralty jurisdiction. Civil jurisdiction of torts has been said to depend solely upon the place where the cause of action arises; 66 U. S. 574; but a doubt is suggested whether it does not also "depend upon the relation of the parties to a ship or vessel,

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embracing only those tortious violations of maritime right and duty which occur in vessels, to which the admiralty jurisdiction in cases of contract applies." Bened. Adm. § 308 and cases cited. This maritime jurisdiction of civil injuries has been held to extend to all cases of personal injuries committed by the master or his officers against passengers or seamen; *id.* § 309. The jurisdiction has been held not to survive the death of the person injured even if aided by a state statute enabling an administrator to sue for such injuries in ordinary cases; Sprague 184. It was held by the supreme court that no action would lie for the death of a person killed by a marine tort; 119 U. S. 199, where the decisions are collected. In that case the question whether an action *in rem* would lie was left undetermined. A personal action in such case has been maintained against the owner at common law; 77 N. Y. 546; and also in admiralty; 55 Fed. Rep. 98. Every violent dispossession of property at sea is *prima facie* a maritime tort; 1 Wheat. 238. An injury to a vessel from negligence in operating a drawbridge is a maritime tort, and a suit in admiralty will lie against the town therefor; 60 Fed. Rep. 560; 45 *id.* 260; 27 *id.* 230; 38 *id.* 202. In actions for torts arising from negligence courts of admiralty do not confine themselves within the limits of mere municipal law, but deal with the question of damage upon enlarged principles of equity and justice, to the extent of dividing the damages in cases of mutual fault; 60 Fed. Rep. 560, 578; 137 U. S. 1. See MARITIME CAUSE.

**MARITUS.** A husband; a married man.

**MARK.** A sign, traced on paper or parchment, which stands in the place of a signature; usually made by persons who cannot write. The use of the mark in ancient times was not confined to illiterate persons; among the Saxons the mark of the cross, as an attestation of the good faith of the person signing, was required to be attached to the signature of those who could write, as well as to stand in the place of the signature of those who could not write. It was the symbol of an oath. It is most often the sign of the cross, made in a little space left between the Christian name and surname; 2 Bla. Com. 305; 12 Pet. 150; 2 Ves. Sen. 455; 1 V. & B. 362. The word *his* is usually written above the mark, and the word *mark* below it; Schoul. Wills 303, 305. But it is not essential that these words shall be attached to the mark made or adopted by a person unable to write, in the execution of a deed, as it is sufficient if it appears that he in fact made the mark or adopted it; 98 N. C. 13. A mark is a signature; 12 Pet. 151; 47 N. H. 205; 93 N. C. 624; 132 Mass. 105. And it may be proved as handwriting: by one who has seen the person make his mark; 17 Ala. 706; 3 Humph. 47; 5 Johns. 144; *contra*, 17 Pa. 159. A mark is now held to be a good signature though the party was able to write; 8 Ad. & E. 94; 3 Curt. 753; 5 Johns. 144; 2 Bradf. Surr. 385; 24 Pa. 502; 19 Mo. 609; 18 Ga. 396; 16 B. Monr. 102; 1 Jarm. Wills 69, 112; 1 Will. Exec. 63. The signature of a subscribing witness to a deed may be made by a cross mark; 102 N. C. 284.

It is not necessary in the execution of a note, that the person executing, if unable to write, touch the pen while the person authorized signs his name; 35 N. E. Rep. (Ind.) 925. See SIGNATURE.

The sign, writing, or ticket put upon manufactured goods to distinguish them from others; 3 B. & C. 541; 2 V. & B. 218; also to indicate the price; and if one use the mark of another to do him damage, an action on the case will lie, or an injunction may be had from chancery; 2 Cro. 47. This mark may consist of the name of the manufacturer, printed, branded, or stamped in a mode peculiar to itself, or a seal, a letter, a cipher, a monogram, or any sign or symbol, to so distinguish it as his product; 31 Fed. Rep. 280. See TRADE-MARKS; UNION LABEL LAWS.

By the act of July 8, 1870, patentees are required to mark patented articles with the word *patented* and the day and year when the patent was granted, and in any suit for infringement by the party failing so to mark, no damages can be recovered by the plaintiff, except on proof that the defendant was duly notified of the infringement, and continued, after such notice, to make, use, or vend the article patented.

Marks and brands are admissible in evidence to prove ownership of animals, whether recorded or not, unless prohibited by statute; 26 Tex. App. 466.

**MARK** (spelled, also, *Marc*). A weight used in several parts of Europe, and for several commodities, especially gold and silver. When gold and silver are sold by the mark, it is divided into twenty-four carats. A money of accounts in England, and in some other countries a coin. The English mark is two-thirds of a pound sterling, or 13*s.* 4*d.*; and the Scotch mark is of equal value in Scotch money of account. Encyc. Amer.

**MARKET.** A public place and appointed time for buying and selling. A public place, appointed by public authority, where all sorts of things necessary for the subsistence or for the convenience of life are sold. All fairs are markets, but not *vice versa*; Bract. l. 2, c. 21; Co. Litt. 22; Co. 2d Inst. 401; Co. 4th Inst. 272. Markets are generally regulated by local laws. A city may establish public markets and confine the sale of commodities therein, where the regulations are reasonable and in consideration of public health; 84 Ala. 17; 17 Wend. 265; 44 La. Ann. 809; 11 Ia. 407; 6 H. & S. 269. See 33 Ga. 229; and ordinances are valid, prohibiting sales in markets by non-producers without license; 11 Pick. 168; 9 Metc. 253; requiring a small fee for stalls; 10 Ohio 257; prohibiting produce wagons from standing within the limits of

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a market; 109 Mass. 355; or the keeping a private market within six squares of a public market (where the ordinance was authorized by statute); 41 La. Ann. 887; 139 U. S. 621; and prohibiting the sale of specified provisions except at a public market; 30 Ala. 540; 76 Tex. 559; 44 Mo. 549; 10 Wend. 100; 8 Johns. 418; 106 N. C. 664; 11 Mich. 347; 53 Ga. 613. See 24 L. R. A. 584, n.

The franchise by which a town holds a market, which can only be by royal grant or immemorial usage.

By the term market is also understood the demand there is for any particular article: as, the cotton market in Europe is dull. See 15 Viner, Abr. 41; Comyns, Dig. *Market;* MARKET STALLS.

**MARKET OVERT.** An open or public market; that is, a place appointed by law or custom for the sale of goods and chattels at stated times in public. "An open, public, and legally constituted market." Jervis, C. J., 9 J. Scott 601; 18 C. B. 599. As to what is a *legally constituted* market overt, see 5 C. B. N. S. 299. In 5 B. & S. 313, the doctrine of market overt was much discussed by Cockburn, C. J., and the opinion expressed that a sale could not be considered as made in market overt, "unless the goods were exposed in the market for sale, and the whole transaction begun, continued, and completed in the open market; so as to give the fullest opportunity to the man whose goods have been taken to make pursuit of them, and prevent their being sold."

The market-place is the only market overt out of London, but in London every shop is a market overt; 5 Co. 83; F. Moore 300. Where a sale took place in a showroom above a store, access to which was only obtainable by special permission, it was not a sale in market overt; [1892] 1 Q. B. 25. In London, every day except Sunday is market-day. In the country, particular days are fixed for market-days by charter or prescription; 2 Bla. Com. 449.

All contracts for any thing vendible, made in market overt, shall be binding; and sales pass the property, though stolen, if it be an open and proper place for the kind of goods, there be an actual sale for valuable consideration, no notice of wrongful possession, no collusion, parties able to contract, a contract originally and wholly in the market overt, toll be paid, if requisite, by statute, and the contract be made between sun and sun; 5 Co. 83 *b*. But sale in market overt does not bind the king, though it does infants, etc.; Co. 2d Inst. 713; 2 Bla. Com. 449; Comyns, Dig. *Market* (E); Bacon, Abr. *Fairs and Markets* (E); 5 B. & Ald. 624. A sale by sample is not a sale in market overt; 5 B. & S. 313; but a sale to a shop-keeper in London is; 11 Ad. & E. 326; but see 5 B. & S. 313. Under 24 & 25 Vict. c. 96, s. 100, upon the conviction of a thief, at the prosecution of a person from whom he has stolen goods, summary restitution of the stolen goods is provided for. The English Sale of Goods Act, 1893, provides that a *bona fide* buyer in market overt acquires a good title, but horses are excepted from the act.

There is no law recognizing the effect of a sale in market overt in the United States; 5 S. & R. 130; 1 Johns. 480; 52 N. H. 158; 59 Me. 111; 8 Mass. 521; 5 Ohio 203; 1 Tyl. 341; 10 Pet. 161; 2 Kent 324; 2 Tud. Lead. Cas. 734, where the subject is fully treated.

**MARKET PRICE.** When referring to the value of an article at the place of exportation, it means the price at which such articles are sold and purchased, clear of every charge, but such as is laid upon it at the time of sale. 2 Wash. C. C. 499.

**MARKET STALLS.** The right acquired by a purchaser of a market stall is in the nature of an easement in, not a title to, a freehold in the land, and such right or easement is limited in duration to the existence of the market, and is to be understood as acquired subject to such changes and modifications in the market during its existence, as the public needs may require. The purchase confers an exclusive right to occupy the particular stalls, with their appendages, for the purposes of the market, and none other, and subject to the regulation of the market. So held in a case in 2 Md. Law Rec. 81, a case of a public market in Baltimore. In 33 Pa. 202, the court refused to enjoin the city of Philadelphia from demolishing the old market house with a view to building a new one on other property. See, also, 18 Ohio 563; 19 Am. L. Reg. N. S. 9.

**MARKET VALUE.** A price established by public sales, or sales in the way of ordinary business, as of merchandise. 99 Mass. 348; 69 N. Y. 448.

The market value is to be determined by the general market value of goods without regard to special advantages which the importer may enjoy; and in ascertaining that value, it is proper in some instances to consider the cost of production, including such items of expense as designs, salary of buyer, clerk hire, rent, interest, and percentage on the aggregate cost of the business in tariff law cases; 155 U. S. 240.

**MARKETABLE TITLE.** A title which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and anxious to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear in such transactions, be willing and ought to accept; and which one is entitled to have. 128 N. Y. 636. A title by adverse possession for forty years is a marketable title; 138 Ind. 103. In equity a marketable title is one in which there is no doubt involved, either as law or fact; 158 Pa. 424. See TITLE.

**MARLBRIDGE, STATUTE OF.** An important English statute, 52 Hen. III. (1267), relating to wrongful distress. It derived its name from the town in Wiltshire in which parliament sat when it was en-

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acted, now known as Marlborough. See 6 Chitty, Eng. Stat.; 2 Reeve, Hist. Eng. Law 62; Crabb, Com. Law 156; 1 Soc. Eng. 410.

**MARQUE AND REPRISAL.** See LETTERS OF MARQUE.

**MARQUIS.** A title of nobility. In England the rank of a marquis is below that of a duke and above an earl. It is also a title of dignity in France, Italy, and Germany.

**MARRIAGE.** A contract made in due form of law, by which a man and woman reciprocally engage to live with each other during their joint lives, and to discharge towards each other the duties imposed by law on the relation of husband and wife. For the laws of the Hebrews and Romans and the canon or ecclesiastical law of the Middle Ages on the subject of marriage, see Fulton's Laws of Marriage.

Marriage, in our law, as distinguished from the agreement to marry and from the act of becoming married, is the civil status of one man and one woman united in law for life, for the discharge to each other and the community of the duties legally incumbent on those whose association is founded on the distinction of sex. 1 Bish. Mar. & D. § 3.

It does not mean a mere temporary agreement to dwell together for a time for the gratification of sexual desires, but it is essential that the contract be entered into with a view to its continuance through life and then be followed by celebration and cohabitation, with the apparent object of continuing such cohabitation through life; 50 N. W. Rep. (Neb.) 155.

The better opinion appears to be that marriage is something more than a mere civil contract. It has been variously said by different writers to be a status, or a relation, or an institution. This view is supported by the following: Story, Confl. Laws § 108 n.; Schoul. Husb. & W. § 12; 4 R. I. 87; 9 Ind. 37; 3 P. D. 1; s. c. 19 Am. L. Reg. N. S. 80; 4 P. D. 1; 5 *id.* 94; 5 Law Mag. & Rev. 4 ser. 26. But see *contra*, 22 S. E. Rep. 178. In New York it has been held to be merely a civil contract; 7 Abb. N. C. 98. Marriage is not a contract within the federal constitutional provision as to impairment of contracts; 125 U. S. 190.

All persons are able to contract marriage unless they are under the legal age, or unless there be other disability. The age of consent at common law is fourteen in males and twelve in females; Reeve, Dom. Rel. 236; 2 Kent 78; 1 N. Chipm. 254; 10 Humphr. 61; 1 Gray 119; 55 Ala. 111. This is still the rule in the older states; but in Ohio, Indiana, and other western states, the age of consent is raised to eighteen for males, and fourteen for females; Schoul. Husb. & W. § 24. When a person under the age marries, such person can, when either he or she arrives at lawful age, avoid the marriage, or such person or both may, if the other is of legal age, confirm it. It has been held that the one who is of legal age may also disaffirm the marriage; Co. Litt. 79; East, P. C. 468; but see 15 Mich. 193. The disaffirmance may be either with or without a judicial sentence; 1 Bish. Marr. & D. § 150. If either of the parties is under seven, the marriage is void; 1 Sharsw. Bla. Com. 436; 5 Ired. Eq. 487. As to the age for contracting marriage in different countries, see 2 Halleck, Int. L., Baker's ed. App.

If either party is *non compos mentis*, or *insane*, the marriage is void. See INSANITY.

If either party has a husband or wife living the marriage is void; 4 Johns. 53; 22 Ala. N. S. 86; 1 Salk. 120; 1 Bla. Com. 438; 45 La. Ann. 419; although the woman may have thought her first husband was dead; 124 Pa. 646. See 40 La. Ann. 10; 156 Mass. 578; INTENTION.

A man may contract marriage before entry of a decree declaring his former marriage to have been void; 36 Pac. Rep. (Cal.) 11. See NULLITY OF MARRIAGE.

Consanguinity and affinity within the rules prescribed by law in this country render a marriage void. In England they rendered the marriage liable to be annulled by the ecclesiastical courts; 10 Metc. 451; 2 Bla. Com. 434. See CONFLICT OF LAWS.

If either party acts under compulsion, or is under duress, the marriage is voidable; 2 Hagg. Cons. 104, 246; 75 Hun 56; 12 P. & D. 21; [1891] P. 369. Where one of the parties answers "no" to every question of the magistrate which should have been answered "yes," and thereafter refused to cohabit with the man, the marriage is not valid; 73 Mich. 133.

The parties must each be willing to marry the other. Where a woman silently withholds her consent to a formal marriage, but subsequently treats it as a good marriage, she is estopped from saying it was not real and binding on her; 69 Hun 146. Where one of the parties is mistaken in the person of the other, the requisite of consent is wanting. But a mistake in the qualities or character of the other party will not avoid the marriage; Poynt. Marr. & D. c. 9. If a man marries the woman he intends to marry, the marriage is valid, though she passes under an assumed name; 1 Bish. Mar. & D. § 204; 3 Curt. Ec. 185; see Burke's Trials 63.

If the apparent willingness is produced by fraud, the marriage will be valid till set aside by a court of chancery or by a decree of divorce; 5 Paige, Ch. 43. See 94 Mich. 559; 6 Misc. Rep. 355. A ceremony of marriage without license and performed by an unauthorized person, and imposed on a woman by false pretences, but believed by her to be lawful and *bona fide*, is valid for all civil purposes, unless and until avoided by the deceived person; 94 Ala. 501. Fraud is sometimes said to render a marriage void; but this is incorrect, as it is competent for the party injured to waive the tort and affirm the marriage. Impotency in one of the parties is sometimes laid down as rendering the marriage void, as being a species of fraud on the other party; but it is only

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a ground for annulling the contract by a court, or for a divorce. Schoul. Husb. & W. § 22.

A prohibition, imposed by the laws of a state against a subsequent marriage by a husband against whom a decree of divorce has been rendered, can have no extra-territorial effect; and therefore such person may contract a subsequent marriage in another state where the law imposes no such prohibition; 83 Ala. 528; but at his death the second wife is not entitled to letters of administration on his estate, in the state which imposed the prohibition against his re-marriage; 39 Atl. Rep. (Pa.) 16.

Dr. Wharton (Confl. Laws) gives three distinct theories as to the law which is to determine the question of matrimonial capacity.

It is determined by the law of the place of solemnization of the marriage. This view is supported by Judge Story (Confl. Laws §§ 110, 112), and Mr. Bishop (Mar. & D. § 390); 19 Am. L. Reg. N. S. 219; 76 Ga. 177; but it is objected to this theory that it is subject to exceptions which destroy its applicability to the majority of litigated cases. Thus marriages which by our law are incestuous, are not validated by being performed in another land, where they would be lawful, and so the converse is true, that the marriage, in England, of an American with his deceased wife's sister, would be recognized as valid in such of our states as hold such a marriage to be legal, nor is it believed that an American court will ever hold a marriage of American citizens, solemnized abroad, to be illegal, simply because the consent of parents was withheld or because one of the parties, though of age at home, was a minor at the place of celebration. Further, to make the *lex loci celebrationis* supreme enables parties to acquire for themselves any kind of marital capacity they want, by having the marriage solemnized in a state where this kind of marital capacity is sanctioned by law. See 87 Tenn. 244; 59 Fed. Rep. 682.

A second theory of matrimonial capacity is that it is determined by the *lex domicilii*; Wheat. Int. Law (Lawr.) 172; 4 Phill. Int. Law 284; 2 Cl. & F. 488; 9 H. L. C. 193. There are two serious objections to this theory. First it would make the validity of the marriages in the United States of natives of other countries depend upon the question whether such persons had acquired a domicil in the United States; for if they had not, they would be governed by the laws of their foreign domicil. Few aliens, who marry in this country, could be sure they were legally married. Second, it would be necessary upon this theory to sustain the polygamous marriages of Chinese; see, as sustaining this theory, L. R. 2 P. & M. 440; 4 P. D. 13; 3 P. D. 1; 29 L. J. P. & M. 97; Westl. 56; but see 125 Mass. 374. According to Savigny, all questions of capacity are to be determined by the husband's domicil, which, as the true seat of the marriage, absorbs that of the wife. It has been conceded that the law of domicil does not extend to the direction of the ceremonial part of the marriage rite, and that the *lex domicilii* is the law of the country in which the parties are domiciled at the time of the marriage, and in which their matrimonial residence is contemplated; Lord Campbell in 9 H. L. C. 193.

The third theory is that matrimonial capacity is a distinctive national policy, as to which judges are obliged to enforce the rules of the state of which they are the officers. So far as concerns the United States, our national policy in this respect is to sustain the matrimonial capacity in all classes of persons arrived at puberty, and free from the impediments of prior ties. This view is approved by Dr. Wharton, Confl. Laws §§ 160–165. See 19 Am. L. Reg. N. S. 76, 219; 31 Am. L. Rev. 524.

At common law, no particular form of words or ceremony was necessary. Mutual assent to the relation of husband and wife was sufficient. Any words importing a present assent to being married to each other were sufficient evidence of the contract. If the words imported an assent to a future marriage, if followed by consummation, this established a valid marriage by the canon law, but not by the common law; 10 Cl. & F. 534; 15 N. Y. 345; 2 Rop. Husb. & W. 445; 1 How. 219; 2 N. H. 268. But a betrothal followed by copulation does not make the common-law marriage *per verba de futuro cum copula* when the parties looked forward to a formal ceremony, and did not agree to become husband and wife without it; 12 R. I. 485. An agreement made *per verba de præsenti* between a man and a woman to become husband and wife, followed by consummation thereof, either secret or public, is a valid marriage and is not invalidated by an agreement of one of the parties not to make the marriage known until a specified time, unless with the consent of the other; 75 Cal. 1; 17 Wash. L. Rep. 328. The question has been raised of the validity of a marriage at sea, and it has been held in California that outside of the three-mile limit there is no law governing marriage, and that if persons go to sea to escape the conditions attached to the ceremony within a state the state cannot be expected to recognize the ceremony as valid; 55 Alb. L. J. 208. But a formal marriage on a British man-of-war on the high seas has been held valid in England; [1896] P. 116.

At common law the consent might be given in the presence of a magistrate or of any other person as a witness, or it might be found by a court or jury from the subsequent acknowledgment of the parties, or from the proof of cohabitation, or of general reputation resulting from the conduct of the parties. In the original United States the common-law rule prevails, except where it has been changed by legislation; 6 Binn. 405; 4 Johns. 52. See 10 N. H. 383; 4 Burr. 2058; 1 How. 219, 234; 1 Gray 119; 2 Me. 102.

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In civil cases a marriage can generally be proved by showing that the parties have held themselves out as husband and wife, and by general reputation founded on their conduct. This is sufficient, too, for purposes of administration; 2 Redf. 456. There is an exception, however, in the case of such civil suits as are founded on the marriage relation, such as actions for the seduction of the wife, where general reputation and cohabitation will not be sufficient; 4 N. Y. 230; 183 Pa. 210; 3 Bradf. Surr. 369, 373; 6 Conn. 446; 29 Me. 323; 14 N. H. 450.

Marriage may be proved by the witnesses to its solemnization, by presumption, from a record, or from cohabitation and repute, and by declaration, or admissions of the parties to it, when against their interest or a part of the *res gestæ*, or by conduct from which such admission may be implied; 49 N. J. Eq. 520; see 65 Vt. 482; or by circumstantial evidence; 76 Hun 200. Eyewitnesses and records are not essential; 103 U. S. 311.

Documentary evidence is not the best proof of marriage; a witness who swears to having seen a marriage ceremony performed, intended to be in good faith, by a person acting as a clergyman or magistrate, testifies to a valid marriage, unless it is clearly illegal by statute; 72 Mich. 184.

In most of the states, the degrees of relationship within which marriages may not be contracted are prescribed by statute. This limit in cases of consanguinity is generally, though not always, that of first cousins. In some of the states, a violation of the rule renders, by statute, the marriage absolutely void. In others, no provision of this kind is made. Various statutes have been passed to guard against abuse of the marriage ceremony. Such of them as require license, or the publication of bans, or the consent of parents or guardians, are regarded as directory, and, unless explicitly declaring the marriage to be void, if not complied with, do not render it void. See 4 Ia. 449; 26 Mo. 260; 2 Watts 9; 1 How. 219; 2 Halst. 138; 2 N. H. 268; 103 Mo. 183; 43 Ala. 57; 30 Ga. 173; 25 N. Y. 390. But see 2 Yerg. 589; 9 H. L. C. 274; 155 Mass. 425; 29 W. Va. 732; 30 Pac. Rep. 65. See Nelson, Divorce.

In England Lord Hardwicke's Act, 1753, nullified all marriages (except those of Quakers and Jews) celebrated otherwise than in a church and according to the rites of the church of England, and this continued to be the law up to the passing of the Marriage Act, 1836, by which provisions were made for civil marriages at a register office, and for legalizing all marriages in duly registered dissenting places of worship, if celebrated in the presence of a civil official called a registrar of marriages. Foreign marriages are regulated in England by the act of 1892. See LEX LOCI, as to foreign marriages.

As to rights of married women, see HUSBAND; MARRIED WOMAN.

**MARRIAGE ARTICLES.** Articles of agreement between parties contemplating marriage, in accordance with which the marriage settlement is afterwards to be drawn up; they are to be binding in case of marriage. They must be in writing, by the Statute of Frauds; Burt. R. P. 484; Crabb, R. P. § 1809; 4 Cruise, Dig. 274, 328.

**MARRIAGE BROKAGE.** The act by which a person interferes, for a consideration to be received by him, between a man and a woman, for the purpose of promoting a marriage between them. The money paid for such service is also known by this name.

Such contracts are illegal at common law; Show. P. C. 76; 3 P. Wms. 76; 3 Lev. 411; and in equity they are utterly void, as against public policy; 1 Fonbl. Eq. b. 1, c. 4, 10, note s; 2 Sto. Eq. Jur. § 263; 1 Ves. 503.

It is said that such contracts were good at the civil law and that "matchmakers (*proxenetæ*) were allowed to receive a reward for their services." Bisph. Eq. § 224, note.

**MARRIAGE LICENSE.** See MARRIAGE.

**MARRIAGE PORTION.** That property which is given to a woman on her marriage. See DOWER.

**MARRIAGE, PROMISE OF.** See PROMISE OF MARRIAGE.

**MARRIAGE SETTLEMENT.** An agreement made by the parties in contemplation of marriage, by which the title to certain property is changed, and the property to some extent becomes inalienable. 1 Rice, Eq. 315. See 2 Hill, Ch. 3; 8 Leigh 29; 1 D. & B. Eq. 389; Baldw. 344; 15 Mass. 106; 139 *id.* 144; 7 Pet. 348; 37 Ill. App. 145; 93 Mich. 274; 112 Mo. 442. See 2 Washb. R. P. Appx.; Atherly, Marr. Settl.

Such settlements are valid, the marriage being at law a valuable consideration; 42 S. W. Rep. (Tenn.) 213; 20 App. Div. N. Y. 560; and payments made in pursuance thereof cannot be set aside by creditors; 42 S. W. Rep. (Tenn.) 213. The property covered passes, on the death of the wife, to her devisees under the settlement; 20 App. Div. N. Y. 560; and is free from any claim by the husband to curtesy; 20 Misc. Rep. 481. It is sufficient to change the course of inheritance and authorize each party to dispose of his or her own property by deed or devise without consent of the other; 5 Kan. App. 341. See 42 Ia. 600. It is not affected by a subsequent statute respecting married women; 109 Ala. 689.

In Quebec a gift of future property between future consorts by marriage contract is illegal and void; Rap. Jud. Quebec 11 C. S. 404. See ANTENUPTIAL CONTRACT.

**MARRIED WOMAN.** A woman who has a husband.

The relation confers upon her certain rights, imposes on her certain obligations, and deprives her of certain powers and privileges.

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**At Common Law.** A wife has a right to share the bed and board of her husband. She can call upon him to provide her with necessary food and clothing according to her position in life, and if he neglects or refuses to do it she can procure them on his account. See NECESSARIES. She is entitled, on his death, to dower in all the real estate of which he is seised at any time during coverture. See DOWER.

She is bound to follow him wherever in the country he may choose to go and establish himself, provided it is not, for other causes, unreasonable. She is under obligation to be faithful in chastity to her marriage vow; 5 Mart. La. N. S. 50. See DIVORCE; ADULTERY.

A married woman can acquire rights of a political character: these rights stand on the general principles of the law of nations; 2 Hard. Ky. 5; 3 Pet. 242. See WOMAN.

When she commits a crime in the presence of her husband, unless it is of a very aggravated character, she is presumed to act by his coercion, and, unless the contrary is proved, she is irresponsible. Under other circumstances she is liable, criminally, as if she were a *feme sole*. See COERCION; DURESS; HUSBAND; WILL.

Her property rights were put by the marriage very much under the control of the husband. He could manage his own affairs in his own way, buy and sell all kinds of personal property, without her control, and he might buy any real estate he might deem proper; but, as the wife acquired a right in the latter, he could not sell it, discharged of her dower, except by her consent, expressed in the manner prescribed by the laws of the state where such lands lay. Her *personal* property in possession was vested in him, and he could dispose of it as if he had acquired it; this arose from the principle that they were considered one person in law; 2 Bla. Com. 433; 83 Ala. 202; and he was entitled to all her property in action, provided he reduced it to possession during her life; 2 Bla. Com. 434. If the wife died before the claims were collected, the husband received them as her administrator, in which case, after payment of her debts, the surplus belonged to him absolutely. He was also entitled to her *chattels real*, but these vested in him not absolutely, but *sub modo:* as, in the case of a lease for years, the husband was entitled to receive the rents and profits of it, and could, if he pleased, sell, surrender, or dispose of it during the coverture, and it was liable to be taken in execution for his debts; and, if he survived her, it was to all intents and purposes his own. In case his wife survived him, it was considered as if it had never been transferred from her, and it belonged to her alone. In his wife's freehold estate he had a life estate during the joint lives of himself and wife; and when he had a child by her who could inherit, he had an estate by the curtesy. See CURTESY.

At common law a married woman could not bind herself by contract, express or implied, by parol or under seal, even for necessaries, nor, though living apart from her husband, could she make a binding contract except for necessaries or for the benefit of her separate estate; 9 Col. 291; and a contract made by her being invalid would be no consideration for a subsequent promise during widowhood; 49 N. J. L. 53. Her husband might be bound by her acts as his agent, duly authorized; 2 Freem. 178; 4 Man. & G. 253; but where payment to her was pleaded, her authority must be stated; 2 *id.* 173. By her own act her authority could not be enlarged; 101 U. S. 240; and she could not execute a conveyance, even in release of dower, otherwise than by joining with her husband in a deed to a third person; 4 Paige 448. No promise of a wife could at common law be enforced against her unless she had a separate estate, and then not by a personal decree but only by treating it as an appointment out of such estate; 49 N. J. L. 53; and then only for her or its benefit; 48 Ark. 220; and no implied promise could be raised against her; 58 Vt. 337. The common-law disabilities of a married woman could not be avoided by any false representations with respect to her capacity, and no estoppel would be raised thereby; 39 Pa. 299; 53 N. Y. 96; 2 Gray 161; but in the management of her separate property she would be answerable for the frauds of her agent, within the scope of his agency, though she were ignorant of it; 47 N. Y. 577. The disabilities of a married woman are her personal privilege, and must be pleaded; 7 Gray 338; 99 Mass. 199. See COVERTURE. And no one but the husband can object to a suit against him by the wife, so that a judgment against a firm of which he is a member is good if he do not himself raise the defence; 126 Pa. 470. Her common-law disability is not removed by the so-called married woman's acts which operate only to give her such capacity as is expressed in them; 22 Mo. App. 554; 4 Sawy. 604; 99 U. S. 325; 41 Miss. 125; 25 W. N. C. (Pa.) 218; 1 Biss. 64; and where such statutes authorize her to contract as though single, she is bound by estoppel arising from her misrepresentation or concealment; 77 N. C. 437; 46 Wis. 677; or by the acts of her husband; 86 Ill. 74; 53 Miss. 344. Where such estoppel operates, it is only in respect to her personal estate; 30 Ark. 393; but the weight of authority is against sustaining estoppel against her; 2 L. R. A. 345, n., where are collected cases of common-law disabilities of a married woman and estoppel against her. The rigor of the common-law disabilities of a married woman and the merger of her individual and property rights in her husband gave rise to certain equitable remedies against her husband, intended to secure at least a portion of her property to the use of herself and her children. As to the character and extent of these rights, see WIFE'S EQUITY.

As a general rule, a contract made between parties who subsequently intermarry is, both at law and in equity, extinguished



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by the marriage; 1 Bla. Com. 442; but when articles are entered into or a settlement is executed whereby the wife is to have a certain provision in lieu of her fortune, the husband becomes virtually a purchaser of her fortune, and she becomes entitled to her provision, though there may be no intervention of trustees, and equity will enforce the contract; 2 Ves. Sen. 675; Husbands, on Married Women 125; MARRIAGE SETTLEMENT.

At common law a married woman was personally liable jointly with her husband for her torts unless committed under the coercion of her husband; 115 Pa. 534; 58 Vt. 337. The death of the wife terminated the liability of the husband, but if the husband died the wife might be sued alone; 115 Pa. 534.

It has been remarked by the recent historians of early English law that "the main idea which governs the law of husband and wife is not that of a 'unity of person,' but that of the guardianship, the *mund*, the profitable guardianship, which the husband has over the wife and over her property;" 1 Poll. & M. 468.

**In Equity.** The difficulties arising from the common-law doctrine of a married woman's incapacity, and her practical non-existence as a legal person, resulted in a qualified recognition by courts of equity of the individuality and existence of a married woman as such. This, however, was only granted in cases where she had what was termed a separate estate. This gave rise to two great doctrines of the law, the separate use and restraint on anticipation.

The latter was an invention of the court of equity and an exception to the general law of inalienability of property. It was justified as the most satisfactory method of giving property to a married woman so that it should not be practically given to her husband, to prevent which the "condition was allowed to be imposed restraining her from anticipating her income and thus fettering the free alienation of her property;" Jessel, M. R., in 11 Ch. D. 644. By the Conveyancing Act, 1881, the court was authorized, where it appeared to be for the benefit of a married woman, by judgment or order with her consent, to bind her interest in any property, notwithstanding that she was restrained from anticipation; 44 & 45 Vict. c. 41, §§ 39, 40. This was held to be not "a general power of removing the restraint upon anticipation, but only a power to make binding a particular disposition of property by a married woman if it be for her benefit;" 52 L. J. Ch. 928. See as to this doctrine, Brett, L. Cas. Mod. Eq. 104. The separate use was also originally a creation of the court of chancery, but in recent years it has been adopted in statutes with the effect of abolishing the common-law marital rights of the husband, to the same extent that they were avoided by a trust, in equity, to her sole and separate use.

The separate property of a *feme covert* as to which equity considers her as a *feme sole*, is that property alone which is settled to her sole and separate use by some will, writing, or deed of settlement with a power expressly or impliedly given her of managing it without the concurrence of her husband; 5 Day 174. This estate may be created by any form of settlement, written or oral (as to personalty), by deed or will, to her directly or in trust for her; or, it may be by *antenuptial agreement* (*q. v.*). It may be settled by the husband; 68 Ala. 405; herself; L. R. 16 Eq. 29; or a stranger; 2 S. C. N. S. 122, 129, 133. The one essential ingredient required for its creation is a sufficient indication of an intention to bar or exclude the marital rights; 2 Bush 112; 49 Conn. 52; 24 Gratt. 250; of the husband contemplated by the settlement; 4 Myl. & C. 377; 1 Beav. 1. See Stew. H. & W. §§ 198, 199. No particular form of words is required, but any which sufficiently indicate this intention will be sufficient. For a great variety of phrases which have been judicially passed upon as sufficient or insufficient, see Stew. H. & W. § 200. Where a wife purchases land in her own name and with her own money it will be presumed to be her separate property; 11 Wash. 390.

To an ordinary equitable estate of a married woman the marital rights of the husband attach; 35 Ark. 84, 88; but the effort to mitigate the severity of the common-law doctrine gave rise to the equitable creations of the *wife's equity* (*q. v.*) and the *equitable separate estate;* 1 Bro. C. C. 16; 27 Gratt. 491, 507; 1 L. Cas. Eq. 481; Stew. H. & W. § 197; 2 Perry, Trusts § 625.

In England a married woman's capacity to dispose of property of whatever kind settled to her separate use, by deed or will, is absolute, unless she be expressly restrained by the settlement; and, generally speaking, it is bound by her contracts, written or verbal; 3 Bro. C. C. 347; 1 *id.* 20. See, also, 13 Ves. 190; 14 *id.* 542. But it was contended by Chancellor Kent that this was not always so held, and that the English cases were too contradictory to afford a safe guide, and he held (practically the converse of the English rule) that she could exercise only such power, to be exercised in such manner as was prescribed by the instrument creating the estate; 3 Johns. Ch. 77. But this decision was reversed; 17 Johns. 548, in which the English doctrine substantially was adopted.

The course of subsequent New York decisions is neither clear nor consistent, but may, probably, on the whole, be considered as following the last cited case with a qualification that the married woman is not to be charged unless her intention to charge her separate estate is sufficiently indicated in the contract or implied from some benefit to be derived by her separate estate from the consideration. See 18 N. Y. 265; 22 *id.* 451; 58 *id.* 80; 63 *id.* 639; 64 *id.* 217; 68 *id.* 329.

Most of the states adopt, in the main, the English doctrine of power to charge the separate estate, but many jurisdictions follow

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what is known as the American doctrine—that a married woman, as to her separate estate, is *feme sole* in so far as the instrument has expressly conferred on her the power to act as such, and that she is confined to the particular mode of disposition prescribed in the instrument, if any, and the estate is not liable for her contracts, bonds, and notes, unless the instrument expressly declares that it shall be charged. It was first established in South Carolina and adhered to, as above stated, by Chancellor Kent. See 1 Rawle 231; 65 Pa. 430; 2 R. I. 355; 1 Swan. 489; 8 Humph. 209; 7 Ired. Eq. 311; 74 N. C. 442; *id.* 458; 26 Miss. 275; *id.* 585. See Kelly, Cont. M. W. 259, n. 5, and a critical annotation by the same author; 23 Am. L. Reg. N. S. 321; Stew. H. & W. § 203.

An instrument creating such an estate is excepted from the rule which makes void clauses in restraint of alienation, provided only that the rule against perpetuities is not violated; *id.* § 204.

**Under Statutes.** Superimposed upon this complex combination of common-law disability and equitable protection for separate estate, there is now, both in England and in the United States, a mass of statute law, as to most of which a classification to be relied on is impossible, and of which it has been truly said that, "To attempt a useful summary of laws so incongruous, so purely local, and so constantly changing, is useless." Schoul. H. & W. 254. For questions arising under the statutes of any state they should be resorted to directly, it being only possible here (and nothing more is intended) to give an impression of the general course of legislation which has so changed the *status* and rights of married women.

The course of legislation in the United States has been such as almost entirely to remove the common-law disabilities of a married woman, and to secure to her the management and control of her own property with power to contract concerning it, and also largely to increase both her individual rights and liabilities. It has been said that the protection and the disability of marriage have been linked together, and the wife when deprived of the one has been released from the other; 66 Tex. 494; but this broad statement does not seem to express the rule of construction generally adopted; see *supra*. The first tendency of the married woman's acts was to emancipate her property both from control and from any liability for obligations naturally springing from the marriage relation. In this country, however, there has been lately a strong current in the direction of creating and enforcing liability for such debts against both husband and wife.

In all the states and territories and the District of Columbia the real property of a married woman remains her separate property, generally free from the control or interference of her husband or liability for his debts; and in most of the states her personal property is equally so. In Connecticut, however, her personal property acquired either before or after marriage, and the proceeds, if sold, vest in the husband in trust to receive the income or so much as may be necessary to be expended for the support of the wife and children, and on the death of the husband to pass to the wife or subject to her will. In Maine, Connecticut, and Iowa the husband acquires no rights in property of the wife, and in Connecticut the wife none in that of the husband, while in California, Nevada, and the Dakotas neither husband nor wife has an interest in the property of the other, and in Missouri the husband may acquire title to personal property reduced to his possession with his wife's written assent. As to property acquired after the marriage independently of the husband, both real and personal property is usually secured to the wife for her separate use, the statutes varying in the specification in the different states; some states including that acquired by devise or descent, others by purchase or gift or as the result of her own labor. For a classification of the statutes on this point both as to real and personal property, see Stims. Am. Stat. L. § 6422.

In New York and West Virginia special protection is given to the property of a woman in patents for her own inventions; in Vermont, Rhode Island, Connecticut, Kansas, Nebraska, Maryland, Kentucky, Tennessee, Missouri, Arkansas, Alabama, and Delaware, in the proceeds of stocks sold, and in the last named state, of any separate estate sold.

In Minnesota and Missouri, savings from the income of her separate estate, and in several states the rents and profits of her real estate are separate property. In some states, including New York, the Dakotas, California, and Nevada, a husband and wife may hold property as joint tenants or tenants in common, or in the two last named states as community property. As to Louisiana, see COMMUNITY.

For reference to the statutes of the several states on this general subject, see Stims. Am. Stat. L. §§ 6410-34.

As to the statutory liability of a married woman and her property for necessaries and family expenses and also for her own torts, see *infra*. The separate property of a married woman is not liable in most states for the debts of the husband, nor bound by judgment or execution against him, and in Pennsylvania, Kentucky, and Tennessee his curtesy or other interest in her real estate is not affected. Generally under the state statutes debts of the wife contracted before marriage are enforceable against her separate property after marriage. For these in Maine and Delaware a judgment may be recovered against her in her own name, but in Rhode Island, New York, Indiana, Maryland, Virginia, West Virginia, Colorado, and Wyoming the action must be against husband and wife jointly. Debts contracted by the wife after marriage may generally be enforced against her and her separate property. A judgment may be recovered against her individually in Rhode Island, Ohio, and Maine, and in the last named state, Rhode Island, Maryland, and Alabama she may be sued jointly with the husband. In Vermont, Ohio, and Arkansas a judgment against a married woman may be enforced against her own property as if she were sole.

By legislation since 1890: In New Jersey if the husband and wife have lived apart seven years either may convey separate real estate without the other. In Rhode Island married women may contract as if single. In Louisiana they may keep bank accounts. In Virginia their real estate is liable on their contracts, but cannot be sold if the rents and profits will discharge the debt in five years. In New Jersey insurance, if payable to a married woman, is free from any claim of the husband, his representatives or creditors, except as to amount of premiums paid in fraud of creditors. In Wisconsin a married woman may receive from any person inheritances, gifts, or bequests as if unmarried, and conveyances between the husband and wife are valid. So in New York she may contract with the husband as to all matters except the alteration or dissolution of the marriage relation or to relieve the husband from liability for her support. In California the debts of a married woman are made and acknowledged as if unmarried. In Arkansas she may make executory contracts, and in that state, as also in California and West Virginia, she may give a power of attorney to sell land. In Alabama contracts of a non-resident married woman have the same force as those of residents. In South Dakota her liability for necessaries is the same as the husband's, and in New Jersey she may become liable upon indorsement, guarantee, or promise to pay the debt of another; but in South Carolina she cannot contract as surety for the debt of another. In Missouri her separate

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property is not subject to levy for debt. In Vermont she may be appointed executrix, administratrix, guardian, or trustee, and the marriage of a single woman will not affect the authority of her previous appointment. In Texas limitation does not run against her until she becomes twenty-one. In Delaware married women abandoned by their husbands may sell real estate held in their own right. In West Virginia married women living separate and apart from their husbands may carry on business, and separate property of the wife acquired by the husband is subject to the payment of her debts. In Pennsylvania husband and wife may sue and testify against each other in certain cases, and by the act of 1893 her capacity to acquire and dispose of property and to sue and be sued is practically absolute. In North Carolina the wife loses her interest in her husband's property when she abandons him, or if divorce is granted on his application; and he may then convey his real estate as if unmarried, and the same provisions apply conversely to the husband in like cases.

English legislation has been much more according to a definite plan, commencing with 20 & 21 Vict. c. 85, which enabled a married woman deserted or judicially separated from her husband to obtain orders of protection against his creditors. Married Women's Property Acts of 1870, 1874, 33 & 34 Vict. c. 93, and 37 & 38 Vict. c. 50, secured to married women several specific property rights, but these acts were repealed and supplied by the Married Women's Property Act of 1882, 45 & 46 Vict. c. 75, under which a married woman could acquire and hold separate property in her own name, and sue and be sued severally, the husband, however, remaining liable for her torts. The purpose of this act was thus stated by Wills, J., to be, not destructive of the "doctrine of the common law by which there was what has been called a unity of person between husband and wife, but to confer in certain specified cases new powers upon the wife, and in others new powers upon the husband, and gives them in certain specified cases new remedies against one another." 14 Q. B. Div. 835. This act is still the married woman's property law of England, the only subsequent act of importance being 49 & 50 Vict. c. 52, under which women who were deserted may summon their husbands for maintenance.

For provisions of the English statute in detail, see an interesting comparison between English and American legislation on the subject, 23 Am. L. Reg. N. s. 761; Brett, L. Cas. Mod. Eq. 96; 1 Brett, Com. ch. 18, at the end of which may be found a list of the English statutes; 7 So. L. Rev. 68; 11 Cent. L. J. 41; 27 *id.* 279.

While the legislation of England and the United States with respect to married women has been mainly in the direction of giving to her property interests such a legal status as had been secured to her in equity in spite of her common law footing, there has, at the same time, been secured to her in both countries, by judicial action, emancipation of the person to the extent of practically abrogating the common-law rule on that subject. An interesting review by Edward Manson of the cases on the marital authority of the husband shows that the right to beat a wife was a part of the common law (see 17 Law Mag. & Rev. 1), though chancery early intervened for her protection; still later there remained the husband's control over his wife's person; but this theory ceased to be acted upon early in the eighteenth century, and Jackson's case is said to have simply emphasized the recognition of the wife's right to her personal liberty; even to compel them to live together is beyond the reach of the law, and the policy of compelling cohabitation was abandoned in the Matrimonial Clauses Act, 1884. The conclusion reached is: "Moulded by the social forces of successive centuries, the law of England as to married women is rapidly following the course of Roman law. They began in subjugation, they end in entire emancipation. The protection of a wife's person is amply assured, so is the protection of her property (though we still cling to the absurdity of making her capacity to control depend on her possession of separate property). The advocates of women's rights have really hardly a grievance left. Whether all this is for good or evil, whether woman is destined to realize her highest ideal in subjection or in freedom, is a matter on which opinions will differ, and which time only can solve. Jurisprudence, as such, has nothing to do with it. It has only to do with the law as it is, and the law in its most recent interpretation (1891) proclaims the wife's freedom with no uncertain sound." 7 L. Quar. Rev. 244. As to the right of custody of the wife, see 25 Ir. L. T. 186.

The effect of this modern legislation is to create what has been termed a statutory separate estate, which is not to be confused with the equitable separate estate; Stew. H. & W. § 217; the two may exist side by side; *id.*; 51 Miss. 172. The word property in these acts has been held to include money; 35 Miss. 108; choses in action *ex contractu;* 16 N. J. Eq. 512; 75 Va. 390; 32 Md. 212; and *ex delicto;* 34 Ohio St. 621; 37 *id.* 10; 27 Mich. 145; 54 Me. 156; 43 Wis. 23; corporeal and incorporeal interests; 69 Pa. 424; 35 Ala. 88; animate and inanimate; 62 Ala. 41 (but not mere contingent interests; L. R. 6 Eq. 210); a mining interest in a lead; 4 G. Greene 231. In England married woman's property does not include a general power of appointment under a deed or will of which she is donee; 17 Q. B. Div. 521. Most of the acts define the mode of acquisition of property which shall be affected by it, and such specification excludes all others; 2 Bish. M. W. § 17. The most common methods of acquisition are, purchase, gift or grant, devise, bequest, descent, distribution, exchange, increase, trade or service, contract, and tort; Stew. H. & W. §§ 223–230, where the cases, as to each, are collected.

Where a husband employs his wife and pays her wages otherwise payable to some other employe, she cannot be deprived of the money or of her property in which she has invested it; 42 N. J. L. 198; 30 Atl. Rep. (N. J.) 867; 44 N. Y. 298; 27 Miss. 830; 37 Me. 94.

The marriage of a woman to a man to whom she is indebted does not extinguish the debt; 49 Ill. App. 163.

A grant or devise to a married woman and her husband as tenants by entireties, is not abrogated by the married women's property acts even where they provide that she shall hold real estate as if sole; 92 N. Y. 152; 156 Pa. 628; 159 Mass. 415; 92 Tenn. 707; 23 Ore. 4; 38 S. C. 34, *contra*, 56 N. H. 105; 88 Me. 17; but a married woman may, under those acts, without joining her husband, sue for and recover land conveyed to her and him in fee; 31 S. W. Rep. (Mo.) 342; and the husband is not exclusively entitled to the use and benefit of lands held in entirety or as joint tenant with his wife; 144 N. Y. 306. In England, since the married women's property act, a conveyance to both creates the same estate as if they were not married; L. R. 39 Ch. D. 148; 27 *id.* 166; 1 Brett, Com. 62. In some states a conveyance to a married woman and her husband is unaffected by these statutes, either because tenancy by entireties and joint tenancy have not been adopted; 11 Conn. 337; or not recognized by the courts; 13 Ohio 68; 28 Ia. 302; or are abolished by statute; 69 Miss. 795. Where a married woman was a tenant by entirety it has been held that a divorce changed it into a tenancy in common; 118 Ind. 36; 80 Tex. 645; 80 Ill. 197; 92 Tenn. 697; 122 Mo. 235. See 22 L. R. A. 594; 30 *id.* 305.

In most of the states the deed of a married woman is ineffectual to pass a title, unless when her husband is a party; and

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generally a separate acknowledgment and private examination of the wife is required; and if signed by her alone without her husband it is absolutely void; 112 Pa. 99; 88 Ala. 318; and so by statute is a mortgage; 117 Ind. 9. For the statutory requirements with respect to acknowledgments in the several states, see ACKNOWLEDGMENT. See, also, as to separate acknowledgment, 30 Cent. L. J. 515. The deed of a married woman without the separate examination will pass neither her interest nor that of the husband; 94 Mo. 511. Where her acknowledgment is not made in compliance with the statute she is presumed to have acted under the coercion of her husband; 12 Pet. 345; 94 Mo. 511.

In Indiana the deed of a married woman to which her husband is not joined gives color of title; 104 Ind. 223. If the deed of a married woman be void by reason of a defective acknowledgment it may be ratified by her after her husband's death, and such ratification may be shown by parol evidence; 9 S. & R. 268.

A deed purporting to be an absolute conveyance of lands of a married woman will not be construed as a release of dower because her husband's name appears first therein; 155 Ill. 514. The common-law disability, incident to the relation of husband and wife with respect to conveyances of real property, still exists in so far as it has not been swept away by express legislative enactments; 119 N. Y. 540. Where a married woman, at the time an infant, had excuted a note and a mortgage intended to convey her separate estate, the mortgage being void, because not executed in accordance with the statutes, she was not estopped to assert the invalidity of the mortgage, by representations at the time of its execution that she was twenty-one years of age, although such representations were material inducements towards the making of the loan; 25 S. E. Rep. (S. C.) 975.

Mere silence by a married woman who knows her conveyance to be void does not estop her from asserting it; 41 N. E. Rep. (Ind.) 444; but in that state it is held that by statute a married woman may be bound by an estoppel *in pais;* 140 Ind. 256. The wife joining her husband in conveyances of his land is not bound by his covenants in the deed and is not estopped to assert a paramount lien in favor of herself; 107 Ala. 429.

Where the husband leased his wife's lands for a year with a privilege of four years more, the receipt of a share of the farm products reserved did not estop her from asserting that the lease was void, because not assented to in writing by her; 57 N. J. L. 242

Where a married woman is unable to convey her separate estate without a deed in which her husband is joined, she cannot make a valid deed to him of such property; 85 Ala. 342. Gifts by a wife to a husband are to be closely scrutinized, but if fairly made and free from coercion and undue influence they ought to be sustained; 39 N. J. Eq. 216. The evidence must be clear and unequivocal, and the intention free from doubt; 82 Ga. 329; 124 Ind. 105. A conveyance by the husband directly to the wife creates in her an equitable estate, but is inoperative to pass a legal title; and he is left a trustee for her; 83 Ala. 408; 84 *id.* 193; 35 Fed. Rep. 677; 17 Or. 423. He may settle property upon his wife if it does not impair the claims of existing creditors and is not intended as a cover for future schemes of fraud; 122 U. S. 446.

An assignment by a married woman of her separate estate to pay a note in which she has been joined with her husband for his debt has been held void; 30 S. C. 159. Mortgages by a wife of her separate estate for the husband's benefit have been held null and void; 94 U. S. 767; 11 S. E. Rep. (S. C.) 351; *contra*, 3 MacArthur 118; 128 U. S. 236; 64 N. H. 585; 112 Pa. 284.

In the absence of an enabling act the contracts of a married woman are cognizable only in equity, and cannot be enforced at law, except as affected by the so-called Married Women's Acts; 95 Wis. 381. The right to contract conferred by these acts has been held to give her not a general contractual capacity, but only ability to make such contracts as have direct relation to the improvement of her separate property; 22 Mich. 255; 44 *id.* 80; and her property must not merely be incidentally benefited, but there must be a direct relation between it and the contract; 39 *id.* 671. See 35 Am. L. Reg. N. S. 727. Such is the general construction of such statutes destroying the common-law rights of the husband in his wife's property; 18 Wall. 141; 99 U. S. 325; 26 N. J. Eq. 504; 33 N. J. L. 266; 1 Marvel Del. —. Generally her contracts are binding when necessary or convenient to the use and enjoyment of her separate estate; 10 Wis. 380. A paper indorsed to enable her husband to raise money does not charge her property; 30 Ohio St. 147, where there is an exhaustive examination of the subject. For extreme cases, see 8 Kan. 525; 9 *id.* 80; 62 Mo. 338. See a full discussion of the effect of these statutes conferring contractual power upon a married woman; Stew. H. & W. §§ 369, 378 *a*.

Where a married woman performs her part of a contract, she may enforce performance against the other party, though she could not have been compelled to perform her part of the agreement; 127 Mo. 232; and if she make a contract, not enforceable against her, to purchase real estate and fail to pay for the same, it may be sold for the unpaid purchase money; 95 Tenn. 87. In some states provision is made for a conveyance of land by a married woman abandoned by her husband, under permission of court or otherwise; and under such statute it has been held that, having conveyed without compliance with the statute, she may not rescind the deed long afterwards on account of coverture without returning the consideration; 30 S. W. Rep. (Ky.) 402.

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Threats of prosecution and imprisonment against her husband constitute duress sufficient to make void the deed or contract of a married woman; 18 Md. 305; 62 Ia. 42; 98 Mich. 163; 59 N. W. Rep. (Wis.) 564; 62 L. T. N. S. 376.

Generally it is held that a married woman cannot become a partner with her husband, even under statutes which would authorize her to enter into partnership with any one else; 67 How. Pr. 292; 65 Tex. 131; 14 Abb. N. C. 341; 31 Ind. 113; 44 Ohio St. 192; 4 Wash. 263, *contra*, 3 Biss. 405; 90 Ala. 525; 122 N. Y. 308 (see as to conflicting New York cases 16 L. R. A. 526, n.); nor ordinarily with any one else; 23 Fla. 83; 41 Md. 19; if she have no separate estate; 87 Mo. 282. If, without capacity to become a partner, she does so, the property remains hers and the husband cannot assign it; 52 Miss. 239; nor can his creditors; 15 Wis. 195; 11 Paige 9. Where her partnership is a nullity the other partner may be sued alone; 20 W. Va. 571. Where her husband borrows her separate property and uses it in a firm, she is the creditor of the firm; 86 Ind. 224; 4 Del. Ch. 580; and her debt is provable in bankruptcy; 11 Paige 9. If a married woman carries on a business under the assumed name of a partnership she may be sued in that name, and cannot plead her coverture; 81 Ala. 123; nor can her co-partners deny her capacity to sue alone for a dissolution; 61 N. Y. 512. As to married women as partners, see, generally, 2 L. R. A. 343; 32 Cent. L. J. 128; 31 Am. St. Rep. 934; and as to partnerships between husband and wife, see 16 *id.* 526, n.; 35 Cent. L. J. 328; 24 Am. L. Reg. 659.

The capacity of a married woman to become surety or guarantor will depend upon the construction of the state statutes, and the questions most frequently arise with respect to efforts to become surety for the husband. In some states this is expressly forbidden, and the prohibition has been held to prevent her from mortgaging her real estate to one who is surety for her husband or co-surety with him; 105 Ala. 657. In other states she may bind her separate estate as surety for her husband; 40 W. Va. 194; 42 Neb. 869; and where she makes a valid contract as surety she is entitled to all the rights of a surety; 91 Va. 458.

A married woman is frequently held to have certain rights growing out of the insanity of her husband, as, to be regarded as the head of the family and to control the domicil of the husband; 54 Vt. 105; 32 Tex. 195; to receive income belonging to him; 4 Bro. C. C. 100; 2 McN. & G. 134. In such case it has also been held that the wife is entitled to act with respect to her separate property as if her husband were civilly dead; 51 Vt. 585; 37 N. H. 437. The husband's insanity does not affect her right to bar her dower by joining in a deed with her husband which by reason of his insanity is invalid; 99 Mo. 19; 84 Wis. 381; 111 Mass. 308; but in some states, as Delaware, this contingency is provided for by statute; 14 Del. Laws, ch. 78.

A married woman has been held authorized to dispose of community property to supply the necessary wants of herself and children; 32 Tex. 195; and see 63 *id.* 287. With respect to the property and rights of the husband the relation of the wife to it appears not to be changed by the insanity of the husband; L. R. 5 Q. B. 51; she may bind the estate of the husband for necessaries; 4 E. L. & Eq. 523; 1 DeG. J. & S. 465; 3 J. J. Marsh. 658; but not for the payment of debts generally; 23 Vt. 486; 16 Pa. 215; nor can she sue for a debt due to him; 7 Dowl. P. C. 22.

A personal judgment against a married woman at common law was void; 66 Mo. 617; 18 Md. 457; 29 W. Va. 385; 80 Ky. 368; if rendered by default it is in some jurisdictions held absolutely void; 121 Pa. 248; 73 Mo. 53; 83 Ky. 305; 41 Cal. 78; 52 Miss. 921; in others merely voidable; 8 B. & C. 421; 61 Ga. 512; 43 Ohio St. 78; 42 Mich. 112; 55 Ind. 419; and she is not estopped by a failure to plead coverture; 83 Ky. 305. In the absence of fraud a consent decree is binding on a married woman; 79 Ala. 481; 126 Mo. 39; and a judgment might be obtained against her for a debt contracted *dum sola;* 2 Cow. 581; 28 Ga. 71; 4 East 521; 55 Miss. 557. Generally provision is made for such suits in the married woman's acts, and in some the husband and wife must be sued jointly, and in others, judgment may be recovered against her separately to bind her separate estate.

In Connecticut, Illinois, Iowa, Oregon, Washington, Alabama, and New Mexico, the husband and wife are equally liable for expenses and children's education, and a married woman is liable for necessaries for herself and children in Montana (see *infra*); and such a debt is enforceable against her property after execution against the husband unsatisfied in Pennsylvania and Alabama, while in Vermont, Missouri, and Arkansas a judgment for necessaries against the husband may be enforced against the separate property of the wife, and for expenses incurred in the improvement of her separate property in Vermont and Missouri. Stims. Am. Stat. L. § 6410 (c).

In many states there are statutory provisions authorizing the assumption of liability by a married woman for the family expenses; and in others, such liability has been held to arise under the statutes without her express consent; thus, in Illinois, Iowa, and Oregon such expenses are made a charge upon the property of the husband and wife, or either of them, either jointly or severally. This is held to be a personal liability and not merely a property charge; 52 Ia. 725; 22 Ill. App. 557; but her property may be pursued without obtaining a personal judgment against her; 65 Ia. 180; and her liability is not dependent upon consent; 15 Ore. 574. Within these statutes family expenses include whatever is actually used in the family; 55 Ia. 702; rent of a house; 33 Ill. App. 394; medical attendance; 63 Ia. 22; whether necessary or

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not; 80 *id.* 243; the servants' wages; 11 Ill. App. 637; a piano; 41 Ia. 588; an organ; 65 *id.* 180; a cook stove and crockery; 12 *id.* 565; the husband's clothing; 23 Ill. App. 118; jewelry purchased by the husband and presented to the wife; 60 Ia. 148. The wife has been held not liable for money borrowed by the husband for household supplies; 55 Ia. 719; a reaping machine; 49 *id.* 536; a breaking plough; 52 *id.* 250; a light farm wagon occasionally used by the family to ride to church and other places; 24 Ill. App. 423; payments for the care of an insane husband; 46 Ia. 170.

Where the separate estate of the wife is made liable for necessaries by statute she must be a party to the suit to enforce payment; 30 Mo. App. 464. In Alabama a constitutional provision is not violated by a statute making the separate estate of the wife liable for necessaries; 55 Ala. 576; see 2 Bish. Mar. W. § 610. In suits under such statute the existence of the separate estate must be alleged; 30 Mo. App. 464; 52 Ala. 161. The separate estate of a married woman is liable for medical service to herself and children but not to children of her husband by a former marriage, though all live together; 48 Ala. 485.

A married woman and her separate property are liable for her torts in Maine, Indiana, Illinois, Iowa, Minnesota, Washington, and New Mexico, and in Connecticut if not under her husband's coercion. When so committed in Indiana they are jointly liable, and in Pennsylvania and Wyoming a judgment against the husband for the wife's tort must be first enforced against her separate property. Stims. Am. Stat. L. § 6414. See as to liability for torts, 55 Conn. 397; 74 Ia. 589; 29 S. C. 108; 42 Fed. Rep. 317; 25 Fla. 927; 103 Ind. 328; 29 Mich. 260; 61 Tex. 458, 471; 16 West. Jur. 425. Such is also the tendency with respect to fraud, in view of the statutes authorizing married women to transact business independently; 45 N. J. Eq. 330. In New York the husband must be joined in an action for the tort of the wife unless it is in relation to her separate property; 109 N. Y. 441. See 7 L. R. A. 640, n.

As to a married woman's liability connected with the use of premises owned by her there is a difference of opinion. Where the husband and wife resided on the premises she could not be convicted of keeping a gambling house; 16 S. E. Rep. (Ga.) 207; but under similar circumstances the husband was held liable for violation of liquor laws; 124 Mass. 30; 126 *id.* 462; and for keeping a brothel; 97 *id.* 225. In New York the wife was held liable for injuries resulting from harboring a vicious dog belonging to her husband; 135 N. Y. 201, *contra*. 101 Ala. 667. In other cases they have been held jointly liable; 4 Colo. App. 92; and in Massachusetts it was held to be a question for the jury of the ownership of the animal; 152 Mass. 7. Where a married woman set fire to a house owned by her and let to a tenant, the husband was not liable; 58 How. Pr. 449; and where the husband and wife were domiciled on premises which were the separate property of the latter, he was held not to be in control of the premises so as to be responsible for injury to a stranger resulting from carelessly leaving a pit uncovered; 45 N. Y. 230. The husband was also held not liable for torts committed on his wife's premises in 118 Mass. 58, and 65 Mich. 31.

A husband is not entitled to alimony. The latter is based upon the common-law requirement, to which the husband was subject, of providing his wife with necessaries, and there is no reciprocal obligation on her; 30 Kan. 132; 66 N. W. Rep. 947. In some states there are statutes providing that alimony, or an allowance out of the wife's estate, in the nature of alimony, may be granted the husband. In Kansas alimony was denied the husband because no authority could be found to authorize it; 30 Kan. 132; 68 N. W. Rep. (Neb.) 947. See on this subject, 55 Alb. L. J. 15.

The estate of a married woman is primarily liable for her funeral expenses, and where her husband pays them, he may recover them from her executor; 47 N. E. Rep. (Mass.) 407. See 146 Mass. 281.

As to the citizenship of married women, the effect of marriage upon the *status* of a woman as an alien, or her expatriation see ALIEN; CITIZEN; NATURALIZATION. See also an annotation on the subject in 22 L.R. A. 148.

As to the effect of ante-nuptial agreements, see that title. See MacQueen; Clancy; Bright; Roper; Bell; Stewart, Husband and Wife; Bish. Law M. W.; Cord, M. W.; Ewell, L. Cas. Coverture, etc.; LeBrun, *Communauté Mari et Femme;* Lawson, R. & R. 695–804; 8 Wait, Act. & Def. 303; RESTITUTION OF CONJUGAL RIGHTS; DIVORCE; DOWER; FEME SOLE TRADER.

**MARSHAL.** An officer of the United States, whose duty it is to execute the process of the courts of the United States. His duties within the district for which he is appointed are very similar to those of a sheriff. See Serg. Const. Law, ch. 25; 2 Dall. 402; Burr's Trial 365; 1 Mas. 100; 2 Gall. 101; 4 Cra. 96; 7 *id.* 276; 9 *id.* 86, 212; 6 Wheat. 194; 9 *id.* 645. He is authorized to protect a federal judge from assault and murder; 135 U. S. 1. See JUDGE.

A marshal who has process in his hands against one person and seizes the goods of another, is liable by virtue of his office and his sureties are bound; 111 U. S. 17, 181; though the authorities differ; 84 Fed. Rep. 409. He is liable in damages where he refuses to surrender property which he has taken unlawfully; 124 U. S. 131.

**MARSHAL.** To arrange; put in proper order; *e. g.* "the law will *marshal* words, *ut res magis valeat.*" Hill, B., Hardr. 92.

**MARSHAL OF THE QUEEN'S BENCH.** An officer who had the custody of the queen's bench prison. Abolished by

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5 & 6 Vict. c. 22 and an officer called keeper of the queen's prison substituted.

**MARSHALLING ASSETS.** An equitable principle upon which the legal rights of creditors are controlled in order to accomplish an equitable distribution of funds in accordance with the superior equities of different parties entitled to share therein. It springs from the principle that one who is entitled to satisfaction of his demand from either of two funds shall not so exercise his election as to exclude a party who is entitled to resort to only one of the funds. For example, where one creditor has a mortgage upon two parcels of land upon one of which there is a junior incumbrance not otherwise secured, the first mortgagee may be compelled to exhaust in the first instance that parcel of land which is otherwise unencumbered in order that the security of the junior incumbrancer may not be entirely destroyed. In such case, however, the indisposition of equity to interfere with the legal rights of a creditor results in working out the equity of the junior incumbrancer through a substitution to the right of the paramount mortgagee as against the other property; Bisph. Eq. § 27, 340; 27 Am. L. Reg. N. S. 739.

Marshalling assets is a pure equity and does not rest at all upon contract, and will not be enforced to the prejudice of either the dominant creditor or third persons, or even so as to do an injustice to the debtor; 85 Tenn. 597. See 1 Johns. Ch. 409; 7 W. & S. 269; 2 Lead. Cas. Eq. 260; 51 Neb. 146; 114 Cal. 537.

The equity of marshalling seems capable of being carried into effect in one of two ways: either, first, by restraining the parties against whom it exists from using a security to the injury of another; or, secondly, by giving the party entitled to the protection of this equity the benefit of another security in lieu of the one of which he has been disappointed. In other words, the right might be enforced either by injunction against the paramount creditor, or by subrogation in favor of the junior creditor. In practice, however, the latter of these two methods is the one usually employed, and the sounder doctrine seems to be that the first of the two ought not to be resorted to except under very peculiar circumstances. But there are decisions to the contrary; 2 Lead. Cas. Eq. 280. Of course, when both funds are in court or under its immediate control, the case is different.

One whose securities have been re-hypothecated by a pledgee, together with securities belonging to the latter, has a right to compel the application of the latter securities to the payment of the debt before resort is had to those wrongfully re-hypothecated; 78 Fed. Rep. 216.

A common application of this doctrine is where mortgaged real property is subject to sale under the mortgage in the inverse order of alienation. The leading English case was Barnes *v.* Racster, 1 Y. & C. Ch. 401, and the rule in that country has been termed the rule of ratable contribution; Sto. Eq. Jur. § 1233; while the American rule was first settled by Kent, Ch., in Clowes *v.* Dickenson, 5 Johns. Ch. 235, where the doctrine of exoneration in the inverse order of conveyance was adopted. It has been noted that in this case a statement in fact *obiter* has been generally adopted and followed in the United States. See a valuable article by J. M. Gest in 27 Am. L. Reg. N. S. 739, for a critical view of the English and American authorities.

In a recent case the rule was held not to apply to a purchase merely of the equity of redemption in a portion of the mortgaged premises so as to relieve the purchaser upon taking an assignment of the mortgage from his proportion of it and entitling him to enforce the law against the remaining portion; 68 Mo. App. 67. See 20 Pa. 222; 62 Ala. 271; 2 Johns. Ch. 125; 11 Paige 30. It is said that on a sale of a part of mortgaged lands the unsold portion is primarily liable to the mortgage debt; 38 Fla. 257.

The term *marshalling liens* has been used to express the application of the particular equity just referred to, being said to mean "the ranking or ordering of several estates or parcels of land, for the satisfaction of a judgment or mortgage to which all are liable, though successively conveyed away by the debtor." 1 Black, Judgm. § 440. It would seem, however, that the phrase is not an apt one in the application made of it, as the case put is the most ordinary one of marshalling assets, though as a matter of course there is always a marshalling of liens, in a certain sense, whenever a fund is distributed to lien creditors, as, even in an ordinary case of the application of the proceeds of a sheriff's sale. This is not, however, to be confused with the great equitable doctrine under consideration.

Another phrase, sometimes used, is *marshalling securities*, which is an expression for the same practice of equity to secure a class of creditors having but one fund available from having their security exhausted by another class who have two.

This equitable doctrine cannot be invoked as against those who have superior equities, and in this light the right of a wife to her own property is superior to that of her husband's creditors; 15 Conn. 504; 11 Md. 465; 119 N. C. 450; nor is it applied in favor of a creditor of the debtor; 4 Johns. Ch. 17; 13 Ill. 41; 17 Ves. 529; unless the creditor is a mere surety; 3 Sandf. Ch. 192; 13 Ill. 41; but it does not apply where the exclusive fund is the property of the surety for the debt for which such fund is bound; 53 Ohio St. 256. The doctrine cannot be made available to create a fund, the two must exist; L. R. 3 Eq. 668; but once existing it cannot be affected by the intervention of subsequent creditors; 2 Watts 205; 4 Gratt. 407. A mortgagee having double security

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for his debt is not required by the existence of subsequent judgments against the mortgagor, of which he has no knowledge, to shape his action in the collection of his demand in accordance with the principle of marshalling the assets; 85 Md. 505.

The doctrine of marshalling is applied to an infinite variety of cases, and is liable to be resorted to wherever there is necessity for the distribution of two funds among creditors, some of whom have claims on both. In the settlement of decedents' estates, five classes of persons are sometimes mentioned to whom it may be applied: (1) Creditors, (2) Legatees, (3) Between creditors and legatees, (4) Between legatees and vendors, (5) Between widows and legatees.

As to its application in cases of successive purchasers, see 27 Am. L. Reg. 739; partnership; 20 *id.* 465; 21 *id.* 800; 24 Alb. L. J. 305; 34 *id.* 344, 364; devisees and legatees; 24 Ir. L. T. 239; homestead cases; 16 W. Jurist 28; 9 Ins. L. J. 677. See generally, 2 Wh. & Tud. L. Cas. Eq. 228; Bisph. Eq. §§ 341–350 and cases cited; Tied. Eq. Jur. 532. See ASSETS; LIEN.

**MARSHALLING LIENS.** See last title.

**MARSHALLING SECURITIES.** See MARSHALLING ASSETS.

**MARSHALSEA. In English Law.** A prison belonging to the king's bench. It has now been consolidated with others, under the name of the queen's prison.

**MARSHALSEA, COURT OF.** See COURT OF THE MARSHALSEA.

**MART.** A place of public traffic or sale. See MARKET.

**MARTIAL LAW.** That military rule and authority which exists in time of war, and is conferred by the laws of war, in relation to persons and things under and within the scope of active military operations, in carrying on the war, and which extinguishes or suspends civil rights and the remedies founded upon them, for the time being, so far as it may appear to be necessary in order to the full accomplishment of the purposes of the war. Prof. Joel Parker, in N. A. Rev., Oct. 1861.

Martial law is not mentioned by that name in the constitution or statutes of the United States; practically the essence of martial law is the suspension of the privilege of *habeas corpus*, and the two have been practically regarded as the same thing. See 1 Halleck, Int. L. 549; HABEAS CORPUS.

The instructions for the government of the United States army, 1863, define martial law as "simply military authority exercised in accordance with the laws and usages of war." It is proclaimed by the presence of a hostile army, and is the immediate and direct effect of occupation or conquest; suspending the civil and criminal law and the domestic government of the occupied place.

It supersedes all civil proceedings which conflict with it; Benet, Mil. Law; but does not necessarily supersede all such proceedings.

It extends, at least, to the camp, environs, and near field of military operations; 7 How. 83; 3 Mart. La. 530; 6 Am. Arch. 186; and see, also, 2 H. Bla. 165; 1 Term 549; 1 Knapp, P. C. 316; 13 How. 115; but does not extend to a neutral country; 1 Hill 377; 25 Wend. 483, 512, n. Nor in time of insurrection can it be applied to citizens in states in which the courts are open and their process unobstructed; 4 Wall. 2. It is founded on paramount necessity, and imposed by a military chief; 1 Kent 377, n. For any excess or abuse of the authority, the officer ordering and the person committing the act are liable as trespassers; 13 How. 115, 154; 1 Cowp. 180.

Martial law must be distinguished from *military* law. The latter is a rule of government for persons in military service only, but the former, when in force, is indiscriminately applied to all persons whatsoever; De Hart, Mil. Law. 17. See Benet; Hopwood, Mil. and Mart. Law; Birkheimer, Mil. L.; Hall. Int. Law; 1 Hale, Pl. Cr. 347; 1 Lieb. Civ. Lib. 130; McArth. Courts Mart. 34; 29 L. Mag. & Rev. 24; Tytl. Courts Mart. 11, 58, 105; Hough, Mil. Courts 349; O'Brien, Mil. Law 26; 3 Webster, Works 459; Story, Const. § 1342; 8 Opin. Atty. Gen. 365; 12 Metc. 56; 3 Mart. La. 531; 7 How. 59; 15 *id.* 115; 10 Johns. 328; COURT MARTIAL; MILITARY LAW.

**MARYLAND.** One of the thirteen original states of the Union.

The territory of Maryland was included in the grants previously made to companies formed for the settlement of Virginia. Out of these Virginia grants Maryland was granted by Charles the First, on the 20th of June, 1632, to Cecilius Calvert, Baron of Baltimore. The first settlement under the authority of Lord Baltimore was made on the 27th of March, 1634, in what is now St. Mary's county. Some settlements were previously made on Kent Island, under the authority of Virginia.

During its colonial period, Maryland was governed, with slight interruptions, by the lord proprietary, under its charter.

In Cromwell's time the government of Maryland was assumed by commissioners acting under the commonwealth of England; but in a few years Lord Baltimore was restored to his full powers, and remained undisturbed until the revolution of 1688, when the government was seized by the crown, and not restored to the proprietary till 1715. From this period there was no interruption to the proprietary rule until the revolution.

The territorial limits of Maryland were somewhat obscurely described in the charter; and long disputes arose about the boundaries, in the adjustment of which this state was reduced to her present limits.

The lines dividing Maryland from Pennsylvania and Delaware were fixed under an agreement between Thomas and Richard Penn and Lord Baltimore. See DELAWARE.

By this agreement, the rights of grantees under the respective proprietaries were saved, and provision made for confirming the titles by the govern-

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ment in whose jurisdiction the lands granted were situated. The boundary between Maryland and Virginia has never been finally settled. Maryland claimed to the south branch of the Potomac; but Virginia has held to the north branch, and exercised jurisdiction up to that line. The rights of the citizens of the respective states to fish and navigate the waters which divide Maryland and Virginia were fixed by compact between the two states in 1785.

The first constitution of this state was adopted on the eighth day of November, 1776. Subsequent constitutions were adopted in 1851 and 1864. The present constitution was adopted in 1867 and went into operation on the fifth of October in that year.

THE LEGISLATIVE POWER.—This is vested in "the general assembly of Maryland," composed of a senate and a house of delegates.

The senate is composed of members elected one from each county (the city of Baltimore also electing three, one from each legislative district therein) for the term of four years. One-half of the senate is elected every two years.

The house of delegates consists of members elected from the various counties, apportioned according to population; but the smallest county is not to have less than two. Each legislative district of the city of Baltimore is entitled to the number of delegates to which the largest county shall be entitled under the apportionment. A senator must be twenty-five and a delegate must be twenty-one years of age, and each must be a citizen of the United States, have resided three years next before election in the state, and the last year thereof in the county or city from which he is elected.

The general assembly meets on the first Wednesday in January every even year, and the session lasts for a period not longer than ninety days. It can grant no act of incorporation which may not be repealed.

THE EXECUTIVE POWER.—*The governor* is elected every fourth year from 1867, for four years. He must be at least thirty years old, ten years a citizen of the state, and for five years next preceding his election a resident of the state. The governor has the usual powers, but no veto, and his appointments to office must be confirmed by the senate.

He may not appoint to an office a person who has been rejected by the senate. He must reside at Annapolis. If a vacancy occurs in the office of governor, the legislature, if in session, appoints a substitute; and if not in session, the president of the senate shall act as governor; and if there is no such president, the speaker of the house is to act.

*A secretary of state* is appointed by the governor, with the advice of the senate.

A *treasurer* is appointed by the two houses of the legislature every second year.

A *comptroller of the treasury* is elected by the voters of the state at the same time as members of the house of delegates.

A *commissioner of the land office* is appointed by the governor for the term of four years. He is judge and clerk of the land office.

THE JUDICIAL POWER.—The *court of appeals* consists of eight judges, one from each judicial district, one of whom is designated by the governor, with the approval of the senate, as chief judge. It has appellate jurisdiction only.

There are seven *circuit courts*, one in each of the seven districts of the state (Baltimore city forming the eighth district); each court has one chief and two associate judges. The judge of the court of appeals from the circuit (or district) is *ex officio* chief judge of the circuit court in his circuit, except in the city of Baltimore. The term of office of the judges is fifteen years.

*An orphans' court* exists in each county, and in the city of Baltimore, composed of three judges, elected for the term of four years by the people of the county or city.

The city of Baltimore constitutes a judicial circuit and has six courts, the judges of which are elected for fifteen years. They are twelve in number and are designated judges of the supreme bench of Baltimore city, and make annual assignments to the six courts.

The *superior court* has civil jurisdiction in all common-law cases.

The *circuit courts*, numbers one and two, have exclusive equity jurisdiction.

The *court of common pleas* has civil jurisdiction in all common-law cases and all cases under the state insolvent law.

The *city court* has civil jurisdiction in all common-law cases, and appellate jurisdiction in all appeals from justices of the peace.

The *criminal court* has jurisdiction of all crimes and offences committed in the city.

*Justices of the peace* are appointed by the governor, and have civil jurisdiction in all cases when the debt or amount of damages claimed does not exceed $100.

The governor, comptroller of the treasury, and the treasurer constitute the *board of public works*.

The comptroller, sheriffs, county commissioners, etc., are elected every second year.

**MASON AND DIXON'S LINE.** The boundary line between Pennsylvania on the north and Maryland on the south, celebrated before the extinction of slavery as the line of demarcation between the slave and the free states. See DELAWARE.

**MASSACHUSETTS.** One of the original thirteen states of the United States of America.

The first important settlement on the territory of Massachusetts was made by the sect of Brownists or Pilgrim Fathers at Plymouth in 1620. On March 4, 1628, Charles I. granted a charter to the Puritans under the name of "The Governor and Company of the Massachusetts Bay in New England." This charter did not include the Plymouth colony which remained separate until 1691. The charter of 1628 continued till 1684, when it was adjudged forfeited. From this time till 1691, governors appointed by the king ruled the colony. In 1691, William and Mary granted a new charter, by which the colonies of Massachusetts Bay and New Plymouth, the province of Maine, and the territory called Nova Scotia, and the tract lying between Nova Scotia and Maine were incorporated into one government, by the name of the Province of Massachusetts Bay. 1 Story, Const. § 71. This charter, amended in 1726, continued until the adoption of the state constitution in 1780, which was drafted by John Adams. 4 Adams, Life and Works 213. It contained a provision for calling a convention for its revision or amendment in 1795, if two-thirds of the voters at an election held for this purpose should be in favor of it. Const. Mass. c. 6, art. x. But at that time a majority of the voters opposed any revision; Bradford's Hist. Mass. 294; and the constitution continued without amendment till 1820, when a convention was called for revising or amending it. Mass. Stat. 1820, c. 15. This convention proposed fourteen amendments, nine of which were accepted by the people. Since then, sixteen additional articles of amendment have been adopted at different times, making twenty-five in all. In 1853, a second convention for revising the constitution was held, which prepared an entirely new draft of a constitution. This draft, upon submission to the people, was rejected.

The constitution, as originally drafted, consists of two parts, one entitled A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts, and the other The Frame of Government.

The name of the state is the Commonwealth of Massachusetts.

THE LEGISLATIVE POWER.—The *Senate* is composed of forty members, elected from single senatorial districts, each containing as nearly as possible the same number of legal voters. A senator must be an inhabitant of the district for which he is chosen, and must have been an inhabitant of the state for five years next preceding his election, and ceases to be a senator on leaving the commonwealth.

The *House of Representatives* consists of two hundred and forty members, chosen in each of the representative districts into which the counties are divided for the purpose. The number of representatives sent by any district depends on the number of legal voters in it; but no district can send

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more than three representatives. A representative must have been an inhabitant of the district for which he is chosen for at least one year next preceding his election, and ceases to represent his district on leaving the commonwealth.

The two houses together constitute the "General Court of Massachusetts." The members of both houses are elected annually.

THE EXECUTIVE POWER.—The *Governor* is the supreme executive magistrate, and is elected annually. He is styled the "Governor of the Commonwealth of Massachusetts," and his title is "His Excellency." Seven years' residence in the commonwealth, and the possession of a freehold of the value of a thousand pounds, are the necessary qualifications for the office of governor or lieutenant-governor. He, with the council, administers the executive department of the government, which has the usual powers.

The *Lieutenant-Governor* is elected at the same time, for the same term, and must have the same qualifications as the governor. His title is "His Honor." He is a member of the council, and, in the absence of the governor, its president. In case of a vacancy in the office of governor, the lieutenant-governor acts as governor.

The *Council* consists of eight councillors, each chosen annually from a separate councillor district. The state is re-districted every ten years. Five councillors constitute a quorum, and their duty is to advise the governor in the executive part of the government. In case of vacancies in both the offices of governor and lieutenant-governor, the council, or the major part of them, shall have and exercise the powers of the governor. Vacancies in the council are filled by concurrent vote of the two branches of the legislature; or, if the legislature is not in session, by the governor's appointment.

The *Secretary of the Commonwealth*, the *Treasurer*, *Auditor*, and *Attorney-General*, are chosen annually at the state election, and no man is eligible as treasurer more than five successive years. Every councillor, the secretary, treasurer, auditor, and attorney-general, must have been an inhabitant of the state for the five years immediately preceding his election or appointment. Sheriffs, registers of probate, clerks of courts, and district attorneys are chosen by the people of the several counties.

THE JUDICIAL POWER.—The *Supreme Judicial Court* consists of one chief and six associate justices. Four justices constitute a quorum. This court has original and concurrent jurisdiction with the superior court of civil actions except actions of tort in which the amount involved exceeds four thousand dollars in Suffolk county or one thousand dollars elsewhere, the jurisdictional amount being stated in the affidavit of the plaintiff. Jury terms are held by a single justice, and either party may require a jury. Otherwise the facts are tried by the judge who has power to direct issues. Questions of law arising at the jury terms may be reported to the full bench. The court has original jurisdiction in equity and in some special proceedings. It is the appellate court of last resort in civil and criminal cases, with general superintendence over any inferior courts, and may issue writs of error, certiorari, mandamus, prohibition, and quo warranto.

This court has also a general superintendence and jurisdiction of cases arising under the insolvent act as a court of equity; and is the supreme court of probate with appellate jurisdiction of all matters determinable by the probate courts, and by the judges thereof, except in cases in which other provisions are specially made.

The *Superior Court* is composed of one chief justice and ten associate justices. It is to be held at the times and places prescribed, being at least two terms annually in each county. The court has exclusive original jurisdiction of capital and other crimes, misdemeanors and offences, divorce and nullity of marriage, complaints for flowing land, of claims against the commonwealth, of actions of tort except those of which the inferior courts or trial justices have concurrent original jurisdiction, and original jurisdiction of all civil actions except those of which the supreme judicial court, or inferior courts or trial justices have exclusive original jurisdiction. It has appellate jurisdiction of all civil actions and proceedings legally brought before it, by appeal or otherwise, from trial justices, police, district, or municipal courts, or courts of insolvency, and from the decisions of commissioners of insolvent estates of deceased persons; and of all offences tried and determined before a police, district, or municipal court or trial justice. In criminal cases legally brought before it, its jurisdiction is final, except as otherwise provided. It has concurrent jurisdiction with the supreme court, as stated *supra*.

All the judicial officers are appointed by the governor, with the advice of the council. Every nomination for a judicial appointment must be made by the governor to the council at least seven days before the council can approve it. The judges hold office during good behavior, but may be removed by the governor, with the consent of the council, upon the address of both branches of the legislature. The governor and council, and either branch of the legislature, may require the opinion of the justices of the supreme judicial court upon important questions of law, and upon solemn occasions.

*Judges of Probate and Insolvency* are appointed to hold office according to the tenor of their commissions, so that there may be one judge for each county. They may interchange services or perform each other's duties when necessary or convenient. Their courts are courts of record, and have original jurisdiction in their respective counties in all cases of insolvency, probate, and administration; appointment of trustees, and guardians for minors, insane persons, and spendthrifts; petitions for the adoption of children and the change of names; petitions of married women relative to their separate estate, and for protection and support, and partition.

The courts are to be held at such times and places as the statutes prescribe. They are held at other places as well as at the shire towns; and sessions occur very frequently.

*Justices of the Peace* are appointed by the governor, by and with the advice and consent of the council, for seven years, but any commission may be renewed. A certain number in each county are designated as trial justices, who have jurisdiction over petty criminal offences, and who have original jurisdiction exclusive of the superior court of all actions of replevin for beasts distrained or impounded, and of all actions of contract, tort, or replevin where the debt or damages demanded or value of the property alleged to be detained does not exceed one hundred dollars. They also have original and concurrent jurisdiction with the superior court where the amount involved is more than one hundred and not more than three hundred dollars. Pub. Stat. ch. 155, § 12 *et seq.*

*Police and District Courts*, consisting of one justice and two "special" justices, are established in many cities and large towns, of less than ten thousand inhabitants. They have substantially the same jurisdiction in civil and criminal matters, as trial justices, and their jurisdiction, when both plaintiff and defendant reside in the district, is exclusive of that of other police and district courts and of trial-justices.

*Municipal Courts* are established in the city of Boston, the principal one having original concurrent civil jurisdiction with the superior court where the amount involved exceeds one hundred and does not exceed one thousand dollars.

**MASSES.** Religious ceremonials or observances of the Roman Catholic Church. Under a will devising the residue of an estate for charitable purposes, masses were held to come within the religious or pious uses which are upheld as public charities. [1897] 2 I. R. 426; 134 Mass. 427; 14 Allen 553; but see 108 N. Y. 316, where a bequest to be applied for the purpose of having prayers offered in any Roman Catholic church selected by the executors was held void because there was no defined beneficiary. See, generally, 32 Alb. L. J. 367.

**MASTER AND SERVANT.** The relation of master and servant exists between one who not only prescribes to the workman the end of his work, but directs,

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or at any moment may direct the means also, or retains the power of controlling the work; 4 E. & B. 570; 24 L. J. Q. B. 138; and one who is engaged, "not merely in doing work or service for him, but who is *in his service*, usually upon or about the premises of his employer, and subject to his direction and control therein, and who is, generally, liable to be dismissed;" 59 Ala. 51; for misconduct or disobedience of orders; 50 Ill. App. 513.

Where the hiring is for a definite term of service the master is entitled to the labor of the servants during the whole term, and may recover damages against any one who entices them away or harbors them knowing them to be in his service; Sm. M. & S. 156; 6 Term 221; 13 Johns. 322; 2 E. & B. 216; 107 Mass. 555. See ENTICE.

A master may justify an assault in defence of his servant and a servant of his master; the master because he has an interest in his servant not to be deprived of his service; the servant because it is a part of his duty, for which he receives his wages, to stand by and defend his master; 1 Bla. Com. 429; Lofft 215. A master may give moderate corporal punishment to his menial servant while under age; 2 Kent 261. See ASSAULT; APPRENTICESHIP; CORRECTION.

The master may dismiss a servant before the expiration of the term for which he is hired, for immoral conduct, wilful disobedience, or habitual neglect, and the servant will not in such case be entitled to his wages; 4 C. & P. 518; 155 Pa. 67; 159 *id.* 579; 82 Mo. 599; 7 Fed. Rep. 642; 11 Q. B. 742; 34 La. Ann. 426; 42 Wis. 311; 63 Ga. 755; but if the dismissal be without reasonable cause, the servant may recover damages from his master therefor, to such an amount as will indemnify him for the loss of wages during the time necessarily spent in obtaining a fresh situation, and for the loss of the excess of any wages contracted for above the usual rate; 2 H. L. 607; 20 E. L. & Eq. 157; 110 N. C. 356; see 13 Lawy. Rep. Ann. 72. Any adequate cause for the dismissal of an employe known to the employer at the time thereof will justify the same, whether assigned or not, or though a different cause is assigned; 40 Ill. App. 340; or the cause may not have been known at the time of discharge; 70 Miss. 234. The statute 5 Eliz. c. 4, required a master, in certain cases, to satisfy two justices of the peace that he had reasonable and sufficient cause for putting away his servant. It was repealed by 38 & 39 Vict. c. 86, s. 17.

Where a servant, after being discharged, sues for a breach of the contract of hiring before the termination of the period covered thereby, he can recover damages, up to, but not after, the time of the trial; 139 Ill. 67; see 81 Fed. Rep. 284; and such recovery will be a bar to any subsequent action upon the same contract; 33 Mo. 212.

When a servant becomes disabled from performing the duties of his contract, such contract is dissolved and the master may discharge him; 13 Misc. Rep. 115; 29 N. E. Rep. (Mass.) 522. An express agreement in the contract of employment that the work must be done to the satisfaction of the master, entitles him to discharge the servant for bad work at his discretion and constitutes the master the sole judge of the sufficiency or the quality of the work; 94 Mich. 496; 53 N. W. Rep. (Minn.) 1156; 14 So. Rep. (Ala.) 362; and the testimony of the master that he is dissatisfied is decisive against evidence that he should be satisfied; 29 Pac. Rep. (Col.) 219; but see 16 N. Y. Suppl. 853. The retention of the servant after his work becomes unsatisfactory is not a condonation and will not prevent a subsequent discharge for the same cause; 59 Ill. App. 226; and where such improperly performed services are accepted by the master as not in full compliance with the contract, but as the best he can get toward a performance, he may in a subsequent action by the employe for services recoup damages for breach of the contract; 21 S. W. Rep. (Ark.) 430. The question whether such services are accepted as a full compliance with the contract is for the jury; *id.*; as is the question whether the discharge of the servant is for a reasonable cause; 42 Ill. App. 230. Where the servant was discharged for conduct which did not justify his dismissal, but there was other sufficient ground therefor, not known to the master at the time, it was held that the dismissal could be justified by proof of the after-discovered fact; 39 Ch. Div. 339.

Where the facts are undisputed, the right of the master to discharge his servant is a question of law; 83 Hun 168. A contract of employment for an indefinite period may be terminated by either party at any time; 23 N. Y. Suppl. 1009; 27 *id.* 351; but one employed for a definite period cannot be discharged through a mere caprice, but only on fair and reasonable grounds; 23 *id.* 119; 143 Pa. 408; 44 Ill. App. 359. Merely because business was dull was held not to be a just cause for dismissal when the services were properly performed; 18 N. Y. Suppl. 586; nor were slight deviations from the master's instructions in immaterial matters after the master had retained his servant for a considerable length of time thereafter without complaint; 43 N. E. Rep. (Ind.) 873; nor was the destruction by fire of the master's factory; 63 L. T. 756 Where a servant was illegally discharged and voluntarily sent in a written resignation which was accepted by his employer, it was held that he could not afterwards sue on the contract of service, even though his resignation were solely because of his illegal discharge; 53 N. J. L. 607. One cannot by a decree of court be compelled to retain another in his service; 62 Ill. App. 334; and equity will not compel a master to keep a servant in his employment who for any cause is not acceptable to him, nor will it compel employes to continue in the employment of their master; 24 U. S. App. 239.

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When the employment contract requires notice before leaving, under penalty of forfeiture of wages, the return of the employe on the day following does not oblige the master to restore the employment and will not enable the servant to recover the forfeited wages; 18 S. W. Rep. (Tenn.) 262; and the master has been held entitled to substantial damages for a refusal of his servants to perform their duties under a contract providing for two weeks' notice on either side; 70 L. T. R. 116. By statute in many of the states it is enacted that where the contract of employment requires notice by the employe under penalty of forfeiture of wages, the employer shall be liable for a like amount for dismissal of the servant without the same notice, *unless in case of a general suspension of labor in his shop or factory*, and in Massachusetts by act of 1895 the latter clause has been stricken out of the law. See FORFEITURE; WAGES.

Where four partners agreed to employ the plaintiff as manager for a certain time and before the end of the period two of the partners retired and the other two were not willing to continue the employment, it was held that the dissolution of the partners amounted to a wrongful dismissal of the servant but that he was only entitled to nominal damages; [1895] 2 Q. B. 253.

In Minnesota and Wyoming a master may not require the surrender of any of the rights of citizenship of his servants, or discharge them because of their nomination for an election, or interfere in the matter of their nomination in any way; and in nearly all of the states it is a criminal offence for the master to threaten to discharge his servant, or to reduce his wages, or to promise to give him higher wages, or otherwise to attempt to influence a voter to give or withhold his vote. In Tennessee absence for voting is declared no violation of the employment contract for personal services, and every contract designed to keep employes from the polls is declared void; Stimson, Lab. L. 117 and statutes there cited.

The master is bound to provide necessaries for an infant servant unable to provide for himself; 2 Campb. 650; 1 Leach 137; 1 Bla. Com. 427, n.; but not to furnish him with medical attendance and medicines during the illness; 4 C. & P. 80; 7 Vt. 76.

The master is answerable for every such wrong of the servant or agent as is committed by him in the course of the service and for the master's benefit, though no express command or privity of the master be proved; L. R. 2 Ex. 259; 36 L. J. Ex. 147. Such liability springs out of the relation itself and does not depend on the stipulations of their contract. Within the scope of his authority, the servant may be said to be the medium through which the master acts; it follows, as a general rule, that for the tortious acts of the servant, the master is liable; 42 Ark. 458; 116 U. S. 624; 2 Wheat. 345; 11 Bush 465; 25 Ill. App. 521; 19 Wend. 345; 40 E. L. & Eq. 329; 26 Vt. 178; 155 Mass. 104; 75 Hun 68; 160 Pa. 300; 63 Conn. 155; 98 Mich. 1; although contrary to his express orders, if not done in wilful disobedience of those orders; 14 How. 468; 7 Cush. 385; 10 Ill. 509; 132 U. S. 518; see 65 Hun 619.

The reason for this rule has been ably expounded by Shaw, C. J., in the leading American case on this subject: "Every man, in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he must answer for it." 4 Metc. 49; followed in 3 Macq. 316. But this case was decided on another point involving the question of the liability of a master for the negligence of a fellow servant, as to which see *infra*.

The master is not liable for acts committed out of the course of his employment; 20 Conn. 284; 17 Mass. 508; 156 *id.* 319; 69 Miss. 723; 37 W. Va. 606; 16 E. L. & Eq. 448; 63 Hun 8; nor for the wilful trespasses of his servants; 1 East 106; 24 Conn. 40; 1 Sm. Ind. 455; 2 Mich. 519; unless committed by his command or with his assent; 8 Ind. 312; 2 Stra. 885.

The master is bound to furnish suitable means and resources to accomplish the work; 73 Wis. 406; 126 Ind. 445; 79 Me. 404; 110 Mass. 240; 129 *id.* 268; 95 Pa. 211; 89 N. Y. 376; 31 Ohio St. 479; 72 N. Y. 607; 53 Tex. 206; 65 Mo. 225; 100 U. S. 213; 37 E. L. & Eq. 281; to exercise ordinary care to provide his servants a reasonably safe place for work; 35 Fed. Rep. 353; 81 *id.* 679; 31 Kan. 586; 68 Wis. 520; 34 Minn. 321; 60 Mich. 501; 143 Mass. 197; 48 N. Y. Supr. Ct. 156; 84 Wis. 418; to use ordinary care to keep machinery in a safe condition, and he is not relieved from that obligation by delegating the management of a machine to a servant; 146 Mass. 586. But it has been held that he is only bound to furnish means and resources which to his own knowledge are not defective; 16 C. B. N. S. 669; 33 L. J. C. P. 329; and that he is not bound to furnish the newest, safest, and best appliances for the use of his employes, nor is he an insurer of their safety; he may furnish such appliances as are ordinarily sufficient for the purpose intended, and such as can, with reasonable care, be used without danger; 79 Me. 404: 50 Conn. 433; 74 Ind. 440; 84 Mich. 289; 65 Cal. 96; 132 N. Y. 278; 92 Pa. 276; 171 *id.* 581; 109 Ill. 314; 136 Mass. 1. He is not liable for hidden defects of which he had no knowledge; 4 Ill. App. 533; nor for known defects, unless they are such as, by the exercise of due care, he might have known to be dangerous; 1 *id.* 510; and the mere fact of injury received by the servant raises no presumption of negligence on the part of the master; 36 W. Va. 232; see 113 Mo. 170; 69 Miss. 848; but it has been held that an employe has a right to suppose

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that his master has used reasonable care in guarding against defects in appliances furnished for his use; 88 W. Va. 546; and see 128 Pa. 294, where it was held that though better machinery existed, yet, if the machine by which the servant was injured was in general use and if reasonably safe when prudently used, the master was not liable; 92 *id.* 276. In order to hold an employer liable for injuries caused by the dangerous condition of a building, the servant must allege distinctly both that the master knew of the danger and the servant was ignorant of it; 13 Q. B. D. 259; 18 *id.* 685; 56 L. J. Q. B. 340. In an action by an employe for damages resulting from the negligence of his employer in furnishing defective appliances, it is no defence to show that he might have been injured in the same manner if the appliances had been in good condition; 48 Pac. Rep. (Col.) 681. If the servant knows that he is running a risk, through defective machinery or otherwise, he cannot recover for injuries: 39 Ill. App. 642; 58 *id.* 83, 250; 59 *id.* 260; 112 U. S. 377; 71 Fed. Rep. 143; 148 N. Y. 372, reversing 26 N. Y. S. 1010, Vann, J., dissenting; 43 N. E. Rep. (Ind.) 961; 34 Atl. Rep. (Md.) 872; 46 Neb. 556; 84 S. W. (Tex.) 298; 72 Fed. Rep. 250; 165 Mass. 267, 368; 164 *id.* 282; 91 Wis. 208; 65 N. W. Rep. (Mich.) 667; 142 Ind. 596; 165 Mass. 233; 38 N. Y. Supp. 591; 74 Fed. Rep. 186; but see 21 Can. S. C. R. 581; 98 Ala. 578. An employe assumes the ordinary risks of his employment; 68 N. W. Rep. (Neb.) 1058; 89 Ga. 318; and also risks arising from unsafe premises which are known to him or apparent and obvious to persons of his experience and understanding if he voluntarily enters into the employment or after he enters makes no complaint or objection; 68 N. W. Rep. (Nob.) 1058. "The adult servant is presumed to possess ordinary intelligence, judgment, and discretion to appreciate such dangers incident to his employment as are open and obvious, and knowledge of them on his part will be presumed or imputed to him as matter of law; 88 Wis. 442; and the master is not bound to warn him of such danger;" 47 N. Y. S. 521.

This presumption is strengthened when the servant is also an expert in his employment; 76 Wis. 136, where the whole subject is considered and the authorities collected. An employe who under such circumstances is injured by reason of a defect in a tube easily discoverable, is guilty of contributory negligence; 88 *id.* 442; if he have a thorough knowledge of the risk and voluntarily undertakes it; 63 L. T. 287.

Where a person without fault is placed in a situation of danger, he is not to be held to the exercise of the same care and caution that prudent persons would exercise where no danger was present, nor is he guilty of contributory negligence because he fails to make the most judicious choice between hazards presented; the question is not what a careful person would do under ordinary circumstances, but what he might reasonably be expected to do in the presence of the peril, and is for the jury; 45 N. E. Rep. (Ohio) 559; as is the question of contributory negligence and of whether one had assumed the risk who is injured whilst obeying the order of a foreman; 12 U. S. App. 534.

The mere knowledge and assent of an immediate superior, to a violation by an employe of a known rule of a company, will not as a matter of law relieve the employe from the consequences of such violation; 19 U. S. App. 586. See 63 Fed. Rep. 231; but one obeying orders of a superior does not assume the risk of the latter's negligence; 21 S. W. Rep. (Ala.) 440. If the servant, knowing a defect existed, gave notice to his employer of it, and was promised that it would be remedied, and continued his work in reliance on this promise, he is not, in law, guilty of contributory negligence; 100 U. S. 213; 17 Col. 280; 1 U. S. App. 96; 7 *id.* 359; 44 Ill. App. 466. See 135 U. S. 554; 55 Ark. 483.

*Fellow Servant.* The relation of the fellow servant has been defined thus: "Those who engage in the same common pursuit under the same general control." Cooley, Torts 541, n. 1. All who serve the same master; work under the same control; derive authority and compensation from the same common source; are engaged in the same general business, though it may be in different grades or departments of it. 32 Ind. 411; L. R. 1 H. L. Sc. 326; 39 N. Y. 468; 2 Thomp. Negl. 1026. "All servants in the employ of the same master, subject to the same general control, paid from a common fund, and engaged in promoting or accomplishing the same common object." Beach, Contrib. Neg. 338. Those who have in view a general common object. L. R. 1 Q. B. 149, 155; 35 L. J. Q. B. 23. By the Texas act of 1893 the essential requirements are: 1, That they be engaged in the common service; 2, in the same grade of employment; 3, be working together at the same time and place; 4, be working for a common purpose.

Where a master uses due diligence in the selection of competent and trusty servants, and furnishes them with suitable means to perform the service in which he employs them, he is not answerable to one of them for an injury received by him in consequence of the carelessness of another while both are engaged in the same service; 4 Metc. 49; 3 M. & W. 1; 100 U. S. 213; 154 Pa. 130; 88 N. Y. 146; 46 N. Y. Supp. 137; 59 Fed. Rep. 626; 84 Ky. 79; 56 Ga. 645; 27 W. Va. 145; 59 Tex. 334; 68 Cal. 225; 46 N. E. Rep. (Mass.) 624; 3 Col. 499. The reasons for the rule have been thus stated: "In considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all

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parties concerned. Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends to a great extent on the care and skill with which each other shall perform his appropriate duty, each is generally an observer of the conduct of the others, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service if the common employer will not take such precautions and employ such agents as the safety of the whole party may require. By these means the safety of each will be more effectually secured than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other." 4 Metc. 49. The rule does not extend to the exemption of the servants from liability to a fellow servant for his negligence; 22 Minn. 185; 58 Ind. 121; 130 Mass. 102; 11 Ex. 832; L. R. 3 Exch. D. 341. See 112 U. S. 377, for a review of the origin of the doctrine as to fellow servants.

If the master is negligent, the concurring negligence of a fellow servant is no defence; 40 S. W. Rep. (Tex.) 1060. Where the employer knew, or ought to have known, that a servant was incompetent, the former is liable to a fellow servant for the negligence of the incompetent servant; 181 Pa. 497.

*Vice Principal.* If the master entrusts the entire supervision of his business, or of a distinct department, to his employe, such an employe may be termed a general vice principal, for whose negligence the master is liable; but if he entrusts only the discharge of his absolute personal duties, such as to employ competent co-workers, to an employe, the latter may be termed a special vice principal, for whose negligence only in the discharge of these absolute personal duties the master becomes liable; 19 U. S. App. 245.

The "shift boss" in a mine whose business it is to direct miners where to work, when performing that duty, acts in the capacity of master or vice principal and if he knows of a concealed danger, such as an unexploded blast, at the place where he sets a miner to work, of the existence of which the latter is ignorant and unable with ordinary care to ascertain and does not inform him thereof, the master is liable; 95 Wis. 308.

The test in determining what is a vice principal seems to be not from the grade or rank of the service, but from the character of the act performed; 53 N. Y. 549; 110 Mass. 240; McKenney, Fellow Serv. § 23. It has been held by some courts that a servant who is a *vice principal*, or who acts in the place of the master, is not a fellow servant with those beneath him, or, in other words, that the master is responsible to inferior servants for the act of their superiors; 19 U. S. App. 245; 88 Mo. 360; 85 Tenn. 227; 84 N. C. 309; 36 Ohio St. 221; 3 *id.* 201; 78 Va. 745; 69 Ga. 137; 44 Ia. 134; 108 Ill. 288; 9 Bush 81; 93 Ill. 302; s. c. 34 Am. Rep. 168; 19 S. E. Rep. (Va.) 652; 59 Fed. Rep. 394; 65 Vt. 553; 6 C. C. App. 205, 636; 100 U. S. 214; 112 *id.* 377; 48 Fed. Rep. 62; 51 *id.* 182. On the other hand this broad doctrine has been denied in some jurisdictions; 98 N. Y. 511; 78 Me. 217; 96 Pa. 246; 112 *id.* 72; 129 Mass. 268; 48 Kan. 120; L. R. 1 Sc. App. 326; L. R. 10 Q. B. 62; 20 Md. 212; 98 Ind. 282; 42 Mich. 34; 32 Minn. 54; 51 Cal. 255. Another rule, established in some jurisdictions, is that in any extensive business, divided into distinct departments, a laborer in one department is not a fellow servant with a laborer in another and separate department; 30 Ga. 150; 9 Heisk. 37; 77 Ill. 391. And this rule has also been denied by some courts, except in cases where the master has surrendered the oversight of the department and put it in the hands of an agent; 67 Tex. 597; 129 Mass. 268; 112 Pa. 400; 65 Md. 438; 42 Mich. 34; 14 Minn. 360.

The rule as to fellow servants depends on the law of the place where the accident occurs; 79 Fed. Rep. 934; 32 *id.* 893; 41 *id.* 667; but see 51 *id.* 182. The decisions on the whole subject are said to be in inextricable confusion; 30 Am. L. Rev. 840.

*Who are fellow servants.* The following are held to be fellow servants: Baggage master and switch tender; 33 Minn. 218; boatswain and stevedore; 30 Fed. Rep. 878; brakeman and car inspector; 46 Ark. 555; brakeman and conductor taking engineer's place on a locomotive; 55 Mich. 57; laborer in a tunnel and an employe who provided him with tools; 39 N. J. L. 117; brakeman and fireman; 49 Mich. 497; director of brakeman and brakeman; 71 Mo. 164; brakeman and station master; 119 Mass. 419; brakeman and station agent; 69 Wis. 188; fireman and switch tender; 88 N. Y. 481; brakeman and train despatcher; 78 Ind. 77, brakeman and conductor; 136 Mass. 1 (*contra*, 71 N. W. Rep. (Neb.) 776); 41 S. W. Rep. (Tex.) 70; mate and common sailor; 17 N. E. Rep. (Mass.) 517; captain and the crew; [1892] 1 Q. B. 58; snow shoveller and conductor; 54 Wis. 226; tunnel repairer and trainman; 103 Ind. 305; agent and manager of express company and an ordinary employe; 55 Wis. 453; mine boss and a driver boy; 112 Pa. 567; mine boss and miner; *id.* 72; runner of an hoisting engine and men in shaft; 14 Fed. Rep. 833; engineer and brakeman; 15 Lea 145; brakeman on a regular train and the conductor on a wild train; 167 U. S. 48; a winchman and a man working in the hold of a vessel; 79 Fed. Rep. 972; conductor and engineer of a railroad train and an employe of the same company riding on a hand car; 80 *id.* 260; conductor and train hand; 27 S. E. Rep. (W. Va.) 278; a section hand unloading ties from a train and a section foreman temporarily in charge of a train; 71 N. W. Rep. (Mich.) 464; gang boss on a railroad and those employed under him; 16 Sup. Ct. Rep. 843 (reversing 51 Fed. Rep. 182, Fuller, C. J., and Field and Harlan, JJ.,

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dissenting); a motorman and a track repairer; 67 N. W. Rep. (Minn.) 1006; motor man and track foreman; 26 S. E. Rep. (N. C.) 923; an engineer and a switchman; 35 S. W. Rep. (Tex.) 564; though employed and discharged by different superiors; *id.*

Where a mining corporation is under the control of a manager, and is divided into three departments, each with a superintendent under the general manager, and in one of the departments there are several gangs of workmen, the foreman of one of these gangs, whether he has or has not authority to engage and discharge the men under him, is a fellow servant with them; 168 U. S. 86.

The following have been held not to be fellow servants: Wheel-inspector and baggage man and train hands; 34 Fed. Rep. 616; engineer and boiler repairer; 109 Pa. 296; brakeman and road master; 31 Kan. 197; brakeman and track repairer; 4 S. E. Rep. (Va.) 339; captain and sailor; 47 Wis. 602; pilot and servants on a vessel; 10 Q. B. 125; mate and deck hand; 18 Fed. Rep. 625; pilot and deck hand; 23 *id.* 413; mining captain and laborer; 50 Mich. 179; superintendent and employe; 57 Cal. 20; general manager and train despatcher and brakeman; 23 Am. & Eng. R. R. Cas. 453; train despatcher and conductor; 8 *id.* 162; a floor man in charge of work and a man working under him; 45 N. Y. Supp. 234; a conductor and train hand; 7 Ohio Dec. 206; an engineer and a porter; 35 S. W. Rep. (Ky.) 199; engineer and brakeman; 41 S. W. Rep. (Tex.) 70; the foreman of a section crew and an engineer of a train not connected with the work of the section men; 67 N. W. Rep. (Neb.) 447; the trainmen of a railroad company and the employes of another company over whose road the train is run; 32 N. Y. Supp. 627; the conductor of a train and trainmen; 112 U. S. 377; conductor and engineer; *id.*, Bradley, Matthews, Gray, and Blatchford, JJ., dissenting.

The sending of one's servant to work for another and to be under the immediate control of the latter's foreman, does not thereby make him a fellow servant of the other employes, and he can have no recovery for injuries occasioned by their negligence; 44 N. Y. Supp. 234.

See 30 Am. L. Rev. 840; 2 Harv. L. Rev. 212; 40 Am. L. Reg. N. S. 766.

The English "Employers Liability Act" of 1880 has been a model for many similar acts in America, and is as follows:

"Where, after the commencement of this act, personal injury is caused to a workman—

(1) By reason of any defect in the condition of the ways, works, machinery, or plant, connected with or used in the business of the employer; or (2) By reason of the negligence of any person in the service of the employer who has any superintendence intrusted to him whilst in the exercise of such superintendence; or (3) By reason of the negligence of any person in the service of the employer, to whose orders or directions the workman at the time of the injury was bound to conform and did conform, where such injury resulted from his having so conformed; or (4) By reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or by-laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf; or (5) By reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train upon a railway, the workman, or in case the injury results in his death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman, or in the service of the employer, or engaged in his work."

The statutes passed in many of the states are usually not so sweeping as the English Act. Such acts are now in force in Alabama, Arkansas, California, the Dakotas, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Rhode Island, Texas, Wisconsin, Wyoming. There are also provisions to the same effect in the Constitutions of Mississippi and South Carolina.

The Prussian law up to June, 1881, recognized the doctrine of the non-liability of the employer, but the commercial code has made the employer liable in case of carriage by land or water. As to the liability of the master on the continent of Europe, generally, see 9 Jurid. Rev. 249.

See Browne; Wood, Master and Ser.; 1 Lawson, R. & R. 231–331; Stimson, Labor Laws; Bailey, Master's Liability; Napton, Liability of Employer; Roberts & Wallace, Duty of Employer; McKinney, Fellow Servants; EMPLOYE; LABOR UNION; LABORER; LIBERTY OF CONTRACT; TRADE SECRETS; RAILWAY RELIEF.

**MASTER IN CHANCERY.** An officer of a court of chancery, who acts as an assistant to the chancellor. 3 Edw. Ch. 458; 19 Ill. 131.

A master in chancery is an officer appointed by a court to assist it in various proceedings incidental to the progress of the case before it, and is usually employed to take and state accounts, to take and report testimony, and to perform such duties as require computation of interest, the value of annuities, the amount of damages in particular cases, the auditing and ascertaining of liens upon property involved, and similar services. The information which he may communicate by his findings in such cases, upon the evidence presented to him, is merely advisory to the court, which it may accept and act upon, or disregard in whole or in part, according to its own judgment as to the weight of the evidence; 104 U. S. 420.

The masters were originally clerks associated with the chancellor, to discharge some of the more mechanical duties of his office. They were called *preceptores*, and gradually increased in number until there were twelve of them. They obtained the title of masters in the reign of Edw. III. Their office was mainly judicial in its character, but sometimes included ministerial offices. See 1 Spence, Eq. Jur. 360–367; 1 Harr. Ch. 436; 1 Bail. Ch. 77; 1 Des. Ch. 587. The office was abolished in England by 15 & 16 Vict. c. 80. In the United States, officers of this name exist in many of the states, with similar powers to those exercised by the English masters, but variously modified, restricted, and enlarged by statute, and in some of the states similar officers are called commissioners and by other titles.

The master's office is a branch of the court and he has power to control the proceedings of parties before him; 3 Edw. Ch. 458.

It is not within the general province of

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a master to pass upon all the issues in an equity case, nor is it competent for the court to refer the entire decision of a case to him without the consent of the parties. It cannot, of its own motion, or upon the request of one party, abdicate its duty to determine by its own judgment the controversy presented, and devolve that duty upon any of its officers; Field, J., in 129 U. S. 524. But when the parties consent to the reference of a case to a master to hear and decide all the issues therein and such reference is entered as a rule of the court, the determinations of the master are not subject to be set aside and disregarded at the mere discretion of the court. A reference by consent of parties of an entire case, though not strictly a submission of the controversy to arbitration—a proceeding which is governed by special rule—is a submission of the controversy to a tribunal of the parties' own selection, to be governed in its conduct by the rules applicable to the administration of justice in tribunals established by law. Its findings, like those of an independent tribunal, are to be taken as presumptively correct, to be reviewed under the reservation contained in the consent and order of the court, when there has been manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise; *id.*

The reference of a whole case to a master has become in late years a matter of more common occurrence than formerly, though it has always been within the power of a court of chancery, with the consent of both parties, to order such a reference. The power is incident to all courts of superior jurisdiction, and is covered in most of the states by statutes; 129 U. S. 525, followed in 144 U. S. 585; 145 U. S. 132; 155 U. S. 687. See 97 U. S. 581.

In most jurisdictions, where an action is properly in equity, the court has a right to refer it to a master, without consent of parties; 25 Ia. 280; and such was the regular practice in Pennsylvania until recent rules, made by the supreme court, required equity cases to be tried by the judges in open court on *viva voce* testimony.

The duties of the masters are, generally; *first*, to take accounts and make computations; 18 How. 295; 2 Munf. 129; 14 Vt. 501; Walk. Ch. 532; *second*, to make inquiries and report facts; 3 W. & M. 258; 3 Paige 305; 23 Conn. 529; 1 Stockt. Ch. 309; 2 Jones, Eq. 238; 5 Gray 423; 5 Cal. 90; *third*, to perform some special ministerial acts directed by the court, such as the sale of property; 11 Humphr. 278; 25 Barb. 440; settlement of deeds; see 1 Cow. 711; appointment of new trustees, and the like; 1 Barb. Ch. Pr. 468; *fourth*, to discharge such duties as are specially charged upon them by statute.

In the federal courts the judges are prohibited by statute from appointing as masters any relation within the degree of first cousin; 1 Fed. Rep. 91; or except when special reasons exist therefor, a clerk of a federal court; 20 Stat. L. ch. 415; but consent of parties is held to be sufficient special reason; 3 Cliff. 146; 1 Fed. Rep. 91; Rule 75.

Cases in which reference to the master should be ordered are: Where inquiries as to compensation or damages do not involve such complexity of facts or amounts as to require an issue; 17 Ala. 295; to ascertain what are "usual covenants" according to local usages; 17 N. J. Eq. 216; where plaintiff in a bill for specific performance, shows his right to a conveyance, but the defendant by sale or otherwise, has put it out of his power to convey; 1 Cow. 711; to settle the account in cases involving mixed questions of law and fact; 1 Hall 560; to inquire into the true value of the property at the time of sale, where an application was to reform a deed made by trustees in relation to trust property where the rights of infants were concerned; 18 How. Pr. 512; to ascertain the damages suffered by defendant by reason of an injunction, where the plaintiff failed to maintain his cause or discontinued it; 19 How. Pr. 413; to ascertain whether property given to a child on marriage was intended as an advancement in marriage, or as payment of a legacy; 2 M'Cord, Ch. 268; to ascertain the intention of the parties where the main issue was a latent ambiguity in a lease of coal lands, and a decree was reversed after but little inquiry below upon this point; 18 Gratt. 304. Where a controversy in equity turns upon facts and involves a variety of circumstances, it should be referred to a master to sift the testimony and collate and report the facts; 58 Pa. 186; and a court of chancery ought not to decide upon accounts mutually existing and controverted between the parties without reference to a master; 1 Hen. & M. 543.

A court of chancery may direct the reference of a case to the master with authority to examine the defendant on oath, and such an examination will have the effect of an answer; 3 Rand. 434.

Cases which should not be referred to a master are: Where, on the settlement of a long account between the parties, the court has facts enough before it to strike the true balance, and both parties do not agree to or ask for reference; 3 Woodb. & M. 277; where the evidence is all written, and a decree can be rendered without difficulty; 9 Port. 79; where it was sought to charge the heirs with a debt of their father, and it was necessary to decide whether the heirs had received assets; 18 Ark. 118; to ascertain the amount due on a promissory note; 3 Ill. 545; where the issue is distinctly raised by the pleadings and testimony taken; 1 Hoffm. Ch. 312; on a bill for a specific performance of a contract of sale where the nature of the title distinctly appears; 4 Dessaus. 536.

Orders of reference to a master should specify the principles on which the accounts are to be taken, or the inquiry proceeds, so far as the court shall have decided thereon; and the examinations before the master



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should be limited to such matters within the order as the principles of the decree or order shall render necessary; 2 Johns. Ch. 495. In an order of reference to a master, the defendant may be directed to produce before the master "all books, papers and writings, in his custody or power," and may be examined on oath upon such interrogatories as the master may direct, relative to the subject-matters of the reference; 2 Johns. Ch. 513. Where upon an order to deliver over books, papers, etc., the court intends to permit it to be done upon his own *ex parte* affidavit merely, he is directed, generally, "to produce and deliver the same on oath," but when the party is directed to produce and deliver them on oath "before a master" or "under the direction of a master," it is that all parties interested may examine as to the full and fair compliance with the order; 2 Paige 432. And the master should, in such a case, afford reasonable time for such examination to be made, and interrogatories to the party to be framed; *id.* Where an order of reference to make preliminary inquiries preparatory to a hearing upon the merits is not an order of course, under some rule of court, and is not assented to by all parties interested, such order can be obtained only by special application to the court upon due notice to all parties who have appeared and have an interest in the subject-matter; 6 Paige 178.

Where a case has been referred to a master, the consent of parties will not confer upon him authority to examine into a matter not charged in the bill; 2 Stor. 243; and if he report as to a matter not referred to him the report *quoad hoc* is a nullity; 5 Fla. 478.

It is his duty to report the facts, and not the mere evidence of facts, it being the province of the court to apply the law to the facts found and not to draw inferences of facts from the evidence; 26 Conn. 264. A master appointed to report the sum due on a mortgage is not authorized to decide on the title; 36 Me. 115.

A report of a master on facts submitted to him will be presumed to be true, and will not be reconsidered or set aside for an alleged mistake or abuse of authority, unless it is clearly shown and the correction is required in equity; 36 Me. 115.

It is improper for a master to perform any official act, as master, in a cause in which he is solicitor or a partner of the solicitor; Walk. Ch. Cas. 453. Where a question before the master is as to the value of certain property, he should form an independent judgment of his own, and the method of taking an average of estimates as a conclusion is tolerated only from necessity; 2 Jones, Eq. 238.

A master cannot reopen a cause for further testimony after the closing of the proofs and the submission of his draft report to the parties, without special order from the court, which will be granted only on the ground of surprise, and under the same circumstances that would induce the court to make such an order before the hearing; 7 R. I. 31. Where a master has reported back a case in which he was ordered to take testimony, it is *res adjudicata* and the case will not be recommitted unless specific errors can be designated; 3 Woodb. & M. 157.

After the report is prepared, it is proper for the master to hear exceptions and correct his report, or if he disallows them, to report them to the court with the evidence; 12 Ill. 277; but he need not report all the testimony where the decretal order under which he acts does not require it; 52 Me. 132, 147. As to reporting evidence, see 6 N. Y. Chy. Reprint 372.

A matter may be referred to a master and his report received and confirmed all at the same term of the court; 3 Ala. 83; but the general practice is to permit the report to lie over to the term following on motion of either party; 1 Brock. 529.

A court of equity is not bound by the report of a master, but may confirm, modify, or reject it, as the issues in the suit must be decided by the court itself; 19 U. S. App. 477; but this finding both of fact and of law will be presumed to be correct; 155 U. S. 631; and will stand unless there is some obvious error in the application of the law or serious mistake in the consideration of the evidence; 144 U. S. 585; *id.* 104; 36 W. Va. 454. See 151 U. S. 285.

In practice it is not usual for the court to reject the report of a master, with his findings upon the matter referred to him, unless exceptions are taken to them and brought to its attention, and, upon examination, the findings are found unsupported or defective in some essential particular; 128 U. S. 617.

The court will not interfere with a report of a master upon a question of fact depending upon the credibility of witnesses, unless an error is clearly made to appear; 9 N. J. Eq. 309, 659; the report has not the position of a verdict on a motion for a new trial at law, but on exceptions on a question of fact it is only necessary to review and weigh the evidence; 18 N. J. Eq. 144; and it will not be overruled because the evidence is vague and conflicting, unless the conclusion is unwarranted by the evidence; *id.* The theory that it stands as a verdict obtains only when the findings are deductions from incorporated facts; 152 Pa. 42.

As to sales by masters, see 7 N. Y. Chy. Reprint 63, note.

As to when a decree founded on a master's report will be opened, see 4 Edw. Ch. 249; 6 Allen 457; and when reviewed, 6 N. Y. Chy. Reprint 527, note.

See generally, Dan. Ch. Pr. ch. xxvi.; 1 Fost. Fed. Pr. ch. xxiii; 15 Myer's Fed. Dec. 827; Bennet, Masters: Tamlyn, Pract. & Master's Office; Garland & Ralston, Fed. Pr.

**MASTER OF A SHIP.** In Maritime

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**Law.** The commander or first officer of a merchant-ship; a captain.

Under the English Merchant Shipping Act, 1854, the term master includes "every person (except a pilot) having command or charge of any ship."

A distinction is noted between the two-fold duties and functions of the master, those in which as *shipmaster* he is entrusted with the management and navigation of the ship, either as the co-partner of the owners or their confidential agent; Maclachlan, Merch. Ship. 134-186; and those in which as *master mariner* he is the officer in command on board; *id.* 203, 215.

The master of an American ship must be a citizen of the United States; 1 Stat. L. 287; and a similar requirement exists in most maritime states. In some countries their qualifications in point of skill and experience must be attested by examination by proper authorities. This is provided for in England under the Merchant Shipping Act, 1894, but in the United States the civil responsibility of the owners for their acts is deemed sufficient, although a license is required for the master of a steam vessel; U. S. Rev. Stat. § 438.

A vessel sailing without a *competent* master is deemed unseaworthy, and the owners are liable for any loss of cargo which may occur, but cannot recover on a policy of insurance in case of disaster; 21 How. 7, 23; 6 Cow. 270; 12 Johns. 128, 136; 21 N. Y. 378; Desty, Sh. & Adm. § 232. One to whom the navigation, discipline, and control of a vessel is entrusted, must be considered as master, although another is registered as such; 59 Fed. Rep. 630. The owner of one half the legal title of a steamboat, who is the master in possession, and who is by written agreement entitled to such possession as master, is not liable to removal from his position as master; 135 U. S. 599.

The master is selected by the owners and is their confidential agent; 1 Wheat. 96; in case of his death or disability during the voyage, the mate succeeds; if he also dies in a foreign country, the consignee of the vessel, or the consul of the nation, may, in a case of necessity and in the absence of other authority, appoint a master; 49 Fed. Rep. 463. The master himself may, in similar circumstances of necessity and distance from the owners, appoint a substitute; 1 Pars. Mar. Law 387; 2 Sumn. 206; 13 Pet. 387. See 34 Barb. 419. During a temporary absence of the master, the mate succeeds; 2 Sumn. 588.

He must, at the *commencement of the voyage*, see that his ship is seaworthy and fully provided with the necessary ship's papers, and with all the necessary and customary requisites for navigation, as well as with a proper supply of provisions, stores, etc.; Bee 80; 2 Paine 291; 1 Pet. Adm. 219; Ware 454; for the voyage; 1 Pet. Adm. 407; 1 W. & M. 338. He must also make a contract with the seamen, if the voyage be a foreign one from the United States; 1 U. S. Stat. at L. 131; 2 *id.* 203. He must store safely under deck all goods shipped on board, unless by well-established custom or by express contract they are to be carried on deck; and he must stow them in the accustomed manner in order to prevent liability in case of damage. In respect to the lading or carriage of goods shipped as freight, he is required to use the greatest diligence; and his responsibility attaches from the moment of their receipt, whether on board, in his boat, or at the quay or beach; 3 Kent 206; Abb. Shipp. 423. He should acquaint himself with the laws of the country with which he is trading; 22 How. 491.

He must proceed on the voyage in which his vessel may be engaged by direction of the owners, must obey faithfully his instructions, and by all legal means promote the interest of the owners of the ship and cargo; 3 Cra. 242. On his arrival at a foreign port, he must at once deposit, with the United States consul, vice consul, or commercial agent, his ship's papers, which are returned to him when he receives his clearance; U. S. R. S. § 4309. This does not apply, however, to those vessels merely touching for advice; 9 How. 372. He must govern his crew and prevent improper exercise of authority by his subordinates; 2 Sumn. 1, 584; 14 Johns. 19. He must take all possible care of the cargo during the voyage, and, in case of stranding, shipwreck, or other disaster, must do all lawful acts which the safety of the ship and the interest of the owners of the ship and cargo require; Fland. Shipp. 190; 19 How. 150; 13 Pet. 387. It is proper, but not indispensable, in case of an accident, to note a protest thereof at the first port afterwards reached; 6 McLean 76; and to give information to the owners of the loss of the vessel as soon as he reasonably can; 4 Mas. 74. After stranding he must take all possible care of the cargo; 9 Wall. 682. In a port of refuge, he is not authorized to sell the cargo as damaged unless necessity be shown; but where it is so much injured as to endanger the ship, or will become utterly worthless, it is his duty to sell it at the place where the necessity arises; 1 Blatch. 357; 1 Story 342. When possible, he is bound to notify the owners before selling; 30 Me. 302; but he cannot sell after the completion of the voyage, when the owners of the cargo can be communicated with or readily reached; 38 Fed. Rep. 330. He may contract for definite salvage in case of emergency; 48 Fed. Rep. 925. And under certain circumstances he may even sell the vessel where she is in danger of destruction; 37 Fed. Rep. 371; but vessel and cargo can only be sold in case of urgent necessity; 13 Moo. P. C. 144; L. R. 6 C. P. 319. He should consult the owners if possible; failing that he should consult disinterested persons of skill and experience whose advice to sell would be strong evidence in justification of a sale; 6 Hall 27. While the master of a stranded vessel may, in case of urgent necessity,

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throw overboard or otherwise sacrifice his cargo to obtain the release of his vessel, he has no right to give it away; if he does, the donee takes no title to the property, but is liable therefor as bailee, and is bound to surrender it upon demand; 44 Fed. Rep. 431.

In time of war, he must avoid acts which will expose his vessel and cargo to seizure and confiscation, and must do all acts required for the safety of the vessel and cargo and the interests of their owners. In case of capture, he is bound to remain by the vessel until condemnation, or until recovery is hopeless; 3 Mas. 161. He must bring home from foreign ports destitute seamen; Act of Congr. Feb. 28, 1803, § 4; R. S. § 4578; and must retain from the wages of his crew hospital-money; Act of Congr. Mar. 3, 1875; R. S. § 4585. He is personally liable to seamen for their wages; 123 Mass. 125.

He is liable to the owners, and he and they to all others whose interests are affected by his acts, for want of reasonable skill, care, or prudence in the navigation or management of the vessel; 1 Wash. C. C. 142; including injuries done to the cargo by the crew; 1 Mas. 104; and this rule includes the improper discharge of a seaman; Ware 65.

His *authority* on shipboard is very great; Ware 506; but is of a civil character. He has a right to control and direct the efforts of the crew, and to use such force as may be necessary to enforce obedience to his lawful commands. He may even take life, if necessary, to suppress a mutiny. He may degrade officers: 1 Blatchf. & H. 195, 366; 1 Pet. Adm. 244; 4 Wash. C. C. 338; 2 C. Rob. 261. He may punish acts of insolence, disobedience, and insubordination, and such other offences, when he is required to do so for the safety and discipline of the ship. Flogging is, however, prohibited on merchant vessels; R.S. § 4611; and for any unreasonable, arbitrary, or brutal exercise of authority towards a seaman or passenger he is liable, criminally and in a civil suit; 4 U. S. Stat. L. 776, 1235. In all cases which will admit of the proper delay for inquiry, due inquiry should precede the act of punishment; 1 Hagg. 274, per Lord Stowell. He has a right to exact from his officers and crew not only a strict observance of all his lawful orders, but also a respectful demeanor towards himself; 22 Fed. Rep. 927. He may also restrain or even confine a passenger who refuses to submit to the necessary discipline of the ship; 3 Mas. 242; but, without conferring with the officers and entering the facts in the log-book, he can inflict no higher punishment on a passenger than a reprimand; 7 Pa. L. J. 77; 6 C. & P. 472; 1 Conkl. Adm. 430; 14 Johns. 119; Desty, Adm. § 129.

If the master has not funds for the necessary supplies, repairs, and uses of his ship when abroad, he may borrow money for that purpose on the credit of his owners; 3 Wash. C. C. 484; and if it cannot be procured on his and their personal credit, he may take up money on bottomry, or in extreme cases may pledge his cargo; 3 Mas. 255. His authority to act as the owner's agent is based on necessity and ceases when the latter is within reach of instructions; [1893] A. C. 38; 67 Mich. 264. He cannot bind owners to pay for repairs done at the home port without special authority; 47 Me. 254; 19 How. 22; nor when they or their agents are so near that communication can be had with them without delay; 31 Conn. 51; Abb. Shipp. 162; 3 Kent 49. The extent of his contracts must be confined to the necessities of the case; 38 Fed. Rep. 447. He has no authority to execute bottomry or any express hypothecation of the ship for differences in freights in favor of the charterer, or for his advances of charter money; 37 *id.* 436; 36 *id.* 919. See BOTTOMRY; RESPONDENTIA.

Generally, when contracting within the ordinary scope of his powers and duties, he is personally responsible, as well as his owners, when they are personally liable. On bottomry loans, however, there is ordinarily no personal liability in this country or in England, beyond the funds which comes to the hands of the master or owners from the subject of the pledge; 6 Ben. 1; Abb. Sh. 90; Story, Ag. §§ 116, 123, 294. See 37 Fed. Rep. 436.

In most cases, too, the ship is bound for the performance of the master's contract; Ware 322; but all contracts of the master in chartering or freighting his vessel do not give such a lien; 19 How. 82.

Where the master of a ship is without fault during a period of detention resulting from seizure of the ship by legal process against the owner, he is entitled to wages on the terms of his contract, unless it stipulate to the contrary; 89 Ga. 660.

See Abbott, Shipp., 13th ed. pt. II. ch. i. —iv.; 2 Parsons, Shipp. & Adm. ch. xiv.; 3 Kent, Lect. xlvi. Kay, Shipmasters & Seamen; Flanders, Shipp.; Desty, Shipp. & Adm.; Blunt; Peters, Shipmasters; 10 Journ. Jur. 106; 3 Jur. Rev. 396; FLAG, LAW OF; LIEN.

**MASTER OF THE CROWN OFFICE.** The queen's coroner and attorney in the criminal department of the court of queen's bench, who prosecutes at the relation of some private person or common informer, the crown being the nominal prosecutor. Stat. 6 & 7 Vict. c. 20; Whart. Dict.

**MASTER OF THE FACULTIES.** An officer under the archbishop, who grants licenses, dispensations, etc. See COURT OF ARCHES.

**MASTER OF THE HORSE.** The third great officer of the royal household of England. He has the privilege of making use of any horses, footmen, or pages belonging to the royal stables.

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**MASTER OF THE MINT. In English Law.** An officer who superintends everything belonging to the mint.

**MASTER OF THE ORDNANCE.** An officer, in England, to whose care all the royal ordnance and artillery were committed.

**MASTER OF THE ROLLS. In English Law.** An officer of chancery, who has the keeping of the rolls and grants which pass the great seal and the records of the chancery. He formerly exercised extensive judicial functions in a court ranking next to that of the lord chancellor.

An officer with this title existed in the time of the Conqueror. He had from most ancient times an office in chancery, with distinct clerks. In early times no judicial authority was conferred by an appointment as master of the rolls. In the reigns of Hen. VI. and Edw. IV. he was found sitting in a judicial capacity, and from 1623 to 1873, had the regulation of some branches of the business of the court. He was the chief of the masters in chancery; and his judicial functions, except those specially conferred by commission, appear to have properly belonged to him in this character. 1 Spence, Eq. Jur. 100, 357.

All orders and decrees made by him, except those appropriate to the great seal alone, were valid, unless discharged or altered by the lord chancellor; but had to be signed by him before enrolment; and he was especially directed to hear motions, pleas, demurrers, and the like. Stat. 3 Geo. II. c. 30; 3 & 4 Will. IV. c. 94; 3 Bla. Com. 442.

Under the Judicature Acts, the court of the master of the rolls has been abolished, but he is a judge of the high court, and sits as the head of one of the divisions of the court of appeal. He is no longer, of necessity, a chancery lawyer.

Provision is made for the abolition of this office when it shall become vacant, by order in council, on the recommendation of the council of judges, provided that such order in council be laid before the houses of parliament for thirty days, and during that time neither house address her majesty against it; Stat. 36 & 37 Vict. c. 66, §§ 5, 31, 32; Mozl. & W. Law Dict.

**MASTERS AT COMMON LAW. In English Law.** Officers of the superior courts of common law, whose duty is to tax costs, compute damages, take affidavits and the like. They are five in number in each court. See stat. 7 Will. IV., and 1 Vict. c. 30.

**MATE. In Maritime Law.** The officer next in rank to the master on board a merchant ship or vessel.

In such vessels there is always one mate, and sometimes a second, third, and fourth mate, according to the vessel's size and the trade in which she may be engaged. When the word mate is used without qualification, it always denotes the first mate; and the others are designated as above. On large ships the mate is frequently styled first officer, and the second and third mates, second and third officers. Parish, Sea Off. Man. 83.

The mate, as well as the inferior officers and seamen, is a mariner, and entitled to sue in admiralty for his wages; and he has a lien on the vessel for his security. Even when he acts as master in consequence of the death of the appointed master, he can sue in the admiralty for his proper wages as mate, but not for the increased compensation to which he is entitled as acting master. And he is entitled, when sick, to be cured at the expense of the ship. The mate should possess a sufficient knowledge of navigation to take command of the ship and carry on the voyage in case of the death of the master; and it may well be doubted whether a vessel be seaworthy for a long voyage at sea when only the master is competent to navigate her; Blount, Com. Dig. 32; Dana, Seaman's Friend 146; Curtis, Rights and Duties of Merchant Seamen 96, note. It is the special duty of the mate to keep the log-book. The mate takes charge of the larboard watch at sea, and in port superintends the storage and breaking out of the cargo.

The mate succeeds, of course, to the station, rights, and authorities of the captain or master on the death of the latter, and he also has command, with the authority required by the exigencies of the case, during the temporary absence of the master. See Dana, Seaman's Friend; Parish, Sea-Officer's Manual; Curtis, Rights and Duties of Merchant Seamen; Parsons, Maritime Law; Desty, Shipp. & Adm.; MASTER OF A SHIP.

**MATELOTAGE.** The hire of a ship or boat.

**MATER FAMILIAS. In Civil Law.** The mother of a family; the mistress of a family.

A chaste woman, married or single. Calvinus, Lex.

**MATERIAL ALTERATION.** See ALTERATION.

**MATERIAL MEN.** Persons who furnish materials to be used in the construction or erection of ships, houses, or buildings.

By the general maritime law, material men have a lien on a foreign ship for supplies or materials furnished for such ship; which may be enforced in the admiralty; Bened. Adm. 266; 9 Wheat. 409; 19 How. 359; 55 Fed. Rep. 523; 56 *id.* 237; but no such lien exists in the case of domestic ships; 4 Wheat. 438; 20 How. 393; 21 *id.* 248; except when authorized by statute. See LIEN.

By statutory provisions, material men have a lien on ships and buildings, in some of the states. See LIEN.

The term is now much used in connection with those who furnished supplies to railroad companies, as to which see RECEIVERS.

**MATERIALITY.** The property of substantial importance or influence, especially as distinguished from formal requirement. Capability of properly influencing the result of the trial.

**MATERIALS.** Matter which is intended to be used in the creation of a mechanical structure. 71 Pa. 293; 36 Wisc. 29. The physical part of that which has a physical existence.

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The general property in materials furnished to a workman remains in the bailor where the contract is merely one for the employment of labor and services; otherwise where it is a sale. See BAILMENT; MANDATE; TROVER; TRESPASS.

**MATERNA MATERNIS** (Lat. from the mother to the mother's).

**In French Law.** A term denoting the descent of property of a deceased person derived from his mother to the relations on the mother's side.

**MATERNAL.** That which belongs to, or comes from, the mother: as, maternal authority, maternal relation, maternal estate, maternal line. See LINE.

**MATERNAL PROPERTY.** That which comes from the mother of the party, and other ascendants of the maternal stock. Domat, *Liv. Prél.* t. 3, s. 2., n. 12.

**MATERNITY.** The state or condition of a mother.

It is either legitimate or natural. The former is the condition of the mother who has given birth to legitimate children; while the latter is the condition of her who has given birth to illegitimate children. Maternity is always certain; while the paternity is only presumed.

**MATERTERA.** A mother's sister.

**MATERTERA MAGNA.** A grandmother's sister.

**MATERTERA MAJOR.** A great-grandmother's sister.

**MATERTERA MAXIMA.** A great-great grandmother's sister.

**MATH.** A moving.

**MATHEMATICAL EVIDENCE.** That evidence which is established by a demonstration. It is used in contradistinction to moral evidence.

**MATIMA.** A godmother.

**MATRICIDE.** The murder of one's mother.

**MATRICULA. In Civil Law.** A register in which are inscribed the names of persons who become members of an association or society. Dig. 50. 3. 1. In the ancient church there was *matricula clericorum*, which was a catalogue of the officiating clergy, and *matricula pauperum*, a list of the poor to be relieved: hence, to be entered in a university is to be matriculated.

**MATRIMONIAL CAUSES.** In the English ecclesiastical courts there are five kinds of causes which are classed under this head, viz.: causes for a malicious jactitation; suits for nullity of marriage, on account of fraud, incest, or other bar to the marriage; 2 Hagg. Cons. 423; suits for restitution of conjugal rights; suits for divorce on account of cruelty or adultery, or causes which have arisen since the marriage; suits for alimony.

Matrimonial causes were formerly a branch of the ecclesiastical jurisdiction. By the Divorce Act of 1857, they passed under the cognizance of the court for divorce and matrimonial causes created by that act. See JUDICATURE ACTS.

**MATRIMONIAL CAUSES ACTS.** A series of English statutes relating to divorce and matrimonial causes. See Brett, Eng. Com. 958; 4 Chitty, Stat.

**MATRIMONIAL DOMICIL.** See DOMICIL; ALIEN; and see also 20 Law Mag. & Rev. 330; 2 Brett, Com. 957.

**MATRIMONIUM. In Civil Law.** A legal marriage. A marriage celebrated in conformity with the rules of the civil law was called *justum matrimonium*; the husband *vir*, the wife *uxor*. It was exclusively confined to Roman citizens, and to those to whom the *connubium* had been conceded. It alone produced the paternal power over the children, and the marital power—*manus*—over the wife. The *farreum*, the *coemptio*, or the *usus*, was indispensable for the formation of this marriage. See PATERFAMILIAS.

**MATRIMONY.** Marriage; the nuptial state. See MARRIAGE.

**MATRIX ECCLESIA.** The mother church.

**MATRON.** A married woman.

**MATRONS, JURY OF.** See JURY OF WOMEN.

**MATTER.** As used in law, a fact or facts constituting the whole or a part of a ground of action or defence. 18 Ind. 332. See 40 Ala. 148.

**MATTER IN CONTROVERSY, or IN DISPUTE.** The subject of litigation, in the matter for which a suit is brought and upon which issue is joined. 1 Wall. 337.

To ascertain the matter in dispute we must recur to the foundation of the original controversy; the thing demanded, not the thing found; 3 Dall. 405. An appeal will not lie on a claim insufficient in amount to give jurisdiction when suit was instituted, but which has been brought within the limitation by the after-accrued interest; 2 La. Ann. 793; *id.* 911; 12 *id.* 87. See 3 Cra. 159; 1 S. & R. 269.

**MATTER IN DEED.** Such matter as may be proved or established by a deed or specialty. Matter of fact, in contradistinction to matter of law. Co. Litt. 320; Steph. Pl. 197.

**MATTER IN ISSUE.** That matter upon which the plaintiff proceeds by his

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action, and which the defendant controverts by his pleadings. 15 N. H. 1. That ultimate fact or state of facts in dispute upon which the verdict or finding is predicated. 4 Fed. Rep. 886.

**MATTER IN PAIS** (literally, matter in the country). Matter of fact, as distinguished from matter of law or matter of record.

**MATTER OF FACT. In Pleading.** Matter, the existence or truth of which is determined by the senses or by reasoning based upon their evidence. The decision of such matters is referred to the jury. Hob. 127; 1 Greenl. Ev. § 49.

**MATTER OF FORM.** That which relates merely to the form of an instrument or to its language, arrangement, or technicality, without affecting its substance.

**MATTER OF LAW. In Pleading.** Matter, the truth or falsity of which is determined by the established rules of law or by reasoning based upon them. The decision of such matters is referred to the court. Where special pleading prevails, it is a rule that matter of law must be pleaded specially. The phrase here means matter which, if established as true, goes to defeat the plaintiff's charges by the effect of some rule of law, as distinguished from that which operates as a direct negative. See 70 N. C. 167.

**MATTER OF RECORD.** Those facts which may be proved by the production of a record. It differs from matter in deed, which consists of facts which may be proved by specialty.

**MATTER OF SUBSISTENCE FOR MAN.** All articles or things, whether animal or vegetable, living or dead, which are used for food, and whether they are consumed in the form in which they are bought from the producer or only after undergoing a process of preparation. 19 Gratt. 813.

**MATTER OF SUBSTANCE.** That which goes to the merits.

**MATURITY.** The time when a bill or note becomes due. See DAYS OF GRACE.

**MAXIM.** An established principle or proposition. A principle of law universally admitted as being just and consonant with reason.

Maxims are said to have been of comparatively late origin in the Roman law. There are none in the Twelve Tables, and they appear but rarely in Gaius and the ante-Justinian fragments, or in the older English text-books and reports. The word *maximum* or *maxima* does not occur in the *Corpus Juris* in any meaning resembling that now borne by it; the nearest word in classical Roman law is *regula;* Fortescue identifies the two terms, and Du Cange defines *maxima* as *recepta sententia, regula vulgo nostris et Anglis maxime.* Doctor and Student defines maxims as "the foundations of the Law and the conclusions of reason, and therefore they ought not to be impugned, but always to be admitted." Coke says they are "a sure foundation or ground of art and a conclusion of reason, so sure and uncontrolled that they ought not to be questioned," and that a maxim is so called "*quia maxima ejus dignitas et certissima auctoritas, atque quod maxime omnibus probetur.*" Co. Litt. 11 *a.* He says in another place: "A maxime is a proposition to be of all men confessed and granted without proofe, argument, or discourse." See 20 L. Quart. & Rev. 288.

*Regula* appears not to be quite the same thing as maxim. The Digest makes the line between *regula, definitio,* and *sententia* a narrow one. *Sententia* is used in several texts as equivalent to *regula. Definitio,* in Labeo, is really a rule of law. In Papinius it is more like *responsa prudentis.* In some editions of the *Corpus Juris,* maxims are given under the name of *Regulæ et Sententiæ Juris.* See 20 L. Mag. & Rev. 288.

Maxims in law are said to be somewhat like axioms in geometry. 1 Bla. Com. 68. They are principles and authorities, and part of the general customs or common law of the land, and are of the same strength as acts of parliament, when the judges have determined what is a maxim. This determination belongs to the court and not the jury; *Termes de la Ley* Doct. & Stud. Dial. 1, c. 8; they prove themselves; *id.* Maxims of the law are holden for law, and all other cases that may be applied to them shall be taken for granted; Co. Litt. 11, 67. See Plowd. 27 *b.*

The alteration of any of the maxims of the common law is dangerous; 2 Inst. 210.

See the introduction by W. F. Cooper to Barton's Maxims.

Later writers place less value on maxims; thus: "It seems to me that legal maxims in general are little more than pert headings of chapters. They are rather minims than maxims, for they give not a particularly great, but a particularly small, amount of information. As often as not the exceptions and qualifications to them are more important than the so-called rules." 2 Steph. Hist. of Cr. L. 94.

"We believe that not a single law maxim can be pointed out which is not obnoxious to objection." Towns. Sl. & Lib. § 88.

"Many of the sayings that are dignified by the name of maxims are nothing but the *obiter dicta* of ancient judges who were fond of sententious phrases, and sometimes sacrificed accuracy of definition to terseness of expression; and some . . . have no definite meaning at all." E. Q. Keasbey, in 3 N. J. L. J. 160.

"Maxims are not all of equal value; some ought to be amended and others discarded altogether; they are neither definitions nor treatises; they require the test of careful analysis; they are in many instances merely guide-posts pointing to the right road, but not the road itself." Prof. Jeremiah Smith, in 9 Harv. L. Rev. 26.

"I need hardly repeat that I detest the

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attempt to fetter the law by maxims. They are almost invariably misleading; they are for the most part so large and general in their language that they always include something which really is not intended to be included in them." Lord Esher, M. R., in 19 Q. B. D. 653.

Maxims have been divided, as to their origin, into three classes: Roman, Roman modified, and indigenous; 20 L. Mag. & Rev. 283.

The application of the maxim to the case before the court is generally the only difficulty. The true method of making the application is to ascertain how the maxim arose, and to consider whether the case to which it is sought to be applied is of the same character, or whether it is an exception to an apparently general rule. This requires extended discussion, which it has received (so far as the more important maxims are concerned) in the able treatise on Legal Maxims by Broom.

*Non ex regula jus sumatur, sed ex jure quod est regula fiat.* The law should not be taken from maxims, but maxims from the law; 9 Jurid. Rev. 307.

The earliest work on maxims appears to have been that of Bacon (1630), followed by Noy (1641), Wingate (1658), Heath (Pleading, 1694), Francis (1728), Grounds and Rudiments of Law and Equity (anonymous, 1751, of which Francis was the author), Branch (1753), Lofft (1776, in his Reports). In the present century, Broom (1845), Trayner (1872, 1883), Cotterell (1881, 1894), and Wharton's Dictionary (1848, 1892), Lawson (1883), Bell's Dictionary (Scotch, 1890), Peloubet (New York, 1880), Barton, Stimson, Morgan, Tayler, Hening, Halkerston, Jackson (Law Latin), and Hughes. See the various Law Dictionaries; also 15 West. Jur. 337; 13 Cr. L. Mag. 832; 5 L. Quart. Rev. 444.

The following list comprises, it is believed, all the legal maxims, commonly so called, together with some that are in reality nothing more than legal phrases, accompanied by a translation, and, in most cases, a reference to one or more authorities which are intended to show the origin or application of the rule. It is obvious that many of them are of slight value and that more of them are open to objections, so far as they can be considered to be statements of principles of law.

*A communi observantia non est recedendum.* There should be no departure from common observance (or usage). Co. Litt. 186; Wing. Max. 208; 2 Co. 74.

*A digniori fieri debet denominatio et resolutio.* The denomination and explanation ought to be derived from the more worthy. Wing. Max. 265; Fleta, lib. 4, c. 10, § 12.

*A justitia (quasi a quodam fonte) omnia jura emanant.* From justice, as a fountain, all rights flow. Brac. 2 *b*.

*A l'impossible nul n'est tenu.* No one is bound to do what is impossible.

*A non posse ad non esse sequitur argumentum necessarie negative, licet non affirmative.* From impossibility to non-existence the inference follows necessarily in the negative, though not in the affirmative. Hob. 336.

*A piratis aut latronibus capti liberi permanent.* Those captured by pirates or robbers remain free. Dig. 49. 15. 192; Grot. lib. 3, c. 3, s. 1.

*A piratis et latronibus capta dominium non mutant.* Things captured by pirates or robbers do not change their ownership. 1 Kent 108, 184; 2 Woodd. Lect. 258, 259.

*A rescriptis valet argumentum.* An argument from rescripts [*i. e.* original writs in the register] is valid. Co. Litt. 11 *a*.

*A summo remedio ad inferiorem actionem non habetur regressus neque auxilium.* From the highest remedy to an inferior action there is no return or assistance. Fleta, lib. 6, c. 1; Brac. 104 *a*, 112 *b*; 3 Sharsw. Bla. Com. 193, 194.

*A verbis legis non est recedendum.* From the words of the law there should be no departure. Broom, Max. 622; Wing. Max. 25; 5 Co. 119.

*Ab abusu ad usum non valet consequentia.* A conclusion as to the use of a thing from its abuse is invalid. Broom, Max. xvii.

*Ab assuetis non fit injuria.* No injury is done by things long acquiesced in. Jenk. Cent. Introd. vi.

*Abbreviationum ille numerus et sensus accipiendus est ut concessio non sit inanis.* Such number and sense is to be given to abbreviations that the grant may not fail. 9 Co. 48.

*Absentem accipere debemus eum qui non est eo loco in quo petitur.* We must consider him absent who is not in that place in which he is sought. Dig. 50. 60. 199.

*Absentia ejus qui reipublicæ causa abest, neque ei neque aliis damnosa esse debet.* The absence of him who is employed in the service of the state ought not to be prejudicial to him nor to others. Dig. 50. 17. 140.

*Absoluta sententia expositore non indiget.* A simple proposition needs no expositor. 2 Inst. 533. See 109 Mass. 325.

*Abundans cautela non nocet.* Abundant caution does no harm. 11 Co. 6; Fleta, lib. 1, c. 28, § 1; 6 Wheat 108.

*Accessorium non ducit sed sequitur suum principale.* The accessory does not draw, but follows, its principal. Co. Litt. 152 *a*, 389 *a*; 5 E. & B. 772; Broom, Max. 491; Lindl. Part. 1036; 21 Misc. Rep. 84.

*Accessorius sequitur naturam sui principalis.* An accessory follows the nature of his principal. 3 Inst. 139; 4 Bla. Com. 36; Broom, Max. 497.

*Accipere quid ut justitiam facias, non est tam accipere quam extorquere.* To accept anything as a reward for doing justice, is rather extorting than accepting. Lofft 72.

*Accusare nemo debet se, nisi coram Deo.* No one is obliged to accuse himself, unless before God. Hardr. 139.

*Accusator post rationabile tempus non est audiendus, nisi se bene de omissione excusaverit.* An accuser is not to be heard after a reasonable time, unless he excuse himself satisfactorily for the omission. F. Moore 817; Bart. Max. 29.

*Acta exteriora indicant interiora secreta.* Outward acts indicate the inward intent. Broom, Max. 301; 8 Co. 146 *b*; 1 Sm. L. Cas. 261.

*Acta in uno judicio non probant in aliis nisi inter easdem personas.* Things done in one action cannot be taken as evidence in another, unless it be between the same parties. Trayner, Max. 11.

*Actio non datur non damnificato.* An action is not given to one who is not injured. Jenk. Cent. 69.

*Actio non facit reum, nisi mens sit rea.* An action does not make one guilty, unless the intention be bad. Lofft 37. See *Actus non*, etc.

*Actio personalis moritur cum persona.* A personal action dies with the person. Noy, Max. 14; Broom, Max. 904; 18 Mass. 455; 1 Pick. 78; 21 Pick. 252; Bart. Max. 30; 38 Fed. Rep. 80; 98 Ky. 700; 34 L. R. A. 788; 93 Va. 396; 25 S. E. Rep. 110; 40 W. N. C. 345; 8 Am. & Eng. Rul. Cas. N. S. 309. See ACTIO PERSONALIS.

*Actio quælibet it sua via.* Every action proceeds in its own course. Jenk. Cent. 77.

*Actionum genera maxime sunt servanda.* The kinds of actions are especially to be preserved. Lofft 460.

*Actor qui contra regulam quid aduxit, non est audiendus.* A pleader ought not to be heard who advances a proposition contrary to the rules of law.

*Actor sequitur forum rei.* The plaintiff must follow the forum of the thing in dispute. Home, Law Tr. 232; Story, Confl. L. § 325 *k*; 2 Kent 462.

*Actore non probante, reus absolvitur.* If the plaintiff does not prove his case, the defendant is absolved. Hob. 103.

*Actori incumbit onus probandi.* The burden of proof lies on the plaintiff. Hob. 103; 100 Mass. 490. See Dig. 22. 3. 2.

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*Acts indicate the intention.* 8 Co. 146 *b*; Broom, Max. 301.

*Actus curiæ neminem gravabit.* An act of the court shall prejudice no man. Jenk. Cent. 118; Broom, Max. 122; 1 Str. 426; 1 Sm. L. C., notes to Cumber *vs.* Wane; 12 C. B. 415.

*Actus Dei nemini facit injuriam.* The act of God does wrong to no one (that is, no one is responsible in damages for inevitable accidents). 2 Bla. Com. 122; Broom, Max. 230; 1 Co. 97 *b*; 5 *id.* 87 *a*; Co. Litt. 206 *a*; 4 Taunt. 309; 1 Term 33; 56 Conn. 374. See ACT OF GOD.

*Actus inceptus cujus perfectio pendet ex voluntate partium, revocari potest; si autem pendet ex voluntate tertiæ personæ, vel ex contingenti, revocari non potest.* An act already begun, whose completion depends upon the will of the parties, may be recalled; but if it depend on consent of a third person, or on a contingency, it cannot be recalled. Bacon, Max. Reg. 20. See Story, Ag. § 424.

*Actus judiciarius coram non judice irritus habetur; de ministeriali autem a quocunque provenit ratum esto.* A judicial act before one not a judge is void; as to a ministeral act, from whomsoever it proceeds, let it be valid. Lofft 458.

*Actus legis nemini est damnosus.* An act of the law shall prejudice no man. 2d Inst. 287; Broom, Max. 126; 11 Johns. 380; 3 Co. 87 *a*; Co. Litt. 264 *b*; 5 Term 381, 385; 2 H. Bla. 324; 1 Prest. Abs. of Tit. 346; 6 Bacon, Abr. 559.

*Actus legis nemini facit injuriam.* The act of the law does no one wrong. Broom, Max. 127, 409; 2 Bla. Com. 123.

*Actus legitimi non recipiunt modum.* Acts required by law admit of no qualification. Hob. 153; Branch, Pr.

*Actus me invito factus, non est meus actus.* An act done by me against my will is not my act. Brac. 101 *b*.

*Actus non reum facit nisi mens sit rea.* An act does not make a person guilty unless his intention be guilty also. (This maxim applies only in criminal cases; in civil matters it is otherwise.) Broom, Max. 306, 367, 807, n.; 7 Term 514; 3 Bingh. N. C. 34, 468; 5 M. & G. 639; 3 C. B. 229; 5 *id.* 380; 9 Cl. & F. 531; 4 N. Y. 159, 163, 195; L. R. 2 C. C. R. 160 (a very full case). It has been said that this is "the foundation of all criminal justice;" 8 Cox, Cr. Cas. 477, per Cockburn, C. J.; but it has also been said to be "an unfortunate phrase and actually misleading;" L. R. 23 Q. B. D. 185; and to be "somewhat uncouth;" *id.* 181; also that "the expression (*mens rea*) is unmeaning;" 2 Steph. Hist. Cr. L. 95. See IGNORANCE; INTENTION; MENS REA.

*Actus repugnans non potest in esse product.* A repugnant act cannot be brought into being (*i. e.* cannot be made effectual). Plowd. 355.

*Actus servi in iis quibus opera ejus communiter adhibita est, actus domini habetur.* The act of a servant in those things in which he is usually employed, is considered the act of his master. Lofft 227.

*Ad ea quæ frequentius accidunt jura adaptantur.* The laws are adapted to those cases which occur more frequently. 2 Inst. 137; Wing. Max. 216; Dig. 1. 3. 3; 19 How. St. Tr. 1061; 3 B. & C. 178, 183; 3 C. & J. 108; 7 M. & W. 599, 600; Vaugh. 373; 6 Co. 77 *a*; 11 Exch. 476; 11 *id.* 628; 12 How. 312; 7 Allen 287; Broom, Max. 43.

*Ad officium justiciariorum spectat, unicuique coram eis placitanti justitiam exhibere.* It is the duty of justices to administer justice to every one pleading before them. 2 Inst. 451.

*Ad proximum antecedens fiat relatio, nisi impediatur sententia.* A relative is to be referred to the next antecedent, unless the sense would be thereby impaired. Broom, Max. 630; Noy, Max., 9th ed. 4; 2 Exch. 479; 17 Q. B. 833; 2 H. & N. 625; 3 Bingh. N. C. 217; 13 How. 142.

*Ad quæstiones facti non respondent judices; ad quæstiones legis non respondent juratores.* The judges do not answer to questions of fact; the jury do not answer to questions of law. Co. Litt. 295; 8 Co. 155 *a*; Vaugh. 149; 5 Gray 211, 219, 290; Broom, Max. 102.

*Ad quæstiones juris respondent judices; ad quæstionem facti respondent juratores.* 116 Cal. 179. See JURY.

*Ad quæstiones legis judices, et non juratores, respondent.* Judges, and not jurors, respond to questions of law. 7 Mass. 279. See JURY.

*Ad recte docendum oportet, primum inquirere nomina, quia rerum cognitio a nominibus rerum dependet.* In order rightly to comprehend a thing, inquire first into the names, for a right knowledge of things depends upon their names. Co. Litt. 68.

*Ad vim majorem vel ad casus fortuitos non tenetur quis, nisi sua culpa intervenerit.* No one is held to answer for the effects of a superior force, or of accidents, unless his own fault has contributed. Fleta, lib. 2, c. 72, § 16.

*Additio probat minoritatem.* An addition proves inferiority. That is, if it be said that a man has a fee tail, it is less than if he has the fee. 4 Inst. 80; Wing. Max. 211, Max. 60; Littleton § 298; Co Litt. 189 *a*.

*Adjuvari quippe nos, non decipi, beneficio oportet.* For we ought to be helped by a benefit, not destroyed by it. Dig. 13. 6, 17. 3; Broom, Max. 392.

*Ædificare in tuo proprio solo non licet quod alteri noceat.* It is not lawful to build upon one's own land what may be injurious to another. 3 Inst. 201; Broom, Max. 369.

*Ædificatum solo, solo cedit.* That which is built upon the land goes with the land. Co. Litt. 4 *a*; Inst. 2. 1. 29; Dig. 47. 3. 1.

*Ædificia solo cedunt.* Buildings pass by a grant of the land. Fleta, lib. 3, c. 2, § 12.

*Æquior est dispositio legis quam hominis.* The disposition of the law is more impartial than that of man. 8 Co. 152 *a*.

*Æquitas agit in personam.* Equity acts upon the person. 4 Bouv. Inst. n. 3733.

*Æquitas est correctio legis generaliter latæ qua parte deficit.* Equity is the correction of law, when too general, in the part in which it is defective. Plowd. 375; Bart. Max. 135.

*Æquitas ignorantiæ opitulatur, oscitantiæ non item.* Equity assists ignorance, but not carelessness.

*Æquitas non facit jus, sed juri auxiliatur.* Equity does not make law, but assists law. Lofft 379.

*Æquitas nunquam contravenit legem.* Equity never contradicts the law.

*Æquitas sequitur legem.* Equity follows the law. 1 Story, Eq. Jur. § 64; 3 Woodd. Lect. 479, 482; Branch, Max. 8; 2 Bla. Com. 330; Gilb. 136; 2 Eden 316; 10 Mod. 3; 15 How. 299; 7 Allen 503; 5 Barb. 277, 282; 65 Minn. 156.

*Æquitas supervacua odit.* Equity abhors superfluous things. Lofft 282.

*Æquum et bonum, est lex legum.* What is just and right is the law of laws. Hob. 224.

*Æstimatio præteriti delicti ex postremo facto nunquam crescit.* The estimation of a crime committed never increases from a subsequent fact. Bacon, Max. Reg. 8; Dig. 50, 17. 139.

*Affectio tua nomen imponit operi tuo.* Your motive gives a name to your act. Bract. 2 *b*, 101 *b*.

*Affectus punitur licet non sequatur effectus.* The intention is punished although the consequence do not follow. 9 Co. 57 *a*; See ATTEMPT.

*Affinis mei affinis non est mihi affinis.* A connection (*i. e.* by marriage) of my connection is not a connection of mine. Shelf. Marr. & D. 174.

*Affirmanti, non neganti, incumbit probatio.* The proof lies upon him who affirms, not on him who denies. See Phill. Ev. 493.

*Affirmantis est probare.* He who affirms must prove. 9 Cush. 535; 42 S. W. Rep. (Ind. Terr.) 282.

*Agentes et consentientes pari pœna plectentur.* Acting and consenting parties are liable to the same punishment. 5 Co. 80 *a*.

*Aliena negotia exacto officio geruntur.* The business of another is to be conducted with particular attention. Jon. Bailm. 83; 79 Pa. 118.

*Alienatio licet prohibeatur, consensu tamen omnium in quorum favorem prohibita est, potest fieri, et quilibet potest renunciare juri pro se introducto.* Although alienation be prohibited, yet, by the consent of all in whose favor it is prohibited, it may take place, for it is in the power of any man to renounce a right introduced for his own benefit. Co. Litt. 98; 9 N. Y. 291.

*Alienatio rei præfertur juri accrescendi.* Alienation is favored by the law rather than accumulation. Co. Litt. 185 *a*, 381 *a*, note; Broom, Max. 442, 458; Wright, Ten. 154; 1 Cruise, Dig. 77; 11 Ves. Jr. 112, 149; 10 L. T. N. S. 682.

*Alienation pending a suit is void.* 2 P. Wms. 482; 2 Atk. 174; 3 *id.* 392; 11 Ves. 194; 1 Johns. Ch. 566, 580. See LIS PENDENS.

*Aliquid conceditur ne injuria remaneat impunita, quod alias non concederetur.* Something is conceded lest a wrong should remain unpunished which otherwise would not be conceded. Co. Litt. 197.

*Aliquis non debet esse judex in propria causa, quia non potest esse judex et pars.* A person ought

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not to be judge in his own cause, because he cannot act both as judge and party. Co. Litt. 141 *a*; Broom, Max. 117; Littleton § 212; 18 Q. B. 327; 17 *id.* 1; 15 C. B. 769: 1 C. B. n. s. 329. See JUDGE; INCOMPETENCY.

*Aliud est celare, aliud tacere.* To conceal is one thing, to be silent another. 3 Burr. 1910. See 2 Wheat. 176; 9 *id.* 631; 3 Bingh. 77; 4 Taunt. 851; 2 C. & P. 341; 18 Pick. 420; 22 *id.* 58; 12 Cush. 495; Broom, Max. 732; [1895] 2 Ch. 205.

*Aliud est distinctio, aliud separatio.* Distinction is one thing, separation another. Bacon's arg. Case of Postnati of Scotland, Works iv. 351.

*Aliud est possidere, aliud esse in possessione.* It is one thing to possess, it is another to be in possession. Hob. 163; Bract. 206.

*Aliud est vendere, aliud vendenti consentire.* To sell is one thing, to give consent to him who sells another. Dig. 50. 17. 160.

*Allegans contraria non est audiendus.* One making contradictory allegations is not to be heard. Jenk. Cent. 16; Broom, Max. 169, 294; 4 Term 211; 3 Exch. 446, 527, 678; 3 E. & B. 363; 5 C. B. 195, 886; 10 Mass. 163; 70 Pa. 274; 4 Inst. 279; 19 R. I. 510.

*Allegans suam turpitudinem non est audiendus.* One alleging his own infamy is not to be heard. 4 Inst. 279; 2 Johns. Ch. 339; 113 N. Y. 52; 13 Ch. Div. 696.

*Allegari non debuit quod probatum non relevat.* That ought not to be alleged which, if proved, would not be relevant. 1 Ch. Cas. 45.

*Allegatio contra factum non est admittenda.* An allegation contrary to a deed is not admissible. See ESTOPPEL.

*Alterius circumventio alii non præbet actionem.* Dig. 50. 17. 49. A deception practised upon one person does not give a cause of actiop to another.

*Alternativa petitio non est audienda.* An alternative petition is not to be heard. 5 Co. 40, *a*.

*Ambigua responsio contra proferentem est accipienda.* An ambiguous answer is to be taken against the party who offers it. 10 Co. 59 *a*.

*Ambiguis casibus semper præsumitur pro rege.* In doubtful cases the presumption is always in favor of the king.

*Ambiguitas contra stipulatorem est.* Doubtful words will be construed most strongly against the party using them. See INSURANCE.

*Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur.* A latent ambiguity may be supplied by evidence; for an ambiguity which arises out of a fact may be removed by proof of the fact. Bacon, Max. Reg. 23; 8 Bingh. 247. See 1 Pow. Dev. 477; Bart. Max. 39; 2 Kent 557; Broom, Max. 608; 13 Pet. 97; 1 Gray 138; 100 Mass. 60; 8 Johns. 90; 3 Halst. 71. Said to be "an unprofitable subtlety; "inadequate and uninstructive." Prof. J. B. Thayer in 6 Harv. L. Rev. 417. See LATENT AMBIGUITY.

*Ambiguitas verborum patens nulla verificatione excluditur.* A patent ambiguity is never holpen by averment. Lofft 249; Bacon, Max. 25; 21 Wend. 651; 23 *id.* 71; 1 Mas. 11; 1 Tex. 377. See PATENT AMBIGUITY.

*Ambiguum placitum interpretari debet contra proferentem.* An ambiguous plea ought to be interpreted against the party pleading it. Co. Litt. 303 *b*; Broom, Max. 601; Bacon, Max. Reg. 3; 2 H. Bla. 531; 2 M. & W. 444.

*Ambulatoria est voluntas defuncti usque ad vitæ supremum exitum.* A will is ambulatory until the last moment of life. Broom, Max. 503; 2 Bla. Com. 502; Co. Litt. 322 *b*; 3 E. & B. 573; 1 M. & K. 485.

*Angliæ jura in omni casu libertati dant favorem.* The laws of England are favorable in every case to liberty. Halkers, Max. 12.

*Animus ad se omne jus ducit.* It is to the intention that all law applies.

*Animus hominis est anima scripti.* The intention of the party is the soul of the instrument. 3 Bulstr. 67; Pitman, Princ. & Sur. 26.

*Anniculus trecentesimo sexagesimo-quinto die dicitur, incipiente plane non exacto die, quia annum civiliter non ad momenta temporum sed ad dies numeramus.* We call a child a year old on the three hundred and sixty-fifth day, when the day is fairly begun but not ended, because we calculate the civil year not by moments, but by days. Dig. 50. 16. 134; *id.* 132; Calvinus, Lex. See AGE.

*Annua nec debitum judex non separat ipse.* Even the judge apportions not annuities or debt. 8 Co. 52. See Story, Eq. Jur. §§ 480, 517; 1 Salk. 36, 65.

*Annus est mora motus quo suum planeta pervolvat circulum.* A year is the duration of the motion by which a planet revolves through its orbit. Dig. 40. 7. 4. 5; Calvinus, Lex.; Bract. 359 *b*.

*Annus inceptus pro completo habetur.* A year begun is held as completed. Said to be of very limited application. Trayner, Max. 45.

*Apices juris non sunt jura.* Legal niceties are not laws. Co. Litt. 304; 3 Scott 773; 10 Co. 126; Broom, Max. 188. See APEX JURIS.

*Applicatio est vita regulæ.* The appilcation is the life of a rule. 2 Bulstr. 79.

*Aqua cedit solo.* The grant of the soil carries the water. Hale, *de Jur. Mar.* pt. 1, c. 1.

*Aqua currit et debet currere ut currere solebat.* Water runs and ought to run as it was wont to run. 3 Rawle 84, 88; Bart. Max. 315; 26 Pa. 413; 3 Kent 439; Ang. Wat. Cour. 413; Gale & W. Easem. 182; 20 Nev. 269; 39 S. W. Rep. (Tenn.) 905.

*Arbitrimentum æquum tribuit cuique suum.* A just arbitration renders to every one his own. Noy, Max. 248.

*Arbitrium est judicium.* An award is a judgment. Jenk. Cent. 137; 3 Bulstr. 64.

*Arbor, dum crescit; lignum, dum crescere nescit.* A tree while it is growing; wood when it cannot grow. Cro. Jac. 166; 12 Johns. 239, 241; 21 Wall. 64.

*Argumentum a divisione est fortissimum in jure.* An argument based on a subdivision of the subject is most powerful in law. 6 Co. 60 *a*; Co. Litt. 213 *b*; 69 Vt. 292.

*Argumentum a majori ad minus negative non valet; valet e converso.* An argument from the greater to the less is of no force negatively; conversely it is. Jenk. Cent. 281.

*Argumentum a simili valet in lege.* An argument drawn from a similar case, or analogy, avails in law. Co. Litt. 191.

*Argumentum ab auctoritate est fortissimum in lege.* An argument drawn from authority is the strongest in law. Co. Litt. 254.

*Argumentum ab impossibili plurimum valet in lege.* An argument deduced from impossibility greatly avails in law. Co. Litt. 92.

*Argumentum ab inconvenienti est validum in lege; quia lex non permittit aliquod inconveniens.* An argument drawn from what is inconvenient is good in law, because the law will not permit any inconvenience. Co. Litt. 66 *a*, 258; 7 Taunt. 527; 3 B. & C. 131; 6 Cl. & F. 671. See Brown, Max. 184; Cooley, Const. Lim. 82–86.

*Arma in armatos sumere jura sinunt.* The laws permit the taking arms against the armed. 2 Inst. 574.

*Assignatus utitur jure auctoris.* An assignee is clothed with the rights of his principal. Halkers. Max. 14; Broom, Max. 465, 477; Wing. Max. 56; 1 Exch. 32; 18 Q. B. 878; Perkins § 100.

*Auctoritates philosophorum, medicorum et poetarum sunt in causis allegandæ et tenendæ.* The opinions of philosophers, physicians, and poets are to be alleged and received in causes. Co. Litt. 264.

*Aucupia verborum sunt judice indigna.* Catching at words is unworthy of a judge. Hob. 343.

*Audi alteram partem.* Hear the other side (or no man should be condemned unheard). Broom, Max. 113; 46 N. Y. 119; 1 Cush. 243; 96 Mo. 478.

*Authority to execute a deed must be given by deed.* Comyn, Dig. *Attorney* (C 5); 4 Term 313; 7 *id.* 207; 1 Holt 141; 9 Wend. 68, 75; 5 Mass. 11; 5 Binn. 613.

*Baratriam committit qui propter pecuniam justitiam baractat.* He is guilty of barratry who for money sells justice. Bell, Dict. (Barratry at common law has a different signification. See BARRATRY.)

*Bastardus non potest habere hæredem nisi de corpore suo legitime procreatum.* A bastard can have no heir unless it be one lawfully begotten of his own body. Trayner, Max. 51.

*Bello parta cedunt reipublicæ.* Things acquired in war go to the state. Cited 2 Russ. & M. 56; 1 Kent 101; 5 C. Rob. 155, 163; 1 Gall. 558.

*Benedicta est expositio quando res redimitur a destructione.* Blessed is the exposition when the thing is saved from destruction. 4 Co. 26 *b*.

*Benigne faciendæ sunt interpretationes chartarum, ut res magis valeat quam pereat; et quælibet concessio fortissime contra donatorem interpretanda est.* Liberal interpretations are to be made of deeds, so that more may stand than fall; and every grant is to be taken most strongly against the grantor. 4 Mass. 134; 1 Sandf. Ch. 258, 268; compare *id.* 275, 277; 78 Pa. 219.

*Benigne faciendæ sunt interpretationes propter simplicitatem laicorum, ut res magis valeat quam pereat; et verba intentioni, non e contra, debent in-*

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*servire.* Construction should be liberal on account of the ignorance of the laity, so that the subject-matter may avail rather than perish; and words must be subject to the intention, not the intention to the words. Co. Litt. 36 *a*; Broom, Max. 540, 565, 645; 11 Q. B. 852, 856, 868, 870; 4 H. L. Cas. 556; 2 Bla. Com. 379; 1 Bulstr. 175; 1 Whart. 315.

*Benignior sententia in verbis generalibus seu dubiis est preferanda.* The more favorable construction is to be placed on general or doubtful expressions. 4 Co. 15; Dig. 50. 17. 192. 1; 2 Kent 557.

*Benignius leges interpretandæ sunt quo voluntas earum conservetur.* Laws are to be more favorably interpreted, that their intent may be preserved. Dig. 1. 3. 16.

*Between equal equities the law must prevail.* See EQUITY. This is hardly of general application.

*Bis dat qui cito dat.* He pays twice who pays promptly.

*Bis idem exigi bona fides non patitur, et in satisfactionibus non permittitur amplius fieri quam semel factum est.* Good faith does not suffer the same thing to be exacted twice; and in making satisfaction, it is not permitted that more should be done after satisfaction is once made. 9 Co. 53; Dig. 50. 17. 57.

*Bona fide possessor facit fructus consumptos suos.* By good faith a possessor makes the fruits consumed his own. Trayner, Max. 57.

*Bona fides exigit ut quod convenit fiat.* Good faith demands that what is agreed upon shall be done. Dig. 19. 20. 21; *id.* 19. 1. 50; *id.* 50. 8. 2. 13.

*Bona fides non patitur ut bis idem exigatur.* Good faith does not allow us to demand twice the payment of the same thing. Dig. 50. 17. 57; Broom, Max. 338, n.; 4 Johns. Ch. 143.

*Bonæ fidei possessor in id tantum quod ad se pervenerit tenetur.* A *bona fide* possessor is bound for that only which has come to him. 2 Inst. 285; Gro. *de J. B.* lib. 2, c. 10, § 3 *et seq.*

*Boni judicis est ampliare jurisdictionem (or justitiam).* See 1 Burr. 304. It is the part of a good judge to enlarge his jurisdiction; that is, his remedial authority. Broom, Max. 79, 80, 82; Chanc. Prec. 339; 1 Wils. 284; 9 M. & W. 818; 1 C. B. N. S. 255; 4 Bingh. N. C. 233; 4 Scott N. R. 229; 17 Mass. 310.

*Boni judicis est causas litium dirimere.* It is the duty of a good judge to remove causes of litigation. 2 Inst. 306.

*Boni judicis est judicium sine dilatione mandare executioni.* It is the duty of a good judge to cause execution to issue on a judgment without delay. Co. Litt. 289 *b*.

*Boni judicis est lites dirimere, ne lis ex lite oritur, et interest reipublicæ ut sint fines litium.* It is the duty of a good judge to prevent litigations, that suit may not grow out of suit, and it concerns the welfare of a state that an end be put to litigation. 4 Co. 15 *b*; 5 *id.* 31 *a*; Bart. Max. 191.

*Bonum necessarium extra terminos necessitatis non est bonum.* A thing good from necessity is not good beyond the limits of the necessity. Hob. 144.

*Bonus judex secundum æquum et bonum judicat, et æquitatem stricto juri præfert.* A good judge decides according to justice and right, and prefers equity to strict law. Co. Litt. 24; 4 Term 344; 2 Q. B. 837; Broom, Max. 80.

*Both law and equity favor the diligent creditor.* 12 Tex. Civ. App. 136.

*Breve judiciale debet sequi suum originale, et accessorium suum principale.* A judicial writ ought to follow its original, and an accessory its principal. Jenk. Cent. 292.

*Breve judiciale non cadit pro defectu formæ.* A judicial writ fails not through defect of form. Jenk. Cent. 43.

*By an acquittance for the last payment all other arrearages are discharged.* Noy 40.

*Carcer ad homines custodiendos, non ad puniendos, dari debet.* A prison ought to be used for the custody, not the punishment, of persons. Co. Litt. 260. See Dig. 48. 19. 8. 9.

*Casus fortuitus non est sperandus, et nemo tenetur divinare.* A fortuitous event is not to be foreseen, and no person is held bound to divine it. 4 Co. 66.

*Casus fortuitus non est supponendus.* A fortuitous event is not to be presumed. Hardr. 82, arg.

*Casus omissus et oblivioni datus dispositioni communis juris relinquitur.* A case omitted and forgotten is left to the disposal of the common law. 5 Co. 37; Broom, Max. 46; 1 Exch. 476.

*Casus omissus pro omisso habendus est.* A case omitted is to be held as (intentionally) omitted. Trayner, Max. 67.

*Catalla juste possessa amitti non possunt.* Chattels rightly possessed cannot be lost. Jenk. Cent. 28.

*Catalla reputantur inter minima in lege.* Chattels are considered in law among the minor things. Jenk. Cent. 52.

*Causa causæ est causa causati.* The cause of a cause is the cause of the effect. Freem. 329; 12 Mod. 639.

*Causa causantis causa est causati.* The cause of the thing causing is the cause of the effect. 4 Campb. 284; 4 Gray 398.

*Causa et origo est materia negotii.* Cause and origin is the material of business. 1 Co. 99; Wing. Max. 41, Max. 21.

*Causa proxima non remota spectatur.* The immediate and not the remote cause is to be considered. Bacon, Max. Reg. 1; Broom, Max. 216; Story, Bailm. 515; 3 Kent 374; 2 East 348; 10 Wall. 191; 5 Dak. 444; L. R. 1 C. P. 320; 4 Am. L. Rev. 201; 44 U. S. App. 1; 60 Fed. Rep. 559. See CAUSA PROXIMA.

*Causa vaga et incerta non est causa rationabilis.* A vague and uncertain cause is not a reasonable cause. 5 Co. 57.

*Causæ dotis, vitæ, libertatis, fisci sunt inter favorabilia in lege.* Causes of dower, life, liberty, revenue, are among the things favored in law. Co. Litt. 341.

*Causæ ecclesiæ publicis causis æquiparantur.* The cause of the church is equal to public cause. Co. Litt. 341.

*Caveat emptor.* Let the purchaser beware. 110 U. S. 116; 70 Fed. Rep. 146; 15 Ind. App. 385; 47 U. S. App. 734; 114 Ala. 74; 21 Misc. Rep. 86; *id.* 88. See CAVEAT EMPTOR.

*Caveat emptor; qui ignorare non debuit quod jus alienum emit.* Let a purchaser beware; for he ought not to be ignorant of what they are when he buys the rights of another. Hob. 99; Broom, Max. 768; Co. Litt. 183 *a*; 3 Taunt. 439; Sugd. V. & P. 328; 1 Story, Eq. Jur. ch. 6. See CAVEAT EMPTOR.

*Caveat venditor.* Let the seller beware. Lofft 328; 28 Wend. 449; 2 Barb. 323; 5 N. Y. 73; 122 Pa. 7; 114 Ala. 74.

*Caveat viator.* Let the wayfarer beware. Broom, Max. 387, n.; 10 Exch. 774.

*Cavendum est a fragmentis.* Beware of fragments. Bacon, Aph. 26.

*Certa debet esse intentio, et narratio et certum fundamentum, et certa res quæ deducitur in judicium.* The intention, count, foundation, and thing brought to judgment ought to be certain. Co. Litt. 303 *a*.

*Certum est quod certum reddi potest.* That is certain which can be made certain. Noy, Max. 461; Co. Litt. 45 *b*, 96 *a*, 142 *a*; 2 Bla. Com. 143; 2 M. & S. 50; Broom, Max. 623; 3 Term 463; 3 M. & K. 353; 11 Cush. 380; 73 Cal. 54; 89 Me. 313; 36 Atl. Rep. 397.

*Cessante causa, cessat effectus.* The cause ceasing, the effect must cease. 1 Exch. 430; Broom, Max. 160.

*Cessante ratione legis cessat et ipsa lex.* When the reason of the law ceases, so does the law itself. 4 Co. 38; 7 *id.* 69; Co. Litt. 70 *b*, 122 *a*; Broom, Max. 159; 13 East 348; 4 Bingh. N. C. 368; 12 Gray 170; 11 Pa. 273; 54 *id.* 201; 136 Mo 562; 20 Nev. 269; 114 Cal. 124; 119 N. C. 779. See Dig. 35. 1. 72. 6. The doctrine is criticised by Austin, lect. 37.

*Cessante statu primitivo, cessat derivativus.* The primary state ceasing, the derivative ceases. 8 Co. 34; Broom, Max. 495; 4 Kent 32.

*C'est le crime qui fait la honte, et non pas l'échafaud.* It is the crime which causes the shame, and not the scaffold.

*Cestuy que doit inheriter al père doit inheriter al fils.* He who would have been heir to the father of the deceased shall also be heir of the son. Fits. Abr. *Descent* 2; 2 Bla. Com. 239, 250.

*Chacea est ad communem legem.* A chace is by common law. Reg. Brev. 806.

*Charta de non ente non valet.* A deed of a thing not in being is not valid. Co. Litt. 36.

*Chartarum super fidem, mortuis testibus, ad patriam de necessitudine recurrendum est.* The witnesses being dead, the truth of deeds must, of necessity, be referred to the country. Co. Litt. 36.

*Chirographum apud debitorem repertum presumitur solutum.* An evidence of debt found in possession of the debtor is presumed to be paid. Halk. Max. 30. See 14 M. & W. 379.

*Chirographum non extans presumitur solutum.* An evidence of debt not existing is presumed to have been discharged. Trayner, Max. 73.

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*Circuitus est evitandus.* Circuity is to be avoided. Co. Litt. 384 *a*; Wing. Max. 179; Broom, Max. 343; 5 Co. 31 *a*; 15 M. & W. 208; 5 Exch. 829.

*Citatio est de juri naturali.* A summons is by natural right. Cases *in Banco Regis* Will. III. 453.

*Citationes non concedantur priusquam exprimatur super qua re fieri debet citatio.* Citations should not be granted before it is stated about what matter the citation is to be made. (A maxim of ecclesiastical law.) 12 Co. 44.

*Clausula generalis de residuo non ea complectitur quæ non ejusdem sint generis cum iis quæ speciatim dicta fuerant.* A general clause of remainder does not embrace those things which are not of the same kind with those which had been specially mentioned. Lofft 419.

*Clausula generalis non refertur ad expressa.* A general clause does not refer to things expressed. 8 Co. 154.

*Clausula quæ abrogationem excludit ab initio non valet.* A clause in a law which precludes its abrogation is invalid from the beginning. Bacon, Max. Reg. 19, p. 89; 2 Dwarris Stat. 673; Broom, Max. 27.

*Clausula vel dispositio inutilis per præsumptionem remotam vel causam, ex post facto non fulcitur.* A useless clause or disposition is not supported by a remote presumption, or by a cause arising afterwards. Bacon, Max. Reg. 21; Broom, Max. 672.

*Clausulæ inconsuetæ semper inducunt suspicionem.* Unusual clauses always excite suspicion. 3 Co. 81; Broom, Max. 290; 1 Sm. L. Cas. 1.

*Cogitationis pœnam nemo meretur.* No one is punished for his thoughts.

*Cogitationis pœnam nemo patitur.* No one is punished for his thoughts. Broom, Max. 311.

*Cohæredes una persona censentur, propter unitatem juris quod habent.* Coheirs are deemed as one person, on account of the unity of right which they possess. Co. Litt. 163.

*Commercium jure gentium commune esse debet, et non in monopolium et privatum paucorum quæstum convertendum.* Commerce, by the law of nations, ought to be common, and not to be converted into a monopoly and the private gain of a few. 3 Inst. 181, in marg.

*Commodum ex injuria sua non habere debet.* A man ought not to derive any benefit from his own wrong. Jenk. Cent. 161; Finch, Law, b. 1, c. 8, n. 62.

*Common opinion is good authority in law.* Co. Litt. 186 *a*; 3 Barb. Ch. 528, 577.

*Communis error facit jus.* A common error makes law. (What was at first illegal, being repeated many times, is presumed to have acquired the force of usage; and then it would be wrong to depart from it.) Broom, Max. 139, 140; 1 Ld. Raym. 42; 6 Cl. & F. 172; 3 M. & S. 396; 4 N. H. 458; 2 Mass. 357; 1 Dall. 13; 49 S. C. 505. The converse of this maxim is *communis error non facit jus.* A common error does not make law. 4 Inst. 242; 3 Term 725; 6 *id.* 564.

*Convendia sunt dispendia.* Abridgments are hindrances. Co. Litt. 305.

*Compromissarii sunt judices.* Arbitrators are judges. Jenk. Cent. 128.

*Concessio per regem fieri debet de certitudine.* A grant by the king ought to be a grant of a certainty. 9 Coke 46.

*Concessio versus concedentem latam interpretationem habere debet.* A grant ought to have a liberal interpretation against the grantor. Jenk. Cent. 279.

*Concordare leges legibus est optimus interpretandi modus.* To make laws agree with laws is the best mode of interpreting them. Halkers 70.

*Conditio beneficialis, quæ statum construit, benigne secundum verborum intentionem est interpretanda; odiosa autem, quæ statum destruit, stricte, secundum verborum proprietatem, accipienda.* A beneficial condition, which creates an estate, ought to be construed favorably according to the intention of the words; but an odious condition, which destroys an estate, ought to be received strictly, according to the letter of the words. 8 Co. 90; Shep. Touch. 134.

*Conditio dicitur, cum quid in casum incertum qui potest tendere ad esse aut non esse, confertur.* It is called a condition when something is given on an uncertain event, which may or may not come into existence. Co. Litt. 201.

*Conditio illicita habetur pro non adjecta.* An unlawful condition is deemed as not annexed.

*Conditio præcedens adimpleri debet priusquam sequatur effectus.* A condition precedent must be fulfilled before the effect can follow. Co. Litt. 201.

*Conditiones quælibet odiosæ; maxime autem contra matrimonium et commercium.* Any conditions are odious, but especially those against matrimony and commerce. Lofft 644.

*Confessio facta in judicio omni probatione major est.* A confession made in court is of greater effect than any proof. Jenk. Cent. 102.

*Confessus in judicio pro judicato habetur et quodammodo sua sententia damnatur.* A person who has confessed in court is deemed as having had judgment passed upon him, and, in a manner, is condemned by his own sentence. 11 Co. 30. See Dig. 42. 2. 1.

*Confirmare est id quod prius infirmum fuit simul firmare.* To confirm is to make firm what was before infirm. Co. Litt. 295.

*Confirmare nemo potest priusquam jus ei acciderit.* No one can confirm before the right accrues to him. 10 Co. 48.

*Confirmatio est nulla, ubi donum præcedens est invalidum.* A confirmation is null where the preceding gift is invalid. Co. Litt. 295; F. Moore 764.

*Confirmatio omnes supplet defectus, licet id quod actum est ab initio non valuit.* Confirmation supplies all defects, though that which has been done was not valid at the beginning. Co. Litt. 295 *b*.

*Confirmat usum qui tollit abusum.* He confirms a use who removes an abuse. F. Moore 764.

*Conjunctio mariti et feminæ est de jure naturæ.* The union of husband and wife is according to the law of nature.

*Consensus facit legem.* Consent makes the law. (A contract is law between the parties agreeing to be bound by it.) Branch, Princ.; 8 Mont. 32.

*Consensus non concubitus facit matrimonium.* Consent, not coition, constitutes marriage. Co. Litt. 33 *a*; Dig. 50. 17. 30. See 10 Cl. & F. 534; Broom, Max. 505; 75 Cal. 1.

*Consensus tollit errorem.* Consent removes or obviates a mistake. Co. Litt. 126; 2 Inst. 123; Broom, Max. 135; 1 Bingh. N. c. 68; 6 E. & B. 338; 5 Cush. 55; 9 Gray 396; 11 Allen 138; 7 Johns. 611; 4 Pa. 335; 65 *id.* 190; 83 Ala. 230.

*Consensus voluntas multorum ad quos res pertinet simul juncta.* Consent is the united will of several interested in one subject-matter. Dav. 48; Branch, Princ.

*Consentientes et agentes pari pœna plectentur.* Those consenting and those perpetrating shall receive the same punishment. 5 Co. 80.

*Consentire matrimonio non possunt infra annos nubiles.* Persons cannot consent to marriage before marriageable years. 5 Co. 80; 6 *id.* 22.

*Consilia multorum requiruntur in magnis.* The advice of many persons is requisite in great affairs. 4 Inst. 1.

*Constitutum esse eam domum unicuique nostrum debere existimari, ubi quisque sedes et tabulas haberet, suarumque rerum constitutionem fecisset.* It is settled that that is to be considered the home of each one of us where he may have his habitation and account-books, and where he may have made an establishment of his business. Dig. 50. 16. 203.

*Constructio legis non facit injuriam.* The construction of law does not work an injury. Co. Litt. 183; Broom, Max. 603.

*Consuetudo contra rationem introducta, potius usurpatio quam consuetudo appellari debet.* A custom introduced against reason ought rather to be called an usurpation than a custom. Co. Litt. 113; Bart. Max. 109.

*Consuetudo debet esse certa.* A custom ought to be certain. Dav. 33.

*Consuetudo est altera lex.* Custom is another law. 4 Co. 21.

*Consuetudo est optimus interpres legum.* Custom is the best expounder of the law. 2 Inst. 18; Dig. 1. 3. 37; Jenk. Cent. 273.

*Consuetudo debet esse certa, nam incerta pro nullis habetur.* Custom ought to be fixed, for if variable it is held as of no account. Trayner, Max. 96.

*Consuetudo et communis assuetudo vincit legem non scriptam, si sit specialis; et interpretatur legem scriptam, si lex sit generalis.* Custom and common usage overcome the unwritten law, if it be special; and interpret the written law if the law be general. Jenk. Cent. 273.

*Consuetudo ex certa causa rationabili usitata privat communem legem.* Custom observed by reason of a certain and reasonable cause supersedes the common law. Littleton § 169; Co. Litt. 33 *b*. See 5 Bingh. 293; Broom, Max. 919.

*Consuetudo, licet sit magnæ auctoritatis, nunquam tamen præjudicat manifestæ veritati.* A custom, though it be of great authority, shoul

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never, however, be prejudicial to manifest truth. 4 Co. 18.

*Consuetudo loci observanda est.* The custom of the place is to be observed. Broom, Max. 918; 4 Co. 28 *b*; 6 *id.* 67; 10 *id.* 139; 4 C. B. 48.

*Consuetudo neque injuria oriri, neque tolli potest.* A custom can neither arise, nor be abolished, by a wrong. Lofft 340.

*Consuetudo non habitur in consequentiam.* Custom is not to be drawn into a precedent. 3 Keble 499.

*Consuetudo præscripta et legitima vincit legem.* A prescriptive and legitimate custom overcomes the law. Co. Litt. 113.

*Consuetudo regni Angliæ est lex Angliæ.* The custom of the kingdom of England is the law of England. Jenk. Cent. 119.

*Consuetudo semel reprobata non potest amplius induci.* Custom once disallowed cannot again be produced. Dav. 33; Grounds & Rud. of Law 58.

*Consuetudo vincit communem legem.* Custom overrules common law. 1 Rop. H. & W. 351; Co. Litt. 33 *b*.

*Consuetudo volentes ducit, lex nolentes trahit.* Custom leads the willing, law drags the unwilling. Jenk. Cent. 274.

*Contemporanea expositio est optima et fortissima in lege.* A contemporaneous exposition is the best and most powerful in the law. 2 Inst. 11; 3 Co. 7; Broom, Max. 683; 116 Ind. 300.

*Contestatio litis eget terminos contradictarios.* An issue requires terms of contradiction (that is, there can be no issue without an affirmative on one side and a negative on the other). Jenk. Cent. 117.

*Contra legem facit qui id facit quod lex prohibit; in fraudem vero qui, salvis verbis legis, sententiam ejus circumvenit.* He does contrary to the law who does what the law prohibits; but he acts in fraud of the law who, the letter of the law being inviolate, uses the law contrary to its intention. Dig. 1. 3. 29.

*Contra negantem principia non est disputandum.* There is no disputing against one who denies principles. Co. Litt. 43; Grounds & Rud. of Law 57.

*Contra non valentem agere nulla currit præscriptio.* No prescription runs against a person unable to act. Broom, Max. 903; Evans, Pothier 451.

*Contra veritatem lex nunquam aliquid permittit.* The law never suffers anything contrary to truth. 2 Inst. 252. (But sometimes it allows a conclusive presumption in opposition to truth.)

*Contractus ex turpi causa, vel contra bonos mores nullus est.* A contract founded on an unlawful consideration or against good morals is null. Hob. 167; Dig. 2. 14. 27. 4.

*Contractus legem ex conventione accipiunt.* The agreement of the parties makes the law of the contract. Dig. 16. 3. 1. 6.

*Contrariorum contraria est ratio.* The reason of contrary things is contrary. Hob. 344.

*Contrectatio rei alienæ animo furandi, est furtum.* The touching or removing of another's property, with an intention of stealing, is theft. Jenk. Cent. 132.

*Conventio privatorum non potest publico juri derogare.* An agreement of private persons cannot derogate from public right. Wing. Max. 201; Co. Litt. 166 *a*; Dig. 50. 17. 45. 1.

*Conventio vincit legem.* The agreement of the parties overcomes the law. Story, Ag. § 368; 6 Taunt. 430; 52 Pa. 96; 18 Pick. 19, 273; 8 Cush. 156; 14 Gray 446. See Dig. 16. 3. 1. 6.

*Copulatio verborum indicat acceptationem in eodem sensu.* Coupling words together shows that they ought to be understood in the same sense. Bacon, Max. Reg. 3; Broom, Max. 588; 8 Allen 85; 11 *id.* 470.

*Corporalis injuria non recipit æstimationem de futuro.* A personal injury does not receive satisfaction from a future course of proceeding. Bacon, Max. Reg. 6; 3 How. St. Tr. 71; Broom, Max. 278.

*Corpus humanum non recipit æstimationem.* A human body is not susceptible of appraisement. Hob. 59.

*Creditorum appellatione non hi tantum accipiuntur qui pecuniam crediderunt, sed omnes quibus ex qualibet causa debetur.* Under the head of creditors are included not alone those who have lent money, but all to whom from any cause a debt is owing. Dig. 50. 16. 11.

*Crescente malitia crescere debet et pœna.* The evil intent increasing, punishment ought also to increase. 2 Inst. 479, n.

*Crimen falsi dicitur, cum quis illicitus, cui non fuerit ad hæc data auctoritas, de sigillo regis rapto vel invento brevia cartasve consignaverit.* The *crimen falsi* is when any one illicitly, to whom power has not been given for such purposes, has signed writs or grants with the king's seal, which he has either stolen or found. Fleta, 1. 1. c. 23.

*Crimen læsæ majestatis omnia alia crimina excedit quoad pœnam.* The crime of treason exceeds all other crimes as far as its punishment is concerned. 3 Inst. 210; Bart. Max. 108.

*Crimen omnia ex se nata vitiat.* Crime vitiates everything which springs from it. 5 Hill 523.

*Crimen trahit personam.* The crime carries the person (*i. e.* the commission of a crime gives the courts of the place where it is committed jurisdiction over the person of the offender). 3 Denio 190, 210.

*Crimina morte extinguuntur.* Crimes are extinguished by death.

*Cui jurisdictio data est, ea quoque concessa esse videntur sine quibus jurisdictio explicari non potest.* To whom jurisdiction is given, to him those things also are held to be granted without which the jurisdiction cannot be exercised. Dig. 2. 1. 2; 1 Woodd. Lect. Introd. lxxi.; 1 Kent 339.

*Cui jus est donandi eidem et vendendi et concedendi jus est.* He who has a right to give has also a right to sell and to grant. Dig. 50. 17. 163.

*Cui licet quod majus non debet quod minus est non licere.* He who has authority to the more important act shall not be debarred from doing that of less importance. 4 Coke 23; Co. Litt. 255 *b*; 2 Inst. 307; Noy, Max. 26; Finch, Law 22; 3 Mod. 322, 392; Broom, Max. 176; Dig. 50. 70. 21.

*Cui pater est populus non habet ille patrem.* He to whom the people is father has not a father. Co. Litt. 123.

*Cuicunque aliquis quid concedit concedere videtur et id sine quo res ipsa esse non potuit.* Whoever grants a thing is supposed also tacitly to grant that without which the grant itself would be of no effect. 11 Co. 52; Broom, Max. 479; Hob. 234; Vaugh. 109; 11 Exch. 775; Shep. Touch. 89; Co. Litt. 56 *a*; Shortt, Ry. Bonds 180; 18 B. Monr. 431.

*Cuicunque aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit.* Whenever anything is granted, that also is granted without which the thing itself could not exist. 9 Metc. 556.

*Cuilibet in arte sua perito est credendum.* Credence should be given to one skilled in his peculiar art. Co. Litt. 125; 1 Bla. Com. 75; Phill. Ev. Cowen & H. notes, 759; 1 Hagg. Ecc. 727; 11 Cl. & F. 85; Broom, Max. 932, 934. See EXPERT; OPINION.

*Cuique in sua arte credendum est.* Every one is to be believed in his own art. 9 Mass. 227.

*Cujus est commodum, ejus est onus.* He who has the benefit has also the burden. 3 Mass. 53.

*Cujus est dare, ejus est disponere.* He who has a right to give has the right to dispose of the gift. Wing. Max. 22; Broom, Max. 459; 2 Co. 71; 5 W. & S. 390.

*Cujus est divisio, alterius est electio.* Whichever of two parties has the division, the other has the choice. Co. Litt. 166.

*Cujus est dominium, ejus est periculum.* The risk lies upon the owner of the subject. Trayner, Max. 114.

*Cujus est instituere, ejus est abrogare.* Whose it is to institute, his it is also to abrogate. Sydney, Gov. 15; Broom, Max. 878, n.

*Cujus est solum, ejus est usque ad cœlum.* He who owns the soil owns it up to the sky. Broom, Max. 395; Shep. Touch. 90; 2 Sharsw. Bla. Com. 18; 9 Co. 54; 4 Campb. 219; 11 Exch. 822; 6 E. & B. 76; 2 Metc. 467; 3 Gray 79; 10 Allen 109. See LAND.

*Cujus juris (i. e. jurisdictionis) est principale, ejusdem juris erit accessorium.* He who has jurisdiction of the principal has also of the accessory. 2 Inst. 493; Bract. 481.

*Cujus per errorem dati repetitio est, ejus consulto dati donatio est.* That which, when given through mistake can be recovered back, when given with knowledge of the facts, is a gift. Dig. 50. 17. 53.

*Cujusque rei potissima pars principium est.* The principal part of everything is the beginning. Dig. 1. 2. 1; 10 Co. 49.

*Culpa caret, qui scit sed prohibere non potest.* He is clear of blame who knows but cannot prevent. Dig. 50. 17. 50.

*Culpa est immiscere se rei ad se non pertinenti.* It is a fault to meddle with what does not belong to or does not concern you. Dig. 50. 17. 36; 2 Inst. 208.

*Culpa lata dolo æquiparatur.* Gross neglect is equivalent to fraud. Dig. 11. 6. 1.

*Culpa tenet suos auctores.* A fault binds its own authors. Erskine, Inst. b. 4, tit. 1, § 14; 6 Bell, App. Cas. 539.

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*Culpæ pœna par esto.* Let the punishment be proportioned to the crime. Branch, Princ.

*Cum actio fuerit mere criminalis, institui poterit ab initio criminaliter vel civiliter.* When an action is merely criminal, it can be instituted from the beginning either criminally or civilly. Bract. 102.

*Cum aliquis renunciaverit societati solvitur societas.* When any partner renounces the partnership, the partnership is dissolved. Trayner, Max. 118.

*Cum constitente sponte mitius est agendum.* One making a voluntary confession is to be dealt with more mercifully. Bart. Max. 68; 4 Inst. 66; Branch, Princ.

*Cum de lucro duorum quæritur melior est causa possidentis.* When the question of gain lies between two, the cause of the possessor is the better. Dig. 50. 17. 126.

*Cum duo inter se pugnantia reperiuntur in testamento, ultimum ratum est.* When two things repugnant to each other are found in a will, the last is to be confirmed. Co. Litt. 112; Shep. Touch. 451; Broom, Max. 583; 2 Jarm. Wills, 5th Am. ed. 44; 16 Johns. 146; 1 Phill. 536.

*Cum in corpore dissentitur apparet nullam esse acceptionem.* When there is a disagreement in the substance, it appears that there is no acceptance. 12 Allen 44.

*Cum in testamento ambigue aut etiam perperam scriptum, est benigne interpretari, et secundum id quod credibile est cogitatum credendum est.* When an ambiguous or even an erroneous expression occurs in a will, it should be construed liberally, and in accordance with the testator's probable meaning. Dig. 34. 5. 24; Broom, Max. 568; 3 Pothier, ad Pand. 46.

*Cum legitimæ nuptiæ factæ sunt, patrem liberi sequuntur.* Children born under a legitimate marriage follow the condition of the father.

*Cum par delictum est duorum, semper oneratur petitor, et melior habetur possessoris causa.* Where two parties are equally in fault, the claimant always is at a disadvantage, and the party in possession has the better cause. Dig. 50. 17. 154; Broom, Max. 720.

*Curia parliamenti suis propriis legibus subsistit.* The court of parliament is governed by its own peculiar laws. 4 Inst. 50; Broom, Max. 85; 12 C. B. 413.

*Curiosa et captiosa interpretatio in lege reprobatur.* A curious and captious interpretation of the law is to be reproved. 1 Bulstr. 6.

*Currit tempus contra desides et sui juris contemptores.* Time runs against the slothful and those who neglect their rights. Bract. 100 *b*; Fleta, lib. 4, c. 5, § 12.

*Cursus curiæ est lex curiæ.* The practice of the court is the law of the court. 3 Bulstr. 53; Broom, Max. 133; 12 C. B. 414; 17 Q. B. 86; 8 Exch. 199; 2 M. & S. 25; 15 East 226; 12 M. & W. 7; 4 My. & C. 635; 3 Scott N. R. 599; 88 Cal. 20.

*Custom is the best interpreter of the law.* 4 Inst. 75; 2 Eden 74; 5 Cra. 32; 1 S. & R. 106; 2 Barb. Ch. 232, 269; 3 *id* 528, 577

*Custome serra prise stricte.* Custom must be taken strictly. Jenk. Cent. 83.

*Custos statum hæredis in custodia existentis meliorem non deteriorem facere potest.* A guardian can make the estate of an heir living under his guardianship better, not worse. 7 Co. 7.

*Dans et retinens, nihil dat.* One who gives and yet retains does not give effectually. Trayner, Max. 129.

*Datur digniori.* It is given to the more worthy. 2 Ventr. 268.

*De fide et officio judicis non recipitur quæstio, sed de scientia sive sit error juris sive facti.* The good faith and honesty of purpose of a judge cannot be questioned, but his decision may be impugned for error either of law or of fact. Bacon, Max. Reg. 17; 5 Johns. 291; 9 *id.* 396; 1 N. Y. 45; Broom, Max. 97.

*De jure judices, de facto juratores, respondent.* The judges answer concerning the law, the jury concerning the facts. See Co. Litt. 295; Broom, Max. 99.

*De majori et minori non variant jura.* Concerning greater and less laws do not vary. 2 Vern. 552.

*De minimis non curat lex.* The law does not notice (or care for) trifling matters. Broom, Max. 142; 2 Inst. 306; Hob. 88; 12 Pick. 549; 97 Mass. 83; 118 *id.* 175; 5 Hill 170; 6 Pa. 472; 73 Cal. 219; 75 *id.* 182; 27 S. E. Rep. (Va.) 826; 21 Alb. L. J. 186; 12 Can. L. J. 105, 130; 109 Ala. 157; 64 Minn. 511; 58 *id.* 503; 60 N. W. Rep. (Ia.) 639; 57 Mo. App. 142; 100 Cal. 454; 86 Wis. 161; 80 Fed. Rep. 896; 20 Misc. Rep. 470.

*De morte hominis nulla est cunctatio longa.* When the death of a human being is concerned, no delay is long. Co. Litt. 134. (When the question is concerning the life or death of a man no delay is too long to admit of inquiring into facts.)

*De nomine proprio non est curandum cum in substantia non erretur; quia nomina mutabilia sunt, res autem immobiles.* As to the proper name, it is not to be regarded when one errs not in substance; because names are changeable, but things are immutable. 6 Co. 66.

*De non apparentibus et non existentibus eadem est ratio.* The law is the same respecting things which do not appear and things which do not exist. 6 Ired. 61; 12 How. 253; 5 Co. 6; 6 Bingh. N. C. 453; 7 Cl. & F. 872; 5 C. B. 53; 8 *id.* 286; 1 Term 404; 4 Mass. 685; 8 *id.* 401; Broom, Max. 163, 166.

*De nullo, quod est sua natura indivisibile et divisionem non patitur, nullam partem habebit vidua, sed satisfaciat ei ad valentiam.* A widow shall have no part from that which in its own nature is indivisible, and is not susceptible of division; but let [the heir] satisfy her with an equivalent. Co. Litt. 32.

*De similibus ad similia eadem ratione procedendum est.* From similars to similars we are to proceed by the same rule. Branch, Princ.

*De similibus idem est judicium.* Concerning similars the judgment is the same. 7 Co. 18.

*Debet esse finis litium.* There ought to be an end of lawsuits. Jenk. Cent. 61.

*Debet quis juri subjacere ubi delinquit.* Every one ought to be subject to the law of the place where he offends. 3 Inst. 34; Finch, Law 14, 36; Wing. Max. 113; 3 Co. 231; 8 Scott N. R. 567.

*Debet sua cuique domus esse perfugium tutissimum.* Every man's house should be a perfectly safe refuge. 12 Johns. 31, 54.

*Debile fundamentum fallit opus.* Where there is a weak foundation, the work falls. 2 Bouv. Inst. n. 2068; Broom, Max. 180, 182.

*Debita sequuntur personam debitoris.* Debts follow the person of the debtor. Story, Confl. Laws § 362; 2 Kent 429; Halkers. Max. 13.

*Debitor non præsumitur donare.* A debtor is not presumed to make a gift. See 1 Kames, Eq. 212; Dig. 50. 16. 108; 1 P. Wms. 289; Wh. & Tud. L. Cas. Eq. 378; see PAYMENT.

*Debitorum pactionibus, creditorum petitio nec tolli nec minui potest.* The right of creditors to sue cannot be taken away or lessened by the contracts of their debtors. Bart. Max. 115; Pothier, Obl. 108; Broom, Max. 697.

*Debitum et contractus sunt nullius loci.* Debt and contract are of no particular place. 7 Co. 61; 7 M. & G. 1019, n.

*Deceptis non decipientibus, jura subveniunt.* The laws help persons who are deceived, not those deceiving. Trayner, Max. 149.

*Decipi quam fallere est tutius.* It is safer to be deceived than to deceive. Lofft 396.

*Deficiente uno sanguine, non potest esse hæres.* One blood being wanted, one cannot be heir. 3 Co. 41; Grounds & Rud. of Law, 77.

*Delegata potestas non potest delegari.* A delegated authority cannot be delegated. Broom, Max. 839; 2 Inst. 597; 5 Bingh. N. C. 310; Story, Ag. § 13; 11 How. 233; 15 Gray 403; 59 N. J. L. 18; 127 Ill. 364. See DELEGATION. This is said to be an extension of *a judice judex delegatus judicis dandi potestatem non habet*, which, in that form, applied to officers whose duties were judicial, but in the English law the maxim has been applied to agency. See 20 L. Mag. & Rev. 293.

*Delegatus non potest delegare.* A delegate (or deputy) cannot appoint another. Story, Ag. § 13; Broom, Max. 840, 842; 9 Co. 77; 2 Scott N. R. 509; 12 M. & W. 712; 6 Exch. 156; 8 C. B. 627.

*Delicatus debitor est odiosus in lege.* A delicate debtor is hateful in the law. 2 Bulstr. 148.

*Delinquens per iram provocatus puniri debet mitius.* A delinquent provoked by anger ought to be punished more mildly. 3 Inst. 55.

*Derivativa potestas non potest esse major primitiva.* The power which is derived cannot be greater than that from which it is derived. Wing. Max. 86; Finch. Law. b. 1, c. 3, p. 11.

*Designatio unius est exclusio alterius, et expressum facit cessare tacitum.* The appointment or designation of one is the exclusion of another; and that expressed makes that which is implied to cease. Co. Litt. 210.

*Deus solus hæredem facere potest, non homo.* God alone, and not man, can make an heir. Co. Litt. 7 *b*; cited 5 B. & C. 440, 454; Broom, Max. 516.

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*Dies dominicus non est juridicus.* Sunday is not a judicial day. Co. Litt. 135 *a*; 2 Saund. 291; Broom, Max. 21; Finch, Law, 7; Noy, Max. 2; Plowd. 265; 3 D. & L. 398; 13 Mass. 327; 17 Pick. 109. See SUNDAY.

*Dies inceptus pro completo habetur.* A day begun is held as complete. 118 Mass. 505.

*Dies incertus pro conditione habetur.* A day uncertain is held as a condition. Bell, Dict. *Computation of Time.*

*Dilationes in lege sunt odiosæ.* Delays in law are odious. Branch, Princ.

*Discretio est discernere per legem quid sit justum.* Discretion is to discern through law what is just. 5 Co. 99. 100; 10 *id.* 140; Broom, Max. 84, n.; Inst. 41; 1 W. Bla. 152; 1 Burr. 570; 2 *id.* 25; 3 Bulstr. 128; 6 Q. B. 700; 5 Gray 204; 76 Ga. 479. See DISCRETION.

*Discretio est scire per legem quid sit justum.* Discretion consists in knowing what is just in law. 4 Johns. Ch. 352, 356.

*Disparata non debent jungi.* Dissimilar things ought not to be joined. Jenk. Cent. 24.

*Dispensatio est vulnus, quod vulnerat jus commune.* A dispensation is a wound, because it wounds a common right. Dav. 69; Branch, Princ.

*Disseisinam satis facit, qui uti non permittit possessorem, vel minus commode, licet omnino non expellat.* He makes disseisin who does not permit the possessor to enjoy, or makes his enjoyment less useful, although he does not expel him altogether. Co. Litt. 331; Bract. lib. 4, tr. 2.

*Dissimilium dissimilis est ratio.* Of dissimilars the rule is dissimilar. Co. Litt. 191 *a*.

*Dissimulatione tollitur injuria.* Injury is wiped out by reconciliation. Erskine, Inst. b. 4, tit. 4, § 108.

*Distinguenda sunt tempora; aliud est facere, aliud perficere.* Times must be distinguished; it is one thing to do a thing, another to complete it. 3 Leon. 243; Branch, Princ. See 1 Co. 16 *a*; 2 Pick. 327; 14 N. Y. 380, 393.

*Distinguenda sunt tempora; distingue tempora, et concordabis leges.* Times are to be distinguished; distinguish time, and you will attune laws. 1 Co. 94.

*Divinatio non interpretatio est, quæ omnino recedit a litera.* It is a guess, not interpretation, which altogether departs from the letter. Bacon, Max. Reg. 3, p. 47.

*Dolosus versatur in generalibus.* A deceiver deals in generalities. 2 Co. 34; 2 Bulstr. 226; Lofft 782; 1 Rolle 137; Wing. Max. 636; Broom, Max. 289.

*Dolum ex indiciis perspicuis probari convenit.* Fraud should be proved by clear proofs. Code 2. 21. 6; 1 Story, Contr. § 625.

*Dolus auctoris non nocet successori.* The fraud of a predecessor does not prejudice the successor.

*Dolus circuitu non purgatur.* Fraud is not purged by circuity. Bacon, Max. Reg. 1; Noy, Max. 9, 12; Broom, Max. 228; 6 E. & B. 948.

*Dolus et fraus nemini patrocinentur (patrocinari debent).* Deceit and fraud shall excuse or benefit no man (they themselves need to be excused). Year B. 14 Hen. VIII. 8; Story, Eq. Jur. § 395; 3 Co. 78; 2 Fonblanque, Eq. b. 2, ch. 6, § 3.

*Dolus latet in generalibus.* Fraud lurks in generalities. Trayner, Max. 162.

*Dolus versatur in generalibus.* Fraud deals in generalities. Trayner, Max. 162.

*Dominium non potest esse in pendenti.* The right of property cannot be in abeyance. Halkers. Max. 39.

*Domus sua cuique est tutissimum refugium.* Every man's house is his castle. 5 Co. 91, 92; 90 Ill. 239; Broom, Max. 432; 1 Hale, Pl. Cr. 481; Foster, Hom. 320; 8 Q. B. 757; 16 *id.* 546, 556; 19 How. St. Tr. 1030. See ARREST; SELF-DEFENCE; DEFENCE; Dig. 50. 17. 103.

*Domus tutissimum cuique refugium atque receptaculum.* The habitation of each one is an inviolable asylum for him. Dig. 2. 4, 18.

*Dona clandestina sunt semper suspiciosa.* Clandestine gifts are always suspicious. 3 Co. 81; Noy, Max., 9th ed. 152; 4 B. & C. 652; 1 M. & S. 253; Broom, Max. 289, 290.

*Donari videtur quod nullo jure cogente conceditur.* That is considered to be given which is granted when no law compels. Dig. 50. 17. 82.

*Donatio non præsumitur.* A gift is not presumed. Jenk. Cent. 109.

*Donatio perficitur possessione accipientis.* A gift is rendered complete by the possession of the receiver. See 2 Johns. 52; 2 Leigh 837; 2 Kent 438.

*Donationum alia perfecta, alia incepta et non perfecta; ut si donatio lecta fuit et concessa, ac traditio nondum fuerit subsecuta.* Some gifts are perfect, others incipient and not perfect; as if a gift were read and agreed to, but delivery had not then followed. Co. Litt. 56.

*Donator nunquam desinit possidere antequam donatarius incipiat possidere.* He that gives never ceases to possess until he that receives begins to possess. Dyer 281; Bract. 41 *b*.

*Dormiunt aliquando leges, nunquam moriuntur.* The laws sometimes sleep, but never die. 2 Inst. 161.

*Dos de dote peti non debet.* Dower ought not to be sought from dower. 4 Co. 122; Co. Litt. 31; 4 Dane, Abr. 671; 1 Washb. R. P. 209; 13 Allen 459.

*Doti lex favet; præmium pudoris est, ideo parcatur.* The law favors dower; it is the reward of chastity, therefore let it be preserved. Co. Litt. 31; Branch, Princ.

*Droit ne done pluis que soit demande.* The law gives no more than is demanded. 2 Inst. 286.

*Droit ne poet pas morier.* Right cannot die. Jenk. Cent. 100.

*Duas uxores eodem tempore habere non licet.* It is not lawful to have two wives at one time. Inst. 1. 10. 6; 1 Bla. Com. 436.

*Duo non possunt in solido unam rem possidere.* Two cannot possess one thing each in entirety. Co. Litt. 368; 1 Preston, Abstr. 318; 2 *id.* 86, 326; 2 Dod. 157; 2 Carth. 76; Broom, Max. 465, n.

*Duo sunt instrumenta ad omnes res aut confirmandas aut impugnandas, ratio et auctoritas.* There are two instruments for confirming or impugning every thing, reason and authority. 8 Co. 16.

*Duorum in solidum dominum vel possessio esse non potest.* Ownership or possession in entirety cannot be in two persons of the same thing. Dig. 13. 6. 5. 15; 1 Mackeldey, Civ. Law 245, § 236; Brac. 28 *b*.

*Duplicationem possibilitatis lex non patitur.* The law does not allow a duplication of possibility. 1 Rolle 321.

*Ea est accipienda interpretatio, quæ vitio caret.* That interpretation is to be received which is free from fault. Bacon, Max. Reg 3, b. 47.

*Ea quæ commendandi causa in venditionibus dicuntur, si palam appareant venditorem non obligant.* Those things which, by way of commendation, are stated at sales, if they are openly apparent, do not bind the seller. Dig. 18. 43. n.; Broom, Max. 783.

*Ea quæ dari impossibilia sunt, vel quæ in rerum natura non sunt, pro non adjectis habentur.* Those things which cannot be given, or which are not in existence, are held as not expressed. Dig. 50. 17. 135.

*Ea quæ in curia nostra rite acta sunt, debitæ executioni demandari debent.* Whatever is properly done in a court should be reduced to a judgment. Co. Litt. 289 b.

*Ea quæ raro accidunt, non temere in agendis negotiis computantur.* Those things which rarely happen are not to be taken into account in the transaction of business without sufficient reason. Dig. 50. 17. 64.

*Eadem est ratio, eadem est lex.* The same reason, the same law. 7 Pick. 493.

*Eadem mens præsumitur regis quæ est juris et quæ esse debet, præsertim in dubiis.* The mind of the sovereign is presumed to be coincident with that of the law, and with that which ought to be, especially in ambiguous matters. Hob. 154; Broom, Max. 54.

*Ecclesia ecclesiæ decimas solvere non debet.* It is not the duty of the church to pay tithes to the church. Cro. Eliz. 479.

*Ecclesiæ magis favendum est quam personæ.* The church is more to be favored than an individual. Godb. 172.

*Effectus sequitur causam.* The effect follows the cause. Wing. Max. 226.

*Ei incumbit probatio qui dicit, non qui negat.* The burden of the proof lies upon him who affirms, not him who denies. Dig. 22. 3. 2; 1 Phill. Ev. 194; 1 Greenl. Ev. § 74; 3 La. 83; 2 Dan. Ch. Pr. 408.

*Ei nihil turpe cui nihil satis.* Nothing is base to whom nothing is sufficient. 4 Inst. 53.

*Ejus est interpretari cujus est condere.* It belongs to him to interpret who enacts. Trayner, Max. 174.

*Ejus est non nolle qui potest velle.* He may consent tacitly who may consent expressly. Dig. 50. 17. 3.

*Ejus est periculum cujus est dominium aut com*

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*modum.* He has the risk who has the right of property or advantage. Bart. Max. 33.

*Ejus nulla culpa est cui parere necesse sit.* No guilt attaches to him who is compelled to obey. Dig. 50. 17. 169; Broom, Max. 12, n.

*Electa una via, non datur recursus ad alteram.* He who has chosen one way cannot have recourse to another. 10 Toull. n. 170.

*Electio est intima [interna], libera, et spontanea separatio unius rei ab alia, sine compulsione, consistens in animo et voluntate.* Election is an internal, free, and spontaneous separation of one thing from another, without compulsion, consisting in intention and will. Dyer 281.

*Electio semel facta, et placitum testatum, non patitur regressum.* An election once made, and the intent shown, cannot be recalled. Co. Litt. 146. See ELECTION.

*Electiones fiant rite et libere sine interruptione aliqua.* Election should be made in due form and freely, without any interruption. 2 Inst. 169.

*Emptor emit quam minimo potest; venditor vendit quam maximo potest.* The buyer buys for as little as possible; the vender sells for as much as possible. 2 Johns. Ch. 256.

*En eschange il covient que les estates soient égales.* In an exchange it is necessary that the estates be equal. Co. Litt. 50; 2 Hill. R. P. 298.

*Enumeratio infirmat regulam in casibus non enumeratis.* Enumeration disaffirms the rule in cases not enumerated. Bacon, Aph. 17.

*Enumeratio unius est exclusio alterius.* Specification of one thing is an exclusion of the rest. 4 Johns. Ch. 106, 113.

*Eodem modo quo oritur, eodem modo dissolvitur.* It is discharged in the same way in which it arises. Bacon, Abr. *Release;* Cro. Eliz. 697; 2 Wms. Saund. 48, n. 1; 11 Wend. 28; 5 Watts 155.

*Eodem modo quo quid constituitur, eodem modo destruitur.* In the same way in which anything is constituted, in that way is it destroyed. 6 Co. 53.

*Equality is equity.* Francis, Max., Max. 3; 4 Bouv. Inst. n. 3725; 1 Story, Eq. Jur. § 64; 165 U. S. 394; 49 Neb. 358; 18 Misc. Rep. 663. See EQUITY.

*Equitas sequitur legem.* Equity follows the law. 5 Barb. 277, 282. Cas. *temp.* Talb. 52; 1 Sto. Eq. Jur. § 64; 17 App. Div. N. Y. 152. Of this maxim it has been said: "Operative only within a very narrow range." 1 Pom. Eq. Jur. § 427. The reverse is quite as sound a maxim; 9 Harv. L. Rev. 18. "The main business of equity is avowedly to correct and supplement the law." Phelps, Jurid. Eq. § 237. The Judicature Act, 1873, provides that when law and equity conflict equity shall prevail.

*Equity delights to do justice, and that not by halves.* 5 Barb. 277, 280; Story, Eq. Pl. § 72.

*Equity follows the law.* See *Equitas sequitur legem, supra.*

*Equity looks upon that as done, which ought to be done.* 4 Bouv. Inst. n. 3729; 1 Fonblanque, Eq. b. 1, ch. 6, s. 9, note; 3 Wheat. 563; 23 Col. 174; 46 Pac. Rep. (Cal.) 673; 95 Wis. 456; 48 S. C. 282.

*Equity suffers not a right without a remedy.* 4 Bouv. Inst. n. 3726.

*Equity will not require that to be done which if done would be useless.* 67 Ill. App. 31.

*Error fucatus nuda veritate in multis est probabilior; et sæpenumero rationibus vincit veritatem error.* Error artfully colored is in many things more probable than naked truth; and frequently error conquers truth by argumentation. 2 Co. 73.

*Error juris nocet.* Error of law is injurious. See 1 Story, Eq. Jur. § 139. n.

*Error nominis nunquam nocet, si de identitate rei constat.* Mistake in the name never injures, if there is no doubt as to the identity of the thing. 1 Duer, Ins. 171.

*Error qui non resistitur approbatur* An error not resisted is approved. Doct. & St. c. 70.

*Error scribentis nocere non debet.* An error made by a clerk ought not to injure. 1 Jenk. Cent. 324.

*Errores ad sua principia referre, est refellere.* To refer errors to their origin is to refute them. 3 Inst. 15.

*Erubescit lex filios castigare parentes.* The law blushes when children correct their parents. 8 Co. 116.

*Est autem jus publicum et privatum, quod ex naturalibus præceptis aut gentium, aut civilibus est collectum; et quod in jure scripto jus appellatur, id in lege Angliæ rectum esse dicitur.* Public and private law is that which is collected from natural precepts, on the one hand of nations, on the other of citizens; and that which in the civil law is called *jus*, in the law of England is said to be right. Co. Litt. 558.

*Est boni judicis ampliare jurisdictionem.* It is the part of a good judge to extend the jurisdiction Gilb. 14.

*Estoveria sunt ardendi, arandi, construendi, et claudendi.* Estovers are for burning, ploughing, building, and inclosing. 13 Co. 68.

*Eum qui nocentem infamat, non est æquum et bonum ob eam rem condemnari; delicta enim nocentium nota esse oportet et expedit.* It is not just and proper that he who speaks ill of a bad man should be condemned on that account; for it is fitting and expedient that the crimes of bad men should be known. Dig. 47. 10. 17; 1 Bla. Com. 125.

*Eventus varios res nova semper habet.* A new matter always produces various events. Co. Litt. 379.

*Every man is presumed to intend the natural and probable consequences of his own voluntary acts.* 1 Greenl. Evid. § 18; 9 East 277; 9 B. & C. 643; 3 Maule & S. 11; Webb, Poll. Torts 35.

*Ex antecedentibus et consequentibus fit optima interpretatio.* The best interpretation is made from antecedents and consequents. 2 Pars. Contr. 12, n. (*r*); Broom, Max. 577; 2d Inst. 317; 2 Bla. Com. 379; 1 Bulstr. 101; 15 East 541.

*Ex diuturnitate temporis omnia præsumuntur solenniter esse acta.* From length of time, all things are presumed to have been done in due form. Co. Litt. 6; Broom, Max. 942; 1 Greenl. Ev. § 20; Best, Ev. § 43; 84 Cal. 126.

*Ex dolo malo non oritur actio.* A right of action cannot arise out of fraud. Broom, Max. 297, 729; Cowp. 343; 2 C. B. 501; 5 Scott N. R. 558; 10 Mass. 276; 107 *id.* 440; 38 Fed. Rep. 800. See VOID; CONTRACT; VOIDABLE.

*Ex facto jus oritur.* The law arises out of the fact. 2 Inst. 479; 2 Bla. Com. 329; Broom, Max. 109.

*Ex frequenti delicto augetur pœna.* Punishment increases with increasing crime. 2 Inst. 479.

*Ex maleficio non oritur contractus.* A contract cannot arise out of an illegal act. Broom, Max. 734; 1 Term 734; 3 *id.* 422; 1 H. Bla. 324; 5 E. & B. 999, 1015.

*Ex malis moribus bonæ leges natæ sunt.* Good laws arise from evil manners. 2 Inst. 161.

*Ex multitudine signorum, colligitur identitas vera.* From the great number of signs true identity is ascertained. Bacon, Max. Reg. 25; Broom, Max. 638.

*Ex nihilo nihil fit.* From nothing nothing comes. 13 Wend. 178, 221; 18 *id.* 257, 301.

*Ex nudo pacto non oritur actio.* No action arises on a contract without a consideration. Noy, Max. 24; Broom, Max. 745; 3 Burr. 1670; 2 Sharsw. Bla. Com. 445; Chitty, Contr., 11th Am. ed. 24; 1 Story, Contr. § 525. See NUDUM PACTUM. In Paulus, *Sent.* II. 14. 1, it is *ex nudo pacto inter cives Romanos actio non nascitur.*

*Ex pacto illicito non oritur actio.* From an illicit contract no action arises. Broom, Max. 742; 7 Cl. & F. 729.

*Ex procedentibus et consequentibus optima fit interpretatio.* The best interpretation is made from things proceeding and following (*i. e.* the context). 1 Rolle 375.

*Ex tota materia emergat resolutio.* The construction or explanation should arise out of the whole subject-matter. Wing. Max. 238.

*Ex turpi causa non oritur actio.* No action arises out of an immoral consideration. Broom, Max. 730; Selw. N. P. 63; 2 Pet. 589; 118 Mass. 299; 83 Ala. 142; 38 Fed. Rep. 800; 58 N. J. L. 627.

*Ex turpi contractu non oritur actio.* No action arises on an immoral contract. Dig. 2 14. 27. 4; 2 Kent 466; 1 Story, Contr. § 592; 22 N. Y. 272; 16 Ohio 129.

*Exceptio ejus rei cujus petitur dissolutio nulla est.* A plea of that matter the solution of which is the object of the action is of no effect. Jenk. Cent. 37.

*Exceptio falsi est omnium ultima.* The exception of falsehood is last of all. Trayner, Max. 198.

*Exceptio firmat regulam in casibus non exceptis.* An exception affirms the rule in cases not excepted. Bacon, Aph. 17.

*Exceptio firmat regulam in contrarium.* An exception proves an opposite rule. See *exceptio probat regulam.* Bacon, Aph. 17.

*Exceptio nulla est versus actionem quæ exceptionem perimit.* There can be no plea against an action which entirely destroys the plea. Jenk. Cent. 106.

*Exceptio probat regulam de rebus non exceptis.*

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An exception proves a rule concerning things not excepted. 11 Co. 41; 1 Pick. 371; 22 *id.* 112. See *exceptio firmat regulam in contrarium.*

*Exceptio quæ firmat legem exponit legem.* An exception which confirms the law, expounds the law. 2 Bulstr. 189.

*Exceptio quoque regulam declarat.* The exception also declares the rule. Bacon, Aph. 17.

*Exceptio semper ultima ponenda est.* An exception is always to be put last. 9 Co. 53.

*Excessus in jure reprobatur. Excessus in re qualibet jure reprobatur communi.* Excess in law is reprehended. Excess in anything is reprehended by common law. 11 Co. 44.

*Excusat aut extenuat delictum in capitalibus, quod non operatur idem in civilibus.* That excuses or extenuates a wrong in capital causes which does not have effect in civil suits. Bacon, Max. Reg. 7; Broom, Max. 324.

*Executio est executio juris secundum judicium.* An execution is the execution of the law according to the judgment. 3 Inst 212.

*Executio est finis et fructus legis.* An execution is the end and the fruit of law. Co. Litt. 289 *b.*

*Executio legis non habet injuriam.* An execution cannot work an injury. Co. Litt. 289 *b.*

*Expedit reipublicæ ne sua re quis male utatur.* It is for the interest of the state that a man should not use his own property improperly. Inst. 1. 8. 2; Broom, Max. 365-6; 8 Allen 329. This maxim belongs to the law of all countries: 1 Phill. Int. L. 553.

*Expedit reipublicæ ut sit finis litium.* It is to the advantage of the state that there should be an end of litigation. Co. Litt. 303 *b*; 5 Johns. Ch. 568. See *interest reipublicæ, etc.*

*Experientia per varios actus legem facit.* Experience by various acts makes laws. Co. Litt. 60; Branch, Princ.

*Expositio, quæ ex visceribus causæ nascitur, est aptissima et fortissima in lege.* That exposition which springs from the vitals of a cause is the fittest and most powerful in law. 10 Co. 24.

*Expressa nocent, non expressa non nocent.* Things expressed may be prejudicial; things not expressed are not. Calvinus, Lex; Dig. 50. 17. 195.

*Expressa non prosunt quæ non expressa prodesse.* Things expressed may be prejudicial which not expressed will profit. 4 Co. 73.

*Expresso eorum quæ tacite insunt nihil operatur.* The expression of those things which are tacitly implied operates nothing. Broom, Max. 669, 753; 2 Pars. Contr. 28; 4 Co. 73; 5 *id.* 11; Andr. Steph. Pl. 366; Hob. 170; 3 Atk. 188; 11 M. & W. 569; 7 Exch. 28.

*Expressio unius est exclusio alterius.* The expression of one thing is the exclusion of another. Co. Litt. 210; Broom, Max. 607, 651; 3 Bingh. N. C. 85; 8 Scott N. R. 1013; 12 M. & W. 761; 16 *id.* 244; 2 Curt. C. C. 365; 6 Mass. 84; 11 Cush. 328; 98 Mass. 29; 117 *id.* 448; 3 Johns. Ch. 110; 5 Watts 156; 50 Pa. 178; 34 Ala. 289; 11 Colo. 265; 36 Fed. Rep. 880; 74 *id.* 535; 104 U. S. 25; 4 Biss. 35.

*Expressum facit cessare tacitum.* That which is expressed puts an end to (renders ineffective) that which is implied. Broom, Max. 607, 651; 5 Bingh. N. C. 185; 6 B. & C. 609; 2 C. & M. 459; 2 E. & B. 856; 7 Mass. 106; 9 Allen 306; 24 Me. 374; 6 N. H. 481; 7 Watts 361; 1 Doug. Mich. 330; 4 Wash. C. C. 183; 36 Fed. Rep. 880.

*Exterus non habet terras.* An alien holds no lands. Trayner, Max. 203.

*Extincto subjecto, tollitur adjunctum.* When the substance is gone, the adjuncts disappear. 16 Johns. 438, 492.

*Extra legem positus est civiliter mortuus.* One out of the pale of the law (an outlaw) is civilly dead. Co. Litt. 130. A bankrupt is, as it were, civilly dead. 101 U. S. 406.

*Extra territorium jus dicenti non paretur impune.* One who exercises jurisdiction out of his territory cannot be obeyed with impunity. 10 Co. 77; Dig. 2. 1. 20; Story, Confl. Laws § 539; Broom, Max. 100, 101.

*Extremis probatis præsumuntur media.* Extremes being proved intermediate things are presumed. Trayner, Max. 207.

*Facta sunt potentiora verbis.* Facts are more powerful than words.

*Facts cannot lie.* 18 How. St. Tr. 1187; 17 *id.* 1430; but see Best, Ev. 587.

*Factum a judice quod ad ejus officium non spectat, non ratum est.* An act of a judge which does not pertain to his office is of no force. 10 Co. 76; Dig. 50. 17. 170; Broom, Max. 98, n.

*Factum cuique suum, non adversario, nocere debet.* A man's actions should injure himself, not his adversary. Dig. 50. 17. 155.

*Factum infectum fieri nequit.* What is done cannot be undone. 1 Kames, Eq. 96, 259.

*Factum negantis nulla probatio.* No proof is incumbent on him who denies a fact.

*Factum non dicitur quod non perseverat.* That is not said to be done which does not last. 5 Co. 96; Shep. Touch., Preston ed. 391.

*Factum unius alteri nocere non debet.* The deed of one should not hurt another. Co. Litt. 152.

*Facultas probationum non est angustanda.* The right of offering proof is not to be narrowed. 4 Inst. 279.

*Falsa demonstratio non nocet.* A false description does not vitiate. 6 Term 676. See 2 Story 291; 1 Greenl. Ev. § 301; Broom, Max. 629 *et seq.*; 2 Pars. Contr. 62, n.; 4 C. B. 328; 14 *id.* 122; 3 Gray 78; 9 Allen 113; 16 Ohio 64; 78 Ga. 688; 93 Va. 447.

*Falsa demonstratione legatum non perimi.* A legacy is not destroyed by an incorrect description. Broom, Max. 645; 3 Bradf. 144, 149. See DEMONSTRATION.

*Falsa orthographia sive falsa grammatica non vitiat concessionem.* False spelling or false grammar does not vitiate a grant. Bart. Max. 164; 9 Co. 48; Shep. Touch. 55.

*Falsus in uno, falsus in omnibus.* False in one thing, false in everything. 1 Sumn. 356; 7 Wheat. 338; 97 Mass. 406; 3 Wis. 645; 2 Jones N. C. 257; 48 Neb. 553; 153 N. Y. 10; 20 Misc. Rep. 300; 89 Wis. 195; 93 Ga. 488; 88 Wis. 402.

*Fama, fides, et oculus non patiuntur ludum.* Fame, plighted faith, and eyesight do not endure deceit. 3 Bulstr. 226.

*Fatetur facinus qui judicium fugit.* He who flees judgment confesses his guilt. 3 Inst. 14; 5 Co. 109 *b.* But see Best, Pres. § 248. See FLIGHT.

*Futuus præsumitur qui in proprio nomine errat.* A man is presumed to be simple who makes a mistake in his own name. Code 6. 24. 14; 5 Johns. Ch. 148, 161.

*Favorabilia in lege sunt fiscus, dos, vita, libertas.* The treasury, dower, life, and liberty are things favored in law. Jenk. Cent. 94.

*Favorabiliores rei potius quam actores habentur.* Defendants are rather to be favored than plaintiffs. Dig. 50. 17. 125. See 8 Wheat. 195, 196; Broom, Max. 715.

*Favorabiliores sunt executiones aliis processibus quibuscunque.* Executions are preferred to all other processes whatever. Co. Litt. 289 *b.*

*Favores ampliandi sunt; odia restringenda.* Favorable inclinations are to be enlarged; animosities restrained. Jenk. Cent. 186.

*Felonia, ex vi termini, significat quodlibet capitale crimen felleo animo perpetratum.* Felony, by force of the term, signifies some capital crime perpetrated with a malignant mind. Co. Litt. 391.

*Felonia implicatur in quolibet proditione.* Felony is implied in every treason. 3 Inst. 15.

*Feodum est quod quis tenet ex quacunque causa, sive sit tenementum sive redditus.* A fee is that which any one holds from whatever cause, whether tenement or rent. Co. Litt. 1.

*Festinatio justitiæ est noverca infortunii.* The hurrying of justice is the stepmother of misfortune. Hob. 97.

*Fiat justitia ruat cælum.* Let justice be done, though the heaven should fall. Branch, Princ. 161.

*Fiat prout fieri consuerit, nil temere novandum.* Let it be done as formerly, let no innovation be made rashly. Jenk. Cent. 116; Branch, Princ.

*Fictio cedit veritati, fictio juris non est ubi veritas.* Fiction yields to truth; where the truth appears, there can be no fiction of law. 11 Co. 51.

*Fictio est contra veritatem, sed pro veritate habetur.* Fiction is against the truth, but it is to be esteemed truth.

*Fictio juris non est ubi veritas.* Where truth is, fiction of law does not exist.

*Fictio legis inique operatur aliqui damnum vel injuriam.* Fiction of law is wrongful if it works loss or injury to any one. 2 Co. 35; 3 *id.* 36; Gilb. 223; Broom, Max. 129.

*Fictio legis neminem lædit.* A fiction of law injures no one. 2 Rolle 502; 3 Bla. Com. 43; 17 Johns. 348.

*Fides servanda.* Good faith must be observed. 1 Metc. Mass. 551; 8 Barb. 323; 23 *id.*; 521.

*Fides servanda est; simplicitas juris gentium*

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*prævaleat.* Good faith is to be preserved; the simplicity of the law of nations should prevail. Story, Bills § 15.

*Fieri non debet, sed factum valet.* It ought not to be done, but done it is valid. 5 Co. 39; 1 Str 596; 19 Johns. 84, 92; 12 *id.* 11, 376.

*Filiatio non potest probari.* Filiation cannot be proved; that is, the husband is presumed to be the father of a child born during coverture. See ACCESS; Co. Litt. 126 *a.* But see 7 & 8 Vict. c. 101.

*Filius est nomen naturæ, sed hæres nomen juris.* Son is a name of nature, but heir a name of law. 1 Sid. 193; 1 Pow. Dev. 311.

*Filius in utero matris est pars viscerum matris.* A son in the mother's womb is part of the mother's vitals. 7 Co. 8.

*Finis finem litibus imponit.* A fine puts an end to litigation. 3 Inst. 78.

*Finis rei attendendus est.* The end of a thing is to be attended to. 3 Inst. 51.

*Finis unius diei est principium alterius.* The end of one day is the beginning of another. 2 Bulstr. 305.

*Firmior et potentior est operatio legis quam dispositio hominis.* The operation of law is firmer and more powerful than the will of man. Co. Litt. 102. See *Fortior et, etc.*

*Flumina et portus publica sunt, ideoque jus piscandi omnibus commune est.* Rivers and ports are public; therefore the right of fishing there is common to all. Dav. 55; Branch, Princ.

*Fœminæ ab omnibus officiis civilibus vel publicis remotæ sunt.* Women are excluded from all civil and public charges or offices. Dig. 50. 17. 2; 1 Exch. 645; 6 M. & W. 216.

*Fœminæ non sunt capaces de publicis officiis.* Women are not admissible to public offices. Jenk. Cent. 237. But see 7 Mod. 233; Str. 1114; 2 Ld. Raym. 1014; 2 Term 395. See WOMEN.

*Forma dat esse.* Form gives being. Lord Henley, Ch., 2 Eden 199.

*Forma legalis forma essentialis.* Legal form is essential form. 10 Co. 100; 9 C. B. 493; 2 Hopk. 319.

*Forma non observata, infertur adnullatio actus.* When form is not observed, a nullity of the act is inferred. 12 Co. 7.

*Forstellarius est pauperum depressor, et totius communitatis et patriæ publicus inimicus.* A forestaller is an oppressor of the poor, and a public enemy to the whole community and the country. 3 Inst. 196. See FORESTALL.

*Fortior est custodia legis quam hominis.* The custody of the law is stronger than that of man. 2 Rolle 325.

*Fortior et potentior est dispositio legis quam hominis.* The disposition of the law is stronger and more powerful than that of man. Co. Litt. 234; Broom, Max. 697; 10 Q. B. 944; 18 *id.* 87; 10 C. B. 561; 3 H. L. C. 507; 13 M. & W. 285, 306; 8 Johns. 401.

*Fractionem diei non recipit lex.* The law does not regard a fraction of a day. Lofft 572. But see DAY.

*Frater fratri uterino non succedit in hæreditate paterna.* A brother shall not succeed a uterine brother in the paternal inheritance. Fort. de Laud. Leg. Ang. by Amos, p. 15; 2 Sharsw. Bla. Com. This maxim is now superseded in England by 3 & 4 Wm. IV. c. 106, s. 9. Broom, Max. 530; 2 Bla. Com. 232.

*Fraus est celare fraudem.* It is a fraud to conceal a fraud. 1 Vern. 240.

*Fraus est odiosa et non præsumenda.* Fraud is odious and not to be presumed. Bart. Max. 159; Cro. Car. 550.

*Fraus et dolus nemini patrocinari debent.* Fraud and deceit should excuse no man. Broom, Max. 97; 3 Co. 78.

*Fraus et jus nunquam cohabitant.* Fraud and justice never dwell together. Wing. Max. 680.

*Fraus latet in generalibus.* Fraud lies hid in general expressions.

*Fraus meretur fraudem.* Fraud deserves fraud. Plowd. 100; Branch, Princ.

*Free ships make free goods.* See FREE SHIPS.

*Freight is the mother of wages.* 2 Show. 283; 3 Kent 196; 1 Hagg. 227; Smith, Merc. Law 548; 1 Hilt. 17; 5 Johns. 154; 12 *id.* 324; 52 Mo. 387.

*Frequentia actus multum operatur.* The frequency of an act effects much. 4 Co. 78; Wing. Max. 192.

*Fructus augent hæreditatem.* Fruits enhance an inheritance.

*Fructus pendentes pars fundi videntur.* Hanging fruits are part of the land. Dig. 6. 1. 44; 2 Bouv. Inst. n. 1578. See LARCENY.

*Fructus perceptos villæ non esse constat.* Gathered fruits are not a part of the farm. Dig. 19. 1. 17. 1; 2 Bouv. Inst. n. 1578.

*Frumenta quæ sata sunt solo cedere intelliguntur.* Grain which is sown is understood to form a part of the soil. Inst. 2. 1. 32.

*Frustra agit qui judicium prosequi nequit cum effectu.* He in vain sues, who cannot prosecute his judgment with effect. Fleta, lib. 6, c. 37, § 9.

*Frustra est potentia quæ nunquam venit in actum.* The power which never comes to be exercised is vain. 2 Co. 51.

*Frustra feruntur leges nisi subditis et obedientibus.* Laws are made to no purpose unless for those who are subject and obedient. 7 Co. 13.

*Frustra fit per plura, quod fieri potest per pauciora.* That is done vainly by many things, which might be accomplished by fewer. Jenk. Cent. 68; Wing. Max. 177.

*Frustra legis auxilium quærit qui in legem committit.* Vainly does he who offends against the law seek the help of the law. 2 Hale, P. C. 386; Broom, Max. 279, 297.

*Frustra petis quod statim alteri reddere cogeris.* Vainly you seek that which you will immediately be compelled to give back to another. Jenk. Cent. 256; Broom, Max. 346.

*Frustra petis quod mox es restituturus.* Vainly you seek what you will immediately have to restore. 15 Mass. 407.

*Frustra probatur quod probatum non relevat.* It is vain to prove that which if proved would not aid the matter in question. Broom, Max. 255; 13 Gray 511.

*Furiosi nulla voluntas est.* A madman has no will. Dig. 50. 17. 5; *id.* 1. 18. 13. 1; Broom, Max. 314.

*Furiosus absentis loco est.* A madman is considered as absent. Dig. 50. 17. 24. 1.

*Furiosus nullum negotium contrahere (gerere) potest (quia non intelligit quod agit).* A lunatic cannot make a contract. Dig. 50. 17. 5; 1 Story, Contr. § 78.

*Furiosus solo furore punitur.* A madman is punished by his madness alone. Co. Litt. 247; Broom, Max. 15; 4 Bla. Com. 24, 25.

*Furiosus stipulari non potest nec aliquod negotium agere, qui non intelligit quid agit.* An insane person who knows not what he does, cannot make a bargain, nor transact any business. 4 Co. 126.

*Furor contrahi matrimonium non sinit, quia consensu opus est.* Insanity prevents marriage from being contracted, because consent is needed. Dig. 23. 2. 16. 2; 1 V. & B. 140; 1 Bla. Com. 439; 4 Johns. Ch. 343, 345.

*Furtum non est ubi initium habet detentionis per dominium rei.* It is not theft where the commencement of the detention arises through the owner of the thing. 3 Inst. 107.

*Generale dictum generaliter est interpretandum.* A general expression is to be construed generally. 8 Co. 116; 1 Eden 96; Bart. Max. 162.

*Generale nihil certi implicat.* A general expression implies nothing certain. 2 Co. 34; Wing. Max. 164.

*Generale tantum valet in generalibus, quantum singulare in singulis.* What is general prevails (or is worth as much) among things general, as what is particular among things particular. 11 Co. 59.

*Generalia præcedunt, specialia sequuntur.* Things general precede, things special follow. Reg. Brev.; Branch, Princ.

*Generalia specialibus non derogant.* Things general do not derogate from things special. Jenk. Cent. 120; 16 R. I. 453; 34 L. R. A. 541; 97 Tenn. 697.

*Generalia sunt præponenda singularibus.* General things are to be put before particular things.

*Generalia verba sunt generaliter intelligenda.* General words are understood in a general sense. 3 Inst. 76; Broom, Max. 647.

*Generalibus specialia derogant.* Things special lessen the effect of things general. Halkers. Max. 51.

*Generalis clausula non porrigitur ad ea quæ antea specialiter sunt comprehensa.* A general clause does not extend to those things which are previously provided for specially. 8 Co. 154.

*Generalis regula generaliter est intelligenda.* A general rule is to be understood generally. 6 Co. 65.

*Glossa viperina est quæ corrodit viscera textus*

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That is a poisonous gloss which eats out the vitals of the text. 10 Co. 70; 2 Bulst. 79.

*Grammatica falsa non vitiat chartam.* False grammar does not vitiate a deed. 9 Co. 48.

*Gravius est divinam quam temporalem lædere majestatem.* It is more serious to hurt divine than temporal majesty. 11 Co. 29.

*Habemus optimum testem, confitentem reum.* We consider as the best witness a confessing defendant. Fos. Cr. Law 243. See 2 Hagg. 315; 1 Phill. Ev. 397.

*Hæredem Deus facit, non homo.* God, and not man, makes the heir. Bract. 62 *b*; Co. Litt. 7 *b*.

*Hæreditæ suo propinquo vel extraneo periculosa sane custodia nullus committatur.* To the next heir, whether a relation or a stranger, certainly a dangerous guardian, let no one be committed. Co. Litt. 88 *b*.

*Hæreditas est successio in universum jus quod defunctus habuerat.* Inheritance is the succession to every right which was possessed by the late possessor. Co. Litt. 237.

*Hæreditas nihil aliud est quam successio in universum jus, quod defunctus habuerat.* The right of inheritance is nothing else than the faculty of succeeding to all the rights of the deceased. Dig. 50. 17. 62.

*Hæreditas nunquam ascendit.* The inheritance never ascends. Glanville, l. 7. c. 1; Broom, Max. 527; 2 Sharsw. Bla. Com. 212, n; 3 Greenl. Cr. R. P. 331; 1 Steph. Com. 378. Abrogated by stat. 3 & 4 Will. IV. c. 106, § 6.

*Hæredum appellatione veniunt hæredes hæredum in infinitum.* By the title of heirs, come the heirs of heirs to infinity. Co. Litt. 9.

*Hæres est alter ipse, et filius est pars patris.* An heir is another self, and a son is a part of the father.

*Hæres est aut jure proprietatis aut jure representationis.* An heir is either by right of property or right of representation. 3 Co. 40.

*Hæres est eadem persona cum antecessore.* The heir is the same person with the ancestor. Co. Litt. 22.

*Hæres est nomen collectivum.* Heir is a collective name.

*Hæres est nomen juris, filius est nomen naturæ.* Heir is a term of law; son, one of nature.

*Hæres est pars antecessoris.* The heir is a part of the ancestor. Co. Litt. 22 *b*; 3 Hill N. Y. 165, 167.

*Hæres hæredis mei est meus hæres.* The heir of my heir is my heir. Wharton, Law Dict.

*Hæres legitimus est quem nuptiæ demonstrant.* He is the lawful heir whom the marriage indicates. Mirror of Just. 70; Fleta, l. 6, c. 1; Dig. 2. 4. 5; Co. Litt. 7 *b*; Broom, Max. 515. (As to the application of the principle when the marriage is subsequent to the birth of the child, see 2 Cl. & F. 571; 6 Bingh. N. C. 385; 5 Wheat. 226, 262, n.)

*Hæres minor uno et viginti annis non respondebit, nisi in casu dotis.* An heir under twenty-one years of age is not answerable, except in the matter of dower. F. Moore 348.

*Hard cases are the quicksands of the law.* 77 Fed. Rep. 705.

*Hard cases make bad law.*

*He who comes into a court of equity must come with clean hands.* 79 Fed. Rep. 854; 97 Tenn. 180; 11 Tex. Civ. App. 624.

*He who has committed iniquity shall not have equity.* Francis, 2d Max.

*He who is silent when conscience requires him to speak shall be debarred from speaking when conscience requires him to be silent.* 93 Va. 415.

*He who seeks equity must do equity.* 109 Ala. 548; 166 Ill. 183; 67 Ill. App. 440; 11 Tex. Civ. App. 162. See EQUITY.

*He who will have equity done to him must do equity to the same person.* 4 Bouv. Inst. 3723.

*Heirs at law shall not be disinherited by conjecture, but only by express words or necessary implication.* Schoul. Wills § 479; 23 Colo. 40.

*Hoc servabitur quod initio convenit.* That shall be preserved which is useful in the beginning. Dig. 50. 17. 23; Bract. 73 *b*.

*Home ne sera puny pur suer des briefes en court le roy, soit il a droit ou a tort.* A man shall not be punished for suing out writs in the king's court, whether he be right or wrong. 2 Inst. 228; but see MALICIOUS PROSECUTION.

*Hominum causa jus constitutum est.* Law is established for the benefit of man.

*Homo potest esse habilis et inhabilis diversis temporibus.* A man may be capable and incapable at divers times. 5 Co. 98.

*Homo vocabulum est naturæ; persona juris civilis.* Man (*homo*) is a term of nature; person (*persona*), of civil law. Calvinus, Lex.

*Hora non est multum de substantia negotii, licet in appello de ea aliquando fiat mentio.* The hour is not of much consequence as to the substance of business, although in appeal it is sometimes mentioned. 1 Bulstr. 82.

*Hostes sunt qui nobis vel quibus nos bellum decernimus; cæteri proditores vel prædones sunt.* Enemies are those upon whom we declare war, or who declare it against us; all others are traitors or pirates. 7 Co. 24; Dig. 50. 16. 118; 1 Sharsw. Bla. Com. 257.

*Id certum est quod certum reddi potest.* That is certain which may be rendered certain. 2 Bla. Com. 143; 4 Kent 462; 24 Pick. 178; 11 Cush. 380; 90 Mass. 548; 99 *id.* 230; Broom, Max. 624 *et seq.*; 38 S. W. Rep. (Tenn.) 588; 67 Ill. App. 381.

*Id perfectum est quod ex omnibus suis partibus constat.* That is perfect which is complete in all its parts. 9 Co. 9.

*Id possumus quod de jure possumus.* We are able to do that which we can do lawfully. Lane 116.

*Id quod est magis remotum non trahit ad se quod est magis junctum, sed e contrario in omni casu.* That which is more remote does not draw to itself that which is nearer, but the contrary in every case. Co. Litt. 164.

*Id quod nostrum est sine facto nostro ad alium transferri non potest.* What belongs to us cannot be transferred to another without our consent. Dig. 50. 17. 11.

*Id solum nostrum quod debitis deductis nostrum est.* That only is ours which remains to us after deduction of debts. Trayner, Max. 227.

*Id tantum possumus quod de jure possumus.* We can do that only which we can lawfully do. Trayner, Max. 237.

*Idem agens et patiens esse non potest.* To be at once the person acting and the person acted upon is impossible. Jenk. Cent. 40.

*Idem est facere et non prohibere cum possis.* It is the same thing to do a thing as not to prohibit it when in your power. 3 Inst. 158.

*Idem est nihil dicere et insufficienter dicere.* It is the same thing to say nothing and not to say enough. 2 Inst. 178.

*Idem est non probari et non esse; non deficit jus sed probatio.* What is not proved and what does not exist, are the same; it is not a defect of the law, but of proof.

*Idem est scire aut scire debere aut potuisse.* To be bound to know or to be able to know is the same as to know.

*Idem non esse et non apparere.* It is the same thing not to exist and not to appear. Broom, Max. 165; Jenk. Cent. 207.

*Idem semper antecedenti proximo refertur.* *Idem* always relates to the next antecedent. Co. Litt. 385; 7 Johns. Ch. 248.

*Identitas vera colligitur ex multitudine signorum.* True identity is collected from a number of signs. Bacon, Max. Reg. 29.

*Ignorantia eorum quæ quis scire tenetur non excusat.* Ignorance of those things which every one is bound to know excuses not. Hale, P. C. 42. See Tindal, C. J., 10 Cl. & F. 210; Broom, Max. 267; 4 Bla. Com. 27.

*Ignorantia excusatur, non juris sed facti.* Ignorance of fact may excuse, but not ignorance of law. See IGNORANCE.

*Ignorantia facti excusat, ignorantia juris non excusat.* Ignorance of fact excuses, ignorance of law does not excuse. 1 Co. 177; Broom, Max. 253, 263; Bart. Max. 100; 2 Gray 412; 1 Fonb. Eq. 119, n. See IGNORANCE.

*Ignorantia judicis est calamitas innocentis.* The ignorance of the judge is the misfortune of the innocent. 2 Inst. 591.

*Ignorantia juris non excusat.* Ignorance of the law is no excuse. 8 Wend. 267; 18 *id.* 586; 6 Paige 189; 1 Edw. Ch. 467; 7 Watts 374; 2 Alb. L. J. 405; 19 *id.* 84; 3 *id.* 448; 6 *id.* 103; 27 L. Mag. 90; 73 Miss. 110; 111 Ala. 126; 74 Fed. Rep. 657. See IGNORANCE.

*Ignorantia juris quod quisque scire tenetur, neminem excusat.* Ignorance of law, which every one is bound to know, excuses no one. 2 Co. 3 *b*; 1 Plowd. 343; 9 Cl. & F. 324; Broom, Max. 253; 7 C. & P. 456; 9 Pick. 129; 16 Gray 596; 2 Kent 491. See IGNORANCE.

*Ignorantia juris sui non præjudicat juri.* Ignorance of one's right does not prejudice the right. Lofft 552. See IGNORANCE.

*Ignorantia legis neminem excusat.* Ignorance of

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law excuses no one. See IGNORANCE; 1 Story, Eq. Jur. § 111; 7 Watts 374.

*Ignorare legis est lata culpa.* To be ignorant of the law is gross neglect. Bartolus on Cod. 1. 14. See CULPA.

*Ignoratis terminis, ignoratur et ars.* Terms being unknown, the art also is unknown. Co. Litt. 2.

*Illud quod alias licitum non est, necessitas facit licitum, et necessitas inducit privilegium quod jure privatur.* That which is not otherwise lawful necessity makes lawful, and necessity makes a privilege which supersedes the law. 10 Co. 61.

*Illud quod alteri unitur extinguitur, neque amplius per se uxare licet.* That which is united to another is extinguished, nor can it be any more independent. Godolph. Rep. Can. 169.

*Immobilia situm sequuntur.* Immovables follow (the law of) their locality. 2 Kent 67.

*Imperitia culpæ annumeratur.* Want of skill is considered a fault (*i. e.* a negligence, for which one who professes skill is responsible). Dig. 50. 17. 132; 2 Kent 593; 4 Ark. 533.

*Impersonalitas non concludit nec ligat.* Impersonality neither concludes nor binds. Co. Litt. 352.

*Impossibilium nulla obligatio est.* There is no obligation to perform impossible things. Dig. 50. 18. 185; 1 Poth. Obl. pt. 1, c. 1, s. 4, § 3; 2 Story, Eq. Jur. 733; Broom, Max. 249.

*Impotentia excusat legem.* Impossibility is an excuse in the law. Broom, Max. 243, 251.

*Impunitas continuum affectum tribuit delinquendi.* Impunity offers a continual bait to a delinquent. 4 Co. 45.

*Impunitas semper ad deteriora invitat.* Impunity always invites to greater crimes. 5 Co. 109.

*In æquali jure melior est conditio possidentis.* When the parties have equal rights, the condition of the possessor is the better. Mitf. Eq. Pl. 215; Jar. Eq. Jur. 235; 1 Madd. Ch. Pr. 170; Dig. 50. 17. 128; Broom, Max. 718; Plowd. 295.

*In alta proditione nullus potest esse accessorius; sed principalis solum nodo.* In high treason, no one can be an accessory; all are principals. 3 Inst. 138; see 4 Cra. 75. 146. See ACCESSORY.

*In alternativis electio est debitoris.* In alternatives, the debtor has the election.

*In ambigua voce legis ea potius accipienda est significatio, quæ vitio caret; præsertim cum etiam voluntas legis ex hoc colligi possit.* In an ambiguous law that interpretation shall be preferred which is most consonant to equity, especially where it is in conformity with the general design of the legislature. Dig. 1. 3. 19; Broom, Max. 576; Bacon, Max. Reg. 3; 2 Inst. 173.

*In ambiguis orationibus maxime sententia spectanda est ejus qui eas protulisset.* When there are ambiguous expressions, the intention of him who uses them is especially to be regarded. (This maxim of Roman law was confined to wills.) Dig. 50. 17. 96; Broom, Max. 587.

*In ambiguo sermone non utrumque dicimus sed id duntaxat quod volumus.* When the language we use is ambiguous, we do not use it in a double sense, but in the sense in which we mean it. Dig. 34. 5. 3; 2 De G. M. & G. 813.

*In Anglia non est interregnum.* There can be no interregnum in England. Jenk. Cent. 205.

*In atrocioribus delictis punitur affectus licet non sequatur effectus.* In more atrocious crimes, the intent is punished though the effect does not follow. 2 Rolle 89. But see ATTEMPT.

*In casu extremæ necessitatis omnia sunt communia.* In cases of extreme necessity, everything is in common. 1 Hale, Pl. Cr. 54; Broom, Max. 2, n.

*In civilibus ministerium excusat, in criminalibus non item.* In civil matters agency (or service) excuses, but not so in criminal matters. Lofft 223; Trayner, Max. 213.

*In commodato hæc pactio, ne dolus præstetur, rata non est.* If in a contract for a loan there is inserted a clause that fraud should not be accounted of, such clause is void. Dig. 13. 7. 17.

*In conjunctivis oportet utramque partem esse veram.* In conjunctives each part must be true. Wing. Max. 13.

*In consimili casu, consimile debet esse remedium.* In similar cases, the remedy should be similar. Hardr. 65.

*In consuetudinibus non diuturnitas temporis sed soliditas rationis est considerandæ.* In customs, not the length of time but the strength of the reason should be considered. Co. Litt. 141.

*In contractibus, benigna; in testamentis, benignior; in restitutionibus, benignissima interpretatio facienda est.* In contracts, the interpretation or construction should be liberal; in wills, more liberal; in restitutions, most liberal. Co. Litt. 112 *a*.

*In contractibus tacite insunt quæ sunt moris et consuetudinis.* In contracts, those things which are of custom and usage are tacitly implied. Broom, Max. 842: 3 Bingh. N. C. 814, 818; Story, Bills § 143; 3 Kent 260.

*In contrahenda venditione, ambiguum pactum contra venditorem interpretandum est.* In negotiating a sale, an ambiguous agreement is to be interpreted against the seller. Dig. 50. 17. 172; 18. 1. 21.

*In conventionibus contrahentium voluntatem potius quam verba spectari placuit.* In agreements, the rule is to regard the intention of the contracting parties rather than their words. Dig. 50. 16. 219; 2 Kent 555; Broom, Max. 551; 17 Johns. 150.

*In criminalibus, probationes debent esse luce clariores.* In criminal cases, the proofs ought to be clearer than the light. 3 Inst. 210.

*In criminalibus sufficit generalis malitia intentionis cum facto paris gradus.* In criminal cases, a general malice of intention is sufficient, with an act of corresponding degree. Bacon, Max. Reg. 16; Broom, Max. 323.

*In criminalibus voluntas reputabitur pro facto.* In criminal acts, the will will be taken for the deed. 3 Inst. 106.

*In disjunctivis sufficit alteram partem esse veram.* In disjunctives, it is sufficient if either part be true. Wing. Max. 13; Broom, Max. 592; Co. Litt. 225 *a*; 10 Co. 50; Dig. 50. 17. 110.

*In dubiis benigniora præferenda sunt.* In doubtful matters, the more favorable are to be preferred. Dig. 50. 17. 56; 2 Kent 557.

*In dubiis magis dignum est accipiendum.* In doubtful cases, the more worthy is to be taken. Branch, Princ.

*In dubiis non præsumitur pro testamento.* In doubtful cases, there is no presumption in favor of the will. Cro. Car. 51.

*In dubio hæc legis constructio quam verba ostendunt.* In a doubtful case, that is the construction of the law which the words indicate.

*In dubio pars mitior est sequenda.* In doubt, the gentler course is to be followed.

*In dubio sequendum quod tutius est.* In doubt, the safer course is to be adopted.

*In eo quod plus sit semper inest et minus.* The less is always included in the greater. Dig. 50. 17. 110.

*In expositione instrumentorum, mala grammatica, quod fieri potest, vitanda est.* In the construction of instruments, bad grammar is to be avoided as much as possible. 6 Co. 39; 2 Pars. Contr. 26.

*In facto quod se habet ad bonum et malum magis de bono quam de malo lex intendit.* In a deed which may be considered good or bad, the law looks more to the good than to the bad. Co. Litt. 78 *b*.

*In favorabilibus magis attenditur quod prodest quam quod nocet.* In things favored, what does good is more regarded than what does harm. Bacon, Max. Reg. 12; Bart. Max. 151.

*In favorem vitæ, libertatis, et innocentiæ omnia præsumuntur.* In favor of life, liberty, and innocence, all things are to be presumed. Lofft 125.

*In fictione juris semper æquitas existit.* A legal fiction is always consistent with equity. 11 Co. 51; Broom, Max. 127, 130; 17 Johns. 348; 3 Bla. Com. 43.

*In fictione juris semper subsistit æquitas.* In a legal fiction equity always exists. 74 Pa. 398; 2 Pick. 495, 627.

*In generalibus versatur error.* Error dwells in general expressions. 3 Sumn. 290; 1 Cush. 292.

*In genere quicunque aliquid dicit, sive actor sive reus, necesse est ut probat.* In general, whoever alleges anything, whether plaintiff or defendant, must prove it. Best, Ev. § 252.

*In hæredes non solent transire actiones quæ pœnales ex maleficio sunt.* Penal actions arising from anything of a criminal nature do not pass to heirs. 2 Inst. 442.

*In his enim quæ sunt favorabilia animæ, quamvis sunt damnosa rebus, fiat aliquando extentio statuti.* In things that are favorable to the spirit, though injurious to property, an extension of the statute should sometimes be made. 10 Co. 101.

*In his quæ de jure communi omnibus conceduntur, consuetudo alicujus patriæ vel loci non est allegunda.* In those things which by common right are conceded to all, the custom of a particular country or place is not to be alleged. 11 Co. 85.

*In judiciis minori ætati succurritur.* In judicial proceedings infancy is favored. Jenk. Cent. 46.

*In judicio non creditur nisi juratis.* In law, no one is credited unless he is sworn. Cro. Car. 64.

*In jure non remota causa, sed proxima, spectatur*

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In law, the proximate and not the remote cause is to be looked to. Bacon, Max. Reg. 1; Broom, Max. 216, 228, 853, n.; 12 Mass. 234; 12 Metc. 387; 14 Allen 293. See 3 Pars. Con. 455; CAUSA PROXIMA NON REMOTA SPECTATUR.

*In majore summa continetur minor.* In the greater sum is contained the less. 5 Co. 115.

*In maleficiis voluntas spectatur non exitus.* In offences, the intention is regarded, not the event. Dig. 48. 8. 14; Bacon, Max. Reg. 7; Broom, Max. 324.

*In maleficio ratihabitio mandato comparetur.* In a tort, ratification is equivalent to authority. Dig. 50. 17. 152. 2.

*In maxima potentia minima licentia.* In the greatest power there is the least liberty. Hob. 159.

*In mercibus illicitis non sit commercium.* There should be no commerce in illicit goods. 3 Kent 262, n.

*In novo casu novum remedium apponendum est.* In a new state of facts a new legal remedy must be found. 2 Inst. 3.

*In obscuris inspici solere quod verisimilius est, aut quod plerumque fieri solet.* Where there is obscurity, we usually regard what is probable or what is generally done. Dig. 50. 17. 114.

*In obscuris quod minimum est sequimur.* In obscure cases, we follow that which is least so. Dig. 50. 17. 9.

*In odium spoliatoris omnia præsumuntur.* All things are presumed against a wrong-doer. Broom, Max. 939; 1 Vern. 19; 1 P. Wms. 731; 1 Ch. Cas. 292.

*In omni actione ubi duæ concurrunt districtiones, videlicet in rem et in personam, illa districtio tenenda est quæ magis timetur et magis ligat.* In every action where two distresses concur, that is *in rem* and *in personam*, that is to be chosen which is most dreaded, and which binds most firmly. Bract. 372; Fleta, L. 6, c. 14, § 28.

*In omni re nascitur res quæ ipsam rem exterminat.* In every thing, the thing is born which destroys the thing itself. 2 Inst. 15.

*In omnibus contractibus, sive nominatis sive innominatis, permutatio continetur.* In every contract, whether nominate or innominate, there is implied an exchange, *i. e.* a consideration.

*In omnibus obligationibus, in quibus dies non ponitur, præsenti die debetur.* In all obligations, when no time is fixed for the performance, the thing is due immediately. Dig. 50. 17. 14.

*In omnibus pœnalibus judiciis, et ætati et imprudentiæ succurritur.* In all trials for penal offences, allowance is made for youth and lack of discretion. Dig. 50. 17. 108; Broom, Max. 314.

*In omnibus quidem maxime tamen in jure æquitas spectanda sit.* In all affairs indeed, but principally in those which concern the administration of justice, equity should be regarded. Dig. 50. 17. 90.

*In pari causa possessor potior haberi debet.* When two parties have equal rights, the advantage is always in favor of the possessor. Dig. 50. 17. 128; Broom, Max. 714.

*In pari delicto melior est conditio possidentis.* When the parties are equally in the wrong, the condition of the possessor is better. 11 Wheat. 258; 3 Cra. 244; Cowp. 341; Broom, Max. 325; 4 Bouv. Inst. n. 3724; 83 Ala. 142.

*In pari delicto potior est conditio defendentis (et possidentis).* Where both parties are equally in fault, the condition of the defendant is preferable. L. R. 7 Ch. 473; 11 Mass. 376; 101 Mass. 150, 364; Broom, Max. 290, 721; 88 Fed. Rep. 191; 15 Wash. 490; 166 Ill. 282.

*In pœnalibus causis benignius interpretandum est.* In penal cases, the more favorable interpretation is to be made. Dig. 50. 17. 155. 2; Plowd. 86 *b*; 2 Hale, P. C. 365.

*In præparatoriis ad judicium favetur actori.* In things preparatory before trial, the plaintiff is favored. 2 Inst. 57.

*In præsentia majoris potestatis, minor potestas cessat.* In the presence of the superior power, the minor power ceases. Jenk. Cent. 214; Hardw. 28; 13 How. 142; 18 Q. B. 740. See Broom, Max. 111, 112.

*In pretio emptionis et venditionis naturaliter licet contrahentibus se circumvenire.* In the price of buying and selling, it is naturally allowed to the contracting parties to overreach each other. 1 Story, Contr. 606.

*In propria causa nemo judex.* No one can be judge in his own cause. 12 Co. 13.

*In quo quis delinquit, in eo de jure est puniendus.* In whatever thing one offends, in that he is rightfully to be punished. Co. Litt. 233 *b*.

*In re communi neminem dominorum jure facere quicquam, invito altero, posse.* One co-proprietor can exercise no authority over the common property against the will of the other. Dig. 10. 3. 28.

*In re dubia benigniorem interpretationem sequi, non minus justius est, quam tutius.* In a doubtful case, to follow the milder interpretation is not less the more just than it is the safer course. Dig. 50. 17. 192. 2; 28. 4. 3.

*In re dubia magis inficiatio quam affirmatio intelligenda.* In a doubtful matter, the negative is to be understood rather than the affirmative. Godb. 37; Bart. Max. 127.

*In re lupanari, testes lupanares admittentur.* In a matter concerning a brothel, prostitutes are admitted as witnesses. 6 Barb. 320, 324.

*In re pari, potiorem causam esse prohibentis constat.* Where a thing is owned in common, it is agreed that the cause of him prohibiting (its use) is the stronger. Dig. 10. 3. 28; 3 Kent 45; Pothier, *Traité du Con. de Soc.* n. 90; 16 Johns. 438, 491.

*In re propria iniquum admodum est alicui licentiam tribuere sententiæ.* It is extremely unjust that any one should be judge in his own cause.

*In rebus manifestis errat qui auctoritates legum allegat; quia perspicua vera non sunt probanda.* He errs who alleges the authorities of law in things manifest; because obvious truths need not be proved. 5 Co. 67.

*In republica maxime conservanda sunt jura belli.* In the state, the laws of war are to be especially observed. 2 Inst. 58; 8 Allen 484.

*In restitutionem, non in pœnam, hæres succedit.* The heir succeeds to the restitution, not the penalty. 2 Inst. 198.

*In restitutionibus benignissima interpretatio facienda est.* The most favorable construction is to be made in restitutions. Co. Litt. 112.

*In satisfactionibus non permittitur amplius fieri quam semel factum est.* In payments, more must not be received than has been received once for all 9 Co. 53.

*In stipulationibus cum quæritur quid actum sit, verba contra stipulatorem interpretanda sunt.* In contracts, when the question is what was agreed upon, the terms are to be interpreted against the party offering them. Dig. 41. 1. 88. 18. (Chancellor Kent remarks that the true principle appears to be "to give the contract the sense in which the person making the promise believes the other party to have accepted it, if he in fact did so understand and accept it." 2 Kent 721.) 2 Day 281; 1 Duer, Ins. 159, 160; Broom, Max. 599. See.

*In stipulationibus id tempus spectatur quo contrahimus.* In agreements, reference is had to the time at which they were made. Dig. 50. 17. 144. 1.

*In suo quisque negotio hebetior est quam in alieno.* Every one is more dull in his own business than in that of another. Co. Litt. 377.

*In testamentis plenius testatoris intentionem scrutamur.* In testaments, we should seek diligently the will of the testator. (But, says Doddridge, C. J., "this is to be observed with these two limitations: 1st, his intent ought to be agreeable to the rules of the law; 2d, his intent ought to be collected out of the words of the will." 3 Bulstr. 103.) Broom, Max. 555.

*In testamentis plenius voluntates testantium interpretantur.* In testaments, the will of the testator should be liberally construed. Dig. 50. 17. 12; Cujac. *ad loc.* cited 3 Pothier, Pand. 46; Broom, Max. 568.

*In toto et pars continetur.* A part is included in the whole. Dig. 50. 17. 113.

*In traditionibus scriptorum (chartarum) non quod dictum est, sed quod gestum (factum) est, inspicitur.* In the delivery of writings (deeds), not what is said but what is done is to be considered. 9 Co. 137; Leake, Contr. 4.

*In veram quantitatem fidejussor teneatur, nisi pro certa quantitate accessit.* Let the surety be holden for the true quantity unless he agree for a certain quantity. 17 Mass. 597.

*In verbis non verba sed res et ratio quærenda est.* In words, not the words, but the thing and the meaning is to be inquired into. Jenk. Cent. 132.

*In vocibus videndum non a quo sed ad quid summatur.* In discourses, it is to be considered not from what, but to what, it is advanced. Ellesmere, Postn. 62.

*Incendium ære alieno non exuit debitorum.* A fire does not release a debtor from his debt. Code 4. 2. 11.

*Incerta pro nullis habentur.* Things uncertain are held for nothing. Dav. 33.

*Incerta quantitas vitiat actum.* An uncertain quantity vitiates the act. 1 Rolle 465.

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*Incivile est, nisi tota lege prospecta, una aliqua particula ejus proposita, judicare vel respondere.* It is improper, unless the whole law has been examined, to give judgment or advice upon a view of a single clause of it. Dig. 1. 3. 24. See Hob. 171 *a*.

*Incivile est, nisi tota sententia inspecta, de aliqua parte judicare.* It is improper to pass an opinion on any part of a passage without examining the whole. Hob. 171 *a*.

*Inclusio unius est exclusio alterius.* The inclusion of one is the exclusion of another. 11 Co. 58; 8 Mont. 312.

*Incolas domicilium facit.* Residence creates domicil. 1 Johns. Cas. 363, 366. See DOMICIL.

*Incommodum non solvit argumentum.* An inconvenience does not solve an argument.

*Incorporalia bello non adquiruntur.* Things incorporeal are not acquired by war. 6 Maule & S. 104.

*Inde datæ leges ne fortior omnia posset.* Laws were made lest the stronger should have unlimited power.

*Indefinitum æquipollet universali.* The undefined is equivalent to the whole. 1 Ventr. 368.

*Indefinitum supplet locum universalis.* The undefined supplies the place of the whole. 4 Co. 77.

*Independenter se habet assecuratio a viaggio navis.* The voyage insured is an independent or distinct thing from the voyage of the ship. 3 Kent 318, n.

*Index animi sermo.* Speech is the index of the mind. Broom, Max. 622.

*Inesse potest donationi, modus, conditio sive causa; ut modus est; si conditio; quia causa.* In a gift there may be manner, condition, and cause; as (*ut*), introduces a manner; if (*si*), a condition; because (*quia*), a cause. Dyer 138.

*Infans non multum a furioso distat.* An infant does not differ much from a lunatic. Bract. l. 3, c. 2, § 8; Dig. 50. 17. 5. 40; 1 Story, Eq. Jur. §§ 223, 224, 242.

*Infinitum in jure reprobatur.* That which is infinite is reprehensible in law. 9 Co. 45.

*Iniquissima pax est anteponenda justissimo bello.* The most unjust peace is to be preferred to the justest war. 18 Wend. 257, 305.

*Iniquum est alios permittere, alios inhibere mercaturam.* It is inequitable to permit some to trade and to prohibit others. 3 Inst. 181.

*Iniquum est aliquem rei sui esse judicem.* It is unjust for any one to be judge in his own cause. 12 Coke 13.

*Iniquum est ingenuis hominibus non esse liberam rerum suarum alienationem.* It is against equity for freemen not to have the free disposal of their own property. Co. Litt. 223.

*Injuria fit ei cui convicium dictum est, vel de eo factum carmen famosum.* An injury is done to him of whom a reproachful thing is said, or concerning whom an infamous song is made. 9 Co. 60; Bart. Max. 179.

*Injuria non excusat injuriam.* A wrong does not excuse a wrong. Broom, Max. 270, 387, 395; 11 Exch. 822; 15 Q. B. 276; 6 E. & B. 76; Branch, Princ.

*Injuria non præsumitur.* A wrong is not presumed. Co. Litt. 232.

*Injuria propria non cadet beneficium facientis.* No one shall profit by his own wrong.

*Injuria servi dominum pertingit.* The master is liable for injury done by his servant. Lofft 229.

*Injustum est, nisi tota lege inspecta, de una aliqua ejus particula proposita judicare vel respondere.* It is unjust to give judgment or advice concerning any particular clause of a law without having examined the whole law. 8 Co. 117 *b*.

*Insanus est qui, objecta ratione, omnia cum impetu et furore facit.* He is insane who, reason being thrown away, does everything with violence and rage. 4 Co. 128.

*Instans est finis unius temporis et principium alterius.* An instant is the end of one time and the beginning of another. Co. Litt. 185.

*Intentio cæca mala.* A hidden intention is bad. 2 Bulstr. 179.

*Intentio inservire debet legibus, non leges intentioni.* Intentions ought to be subservient to the laws, not the laws to intentions. Co. Litt. 314.

*Intentio mea imponit nomen operi meo.* My intent gives a name to my act. Hob. 123.

*Inter alios res gestas aliis non posse præjudicium facere sæpe constitutum est.* It has been often settled that things which took place between other parties cannot prejudice. Code 7. 60. 1. 2.

*Interdum venit ut exceptio quæ prima facie justa videtur, tamen inique noceat.* It sometimes happens that a plea which seems *prima facie* just, nevertheless is injurious and unequal. Inst. 4. 14; 4. 14; 1. 2.

*Interest reipublicæ ne maleficia remaneant impunita.* It concerns the commonwealth that crimes do not remain unpunished. Jenk. Cent. 30, 31.

*Interest reipublicæ ne sua quis male utatur.* It concerns the commonwealth that no one misuse his property. 6 Co. 36.

*Interest reipublicæ quod homines conserventur.* It concerns the commonwealth that men be preserved. 12 Co. 62.

*Interest reipublicæ res judicatas non rescindi.* It concerns the commonwealth that things adjudged be not rescinded. See RES JUDICATA.

*Interest reipublicæ suprema hominum testamenta rata haberi.* It concerns the commonwealth that men's last wills be sustained. Co. Litt. 236.

*Interest reipublicæ ut carceres sint in tuto.* It concerns the commonwealth that prisons be secure. 2 Inst. 587.

*Interest reipublicæ ut pax in regno conservetur, et quæcunque paci adversentur provide declinentur.* It benefits the state to preserve peace in the kingdom, and prudently to decline whatever is adverse to it. 2 Inst. 158.

*Interest reipublicæ ut quilibet re sua bene utatur.* It concerns the commonwealth that every one use his property properly. 6 Co. 37.

*Interest reipublicæ ut sit finis litium.* It concerns the commonwealth that there be a limit to litigation. Broom, Max. 331, 343, 893 n.; Co. Litt. 303; 7 Mass. 432; 16 Gray 27; 99 Mass. 203; 88 Pa. 506; 101 N. C. 78; 59 Fed. Rep. 868; 49 La. Ann. 757.

*Interpretare et concordare leges legibus est optimus interpretandi modus.* To interpret and reconcile laws so that they harmonize is the best mode of construction. 8 Co. 169.

*Interpretatio fienda est ut res magis valeat quam pereat.* Such a construction is to be made that the subject may have an effect rather than none. Broom, Max. 543; Jenk. Cent. 198; 78 Pa. 219. See CONSTRUCTION; INTERPRETATION.

*Interpretatio talis in ambiguis semper fienda est, ut evitetur inconveniens et absurdum.* In ambiguous things, such a construction should be made, that what is inconvenient and absurd may be avoided. 4 Inst. 328.

*Interruptio multiplex non tollit præscriptionem semel obtentam.* Repeated interruptions do not defeat a prescription once obtained. 2 Inst. 654.

*Intestatus decedit, qui aut omnino testamentum non fecit aut non jure fecit, aut id quod fecerat ruptum irritumve factum est, aut nemo ex eo hæres exstitit.* He dies intestate who either has made no will at all or has not made it legally, or whose will which he had made has been annulled or become ineffectual, or to whom there is no living heir. Inst. 3. 1. pr.; Dig. 38. 16. 1; 50. 16. 64.

*Inutilis labor, et sine fructu, non est effectus legis.* Useless labor and without fruit is not the effect of law. Co. Litt. 127; Wing. Max. 38.

*Inveniens libellum famosum et non corrumpens punitur.* He who finds a libel and does not destroy it, is punished. F. Moore 813.

*Invito beneficium non datur.* No one is obliged to accept a benefit against his consent. Dig. 50. 17. 69; Broom, Max. 699 n. (But if he does not dissent, he will, in many cases, be considered as assenting. See ASSENT.)

*Ipsæ leges cupiunt ut jure regantur.* The laws themselves desire that they should be governed by right. Co. Litt. 174 *b*, quoted from Cato; 2 Co. 25 *b*.

*Ira furor brevis est.* Anger is a short insanity. 4 Wend. 336, 355.

*Ita lex scripta est.* The law is so written. 26 Barb. 374, 380; 18 Pa. 306. See 22 Pick. 389.

*Ita semper fiat relatio ut valeat dispositio.* Let the relation be so made that the disposition may stand. 6 Co. 76.

*Iter est jus eundi, ambulandi hominis; non etiam jumentum agendi vel vehiculum.* A way is the right of going or walking, and does not include the right of driving a beast of burden or a carriage. Co. Litt. 56 *a*; Inst. 2. 3. pr.; 1 Mack. Civ. Law 343, § 314.

*Judex æquitatem semper spectare debet.* A judge ought always to regard equity. Jenk. Cent. 45.

*Judex ante oculos æquitatem semper habere debet.* A judge ought always to have equity before his eyes. Jenk. Cent. 58.

*Judex bonus nihil ex arbitrio suo faciat, nec propositione domesticæ voluntatis, sed juxta leges et jura pronunciet.* A good judge should do nothing from his own arbitrary will, or from the dictates of

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his private wishes; but he should pronounce according to law and justice. 7 Co. 27 *a*.

*Judex damnatur cum nocens absolvitur.* The judge is condemned when the guilty are acquitted.

*Judex debet judicare secundum allegata et probata.* The judge ought to decide according to the allegations and the proofs.

*Judex est lex loquens.* The judge is the speaking law. 7 Co. 4 *a*.

*Judex habere debet duos sales, salem sapientiæ, ne sit insipidus, et salem conscientiæ, ne sit diabolus.* A judge should have two salts: The salt of wisdom, lest he be foolish; and the salt of conscience, lest he be devilish. 3 Inst. 147; Bart. Max. 189.

*Judex non potest esse testis in propria causa.* A judge cannot be a witness in his own cause. 4 Inst. 279. See JUDGE.

*Judex non potest injuriam sibi datam punire.* A judge cannot punish a wrong done to himself. 12 Co. 114.

*Judex non reddit plus quam quod petens ipse requirit.* The judge does not give more than the plaintiff demands. 2 Inst. 286, case 84.

*Judicandum est legibus non exemplis.* We are to judge by the laws, not by examples. 4 Co. 33 *b*; 4 Bla. Com. 405; 19 Johns. 513.

*Judices non tenentur exprimere causam sententiæ suæ.* Judges are not bound to explain the reason of their judgments. Jenk. Cent. 75.

*Judici officium suum excedenti non paretur.* To a judge who exceeds his office (or jurisdiction) no obedience is due. Jenk. Cent. 139.

*Judici satis pœna est quod Deum habet ultorem.* It is punishment enough for a judge that he is responsible to God. 1 Leon. 295.

*Judicia in curia regis non adnihilentur, sed stent in robore suo quousque per errorem aut attinctum adnullentur.* Judgments in the king's court are not to be annihilated, but to remain in force until annulled by error or attaint. 2 Inst. 539.

*Judicia in deliberationibus crebro maturescunt, in accelerato processu nunquam.* Judgments frequently become matured by deliberation, never by hurried process. 3 Inst. 210.

*Judicia posteriora sunt in lege fortiora.* The later decisions are stronger in law. 8 Co. 97.

*Judicia sunt tanquam juris dicta, et pro veritate accipiuntur.* Judgments are, as it were, the dicta or sayings of the law, and are received as truth. 2 Inst. 537.

*Judiciis posterioribus fides est adhibenda.* Faith or credit is to be given to the later decisions. 13 Co. 14.

*Judicis est in pronuntiando sequi regulam, exceptione non probata.* The judge in his decision ought to follow the rule, when the exception is not proved.

*Judicis est judicare secundum allegata et probata.* A judge ought to decide according to the allegations and proofs. Dyer 12 *a*; Halkers. Max. 78.

*Judicis es jus dicere non dare.* It is the duty of a judge to declare the law, not to enact it. Lofft 42.

*Judicis officium est opus diei in die suo perficere.* It is the duty of a judge to finish the work of each day within that day. Dyer 12.

*Judicis officium est ut res ita tempora rerum quærere; quæsito tempore tutus eris.* It is the duty of a judge to inquire the times of things, as well as into things; by inquiring into the time you will be safe. Co. Litt. 171.

*Judicium a non suo judice datum nullius est momenti.* A judgment given by an improper judge is of no moment. 10 Co. 76 *b*; 2 Q. B. 1014; 13 *id.* 143; 14 M. & W. 124; 11 Cl. & F. 610; Broom, Max. 93.

*Judicium est quasi juris dictum.* Judgment is as it were a saying of the law. Co. Litt. 168.

*Judicium non debet esse illusorium, suum effectum habere debet.* A judgment ought not to be illusory, it ought to have its proper effect. 2 Inst. 341.

*Judicium redditur in invitum, in præsumptione legis.* In presumption of law, a judgment is given against inclination. Co. Litt. 248 *b*, 314 *b*.

*Judicium semper pro veritate accipitur.* A judgment it always taken for truth. 2 Inst. 380; 17 Mass. 237.

*Juncta juvant.* Things joined have effect. 11 East 220.

*Jura ecclesiastica limitata sunt infra limites separatos.* Ecclesiastical laws are limited within separate bounds. 3 Bulstr. 53.

*Jura eodem modo destituuntur quo constituuntur.* Laws are abrogated or repealed by the same means by which they are made. Broom, Max. 878.

*Jura naturæ sunt immutabilia.* The laws of nature are unchangeable. Branch, Princ.; Oliver, Forms 56.

*Jura publica anteferenda privatis.* Public rights are to be preferred to private. Co. Litt. 130.

*Jura publica ex privato promiscue decidi non debent.* Public rights ought not to be decided promiscuously with private. Co. Litt. 181 *b*.

*Jura regis specialia non concedunter per generalia verba.* The special rights of the king are not granted by general words. Jenk. Cent. 108.

*Jura sanguinis nullo jure civili dirimi possunt.* The right of blood and kindred cannot be destroyed by any civil law. Dig. 50. 17. 9; Bacon, Max. Reg. 11; Broom, Max. 533; 14 Allen 562.

*Juramentum est indivisibile, et non est admittendum in parte verum et in parte falsum.* An oath is indivisible; it is not to be held partly true and partly false. 4 Inst. 274.

*Jurare est Deum in testum vocare, et est actus divini cultus.* To swear is to call God to witness, and is an act of religion. 3 Inst. 165. See Bart. Max. 232; 1 Benth. Ev. 376, 371, note.

*Juratur creditur in judicio.* He who makes oath is to be believed in judgment. 3 Inst. 79.

*Juratores debent esse vicini, sufficientes et minus suspecti.* Jurors ought to be neighbors, of sufficient estate, and free from suspicion. Jenk. Cent. 141.

*Juratores sunt judices facti.* Jurors are the judges of the facts. Jenk. Cent. 68.

*Jure naturæ æquum est neminem cum alterius detrimento et injuria fieri locupletiorem.* According to the laws of nature, it is just that no one should be enriched with detriment and injury to another (*i. e.* at another's expense). Dig. 50. 17. 200.

*Juri non est consonum quod aliquis accessorius in curia regis convincatur antequam aliquis de facto fuerit attinctus.* It is not consonant to justice that any accessory should be convicted in the king's court before any one has been attainted of the fact. 2 Inst. 183.

*Juris effectus in executione consistit.* The effect of a law consists in the execution. Co. Litt. 289 *b*.

*Juris ignorantia est, cum jus nostrum ignoramus.* It is ignorance of the law when we do not know our own rights. 9 Pick. 130.

*Juris præcepta sunt hæc, honeste vivere, alterum non lædere, suum cuique tribuere.* These are the precepts of the law, to live honorably, to hurt nobody, to render to every one his due. Inst. 1. 1. 3; Sharsw. Bla. Com. Introd. 40.

*Juris quidem ignorantiam cuique nocere, facti verum ignorantiam non nocere.* Ignorance of fact prejudices no one, ignorance of law does. Dig. 22. 6. 9.

*Jurisdictio est potestas de publico introducta, cum necessitate juris dicendi.* Jurisdiction is a power introduced for the public good, on account of the necessity of dispensing justice. 10 Co. 73 *a*.

*Jurisprudentia est divinarum atque humanarum rerum notitia; justi atque injusti scientia.* Jurisprudence is the knowledge of things divine and human; the science of the just and the unjust. Dig. 1. 1. 10. 2; Inst. 1. 1. 1; Bract. 3; 8 Johns. 290, 295.

*Jurisprudentia legis communis Angliæ est scientia socialis et copiosa.* The jurisprudence of the common law of England is a science sociable and copious. 7 Co. 28 *a*.

*Jus accrescendi inter mercatores locum non habet, pro beneficio commercii.* The right of survivorship does not exist among merchants, for the benefit of commerce. Co. Litt. 182; Broom, Max. 455; Lindl. Part., 4th ed. 664.

*Jus accrescendi præfertur oneribus.* The right of survivorship is preferred to incumbrances. Co. Litt. 185.

*Jus accrescendi præfertur ultimæ voluntati.* The right of survivorship is preferred to a last will. Co. Litt. 185 *b*.

*Jus civile est quod sibi populus constituit.* The civil law is what a people establishes for itself. Inst. 1. 2. 1; 1 Johns. 424, 426.

*Jus descendit, et non terra.* A right descends, not the land. Co. Litt. 345.

*Jus dicere, et non jus dare.* To declare the law, not to make it. 7 Term 696; *Arg.* 10 Johns. 566; 7 Exch. 543; 2 Eden 29; 4 C. B. 560, 561; Broom, Max. 140.

*Jus est ars boni et æqui.* Law is the science of what is good and just. Dig. 1. 1. 1. 1.

*Jus est norma recti; et quicquid est contra normam recti est injuria.* The law is the rule of right; and whatever is contrary to the rule of right is an injury. 3 Bulstr. 313.

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*Jus et fraus nunquam cohabitant.* Right and fraud never live together. 10 Co. 45.

*Jus ex injuria non oritur.* A right cannot arise from a wrong. 4 Bingh. 639; Broom, Max. 738, n.

*Jus in re inhærit ossibus usufructuarii.* A right in the thing cleaves to the person of the usufructuary.

*Jus naturale est quod apud homines eandem habet potentiam.* Natural right is that which has the same force among all mankind. 7 Co. 12.

*Jus non habenti tute non paretur.* It is safe not to obey him who has no right. Hob. 146.

*Jus publicum privatorum pactis mutari non potest.* A public right cannot be changed by agreement of private parties. Dig. 2. 14. 38; cited *arg.* in 3 C. & F. 621; 4 *id.* 241; 68 Conn. 533; 37 Atl. Rep. 420.

*Jus quo universitates utuntur est idem quod habent privati.* The law which governs corporations is the same as that which governs individuals. 16 Mass. 44.

*Jus respicit æquitatem.* Law regards equity. Co. Litt. 24 *b*; Broom, Max. 151; 17 Q. B. 292.

*Jus superveniens auctori accrescit successori.* A right growing to a possessor accrues to a successor. Halker. Max. 76.

*Jus vendit quod usus approbavit.* The law dispenses what use has approved. Ellesmere, Postn. 35.

*Jusjurandi forma verbis differt, re convenit; hunc enim sensum habere debet, ut Deus invocetur.* The form of taking an oath differs in language, agrees in meaning; for it ought to have this sense, that the Deity is invoked. Grotius, b. 2. c. 13, s. 10.

*Jusjurandum inter alios factum nec nocere nec prodesse debet.* An oath made between third parties ought neither to hurt nor profit. 4 Inst. 279.

*Justitia debet esse* LIBERA, *quia nihil iniquius venali justitia;* PLENA, *quia justitia non debet claudicare; et* CELERIS, *quia dilatio est quædam negatio.* Justice ought to be *unbought*, because nothing is more hateful than venal justice; *full*, for justice ought not to halt; and *quick*, for delay is a kind of denial. 2 Inst. 56.

*Justitia est constans et perpetua voluntas jus suum cuique tribuendi.* Justice is a steady and unceasing disposition to render to every man his due. Inst. 11. pr.; Dig. 1. 1 10.

*Justitia est virtus excellens et Altissimo complacens.* Justice is an excellent virtue and pleasing to the Most High. 4 Inst. 28.

*Justitia firmatur solium.* By justice the throne is established. 3 Inst. 140.

*Justitia nemini neganda est.* Justice is to be denied to none. Jenk. Cent. 178.

*Justitia non est neganda, non differenda.* Justice is not to be denied nor delayed. Jenk. Cent. 76.

*Justitia non novit patrem nec matrem, solum veritatem spectat justitia.* Justice knows neither father nor mother, justice looks to truth alone. 1 Bulstr. 199.

*Justum non est aliquem antenatum mortuum facere bastardum, qui pro tota vita sua pro legitimo habetur.* It is not just to make a bastard after his death one elder born who all his life has been accounted legitimate. 8 Co. 101.

*King can do no wrong.* See KING CAN DO NO WRONG.

*L'obligation sans cause, ou sur une fausse cause, ou sur cause illicite, ne peut avoir aucun effet.* An obligation without consideration, or upon a false consideration (which fails), or upon unlawful consideration, cannot have any effect. Code 3. 3. 4; Chitty, Contr. 11th, Am. ed. 25, note.

*L'ou le ley done chose, la ceo done remedie a vener a ceo.* Where the law gives a right, it gives a remedy to recover. 2 Rolle 17.

*La conscience est la plus changeante des régles.* Conscience is the most changeable of rules.

*La ley favour la vie d'un home.* The law favors a man's life. Year B. Hen. VI. 51.

*La ley favour l'inheritance d'un home.* The law favors a man's inheritance. Year B. Hen. VI. 51.

*La ley voit plus tost suffer un mischiefe que un inconvenience.* The law will sooner suffer a mischief than an inconvenience. Littleton § 231.

*Lata culpa dolo æquiparatur.* Gross negligence is equal to fraud.

*Law construeth every act to be lawful when it standeth indifferent whether it be lawful or not.* Wing. Max. 194.

*Law construeth things according to common possibility or intendment.* Wing. Max. 189.

*Law construeth things to the best.* Wing. Max. 198.

*Law construeth things with equity and moderation.* Wing. Max. 183; Finch, Law 74.

*Law disfavoreth impossibilities.* Wing. Max. 165.

*Law disfavoreth improbabilities.* Wing. Max. 161.

*Law favoreth charity.* Wing. Max. 135.

*Law favoreth common right.* Wing. Max. 144.

*Law favoreth diligence, and therefore hateth folly and negligence.* Wing. Max. 172; Finch, Law, b. 1, c. 3, n. 70.

*Law favoreth honor and order.* Wing. Max. 199.

*Law favoreth justice and right.* Wing. Max. 141.

*Law favoreth life, liberty, and dower.* 4 Bacon, Works 345.

*Law favoreth mutual recompense.* Wing. Max. 100; Finch, Law, b. 1, c. 3, n. 42.

*Law favoreth possession where the right is equal.* Wing. Max. 98; Finch, Law, b. 1, c. 3, n. 36.

*Law favoreth public commerce.* Wing. Max. 198.

*Law favoreth public quiet.* Wing. Max. 200; Finch, Law, b. 1, c. 3. n. 54.

*Law favoreth speeding of men's causes.* Wing. Max. 176.

*Law favoreth things for the commonwealth.* Wing. Max. 197; Finch, Law, b. 1, c. 3, n. 53.

*Law favoreth truth, faith, and certainty.* Wing. Max. 154.

*Law hateth delays.* Wing. Max. 176; Finch, Law, b. 1, c. 3, n. 71.

*Law hateth new inventions and innovations.* Wing. Max. 204.

*Law hateth wrong.* Wing. Max. 146; Finch, Law, b. 1, c. 3, n. 62.

*Law of itself prejudiceth no man.* Wing. Max. 148; Finch, Law, b. 1, c. 3, n. 63.

*Law respecteth matter of substance more than matter of circumstance.* Wing. Max. 101; Finch, Law, b. 1, c. 3, n. 39.

*Law respecteth possibility of things.* Wing. Max. 140; Finch, Law, b. 1, c. 3, n. 40.

*Law respecteth the bonds of nature.* Wing. Max. 78; Finch, Law, b. 1, c. 3, n. 29.

*Lawful things are well mixed, unless a form of law oppose.* Bacon, Max. Reg. 23. (*The law giveth that favor to lawful acts, that although they be executed by several authorities, yet the whole act is good.* Ibid.)

*Le contrat fait la loi.* The contract makes the law.

*Le ley de Dieu et ley de terre sont tout un, et l'un et l'autre preferre et favour le common et publique bien del terre.* The law of God and the law of the land are all one; and both preserve and favor the common and public good of the land. Keilw. 191.

*Le ley est le plus haut inheritance que le roy ad, car par le ley, il mesme et touts ses sujets sont rules, et si le ley ne fuit, nul roy ne nul inheritance serra.* The law is the highest inheritance that the king possesses; for by the law both he and all his subjects are ruled; and if there were no law, there would be neither king nor inheritance.

*Le salut du peuple est la suprême loi.* The safety of the people is the highest law. Montes. Esp. Lois 1. xxvii. ch. 23; Broom, Max. 2. n.

*Legatos violare contra jus gentium est.* It is contrary to the law of nations to do violence to ambassadors. Branch, Princ.

*Legatum morte testatoris tantum confirmatur, sicut donatio inter vivos traditione sola.* A legacy is confirmed by the death of the testator, in the same manner as a gift from a living person is by delivery alone. Dyer 148.

*Legatus regis vice fungitur a quo destinatur, et honorandus est sicut ille cujus vicem gerit.* An ambassador fills the place of the king by whom he is sent, and is to be honored as he is whose place he fills. 12 Co. 17.

*Legem enim contractus dat.* The contract makes the law. 22 Wend. 215, 233.

*Legem terræ amittentes perpetuam infamiæ notam inde merito incurrunt.* Those who do not preserve the law of the land, then justly incur the ineffaceable brand of infamy. 3 Inst. 221.

*Leges Angliæ sunt tripartitæ: jus commune, consuetudines, ac decreta comitiorum.* The laws of England are threefold: common law, customs, and decrees of parliament.

*Leges figendi et refigendi consuetudo est periculosissima.* The custom of making and unmaking laws is a most dangerous one. 4 Co. pref.

*Leges humanæ nascuntur, vivunt, et moriuntur.* Human laws are born, live, and die. 7 Co. 25; 2 Atk. 674; 11 C. B. 767; 1 Bla. Com. 89.

*Leges naturæ perfectissimæ sunt et immutabiles; humani vero juris conditio semper in infinitum de-*

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*currit, et nihil est in eo quod perpetuo stare possit. Leges humanæ nascuntur, vivunt, moriuntur.* The laws of nature are most perfect and immutable; but the condition of human law is an unending succession, and there is nothing in it which can continue perpetually. Human laws are born, live, and die. 7 Co. 25.

*Leges non verbis sed rebus sunt impositæ.* Laws are imposed on things, not words. 10 Co. 101.

*Leges posteriores priores contrarias abrogant.* Subsequent laws repeal prior conflicting ones. Broom, Max. 27, 29; 2 Rolle 410; 11 Co. 626, 630; 12 Allen 434; 20 Nev. 214.

*Leges suum ligent latorem.* Laws should bind the proposers of them. Fleta, b. 1, c. 17, § 11.

*Leges vigilantibus, non dormientibus subveniunt.* The laws aid the vigilant, not the negligent. 5 Johns. Ch. 122, 145; 16 How. Pr. 142, 144.

*Legibus sumptis desinentibus, lege naturæ utendum est.* When laws imposed by the state fail, we must act by the law of nature. 2 Rolle 298.

*Legis constructio non facit injuriam.* The construction of law does no wrong. Co. Litt. 183.

*Legis figendi et refigendi consuetudo periculosissima est.* The custom of fixing and refixing (making and annulling) laws is most dangerous.

*Legis interpretatio legis vim obtinet.* The construction of law obtains the force of law. Branch, Princ.

*Legis minister non tenetur, in executione officii sui, fugere aut retrocedere.* The minister of the law is not bound, in the execution of his office, either to fly or retreat. 6 Co. 68.

*Legislatorum est viva vox, rebus et non verbis legem imponere.* The voice of legislators is a living voice, to impose laws on things and not on words. 10 Co. 101; Bart. Max. 211.

*Legitime imperanti parere necesse est.* One who commands lawfully must be obeyed. Jenk. Cent. 180.

*Les fictions naissent de la loi, et non la loi des fictions.* Fictions arise from the law, and not law from fictions.

*Les lois ne se chargent de punir que les actions extérieures.* Laws do not undertake to punish other than outward actions. Montes. Esp. Lois, b. 12, c. 11; Broom, Max. 311.

*Lex æquitate gaudet; appetit perfectum; est norma recti.* The law delights in equity: it covets perfection; it is a rule of right. Jenk. Cent. 36.

*Lex aliquando sequitur æquitatem.* The law sometimes follows equity. 3 Wils. 119.

*Lex Angliæ est lex misericordiæ.* The law of England is a law of mercy. 2 Inst. 619.

*Lex Angliæ non patitur absurdum.* The law of England does not suffer an absurdity. 9 Co. 22.

*Lex Angliæ nunquam matris sed semper patris conditionem imitari partum judicat.* The law of England rules that the offspring shall always follow the condition of the father, never that of the mother. Co. Litt. 123; Bart. Max. 59.

*Lex Angliæ nunquam sine parliamento mutari potest.* The law of England cannot be changed but by parliament. 2 Inst. 218, 619.

*Lex beneficialis rei consimili remedium præstat.* A beneficial law affords a remedy in a similar case. 2 Inst. 689.

*Lex citius tolerare vult privatum damnum quam publicum malum.* The law would rather tolerate a private loss than a public evil. Co. Litt. 152 *b*.

*Lex contra id quod præsumit probationem non recipit.* The law admits no proof against that which it presumes. Lofft 573.

*Lex de futuro, judex de præterito.* The law provides for the future, the judge for the past.

*Lex deficere non potest in justitia exhibenda.* The law ought not to fail in dispensing justice. Co. Litt. 197.

*Lex dilationes semper exhorret.* The law always abhors delay. 2 Inst. 240.

*Lex est ab æterno.* The law is from everlasting. Branch, Princ.

*Lex est dictamen rationis.* Law is the dictate of reason. Jenk. Cent. 117.

*Lex est norma recti.* Law is a rule of right.

*Lex est ratio summa, quæ jubet quæ sunt utilia et necessaria, et contraria prohibet.* Law is the perfection of reason, which commands what is useful and necessary, and forbids the contrary. Co. Litt. 319 *b*.

*Lex est sanctio sancta, jubens honesta, et prohibens contraria.* Law is a sacred sanction, commanding what is right and prohibiting the contrary. 2 Inst. 587; 1 Sharsw. Bla. Com. 44, n.

*Lex est tutissima cassis; sub clypeo legis nemo decipitur.* Law is the safest helmet; under the shield of the law no one is deceived. 2 Inst. 56.

*Lex favet doti.* The law favors dower. 3 & 4 Will. IV. c. 105.

*Lex fingit ubi subsistit æquitas.* Law creates a fiction where equity exists. Branch, Princ.

*Lex intendit vicinum vicini facta scire.* The law presumes that one neighbor knows the actions of another. Co. Litt. 78 *b*. See JURY.

*Lex necessitatis est lex temporis*, i. e. *instantis.* The law of necessity is the law of time, that is, time present. Hob. 159.

*Lex neminem cogit ad vana seu inutilia peragenda.* The law forces no one to do vain or useless things. Wing. Max. 600; Broom, Max. 252; 3 Sharsw. Bla. Com. 144; 2 Bingh. N. C. 121; 13 East 420; 15 Pick. 190; 7 Cush. 43, 393; 14 Gray 78; 7 Pa. 206; 3 Johns. 598. See IMPOSSIBILITY.

*Lex neminem cogit ostendere quod nescire præsumitur.* The law forces no one to make known what he is presumed not to know. Lofft 569.

*Lex nemini facit injuriam.* The law does wrong to no one. Branch, Princ.; 66 Pa. 157.

*Lex nemini operatur iniquum, nemini facit injuriam.* The law never works an injury, or does a wrong. Jenk. Cent. 22.

*Lex nil facit frustra, nil jubet frustra.* The law does nothing and commands nothing in vain. Broom, Max. 252; 3 Bulstr. 279; Jenk. Cent. 17.

*Lex non cogit ad impossibilia.* The law requires nothing impossible. Broom, Max. 242; Co. Litt. 231 *b*; Hob. 96; 1 Bouv. Inst. n. 851; 17 N. H. 411; 55 *id.* 211; 136 Mo. 227.

*Lex non curat de minimis.* The law does not regard small matters. Hob. 88.

*Lex non deficit in justitia exhibenda.* The law does not fail in showing justice. Jenk. Cent. 31.

*Lex non exacte definit, sed arbitrio boni viri permittit.* The law does not define exactly, but trusts in the judgment of a good man. 9 Mass. 475.

*Lex non favet votis delicatorum.* The law favors not the wishes of the dainty. 9 Co. 58 *a*; Broom, Max. 379.

*Lex non intendit aliquid impossibile.* The law intends not anything impossible. 12 Co. 89 *a*.

*Lex non patitur fractiones et divisiones statutorum.* The law suffers no fractions and divisions of estates. 1 Co. 87; Branch, Princ.

*Lex non præcipit inutilia, quia inutilus labor stultus.* The law commands not useless things, because useless labor is foolish. Co. Litt. 197; 5 Co. 89 *a*; 112 Mass. 400.

*Lex non requirit verificari quod apparet curiæ.* The law does not require that to be proved which is apparent to the court. 9 Co. 54. See JUDICIAL NOTICE.

*Lex plus laudatur quando ratione probatur.* The law is the more praised when it is consonant with reason. 3 Term 146; 7 *id.* 252; 7 A. & E. 657; Broom, Max. 159.

*Lex posterior derogat priori.* A prior statute shall give place to a later. Mack. Civ. Law, 5; Broom, Max. 27, 28.

*Lex prospicit, non respicit.* The law looks forward, not backward. Jenk. Cent. 284.

*Lex punit mendaciam.* The law punishes falsehood. Jenk. Cent. 15.

*Lex rejicit superflua, pugnantia, incongrua.* The law rejects superfluous, contradictory, and incongruous things. Jenk. Cent. 133, 140, 176.

*Lex reprobat moram.* The law disapproves of delay.

*Lex respicit æquitatem.* Law regards equity. See 14 Q. B. 504, 511, 512; Broom, Max. 151.

*Lex semper dabit remedium.* The law will always give a remedy. Bac. Abr. *Actions in general* (B); Branch, Princ.; Broom, Max. 192; 12 A. & E. 266; 7 Q. B. 451; 5 Rawle 89.

*Lex semper intendit quod convenit rationi.* The law always intends what is agreeable to reason. Co. Litt. 78.

*Lex spectat naturæ ordinem.* The law regards the order of nature. Co. Litt. 197; Broom, Max. 252.

*Lex succurrit ignoranti.* The law succors the ignorant. Jenk. Cent. 15.

*Lex succurrit minoribus.* The law assists minors. Jenk. Cent. 57.

*Lex uno ore omnes alloquitur.* The law speaks to all with one mouth. 2 Inst. 184.

*Lex vigilantibus, non dormientibus, subvenit.* Law assists the wakeful, not the sleeping. 1 Story, Contr. § 529.

*Liberata pecunia non liberat offerentem.* Money being restored does not set free the party offering. Co. Litt. 207.

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*Libertas est naturalis facultas ejus quod cuique facere libet, nisi quod de jure aut vi prohibetur.* Liberty is the natural power of doing whatever one pleases, except that which is restrained by law or force. Co. Litt. 116; Sharsw. Bla. Com. Introd. 6, n.

*Libertas inæstimabilis res est.* Liberty is an inestimable good. Dig. 50. 17. 106; Fleta, lib. 2, c. 51, § 13.

*Libertas non recipit æstimationem.* Freedom does not admit of valuation. Bracton 14.

*Libertas omnibus rebus favorabilior est.* Liberty is more favored than all things. Dig. 50. 17. 122.

*Liberum corpus æstimationem non recipit.* The body of a freeman does not admit of valuation. Dig. 9. 3. 7.

*Liberum est cuique apud se explorare an expediat sibi consilium.* Every one is free to ascertain for himself whether a recommendation is advantageous to his interests. 6 Johns. 181, 184.

*Librorum appellatione continentur omnia volumina, sive in charta, sive in membrana sint, sive in quavis alia materia.* Under the name of books are contained all volumes, whether upon paper, or parchment, or any other material. Dig. 32. 52. *pr. et per tot.*

*Licet dispositio de interesse futuro sit inutilis tamen potest fieri declaratio præcedens quæ sortiatur effectum interveniente novo actu.* Although the grant of a future interest be inoperative, yet a declaration precedent may be made which may take effect, provided a new act intervene. Bacon, Max. Reg. 14; Broom, Max. 498.

*Licita bene miscentur, formula nisi juris obstet.* Lawful acts may well be fused into one, unless some form of law forbid. (*E. g.* Two having a right to convey, each a moiety, may unite and convey the whole.) Bacon, Max. 94; Crabb, R. P. 179.

*Ligeantia est quasi legis essentia; est vinculum fidei.* Allegiance is, as it were, the essence of the law; it is the bond of faith. Co. Litt. 129.

*Ligeantia naturalis nullis claustris coercetur, nullis metis refrœnatur, nullis finibus premitur.* Natural allegiance is restrained by no barriers, curbed by no bounds, compressed by no limits. 7 Co. 10.

*Ligna et lapides sub armorum appellatione non continentur.* Sticks and stones are not contained under the name of arms. Bract. 144 *b*.

*Linea recta est index sui et obliqui; lex est linea recti.* A right line is an index of itself and of an oblique; law is a line of right. Co. Litt. 158.

*Linea recta semper præfertur transversali.* The right line is always preferred to the collateral. Co. Litt. 10; Fleta, lib. 6, c. 1; 1 Steph. Com., 4th ed. 406; Broom, Max. 529.

*Literæ patentes regis non erunt vacuæ.* Letters-patent of the king shall not be void. 1 Bulstr. 6.

*Litis nomen omnem actionem significat, sive in rem, sive in personam sit.* The word "lis" (*i. e.* a law-suit) signifies every action, whether *in rem* or *in personam*. Co. Litt. 292.

*Litus est quousque maximus fluctus a mari pervenit.* The shore is where the highest wave from the sea has reached. Dig. 50. 16. 96; Ang. Tide-Waters 67.

*Locus contractus regit actum.* The place of the contract governs the act. 2 Kent 458; L. R. 1 Q. B. 119; 91 U. S. 406. See LEX LOCI.

*Locus pro solutione reditus aut pecuniæ secundum conditionem dimissionis aut obligationis est stricte observandus.* The place for the payment of rent or money is to be strictly observed according to the condition of the lease or obligation. 4 Co. 73.

*Longa patientia trahitur ad consensum.* Long sufferance is construed as consent. Fleta, lib. 4, c. 26, § 4.

*Longa possessio est pacis jus.* Long possession is the law of peace. Co. Litt. 6.

*Longa possessio parit jus possidendi, et tollit actionem vero domino.* Long possession produces the right of possession, and takes away from the true owner his action. Co. Litt. 110; see 115 U. S. 623; ADVERSE POSSESSION.

*Longum tempus, et longus usus qui excedit memoriam hominum, sufficit pro jure.* Long time and long use beyond the memory of man suffice for right. Co. Litt. 115.

*Loquendum ut vulgus, sentiendum ut docti.* We should speak as the common people, we should think as the learned. 7 Co. 11.

*Lubricum linguæ non facile trahendum est in pœnam.* The slipperiness of the tongue (*i. e.* its liability to err) ought not lightly to be subjected to punishment. Cro. Car. 117.

*Lucrum facere ex pupilli tutela tutor non debet.* A guardian ought not to make money out of the guardianship of his ward. 1 Johns. Ch. 527.

*Lunaticus, qui gaudet in lucidis intervallis.* He is a lunatic who enjoys lucid intervals. 1 Story, Cont. § 78.

*Magis dignum trahit ad se minus dignum.* The more worthy draws to itself the less worthy. Year B. 20 Hen. VI. 2, arg.

*Magister rerum usus; magistra rerum experientia* Use is the master of things; experience is the mistress of things. Co. Litt. 69, 229; Wing. Max. 752.

*Magna culpa dolus est.* Gross negligence is equivalent to fraud. Dig. 50. 16. 226; 2 Spear 256; 1 Bouv. Inst. n. 646.

*Magna negligentia culpa est, magna culpa dolus est.* Gross negligence is a fault, gross fault is a fraud. Dig. 50. 16. 226. (*Culpa* is an intermediate degree of negligence between *negligentia*, or lack of energetic care, and *dolus*, or fraud, seeming to approach nearly to our "negligence" in meaning.) See Whart. Negl.

*Maihemium est homicidium inchoatum.* Mayhem is incipient homicide. 3 Inst. 118.

*Maihemium est inter crimina majora minimum, et inter minora maximum.* Mayhem is the least of great crimes, and the greatest of small. Co. Litt. 127.

*Major continet in se minus.* The greater includes the less. 19 Vin. Abr. 379.

*Major hæreditas venit unicuique nostrum a jure et legibus quam a parentibus.* A greater inheritance comes to every one of us from right and the laws than from parents. 2 Inst. 56.

*Major numerus in se continet minorem.* The greater number contains in itself the less. Bracton 16.

*Majore pœna affectus quam legibus statuta est, non est infamis.* One affected with a greater punishment than is provided by law is not infamous. 4 Inst. 66.

*Majori summæ minor inest.* The lesser is included in the greater sum. 2 Kent 618; Story, Ag. § 172.

*Majus dignum trahit ad se minus dignum.* The more worthy or the greater draws to it the less worthy or the lesser. 5 Vin. Abr. 584, 586; Co. Litt. 43, 355 *b*; 2 Inst. 307; Finch, Law 23; Broom, Max. 176, n.

*Majus est delictum seipsum occidere quam alium.* It is a greater crime to kill one's self than another. Bart. Max. 108. See SUICIDE.

*Mala grammatica non vitiat chartam; sed in expositione instrumentorum mala grammatica quoad fieri possit evitanda est.* Bad grammar does not vitiate a deed; but in the construction of instruments, bad grammar, as far as it can be done, is to be avoided. 6 Co. 39; 9 *id.* 48; Vin. Abr. *Grammar* (A); Lofft 441; Broom, Max. 686.

*Maledicta expositio quæ corrumpit textum.* It is a cursed construction which corrupts the text. 2 Co. 24; 4 *id.* 35; 11 *id.* 34; Wing. Max. 26; Broom, Max. 622.

*Maleficia non debent remanere impunita, et impunitas continuum affectum tribuit delinquenti.* Evil deeds ought not to remain unpunished, and impunity affords continual incitement to the delinquent. 4 Co. 45.

*Maleficia propositis distinguuntur.* Evil deeds are distinguished from evil purposes. Jenk. Cent. 290.

*Malitia est acida, est mali animi affectus.* Malice is sour, it is the quality of a bad mind. 2 Bulstr. 49.

*Malitia supplet ætatem.* Malice supplies age. Dyer 104; 1 Bla. Com. 464; 4 *id.* 22, 23, 312; Broom, Max. 316. See MALICE.

*Malum hominum est obviandum.* The malicious plans of men must be avoided. 4 Co. 15.

*Malum non habet efficientem, sed deficientem causam.* Evil has not an efficient, but a deficient, cause. 3 Inst. Præme.

*Malum non præsumitur.* Evil is not presumed. 4 Co. 72; Branch, Princ.

*Malum quo communius eo pejus.* The more common the evil, the worse. Branch, Princ.

*Malus usus est abolendus.* An evil custom ought to be abolished. Co. Litt. 141; Broom, Max. 921; Litt. § 212; 5 Q. B. 701; 12 *id.* 845; 2 M. & K. 449; 71 Pa. 69.

*Mandata licita strictam recipiunt interpretationem, sed illicita latam et extensam.* Lawful commands receive a strict interpretation, but unlawful, a wide or broad construction. Bacon, Max. Reg. 16.

*Mandatarius terminos sibi positos transgredi non*

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*potest.* A mandatary cannot exceed the bounds of his authority. Jenk. Cent. 53.

*Mandatum nisi gratuitum nullum est.* Unless a mandate is gratuitous, it is not a mandate. Dig. 17. 1. 1. 4; Inst. 3. 27; 1 Bouv. Inst. n. 1070.

*Manifesta probatione non indigent.* Manifest things require no proof. 7 Co. 40 *b.*

*Maris et fœminæ conjunctio est de jure naturæ.* The union of male and female is founded on the law of nature. 7 Co. 13 *b.*

*Matrimonia debent esse libera.* Marriages ought to be free. Halkers. Max. 86; 2 Kent 102.

*Matrimonium subsequens tollit peccatum præcedens.* A subsequent marriage cures preceding fault. Bart. Max. 218.

*Matter en ley ne serra mise en bouche del jurors.* Matter of law shall not be put into the mouth of jurors. Jenk. Cent. 180.

*Maturiora sunt vota mulierum quam virorum.* The wishes of women are of quicker growth than those of men (*i. e.* women arrive at maturity earlier than men). 6 Co. 71 *a*; Bract. 86 *b.*

*Maxime ita dicta quia maxima est ejus dignitas et certissima auctoritas, atque quod maxime omnibus probetur.* A maxim is so called because its dignity is chiefest, and its authority the most certain, and because universally approved by all. Co. Litt. 11.

*Maxime paci sunt contraria vis et injuria.* The greatest enemies to peace are force and wrong. Co. Litt. 161.

*Maximus erroris populus magister.* The people is the greatest master of error. Bacon, Max.

*Melior est causa possidentis.* The cause of the possessor is preferable. Dig. 50. 17. 126. 2.

*Melior est conditio defendentis.* The cause of the defendant is the better. Broom, Max. 715, 719; Dig. 50. 17, 126. 2; Hob. 199; 1 Mass. 66; 8 *id.* 307; 4 Cush. 405.

*Melior est conditio possidentis et rei quam actoris.* Better is the condition of the possessor and that of the defendant than that of the plaintiff. Broom, Max. 714, 719; 4 Inst. 180; Vaugh. 58, 60; Hob. 103; 8 Mass. 189.

*Melior est conditio possidentis, ubi neuter jus habet.* Better is the condition of the possessor where neither of the two has a right. Jenk. Cent. 118.

*Melior est justitia vere præveniens quam severe puniens.* That justice which justly prevents a crime is better than that which severely punishes it.

*Meliorem conditionem suam facere potest minor, deteriorem nequaquam.* A minor can improve or make his condition better, but never worse. Co. Litt. 337 *b.*

*Melius est in tempore occurrere quam post causam vulneratum remedium quærere.* It is better to meet a thing in time, than to seek a remedy after a wrong has been inflicted. 2 Inst. 299.

*Melius est jus deficiens quam jus incertum.* Law that is deficient is better than law that is uncertain. Lofft 395.

*Melius est omnia mala pati quam malo consentire.* It is better to suffer every wrong or ill, than to consent to it. 3 Inst. 23.

*Melius est recurrere quam malo currere.* It is better to recede than to proceed wrongly. 4 Inst. 176.

*Mens testatoris in testamentis spectanda est.* In wills, the intention of the testator is to be regarded. Jenk. Cent. 277.

*Mentiri est contra mentem ire.* To lie is to go against the mind. 3 Bulstr. 260.

*Mercis appellatio ad res mobiles tantum pertinet.* The term merchandise belongs to movable things only. Dig. 50. 16. 66.

*Mercis appellatione homines non contineri.* Under the name of merchandise men are not included. Dig. 50. 16. 207.

*Merito beneficium legis amittit, qui legem ipsam subvertere intendit.* He justly loses the protection of the law, who attempts to infringe the law. 2 Inst. 253.

*Merx est quidquid vendi potest.* Merchandise is whatever can be sold. 3 Metc. 367. See MERCHANDISE.

*Meum est promittere, non dimittere.* It is mine to promise, not to discharge. 2 Rolle 39.

*Minatur innocentibus qui parcit nocentibus.* He threatens the innocent who spares the guilty. 4 Co. 45.

*Minima pœna corporalis est major qualibet pecuniaria.* The smallest bodily punishment is greater than any pecuniary one. 2 Inst. 220.

*Minime mutanda sunt quæ certam habuerunt interpretationem.* Things which have had a certain interpretation are to be altered as little as possible. Co. Litt. 365.

*Minimum est nihilo proximum.* The least is next to nothing. Bacon, Arg. Low's Case of Tenures.

*Minor ante tempus agere non potest in casu proprietatis, nec etiam convenire.* A minor before majority cannot act in a case of property, nor even agree. 2 Inst. 291.

*Minor jurare non potest.* A minor cannot make oath. Co. Litt. 172 *b.* An infant cannot be sworn on a jury. Littleton 289.

*Minor minorem custodire non debet; alios enim præsumitur male regere qui seipsum regere nescit.* A minor ought not be guardian of a minor, for he is presumed to govern others ill who does not know how to govern himself. Co. Litt. 88.

*Minor non tenetur respondere durante minori ætati; nisi in causa dotis, propter favorem.* A minor is not bound to answer during his minority, except as a matter of favor in a cause of dower. 3 Bulstr. 143.

*Minor, qui infra ætatem 12 annorum fuerit, utlagari non potest nec extra legem poni, quia ante talem ætatem, non est sub lege aliqua, nec in decenna.* A minor who is under twelve years of age cannot be outlawed, nor placed without the laws, because before such age he is not under any laws, nor in a decennary. Co. Litt. 128.

*Minor 17 annis non admittitur fore executorem.* A minor under seventeen years of age is not admitted to be an executor. 6 Co. 67.

*Minus solvit, qui tardius solvit; nam et tempore minus solvitur.* He does not pay who pays too late; for; from the delay, he is judged not to pay. Dig. 50. 16. 12. 1.

*Misera est servitus, ubi jus est vagum aut incertum.* It is a miserable slavery where the law is vague or uncertain. 4 Inst. 246; 9 Johns. 427; 11 Pet. 286; Broom, Max. 150.

*Mitius imperanti melius paretur.* The more mildly one commands, the better is he obeyed. 3 Inst. 24.

*Mobilia non habent situm.* Movables have no *situs.* 4 Johns. Ch. 472.

*Mobilia personam sequuntur, immobilia situm.* Movable things follow the person; immovable, their locality. Story, Confl. L., 3d ed. 638; 166 U. S. 185; 165 *id.* 194; 49 La. Ann. 43.

*Mobilia sequuntur personam.* Movables follow the person. Story, Confl. L., 3d ed. 638, 639; Broom, Max. 522; 87 Ky. 635; 16 L. R. A. 57. See TAX.

*Modica circumstantia facti jus mutat.* A small circumstance attending an act may change the law.

*Modus de non decimando non valet.* A *modus* (prescription) not to pay tithes is void. Lofft 427; Cro. Eliz. 511; 2 Sharsw. Bla. Com. 31.

*Modus et conventio vincunt legem.* The form of agreement and the convention of the parties overrule the law. 13 Pick. 491; Broom, Max. 689 *et seq.*; 2 Co. 73; 22 N. Y. 252.

*Modus legem dat donationi.* The manner gives law to a gift. Co. Litt. 19 *a*; Broom, Max. 459.

*Moneta est justum medium et mensura rerum commutabilium, nam per medium mnetæ fit omnium rerum conveniens, et justa æstimatio.* Money is the just medium and measure of all exchangeable things, for by the medium of money a convenient and just estimation of all things is made. See 1 Bouv. Inst. n. 922; Bart. Max. 222.

*Monetandi jus comprehenditur in regalibus quæ nunquam a regio sceptro abdicantur.* The right of coining is comprehended amongst those rights of royalty which are never relinquished by the kingly sceptre. Dav. 18.

*Mora reprobatur in lege.* Delay is disapproved of in law. Jenk. Cent. 51.

*Mors dicitur ultimum supplicium.* Death is denominated the extreme penalty. 3 Inst. 212.

*Mors omnia solvit.* Death dissolves all things.

*Mortis momentum est ultimum vitæ momentum.* The last moment of life is the moment of death. 4 Bradf. 245, 250.

*Mortuus exitus non est exitus.* To be dead-born is not to be born. Co. Litt. 29. See 2 Paige 35; Domat, liv. prél. t. 2, s. 1, n. 4, 6.

*Mos retinendus est fidelissimæ vetustatis.* A custom of the truest antiquity is to be retained. 4 Co. 78.

*Mulcta damnum famæ non irrogat.* A fine does not impose a loss of reputation. Code, 1. 54; Calvinus, Lex.

*Multa conceduntur per obliquum quæ non conce-*

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*duntur de directo.* Many things are conceded indirectly which are not allowed directly. 6 Co. 47.

*Multa fidem promissa levant.* Many promises lessen confidence. 11 Cush. 350.

*Multa ignoramus quæ nobis non laterent si veterum lectio nobis fuit familiaris.* We are ignorant of many things which would not be hidden from us if the reading of old authors were familiar to us. 10 Co. 73.

*Multa in jure communi contra rationem disputandi pro communi utilitate introducta sunt.* Many things have been introduced into the common law, with a view to the public good, which are inconsistent with sound reason. Co. Litt. 70; Broom, Max. 158; 2 Co. 75. See 3 Term 146; 7 *id.* 252.

*Multa multo exercitatione facilius quam regulis percipies.* You will perceive many things much more easily by practice than by rules. 4th Inst. 50.

*Multa non vetat lex, quæ tamen tacite damnavit.* The law fails to forbid many things which yet it has silently condemned.

*Multa transeunt cum universitate quæ non per se transeunt.* Many things pass as a whole which would not pass separately. Co. Litt. 12 *a.*

*Multi multa, nemo omnia novit.* Many men know many things, no one knows everything. 4 Inst. 348.

*Multiplex et indistinctum parit confusionem; et questiones quo simpliciores, eo lucidiores.* Multiplicity and indistinctness produce confusion: the more simple questions are, the more lucid they are. Hob. 335; Bart. Max. 70.

*Multiplicata transgressione crescat pœnæ inflictio.* The infliction of punishment should be in proportion to the increase of crime. 2 Inst. 479.

*Multitudinem decem faciunt.* Ten make a multitude. Co. Litt. 247.

*Multitudo errantium non parit errori patrocinium.* The multitude of those who err is no protection for error. 11 Co. 75.

*Multitudo imperitorum perdit curiam.* A multitude of ignorant practitioners destroys a court. 2 Inst. 219.

*Multo utilius est pauca idonea effundere, quam multis inutilibus homines gravari.* It is much more useful to pour forth a few useful things than to oppress men with many useless things. 4 Co. 20.

*Natura appetit perfectum, ita et lex.* Nature aspires to perfection, and so does the law. Hob. 144.

*Natura fide jussionis sit strictissimi juris et non durat vel extendatur de re ad rem, de persona ad personam, de tempore ad tempus.* The nature of the contract of suretyship is *strictissimi juris*, and cannot endure nor be extended from thing to thing, from person to person, or from time to time. Burge, Sur. 40.

*Natura non facit saltum, ita nec lex.* Nature makes no leap, nor does the law. Co. Litt. 238.

*Natura non facit vacuum, nec lex supervacuum.* Nature makes no vacuum, the law nothing purposeless. Co. Litt. 79.

*Naturæ vis maxima; natura bis maxima.* The force of nature is greatest; nature is doubly great. 2 Inst. 564.

*Naturale est quidlibet dissolvi eo modo quo ligatur.* It is natural for a thing to be unbound in the same way in which it was bound. Jenk. Cent. 66; 4 Denio 417; Broom, Max. 877.

*Nec curia deficeret in justitia exhibenda.* Nor should the court be deficient in showing justice. 4 Inst. 63.

*Nec tempus nec locus occurrit regi.* Neither time nor place bars the king. Jenk. Cent. 190.

*Nec veniam effuso sanguine casus habet.* Where blood is spilled, the case is unpardonable. 3 Inst. 57.

*Nec veniam, læso numine, casus habet.* Where the Divinity is insulted, the case is unpardonable. Jenk. Cent. 167.

*Necessarium est quod non potest aliter se habere.* That is necessary which cannot be otherwise.

*Necessitas est lex temporis et loci.* Necessity is the law of time and place. 8 Co. 69.

*Necessitas excusat aut extenuat delictum in capitalibus, quod non operatur idem in civilibus.* Necessity excuses or extenuates delinquency in capital cases, but not in civil. See NECESSITY.

*Necessitas facit licitum quod alias non est licitum.* Necessity makes that lawful which otherwise is unlawful. 10 Co. 61.

*Necessitas inducit privilegium quoad jura privata.* With regard to private rights, necessity privileges. Bacon, Max. Reg. 5. Broom, Max. 11.

*Necessitas non habet legem.* Necessity has no law. Plowd. 18. See NECESSITY, and 15 Vin. Abr. 534; 22 *id.* 540.

*Necessitas publica major est quam privata.* Public necessity is greater than private. Bacon, Max. Reg. 5; Noy, Max., 9th ed. 34; Broom, Max. 18.

*Necessitas, quod cogit, defendit.* Necessity defends what it compels. Hale, P. C. 54; Broom, Max. 14.

*Necessitas sub lege non continetur, quia quod alias non est licitum necessitas facit licitum.* Necessity is not restrained by law; since what otherwise is not lawful, necessity makes lawful. Bart. Max. 227; 2 Inst. 326; Fleta, l. 5, c. 23, § 14.

*Necessitas vincit legem.* Necessity controls the law. Hob. 144; Cooley, Const. Lim. 747.

*Necessity creates equity.*

*Negatio conclusionis est error in lege.* The denial of a conclusion is error in law. Wing. Max. 268.

*Negligentia semper habet infortuniam comitem.* Negligence always has misfortune for a companion. Co. Litt. 246; Shep. Touch. 476.

*Neminem lædit qui jure suo utitur.* He who stands on his own rights injures no one. 41 La. Ann. 194; 48 *id.* 1389.

*Neminem oportet esse sapientiorem legibus.* No man need be wiser than the laws. Co. Litt. 97.

*Nemo admittendus est inhabilitare seipsum.* No one is allowed to incapacitate himself. Jenk. Cent. 40. See STULTIFY; 5 Whart. 371.

*Nemo agit in seipsum.* No man acts against himself. Jenk. Cent. 40. Therefore no man can be a judge in his own cause. Broom, Max. 216, n.; 4 Bingh. 151; 2 Exch. 595; 18 C. B. 253; 2 B. & Ald. 822.

*Nemo alienæ rei, sine satisdatione, defensor idoneus intelligitur.* No man is considered a competent defender of another's property, without security. 1 Curt. C. C. 202.

*Nemo alieno nomine lege agere potest.* No man can sue at law in the name of another. Dig. 50. 17. 123.

*Nemo aliquam partem recte intelligere potest, antequam totum iterum atque iterum perlegerit.* No one can properly understand any part of a thing till he has read through the whole again and again. 3 Co. 59; Broom, Max. 598.

*Nemo allegans suam turpitudinem audiendus est.* No one alleging his own turpitude is to be heard as a witness. 4 Inst. 279; 3 Story 514, 516; 12 Pick. 567; 24 *id.* 146.

*Nemo bis punitur pro eodem delicto.* No one can be punished twice for the same offence. 2 Hawk. Pl. Cr. 377; 4 Sharsw. Bla. Com. 315.

*Nemo cogitationis pœnam patitur.* No one suffers punishment on account of his thoughts. Trayner, Max. 362.

*Nemo cogitur rem suam vendere, etiam justo pretio.* No one is bound to sell his property, even for a just price. But see EMINENT DOMAIN.

*Nemo contra factum suum venire potest.* No man can contradict his own deed. 2 Inst. 66.

*Nemo damnum facit, nisi qui id fecit quod facere jus non habet.* No one is considered as doing damage, unless he who is doing what he has no right to do. Dig. 50. 17. 151.

*Nemo dat qui non habet.* No one can give who does not possess. Broom, Max. 499, n.; Jenk. Cent. 250; 100 Mass. 24.

*Nemo de domo sua extrahi debet.* A citizen cannot be taken by force from his house. Dig. 50. 17. 103. (This maxim in favor of Roman liberty is much the same as that *every man's house is his castle.*) Broom, Max. 432, n.

*Nemo debet aliena factura locupletari.* No one ought to gain by another's loss. 2 Kent 336.

*Nemo debet bis puniri pro uno delicto.* No one ought to be punished twice for the same offence. 4 Co. 43; 11 *id.* 59 *b*; Broom, Max. 348.

*Nemo debet bis vexari pro eadem causa.* No one should be twice harassed for the same cause. 2 Johns. 24, 182; 13 *id.* 153; 8 Wend. 10; 3 Hill N. Y. 420; 6 *id.* 133; 2 Barb. 285; 6 *id.* 32.

*Nemo debet bis vexari pro una et eadem causa.* No one ought to be twice vexed for one and the same cause. 5 Pet. 61; 1 Archb. Pr. by Ch. 476; 2 Mass. 355; 17 *id.* 425; 79 Fed. Rep. 868; 93 Va. 595.

*Nemo debet bis vexari, si constat curiæ quod sit pro una et eadem causa.* No man ought to be twice punished, if it appear to the court that it is for one and the same cause. 5 Co. 61; Broom, Max. 327, 348; 5 Mass. 176; 7 *id.* 423; 99 *id.* 203.

*Nemo debet esse judex in propria causa.* No one should be judge in his own cause. 12 Co. 114; Broom, Max. 116. See JUDGE; 111 N. Y. 1.

*Nemo debet immiscere se rei alienæ—ad se nihil pertinenti.* No one should interfere in what in no way concerns him. Jenk. Cent. 18.

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*Nemo debet in communione invitus teneri.* No one should be retained in a partnership against his will. 2 Sandf. 568, 598; 1 Johns. 106, 114.

*Nemo debet locupletari ex alterius incommodo.* No one ought to be made rich out of another's loss. Jenk. Cent. 4; 10 Barb. 626, 633.

*Nemo debet rem suam sine factu aut defectu suo amittere.* No one should lose his property without his own act or negligence. Co. Litt. 263.

*Nemo duobus utatur officiis.* No one should fill two offices. 4 Inst. 100.

*Nemo ejusdem tenementi simul potest esse hæres et dominus.* No one can be at the same time heir and lord of the same fief. 1 Reeve, Hist. Eng. Law 106.

*Nemo est hæres viventis.* No one is an heir to the living. Co. Litt. 22 *b*; 2 Bla. Com. 70, 107, 208; Vin. Abr. *Abeyance*; Broom, Max. 523; 7 Allen 75; 99 Mass. 456; 118 *id.* 345; 2 Johns. 36.

*Nemo est supra leges.* No one is above the law. Lofft 142.

*Nemo ex alterius facto prægravari debet.* No man ought to be burdened in consequence of another's act. 2 Kent 646; Pothier, Obl., Evans, ed. 133.

*Nemo ex consilio obligatur.* No man is bound for the advice he gives. Story, Bailm. § 155.

*Nemo ex proprio dolo consequitur actionem.* No one acquires a right of action from his own wrong. Broom, Max. 297; 73 Miss. 575; 43 Pac. Rep. (Cal.) 412.

*Nemo ex suo delicto meliorem suam conditionem facere potest.* No one can improve his condition by his own wrong. Dig. 50. 17. 134. 1. See 116 Ind. 399.

*Nemo in propria causa testis esse debet.* No one can be a witness in his own cause. (But to this rule there are many exceptions.) 1 Sharsw. Bla. Com. 443; 3 *id.* 370.

*Nemo inauditus condemnari debet, si non sit contumax.* No man ought to be condemned unheard, unless he be contumacious. Jenk. Cent. 18. No man shall be condemned in his rights of property, as well as in his rights of person, without his day in court. 48 S. C. 325.

*Nemo jus sibi dicere potest.* No one can declare the law for himself. (No one is entitled to take the law into his own hands.) Trayner, Max. 366.

*Nemo militans Deo implicetur secularibus negotiis.* No man warring for God should be troubled by secular business. Co. Litt. 70.

*Nemo nascitur artifex.* No one is born an artificer. Co. Litt. 97.

*Nemo patriam in qua natus est exuere, nec ligeantiæ debitum ejurare possit.* No man can renounce the country in which he was born, nor abjure the obligation of his allegiance. Co. Litt. 129 *a*; 3 Pet 155; Broom, Max. 75. See ALLEGIANCE; EXPATRIATION; NATURALIZATION.

*Nemo plus commodi heredi suo relinquit quam ipse habuit.* No one leaves a greater advantage to his heir than he had himself. Dig. 50. 17. 120.

*Nemo plus juris ad alienum transferre potest quam ipse habet.* One cannot transfer to another a larger right than he himself has. Dig. 50. 17. 54; Co. Litt. 309 *b*; Wing. Max. 56; Broom, Max. 467, 469; 2 Kent 324; 5 Co. 113; 10 Pet. 161, 175.

*Nemo potest contra recordum verificare per patriam.* No one can verify by the country against a record. (The issue upon a record cannot be tried by a jury.) 2 Inst. 380.

*Nemo potest esse dominus et hæres.* No one can be both owner and heir. Hale, C. L. c. 7.

*Nemo potest esse simul actor et judex.* No one can be at the same time judge and suitor. Broom, Max. 117; 13 Q. B. 327; 17 *id.* 1; 15 C. B. 790; 1 C. B. N. S. 328.

*Nemo potest esse tenens et dominus.* No man can be at the same time tenant and landlord (of the same tenement). Gilbert, Ten. 152.

*Nemo potest facere per alium quod per se non potest.* No one can do that by another which he cannot do by himself. Jenk. Cent. 237.

*Nemo potest facere per obliquum quod non potest facere per directum.* No one can do that indirectly which cannot be done directly. 1 Eden 513.

*Nemo potest mutare consilium suum in alterius injuriam.* No one can change his purpose to the injury of another. Dig. 50. 17. 75; Broom, Max. 34; 7 Johns. 477.

*Nemo potest sibi debere.* No one can owe to himself. See CONFUSION OF RIGHTS.

*Nemo potest nisi quod de jure potest.* No one is able to do a thing, unless he can do it lawfully. 67 Ill. App. 80.

*Nemo præsens nisi intelligat.* One is not present unless he understands. See PRESENCE.

*Nemo præsumitur alienam posteritatem suæ prætulisse.* No one is presumed to have preferred another's posterity to his own. Wing. Max. 285.

*Nemo præsumitur donare.* No one is presumed to give. 9 Pick. 128.

*Nemo præsumitur esse immemor suæ æternæ salutis, et maxime in articulo mortis.* No man is presumed to be forgetful of his eternal welfare, and particularly at the point of death. 6 Co. 76.

*Nemo præsumitur ludere in extremis.* No one is presumed to trifle at the point of death.

*Nemo præsumitur malus.* No one is presumed to be bad.

*Nemo prohibetur plures negotiationes sive artes exercere.* No one is restrained from exercising several kinds of business or arts. 11 Co. 54.

*Nemo prohibetur pluribus defensionibus uti.* No one is forbidden to set up several defences. Co. Litt. 304; Wing. Max. 479.

*Nemo prudens punit ut præterita revocentur, sed ut futura præveniantur.* No wise man punishes that things done may be revoked, but that future wrongs may be prevented. 3 Bulstr. 17.

*Nemo punitur pro alieno delicto.* No one is to be punished for the crime or wrong of another. Wing. Max. 336.

*Nemo punitur sine injuria, facto, seu defalte.* No one is punished unless for some wrong, act, or default. 2 Inst. 287.

*Nemo qui condemnare potest, absolvere non potest.* No one who may condemn is unable to acquit. Dig. 50. 17. 37.

*Nemo sibi esse judex vel suis jus dicere debet.* No man ought to be his own judge, or to administer justice in cases where his relations are concerned. 12 Co. 113; Cod. 3. 5. 1; Broom, Max. 116, 124.

*Nemo sine actione experitur, et hoc non sine breve sive libello conventionali.* No one goes to law without an action, and no one can bring an action without a writ or bill. Bract. 112.

*Nemo tenetur ad impossibile.* No one is bound to an impossibility. Jenk. Cent. 7; Broom, Max. 244.

*Nemo tenetur armare adversarium contra se.* No one is bound to arm his adversary against himself. Wing. Max. 665.

*Nemo tenetur divinare.* No one is bound to foretell. 4 Co. 28; 10 *id.* 55 *a*.

*Nemo tenetur edere instrumenta contra se.* No man is bound to produce writings against himself. Bell, Dict.

*Nemo tenetur informare qui nescit sed quisquis scire quod informat.* No one who is ignorant of a thing is bound to give information of it, but every one is bound to know that which he gives information of. Branch, Princ.; Lane 110.

*Nemo tenetur jurare in suam turpitudinem.* No one is bound to testify to his own baseness.

*Nemo tenetur seipsum accusare.* No one is bound to accuse himself. Wing. Max. 486; Broom, Max. 968, 970; 1 Sharsw. Bla. Com. 443; 14 M. & W. 236; 107 Mass. 181.

*Nemo tenetur seipsum infortuniis et periculis exponere.* No one is bound to expose himself to misfortune and dangers. Co Litt. 253.

*Nemo tenetur seipsum prodere.* No one is bound to betray himself. 10 N. Y. 10, 33; 7 How. Pr. 57, 58; Broom Max. 968.

*Nemo videtur fraudare eos qui sciunt et consentiunt.* No one is considered as deceiving those who know and consent. Dig. 20. 17. 145.

*Nigrum nunquam excedere debet rubrum.* The black should never go beyond the red (*i. e.* the text of a statute should never be read in a sense more comprehensive than the rubric, or title). Trayner, Max. 373.

*Nihil aliud potest rex quam quod de jure potest.* The king can do nothing but what he can do legally. 11 Co. 74.

*Nihil consensui tam contrarium est quam vis atque metus.* Nothing is so contrary to consent as force and fear. Dig. 50. 17. 116; Broom, Max. 278, n.

*Nihil dat qui non habet.* He gives nothing who has nothing.

*Nihil de re accrescit ei qui nihil in re quando jus accresceret habet.* Nothing accrues to him who, when the right accrues, has nothing in the subject-matter. Co. Litt. 188.

*Nihil est enim liberale quod non idem justum.* For there is nothing generous which is not at the same time just. 2 Kent 441, note *a*.

*Nihil est magis rationi consentaneum quam eodem modo quodque dissolvere quo conflatum est.* Nothing is more consonant to reason than that every-

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thing should be dissolved in the same way in which it was made. Shep. Touch. 328.

*Nihil facit error nominis cum de corpore constat.* An error in the name is nothing when there is certainty as to the thing. 11 Co. 21; 2 Kent 292; Bart. Max. 225.

*Nihil habet forum ex scena.* The court has nothing to do with what is not before it.

*Nihil in lege intolerabilius est, eandem rem diverso jure censeri.* Nothing in law is more intolerable than that the same case should be subject (in different courts) to different views of the law. 4 Co. 93.

*Nihil infra regnum subditos magis conservat in tranquilitate et concordia quam debita legum administratio.* Nothing preserves in tranquillity and concord those who are subjected to the same government better than a due administration of the laws. 2 Inst. 158.

*Nihil iniquius quam æquitatem nimis intendere.* Nothing is more unjust than to extend equity too far. Halkers. 103.

*Nihil magis justum est quam quod necessarium est.* Nothing is more just than what is necessary. Dav 12.

*Nihil nequam est præsumendum.* Nothing wicked is to be presumed. 2 P. Wms. 583.

*Nihil perfectum est dum aliquid restat agendum.* Nothing is perfect while something remains to be done. 9 Co. 9.

*Nihil peti potest ante id tempus quo per rerum naturam persolvi possit.* Nothing can be demanded before the time when, in the nature of things, it can be paid. Dig. 50. 17. 186.

*Nihil possumus contra veritatem.* We can do nothing against truth. Doct. & Stu. Dial. 2, c. 6.

*Nihil præscribitur nisi quod possidetur.* There is no prescription for that which is not possessed. 5 B. & A. 277.

*Nihil quod est contra rationem est licitum.* Nothing against reason is lawful. Co. Litt. 97.

*Nihil quod est inconveniens est licitum.* Nothing inconvenient is lawful. 4 H. L. C. 145, 195; Broom, Max. 186, 366.

*Nihil simul inventum est et perfectum.* Nothing is invented and perfected at the same moment. Co. Litt. 230; 2 Bla. Com. 298, n.

*Nihil tam conveniens est naturali æquitati quam unumquodque dissolvi eo ligamine quo ligatum est.* Nothing is so consonant to natural equity as that each thing should be dissolved by the same means by which it was bound. 2 Inst. 360; Broom, Max. 877. See Shep. Touch. 323.

*Nihil tam conveniens est naturali æquitati, quam voluntatem domini volentis rem suam in alium transferre, ratam haberi.* Nothing is more conformable to natural equity than to confirm the will of an owner who desires to transfer his property to another. Inst. 2. 1. 40; 1 Co. 100.

*Nihil tam naturale est quam eo genere quidque dissolvere, quo colligatum est.* Nothing is so natural as that an obligation should be dissolved by the same principles which were observed in contracting it. Dig. 50. 17. 35. See 2 Inst. 359; Broom, Max. 887.

*Nihil tam proprium imperio quam legibus vivere.* Nothing is so becoming to authority as to live according to the law. Fleta, l. 1, c. 17, § 11; 2 Inst. 63.

*Nil agit exemplum litem quod lite resolvit.* An example does no good which settles one question by another. 15 Wend. 44, 49.

*Nil facit error nominis si de corpore constat.* An error in the name is immaterial if the thing itself is certain. Broom, Max. 634; 11 C. B. 406.

*Nil sine prudenti fecit ratione vetustas.* Antiquity did nothing without a good reason. Co. Litt. 65.

*Nil temere novandum.* Nothing should be rashly changed. Jenk. Cent. 163.

*Nimia certitudo certitudinem ipsam destruit.* Too great certainty destroys certainty itself. Lofft 244.

*Nimia subtilitas in jure reprobatur, et talis certitudo certitudinem confundit.* Too great subtlety is disapproved of in law, and such certainty confounds certainty. Broom, Max. 187; 4 Co. 5.

*Nimium altercando veritas amittitur.* By too much altercation truth is lost. Hob. 344.

*No man can hold the same land immediately of two several landlords.* Co. Litt. 152.

*No man is presumed to do anything against nature.* 22 Vin. Abr. 154.

*No man may be judge in his own cause.*

*No man shall set up his infamy as a defence.* 2 W. Bla. 364.

*No man shall take by deed but parties, unless in remainder.*

*No one can grant or convey what he does not own.* 25 Barb. 284, 301. See 20 Wend. 267; 23 N. Y. 252; 13 id. 121; 6 Du. N. Y. 232. And see ESTOPPEL.

*No one will be permitted to take the benefit under a will and at the same time defeat its provisions.* 25 Wash. L. Rep. 50.

*Nobiles magis plectuntur pecunia, plebes vero in corpore.* The higher classes are more punished in money, but the lower in person. 3 Inst. 220.

*Nobiles sunt qui arma gentilitia antecessorum suorum proferre possunt.* The gentry are those who are able to produce armorial bearings derived by descent from their own ancestors. 2 Inst. 595.

*Nobiliores et benigniores præsumptiones in dubiis sunt præferendæ.* When doubts arise, the more generous and benign presumptions are to be preferred. Reg. Jur. Civ.

*Nomen est quasi rei notamen.* A name is as it were the note of a thing. 11 Co. 20.

*Nomen non sufficit si res non sit de jure aut de facto.* A name does not suffice if the thing do not exist by law or by fact. 4 Co. 107.

*Nomina si nescis perit cognitio rerum.* If you know not the names of things, the knowledge of things themselves perishes. Co. Litt. 86.

*Nomina sunt mutabilia, res autem immobiles.* Names are mutable, but things immutable. 6 Co. 66.

*Nomina sunt notæ rerum.* Names are the marks of things. 11 Co. 20.

*Nomina sunt symbola rerum.* Names are the symbols of things.

*Non accipi debent verba in demonstrationem falsam, quæ competunt in limitationem veram.* Words ought not to be accepted to import a false description, which may have effect by way of true limitation. Bacon, Max. Reg. 13; 2 Pars. Con. 62; Broom, Max. 642; Leake, Con. 191; 3 B. & Ad. 459; 4 Exch. 604; 3 Taunt. 147.

*Non alio modo puniatur aliquis, quam secundum quod se habet condemnatio.* A person may not be punished differently than according to what the sentence enjoins. 3 Inst. 217.

*Non aliter a significatione verborum recedi oportet quam cum manifestum est aliud sensisse testatorem.* We must never depart from the signification of words, unless it is evident that they are not conformable to the will of the testator. Dig. 32. 69. pr.; Broom, Max. 568; 2 De G. M. & G. 313.

*Non auditur perire volens.* One who wishes to perish ought not to be heard. Best, Ev. § 385.

*Non concedantur citationes priusquam exprimatur super qua re fieri decet citatio.* Summonses or citations should not be granted before it is expressed upon what ground a citation ought to be issued. 12 Co. 47.

*Non consentit qui errat.* He who errs does not consent. 1 Bouv. Inst. n. 581; Bract. 44.

*Non dat qui non habet.* He gives nothing who has nothing. Broom, Max. 467; 3 Cush. 369; 3 Gray, 178.

*Non debeo melioris conditionis esse, quam auctor meus a quo jus in me transit.* I ought not to be in better condition than he to whose rights I succeed. Dig. 50. 17. 175. 1.

*Non deberet alii nocere quod inter alios actum esset.* No one ought to be injured by that which has taken place between other parties. Dig. 12. 2. 10.

*Non debet actori licere, quod reo non permittitur.* That which is not permitted to the defendant ought not to be to the plaintiff. Dig. 50. 17. 41.

*Non debet adduci exceptio ejus rei cujus petitur dissolutio.* A plea of the very matter of which the determination is sought ought not to be made. Bacon, Max. Reg. 2; Broom, Max. 166; 3 P. Wms. 317; 1 Ld. Raym. 57; 2 id. 1433.

*Non debet alteri per alterum iniqua conditio inferri.* A burdensome condition ought not to be brought upon one man by the act of another. Dig. 50. 17. 74.

*Non debet, cui plus licet, quod minus est non licere.* He who is permitted to do the greater may with greater reason do the less. Dig. 50. 17. 21; Broom, Max. 176.

*Non decet homines dedere causa non cognita.* It is unbecoming to surrender men when no cause is shown. 4 Johns. Ch. 106, 114; 3 Wheel. Cr. Cas. 473, 482.

*Non decipitur qui scit se decipi.* He is not deceived who knows himself to be deceived. 5 Co. 60.

*Non definitur in jure quid sit conatus.* What an attempt is, is not defined in law. 6 Co. 43. See ATTEMPT.

*Non differunt quæ concordant re, tametsi non in*

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*verbis iisdem.* Those things which agree in substance, though not in the same words, do not differ. Jenk. Cent. 70.

*Non dubitatur, etsi specialiter venditor evictionem non promiserit, re evicta, ex empto competere actionem.* It is certain that although the vendor has not given a special guarantee, an action *ex empto* lies against him, if the purchaser is evicted. Code, 8. 45. 6. But see Doct. & Stud. b. 2, c. 47; Broom, Max. 768.

*Non efficit affectus nisi sequatur effectus.* The intention amounts to nothing unless some effect follows. 1 Rolle 226.

*Non est arctius vinculum inter homines quam jusjurandum.* There is no stronger link among men than an oath. Jenk. Cent. 126.

*Non est certandum de regulis juris.* There is no disputing about rules of law.

*Non est disputandum contra principia negantem.* There is no disputing against a man denying principles. Co. Litt. 343.

*Non est justum aliquem antenatum post mortem facere bastardum, qui toto tempore vitæ suæ pro legitimo habebatur.* It is not just to make an elder-born a bastard after his death, who during his lifetime was accounted legitimate. Bart. Max. 49; 12 Co. 44.

*Non est novum ut priores leges ad posteriores trahantur.* It is not a new thing that prior statutes shall give place to later ones. Dig. 1. 3. 26; 1. 1. 4; Broom, Max. 28.

*Non est recedendum a communi observantia.* There should be no departure from a common observance. 2 Co. 74.

*Non est regula quin fallat.* There is no rule but what may fail. Off. Ex. 212.

*Non est reus nisi mens sit rea.* One is not guilty unless his intention be guilty. This maxim is much criticised. See *actus non reum facit*, etc.; MENS REA.

*Non ex opinionibus singulorum, sed ex communi usu, nomina exaudiri debent.* Names of things ought to be understood according to common usage, not according to the opinions of individuals. Dig. 33. 10. 7. 2.

*Non exemplis sed legibus judicandum est.* Not by the facts of the case, but by the law must judgment be made. Dig. 7. 45. 13. (called by Albericus Gentilis *lex aurea*).

*Non facias malum ut inde veniat bonum.* You are not to do evil that good may come of it. 11 Co. 74 *a*.

*Non impedit clausula derogatoria, quo minus ab eadem potestate res dissolvantur a qua constituuntur.* A derogatory clause does not prevent things from being dissolved by the same power by which they were originally made. Bacon, Max. Reg. 19; Broom, Max. 27; 5 Watts 155.

*Non in legendo sed in intelligendo leges consistunt.* The laws consist, not in being read, but in being understood. 8 Co. 167.

*Non jus ex regula, sed regula ex jure.* The law does not arise from the rule (or maxim), but the rule from the law. Fleta vi. 14; Trayner, Max. 384.

*Non jus, sed seisina facit stipitem.* Not right, but seisin, makes a stock (from which the inheritance must descend). Fleta, l. 6, cc. 14, 2, § 2; Noy, Max., 9th ed. 72, n. (*b*); Broom, Max. 525; 2 Sharsw. Bla. Com. 209; 1 Steph. Com. 365, 368, 394; 4 Kent 388; 4 Scott N. R. 468.

*Non licet quod dispendio licet.* That which is permitted only at a loss is not permitted to be done. Co. Litt. 127.

*Non nasci, et natum mori, paria sunt.* Not to be born, and to be dead-born, are the same.

*Non obligat lex nisi promulgata.* A law is not obligatory unless it be promulgated.

*Non observata forma, infertur adnullatio actus.* When the form is not observed, it is inferred that the act is annulled. 12 Co. 7.

*Non officit conatus nisi sequatur effectus.* An attempt does not harm unless a consequence follow. 11 Co. 98.

*Non omne damnum inducit injuriam.* Not every loss produces an injury (*i. e.* gives a right of action). See 3 Bla. Com. 219; 1 Sm. L. C. 131; 2 Bouv. Inst. n. 2211.

*Non omne quod licet honestum est.* It is not everything which is permitted that is honorable. Dig. 50. 17. 144; 4 Johns. Ch. 121.

*Non omnium quæ a majoribus nostris constituta sunt ratio reddi potest.* A reason cannot always be given for the institutions of our ancestors. 4 Co. 78; Broom, Max. 157; Branch, Princ.

*Non possessori incumbit necessitas probandi possessiones ad se pertinere.* It is not incumbent on the possessor of property to prove his right to his possessions. Code, 4. 19. 2; Broom, Max. 714.

*Non potest adduci exceptio ejusdem rei cujus petitur dissolutio.* A plea of the same matter, the determination of which is sought by the action, cannot be brought forward. Bacon, Max. Reg. 2. (When an action is brought to annul a proceeding, the defendant cannot plead such proceeding in bar.) Broom, Max. 166; Wing. Max. 647; 3 P. Wms. 317.

*Non potest probari quod probatum non relevat.* That cannot be proved which proved is irrelevant. See 1 Exch. 91, 102.

*Non potest quis sine brevi agere.* No one can sue without a writ. Fleta, l. 2, c. 13, § 4.

*Non potest rex gratiam facere cum injuria et damno aliorum.* The king cannot confer a favor which occasions injury and loss to others. 3 Inst. 236; Broom, Max. 63; Vaugh. 338; 2 E. & B. 874.

*Non potest rex subditum renitentem onerare impositionibus.* The king cannot load a subject with imposition against his consent. 2 Inst. 61.

*Non potest videri desisse habere, qui nunquam habuit.* He cannot be considered as having ceased to have a thing, who never had it. Dig. 50. 17. 208.

*Non præstat impedimentum quod de jure non sortitur effectum.* A thing which has no effect in law is not an impediment. Jenk. Cent. 162; Wing. Max. 727.

*Non quod dictum est, sed quod factum est, inspicitur.* Not what is said, but what is done, is to be regarded. Co. Litt. 36; 6 Bing. 310; 1 Metc. 353; 11 Cush. 536.

*Non refert an quis assensum suum præfert verbis, an rebus ipsis et factis.* It is immaterial whether a man gives his assent by words or by acts and deeds. 10 Co. 52.

*Non refert quid ex æquipollentibus fiat.* It matters not which of two equivalents happens. 5 Co. 122.

*Non refert quid notum sit judici, si notum non sit in forma judicii.* It matters not what is known to the judge, if it is not known to him judicially. 3 Bulstr. 115. See JUDICIAL NOTICE.

*Non refert verbis an factis fit revocatio.* It matters not whether a revocation be by words or by acts. Cro. Car. 49; Branch, Princ.

*Non remota causa sed proxima spectatur.* See CAUSA PROXIMA.

*Non respondebit minor, nisi in causa dotis, et hoc pro favore doti.* A minor shall not answer unless in a case of dower, and this in favor of dower. 1 Co. 71.

*Non solent quæ abundant vitiare scripturas.* Surplusage does not usually vitiate writings. Dig. 50. 17. 94; Broom, Max. 627, n.

*Non solum quid licet, sed quid est conveniens considerandum, quia nihil quod inconveniens est licitum.* Not only what is permitted, but what is convenient, is to be considered, because what is inconvenient is illegal. Co. Litt. 66 *a*.

*Non sunt longa ubi nihil est quod demere possis.* There is no prolixity where there is nothing that can be omitted. Vaugh. 138.

*Non temere credere, est nervus sapientiæ.* Not to believe rashly is the nerve of wisdom. 5 Co. 114.

*Non valet confirmatio, nisi ille, qui confirmat, sit in possessione rei vel juris unde fieri debet confirmatio; et eodem modo, nisi ille cui confirmatio fit sit in possessione.* Confirmation is not valid unless he who confirms is either in possession of the thing itself, or of the right of which confirmation is to be made, and, in like manner, unless he to whom confirmation is made is in possession. Co. Litt. 295.

*Non valet donatio nisi subsequatur traditio.* A gift is not valid unless accompanied by possession. Bract. 39 *b*.

*Non valet exceptio ejusdem rei cujus petitur dissolutio.* A plea of that of which the determination is sought is not valid. 2 Eden 134.

*Non valet impedimentum quod de jure non sortitur effectum.* An impediment is of no avail which by law has no effect. 4 Co. 31 *a*.

*Non verbis sed ipsis rebus, leges imponimus.* Not upon words, but upon things themselves, do we impose law. Code 6. 43. 2.

*Non videntur qui errant consentire.* He who errs is not considered as consenting. Dig. 50. 17. 116; Broom, Max. 262; 2 Kent 477; 6 Allen 543; 14 Ga. 207.

*Non videntur rem amittere quibus propria non fuit.* They are not considered as losing a thing whose own it was not. Dig. 50. 17. 85.

*Non videtur consensum retinuisse si quis ex præ-*

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*scripto minantis aliquod immutavit.* He does not appear to have retained his consent, who has changed anything at the command of a party threatening. Bacon, Max. Reg. 22; Broom, Max. 278.

*Non videtur perfecte cujusque id esse, quod ex casu auferri potest.* That does not truly belong to any one which can be taken from him upon occasion. Dig. 50. 17. 159. 1.

*Non videtur quisquam id capere, quod ei necesse est alio restituere.* One is not considered as acquiring property in a thing which he is bound to restore. Dig. 50. 17. 51.

*Non videtur vim facere, qui jure suo utitur, et ordinaria actione experitur.* He is not judged to use force who exercises his own right and proceeds by ordinary action. Dig. 50. 17. 155. 1.

*Noscitur a sociis.* It is known from its associates. The meaning of a word may be ascertained by reference to the meaning of words associated with it. Broom, Max. 588; 9 East 267; 6 Taunt. 294; 1 B. & C. 644; 18 C. B. 102, 893; 5 M. & G. 639, 667; 3 C. B. 437; 5 *id.* 880; 4 Exch. 511, 519; 5 *id.* 294; 11 *id.* 113; 3 Term 87; 12 Allen 77; 105 Mass. 433; 1 N. Y. 47, 69; 11 Barb. 43, 63; 20 *id.* 644; 38 Minn. 366; 166 U. S. 1; 67 Ill. App. 665.

*Noscitur ex socio, qui non cognoscitur ex se.* He who cannot be known from himself may be known from his associate. F. Moore 817; 1 Ventr. 225; 3 Term 87; 9 East 267; 13 *id.* 531; 6 Taunt. 294; 1 B. & C. 644.

*Notitia dicitur a noscendo; et notitia non debet claudicare.* Notice is named from knowledge; and notice ought not to halt (*i. e.* be imperfect). 6 Co. 29.

*Nova constitutio futuris formam imponere debet, non præteritis.* A new enactment ought to impose form upon what is to come, not upon what is past. 2 Inst. 292; Broom, Max. 34, 87; T. Jones 108; 2 Show. 16; 6 M. & W. 285; 7 *id.* 536; 2 Mass. 122; 10 *id.* 439; 2 Gall. 139; 2 N. Y. 345; 7 Johns. 503.

*Novatio non præsumitur.* A novation is not presumed. Halkers. Max. 104; Bart. Max. 231.

*Novitas non tam utilitate prodest quam novitate perturbat.* Novelty benefits not so much by its utility as it disturbs by its novelty. Jenk. Cent. 167.

*Novum judicium non dat novum jus, sed declarat antiquum.* A new judgment does not make a new law, but declares the old. 10 Co. 42.

*Noxa sequitur caput.* The injury (*i. e.* liability to make good an injury caused by a slave) follows the head or person (*i. e.* attaches to his master). Heineccius, *Elem. Jur. Civ.* l. 4, t. 8, § 1231.

*Nuda pactio obligationem non parit.* A naked promise does not create an obligation. Dig. 2. 14. 7. 4; Code 4. 65. 27; Broom, Max. 746; Brisson, *Nudus.*

*Nuda ratio et nuda pactio non ligant aliquem debitorem.* Naked reason and naked promise do not bind any debtor. Fleta, l. 2, c. 60, § 25.

*Nudum pactum est ubi nulla subest causa præter conventionem; sed ubi subest causa, fit obligatio, et parit actionem.* Nudum pactum is where there is no consideration besides the agreement; but when there is a consideration, an obligation is created and an action arises. Dig. 2 14. 7. 4; Sharsw. Bla. Com. 445; Broom, Max. 745; 1 Pow. Contr. 330; 3 Burr. 1670; Vin. Abr. *Nudum Pactum* (A). This is explained under CONSIDERATION.

*Nudum pactum ex quo non oritur actio.* Nudum pactum is that upon which no action arises. Code 2. 3. 10; 5. 14. 1; Broom, Max. 676; Bart. Max. 231.

*Nul ne doit s'enrichir aux depens des autres.* No one ought to enrich himself at the expense of others.

*Nul prendra advantage de son tort demesne.* No one shall take advantage of his own wrong. Broom, Max. 290.

*Nulla curia quæ recordum non habet potest imponere finem, neque aliquem mandare carceri; quia ista spectant tantummodo ad curias de recordo.* No court which has not a record can impose a fine, or commit any person to prison; because those powers belong only to courts of record. 8 Co. 60.

*Nulla emptio sine pretio esse potest.* There can be no sale without a price. 4 Pick. 189.

*Nulla impossibilia aut inhonesta sunt præsumenda; vera autem et honesta et possibilia.* No impossible or dishonorable things are to be presumed; but things true, honorable, and possible. Co. Litt. 78.

*Nulla pactione effici potest ne dolus præstetur.* By no agreement can it be effected that there shall be no accountability for fraud. Dig. 2. 14. 27. 3; Broom, Max. 696, 118, n.; 5 M. & S. 466.

*Nulle règle sans faute.* There is no rule without a fault.

*Nulle terre sans seigneur.* No land without a lord. Guyot, Inst. Feod. c. 26.

*Nulli enim res sua servit jure servitutis.* No one can have a servitude over his own property. Dig. 8. 2. 26; 17 Mass. 443.

*Nullius hominis auctoritas apud nos valere debet, ut meliora non sequeremur si quis attulerit.* The authority of no man ought to avail with us, that we should not follow better [opinions] should any one present them. Co. Litt. 383 *b.*

*Nullum crimen majus est inobedientia.* No crime is greater than disobedience. Jenk. Cent. 77.

*Nullum exemplum est idem omnibus.* No example is the same for all purposes. Co. Litt. 212 *a.*

*Nullum iniquum est præsumendum in jure.* Nothing unjust is to be presumed in law. 4 Co. 72.

*Nullum matrimonium, ibi nulla dos.* No marriage, no dower. 4 Barb. 192.

*Nullum simile est idem.* Nothing which is like another is the same, *i. e.* no likeness is exact identity. 2 Story 512; Story, Partn. 90; Co. Litt. 3 *a*; 2 Bla. Com. 162; 6 Binn. 506.

*Nullum simile quatuor pedibus currit.* No simile runs upon four feet (or, as ordinarily expressed, "on all fours"). Co. Litt. 3 *a*; Eunomus, Dial. 2, p. 155; 1 Story 143; 6 Binn. 506.

*Nullum tempus occurrit regi.* Lapse of time does not bar the right of the crown. 2 Inst. 273; 1 Sharsw. Bla. Com. 247; Broom, Max. 65; Hob. 347; 2 Steph. Com. 504; 1 Mass. 355; 2 Brock. 393; 18 Johns. 227; 10 Barb. 139; 32 W. Va. 387; 13 Am. L. Reg. 465; 45 S. C. 312; 19 Misc. Rep. 571.

*Nullum tempus occurrit reipublicæ.* Lapse of time does not bar the commonwealth. 11 Wheat. 572; 8 Tex. 410; 16 *id.* 305; 5 McLean 133; 19 Mo. 667.

*Nullus commodum capere potest de injuria sua propria.* No one shall take advantage of his own wrong. Co. Litt. 148 *b*; Broom, Max. 279; 4 Bingh. N. C. 395; 4 B. & A. 409; 10 M. & W. 309; 11 *id.* 680; 12 Gray 493; 19 Misc. Rep. 591.

*Nullus debet agere de dolo, ubi alia actio subest.* Where another form of action is given, no one ought to sue in the action *de dolo.* 7 Co. 92.

*Nullus dicitur accessorius post feloniam sed ille qui novit principalem feloniam fecisse, et illum receptavit et comfortavit.* No one is called an accessory after the fact but he who knew the principal to have committed a felony, and received and comforted him. 3 Inst. 138.

*Nullus dicitur felo principalis nisi actor, aut qui præsens est, abettans aut auxilians actorem ad feloniam faciendam.* No one is called a principal felon except the party actually committing the felony, or the party present aiding and abetting in its commission. 3 Inst. 138.

*Nullus idoneus testis in re sua intelligitur.* No one is understood to be a competent witness in his own cause. Dig. 22. 5. 10; 1 Sumn. 328.

*Nullus jus alienum forisfacere potest.* No man can forfeit another's right. Fleta, l. 1, c. 28, § 11.

*Nullus recedat e curia cancellaria sine remedio.* No one ought to depart out of the court of chancery without a remedy. Bisp. Eq. 8; Year B. 4 Hen. VII. 4.

*Nullus videtur dolo facere qui suo jure utitur.* No man is to be esteemed a wrong-doer who avails himself of his legal right. Dig. 50. 17. 55; Broom, Max. 130; 14 Wend. 399, 492. See [1898] Ch. 1.

*Nunquam crescit ex post facto præteriti delicti æstimatio.* The quality of a past offence is never aggravated by that which happens subsequently. Dig. 50. 17. 188. 1; Bacon, Max. Reg. 8; Broom, Max. 42.

*Nunquam fictio sine lege.* There is no fiction without law.

*Nunquam nimis dicitur quod nunquam satis dicitur.* What is never sufficiently said is never said too much Co. Litt. 375.

*Nunquam præscribitur in falso.* There is never prescription in case of falsehood. Bell, Dict.

*Nunquam res humanæ prospere succedunt ubi negliguntur divinæ.* Human things never prosper when divine things are neglected. Co. Litt. 95; Wing. Max. 2.

*Nuptias non concubitus sed consensus facit.* Not cohabitation but consent makes the marriage. Dig. 50. 17. 30; Co. Litt. 33; Broom, Max. 506, n.

*Obedientia est legis essentia.* Obedience is the essence of the law. 11 Co. 100.

*Obtemperandum est consuetudini rationabili tanquam legi.* A reasonable custom is to be obeyed like law. 4 Co. 38.

*Occupantis fiunt derelicta.* Things abandoned

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become the property of the (first) occupant. 1 Pet. Adm. 58.

*Odiosa et inhonesta non sunt in lege præsumenda.* Odious and dishonest acts are not presumed in law. Co. Litt. 78; 6 Wend. 228; 18 N. Y. 295.

*Odiosa non præsumuntur.* Odious things are not presumed. Burr. Sett. Cas. 190.

*Officers may not examine the judicial acts of the court.*

*Officia judicialia non concedantur antequam vacent.* Judicial offices ought not to be granted before they are vacant. 11 Co. 4.

*Officia magistratus non debent esse venalia.* The offices of magistrates ought not to be sold. Co. Litt. 234.

*Officit conatus si effectus sequatur.* The attempt becomes of consequence, if the effect follows. Jenk. Cent. 55.

*Officium nemini debet esse damnosum.* An office ought to be injurious to no one. Bell, Dict.

*Omissio eorum quæ tacite insunt nihil operatur.* The omission of those things which are silently implied is of no consequence. 2 Bulstr. 131.

*Omne actum ab intentione agentis est judicandum.* Every act is to be estimated by the intention of the doer. Branch, Princ.

*Omne crimen ebrietas et incendit et detegit.* Drunkenness inflames and reveals every crime. Co. Litt. 247; Broom, Max. 17; Whart. Cr. L. § 48.

*Omne jus aut consensus fecit, aut necessitas constituit, aut firmavit consuetudo.* All law has been derived from consent, established by necessity, or confirmed by custom. Dig. 1. 3. 40; Broom, Max. 690, n.

*Omne magis dignum trahit ad se minus dignum, quamvis minus dignum sit antiquius.* Every worthier thing draws to it the less worthy, though the latter be more ancient. Co. Litt. 355.

*Omne magnum exemplum habet aliquid ex iniquo, quod publica utilitate compensatur.* Every great example has some portion of evil, which is compensated by its public utility. Hob. 279.

*Omne majus continet in se minus.* The greater contains in itself the less. 5 Co. 115 *a*; Wing. Max. 206; Story, Ag. § 172; Broom, Max. 174; 15 Pick. 397; 1 Gray 336.

*Omne majus dignum continet in se minus dignum.* The more worthy contains in itself the less worthy. Co. Litt. 143.

*Omne majus minus in se complectitur.* Every greater embraces in itself the minor. Jenk. Cent. 208.

*Omne principale trahit ad se accessorium.* Every principal thing draws to itself the accessory. 17 Mass. 425; 1 Johns. 580.

*Omne quod solo inædificatur solo cedit.* Every thing belongs to the soil which is built upon it. Dig. 41. 1. 7. 10; 47. 3. 1; Inst. 2. 1. 29; Broom, Max. 401; Fleta, l. 3, c. 2, § 12.

*Omne sacramentum debet esse de certa scientia.* Every oath ought to be founded on certain knowledge. 4 Inst. 279.

*Omne testamentum morte consummatum est.* Every will is consummated by death. 3 Co. 29 *b*; 4 *id.* 61 *b*; 2 Bla. Com. 500; Shep. Touch. 401; Broom, Max. 503.

*Omnes actiones in mundo infra certa tempora habent limitationem.* All actions in the world are limited within certain periods. Bract. 52.

*Omnes licentiam habere his quæ pro se indulta sunt, renunciare.* All have liberty to renounce those things which have been established in their favor. Code 2. 3. 29; 1. 3. 51; Broom, Max. 699.

*Omnes prudentes illa admittere solent quæ probantur iis qui in arte sua bene versati sunt.* All prudent men are accustomed to admit those things which are approved by those who are well versed in the art. 7 Co. 19.

*Omnia delicta in aperto leviora sunt.* All crimes committed openly are considered lighter. 8 Co. 127.

*Omnia præsumuntur contra spoliatorem.* All things are presumed against a wrong-doer. Broom, Max. 938; 1 Greenl. Ev. § 37; 5 Allen 172; 34 L. R. A. 581; 45 Pac. Rep. 1073.

*Omnia præsumuntur legitime facta donec probetur in contrarium.* All things are presumed to be done legitimately until the contrary is proved. Co. Litt. 232; Broom, Max. 948; 59 Pa. 68.

*Omnia præsumuntur rite et solenniter esse acta.* All things are presumed to have been rightly and regularly done. Co. Litt. 232 *b*; Broom, Max. 165, 942; 12 C. B. 788; 3 Exch. 191; 6 *id.* 716.

*Omnia præsumuntur rite et solenniter esse acta donec probetur in contrarium.* All things are presumed to have been done regularly and with due formality until the contrary is proved. Broom, Max. 944; 3 Bingh. 381; Campb. 44; 1 C. & M. 461; 17 C. B. 183; 5 B. & Ad. 550; 12 M. & W. 251; 12 Wheat. 69; 6 Binn. 447; 61 Vt. 449; 85 Va. 456; 70 Md. 546; 102 N. C. 284; 124 Pa. 280.

*Omnia quæ jure contrahuntur, contrario jure pereunt.* Obligations contracted under a law are destroyed by a law to the contrary. Dig. 50. 17. 100.

*Omnia quæ sunt uxoris sunt ipsius viri.* All things which are the wife's belong to the husband. Co. Litt. 112; 2 Kent 130, 143.

*Omnia rite esse acta præsumuntur.* All things are presumed to have been done in due form. Co. Litt. 6; Broom, Max. 944, n.; 11 Cush. 441; 13 Allen 397; 108 Mass. 425; 2 Ohio St. 246; 6 *id.* 298; 63 Minn. 170.

*Omnis conclusio boni et veri judicii sequitur ex bonis et veris præmissis et dictis juratorum.* Every conclusion of a good and true judgment arises from good and true premises, and the verdicts of jurors. Co. Litt. 226.

*Omnis consensus tollit errorem.* Every consent removes error. 2 Inst. 123.

*Omnis definitio in jure civili periculosa est, parum est enim ut non subverti possit.* Every definition in the civil law is dangerous, for there is very little that cannot be overthrown. (There is no rule in the civil law which is not liable to some exception; and the least difference in the facts of the case renders its application useless.) Dig. 50. 17. 202; 2 Woodd. Lect. 196.

*Omnis exceptio est ipsa quoque regula.* An exception is in itself also a rule.

*Omnis indemnatus pro innoxis legibus habetur.* Every uncondemned person is held by the law as innocent.

*Omnis innovatio plus novitate perturbat quam utilitate prodest.* Every innovation disturbs more by its novelty than it benefits by its utility. 2 Bulstr. 338; 1 Salk. 20; Broom, Max. 147; 62 Pa. 381.

*Omnis interpretatio si fieri potest ita fienda est in instrumentis, ut omnes contrarietates amoveantur.* The interpretation of instruments is to be made, if they will admit of it, so that all contradictions may be removed. Jenk. Cent. 96.

*Omnis interpretatio vel declarat, vel extendit, vel restringit.* Every interpretation either declares, extends, or restrains.

*Omnis nova constitutio futuris temporibus formam imponere debet, non præteritis.* Every new statute ought to set its stamp upon the future, not the past. Bract. 228; 2 Inst. 95.

*Omnis persona est homo, sed non vicissim.* Every person is a man, but not every man a person. Calvinus, Lex.

*Omnis privatio præsupponit habitum.* Every privation presupposes former enjoyment. Co. Litt. 339.

*Omnis querela et omnis actio injuriarum limitata est infra certa tempora.* Every plaint and every action for injuries is limited within certain times. Co. Litt. 114.

*Omnis ratihabitio retrotrahitur et mandato priori æquiparatur.* Every subsequent ratification has a retrospective effect, and is equivalent to a prior command. Co. Litt. 207 *a*; Story, Ag., 4th. ed. 102; Broom, Max. 757, 867; 8 Wheat. 363; 7 Exch. 726; 9 C. B. 532, 607; 5 Johns. Ch. 256; 57 Pa. 433; 111 N. Y. 295; 67 Fed. Rep. 49; 52 Me. 82; 69 Conn. 86.

*Omnis regula suas patitur exceptiones.* Every rule of law is liable to its own exceptions.

*Omnium contributione sarciatur quod pro omnibus datum est.* What is given for all shall be compensated for by the contribution of all. 4 Bingh. 121; 2 Marsh. 309.

*Omnium rerum quarum usus est, potest esse abusus, virtute solo excepta.* There may be an abuse of everything of which there is a use, virtue only excepted. Dav. 79.

*Once a fraud, always a fraud.* 13 Vin. Abr. 539.

*Once a mortgage, always a mortgage.* 1 Hill. R. P. 378; Bisph. Eq. § 153; 7 Watts 375; 67 Pa. 104; 22 Ind. 62. See MORTGAGE.

*Once a recompense, always a recompense.* 19 Vin. Abr. 277.

*Once quit and cleared, ever quit and cleared.* Skene *de Verb. Sign., iter ad fin.*

*One may not do an act to himself.*

*Opinio quæ favet testamento est tenenda.* That opinion is to be followed which favors the will.

*Oportet quod certa res deducatur in judicium.* A thing, to be brought to judgment, must be certain or definite. Jenk. Cent. 84; Bract. 15 *b*.

*Oportet quod certa sit res quæ venditur.* A thing, to be sold, must be certain or definite. Bract. 61.

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*Optima enim est legis interpres consuetudo.* Usage is the best interpreter of law. 2 Inst. 18; Broom, Max. 931.

*Optima est lex, quæ minimum relinquit arbitrio judicis, optimus judex qui minimum sibi.* That is the best law which confides as little as possible to the discretion of the judge; he is the best judge who takes least upon himself. Bacon, Aph. 46; Broom, Max. 84; 76 Ga. 479.

*Optima statuti interpretatrix est (omnibus particulis ejusdem inspectis) ipsum statutum.* The best interpretress of a statute is (all the separate parts being considered) the statute itself. 8 Co. 117; Wing. Max. 239, max. 68.

*Optimam esse legem, quæ minimum relinquit arbitrio judicis; id quod certitudo ejus præstat.* That law is the best which leaves the least discretion to the judge; and this is an advantage which results from its certainty. Bacon, Aph. 8.

*Optimus interpres rerum usus.* Usage is the best interpreter of things. 2 Inst. 282; Broom, Max. 917, 980.

*Optimus interpretandi modus est sic leges interpretare ut leges legibus accordant.* The best mode of interpreting laws is to make them accord. 8 Co. 169.

*Optimus judex, qui minimum sibi.* He is the best judge who relies as little as possible on his own discretion. Bacon, Aph. 46; Broom, Max. 84.

*Optimus legum interpres consuetudo.* Usage is the best interpreter of laws. 4 Inst. 75; 2 Pars. Con., 8th ed. *541; Broom, Max. 685.

*Ordine placitandi servato, servatur et jus.* The order of pleading being preserved, the law is preserved. Co. Litt. 303; Broom, Max. 188.

*Origine propria neminem posse voluntate sua eximi manifestum est.* It is manifest that no one by his own will can renounce his origin (put off or discharge his natural allegiance). Code 10. 34. 4. See 1 Bla. Com. c. 10; 20 Johns. 313; 3 Pet. 122, 246; Broom, Max. 77.

*Origo rei inspici debet.* The origin of a thing ought to be inquired into. 1 Co. 99.

*Pacta conventa quæ neque contra leges, neque dolo malo inita sunt, omni modo observanda sunt.* Contracts which are not illegal, and do not originate in fraud, must in all respects be observed. Code 2. 3. 29; Broom, Max. 698, 732.

*Pacta dant legem contractui.* Agreements give the law to the contract. Halkers. Max. 118.

*Pacta privata juri publico derogare non possunt.* Private contracts cannot derogate from the public law. 7 Co. 23; 111 N. Y. 132.

*Pacta quæ contra leges constitutionesque vel contra bonos mores fiunt nullam vim habere, indubitati juris est.* It is indubitable law that contracts against the laws, or good morals, have no force. Code 2. 3. 6; Broom, Max. 695.

*Pacta quæ turpem causam continent non sunt observanda.* Contracts founded upon an immoral consideration are not to be observed. Dig. 2. 14. 27. 4; 2 Pet. 539; Broom, Max. 732.

*Pactis privatorum juri publico non derogatur.* Private contracts do not derogate from public law. Broom, Max. 695; per Dr. Lushington, *Arg.* 4 Cl. & F. 241; *Arg.* 3 *id.* 621.

*Pacto aliquid licitum est, quod sine pacto non admittitur.* By a contract something is permitted, which, without it, could not be admitted. Co. Litt. 166.

*Par in parem imperium non habet.* An equal has no power over an equal. Jenk. Cent. 174. Example: One of two judges of the same court cannot commit the other for contempt.

*Parens est nomen generale ad omne genus cognationis.* Parent is a general name for every kind of relationship. Co. Litt. 80; Littleton § 108; Mag. Cart. Joh. c. 50.

*Parentum est liberos alere etiam nothos.* It is the duty of parents to support their children even when illegitimate. Lofft 222.

*Paria copulantur paribus.* Similar things unite with similar.

*Paribus sententiis reus absolvitur.* When opinions are equal, a defendant is acquitted. 4 Inst. 64.

*Parte quacumque integrante sublata, tollitur totum.* An integral part being taken away, the whole is taken away. 8 Co. 41.

*Partus ex legitimo thoro non certius noscit matrem quam genitorem suum.* The offspring of a legitimate bed knows not his mother more certainly than his father. Fortescue, c. 42.

*Partus sequitur ventrem.* The offspring follow the condition of the mother. Inst. 2. 1. 19. (This is the law in the case of slaves and animals; but with regard to freemen, children follow the condition of the father.) Broom, Max. 516, n.; 13 Mass. 551; 18 Pick. 222; 85 Ala. 605.

*Parum est latam esse sententiam, nisi mandetur executioni.* It is not enough that judgment should be given unless it be committed to execution. Co. Litt. 289 *b.*

*Parum proficit scire quid fieri debet si non cognoscas quomodo sit facturum.* It avails little to know what ought to be done, if you do not know how it is to be done. 2 Inst. 503.

*Pater is est quem nuptiæ demonstrant.* The father is he whom the marriage points out. Bart. Leg. Max. 151; 1 Bla. Com. 446; 7 Mart. N. S. 548, 553; Dig. 2. 4. 5; Broom, Max. 516. See ACCESS.

*Patria laboribus et expensis non debet fatigari.* A jury ought not to be harassed by labors and expenses. Jenk. Cent. 6.

*Patria potestas in pietate debet, non in atrocitate consistere.* Paternal power should consist in affection, not in atrocity.

*Peccata contra naturam sunt gravissima.* Offences against nature are the most serious. 3 Inst. 20.

*Peccatum peccato addit qui culpæ quam facit patrocinium defensionis adjungit.* He adds one offence to another, who, when he commits a crime, joins to it the protection of a defence. 5 Co. 49.

*Pendente lite nihil innovetur.* During a litigation nothing should be changed. Co. Litt. 344. See 20 How. 106; 1 Story, Eq. Jur. § 406; 2 Johns. Ch. 441; 6 Barb. 33; 79 Cal. 123; see LIS PENDENS.

*Per alluvionem id videtur adjici, quod ita paulatim adjicitur ut intelligere non possumus quantum quoque momento temporis adjiciatur.* That is said to be added by alluvion which is so added little by little that we cannot tell how much is added at any one moment of time. Dig. 41. 1. 7. 1; Hale, *de Jur. Mar.* pars 1, c. 4; Fleta, l. 3, c. 2, § 6.

*Per rationes perventur ad legitimam rationem.* By reasoning we come to legal reason. Littleton § 396.

*Per rerum naturam, factum negantis nulla probatio est.* It is in the nature of things that he who denies a fact is not bound to give proof.

*Per varios actus, legem experientia facit.* By various acts experience frames the law. 4 Inst. 50.

*Perfectum est cui nihil deest secundum suæ perfectionis vel naturæ modum.* That is perfect which wants nothing according to the measure of its perfection or nature. Hob. 151.

*Periculosum est res novas et inusitatas inducere.* It is dangerous to introduce new and unaccustomed things. Co. Litt. 379.

*Periculum rei venditæ, nondum traditæ, est emptoris.* The purchaser runs the risk of the loss of a thing sold, though not delivered. 2 Kent 498, 499; 4 B. & C. 481, 941.

*Perjuri sunt qui servatis verbis juramenti decipiunt aures eorum qui accipiunt.* They are perjured who, preserving the words of an oath, deceive the ears of those who receive it. 3 Inst. 166.

*Perpetua lex est, nullam legem humanam ac positivam perpetuam esse; et clausula quæ abrogationem excludit ab initio non valet.* It is a perpetual law that no human or positive law can be perpetual; and a clause in a law which precludes the power of abrogation is void *ab initio.* Bacon, Max. Reg. 19; Broom, Max. 27.

*Perpetuities are odious in law and equity.*

*Persona conjuncta æquiparatur interesse proprio.* The interest of a personal connection is sometimes regarded in law as that of the individual himself. Bacon, Max. Reg. 18; Broom. Max. 533, 537.

*Persona est homo cum statu quodam consideratus.* A person is a man considered with reference to a certain *status.* Heineccius, Elem. Jur. Civ. l. 1, tit. 3, § 75.

*Personæ vice fungitur municipium et decuria.* Towns and boroughs act as if persons. 23 Wend. 103, 144.

*Personal things cannot be done by another.* Finch, Law b. 1, c. 3, n. 14.

*Personal things cannot be granted over.* Finch, Law, b. 1, c. 3, n. 15.

*Personal things die with the person.* Finch, Law, b. 1, c. 3, n. 16.

*Personalia personam sequuntur.* Personal things follow the person. 10 Cush. 516.

*Perspicua vera non sunt probanda.* Plain truths need not be proved. Co. Litt. 16.

*Pirata est hostis humani generis.* A pirate is an enemy of the human race. 3 Inst. 113.

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*Placita negativa duo exitum non faciunt.* Two negative pleas do not form an issue. Lofft 415.

*Plena et celeris justitia fiat partibus.* Let full and speedy justice be done to the parties. 4 Inst. 67.

*Pluralis numerus est duobus contentus.* The plural number is contained in two. 1 Rolle 476.

*Pluralities are odious in law.*

*Plures cohæredes sunt quasi unum corpus, propter unitatem juris quod habent.* Several co-heirs are as one body, by reason of the unity of right which they possess. Co. Litt. 163.

*Plures participes sunt quasi unum corpus, in eo quod unum jus habent.* Several part-owners are as one body, by reason of the unity of their rights. Co. Litt. 164.

*Plus exempla quam peccata nocent.* Examples hurt more than offences.

*Plus peccat auctor quam actor.* The instigator of a crime is worse than he who perpetrates it. 5 Co. 99.

*Plus valet unus oculatus testis, quam auriti decem.* One eye-witness is better than ten ear-witnesses. 4 Inst. 279.

*Plus vident oculi quam oculus.* Several eyes see more than one. 4 Inst. 160.

*Pœna ad paucos, metus ad omnes.* Punishment to few, dread or fear to all.

*Pœna ad paucos, metus ad omnes perveniat.* If punishment be inflicted on a few, a dread comes to all.

*Pœna ex delicto defuncti hæres teneri non debet.* The heir ought not to be bound in a penalty inflicted for the crime of the ancestor. 2 Inst. 198.

*Pœna non potest, culpa perennis erit.* Punishment cannot be, crime will be, perpetual. 21 Vin. Abr. 271.

*Pœna tolli potest, culpa perennis erit.* The punishment can be removed, but the crime remains. 1 Park. Cr. Rep. 241. See PARDON.

*Pœnæ potius molliendæ quam exasperandæ sunt.* Punishments should rather be softened than aggravated. 3 Inst. 220.

*Pœnæ sint restringendæ.* Punishments should be restrained. Jenk. Cent. 29.

*Pœnæ suos tenere debet actores et non alios.* Punishment ought to be inflicted upon the guilty, and not upon others. Bract. 380 *b*; Fleta, l. 1, c. 38, § 12; l. 4, c. 17, § 17.

*Politæ legibus non leges politiis adaptandæ.* Politics are to be adapted to the laws, and not the laws to politics. Hob. 154.

*Ponderantur testes, non numerantur.* Witnesses are weighed, not counted. 1 Stark. Ev. 554; Best, Ev. 426, § 389; 14 Wend. 105, 109.

*Posito uno oppositorum negatur alterum.* One of two opposite positions being affirmed, the other is denied. 3 Rolle 422.

*Possessio est quasi pedis positio.* Possession is, as it were, the position of the foot. 3 Co. 42.

*Possessio fratris de feodo simplici facit sororem esse hæredem.* Possession of the brother in fee-simple makes the sister to be heir. 3 Co. 42; 2 Sharsw. Bla. Com. 227; Broom, Max. 532.

*Possessio pacifica pour anns 60 facit jus.* Peaceable possession for sixty years gives a right. Jenk. Cent. 26.

*Possession is a good title, where no better title appears.* 20 Vin. Abr. 278.

*Possession of the termor, possession of the reversioner.*

*Possessor has right against all men but him who has the very right.*

*Possibility cannot be on a possibility.*

*Posteriora derogant prioribus.* Posterior things derogate from things prior. 1 Bouv. Inst. n. 90.

*Posthumus pro nato habetur.* A posthumous child is considered as though born (at the parent's death). 15 Pick. 258.

*Postliminium fingit eum qui captus est in civitate semper fuisse.* Postliminy feigns that he who has been captured has never left the state. Inst. 1. 12. 5; Dig. 49. 51.

*Potentia debet sequi justitiam, non antecedere.* Power ought to follow, not to precede, justice. 3 Bulstr. 199.

*Potentia inutilis frustra est.* Useless power is vain.

*Potentia non est nisi ad bonum.* Power is not conferred but for the public good.

*Potest quis renunciare pro se et suis, jus quod pro se introductum est.* A man may relinquish, for himself and those claiming under him, a right which was introduced for his own benefit. See 1 Bouv. Inst. n. 83.

*Potestas stricte interpretatur.* Power should be strictly interpreted. Jenk. Cent. 17.

*Potestas suprema seipsum dissolvere potest, ligare non potest.* Supreme power can dissolve, but cannot bind itself. Bacon, Max. Reg. 19.

*Potior est conditio defendentis.* Better is the condition of the defendant (than that of the plaintiff). Broom, Max. 740; Cowp. 343; 15 Pet. 471; 21 Pick. 289; 22 *id.* 186, 187; 107 Mass. 440.

*Potior est conditio possidentis.* Better is the condition of the possessor. Broom, Max. 215, n. 719; 6 Mass. 84, 381; 21 Pick. 140.

*Prædium servit prædio.* Land is under servitude to land. (*i. e.* Servitudes are not personal rights, but attach to the dominant tenement.) Trayner, Max. 455.

*Præpropera consilia raro sunt prospera.* Hasty counsels are seldom prosperous. 4 Inst. 57.

*Præscriptio est titulus ex usu et tempore substantiam capiens ab auctoritate legis.* Prescription is a title by authority of law, deriving its force from use and time. Co. Litt. 113.

*Præscriptio et executio non pertinent ad valorem contractus, sed ad tempus et modum actionis instituendæ.* Prescription and execution do not affect the validity of the contract, but the time and manner of bringing an action. 3 Mass. 84; 3 Johns. Ch. 190, 219.

*Præsentare nihil aliud est quam præsto dare seu offere.* To present is no more than to give or offer on the spot. Co. Litt. 120.

*Præsentia corporis tollit errorem nominis, et veritas nominis tollit errorem demonstrationis.* The presence of the body cures the error in the name; the truth of the name cures an error in the description. Bacon, Max. Reg. 25; Broom, Max. 637; 6 Co. 66; 3 B. & Ad. 640; 6 Term 675; 11 C. B. 996; 1 H. L. C. 792; 3 De G. M. & G. 140; Hare, Contr. 471.

*Præstat cautela quam medela.* Prevention is better than cure. Co. Litt. 304.

*Præsumatur pro justitia sententiæ.* The justice of a sentence should be presumed. Best, Ev. Int. 42; Mascardus, *de prob. conc.* 1237, n. 2.

*Præsumitur pro legitimatione.* There is a presumption in favor of legitimacy. 5 Co. 98 *b*; 1 Sharsw. Bla. Com. 457.

*Præsumptio, ex eo quod plerumque fit.* Presumptions arise from what generally happens. 22 Wend. 425, 475.

*Præsumptio violenta, plena probatio.* Violent presumption is full proof.

*Præsumptio violenta valet in lege.* Strong presumption avails in law. Jenk. Cent. 58.

*Præsumptiones sunt conjecturæ ex signo verisimili ad probandum assumptæ.* Presumptions are conjectures from probable proof, assumed for purposes of evidence. J. Voet. *ad. Pand.* l. 22, tit. 3, n. 14.

*Prætextu liciti non debet admitti illicitum.* Under pretext of legality, what is illegal ought not to be admitted. 10 Co. 88.

*Praxis judicum est interpres legum.* The practice of the judges is the interpreter of the laws. Hob. 96; Branch, Princ.

*Precedents have as much law as justice.*

*Precedents that pass sub-silentio are of little or no authority.* 16 Vin. Abr. 499.

*Pretium succedit in locum rei.* The price stands in the place of the thing sold. 1 Bouv. Inst. n. 939; 2 Bulstr. 312.

*Previous intentions are judged by subsequent acts.* 4 Denio 319.

*Prima pars æquitatis æqualitas.* The radical element of equity is equality.

*Primo excutienda est verbi vis, ne sermonis vitio obstruatur oratio, sive lex sine argumentis.* The force of a word is to be first examined, lest by the fault of diction the sentence be destroyed or the law be without arguments. Co. Litt. 68.

*Princeps et respublica ex justa causa possunt rem meam auferre.* The king and the commonwealth for a just cause can take away my property. 12 Co. 13.

*Princeps legibus solutus est.* The emperor is free from laws. Dig. 1. 3. 31; Halifax, Anal. prev. vi, vii, note.

*Principalis debet semper excuti antequam perveniatur ad fideijussores.* The principal should always be exhausted before coming upon the sureties. 2 Inst. 19.

*Principia probant, non probantur.* Principles prove, they are not proved. 3 Co. 40. See PRINCIPLES.

*Principiis obsta.* Oppose beginnings. Branch, Princ.

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*Principiorum non est ratio.* There is no reasoning of principles. 2 Bulstr. 239. See PRINCIPLES.

*Principium est potissima pars cujusque rei.* The beginning is the most powerful part of a thing. 10 Co. 49.

*Prior tempore, potior jure.* He who is first in time is preferred in right. Co. Litt. 14 *a*; Broom, Max. 354; 2 P. Wms. 491; 1 Term 733; 9 Wheat. App. 24; 15 Atl. Rep. (Pa.) 730.

*Privatio præsupponit habitum.* A deprivation presupposes a possession. 2 Rolle 419.

*Privatis pactionibus non dubium est non lædi jus cæterorum.* There is no doubt that the rights of others cannot be prejudiced by private agreements. Dig. 2. 15. 3. pr.; Broom, Max. 697.

*Privatorum conventio juri publico non derogat.* Private agreements cannot derogate from public law. Dig. 50. 17. 45. 1: Broom, Max. 695.

*Privatum commodum publico cedit.* Private yields to public good. Jenk. Cent. 273.

*Privatum incommodum publico bono pensatur.* Private inconvenience is made up for by public good. Broom, Max. 7.

*Privilegium est beneficium personale et extinguitur cum persona.* A privilege is a personal benefit and dies with the person. 3 Bulstr. 8.

*Privilegium est quasi privata lex.* A privilege is, as it were, a private law. 2 Bulstr. 189.

*Privilegium non valet contra rempublicam.* A privilege avails not against the commonwealth. Bacon, Max. 25; Broom, Max. 18; Noy, Max., 9th ed. 34.

*Pro possessione præsumitur de jure.* From possession arises a presumption of law. See POSSESSION.

*Pro possessore habetur qui dolo injuriave desiit possidere.* He is esteemed a possessor whose possession has been disturbed by fraud or injury. Off. Ex. 166.

*Probandi necessitas incumbit illi qui agit.* The necessity of proving lies with him who sues. Inst. 2. 20. 4.

*Probationes debent esse evidentes, (id est) perspicuæ et faciles intelligi.* Proofs ought to be made evident, (that is) clear and easy to be understood. Co. Litt. 283.

*Probatis extremis, præsumitur media.* The extremes being proved, the intermediate proceedings are presumed. 1 Greenl. Ev. § 20.

*Processus legis est gravis vexatio, executio legis coronat opus.* The process of the law is a grievous vexation; the execution of the law crowns the work. Co. Litt. 289.

*Prohibetur ne quis faciat in suo quod nocere possit alieno.* It is prohibited to do on one's own property that which may injure another's. 9 Co. 59.

*Proles sequitur sortem paternam.* The offspring follows the condition of the father. 1 Sandf. 583, 660.

*Propinquior excludit propinquum; propinquus remotum; et remotus remotiorem.* He who is nearer excludes him who is near; he who is near, him who is remote; he who is remote, him who is more remote. Co. Litt. 10.

*Propositum indefinitum æquipollet universali.* An indefinite proposition is equal to a general one.

*Proprietas totius navis carinæ causam sequitur.* The property of the whole ship follows the ownership of the keel. Dig. 6. 1. 61; 6 Pick. 220. (Provided it had not been constructed with the materials of another. *Id.*) 2 Kent 362.

*Proprietates verborum observandæ sunt.* The proprieties (*i. e.* proper meanings) of words are to be observed. Jenk. Cent. 136.

*Prosecutio legis est gravis vexatio; executio legis coronat opus.* Litigation is vexatious, but an execution crowns the work. Co. Litt. 289 *b*.

*Protectio trahit subjectionem, subjectio protectionem.* Protection draws to it subjection; subjection, protection. Co. Litt. 65; Broom, Max. 78; 169 U. S. 649.

*Proviso est providere præsentia et futura, non præterita.* A proviso is to provide for the present and the future, not the past. 2 Co. 72; Vaugh. 279.

*Prudenter agit qui præcepto legis obtemperat.* He acts prudently who obeys the commands of the law. 5 Co. 49.

*Pueri sunt de sanguine parentum, sed pater et mater non sunt de sanguine puerorum.* Children are of the blood of their parents, but the father and mother are not of the blood of their children. 3 Co. 40.

*Pupillus pati posse non intelligitur.* A pupil is not considered able to do an act which would be prejudicial to him. Dig. 50. 17. 110. 2; 2 Kent 245.

*Purchaser without notice is not obliged to discover to his own hurt.* See 4 Bouv. Inst. n. 4336.

*Quæ ab hostibus capiuntur, statim capientium fiunt.* Things taken from public enemies immediately become the property of the captors. Inst. 2. 1. 17; Grotius, *de jur. Bell.* 1. 3, c. 6, § 12.

*Quæ ab initio inutilis fuit institutio, ex post facto convalescere non potest.* An institution void in the beginning cannot acquire validity from after-matter. Dig. 50. 17. 210.

*Quæ ab initio non valent, ex post facto convalescere non possunt.* Things invalid from the beginning cannot be made valid by subsequent act. Trayner, Max. 482.

*Quæ accessionum locum obtinent, extinguuntur cum principales res peremptæ fuerint.* When the principal is destroyed, those things which are accessory to it are also destroyed. Pothier, Obl. pt. 3, c. 6, art. 4; Dig. 33. 8. 2; Broom, Max. 496.

*Quæ ad unum finem locuta sunt, non debent ad alium detorqueri.* Words spoken to one end ought not to be perverted to another. 4 Rep. 14; 4 Co. 14.

*Quæ cohærent personæ a persona separari nequeunt.* Things which belong to the person ought not to be separated from the person. Jenk. Cent. 28.

*Quæ communi legi derogant stricte interpretantur.* Laws which derogate from the common law ought to be strictly construed. Jenk. Cent. 221.

*Quæ contra rationem juris introducta sunt, non debent trahi in consequentiam.* Things introduced contrary to the reason of the law ought not to be drawn into precedents. 12 Co. 75.

*Quæ dubitationis causa tollendæ inseruntur communem legem non lædunt.* Whatever is inserted for the purpose of removing doubt does not hurt or affect the common law. Co. Litt. 205.

*Quæ dubitationis tollendæ causa contractibus inseruntur, jus commune non lædunt.* Particular clauses inserted in agreements to avoid doubts and ambiguity do not prejudice the general law. Dig. 50. 17. 81.

*Quæ in curia acta sunt rite agi præsumuntur.* Whatever is done in court is presumed to be rightly done. 3 Bulstr. 43.

*Quæ in partes dividi nequeunt solida a singulis præstantur.* Things (*i. e.* services and rents) which cannot be divided into parts are rendered entire by each severally. 6 Co. 1.

*Quæ in testamento ita sunt scripta ut intelligi non possint, perinde sunt ac si scripta non essent.* Things which are so written in a will that they cannot be understood, are as if they had not been written. Dig. 50. 17. 73. 3.

*Quæ incontinenti vel certo fiunt inesse videntur.* Whatever things are done at once and certainly, appear part of the same transaction. Co. Litt. 236.

*Quæ inter alios acta sunt nemini nocere debent, sed prodesse possunt.* Transactions between strangers may benefit, but cannot injure, persons who are not parties to them. 6 Co. 1.

*Quæ legi communi derogant non sunt trahenda in exemplum.* Things derogatory to the common law are not to be drawn into precedent. Branch, Princ.

*Quæ legi communi derogant stricte interpretantur.* Those things which derogate from the common law are to be construed strictly. Jenk. Cent. 29.

*Quæ mala sunt inchoata in principio vix bono peraguntur exitu.* Things bad in the commencement seldom end well. 4 Co. 2.

*Quæ non fieri debent, facta valent.* Things which ought not to be done are held valid when they have been done. Trayner, Max. 484.

*Quæ non valeant singula, juncta juvant.* Things which may not avail singly, when united have an effect. 3 Bulstr. 132; Broom, Max. 588.

*Quæ præter consuetudinem et morem majorum fiunt, neque placent, neque recta videntur.* What is done contrary to the custom and usage of our ancestors, neither pleases nor appears right. 4 Co. 78.

*Quæ propter necessitatem recepta sunt, non debent in argumentum trahi.* Things which are tolerated on account of necessity ought not to be drawn into precedent. Dig. 50. 17. 162.

*Quæ rerum natura prohibentur, nulla lege confirmata sunt.* What is prohibited in the nature of things can be confirmed by no law. Finch, Law 74.

*Quæ singula non prosunt, juncta juvant.* Things which taken singly are of no avail afford help when taken together. Trayner, Max. 486.

*Quæ sunt minoris culpæ sunt majoris infamiæ.* Things which are of the smaller guilt are of the greater infamy. Co. Litt. 6.

*Quæcunque intra rationem legis inveniuntur, in-*

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*tra legem ipsam esse judicantur.* Whatever appears within the reason of the law, is considered within the law itself. 2 Inst. 689.

*Quælibet concessio fortissime contra donatorem interpretanda est.* Every grant is to be taken most strongly against the grantor. Co. Litt. 183 *a*; 7 Metc. 516.

*Quælibet jurisdictio cancellos suos habet.* Every jurisdiction has its bounds. Jenk. Cent. 139.

*Quælibet pœna corporalis, quamvis minima, major est qualibet pœna pecuniaria.* Every corporal punishment, although the very least, is greater than any pecuniary punishment. 3 Inst. 220.

*Quæras de dubiis, legem bene discere si vis.* Inquire into doubtful points if you wish to understand the law well. Littl. § 443.

*Quære de dubiis, quia per rationes pervenitur ad legitimam rationem.* Inquire into doubtful points, because by reasoning we arrive at legal reason. Littl. § 377.

*Quærere dat sapere quæ sunt legitima vere.* To investigate is the way to know what things are really lawful. Littl. § 448.

*Qualitas quæ inesse debet, facile præsumitur.* A quality which ought to form a part is easily presumed.

*Quam longum debet esse* rationabile tempus, *non definitur in lege, sed pendet ex discretione justiciariorum.* What is *reasonable time* the law does not define; it is left to the discretion of the judges. Co. Litt. 56. See 11 Co. 44.

*Quam rationabilis debet esse finis, non definitur, sed omnibus circumstantiis inspectis pendet ex justiciariorum discretione.* What a reasonable fine ought to be is not defined, but is left to the discretion of the judges, all the circumstances being considered. 11 Co. 44.

*Quamvis aliquid per se non sit malum, tamen si sit mali exempli, non est faciendum.* Although in itself a thing may not be bad, yet if it holds out a bad example it is not to be done. 2 Inst. 564.

*Quamvis lex generaliter loquitur, restringenda tamen est, ut cessante ratione et ipsa cessat.* Although the law speaks generally, it is to be restrained, since when the reason on which it is founded fails, it fails. 4 Inst. 330.

*Quando aliquid conceditur, conceditur id sine quo illud fieri non possit.* When anything is granted, that also is granted without which it cannot be of effect. 9 Barb. 516; 10 *id.* 354.

*Quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud.* When anything is commanded, everything by which it can be accomplished is also commanded. 5 Co. 116. See 7 C. B. 886; 14 *id.* 107; 6 Exch. 886, 889; 10 *id.* 449; 2 E. & B. 301; 8 Cush. 345; Broom, Max. 485; Bish. Writ. L. § 137.

*Quando aliquid per se non sit malum, tamen si sit mali exempli, non est faciendum.* When anything by itself is not evil, and yet may be an example for evil, it is not to be done. 2 Inst. 564.

*Quando aliquid prohibetur ex directo, prohibetur et per obliquum.* When anything is prohibited directly, it is also prohibited indirectly. Co. Litt. 223.

*Quando aliquid prohibetur, prohibetur omne per quod devenitur ad illud.* When anything is prohibited, everything by which it is reached is prohibited. 2 Inst. 48; Broom, Max. 432, 489; Wing. Max. 618. See 7 Cl. & F. 509, 546; 4 B. & C. 187; 2 Term 251; 8 *id.* 301, 415; 15 M. & W. 7; 11 Wend. 339.

*Quando aliquis aliquid concedit, concedere videtur et id sine quo res uti non potest.* When a person grants a thing, he is supposed to grant that also without which the thing cannot be used. 3 Kent 421; 24 Pick. 104.

*Quando charta continet generalem clausulam, posteaque descendit ad verba specialia quæ clausulæ generali sunt consentanea, interpretanda est charta secundum verba specialia.* When a deed contains a general clause, and afterwards descends to special words, consistent with the general clause, the deed is to be construed according to the special words. 8 Co. 154.

*Quando de una et eadem re, duo onerabiles existunt, unus, pro insufficientia alterius, de integro onerabitur.* When two persons are liable concerning one and the same thing, if one makes default the other must bear the whole. 2 Inst. 277.

*Quando dispositio referri potest ad duas res, ita quod secundum relationem unam vitiatur et secundum alteram utilis sit, tum facienda est relatio ad illam ut valeat dispositio.* When a disposition may be made to refer to two things, so that according to one reference it would be vitiated and by the other it would be made effectual, such a reference must be made that the disposition shall have effect. 6 Co. 76 *b*.

*Quando diversi desiderantur actus ad aliquem statum perficiendum, plus respicit lex actum originalem.* When different acts are required to the formation of an estate, the law chiefly regards the original act. 10 Co. 49.

*Quando duo jura concurrunt in una persona, æquum est ac si essent in diversis.* When two rights concur in one person, it is the same as if they were in two separate persons. 4 Co. 118; Broom, Max. 531.

*Quando jus domini regis et subditi concurrunt, jus regis præferri debet.* When the right of the sovereign and of the subject concur, the right of the sovereign ought to be preferred. Co. Litt. 30 *b*; Broom, Max. 69.

*Quando lex aliquid alicui concedit, concedere videtur id sine quo res ipsa esse non potest.* When the law gives anything, it gives the means of obtaining it. 5 Co. 47; 3 Kent 421.

*Quando lex aliquid alicui concedit, omnia incidentia tacite conceduntur.* When the law gives anything, it gives tacitly what is incident to it. 2 Inst. 326; Hob. 234.

*Quando lex aliquid alicui concedit, conceditur et id sine quo res ipsa esse non potest.* When the law grants a thing to any one, it grants that also without which the thing itself cannot exist. Broom, Max. 486; 15 Barb. 153, 160.

*Quando lex est specialis, ratio autem generalis, generaliter lex est intelligenda.* When the law is special, but its reason is general, the law is to be understood generally. 2 Inst. 83; 10 Co. 101.

*Quando licet id quod majus, videtur licere id quod minus.* When the greater is allowed, the less seems to be allowed also. Shep. Touch. 429.

*Quando plus fit quam fieri debet, videtur etiam illud fieri quod faciendum est.* When more is done than ought to be done, that at least shall be considered as performed which should have been performed (as, if a man, having a power to make a lease for ten years, make one for twenty years, it shall be void only for the surplus). Broom, Max. 177; 5 Co. 115; 8 *id.* 85 *a*.

*Quando quod ago non valet ut ago, valeat quantum valere potest.* When that which I do does not have effect as I do it, let it have as much effect as it can. 16 Johns. 172; 3 Barb. Ch. 242.

*Quando res non valet ut ago, valeat quantum valere potest.* When the thing is of no force as I do it, it shall have as much as it can have. Cowp. 600; Broom, Max. 543; 2 Sm. L. C. 294. 6 East 105; 1 H. Bla. 614; 78 Pa. 219.

*Quando verba et mens congruunt, non est interpretationi locus.* When the words and the mind agree, there is no place for interpretation.

*Quando verba statuti sunt specialia, ratio autem generalis, generaliter statutum est intelligendum.* When the words of a statute are special, but the reason or object of it general, the statute is to be construed generally. 10 Co. 101 *b*.

*Quemadmodum ad quæstionem facti non respondent judices, ita ad quæstionem juris non respondent juratores.* In the same manner that judges do not answer to questions of fact, so jurors do not answer to questions of law. Co. Litt. 295.

*Qui accusat integræ famæ sit et non criminosus.* Let him who accuses be of clear fame, and not criminal. 3 Inst. 26.

*Qui acquirit sibi acquirit hæredibus.* He who acquires for himself acquires for his heirs. Trayner, Max. 496.

*Qui adimit medium dirimit finem.* He who takes away the means destroys the end. Co. Litt. 161.

*Qui aliquid statuerit parte inaudita altera, æquum licet dixerit, haud æquum fecerit.* He who decides anything, one party being unheard, though he should decide right, does wrong. 6 Co. 52; 4 Bla. Com. 483.

*Qui alterius jure utitur, eodem jure uti debet.* He who uses the right of another ought to use the same right. Pothier, Tr. *De Change*, pt. 1, c. 4, § 114; Broom, Max. 473.

*Qui bene distinguit, bene docet.* He who distinguishes well, teaches well. 2 Inst. 470.

*Qui bene interrogat, bene docet.* He who questions well teaches well. 2 Bulstr. 227.

*Qui cadit a syllaba cadit a tota causa.* He who fails in a syllable fails in his whole cause. Bract. fol. 2f1; Stat. Wales, 12 Edw. I.; 3 Sharsw. Bla. Com. 407.

*Qui concedit aliquid, concedere videtur et id sine*

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*quo concessio est irrita, sine quo res ipsa esse non potuit.* He who grants anything is considered as granting that without which his grant would be idle, without which the thing itself could not exist. 11 Co. 52; Jenk. Cent. 32.

*Qui confirmat nihil dat.* He who confirms does not give. 2 Bouv. Inst. n. 2069.

*Qui contemnit præceptum, contemnit præcipientem.* He who contemns the precept contemns the party giving it. 12 Co. 96.

*Qui cum alio contrahit, vel est vel debet esse non ignarus conditionis ejus.* He who contracts knows, or ought to know, the quality of the person with whom he contracts (otherwise he is not excusable). Dig. 50. 17. 19; Story, Confl. § 76.

*Qui dat finem, dat media ad finem necessaria.* He who gives an end gives the means to that end. 3 Mass. 129.

*Qui destruit medium, destruit finem.* He who destroys the means destroys the end. 11 Co. 51; Shep. Touch. 342; Co. Litt. 161 *a*.

*Qui doit inheriter al père, doit inheriter al fitz.* He who ought to inherit from the father ought to inherit from the son. 2 Bla. Com. 250, 273; Broom, Max. 517.

*Qui evertit causam, evertit causatum futurum.* He who overthrows the cause overthrows its future effects. 10 Co. 51.

*Qui ex damnato coitu nascuntur, inter liberos non computantur.* They who are born of an illicit union should not be counted among children. Co. Litt. 8. See Bract. 5; Broom, Max. 519.

*Qui facit id quod plus est, facit id quod minus est, sed non convertitur.* He who does that which is more does that which is less, but not *vice versa*. Bracton 207 *b*.

*Qui facit per alium facit per se.* He who acts through another acts himself (*i. e.* the acts of an agent are the acts of the principal). Broom, Max. 818; 1 Sharsw. Bla. Com. 429; Story, Ag. § 440; 7 M. & G. 32, 33; 16 M. & W. 26; 8 Scott N. R. 590; 6 Cl. & F. 600; 9 *id.* 850; 10 Mass. 155; 3 Gray 361; 11 Metc. 71; 123 Pa. 62; Bish. Writ. L. § 93; Webb, Poll. Torts 89. See Co. Litt. 258 *a*.

*Qui habet jurisdictionem absolvendi, habet jurisdictionem ligandi.* He who has jurisdiction to loosen has jurisdiction to bind. 12 Co. 59.

*Qui hæret in litera, hæret in cortice.* He who adheres to the letter adheres to the bark. Broom, Max. 685; Co. Litt. 289; 5 Co. 4 *b*; 11 *id.* 34 *b*; 12 East 372; 9 Pick. 317; 22 *id.* 557; 1 S. & R. 253; 33 S. W. Rep. (Minn.) 87; 93 Wis. 656.

*Qui ignorat quantum solvere debeat, non potest improbus videre.* He who does not know what he ought to pay does not want probity in not paying. Dig. 50. 17. 99.

*Qui in jus dominiumve alterius succedit jure ejus uti debet.* He who succeeds to the right or property of another ought to use his right (*i. e.* holds it subject to the same rights and liabilities as attached to it in the hands of the assignor). Dig. 50. 17. 177; Broom, Max. 473, 478.

*Qui in utero est, pro jam nato habetur quoties de ejus commodo quæritur.* He who is in the womb is considered as born, whenever his benefit is concerned. See 1 Bla. Com. 130.

*Qui jure suo utitur, nemini facit injuriam.* He who uses his legal rights harms no one. 8 Gray 424. See Broom, Max. 379.

*Qui jussu judicis aliquod fecerit non videtur dolo malo fecisse, quia parere necesse est.* He who does anything by command of a judge will not be supposed to have acted from an improper motive, because it was necessary to obey. 10 Co. 76; Dig. 50. 17. 167. 1; Broom, Max. 93

*Qui male agit, odit lucem.* He who acts badly hates the light. 7 Co. 66.

*Qui mandat ipse fecisse videtur.* He who commands (a thing to be done) is held to have done it himself. Story, Bailm. § 147.

*Qui melius probat, melius habet.* He who proves most recovers most. 9 Vin. Abr. 235.

*Qui nascitur sine legitimo matrimonio, matrem sequitur.* He who is born out of lawful matrimony follows the condition of the mother.

*Qui non cadunt in constantem virum, vani timores sunt æstimandi.* Those are to be esteemed vain fears which do not affect a man of a firm mind. 7 Co. 27.

*Qui non habet, ille non dat.* Who has not, he gives not. Shep. Touch. 243; 4 Wend. 619.

*Qui non habet in ære luat in corpore, ne quid peccetur impune.* He who cannot pay with his purse must suffer in his person, lest he who offends should go unpunished. 2 Inst. 173; 4 Bla. Com. 20.

*Qui non habet potestatem alienandi habet necessitatem retinendi.* He who has not the power of alienating is obliged to retain. Hob. 336.

*Qui non improbat, approbat.* He who does not disapprove, approves. 3 Inst. 27.

*Qui non negat, fatetur.* He who does not deny, admits. Trayner, Max. 503.

*Qui non obstat quod obstare potest, facere videtur.* He who does not prevent what he can, seems to commit the thing. 2 Inst. 146.

*Qui non prohibet cum prohibere possit, jubet.* He who does not forbid when he can forbid, commands. 1 Sharsw. Bla. Com. 430.

*Qui non prohibet quod prohibere potest, assentire videtur.* He who does not forbid what he can forbid, seems to assent. 2 Inst. 308; 8 Exch 304.

*Qui non propulsat injuriam quando potest, infert.* He who does not repel a wrong when he can, occasions it. Jenk. Cent. 271.

*Qui obstruit aditum, destruit commodum.* He who obstructs an entrance destroys a conveniency. Co. Litt. 101.

*Qui omne dicit, nihil excludit.* He who says all excludes nothing. 4 Inst. 81.

*Qui parcit nocentibus innocentes punit.* He who spares the guilty punishes the innocent. Jenk. Cent. 126.

*Qui peccat ebrius, luat sobrius.* He who offends drunk must be punished when sober. Cary 133; Broom, Max. 17.

*Qui per alium facit per seipsum facere videtur.* He who does anything through another is considered as doing it himself. Co. Litt. 258; Broom, Max. 817.

*Qui per fraudem agit, frustra agit.* He who acts fraudulently acts in vain. 2 Rolle 17.

*Qui potest et debet vetare, tacens jubet.* He who can and ought to forbid and does not, commands. 1 Johns. Ch. 244.

*Qui primum peccat ille facit rixam.* He who first offends causes the strife.

*Qui prior est tempore, potior est jure.* He who is prior in time is stronger in right. Broom, Max. 353; Co. Litt. 14 *a*; 1 Story, Eq. Jur. § 64 *d*; Story, Bailm. § 312; 97 Mass. 108; 100 *id.* 411; 3 East 93; 10 Watts 24; 24 Miss. 208; 70 Md. 448; 44 Cent. L. J. 427; Tiedm. Eq. Jur. § 22.

*Qui pro me aliquid facit, mihi fecisse videtur.* He who does any benefit for me (to another) is considered as doing it to me. 2 Inst. 501.

*Qui providet sibi, providet hæredibus.* He who provides for himself provides for his heirs.

*Qui rationem in omnibus quærunt, rationem subvertunt.* He who seeks a reason for everything subverts reason. 2 Co. 75; Broom, Max. 157.

*Qui sciens solvit indebitum donandi consilio id videtur fecisse.* One who knowingly pays what is not due, is supposed to have done it with the intention of making a gift. 17 Mass. 388.

*Qui semel actionem renunciaverit, amplius repetere non potest.* He who renounces his action once cannot any more bring it. 8 Co. 59. See RETRAXIT.

*Qui semel malus, semper præsumitur esse malus in eodem genere.* He who is once bad is presumed to be always so in the same degree. Cro. Car. 317; Best, Ev. 345.

*Qui sentit commodum, sentire debet et onus.* He who derives a benefit from a thing ought to bear the disadvantages attending it. 2 W. & M. 217; 1 Stor. Const. 78; Broom, Max. 706; 17 Pick. 530; 2 Binn. 308, 571; Short, Ry. Law 799; 49 La. Ann. 600.

*Qui sentit onus, sentire debet et commodum.* He who bears the burden ought also to derive the benefit. 1 Co. 99 *a*; Broom, Max. 712; 1 S. & R. 180; Francis, Max. 5.

*Qui tacet consentire videtur.* He who is silent appears to consent. Jenk. Cent. 32; Broom, Max. 138, 787; 2 Pick. 73, n.; 119 Mass. 515. See Dig. 50. 17. 142, for a different form.

*Qui tacet consentire videtur ubi tractatur de ejus commodo.* He who is silent is considered as assenting, when his advantage is debated. 9 Mod. 38; 38 Fla. 169.

*Qui tacet non utique fatetur, sed tamen verum est eum non negare.* He who is silent does not indeed confess, but yet it is true that he does not deny. Dig. 50. 17. 142.

*Qui tardius solvit, minus solvit.* He who pays tardily pays less than he ought. Jenk. Cent. 38.

*Qui vult decipi, decipiatur.* Let him who wishes to be deceived, be deceived. Broom, Max. 782, n.; 1 De G., M. & G. 687, 710; Shep. Touch. 56; 43 Cal. 110.

*Quicquid acquiritur servo, acquiritur domino.* Whatever is acquired by the servant is acquired for the master. 15 Vin. Abr. 327.

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*Quicquid demonstratæ rei additur satis demonstratæ frustra est.* Whatever is added to the description of a thing already sufficiently described is of no effect. Dig. 33. 4. 1. 8; Broom, Max. 630.

*Quicquid est contra normam recti est injuria.* Whatever is against the rule of right is a wrong. 3 Bulstr. 313.

*Quicquid in excessu actum est, lege prohibetur.* Whatever is done in excess is prohibited by law. 2 Inst. 107.

*Quicquid judicis auctoritati subjicitur, novitati non subjicitur.* Whatever is subject to the authority of a judge is not subject to innovation. 4 Inst. 66.

*Quicquid plantatur solo, solo cedit.* Whatever is affixed to the soil belongs to it. Off. Ex. 145; 8 Cush. 189. See Ambl. 113; 3 East 51; Broom, Max. 401; 61 Vt. 134; 10 N. Y. L. R. 169; FIXTURES.

*Quicquid recipitur, recipitur secundum modum recipientis.* Whatever is received is received according to the intention of the recipient. Broom, Max. 810; Halkers. Max. 149; 2 Bingh. N. C. 461; 2 B. & C. 73; 14 Sim. 522; 2 Cl. & F. 681; 2 Cr. & J. 678; 14 East 239, 243 *c.*

*Quicquid solvitur, solvitur secundum modum solventis.* Whatever is paid is to be applied according to the intention of the payer. Broom, Max. 810; 2 Vern. 606. See APPROPRIATION OF PAYMENTS.

*Quid sit jus, et in quo consistit injuria, legis est definire.* What constitutes right, and what injury, it is the business of the law to declare. Co. Litt. 158 *b.*

*Quid turpi ex causa promissum est non valet.* A promise arising out of immoral circumstances is invalid.

*Quidquid enim sive dolo et culpa venditoris accidit in eo venditor securus est.* For concerning anything which occurs without deceit and wrong on the part of the vendor, the vendor is secure. 4 Pick. 198.

*Quieta non movere.* Not to unsettle things which are established. 28 Barb. 9, 22.

*Quilibet potest renunciare juri pro se inducto.* Any one may renounce a right introduced for his own benefit. To this rule there are some exceptions. See Broom, Max. 699, 705; 3 Curt. C. C. 393; 1 Exch. 657; 31 L. J. Ch. 175; 9 Mass. 492; 3 Pick. 218; 12 Cush. 83; 5 Johns. Ch. 566.

*Quisquis est qui velit jurisconsultus haberi, continuet studium, velit a quocunque doceri.* Whoever wishes to be held a jurisconsult, let him continually study, and desire to be taught by everybody.

*Quo ligatur, eo dissolvitur.* As a thing is bound, so it is unbound. 2 Rolle 21.

*Quocumque modo velit, quocumque modo possit.* In any way he wishes, in any way he can. 14 Johns. 484, 492.

*Quod a quoque pœnæ nomine exactum est id eidem restituere nemo cogitur.* That which has been exacted as a penalty no one is obliged to restore. Dig. 50. 17. 46.

*Quod ab initio non valet, in tractu temporis non convalescet.* What is not good in the beginning cannot be rendered good by time. Merlin, *Rép. verb. Regle de Droit.* (This, though true in general, is not universally so.) 4 Co. 26; Broom, Max. 178; 5 Pick. 27.

*Quod ad jus naturale attinet, omnes homines æquales sunt.* All men are equal as far as the natural law is concerned. Dig. 50. 17. 32.

*Quod ædificatur in area legata cedit legato.* Whatever is built upon land given by will passes with the gift of the land. Amos & F. Fixtures 246; Broom, Max. 424.

*Quod alias bonum et justum est, si per vim vel fraudem petatur, malum et injustum efficitur.* What is otherwise good and just, if sought by force or fraud, becomes bad and unjust. 3 Co. 78.

*Quod alias non fuit licitum necessitas licitum facit.* Necessity makes that lawful which otherwise were unlawful. Fleta, l. 5, c. 23, § 14.

*Quod approbo non reprobo.* What I approve I do not disapprove. Broom, Max. 712.

*Quod attinet ad jus civile, servi pro nullis habentur, non tamen et jure naturali, quia, quod ad jus naturale attinet, omnes homines æquali sunt.* So far as the civil law is concerned, slaves are not reckoned as persons, but not so by natural law, for so far as regards natural law all men are equal. Dig. 50. 17. 32.

*Quod constat clare, non debet verificari.* What is clearly apparent need not be proved. 10 Mod. 150.

*Quod constat curiæ opere testium non indiget.* What appears to the court needs not the help of witnesses. 2 Inst. 662.

*Quod contra juris rationem receptum est, non est producendum ad consequentias.* What has been admitted against the reason of the law, ought not to be drawn into precedents. Dig. 50. 17. 141; 12 Co. 75.

*Quod contra legem fit, pro infecto habetur.* What is done contrary to the law, is considered as not done. 4 Co. 31. (No one can derive any advantage from such an act.)

*Quod datum est ecclesiæ, datum est Deo.* What is given to the church is given to God. 2 Inst. 590.

*Quod demonstrandi causa additur rei satis demonstratæ, frustra fit.* What is added to a thing sufficiently palpable, for the purpose of demonstration, is vain. 10 Co. 113.

*Quod dubitas, ne feceris.* When you doubt about a thing, do not do it. 1 Hale, P. C. 310; Broom, Max. 325, n.

*Quod enim semel aut bis existit, prætereunt legislatores.* That which never happens but once or twice, legislators pass by. Dig. 1. 3. 17.

*Quod est ex necessitate nunquam introducitur, nisi quando necessarium.* What is introduced of necessity, is never introduced except when necessary. 2 Rolle 512.

*Quod est inconveniens, aut contra rationem non permissum est in lege.* What is inconvenient or contrary to reason, is not allowed in law. Co. Litt. 178.

*Quod est necessarium est licitum.* What is necessary is lawful. Jenk. Cent. 76.

*Quod fieri debet facile præsumitur.* That is easily presumed which ought to be done. Halkers. Max. 153, Broom, Max. 182, 297.

*Quod fieri non debet, factum valet.* What ought not to be done, when done, is valid. 5 Co. 38; 12 Mod. 438; 6 M. & W. 58; 9 *id.* 636.

*Quod in jure scripto "jus" appellatur, id in lege Angliæ "rectum" esse dicitur.* What in the civil law is called "*jus*," in the law of England is said to be "*rectum*" (right). Co. Litt 260; Fleta, l. 6, c. 1, § 1.

*Quod in minori valet, valebit in majori; et quod in majori non valet, nec valebit in minori.* What avails in the less, will avail in the greater; and what will not avail in the greater, will not avail in the less. Co. Litt. 260.

*Quod in uno similium valet, valebit in altero.* What avails in one of two similar things, will avail in the other. Co. Litt. 191.

*Quod inconsulto fecimus, consultius revocemus.* What is done without consideration or reflection, upon better consideration we should revoke or undo. Jenk. Cent. 116.

*Quod initio non valet, tractu temporis non valet.* A thing void in the beginning does not become valid by lapse of time. 1 S. & R. 58.

*Quod initio vitiosum est non potest tractu temporis convalescere.* Time cannot render valid an act void in its origin. Dig. 50. 17. 29; Broom, Max. 178.

*Quod ipsis, qui contraxerunt, obstat, et successoribus eorum obstabit.* That which bars those who have contracted will bar their successors also. Dig. 50. 17. 108.

*Quod jussu alterius solvitur pro eo est quasi ipsi solutum esset.* That which is paid by the order of another is, so far as such person is concerned, as if it had been paid to himself. Dig. 50. 17. 180.

*Quod meum est, sine facto sive defectu meo amitti seu in alium transferri non potest.* That which is mine cannot be lost or transferred to another without mine own act or default. 8 Co. 92; Broom, Max. 465; 1 Prest. Abstr. 147, 318.

*Quod meum est sine me auferri non potest.* What is mine cannot be taken away without my consent. Jenk. Cent. 251. But see EMINENT DOMAIN.

*Quod minus est in obligationem videtur deductum.* That which is the less is held to be imported into the contract (*e. g.* A offers to hire B's house at six hundred dollars, at the same time B offers to let it for five hundred dollars; the contract is for five hundred dollars). 1 Story, Contr. 481

*Quod naturalis ratio inter omnes homines constituit, vocatur jus gentium.* That which natural reason has established among all men, is called the law of nations. Dig. 1. 1. 9; Inst. 1. 2. 1; 1 Bla. Com. 43.

*Quod necessarie intelligitur id non deest.* What is necessarily understood is not wanting. 1 Bulstr. 71.

*Quod necessitas cogit, defendit.* What necessity forces, it justifies. Hale, P. C. 54.

*Quod non apparet non est, et non apparet judi-*

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*cialiter ante judicium.* What appears not does not exist, and nothing appears judicially before judgment. 2 Inst. 479; Broom, Max. 164; Jenk. Cent. 207; *arg.* 55 Pa. 57.

*Quod non capit Christus, capit fiscus.* What the church does not take, the treasury takes. Year B. 19 Hen. VI. 1.

*Quod non habet principium non habet finem.* What has no beginning has no end. Co. Litt. 345; Broom, Max. 180.

*Quod non legitur, non creditur.* What is not read is not believed. 4 Co. 304.

*Quod non valet in principali, in accessorio seu consequenti non valebit; et quod non valet in magis propinquo, non valebit in magis remoto.* What is not good as to things principal, will not be good as to accessories or consequences; and what is not of force as regards things near will not be of force as to things remote. 8 Co. 78.

*Quod nullius esse potest, id ut alicujus fieret nulla obligatio valet efficere.* No agreement can avail to make that the property of any one which cannot be acquired as property. Dig. 50. 17. 182.

*Quod nullius est, est domini regis.* That which belongs to nobody belongs to our lord the king. Fleta lii. 12; Broom, Max. 354; Bacon, Abr. *Prerogative* (B); 2 Bla. Com. 260.

*Quod nullius est id ratione naturali occupanti conceditur.* What belongs to no one, by natural reason belongs to the first occupant. 2 Inst. 2. 1. 12; 1 Bouv. Inst. n. 491; Broom, Max. 353.

*Quod nullum est, nullum producit effectum.* That which is null produces no effect. Trayner, Max. 519.

*Quod omnes tangit, ab omnibus debet supportari.* That which concerns all ought to be supported by all. 3 How. St. Tr. 818, 1067.

*Quod per me non possum, nec per alium.* What I cannot do in person, I cannot do through the agency of another. 4 Co. 24 *b*; 11 *id.* 87 *a.*

*Quod per recordum probatum, non debet esse negatum.* What is proved by the record, ought not to be denied.

*Quod populus postremum jussit, id jus ratum esto.* What the people have last enacted, let that be the established law. 1 Bla. Com. 89; 12 Allen 434.

*Quod principi placuit, legis habet vigorem; ut pote cum lege regia, quæ de imperio ejus lata est, populus ei et in eum omne suum imperium et potestatem conferat.* The will of the emperor has the force of law; for, by the royal law which has been made concerning his authority, the people have conferred upon him all its sovereignty and power. Dig. 1. 4. 1; Inst. 1. 2. 1; Fleta, l. 1, c. 17, § 7; Brac. 107; Selden, *Diss. ad Flet.* c. 3, § 2.

*Quod prius est verius est; et quod prius est tempore potius est jure.* What is first is truest; and what comes first in time is best in law. Co. Litt. 347.

*Quod pro minore licitum est, et pro majore licitum est.* What is lawful in the less is lawful in the greater. 8 Co. 43.

*Quod pure debetur præsenti die debetur.* That which is due unconditionally is due now. Trayner, Max. 519.

*Quod quis ex culpa sua damnum sentit, non intelligitur damnum sentire.* He who suffers a damage by his own fault is not held to suffer damage. Dig. 50. 17. 203.

*Quod quis sciens indebitum dedit hac mente, ut postea repeteret, repetere non potest.* What one has paid knowing it not to be due, with the intention of recovering it back, he cannot recover back. Dig. 2. 6. 50.

*Quod quisquis norit in hoc se exerceat.* Let every one employ himself in what he knows. 11 Co. 10.

*Quod remedio destituitur ipsa re valet si culpa absit.* What is without a remedy is by that very fact valid if there be no fault. Bacon, Max. Reg. 9; 3 Bla. Com. 20; Broom, Max. 212.

*Quod semel aut bis existit prætereunt legislatores.* Legislators pass over what happens (only) once or twice. Dig. 1. 3. 6; Broom, Max. 46.

*Quod semel meum est amplius meum esse non potest.* What is once mine cannot be mine more completely. Co. Litt. 49 *b*; Shep. Touch. 212; Broom, Max. 465, n.

*Quod semel placuit in electione, amplius displicere non potest.* That which in making his election a man has once been pleased to choose, he cannot afterwards quarrel with. Co. Litt. 146; Broom, Max. 295.

*Quod solo inædificatur solo cedit.* Whatever is built on the soil is an accessory of the soil. Inst. 2. 1. 29; 16 Mass. 449; 2 Bouv. Inst. n. 1571.

*Quod sub certa forma concessum vel reservatum est, non trahitur ad valorem vel compensationem.* That which is granted or reserved under a certain form, is not to be drawn into valuation or compensation. Bacon, Max. Reg. 4; Broom, Max. 464.

*Quod subintelligitur non deest.* What is understood is not wanting. 2 Ld. Raym. 832.

*Quod tacite intelligitur deesse non videtur.* What is tacitly understood does not appear to be wanting. 4 Co. 22.

*Quod vanum et inutile est, lex non requirit.* The law does not require what is vain and useless. Co. Litt. 319.

*Quod vero contra rationem juris receptum est, non est producendum ad consequentias.* But that which has been admitted contrary to the reason of the law, ought not to be drawn into precedents. Dig. 1. 3. 14; Broom, Max. 158.

*Quodcunque aliquis ob tutelam corporis sui fecerit jure id fecisse videtur.* Whatever one does in defence of his person, that he is considered to have done legally. 2 Inst. 590.

*Quodque dissolvitur eodem modo quo ligatur.* In the same manner that a thing is bound, it is unbound. 5 Rolle 39; Broom, Max. 881; 2 M. & G. 729.

*Quo modo quid constituitur eodem modo dissolvitur.* In whatever mode a thing is constituted, in the same manner is dissolved. Jenk. Cent. 74.

*Quorum prætextu nec auget nec minuit sententiam, sed tantum confirmat præmissa.* "*Quorum prætextu*" neither increases nor diminishes the meaning, but only confirms that which went before. Plowd. 52.

*Quotiens dubia interpretatio libertatis est, secundum libertatem respondendum erit.* Whenever there is a doubt between liberty and slavery, the decision must be in favor of liberty. Dig. 50. 17. 20.

*Quotiens idem sermo duas sententias exprimit, ea potissimum accipiatur, quæ rei gerendæ aptior est.* Whenever the same words express two meanings, that is to be taken which is the better fitted for carrying out the proposed end. Dig. 50. 17. 67.

*Quoties in stipulationibus ambigua oratio est, commodissimum est id accipi quo res de quo agitur in tuto sit.* Whenever in stipulations the expression is ambiguous, it is most proper to give it that interpretation by which the subject-matter may be in safety. Dig. 41. 1. 80; 50. 16. 219.

*Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba expressa fienda est.* When there is no ambiguity in the words, then no exposition contrary to the words is to be made. Co. Litt. 147; Broom, Max. 619; 8 Mass. 201.

*Quum de lucro duorum quæratur, melior est conditio possidentis.* When the gain of one or two is in question, the condition of the possessor is the better. Dig. 50. 17. 126. n.

*Quum in testamento ambigue aut etiam perperam scriptum est, benigne interpretari et secundum id quod credibile est cogitatum, credendum est.* When in a will an ambiguous or even an erroneous expression occurs, it should be construed liberally and in accordance with what is thought the probable meaning of the testator. Dig. 34. 5. 24; Broom, Max. 567. See Brisson, *Perperam.*

*Quum principalis causa non consistit ne ea quidem quæ sequuntur locum habent.* When the principal cause does not hold its ground, neither do the accessories find place. Dig. 50. 17. 129. 1; Broom, Max. 496; 1 Pothier, Obl. 413.

*Ratihabitio mandato æquiparatur.* Ratification is equal to a command. Dig. 46. 3. 12. 4; Broom, Max. 867; 20 Pick. 95.

*Ratio est formalis causa consuetudinis.* Reason is the source and mould of custom.

*Ratio est legis anima, mutata legis ratione mutatur et lex.* Reason is the soul of the law; the reason of the law being changed, the law is also changed. 7 Co. 7.

*Ratio et auctoritas duo clarissima mundi lumina.* Reason and authority are the two brightest lights in the world. 4 Inst. 320.

*Ratio in jure æquitas integra.* Reason in law is perfect equity.

*Ratio legis est anima legis.* The reason of the law is the soul of the law. Jenk. Cent. 45.

*Ratio non clauditur loco.* Reason is not confined to any place.

*Ratio potest allegari deficiente lege, sed vera et legalis et non apparens.* Reason may be alleged when the law is defective, but it must be true and legal reason, and not merely apparent. Co. Litt. 191.

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*Re, verbis, scripto, consensu, traditione, junctura vestes sumere pacta solent.* Compacts usually take their clothing from the thing itself, from words, from writings, from consent, from delivery. Plowd. 161.

*Receditur a placitis juris potius quam injuriæ et delicta maneant impunita.* Positive rules of law will be receded from rather than that crimes and wrongs should remain unpunished. Bacon, Max. Reg. 12; Broom, Max. 10. (This applies only to such maxims as are called *placita juris*; these will be dispensed with rather than crimes should go unpunished, *quia salus populi suprema lex*, because the public safety is the supreme law.)

*Recorda sunt vestigia vetustatis et veritatis.* Records are vestiges of antiquity and truth. 2 Rolle 296.

*Recurrendum est ad extraordinarium quando non valet ordinarium.* We must have recourse to what is extraordinary when what is ordinary fails.

*Reddenda singula singulis.* Let each be put in its proper place; that is, that the words should be taken distributively. 2 Johns. Ch. 614; 3 Dist. Rep. Pa. 344; 12 Pick. 291; 18 *id.* 228.

*Regula est, juris quidem ignorantiam cuique nocere, facti vero ignorantiam non nocere.* The rule is, that ignorance of the law does not excuse, but that ignorance of a fact may excuse a party from the legal consequences of his conduct. Dig. 22. 6. 9; Broom, Max. 253. See Irvine, Civ. Law 74.

*Regula pro lege, si deficit lex.* In default of the law, the maxim rules.

*Regulariter non valet pactum de re mea non alienanda.* Regularly a contract not to alienate my property is not binding. Co. Litt. 223.

*Rei turpis nullum mandatum est.* A mandate of an illegal thing is void. Dig. 17. 1 6. 8.

*Reipublicæ interest voluntates defunctorum effectum sortiri.* It concerns the state that the wills of the dead should have their effect.

*Relatio est fictio juris et intenta ad unum.* Relation is a fiction of law, and intended for one thing. 8 Co. 28.

*Relatio semper fiat ut valeat dispositio.* Reference should always be had in such a manner that a disposition in a will may avail. 6 Co. 76.

*Relation never defeats collateral acts.* 18 Vin. Abr. 292.

*Relation shall never make good a void grant or devise of the party.* 18 Vin. Abr. 292.

*Relative words refer to the next antecedent, unless the sense be thereby impaired.* Noy, Max. 4; Wing. Max. 19; Broom, Max. 606; Jenk. Cent. 180.

*Relativorum cognito uno, cognoscitur et alterum.* Of things relating to each other, one being known, the other is known. Cro. Jac. 539.

*Remainder can depend upon no estate but what beginneth at the same time the remainder doth.*

*Remainder must vest at the same instant that the particular estate determines.*

*Remainder to a person not of a capacity to take at the time of appointing it, is void.* Plowd. 27.

*Remedies for rights are ever favorably extended.* 18 Vin. Abr. 521.

*Remedies ought to be reciprocal.*

*Remissius imperanti melius paretur.* A man commanding not too strictly is better obeyed. 3 Inst. 233.

*Remoto impedimento, emergit actio.* The impediment being removed, the action arises. 5 Co. 76; Wing. Max. 20.

*Rent must be reserved to him from whom the state of the land moveth.* Co. Litt. 143.

*Repellitur a sacramento infamis.* An infamous person is repelled or prevented from taking an oath. Co. Litt. 158; Bract. 185.

*Repellitur exceptione cedendarum actionum.* He is defeated by the plea that the actions have been assigned. 1 Johns. Ch. 409, 414.

*Reprobata pecunia liberat solventem.* Money refused releases the debtor. 9 Co. 79. But this must be understood with a qualification. See TENDER.

*Reputatio est vulgaris opinio ubi non est veritas.* Reputation is a common opinion where there is no certain knowledge. 4 Co. 107. But see CHARACTER.

*Rerum ordo confunditur, si unicuique jurisdictio non servatur.* The order of things is confounded if every one preserves not his jurisdiction. 4 Inst. Proem.

*Rerum progressu ostendunt multa, quæ in initio præcaveri seu prævideri non possunt.* In the course of events many mischiefs arise which at the beginning could not be guarded against or foreseen. 6 Co. 40.

*Rerum suarum quilibet est moderator et arbiter.* Every one is the manager and disposer of his own matters. Co. Litt. 223.

*Res accendent lumina rebus.* One thing throws light upon others. 4 Johns. Ch. 149.

*Res accessoria sequitur rem principalem.* An accessory follows its principal. Broom, Max. 491. (For a definition of *res accessoria*, see Mack. Civ. Law 155.)

*Res denominatur a principaliori parte.* A thing is named from its principal part. 5 Co. 47.

*Res est misera ubi jus est vagum et incertum.* It is a miserable state of things where the law is vague and uncertain. 2 Salk. 512.

*Res generalem habet significationem, quia tam corporea, quam incorporea, cujuscunque sunt generis, naturæ sive speciei, comprehendit.* The word things has a general signification, because it comprehends as well corporeal as incorporeal objects, of whatever sort, nature, or species. 3 Inst. 482; 1 Bouv. Inst. n. 415.

*Res inter alios acta alteri nocere non debet.* Things done between strangers ought not to injure those who are not parties to them. Co. Litt. 132; Broom, Max. 954, 967; 3 Curt. C. C. 403; 11 Q. B. 1028; 57 N. H. 369; Freem. Judg. § 154; 110 Ala. 572.

*Res inter alios judicatæ nullum aliis præjudicium faciunt.* Matters adjudged in a cause do not prejudice those who were not parties to it. Dig. 44. 2. 1.

*Res judicata facit ex albo nigrum, ex nigro album, ex curvo rectum, ex recto curvum.* A thing adjudged makes white, black; black, white; the crooked, straight; the straight, crooked. 1 Bouv. Inst. n. 840.

*Res judicata pro veritate accipitur.* A thing adjudged must be taken for truth. Dig. 50. 17. 207; Co. Litt. 103; Broom, Max. 328, 333, 945; 2 Kent 120; 13 M. & W. 679; 59 Pa. 68. See RES JUDICATA.

*Res nullius naturaliter fit primi occupantis.* A thing which has no owner naturally belongs to the first finder. See FINDER.

*Res per pecuniam æstimatur, et non pecunia per res.* The value of a thing is estimated by its worth in money, and the value of money is not estimated by reference to the thing. 9 Co. 76; 1 Bouv. Inst. n. 922.

*Res perit domino suo.* The destruction of the thing is the loss of its owner. Hare, Contr. 88; Story, Bailm. 426; 2 Kent 591; Broom, Max. 238; 12 Allen 381; 14 *id.* 269. This maxim is said to be quoted chiefly in cases to which it did not apply in the Roman Law; 9 Harv. L. Rev. 106. See SALE.

*Res propria est quæ communis non est.* A thing is private which is not common. 8 Paige 261, 270.

*Res quæ intra præsidia perductæ nondum sunt, quanquam ab hostibus occupatæ, ideo postliminii non egent, quia dominum nondum maturunt ex gentium jure.* Things which have not yet been introduced within the enemy's lines, although held by the enemy, do not need the fiction of postliminy on this account, because their ownership by the law of nations has not yet changed. Grotius, *de Jur. Bell.* l. 3, c. 9, § 16; l. 3, c. 6, § 3.

*Res sacra non recipit æstimationem.* A sacred thing does not admit of valuation. Dig. 1. 8. 9. 5.

*Res sua nemini servit.* No one can have a servitude over his own property. Trayner, Max. 541.

*Res transit cum suo onere.* The thing passes with its burden. Fleta, l. 3, c. 10, § 3.

*Reservatio non debet esse de proficuis ipsis quia ea conceduntur, sed de redditu novo extra proficua.* A reservation ought not to be of the annual increase itself, because it is granted, but of new rent apart from the annual increase. Co. Litt. 142.

*Resignatio est juris proprii spontanea refutatio.* Resignation is the spontaneous relinquishment of one's own right. Godb. 284.

*Resoluto jure concedentis, resolvitur jus concessum.* The right of the grantor being extinguished, the right granted is extinguished. Mack. Civ. Law 179; Broom, Max. 467.

*Respiciendum est judicanti, nequid aut durius aut remissius constituatur quam causa deposcit; nec enim aut severitatis aut clementiæ gloria affectanda est.* It is a matter of import to one adjudicating that nothing should be either more severely or more leniently construed than the cause itself demands; for the glory neither of severity nor clemency should be affected. 3 Inst. 220.

*Respondeat raptor, qui ignorare non potuit quod pupillum alienum abduxit.* Let the ravisher answer, for he could not be ignorant that he has taken away another's ward. Hob. 99.

*Respondeat superior.* Let the principal answer. Broom, Max. 7, 62, 268, 369, n. 843; 4 Inst. 114; 1 Salk. 408; 1 Bingh. N. C. 418; 4 Maule & S. 259; 19 Exch.

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656; 2 E. & B. 216; 1 B. & P. 404; 1 C. B. 578; 6 M. & W. 302; 10 Exch. 656; 1 Allen 102, 174; 98 Mass. 221, 571; 119 Ind. 455; 79 Ga. 125; 120 Pa. 624; 15 Atl. Rep. (Ohio) 812.

*Responsio unius non omnino auditur.* The answer of one witness shall not be heard at all. 1 Greenl. Ev. § 260. (This is a maxim of the civil law, where everything must be proved by two witnesses.)

*Reus excipiendo fit actor.* The defendant by a plea becomes plaintiff. Bannier, *Tr. des preuves*, §§ 152, 320; Best, Evid. 294, § 252.

*Reus læsæ majestatis punitur, ut pereat unus ne pereant omnes.* A traitor is punished that one may die lest all perish. 4 Co. 124.

*Rex non debet esse sub homine sed sub Deo et lege.* The king should not be under the authority of man, but of God and the law. Broom, Max. 47, 117; Bract. 5.

*Rex non potest fallere nec falli.* The king cannot deceive or be deceived. Grounds & Rud. of Law 438.

*Rex non potest peccare.* The king can do no wrong. 2 Rolle 304; Jenk. Cent. 9, 308; Broom, Max. 52; 1 Sharsw. Bla. Com. 246.

*Rex nunquam moritur.* The king never dies. Broom, Max. 50; Branch, Max. 5th ed. 197; 1 Bla. Com. 249.

*Rights never die.*

*Riparum usus publicus est jure gentium, sicut ipsius fluminis.* The use of river-banks is by the law of nations public, like that of the stream itself. Dig. 1. 8. 5. pr.; Fleta, l. 3, c. 1, § 5; Loccenius *de Jur. Mar.* l. 1, c. 6, § 12; 3 Kent 425.

*Roy n'est lie per ascun statute, si il ne soit expressement nosme.* The king is not bound by any statute, if he is not expressly named. Jenk. Cent. 307; Broom, Max. 72.

*Sacramentum habet in se tres comites, veritatem, justitiam et judicium: veritas habenda est in jurato; justitia et judicium in judice.* An oath has in it three component parts—truth, justice, and judgment: truth in the party swearing, justice and judgment in the judge administering the oath. 3 Inst. 160.

*Sacramentum si fatuum fuerit, licet falsum, tamen non committit perjurium.* A foolish oath, though false, makes not perjury. 2 Inst. 167.

*Sacrilegus omnium prædonum cupiditatem et scelerem superat.* A sacrilegious person transcends the cupidity and wickedness of all other robbers. 4 Co. 106.

*Sæpe constitutum est, res inter alios judicatas aliis non præjudicare.* It has often been settled that matters adjudged between others ought not to prejudice those who were not parties. Dig. 42. 1. 63.

*Sæpe viatorem nova non vetus orbita fallit.* Often it is the new track, not the old one, which deceives the travellor. 4 Inst. 34.

*Sæpenumero ubi proprietas verborum attenditur, sensus veritatis amittitur.* Frequently where the propriety of words is attended to, the meaning of truth is lost. 7 Co. 27.

*Salus populi est suprema lex.* The safety of the people is the supreme law. Bacon, Max. Reg. 12; Broom, Max. 1, 10, 287, n.; 13 Co. 139; 8 Metc. 465; 12 *id.* 82; 116 Mass. 260; 97 N. C. 477.

*Salus reipublicæ suprema lex.* The safety of the state is the supreme law. 4 Cush. 71; 1 Gray 386; Broom, Max. 366.

*Salus ubi multi consilia.* In many counsellors there is safety. 4 Inst. 1.

*Sanguinis conjunctio benevolentia devincit homines et caritate.* A tie of blood overcomes men through benevolence and family affection. 5 Johns. Ch. 1, 13.

*Sapiens incipit a fine, et quod primum est in intentione, ultimum est in executione.* A wise man begins with the last, and what is first in intention is last in execution. 10 Co. 25.

*Sapiens omnia agit cum consilio.* A wise man does everything advisedly. 4 Inst. 4.

*Sapientia legis nummario pretio non est æstimanda.* The wisdom of the law cannot be valued by money. Jenk. Cent. 168.

*Sapientis judicis est cogitare tantum sibi esse permissum, quantum commissum et creditum.* It is the duty of a wise judge to think so much only permitted to him as is committed and intrusted to him. 4 Inst. 163.

*Satisfaction should be made to that fund which has sustained the loss.* 4 Bouv. Inst. n. 3731.

*Satius est petere fontes quam sectari rivulos.* It is better to seek the fountain than to follow rivulets. 10 Co. 118.

*Scienti et volenti non fit injuria.* A wrong is not done to one who knows and assents to it. Bract. 99.

*Scientia sciolorum est mixta ignorantia.* The knowledge of smatterers is mixed ignorance. 8 Co. 159.

*Scientia utrinque par pares contrahentes facit.* Equal knowledge on both sides makes the contracting parties equal. 3 Burr. 1910; L. R. 2 Q. B. 589; Broom, Max. 772, 792, n.

*Scire debes cum quo contrahis.* You ought to know with whom you deal. 11 M. & W. 405, 632; 13 *id.* 171.

*Scire et scire debere æquiparantur in jure.* To know a thing, and to be bound to know it, are regarded in law as equivalent. Trayner, Max. 551.

*Scire leges, non hoc est verba earum tenere, sed vim et potestatem.* To know the laws, is not to observe their mere words, but their force and power. Dig. 1. 3. 17.

*Scire proprie est rem ratione et per causam cognoscere.* To know properly is to know a thing by its cause and in its reason. Co. Litt. 183.

*Scribere est agere.* To write is to act. 2 Rolle 89; 4 Bla. Com. 80; Broom, Max. 312, 967.

*Scriptæ obligationes scriptis tolluntur, et nudi consensus obligatio, contrario consensu dissolvitur.* Written obligations are dissolved by writing, and the obligations of a naked agreement by a naked agreement to the contrary.

*Secta est pugna civilis, sicut actores armantur actionibus, et quasi accinguntur gladiis, ita rei (e contra) muniuntur exceptionibus, et defenduntur quasi clypeis.* A suit is a civil battle, as the plaintiffs are armed with actions and as it were girt with swords, so on the other hand the defendants are fortified with pleas, and defended as it were by shields. Hob. 20; Bract. 339 *b.*

*Secta quæ scripto nititur a scripto variari non debet.* A suit which relies upon a writing ought not to vary from the writing. Jenk. Cent. 65.

*Secundum naturam est, commoda cujusque rei eum sequi, quem sequuntur incommoda.* It is natural that he who bears the charge of a thing should receive the profits. Dig. 50. 17. 10.

*Securius expediuntur negotia commissa pluribus, et plus vident oculi quam oculus.* Business intrusted to several speeds best, and several eyes see more than one. 4 Co. 46.

*Seisina facit stipitem.* Seisin makes the stock. 2 Bla. Com. 209; Broom, Max. 525, 528; 1 Steph. Com. 367; 4 Kent 388, 389; 13 Ga. 238.

*Semel civis semper civis.* Once a citizen always a citizen. Trayner, Max. 555.

*Semel malus semper præsumitur esse malus in eodem genere.* Whoever is once bad is presumed to be so always in the same degree. Bro. Car. 317.

*Semper in dubiis benigniora præferenda sunt.* In dubious cases the more liberal constructions are always to be preferred. Dig. 50. 17. 56.

*Semper in dubiis id agendum est, ut quam tutissimo loco res sit bona fide contracta, nisi quum aperte contra leges scriptum est.* Always in doubtful cases that is to be done by which a *bona fide* contract may be in the greatest safety, except when its provisions are clearly contrary to law. Dig. 34. 5. 21.

*Semper in obscuris quod minimum est sequimur.* In obscure cases we always follow that which is least obscure. Dig. 50. 17. 9; Broom, Max. 687, n.; 3 C. B. 962.

*Semper in stipulationibus et in cæteris contractibus id sequimur quod actum est.* In stipulations and other contracts we always follow that which was agreed. Dig. 50. 17. 34.

*Semper ita fiat relatio ut valeat dispositio.* Let the reference always be so made that the disposition may avail. 6 Co. 76.

*Semper necessitas probandi incumbit ei qui agit.* The claimant is always bound to prove (the burden of proof lies on him).

*Semper præsumitur pro legitimatione puerorum, et filiatio non potest probari.* The presumption is always in favor of legitimacy, for filiation cannot be proved. Co. Litt. 126. See 5 Co. 98 *b.*

*Semper præsumitur pro negante.* The presumption is always in favor of the one who denies. See 10 Cl. & F. 534; 3 E. & B. 723; 1 Bish. Mar. Div. & Sep. 400.

*Semper præsumitur pro sententia.* Presumption is always in favor of a judgment. 3 Bulstr. 42.

*Semper qui non prohibet pro se intervenire, mandare creditur.* He who does not prohibit the intervention of another in his behalf is supposed to authorize it. 2 Kent 616; Dig. 14. 6. 16; 43. 3. 12. 4.

*Semper sexus masculinus etiam fœmininum con*

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*tinet.* The male sex always includes the female. Dig. 32, 62; 2 Brev. 9.

*Semper specialia generalibus insunt.* Special clauses are always comprised in general ones. Dig. 50. 17. 147.

*Senatores sunt partes corporis regis.* Senators are part of the body of the king. Staunf. 72 E; 4 Inst. 58, in marg.

*Sensus verborum est anima legis.* The meaning of words is the spirit of the law. 5 Co. 2.

*Sensus verborum est duplex, mitis et asper, et verba semper accipienda sunt in mitiore sensu.* The meaning of words is twofold, mild and harsh; and words are to be received in their milder sense. 4 Co. 13.

*Sensus verborum ex causa dicendi accipiendus est, et sermones semper accipiendi sunt secundum subjectam materiam.* The sense of words is to be taken from the occasion of speaking them, and discourses are always to be interpreted according to the subject-matter. 4 Co. 14.

*Sententia a non judice lata nemini debet nocere.* A judgment pronounced by one who is not a judge should not harm any one. Fleta, l. 6, c. 6, § 7.

*Sententia contra matrimonium nunquam transit in rem judicatam.* A sentence against marriage never passes into a judgment (conclusive upon the parties). 7 Co. 43.

*Sententia facit jus, et legis interpretatio legis vim obtinet.* The judgment makes the law, and the interpretation has the force of law.

*Sententia facit jus, et res judicata pro veritate accipitur.* Judgment creates the right, and what is adjudicated is taken for truth. Ellesm. Postn. 55.

*Sententia interlocutoria revocari potest, definitiva non potest.* An interlocutory order may be revoked, but not a final one. Bacon, Max. Reg. 20.

*Sententia non fertur de rebus non liquidis.* Judgment is not given upon a thing which is not clear.

*Sequi debet potentia justitiam, non præcedere.* Power should follow justice, not precede it. 2 Inst. 454.

*Sermo index animi.* Speech is an index of the mind. 5 Co. 118.

*Servanda est consuetudo loci ubi causa agitur.* The custom of the place where the action is brought is to be observed. 3 Johns. Ch. 190, 219

*Servilia personalia sequuntur personam.* Personal services follow the person. 2 Inst. 374; Fleta, l. 3, c. 11, § 1.

*Si a jure discedas, vagus eris et erunt omnia omnibus incerta.* If you depart from the law, you will wander without a guide, and everything will be in a state of uncertainty to every one. Co Litt. 227.

*Si alicujus rei societas sit et finis negotio impositus est, finitur societas.* If there is a partnership in any matter, and the business is ended, the partnership ceases. 16 Johns. 438, 489.

*Si aliquid ex solemnibus deficiat, cum æquitas poscit subveniendum est.* If anything be wanting from required forms, when equity requires it will be aided. 1 Kent 157.

*Si assuetis mederi possis nova non sunt tentanda.* If you can be relieved by accustomed remedies, new ones should not be tried. 10 Co. 142.

*Si duo in testamento pugnantia reperientur, ultimum est ratum.* If two conflicting provisions are found in a will, the last is observed. Lofft 251.

*Si judicas, cognosce.* If you judge, understand.

*Si meliores sunt quos ducit amor, plures sunt quos corrigit timor.* If those are better who are led by love, those are the greater number corrected by fear. Co. Litt. 392.

*Si non appareat quid actum est, erit consequens ut id sequamur quod in regione in qua actum est frequentatur.* If it does not appear what was agreed upon, the consequence will be that we must follow that which is the usage of the place where the agreement was made. Dig. 50. 17. 34.

*Si nulla sit conjectura quæ ducat alio, verba intelligenda sunt ex proprietate, non grammatica sed populari ex usu.* If there be no inference which leads to a different result, words are to be understood according to their proper meaning, not in a grammatical, but in a popular and ordinary, sense. 2 Kent 555.

*Si plures conditiones ascriptæ fuerunt donationi conjunctim, omnibus est parendum; et ad veritatem copulative requiritur quod utraque pars sit vera, si divisim, cuilibet vel alteri eorum satis est obtemperare; et in disjunctivis, sufficit alteram partem esse veram.* If several conditions are conjunctively written in a gift, the whole of them must be complied with; and with respect to their truth, it is necessary that every part be true, taken jointly: if the conditions are separate, it is sufficient to comply with either one or other of them; and being disjunctive, that one or the other be true. Co. Litt. 225.

*Si plures sint fidejussores, quotquot erunt numero, singuli in solidum tenentur.* If there are more sureties than one, how many soever they shall be, they shall each be held for the whole. Inst. 3. 20. 4.

*Si quid universitati debetur singulis non debetur, nec quod debet universitas singuli debent.* If any thing is due to a corporation, it is not due to the individual members of it, nor do the members individually owe what the corporation owes. Dig. 3. 4. 7; 1 Bla. Com. 484; Lindl. Part. 5.

*Si quidem in nomine, cognomine, prænomine, agnomine legatarii testator erraverit, cum de persona constat, nihilominus valet legatum.* If the testator has erred in the name, cognomen, prænomen, or title of the legatee, whenever the person is rendered certain, the legacy is nevertheless valid. Inst. 2. 20. 29; Broom, Max. 645; 2 Domat b. 2, t. 6, §§ 10, 19.

*Si quis custos fraudem pupillo fecerit, a tutela removendus est.* If a guardian behave fraudulently to his ward, he shall be removed from the guardianship. Jenk. Cent. 39.

*Si quis prægnantem uxorem reliquit, non videtur sine liberis decessisse.* If a man dies leaving his wife pregnant, he shall not be considered as having died childless.

*Si quis unum percusserit, cum alium percutere vellet, in felonia tenetur.* If a man kill one, meaning to kill another, he is held guilty of felony. 3 Inst. 51.

*Si suggestio non sit vera, literæ patentes vacuæ sunt.* If the suggestion of a patent is false, the patent itself is void. 10 Co. 113.

*Sic enim debere quem meliorem agrum suum facere, ne vicini deteriorem faciat.* Every one ought so to improve his land as not to injure his neighbors. 3 Kent 441.

*Sic interpretandum est ut verba accipiantur cum effectu.* Such an interpretation is to be made that the words may have an effect. 3 Inst. 80.

*Sic utere tuo ut alienum non lædas.* So use your own as not to injure another's property. 1 Bla. Com. 306; Broom, Max. 268, 365, Webb, Poll. Torts 153; 2 Bouv. Inst. n. 2379; 9 Co. 59; 5 Exch. 797; 12 Q. B. 739, 4 A. & E. 384; El. Bl. & El. 643; 15 Johns. 218; 17 Mass. 334; 106 *id.* 199; 86 Pa. 401; 4 M'Cord 472, 12 Colo. 294; 49 Ark. 167; 97 N. C. 477; 101 *id.* 21, 122 Pa. 191, 41 La. Ann. 194, 1 L. R. A. 52; 16 *id.* 57; 31 *id.* 547. Various comments have been made on this maxim:—"Mere verbiage"; El. B. & E. 643. "No help to decision": L. R. 2 Q. B. 247. "Utterly useless as a legal maxim;" 9 N. Y. 445. It is a mere begging of the question: it assumes the very point in controversy; 13 Lea 507. See 2 Aust. Jurisp. 795, 829; *Expedit reipublicæ ne sua re quis male utatur supra.*

*Sicut natura nil facit per saltum, ita nec lex.* As nature does nothing by a bound or leap, so neither does the law. Co. Litt. 238.

*Sigillum est cera impressa, quia cera sine impressione non est sigillum.* A seal is a piece of wax impressed because wax without an impression is not a seal. 3 Inst. 169. But see SEAL.

*Silence shows consent.* 6 Barb. 28, 35.

*Silent leges inter arma.* Laws are silent amidst arms. 4 Inst. 70.

*Similitudo legalis est casuum diversorum inter se collatorum similis ratio; quod in uno similium valet, valebit in altero. Dissimilium, dissimilis est ratio.* Legal similarity is a similar reason which governs various cases when compared with each other, for what avails in one similar case will avail in the other. Of things dissimilar, the reason is dissimilar. Co. Litt. 191; Benj. Sales 379.

*Simplex commendatio non obligat.* A simple recommendation does not bind. Dig. 4. 3. 37; 2 Kent 485; Broom, Max. 781; 4 Taunt. 488; 16 Q. B. 282, 283; Cro. Jac. 4; 2 Allen 214; 5 Johns. 354; 4 Barb. 95.

*Simplex et pura donatio dici poterit, ubi nulla est adjecta conditio nec modus.* A gift is said to be pure and simple when no condition or qualification is annexed. Bract. 1.

*Simplicitas est legibus amica, et nimia subtilitas in jure reprobatur.* Simplicity is favorable to the law, and too much subtlety is blameworthy in law. 4 Co. 8.

*Sine possessione usucapio procedere non potest.* There can be no prescription without possession.

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***Singuli in solidum tenentur.*** Each is bound for the whole. 6 Johns. Ch. 242, 252.

***Sive tota res evincatur, sive pars, habet regressum emptor in venditorem.*** The purchaser who has been evicted in whole or in part has an action against the vendor. Dig. 21. 2. 1; Broom, Max. 768.

***Socii mei socius meus socius non est.*** The partner of my partner is not my partner. Dig. 50. 17. 47; Lindl. Part. *48; 13 Gray 472.

***Sola ac per se senectus donationem, testamentum aut transactionem non vitiat.*** Old age does not alone and of itself vitiate gift, will or transaction. 5 Johns. Ch. 148, 158.

***Solemnitates juris sunt observandæ.*** The solemnities of law are to be observed. Jenk. Cent. 13.

***Solo cedit quod solo implantatur.*** What is planted in the soil belongs to the soil. Inst. 2. 1. 32; 2 Bouv. Inst. n. 1572.

***Solo cedit quod solo inædificatur.*** Whatever is built on the soil belongs to the soil. Inst. 2. 1. 29. See 1 Mack. Civ. Law § 268.

***Solus Deus hæredem facit.*** God alone makes the heir. Bract. 62 *b*; Co. Litt. 5.

***Solutio pretii emptionis loco habetur.*** The payment of the price stands in the place of a sale. Jenk. Cent. 56; 1 Pick. 70.

***Solvendo esse nemo intelligitur nisi qui solidum potest solvere.*** No one is considered to be solvent unless he can pay all that he owes. Dig. 50. 16. 114.

*Solvitur adhuc societas etiam morte socii.* A partnership is moreover dissolved by the death of a partner. Inst. 3. 26. 5; Dig. 17. 2.

*Solvitur eo ligamine quo ligatur.* In the same manner that a thing is bound it is unloosed. 4 Johns. Ch. 582.

*Spes impunitatis continuum affectum tribuit delinquendi.* The hope of impunity holds out a continual temptation to crime. 3 Inst. 236.

*Spoliatus debet ante omnia restitui.* He who has been despoiled ought to be restored before anything else. 2 Inst. 714; 4 Sharsw. Bla. Com. 353.

*Spondet peritiam artis.* He promises to use the skill of his art. Pothier, *Louage*, n. 425; Jones, Bailm. 22, 53, 62, 97, 120; Domat, liv. 1, t. 4, s. 8, n. 1; 1 Story, Bailm. § 431; 1 Bell, Com. 5th ed. 459; 1 Bouv. Inst. n. 1004.

*Sponte virum fugiens mulier et adultera facta, doti sua careat, nisi sponsi sponte retracta.* A woman leaving her husband of her own accord, and committing adultery, should lose her dower, unless her husband takes her back of his own accord. Co. Litt 37.

*Stabit præsumptio donec probetur in contrarium.* A presumption will stand good until the contrary is proved. 1 Greenl. Ev. § 33, n.; Hob. 297; 3 Bla. Com. 371; Broom, Max. 949; 15 Mass. 90; 16 *id.* 87; 9 S. & R. 384.

*Stare decisis, et non quieta movere.* To adhere to precedents, and not to unsettle things which are established. 9 Johns. 395, 428; 11 Wend. 504; 25 *id.* 119, 142; 4 Hill, N. Y. 271, 323; 4 *id.* 592, 595; 87 Pa. 286; Cooley, Const. Lim. 65; 32 U. S. App. 676; 89 Me. 236; 73 Miss. 360; 97 Tenn. 85.

*Stat pro ratione voluntas.* The will stands in place of a reason. 1 Barb. 408, 411; 16 *id.* 514, 525.

*Stat pro ratione voluntas populi.* The will of the people stands in place of a reason. 25 Barb. 344,276.

*Statuta pro publico commodo late interpretantur.* Statutes made for the public good ought to be liberally construed. Jenk. Cent. 21.

*Statuta suo clauduntur territorio, nec ultra territorium disponunt.* Statutes are confined to their own territory, and have no extra-territorial effect. 4 Allen 324; Story, Confl. L. 24.

*Statutes in derogation of common law must be strictly construed.* 1 Grant, Cas. 57; Cooley, Const. Lim. 75, n.

*Statutum affirmativum non derogat communi legi.* An affirmative statute does not take from the common law. Jenk. Cent. 24.

*Statutum generaliter est intelligendum quando verba statuti sunt specialia, ratio autem generalis.* When the words of a statute are special, but the reason of it general, it is to be understood generally. 10 Co. 101.

*Statutum speciale statuto speciali non derogat.* One special statute does not take away from another special statute. Jenk. Cent. 199.

*Sublata causa tollitur effectus.* Remove the cause and the effect will cease. 2 Bla. Com. 203.

*Sublata veneratione magistratuum, respublica ruit.* The commonwealth perishes, if respect for magistrates be taken away. Jenk. Cent. 48.

*Sublato fundamento, cadit opus.* Remove the foundation, the structure falls. Jenk. Cent. 106.

*Sublato principali, tollitur adjunctum.* If the principal be taken away, the adjunct is also taken away. Co. Litt. 389; Broom, Max. 180, n.

*Succurritur minori; facilis est lapsus juventutis.* A minor is to be aided; youth is liable to err. Jenk. Cent. 47.

*Summa caritas est facere justitiam singulis et omni tempore quando necesse fuerit.* The greatest charity is to do justice to every one, and at any time whenever it may be necessary. 11 Co. 70.

*Summa est lex quæ pro religione facit.* That is the highest law which favors religion. 10 Mod. 117, 119; 2 Ch. Ca. 18.

*Summa ratio est quæ pro religione facit.* The highest reason is that which determines in favor of religion. Co. Litt. 341 *a*; Broom, Max. 19; 5 Co. 14 *b*; 10 *id.* 55 *a*; 2 Ch. Cas. 18.

*Summam esse rationem quæ pro religione facit.* That is the highest reason which determines in favor of religion. Dig. 11. 7. 43, cited in Grotius *de Jur. Bello*, l. 3, c. 12, s. 7. See 10 Mod. 117, 119.

*Summum jus, summa injuria.* The height of law is the height of wrong. Hob. 125.

*Sunday is* dies non juridicus. 12 Johns. 178, 180.

*Superflua non nocent.* Superfluities do no injury. Jenk. Cent. 184.

*Suppressio veri, expressio falsi.* Suppression of the truth is (equivalent to) the expression of what is false. 11 Wend. 374, 417.

*Suppressio veri, suggestio falsi.* Suppression of the truth is (equivalent to) the suggestion of what is false. 23 Barb. 521, 525.

*Surplusagium non nocet.* Surplusage does no harm. Broom, Max. 627.

*Tacita quædam habentur pro expressis.* Certain things though unexpressed are considered as expressed. 8 Co. 40.

*Talis interpretatio semper fienda est, ut evitetur absurdum, et inconveniens, et ne judicium sit illusorium.* Interpretation is always to be made in such a manner that what is absurd and inconvenient is to be avoided, and so that the judgment be not nugatory. 1 Co. 52.

*Talis non est eadem, nam nullum simile est idem.* What is like is not the same, for nothing similar is the same. 4 Co. 18.

*Tantum bona valent, quantum vendi possunt.* Things are worth what they will sell for. 3 Inst. 305.

*Tempus enim modus tollendi obligationes et actiones, quia tempus currit contra desides et sui juris contemptores.* For time is a means of destroying obligations and actions, because time runs against the slothful and contemners of their own rights. Fleta, l. 4, c. 5, § 12.

*Tenor est qui legem dat feudo.* It is the tenor of the feudal grant which regulates its effect and extent. Craig, *Jus. Feud.* 3d. ed. 66. See Co. Litt. 19 *a*; 2 Bla. Com. 310; 2 Co. 71; Broom, Max. 459; Wright, Ten. 21, 52, 152.

*Terminus annorum certus debet esse et determinatus.* A term of years ought to be certain and determinate. Co. Litt. 45.

*Terminus et (ac) feodum non possunt constare simul in una eademque persona.* A term and the fee cannot both be vested in one and the same person (at the same time). Plowd. 29; 3 Mass. 141.

*Terra manens vacua occupanti conceditur.* Land lying unoccupied is given to the occupant. 1 Sid. 347.

*Terra transit cum onere.* Land passes with the incumbrances. Co. Litt. 231; Broom, Max. 437, 630.

*Testamenta latissimam interpretationem habere debent.* Wills ought to have the broadest interpretation. Jenk. Cent. 81.

*Testamentum est voluntatis nostræ justa sententia, de eo quod quis post mortem suam fieri velit.* A testament is the just expression of our will concerning that which any one wishes done after his death (or, as Blackstone translates, "the legal declaration of a man's intentions which he wills to be performed after his death"). 2 Bla. Com. 499; Dig. 28. 1. 1; 29. 3. 2. 1.

*Testamentum omne morte consummatum.* Every will is completed by death. Co. Litt. 282.

*Testatoris ultima voluntas est perimplenda secundum veram intentionem suam.* The last will of a testator is to be fulfilled according to his real intention. Co. Litt. 322.

*Testes ponderantur, non numerantur.* See the maxim *Ponderantur testes.*

*Testibus deponentibus in pari numero dignioribus est credendum.* When the number of witnesses is equal on both sides, the more worthy are to be believed. 4 Inst. 279.

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*Testimonia ponderanda sunt, non numeranda.* Proofs are to be weighed, not numbered. Trayner, Max. 585.

*Testis de visu præponderat aliis.* An eye-witness outweighs others. 4 Inst. 470.

*Testis nemo in sua causa esse potest.* No one can be a witness in his own cause. (Otherwise in England, and in the United States.)

*Testis oculatus unus plus valet quam auriti decem.* One eye-witness is worth ten ear-witnesses. 4 Inst. 279. See 3 Bouv. Inst. n. 3154.

*Testmoignes ne poent testifié le negative, mes l'affirmative.* Witnesses cannot testify to a negative; they must testify to an affirmative. 4 Inst. 279.

*That which I may defeat by my entry I make good by my confirmation.* Co. Litt. 300.

*The fund which has received the benefit should make the satisfaction.* 4 Bouv. Inst. n. 3730.

*The law abhors a multiplicity of suits.* 98 Ky. 475; 32 S. W. Rep. (Ky.) 614.

*The parties being in pari casu, justice is in equilibrio.* 19 Misc. Rep. 511.

*The repeal of the law imposing a penalty is itself a remission.* 98 Ky. 468.

*Things accessary are of the nature of the principal.* Finch, Law b. 1, c. 3, n. 25.

*Things are construed according to that which was the cause thereof.* Finch, Law b. 1, c. 3, n. 4.

*Things are dissolved as they be contracted.* Finch, Law, b. 1, c. 3, n, 7.

*Things grounded upon an ill and void beginning cannot have a good perfection.* Finch, Law, b. 1, c. 3, n. 8.

*Things in action, entry, or re-entry cannot be granted over.* 19 N. Y. 100, 103.

*Things incident cannot be severed.* Finch, Law b. 3, c. 1, n. 12.

*Things incident pass by the grant of the principal.* 25 Barb. 284, 310.

*Things incident shall pass by the grant of the principal, but not the principal by the grant of the incident.* Co. Litt. 152 *a*, 151 *b*; Broom, Max. 433.

*Things shall not be void which may possibly be good.*

*Timores vani sunt æstimandi qui non cadunt in constantem virum.* Fears which do not affect a brave man are vain. 7 Co. 17.

*Titulus est justa causa possidendi id quod nostrum est.* Title is the just cause of possessing that which is ours. 8 Co. 153 (305); Co. Litt. 345 *b*.

*Tolle voluntatem et erit omnis actus indifferens.* Take away the will, and every action will be indifferent. Bract. 2.

*Totum præfertur unicuique parti.* The whole is preferable to any single part. 3 Co. 41 *a*.

*Tout ce que la loi ne defend pas est permis.* Everything is permitted which is not forbidden by law.

*Toute exception non surveillée tend à prendre la place du principe.* Every exception not watched tends to assume the place of the principle.

*Tractent fabrilia fabri.* Let smiths perform the work of smiths. 3 Co. Epist.

*Traditio loqui facit chartam.* Delivery makes the deed speak. 5 Co. 1.

*Traditio nihil amplius transferre debet vel potest ad eum qui accipit, quam est apud eum qui tradit.* Delivery cannot and ought not to transfer to him who receives more than was in possession of him who made the delivery. Dig. 41. 1. 20.

*Transgressione multiplicata, crescat pœnæ inflictio.* When transgression is multiplied, let the infliction of punishment be increased. 2 Inst. 479.

*Transit in rem judicatum.* It passes into a judgment. Broom, Max. 293; 11 Pet. 100; 1 Pick. 70. See, also, 18 Johns. 463; 2 Sumn. 436; 6 East 251.

*Transit terra cum onere.* The land passes with its burden. Co. Litt. 231 *a*; Shep. Touch. 178; 5 B. & C. 607; 7 M. & W. 530; 3 B. & A. 587; 18 C. B. 845; 19 Pick. 453; 24 Barb. 365; Broom, Max. 495, 706. See COVENANTS.

*Tres faciunt collegium.* Three form a corporation. Dig. 50. 16. 85; 1 Bla. Com. 469.

*Triatio ibi semper debet fieri, ubi juratores meliorem possunt habere notitiam.* Trial ought always to be had where the jury can have the best knowledge. 7 Co. 1.

*Trusts survive.*

*Turpis est pars quæ non convenit cum suo toto.* That part is bad which accords not with its whole. Plowd. 161.

*Tuta est custodia quæ sibimet creditur.* That guardianship is secure which trusts to itself alone. Hob. 340.

*Tutius erratur ex parte mitiori.* It is safer to err on the side of mercy. 3 Inst. 220.

*Tutius semper est errare in acquietando, quam in puniendo; ex parte misericordiæ quam ex parte justitiæ.* It is always safer to err in acquitting than punishing; on the side of mercy than on the side of justice. Branch, Princ.; 2 Hale, P. C. 290; Broom, Max. 326; 9 Metc. 116.

*Ubi aliquid conceditur, conceditur et id sine quo res ipsa esse non potest.* When anything is granted, that also is granted without which the thing granted cannot exist. Broom, Max. 483; 13 M. & W. 706; 41 La. Ann. 194.

*Ubi aliquid impeditur propter unum, eo remoto, tollitur impedimentum.* When anything is impeded by one single cause, if that be removed, the impediment is removed. 5 Co. 77 *a*.

*Ubi cessat remedium ordinarium ibi decurritur ad extraordinarium.* When a common remedy ceases to be of service, recourse must be had to an extraordinary one. 4 Co. 93.

*Ubi culpa est, ibi pœna subesse debet.* Where a crime is committed, there the punishment should be inflicted. Jenk. Cent. 325.

*Ubi damna dantur, victus victori in expensis condemnari debet.* Where damages are given, the losing party should be adjudged to pay the costs of the victor. 2 Inst. 289; 3 Sharsw. Bla. Com. 399.

*Ubi eadem ratio, ibi idem jus; et de similibus idem est judicium.* Where there is the same reason, there is the same law, and the same judgment should be rendered on the same state of facts. 7 Co. 18; Broom, Max. 103, n., 153, 155.

*Ubi et dantis et accipientis turpitudo versatur, non posse repeti dicimus; quotiens autem accipientis turpitudo versatur, repeti posse.* Where there is turpitude on the part of both giver and receiver, we say it cannot be recovered back; but as often as the turpitude is on the side of the receiver (alone) it can be recovered back. 17 Mass. 562.

*Ubi factum nullum, ibi fortia nulla.* Where there is no act, there can be no force. 4 Co. 43.

*Ubi jus, ibi remedium.* Where there is a right, there is a remedy. Broom, Max. 191, 204; 1 Term 512; Co. Litt. 197 *b*; 7 Gray 197; Andr. Steph. Pl. 28.

*Ubi jus incertum, ibi jus nullum.* Where the law is uncertain, there is no law.

*Ubi lex aliquem cogit ostendere causam, necesse est quod causa sit justa et legitima.* Where the law compels a man to show cause, it is necessary that the cause be just and legal, 2 Inst. 269.

*Ubi lex est specialis, et ratio ejus generalis, generaliter accipienda est.* Where the law is special and the reason of it is general, it ought to be taken as being general. 2 Inst. 43.

*Ubi lex non distinguit, nec nos distinguere debemus.* Where the law does not distinguish, we ought not to distinguish. 7 Co. 5.

*Ubi major pars est, ibi totum.* Where is the greater part, there is the whole. F. Moore 578.

*Ubi matrimonium, ibi dos.* Where there is marriage, there is dower. Bract. 92.

*Ubi non adest norma legis, omnia quasi pro suspectis habenda sunt.* When the law fails to serve as a rule, almost everything ought to be suspected. Bacon, Aph. 25

*Ubi non est condendi auctoritas, ibi non est parendi necessitas.* Where there is no authority to establish, there is no necessity to obey. Dav. 69.

*Ubi non est directa lex, standum est arbitrio judicis, vel procedendum ad similia.* Where there is no direct law, the judgment of the judge must be depended upon, or reference made to similar cases.

*Ubi non est lex, ibi non est transgressio quoad mundum.* Where there is no law, there is no transgression, as it regards the world. 4 Co. 1 *b*.

*Ubi non est manifesta injustitia, judices habentur pro bonis viris, et judicatum pro veritate.* Where there is no manifest injustice, the judges are to be regarded as honest men, and their judgment as truth. 1 Johns. Cas. 341, 345.

*Ubi non est principalis, non potest esse accessorius.* Where there is no principal, there can be no accessory. 4 Co. 43.

*Ubi nulla est conjectura quæ ducat alio, verba intelligenda sunt ex proprietate non grammatica sed populari ex usu.* Where there is no inference which would lead in any other direction, words are to be understood according to their proper meaning, not grammatical, but according to popular usage. Grotius, *de Jur. Belli*, l. 2, c. 16, § 2.

*Ubi nullum matrimonium, ibi nulla dos.* Where

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there is no marriage there is no dower. Co. Litt. 32 *a*.

*Ubi periculum, ibi et lucrum collocatur.* He at whose risk a thing is, should receive the profits arising from it.

*Ubi pugnantia inter se in testamento juberentur, neutrum ratum est.* When two directions conflicting with each other are given in a will, neither is held valid. Dig. 50. 17. 188 pr.

*Ubi quid generaliter conceditur, inest hæc exceptio, si non aliquid sit contra jus fasque.* Where a thing is granted in general terms, this exception is present, that there shall be nothing contrary to law and right. 10 Co. 78.

*Ubi quis delinquit ibi punictur.* Let a man be punished where he commits the offence. 6 Co. 47.

*Ubi verba conjuncta non sunt, sufficit alterutrum esse factum.* Where words are used disjunctively, it is sufficient that either one of the things enumerated be performed. Dig. 50. 17. 110. 3.

*Ubicunque est injuria, ibi damnum sequitur.* Wherever there is a wrong, there damage follows. 10 Co. 116.

*Ultima voluntas testatoris est perimplenda secundum veram intentionem suam.* The last will of a testator is to be fulfilled according to his true intention. Co. Litt. 323; Broom, Max. 566.

*Ultimum supplicium esse mortem solam interpretamur.* The extremest punishment we consider to be death alone. Dig. 48. 19. 21.

*Ultra posse non potest esse et vice versa.* What is beyond possibility cannot exist, and the reverse (what cannot exist is not possible). Wing. Max. 100.

*Un ne doit prise advantage de son tort demesne.* One ought not to take advantage of his own wrong. 2 And. 88, 40.

*Una persona vix potest supplere vices duarum.* One person can scarcely supply the place of two. 4 Co. 118.

*Unius omnino testis responsio non audiatur.* Let not the evidence of one witness be heard at all. Code, 4. 20. 9; 3 Bla. Com. 370.

*Uniuscujusque contractus initium spectandum est, et causa.* The beginning and cause of every contract must be considered. Dig. 17. 1. 8; Story, Ballm. § 56.

*Universalia sunt notiora singularibus.* Things universal are better known than things particular. 2 Rolle 294; 2 C. Rob. 294.

*Universitas vel corporatio non dicitur aliquid facere nisi id sit collegialiter deliberatum, etiamsi major pars id faciat.* A university or corporation is not said to do anything unless it be deliberated upon as a body, although the majority should do it. Dav. 48.

*Uno absurdo dato, infinita sequuntur.* One absurdity being allowed, an infinity follow. 1 Co. 102.

*Unumquodque dissolvitur eodem ligamine quo ligatur.* Everything is dissolved by the same mode in which it is bound together. Broom, Max. 884; 9 Pick. 303.

*Unumquodque eodem modo quo colligatum est dissolvitur.* In the same manner in which anything is bound it is loosened. 2 Rolle 39; Broom, Max. 891.

*Unumquodque est id quod est principalius in ipso.* That which is the principal part of a thing is the thing itself.

*Unumquodque ligamen dissolvitur eodem ligamine quo et ligatur.* Every obligation is dissolved in the same manner in which it is contracted. 2 M. & G. 729; 12 Barb. 366, 375.

*Unumquodque principiorum est sibimet ipsi fides; et perspicua vera non sunt probanda.* Every principle is its own evidence, and plain truths are not to be proved. Co. Litt. 11; Branch, Princ.

*Usucapio constituta est ut aliquis litium finis esset.* Prescription was instituted that there might be some end to litigation. Dig. 41. 10. 5; Broom, Max. 894, n.; Wood, Civ. Law 3d ed. 123.

*Usury is odious in law.*

*Usus est dominium fiduciarium.* A use is a fiduciary ownership. Bacon, Uses.

*Ut pœna ad paucos, metus ad omnes perveniat.* That punishment may happen to a few, the fear of it affects all. 4 Inst. 63.

*Ut res magis valeat quam pereat.* That the thing may rather have effect than be destroyed. 11 Allen 445; 100 Mass. 113; 108 Mass. 373; 85 Ala. 394; 97 Mo. 231; 100 N. C. 287; Poll. Contr. 105.

*Utile per inutile non vitiatur.* What is useful is not vitiated by the useless. Broom, Max. 627-8; 2 Wheat. 221; 2 S. & R. 298; 6 Mass. 303; 12 *id.* 438; 7 Allen 571; 9 Ired. 254. See 18 Johns. 93, 94; 38 Fed. Rep. 25; 123 Pa. 275; Andr. Steph. Pl. 41, n.

*Uxor et filius sunt nomina naturæ.* Wife and son are names of nature. 4 Bacon, Works 350.

*Uxor non est sui juris, sed sub potestate viri.* A wife is not her own mistress, but is under the power of her husband. 3 Inst. 108.

*Uxor sequitur domicilium viri.* A wife follows the domicil of her husband. Trayner, Max. 606.

*Vagabundum nuncupamus eum qui nullibi domicilium contraxit habitationis.* We call him a vagabond who has acquired nowhere a domicil of residence. Phil. Dom. 23, note.

*Valeat quantum valere potest.* It shall have effect as far as it can have effect. Cowp. 600; 4 Kent 493; Shep. Touch. 87.

*Vana est illa potentia quæ nunquam venit in actum.* Vain is that power which is never brought into action. 2 Co. 51.

*Vani timores sunt æstimandi, qui non cadunt in constantem virem.* Vain are those fears which affect not a brave man. 7 Co. 27.

*Vani timoris justa excusatio non est.* A frivolous fear is not a legal excuse. Dig. 50. 17. 184; 2 Inst. 483; Broom, Max. 256, n.

*Velle non creditur qui obsequitur imperio patris vel domini.* He is not presumed to consent who obeys the orders of his father or his master. Dig. 50. 17. 4.

*Vendens eandem rem duobus falsarius est.* He is fraudulent who sells the same thing twice. Jenk. Cent. 107.

*Veniæ facilitas incentivum est delinquendi.* Facility of pardon is an incentive to crime. 3 Inst. 236.

*Verba accipienda sunt secundum subjectam materiam.* Words are to be interpreted according to the subject-matter. 6 Co. 6, n.

*Verba accipienda ut sortiantur effectum.* Words are to be taken so that they may have some effect. 4 Bacon, Works 258.

*Verba æquivoca ac in dubio sensu posita, intelliguntur digniori et potentiori sensu.* Equivocal words and those in a doubtful sense are to be taken in their best and most effective sense. 6 Co. 20.

*Verba aliquid operari debent—debent intelligi ut aliquid operentur.* Words ought to have some effect—words ought to be interpreted so as to give them some effect. 8 Co. 94.

*Verba aliquid operari debent, verba cum effectu sunt accipienda.* Words are to be taken so as to have effect. Bacon, Max. Reg. 8, p. 47. See 1 Duer, Ins. 210, 211, 216.

*Verba artis ex arte.* Terms of art should be explained from the art. 2 Kent 556, n.

*Verba chartarum fortius accipiuntur contra proferentem.* The words of deeds are to be taken most strongly against the person offering it. Co. Litt. 36 *a*; Bacon, Max. Reg. 3; Noy, Max., 9th ed. p. 48; 3 B. & P. 399, 403; 1 C. & M. 657; 8 Term 605; 15 East 546; 1 Ball. & B. 335; 2 Pars. Con. 22; Broom, Max. 594. See CONSTRUCTION; POLICY.

*Verba cum effectu accipienda sunt.* Words are to be interpreted so as to give them effect. Bacon, Max. Reg. 3.

*Verba currentis monetæ tempus solutionis designant.* The words "current money" refer to the time of payment. Dav. 20.

*Verba debent intelligi cum effectu.* Words should be understood effectively. 2 Johns. Cas. 97, 101.

*Verba debent intelligi ut aliquid operentur.* Words ought to be so understood that they may have some effect. 8 Co. 94 *a*.

*Verba dicta de persona, intelligi debent de conditione personæ.* Words spoken of the person are to be understood of the condition of the person. 2 Rolle 72.

*Verba generalia generaliter sunt intelligenda.* General words are to be generally understood. 3 Inst. 76.

*Verba generalia restringuntur ad habilitatem rei vel aptitudinem personæ.* General words must be restricted to the nature of the subject-matter or the aptitude of the person. Bacon, Max. Reg. 10; 11 C. B. 254, 356.

*Verba generalia restringuntur ad habilitatem rei vel personæ.* General words must be confined or restrained to the nature of the subject or the aptitude of the person. Bacon, Max. Reg. 10; Broom, Max. 646.

*Verba illata (relata) inesse videntur.* Words referred to are to be considered as if incorporated. Broom, Max. 674, 677; 11 M. & W. 183, 188; 10 C. B. 261, 263, 266.

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*Verba in differenti materia per prius, non per posterius, intelligenda sunt.* Words referring to a different subject are to be interpreted by what goes before, not by what follows. Calvinus, Lex.

*Verba intelligenda sunt in casu possibili.* Words are to be understood in reference to a possible case. Calvinus, Lex.

*Verba intentioni, et non e contra, debent inservire.* Words ought to wait upon the intention, not the reverse. 8 Co. 94; 6 Allen 394; 1 Spence, Eq. Jur. 527; 2 Sharsw. Bla. Com. 379.

*Verba ita sunt intelligenda, ut res magis valeat quam pereat.* Words are to be so understood that the subject-matter may be preserved rather than destroyed. Bacon, Max. Reg. 3; Plowd. 156; 2 Bla. Com. 380; 2 Kent 555.

*Verba mere æquivoca, si per communem usum loquendi in intellectu certo sumuntur, talis intellectus præferendus est.* When words are merely equivocal, if by common usage of speech they acquire a certain meaning, such meaning is to be preferred. Calvinus, Lex.

*Verba nihil operari melius est quam absurde.* It is better that words should have no operation, than to operate absurdly. Calvinus, Lex.

*Verba non tam intuenda, quam causa et natura rei, ut mens contrahentium ex eis potius quam ex verbis appareat.* Words are not to be looked at so much as the cause and nature of the thing, since the intention of the contracting parties may appear from those rather than from the words. Calvinus, Lex.

*Verba offendi possunt, imo ab eis recedere licet, ut verba ad sanum intellectum reducantur.* You may disagree with words, nay, you may recede from them, in order that they may be reduced to a sensible meaning. Calvinus, Lex.

*Verba ordinationis quando verificari possunt in sua vera significatione, trahi ad extraneum intellectum non debent.* When the words of an ordinance can be made true in their true signification, they ought not to be warped to a foreign meaning. Calvinus, Lex.

*Verba posteriora propter certitudinem addita, ad priora quæ certitudine indigent, sunt referenda.* Subsequent words added for the purpose of certainty are to be referred to preceding words in which certainty is wanting. Wing. Max. 167; 6 Co. 236; Broom, Max. 586.

*Verba pro re et subjecta materia accipi debent.* Words should be received most favorably to the thing and the subject-matter. Calvinus, Lex.

*Verba quæ aliquid operari possunt non debent esse superflua.* Words which can have any effect ought not to be treated as surplusage. Calvinus, Lex.

*Verba, quantumvis generalia, ad aptitudinem restringuntur, etiamsi nullam aliam paterentur restrictionem.* Words, howsoever general, are restrained to fitness (*i. e.* to harmonize with the subject-matter) though they would bear no other restriction. Spiegelius.

*Verba relata hoc maxime operantur per referentiam ut in eis inesse videntur.* Words to which reference is made in an instrument have the same effect and operation as if they were inserted in the clause referring to them. Co. Litt. 359; Broom, Max. 673; 14 East 568; 66 Pa. 56.

*Verba relata inesse videntur.* Words to which reference is made seem to be incorporated. 11 Cush. 137; 121 Mass. 50.

*Verba secundum materiam subjectam intelligi nemo est qui nescit.* There is no one who is ignorant that words should be understood according to the subject-matter. Calvinus, Lex.

*Verba semper accipienda sunt in mitiori sensu.* Words are always to be taken in their milder sense. 4 Co. 17.

*Verba strictæ significationis ad latam extendi possunt, si subsit ratio.* Words of a strict signification can be given a wide signification if reason require. Calvinus, Lex; Spiegelius.

*Verba sunt indices animi.* Words are indications of the intention. Latch 106.

*Verbis standum ubi nulla ambiguitas.* One must abide by the words where there is no ambiguity. Trayner, Max. 612.

*Verbum imperfecti temporis rem adhuc imperfectam significat.* The imperfect tense of the verb indicates an incomplete matter. 6 Wend. 103, 120.

*Veredictum, quasi dictum veritatis; ut judicium, quasi juris dictum.* A verdict is as it were the *saying of the truth*, in the same manner that a judgment is the *saying of the law*. Co. Litt. 226.

*Veritas demonstrationis tollit errorem nominis.* The truth of the description removes the error of the name. 1 Ld. Raym. 303. See Legatee.

*Veritas habenda est in juratore; justitia et judicium in judice.* Truth is the desideratum in a juror; justice and judgment, in a judge. Bract. 185 *b*.

*Veritas nihil veretur nisi abscondi.* Truth fears nothing but concealment. 9 Co. 20.

*Veritas nimium altercando amittitur.* By too much altercation truth is lost. Hob. 344.

*Veritas nominis tollit errorem demonstrationis.* The truth of the name takes away the error of description. Bacon, Max. Reg. 25; Broom, Max. 637, 641; 8 Taunt. 313; 2 Jones, Eq. N. C. 72.

*Veritatem qui non libere pronunciat, proditor est veritatis.* He who does not speak the truth freely is a traitor to the truth. 4 Inst. Epil.

*Via antiqua via est tuta.* The old way is the safe way. 1 Johns. Ch. 527, 530.

*Via trita est tutissima.* The beaten road is the safest. 10 Co. 142; 4 Maule & S. 168.

*Via trita, via tuta.* The beaten way is the safe way. 5 Pet. 223; Broom, Max. 134.

*Vicarius non habet vicarium.* A deputy cannot appoint a deputy. Branch, Max. 38; Broom, Max. 839; 2 Bouv. Inst. n. 1300.

*Vicini viciniora præsumuntur scire.* Neighbors are presumed to know things of the neighborhood. 4 Inst. 173; 78 Ga. 129.

*Videtur qui surdus et mutus ne poet faire alienation.* It seems that a deaf and dumb man cannot alienate. 4 Johns. Ch. 441, 444; Bisp. Eq. § 39.

*Vigilantibus et non dormientibus jura subveniunt.* The laws serve the vigilant, not those who sleep. 7 Allen 493; 12 *id.* 28; 10 Watts 24. See Laches; Broom, Max. 65, 772, 892; 76 Ga. 618; 78 *id.* 53; 121 Pa. 467; 27 Ch. D. 523. See High, Receivers.

*Vim vi repellere licet, modo fiat moderamine inculpatæ tutelæ, non ad sumendam vindictam, sed ad propulsandam injuriam.* It is lawful to repel force by force; but let it be done with the self-control of blameless defence,—not to take revenge, but to repel injury. Co. Litt. 162.

*Viperina est expositio quæ corrodit viscera textus.* That is a viperous exposition which gnaws out the bowels of the text. 11 Co. 34.

*Vir et uxor consentur in lege una persona.* Husband and wife are considered one person in law. Co. Litt. 112; Jenk. Cent. 27.

*Vis legibus est inimica.* Force is inimical to the laws. 3 Inst. 176.

*Vitium clerici nocere non debet.* Clerical errors ought not to prejudice. Jenk. Cent. 23; Dig. 34. 5. 3.

*Vitium est quod fugi debet, ne, si rationem non invenias, mox legem sine ratione esse clames.* It is a fault which ought to be avoided, that if you cannot discover the reason, you should presently exclaim that the law is without reason. Ellesm. Postn. 86.

*Vix ulla lex fieri potest quæ omnibus commoda sit, sed si majori parti prospiciat, utilis est.* Scarcely any law can be made which is beneficial to all; but if it benefit the majority it is useful. Plowd. 369.

*Vocabula artium explicanda sunt secundum definitiones prudentium.* Terms of art should be explained according to the definitions of those who are experienced in that art. Puffendorff, *de Off. Hom.* l. 1, c. 17, § 3; Grotius, *de Jur. Bell.* l. 2, c. 16, § 3.

*Void in part, void in toto.* 15 N. Y. 9, 96.

*Void things are as no things.* 9 Cow. 778, 784.

*Volenti non fit injuria.* He who consents cannot receive an injury. Webb, Poll. Torts 185; 109 Ala. 287; 179 Pa. 639; 69 Fed. Rep. 559.

*Voluit sed non dixit.* He willed but did not say. 4 Kent 538.

*Voluntas donatoris in charta doni sui manifeste expressa observetur.* The will of the donor, clearly expressed in the deed, should be observed. Co. Litt. 21 *a*.

*Voluntas et propositum distinguunt maleficia.* The will and the proposed end distinguished crimes. Bract. 2 *b*, 136 *b*.

*Voluntas facit quod in testamento scriptum valeat.* The will of the testator gives validity to what is written in the will. Dig. 30. 1. 12. 3.

*Voluntas in delictis non exitus spectatur.* In offences, the will and not the consequences are to be looked to. 2 Inst. 57.

*Voluntas reputatur pro facto.* The will is to be taken for the deed. 3 Inst. 69; Broom, Max. 341; 4 Mass. 439.

*Voluntas testatoris ambulatoria est usque ad mortem.* The will of a testator is ambulatory until his death (that is, he may change it at any time). See 1 Bouv. Inst. n. 33; 4 Co. 61.

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*Voluntas testatoris habet interpretationem latam et benignam.* The will of the testator has a broad and liberal interpretation. Jenk. Cent. 260; Dig. 50. 17. 12.

*Voluntas ultima testatoris est perimplenda secundum veram intentionem suam.* The last will of a testator is to be fulfilled according to his true intention. Co. Litt. 322.

*Vox emissa volat,—litera scripta manet.* Words spoken vanish, words written remain. Broom, Max. 666; 1 Johns. 571.

*We must not suffer the rule to be frittered away by exceptions.* 4 Johns. Ch. 46.

*What a man cannot transfer, he cannot bind by articles.*

*When many join in one act, the law says it is the act of him who could best do it; and things should be done by him who has the best skill.* Noy, Max.

*When no time is limited, the law appoints the most convenient.*

*When the common law and statute law concur, the common law is to be preferred,* 4 Co. 71.

*When the foundation fails, all fails.*

*When the law gives anything, it gives a remedy for the same.*

*When the law presumes the affirmative, the negative is to be proved.* 1 Rolle 83; 3 Bouv. Inst. nn. 3063, 3090.

*When two titles concur, the best is preferred.* Finch, Law. b. 1, c. 4, n. 82.

*Where there is equal equity, the law must prevail.* Bisp. Eq. § 40; 4 Bouv. Inst. n. 3727.

*Where two rights concur, the more ancient shall be preferred.*

**MAY.** Is permitted to; has liberty to. In interpreting statutes the word *may* should be construed as equivalent to *shall* or *must* in cases where the good sense of the entire enactment requires it; 22 Barb. 404; 50 Kan. 739; or where it is necessary in order to carry out the intention of the legislature; 1 Pet. 46; 4 Wall. 435; 3 Neb. 224; or where it is necessary for the preservation or enforcement of the rights and interests of the public or third persons; 18 Ind. 27; 61 Me. 566; 48 Mo. 167; 107 Mass. 194, 197; 12 How. Pr. 224; but not for the purpose of creating or determining the character of rights; 28 Ala. 28; 39 Mo. 521. Where there is nothing in the connection of the language or in the sense and policy of the provision to require an unusual interpretation, its use is merely permissive and discretionary; 24 N. Y. 405; 77 Ill. 271; 27 N. J. L. 407; 8 Misc. Rep. 256; 7 *id.* 15; 107 Mass. 196; 30 Fed. Rep. 52. See 53 Me. 438; 48 Mo. 167; 125 Mass. 198; 52 Kan. 18; 40 La. Ann. 756; 125 Mass. 199; 46 Ia. 162.

**MAYHEM.** In Criminal Law. The act of unlawfully and violently depriving another of the use of such of his members as may render him less able, in fighting, either to defend himself or annoy his adversary. 8 C. & P. 167. See 7 Mass. 247.

"Maiheming is when one member of the commonweale shall take from another member of the same, a naturall member of his bodie, or the use and benefit thereof, and thereby disable him to serve the commonweale by his weapons in the time of warre, or by his labour in the time of peace, and also diminisheth the strength of his bodie, and weaken him thereby to get his owne living, and by that means the commonweale is in a sort deprived of the use of one of her members." Pulton, *De Pace Regis*, 1609, fol. 15, § 58.

One may not innocently maim himself, and where he procures another to maim him, both are guilty; Co. Litt. 127 *a*; 17 Wend. 351, 352. The cutting or disabling or weakening a man's hand or finger, or striking out his eye or foretooth, or depriving him of those parts the loss of which abates his courage, are held to be mayhems; 7 Humphr. 161; Cl. Cr. L. 183. But cutting off the ear or nose, or the like, are not held to be mayhems at common law; 4 Bla. Com. 205; but see 9 Ala. 928. The injury must be permanent; 8 Port. 472; 30 La. Ann. II. 1329; and if inflicted on an assailant in self-defence, it is not mayhem; 4 Blackf. 546.

These and other severe personal injuries are punished by the Coventry Act, which is common law and also has been re-enacted in most of the states; 1 Hawk. P. C., Curw. ed. 107, § 1; Ryan, Med. Jur., Phil. ed. 191; and by act of congress. See Act of April 30, 1790, s. 13; Act of March 3, 1825, s. 22; Rev. Stat. § 1342, art. 58 (when committed by a soldier in time of war, etc.); 10 Ala. N. S. 928; 5 Ga. 404; 7 Mass. 245; 1 Ired. 121; 6 S. & R. 224; 2 Va. Cas. 198; 4 Wisc. 168; 93 Cal. 564. Mayhem was not an offence at common law in Massachusetts, but only an aggravated trespass; 7 Mass. 248; but at the early common law it was a felony punishable by the loss of member for member, a punishment disused later; see *id.*; 1 McCl. Cr. L. § 432. Maim as used in the statutes is not equivalent to mayhem but to mutilate; McCl. Cr. L. § 432.

See PHYSICAL EXAMINATION.

**MAYHEMAVIT.** Maimed.

This is a term of art which cannot be supplied in pleading by any other word, as *mutilavit*, *truncavit*, etc.; 3 Thomas Co. Litt. 548; 7 Mass. 247. In indictments for mayhem the words *feloniously* and *did maim* are requisite; Whart. Cr. Pr. § 260, n.

**MAYOR** (Lat. *major*; Spelman, Gloss. *Meyr*, *miret*, *maer*, one that keeps guard. Cowel; Blount; Webster). The chief governor or executive magistrate of a city.

The old word was portgreve. The word mayor first occurs in 1189, when Rich. I. substituted a mayor for the two bailiffs of London. The word is common in Bracton. Brac. 57. In London, York, and Dublin, he is called lord mayor. Wharton, Lex.

It is generally his duty to cause the laws of the city to be enforced, and to superintend inferior officers, such as constables, watchmen, and the like. But the power and authority which mayors possess, being given to them by local regulations, vary in different places.

**MAYOR'S COURT.** The name of a court usually established in cities, composed of a mayor, recorder, and aldermen, generally having jurisdiction of offences committed within the city, and of other matters specially given them by the statute.

**MAOYRAZGO.** In Spanish Law. A species of entail known to Spanish law. 1 New Rec. 119.

**MEADOW.** A tract of land lying above the shore overflowed only by spring freshets or extraordinary tides, and which yields grass good for hay. 34 Conn. 429.

**MEAL RENT.** A rent formerly paid in meal.

**MEANDER.** To wind as a river or stream. Webster.

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The winding or bend of a stream.

Meander lines are run in surveying public lands bordering upon navigable rivers, not as boundaries of the tract, but to ascertain the quantity of the land subject to sale; and the watercourse, and not the meander line, as actually run on the land, is the boundary; 134 U. S. 178; 140 *id.* 376, 406; 7 Wall. 286. See LAKE; 14 Or. 340.

**MEANS OF SUPPORT.** All those resources from which the necessaries and comforts of life are or may be supplied, such as lands, goods, salaries, wages, or other sources of income. 71 Ill. 242.

**MEASE.** A messuage or dwelling-house. Whart.

**MEASON-DUE.** A corruption of *Maison de Dieu.*

**MEASURE.** A means or standard for computing amount. A certain quantity of something, taken for a unit, and which expresses a relation with other quantities of the same thing.

The constitution of the United States gives power to congress to "fix the standard of weights and measures." Art. 1, s. 8.

The states, it seems, possess the power to legislate on this subject, or, at least, the existing standards at the adoption of the constitution remain in full force; 3 Story, Const. 21; Rawle, Const. 102; but it has been decided that this constitutional power is exclusive in congress when exercised; 7 How. 282; 29 Pa. 27.

By a resolution of congress, of the 14th of June, 1836, the secretary of the treasury is directed to cause a complete set of all weights and measures adopted as standards, and now either made or in the progress of manufacture, for the use of the several custom-houses and for other purposes, to be delivered to the governor of each state in the Union, or to such person as he may appoint, for the use of the states respectively, to the end that a uniform standard of weights and measures may be established throughout the United States. The act of March 3, 1881, requires the same to be furnished to such agricultural colleges in every state as have received grants of land from the United States. The act of July 28, 1866, authorized the use of the French metric system of weights and measures in this country, and provided that no contract or dealing, or pleading in any court, shall be deemed invalid or liable to objection, because the weights or measures expressed or referred to therein are weights or measures of the metric system; Rev. Stat. § 3569. Annexed to § 3570, *q. v.*, is a schedule which shall be recognized in the construction of contracts, and in all legal proceedings, as establishing, in terms of the weights and measures now in use in the United States, the equivalent of the weights and measures expressed therein in terms of the metric system. See *infra;* WEIGHT.

METRIC SYSTEM. The fundamental, invariable, and standard measure, by which all weights and measures are formed, is called the *mètre*, a word derived from the Greek, which signifies measure. It is a lineal measure, and is equal to 3 feet, 0 inches, 11 44-1000th lines, Paris measure, or 3 feet, 3 inches, 370-1000th, English. This unit is divided into ten parts; each tenth, into ten hundredths; each hundredth, into ten thousandths, etc. These divisions, as well as those of all other measures, are infinite. As the standard is to be invariable, something has been sought from which to make it, which is not variable or subject to any change. The fundamental base of the mètre is the quarter of the terrestrial meridian, or the distance from the pole to the equator, which has been divided into ten millions of equal parts, one of which is the length of the *mètre*. All the other measures are formed from the *mètre*, as follows:—

CAPACITY. The *litre*. This is the cubic *decimètre*, or the cube of one-tenth part of a *mètre*. This is divided by tenths, as the *mètre*. The measures which amount to more than a single litre are counted by tens, hundreds, thousands, etc., of litres.

WEIGHT. The *gramme*. This is the weight of a cubic *centimètre* of distilled water at the temperature of 4° above zero Centigrade.

SURFACE. The *are*, use in surveying. This is a square, the sides of which are of the length of ten mètres, or what is equal to one hundred square mètres. Its divisions are the same as in the preceding measures. One hundred ares make a hectare.

SOLIDITY. The *stère*, used in measuring firewood. It is a cubic mètre. Its subdivisions are similar to the preceding. For the measure of other things, the term *cube mètre*, or cubic mètre, is used, or the tenth, hundredth, etc., of such a cube.

MONEY. The *franc* weighs five grammes. It is made out of nine-tenths of silver and one-tenth of copper. Its tenth part is called a *decime*, and its hundredth part a *centime*.

As already stated the divisions of these measures are all uniform, namely, by tens, or decimal fractions; they may, therefore, be written as such. Instead of writing,

1 mètre and 1-tenth of a mètre, we may write, 1 m. 1.
2 mètres and 8-tenths,—2 m. 8.
10 mètres and 4-hundredths,—10 m. 04.
7 litres, 1-tenth, and 2-hundredths,—7 lit. 12, etc.

Names have been given to each of these divisions of the principal unit; but these names always indicate the value of the fraction and the unit from which it is derived. To the name of the unit have been prefixed *deci*, for tenth, *centi*, for hundredth, and *milli*, for thousandth. They are thus expressed: a décimètre, a décilitre, a décigramme, a décistère, a déciare, a centimètre, a centilitre, a centigramme, etc. The facility with which the divisions of the unit are reduced to the same expression is very apparent; this cannot be done with any other kind of measures.

As it may sometimes be necessary to express great quantities of units, collections have been made of them in tens, hundreds, thousands, tens of thousands, etc., to which prefixes derived from the Greek have been given, namely, *deca*, for tens; *hecto*, for hundreds; *kilo*, for thousands; and *myria*, for tens of thousands; they are thus expressed: a *décamètre*, a *décalitre*, etc.; a *hectomètre*, a *hectogramme*, etc.; a *kilomètre*, a *kilogramme*, etc.

The above act of congress gives the equivalents thus:—

The *Mètre* is 39.37 in.
*Litre* is .908 quarts, dry measure, or 1.0567 quarts, wine measure.
*Are* is 119.6 square yards.
*Gramme* is 15.432 grains avoirdupois.
The *Stère* is 35.317 cubic feet.

As to certain measures under Mexican grants, see 161 U. S. 219.

**MEASURE OF DAMAGES. In Practice.** A rule or method by which the damage sustained is to be estimated or measured. Sedg. Meas. Dam. § 29.

It is the duty of the judge to explain to the jurors, as a matter of law, the footing upon which they should calculate their damages, if their verdict is for the plaintiff. This footing or scheme is called the "measure of damages;" Poll. Torts 27.

The defendant is to make compensation for all the natural and proximate consequences of his wrong, but not for secondary or remote consequences. There are cases in which this principle of compensation is departed from; as, where exemplary damages are awarded, or double or treble damages are allowed by statute. But, in general, the law seeks to give compensation.



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*Value* is in most cases the real measure of compensation and it is a fundamental principle that market value is resorted to not as a test, but only as an aid in getting at the real value, the latter being the true measure of a recovery, whether it be property, time, labor, or service which were affected by the contract or tort which is the subject matter of the action; 1 Sedg. Meas. Dam. §§ 242, 243.

The compensation awarded may be based upon, (1) pecuniary loss, direct or indirect; (2) physical pain; (3) mental suffering; to which have been added the value of the time required for the enforcement of the plaintiff's rights and his actual expenses incurred in so doing. There may be also in the case of injuries resulting from design, malice, or fraud, the sense of wrong or injury to one's feelings which is in some cases taken into consideration as a proper subject of compensation. See Hale, Dam. 86; 1 Sedg. Meas. Dam. § 37. The injuries for which compensation may be recovered are stated generally to include all those which affect any right protected by the common law where they are the direct result of actionable wrong. They may be to property, family relations, reputation, or the person,—whether affecting the body or mind or personal freedom of action; *id.* § 39.

Pecuniary compensation includes every kind of damage which can be measured by money value; 71 Md. 135. Such loss is almost always an element to be considered and in most cases the primary one; Hale, Dam. 87. So important is the idea of compensation that it is laid down as the fundamental rule of the measure of damages that the recovery must be "by way of compensation for loss and not to punish the wrong doer;" 8 Eng. Rul. Cas. 360. The test is compensation, not restitution, and beyond this it is rarely possible to lay down any general rule; Poll. Torts 180. This idea of compensation which lies at the root of the subject, may be illustrated by cases of the most diverse character. The measure of damages for failing to fulfil a covenant which the other party performs, is what it cost to fulfil it; 123 Pa. 381; in a trespass for an injury to the realty, by the inadvertent removal of part of coal, it is its value as part of the realty, and not as a chattel after its removal; 20 So. Rep. (Ala.) 918; for illegal diversion of water by an upper riparian owner, it is the cost of enough water to take the place of that unlawfully diverted; 5 Super. Ct. Pa. 563; for a breach of contract to return borrowed stock it is the price of the stock at the time of the refusal to return it; 184 Pa. 318. In an action of replevin for wrongful detention, the value of its use during detention may be recovered, although ordinarily the damages would be the interest on its value while detained; 38 Pac. Rep. (Kan.) 482. Where an attorney undertakes for a client a search of records for liens and overlooks a lien, his client, a mortgagee, who has thereupon loaned money on what was supposed to be a first lien upon real estate, may recover from the attorney the difference in value between a first lien and the lien which the client got; 180 Pa. 532. The amount stolen from a safe, warranted burglar proof, may be recovered in an action for breach of the warranty; 69 Ill. App. 106. Breach of contract to make a loan on a demand note secured by mortgage, to take up an existing lien, renders the lender liable for damages caused by foreclosure of the latter, although ordinarily there is no recovery for breach of contract to make a demand loan; 20 App. Div. N. Y. 375; and where a reasonable sum was stipulated for as liquidated damages for the breach of agreement to loan money, such stipulation will be enforced; 21 *id.* 94. The compensation is not necessarily for actual loss or expense. In many cases there may be a recovery for the amount of expenditure proper to be made and charged where the service was, in fact, gratuitous, as in the case of services of physicians and nurses which cost the plaintiff nothing, and for which he is held entitled to recover upon the ground that he recovers not for their cost but for their value; 127 Ind. 1; 79 Fed. Rep. 291; *contra*, 61 N. W. Rep. (Wis.) 79, where it was held that the recovery could only be for expense incurred.

The other essential requisite is that the amount is determined, not by the actual loss, but only that which is the natural result of the act complained of, or as its consequence may be presumed to have been in contemplation of the parties. This rule was established by the leading case of Hadley *v.* Baxendale, in which the application of the principle was to a suit against a carrier; 9 Exch. 341; 5 Eng. Rul. Cas. 502; 8 *id.* 405. Remote, contingent, or speculative damages will not be allowed, but only such as naturally flow from the breach of the contract; 46 Fed. Rep. 40. The principle of Hadley *v.* Baxendale, however, is held to cover damages resulting from the failure of the plaintiff to comply with other contracts, made upon the faith of his contract with the defendant, for the breach of which he sues, where the fact of his having made such other contracts was known to the defendant; 20 Q. B. D. 86. See CAUSA PROXIMA NON REMOTA SPECTATUR, which is particularly to be noted in connection with claims for damages based upon physical pain and inconvenience.

As to *mental suffering*, see that title.

With regard to the measure of damages, the same principles are, to a great extent, applicable to cases of contract and tort; Poll. Torts 529; 9 P. Div. 113. Where the action is for breach of contract, the damages are limited to what may reasonably be considered to have been contemplated by the parties at the time of making it as likely to arise from a breach; 94 Wis. 44. They may include, however, gains prevented, as well as losses sustained, if certain, and reasonably to be expected; 48 Neb. 910. They are measured by the loss which

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results from the breach and not the sum of money or property involved in the transaction; [1897] 1 Q. B. 692. As a general rule, the contract itself furnishes the measure of damages.

In an action of tort based upon negligence in the performance of a contractual obligation without malice, the damages would be substantially the same as for breach of contract under the same circumstances; 9 App. D. C. 455.

There are *dicta* to the effect that a more liberal rule of damages should be applied in cases of tort than of contract; 42 Wis. 23; 11 Mich. 542; but they are contrary to the general current of authority which is in favor of applying the same principles to both classes of cases; 53 N. Y. 211, 216; Sedg. Meas. Dam. § 429, note a.

While the rule which affords the measure of damages is to be supplied by the court, the amount is a question for the jury, and unless the damages are so excessive as to lead to the conclusion of passion or prejudice on the part of the jury, the court cannot interfere with their verdict; 52 Fed. Rep. 87.

Damages should not exceed the amount claimed; but cases have been known in which the verdict was in excess of the amount claimed, and the court has amended the statement of claim to enable it to enter judgment on the verdict; Poll. Torts 180; but this is said to be an extreme use of the power of the court; *id.*; 43 Ch. Div. 327. Where there is uncertainty as to the measure of damages, the rule is to give the lowest sum; 62 Pa. 324.

"Estimates of value made by friendly witnesses, with no practical illustrations to support them, are too unsafe, as a rule, to be made the basis of a judicial award." 166 U. S. 134.

The measure of compensation allowed as damages has been somewhat definitely fixed, as to many classes of cases, by rules of decision, many of which are important and well established.

DEATH BY WRONGFUL ACT. The right of action in this case is entirely statutory. At common law no civil action could be maintained, but such an action was given in England in 1846 by Lord Campbell's Act, and similar statutes exist in most of the United States. For a collation of statutes see Tiff. Death Wrongf. Act c. 9.

These statutes are held constitutional even where applicable to one class of corporations; 92 Ky. 233; 32 N. H. 215. See 75 Ala. 449; 4 Col. 162; 24 Ga. 356. By some courts they are construed strictly as being remedial; in others strictly as in derogation of common law; Hale, Dam. § 126; Tiff. Death Wrongf. Act c. 2, § 32, where the cases are collected. These statutes are said to operate not by way of exception or repeal of the common law, but to create an action totally new in species, quality, principle; Blackburn, L. J., in 10 App. Cas. 59. This bears upon the measure of damages. It has been said that life is to be regarded as property to be compensated for "without regard to past earnings or capacity to earn at time of death;" 67 Pa. 300; but this case is severely criticised as unsound reasoning; 2 Sedg. Meas. Dam. § 572, where it is remarked that at common law life was not property, and no civil action lay for its loss, which "rule has only been modified by this statute, under which juries are allowed to give, in most states, damages for pecuniary injuries only." These pecuniary damages embrace: (1) Present pecuniary loss; (2) prospective pecuniary loss; (3) the interest of one who would presumably derive pecuniary benefit from the services of the deceased. Any case may involve one or all of these elements. Present pecuniary loss is based upon actual compensation for loss to the time of action, and although the action is maintainable only where it might have been brought by the deceased if he survived, the measure of damages rests upon different principles. The deceased might have recovered both for pecuniary loss and his pain and suffering, physical and mental, while his representatives recover only for the injury to his family resulting from his death; 18 Q. B. 93; 23 N. Y. 465; and not for his suffering, medical attendance, funeral expenses, loss of society of husband or wife, and the like; 2 Sedg. Meas. Dam. § 573, citing cases. See 83 Fed. Rep. 82. Prospective pecuniary loss is based on a reasonable expectation of pecuniary benefit from the life of the deceased; 3 H. & N. 211; 60 Md. 449; 66 N. C. 154; 74 Wis. 562. It is what the deceased would have probably earned during the residue of his life, taking into consideration his age, condition, ability, disposition, habits, and expenditures, without any *solatium* for distress of mind; Sharswood, J., in 57 Pa. 335, 358; 86 Tenn. 343; 29 Gratt. 431; 88 N. Y. 641; and no account can be taken of income from investments; 47 N. J. L. 28.

In the third class of cases damages are allowed to a husband for the loss of a wife's services, not her society; 11 Can. 422; to a wife for the loss of support; *id.*; for the same reason to a child during minority; 47 N. Y. 317; 38 Wis. 613; 35 Minn. 84; 129 Ill. 91; 76 Cal. 240; and on the weight of authority, for the expectation of pecuniary benefit after majority; 110 N. Y. 504; 84 Cal. 515; 32 Minn. 518; and if the statute is in favor of the estate of the deceased, the damages are not limited to the minority of a child; 73 Ind. 252; 36 Ia. 458; to a parent for the loss of a child to the extent of the pecuniary value of his services during minority; 71 Md. 573; 97 Mo. 253; 32 W. Va. 370; to the next of kin if dependent on the deceased for support; 43 Ill. 338; but not otherwise for nominal damages; 33 Kan. 543; 7 Ohio St. 336; 71 Md. 573. Exemplary damages cannot generally be given, but in some states they are expressly authorised, either generally or under special circumstances set forth in the act. Hale, Meas. Dam. § 128.

In estimating the damages in these cases,

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the expectation of life may be reckoned; 91 Ala. 548; 19 Kan. 83; 85 Ia. 167. See LIFE TABLES.

As to the measure of damages in this action, generally, see 60 A. & E. Ry. Cas. 178, 219; 1 C. C. A. 33; 28 Am. L. Reg. 385, 513, 577; for the death of a child; 29 Cent. L. J. 253; value of human limbs; 27 Can. L. J. 417.

NEGOTIABLE PAPER. In suits on negotiable paper the measure of damages is its face value with interest from the breach; Sedg. Elem. Dam. 240; 6 Cow. 484; 58 Ind. 360; 9 Wis. 503. The value of a note is *prima facie* the amount secured; 120 N. Y. 134; 69 Me. 484; 23 Mo. 252; 31 Vt. 570. Formerly it was said that interest was only recoverable as damages allowable at the discretion of the jury; 2 B. & Ald. 305; 3 Campb. 296; W. N. (1887) 184. It was early settled that interest, as a matter of law, could not be given without an express or implied contract for its payment; 2 B. & C. 348. The present rule is said to be that in England it is allowed on commercial paper; 1 Sedg. Meas. Dam. § 291; and that in the United States the jury should be instructed to give it; 2 *id.* § 699; *id.* § 325; 5 Cow. 587, 610; 79 N. C. 122. Where interest is provided for in the paper the recovery is under the contract and not as damages, and there has been much conflict as to whether in case of non-payment at maturity interest thereafter is payable as interest at the contract rate or as damages at the statutory rate. The former view is supported upon the doctrine of an implied contract to pay the stipulated rate after maturity; 74 Ind. 158; 94 *id.* 178; 144 Mass. 448; 38 Ohio St. 575; 38 Mich. 662. Following the latter view—the statutory rate: 67 Me. 145; 63 Cal. 503; 42 Conn. 570; 23 Minn. 84; 8 Wend. 550; 43 N. Y. 244 (but *contra*, 4 Johns. Ch. 436; 19 Hun 87); 63 Md. 484; 5 W. & S. 51; L. R. 7 H. L. 27; 14 Ch. D. 49 (*contra*, 3 C. B. N. S. 144). See 1 Sedg. Meas. Dam. § 325 n., where the authorities are collected and the conclusion stated that the weight of authority is in favor of the latter position, which is also sustained by the supreme court as its own rule when not controlled by local law; 100 U. S. 72. See 96 *id.* 51.

If there is an intention expressed it prevails, whatever may be the form of words used; 68 Me. 80; 25 Ch. D. 338; 84 N. Y. 471; 79 Mo. 226; 10 R. I. 299; 2 Kan. 83; 18 S. C. 141; *id.* 600. Where a higher rate after maturity is expressed it is generally allowed; 91 Ill. 609; 33 Ark. 416; 66 Me. 282; L. R. 2 Eq. 221; 15 U. C. C. P. 360; but not by some courts, on the theory that it is a penalty; 11 Mo. 547; 24 Minn. 43. It is said that the question properly rests upon the doctrine of liquidated damages, but that the courts have not generally so held; 1 Sedg. Meas. Dam. § 331.

In most of the states there are statutory provisions for damages upon protested paper, ranging as to foreign bills from five to twenty per cent; and on bills payable in another state there are varying rates, some statutes making discriminations between states or groups of states, based, apparently, upon contiguity, or extent of business relations and the like. For a summary of the provisions of these statutes, see 1 Stims. Am. Stat. L. § 4753.

CARRIERS. Upon a total failure to deliver goods, the carrier is liable for the value of the goods at their place of destination, with interest from the time they should have been delivered, deducting the freight; 12 S. & R. 186; 24 N. H. 297; 1 Cal. 108; 10 La. An. 412; 9 Rich. So. C. 465; 46 N. Y. 462; 74 Ill. 249; 28 Ohio St. 358; 87 Ill. 195; 64 Mo. 47; 27 Wis. 327; 8 Mo. App. 27; 98 Mass. 550; 41 Miss. 671; 26 Ga. 122; 13 Md. 164; 42 S. W. Rep. (Tenn.) 72. Upon a failure to take the goods at all for transportation, he is liable for the difference between the value at the place of shipment and at the place of destination, less his freight; or, if another conveyance can be found, the difference between the freight agreed on with defendant and the sum (if greater) which the shipper would be compelled to pay another carrier; 1 Abb. Adm. 119; 58 Barb. 216; 56 Penn. 231; 34 Mich. 439. Upon a delay to deliver the goods, the plaintiff is entitled to an indemnity for his loss incurred by the delay, taking into account any fall in the market occurring between the time when the property should have been delivered by the carrier and the time when it actually was; 54 Ill. 58; 1 Disn. 23; 64 Ill. 143; 20 Wis. 594; 106 Mass. 468; 48 N. H. 455; 47 N. Y. 29; 14 Mich. 489; 49 Vt. 255; or, in some cases, the additional price paid for goods required by him to take the place of the delayed goods; 90 Me. 193; 147 U. S. 591; Ang. Carr. § 490 *a*; in case of property for exhibition at a museum, the probable net profits: 1 Tex. Civ. App. 524; or in case of stock injured, the depreciation measured by market value at the place of destination; 63 Ark. 443; 33 S. W. Rep. (Tex.) 704. The value of damaged goods may properly be determined by their sale at auction by the owner; 78 Fed. Rep. 155.

The measure of damages for a breach of a contract to transport freight by vessel, is the difference between the contract and the actual price of freight paid; 6 U. S. App. 581.

In modern times, the conditions which led to the adoption of the common law rule making a carrier an insurer having changed, it is very common to limit, by contract, the amount of the shipper's recovery. The effect of such contracts is to fix a valuation on the goods which shall be the measure of damages in case of loss, and to this the shipper is held; 112 U. S. 332; 70 N. Y. 410; 81 Pa. 315; 137 Mass. 33. Some courts, however, hold such contracts invalid: 88 Tenn. 320; this is upon the theory that it is in fact an exemption from liability for negligence which is not permitted; 17 Wall. 357. It is suggested that the true doctrine is that the carrier cannot himself limit the damages, but that a contract to do so, fairly made by both parties to it,

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should be sustained; 6 Mich. 242. See 9 A. & E. Ry. Cas. 334; 21 *id.* 125, 142.

LAND CONTRACTS. In actions for the breach of contracts for the sale of land where the vendor fails to convey, the English rule limits the damages to the amount advanced with interest and expenses incurred in examining the title. The rule dates back to Y. B. 30 Edw. III, 14 *b.*; but the leading case is Flureau *v.* Thornhill, 2 W. Bla. 1078. The rule was qualified by an exception, established in Hopkins *v.* Grazebrook, when the vendor knew of the defect in title; 6 B. & C. 31; but that case was discredited as authority and the earlier rule adhered to by the house of lords; L. R. 7 H. L. 158, affirming L. R. 6 Excheq. 59, which was followed in 36 Ch. D. 619. In American law there is great lack of harmony in the decisions, and a distinction is taken in many cases growing out of the motive of the party in default. The extreme English rule has been followed in Pennsylvania, and, apparently, even where there is fraud; 80 Pa. 413; see 11 *id.* 127; 67 *id.* 126. In other states a failure to convey for want of good title does not involve liability for the value of the bargain, unless there be fraud, bad faith, or other misconduct; 2 Bibb 415; 2 Wend. 399; 57 N. Y. 155; 69 *id.* 201; 9 Lea 111; 9 Md. 250; 54 *id.* 187; 29 Kan. 508; 5 Ia. 352; 56 *id.* 139; 17 Fla. 532; see 39 Minn. 326.

Knowledge of the defendant that the title was in a third person has been considered in some cases sufficient to warrant substantial damages; 40 N. Y. 59; and where the failure to convey was the result of the refusal of the wife to sign the deed, the same rule was applied, upon the theory that the vendor knew that it was doubtful if his wife would sign; 34 N. J. L. 358; 78 Ill. 222. In a case of contract by the defendant to sell the lands of another which he had contracted to purchase, and failed to accomplish his object because the real owner could not make title, the judgment was reversed because the judge had charged in favor of substantial damages, and Cooley, J., held, upon a review of the cases, that Flureau *v.* Thornhill must be considered as established law, but that where a party acted in bad faith or sold what he did not own, such damages should be allowed; 21 Mich. 374.

In many jurisdictions what is sometimes called the rule of the United States Supreme Court is adhered to and the purchaser is held to be entitled to the difference between the amount he has agreed to pay and the value at the time of breach. This is the opposite extreme from the English rule. 6 Wheat. 109; 113 Mass. 538; 3 R. I. 187; 37 Ia. 134; 65 Me. 87; 29 La. Ann. 286; 35 Neb. 429; 57 Fed. Rep. 973; 145 U. S. 522; 37 Ill. App. 465; 7 Utah 113.

When the purchaser refuses to perform, the measure has been held, in England, to be the difference between the price fixed in the contract and the value of the land at the time fixed for the delivery of the deed; 7 M. & W. 474. But the rule does not appear to be well settled in this country.

The English rule has been followed by some courts; 51 N. H. 167; 101 Mass. 409; 67 Pa. 126; 22 Ohio St. 172; 86 Mich. 328. In some states where a deed has been tendered and refused, it is held that the contract price may be recovered in full; 17 Barb. 260 (the question having been left undecided in 5 Cow. 506); 4 Me. 258; 11 Ia. 161; *contra.* 1 Pugs. 195; see 21 Wend. 457; 18 Vt. 27. A purchaser in possession on an instalment contract of sale on eviction was held entitled to recover instalments made and cost of improvements; 109 Ala. 261; *contra,* if buildings were erected without the vendor's request; 59 N. J. L. 160.

One who has contracted for the right to purchase public land is entitled on a breach to the difference between the contract price and the saleable value of such right, and it is the vendor's duty to re-sell the right, or, failing this, to show its market value; 145 U. S. 522; evidence of particular sales of other real estate is not admissible to establish market value; 107 Pa. 460.

EVICTION. The damages recoverable for an eviction, in an action for breach of covenants of seisin and warranty in a deed, are the consideration-money, interest thereon, and the costs, if any, of defending the eviction.

This is not in accordance with the fundamental doctrine of the law of damages, but it is the rule in most of the states, and is sometimes termed the New York rule; 3 Cai. 111; 69 N. Y. 434; 4 Dall. 441; 27 Pa. 288; 2 McCord 413 (earlier decisions were *contra;* 1 Bay 19, 92, 265); 2 Leigh 451 (also after conflicting decisions, 3 Call 320; 1 Munf. 493); 82 Va. 769; 8 Humph. 647; 2 Bibb 273; 4 Dana 253; 3 Ohio 211; 14 *id.* 118; 1 Ark. 313, 323; 43 *id.* 439; 24 Ga. 533; 41 Ill. 413; 58 Ind. 392; 122 *id.* 272; 5 Ia. 287; 44 *id.* 249; 33 Cal. 299; 39 Cal. 360; 17 N. J. L. 304; 30 N. H. 531; 65 *id.* 13; 31 Miss. 433; 23 Mo. 437; 38 Minn. 24; 100 N. C. 75; 44 Tex. 400; 36 Md. 129, 150; 18 Nev. 360; 69 Ala. 502; 33 Kan. 765; 3 Ore. 88; 26 W. Va. 447; 64 Wis. 258; 8 U. C. Q. B. 191 (but see 13 U. C. C. P. 146); 13 La. 143; but the value of improvements may be recovered; 13 La. Ann. 512; and see as to Louisiana, 131 U. S. 191: though excluded by the New York rule; 4 Johns. 1. In Mississippi a vendee who has lost land by reason of a title paramount to his remote vendor may recover the amount which such remote vendor received for the land; 68 Miss. 161.

What is known as the New England rule establishes as the measure of damages the value of the land at the time of eviction, together with the expenses of the suit, etc., and this is followed in all the New England states, Quebec, and Michigan; 119 Mass. 500; 66 Me. 557; 14 Conn. 245; 12 Vt. 381; 30 *id.* 242; 61 Mich. 625; 6 Can. 425; and it is also recognized as the rule in England; 9 Q. B. D. 128.

Where a paramount title is purchased to

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prevent actual eviction the measure of damages is the price paid with interest; 59 Ark. 699; 61 Hun 427; 21 S. W. Rep. (Tex.) 172; and where the breach alleged was the foreclosure of a mortgage, it is the amount paid to redeem the land and expenses of defending the title; 3 N. E. Rep. (Ind.) 260; 17 S. W. Rep. (Mo.) 1014.

INCUMBRANCES. On a breach of a covenant in a deed against incumbrances, the purchaser is entitled to recover his expenses incurred in extinguishing the incumbrance, if that is practicable; 7 Johns. 358; 34 Me. 422; 4 Ind. 130; 109 Mass. 299; 7 R. I. 538; 51 Ill. 373; 41 Ia. 204; 48 N. Y. 532; 59 Mo. 488.

For a permanent incumbrance the compensation should be measured by the decreased value of the land; 20 N. Y. 191; 108 Mass. 175; 44 Conn. 312; but the amount is limited by the sum recoverable for a total loss of the land; 41 Ia. 204; 79 Ala. 346. If the incumbrance causes a total eviction the damages are the same as in other cases of eviction. See *supra*.

SALES. Where the seller of chattels fails to perform his agreement, the measure of damages is the difference between the contract price and the market value of the article at the time and place fixed for delivery; 5 N. Y. 537; 107 *id.* 674; 3 Mich. 55; 35 *id.* 478; 4 Tex. 289; 12 Ill. 184; 3 Wheat. 200; 44 Me. 255; 6 McLean 102; 41 Miss. 368; 24 Wend. 322; 3 Col. 373; 48 Pa. 407; 147 *id.* 372; 33 Vt. 92; 82 Va. 614; 75 Ia. 550; 46 Mo. App. 539; 38 Ill. App. 91; 87 Ga. 333; 98 Cal. 676; 124 U. S. 64; 8 Q. B. 604; Benj. Sales § 758.

The same rule applies as to the deficiency where there is a part-delivery only; 16 Q. B. 941; 23 How. 149; 41 N. H. 86; 51 Pa. 175; 21 Pick. 378; 12 Wis. 276; 5 Hill 472; 2 Minn. 229. Where, however, the purchaser has paid the price in advance, some of the cases, particularly in England and New York, allow the highest market price up to the time of the trial; 27 Barb. 424; 26 Pa. 143; 13 Tex. 324. Where the purchaser refuses to take and pay for the goods, the seller may sell them fairly, and charge the buyer with the difference between the contract price and the best market price obtainable within a reasonable time after the refusal; 45 Ill. 79; 5 S. & R. 19; 30 N. Y. 549; 3 Metc. Ky. 555; 9 B. Mon. 69; 83 Me. 407; 55 Ark. 401; 67 Hun 38; 5 Tex. Civ. App. 415. See 147 Pa. 184. Where the goods are delivered and received, but do not correspond in quality with a warranty given, the vendee may recover the difference between the value of the goods delivered and the value they would have had if they had corresponded with the contract; 4 Gray 457; 5 Harr. 233; 26 Ga. 704; 21 Ill. 180; 29 Md. 142; 39 Me. 287; 14 N. Y. 597; 29 Ala. 558; 20 Ill. 184; 15 U. S. App. 218. But where the article is one which cannot be bought in the market (a machine), and it was not of the warranted capacity, it appearing that the vendee had contracted to supply the products of the machine, which he was unable to do because of the breach, and the facts were known to the vendor, the measure of damages is the difference between what it would have cost to fulfil his contracts and what the vendee would have received if he had not lost them by reason of the defects in the machine; or if the work was done by others, the difference between what it would have cost him to do the work and what he paid for having it done; 3 U. S. App. 631; 49 *id.* 438.

The measure of damages for breach of a contract to deliver articles, if they have no market value or cannot be had in the market where the delivery was to be made, is the additional cost and expense of obtaining them at the nearest market, or on the most advantageous terms; 117 Ind. 594.

Many courts allow the highest intermediate value between the breach and the end of the trial; 66 Ia. 116; 1 Nott. & McC. 334; 33 Ind. 127; but it is generally denied; 104 Mass. 259; 47 Wis. 406; 44 Md. 47; 119 Ill. 554; Hale, Dam. 186, 194, where the rule is discussed, with the authorities. This rule was originally adopted in New York as to chattels generally; 26 N. Y. 309. It was modified to exclude stock transactions on the ground that the highest intermediate value was not the natural and proximate result; 53 N. Y. 211. The rule of the last cited case is adopted by the United States supreme court; 129 U. S. 193. In Pennsylvania the rule is rejected in its general application; 5 W. & S. 106; but adopted in case of stocks; 53 Pa. 310; see 69 *id.* 403. In some cases it is left to the jury to allow any value between the highest value and that at the time of conversion; 69 Ala. 581; and in others, where the transaction is free from bad faith, value is taken at the time of conversion, with interest; 40 Miss. 352.

COLLISION. The general principle followed by the courts of admiralty in cases of collision between vessels is that the damages awarded against the offending vessel must be sufficient to restore the other to the condition she was in at the time of the collision, if restoration is practicable. Both damages to vessel and cargo are to be made good. But hypothetical and consequential damages are excluded. The loss of the use of the injured vessel while undergoing repairs is proper to be included. See 37 Fed. Rep. 148. If the injured vessel is a total loss, her market value at the time is the measure of damages. See Olc. 188, 246, 388, 444, 505; 13 How. 106; 17 *id.* 170; 2 Wall. Jr. 52; 6 McLean 238; 37 Fed. Rep. 270.

If the fault is equal on the part of both vessels, the loss is to be divided between them; 1 Sprague 128; 6 McLean 221; 14 Wall. 345; 21 Wall. 389; 37 Fed. Rep. 716; 60 *id.* 296; 59 *id.* 714; 122 U. S. 97.

For a total loss of cargo, its value at the place of shipment, or its cost, including expenses, charges, insurance, and interest, should be allowed; 11 U. S. App. 612; when part is recovered and sold, after ex-

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penses are incurred, the rule is to allow the difference between the market value of the goods, if uninjured, and the value in their damaged condition; *d.* The allowance of interest and costs in case of collision rests in the discretion of the lower court, and will not be disturbed on appeal; 123 U. S. 349.

CONTINUING TORTS. Ordinarily the damages which may be recovered for a tort include only compensation for the injury suffered to the time of suit, and the theory formerly acted upon was that each continuance of a trespass or a nuisance was a fresh one for which a new action would lie; 3 Bla. Com. 220; 1 Den. 257; 21 N. J. L. 469. The only remedy applied in such cases is that exemplary damages will be given, if, after one verdict against him, any one has the hardihood to continue it; 2 Selw. N. P. 1130. In cases, however, where the injury is of a nature to be permanent, it is held that entire damages may be recovered in one action; Sedg. Meas. Dam. § 924: as where the trespass was the insertion of girders into a wall; 105 Pa. 400; or maintaining a brothel next to the plaintiff's dwelling-house; 72 Mo. 129.

The same principle is applied in actions for breach of contract by neglect of a continuing duty imposed by it. Each moment the neglect continues is a separate breach and is often considered and treated as a total breach for which the entire damage, past and prospective, may be recovered in one action, the judgment being a bar to any further suit; Hale, Dam. § 33; but not if the contract be divisible, as was held a contract to issue an annual pass renewable from year to year during the pleasure of the promisee; 51 Pac. Rep. (Kan.) 576. Whether a tort is permanent or not is a question of fact to be determined according to circumstances; Sedg. Meas. Dam. § 924; the presumption being that a wrong will not continue; 51 Ga. 378.

The question of the right to recover in one action of damage resulting from a continuing trespass, and to be protected by the judgment from further suit, is a very important one in connection with the exercise of the right of eminent domain under those modern constitutions which secure compensation for property *damaged* as well as for that *taken*.

As to property taken or injured for public use, see, generally, EMINENT DOMAIN; Sedg. Meas. Dam. ch. xxxvi.; Hale, Dam. 167; Harris, Dam.; 2 Am. & Eng. Corp. Cas. 477; 5 Am. & Eng. Ry. Cas. 352, 386; 14 *id.* 207; change of grade; 4 Am. Ry. & Corp. Cas. 277; rights of landlords, tenants, and reversioners; 21 L. R. A. 212; 4 Am. Ry. & Corp. Cas. 744; benefit to of abutting property to rebut proof of damage; 129 N. Y. 576; 14 L. R. A. 344; patents, see that title.

See, generally, works on damages; DAMAGES; CONSEQUENTIAL DAMAGES; LIQUIDATED DAMAGES; LATERAL SUPPORT; TELEGRAPH.

**Exemplary Damages.** Those allowed as a punishment for torts committed with fraud, actual malice, or deliberate violence or oppression.

In nearly all of the states, in such cases, the jury are not confined to a strict compensation for the plaintiff's loss, but may, in assessing damages, allow an additional sum by way of punishment for the wrong done. This allowance is termed "smart money," or "exemplary," "vindictive," or "punitive" damages.

Some courts, however, have declined to recognize the doctrine; 4 Pick. 143; 21 *id.* 378 (and see 114 Mass. 518); 7 Col. 541; 11 Neb. 261; 64 Mich. 133; 56 N. H. 456, (overruling earlier cases).

Some other courts refuse punitive damages; but allow exemplary damage as compensatory or "indeterminate damages;" 31 W. Va. 220; 1 Wyo. 27; 11 Nev. 350; 2 L. C. J. 96; 20 *id.* 141; 4 R. I. 371. In some of these jurisdictions they are really allowed under the guise of compensation for mental suffering and the like.

"Whenever the injury complained of is the result of the fraud, malice or wilful or wanton act of the defendant, and the circumstances of the case are such as call for such damages, vindictive damages may be given. The general rule is that, when the injury has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not restricted to actual damages, but may give such damages in addition thereto as the circumstances of the case seem to warrant, to deter others from like offences." Wood's Mayne, Dam. 58; Webb, Poll. Torts 219.

"All rules of damages are referred by the law to one of two heads, either compensation or punishment. Compensation is to make the injured party whole. Exemplary damages are something beyond this, and inflicted with a view not to compensate the plaintiff, but to punish the defendant." Per Dillon, Circ. J., in summing up before the jury; 1 Dill. 71.

It has been said that the distinction between exemplary damages, and damages given as special or extraordinary compensation, is one of words merely; and the effect of allowing the former is the same as that produced upon the theory of compensation, when this is extended to cover injury beyond the pecuniary loss; Hill. Torts 440; Field. Dam. 70.

The propriety of allowing damages to be given by way of punishment under any circumstances has been strenuously denied in many of the cases, and the question has given rise to extensive discussion; but the weight of authority is decidedly that such allowance, in a suitable case, is proper. In 44 Wis. 289, the court said: "The argument and consideration of this case have gone to confirm the present members of this court in their disapprobation of the rule of exemplary damages which they have inherited; but they . . . do not feel at liberty to change or modify the rule at so late a day against the general current of authority elsewhere . . . if a change should now be made, it lies with the legislature, etc." See, also, 7 So. L. Rev. N. s. 675; 7 Jones, L. 64; 20 Am. Law. Reg. N. s. 573; 11 Nev. 350; 6 Cent. L. J. 74.

See note to Wood's Mayne, Dam. 17; Sedgw.; Field, Damages; Greenl. Evidence.

Actual malice need not be shown if the act complained of was wantonly or recklessly done; 51 Ill. 467; 66 Hun 626; 1 Misc. Rep. 148; 51 Mo. App. 320; see 161 Pa. 553; or conceived in a spirit of mischief, or in evident disregard of the rights of others, or of civil or social obligations; 26 Conn. 416; 42 Miss. 607; Wood's Mayne, Dam. 59, note. In an action for slander, however, exemplary damages cannot be recovered without proof of express malice; 48 Mo. App. 193. Where motive may be

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ground of aggravation of damages, evidence on this score, as of proof of provocation, or of good faith, is admissible in mitigation of damages; Poll. Torts 184. So exemplary damages cannot be recovered where the defendant acted on advice of counsel; 33 Mich. 511; 81 Ga. 468; 73 Ala. 183; 44 Vt. 441; or in good faith; 76 Me. 216; 35 N. Y. 297; 60 Md. 358; 42 Conn. 318; or with a fixed belief that he was acting in the right; 70 Ill. 28; 35 Ia. 306; 76 Ala. 176.

The ground of the doctrine is said to be that society is protected by this species of punishment, while the party is also compensated at the same time and persons are deterred from like offences; 6 Tex. 266; 2 Hill 40.

Mere negligence on the part of the defendant is not enough; 35 Penn. 60; 27 Mo. 28; 5 Bush 206; but see 2 C. C. App. 354; 5 *id.* 91; 6 Misc. Rep. 162. Malicious motives alone can never constitute a cause of action but, where the allegations are sufficient to sustain the action, malice may be alleged and proved to enhance the damages; 78 Me. 445; 77 Ill. 562; 69 Mich. 380; 115 Mass. 217; 27 Fla. 157; 75 Pa. 467; 75 Ga. 198. See MALICE; MOTIVE.

Exemplary damages as a rule are recoverable only in tort, except that they are allowed for breach of promise of marriage; L. R. 1 C. P. 331; 125 N. Y. 214; 59 Mich. 33; see PROMISE OF MARRIAGE; and where there was a breach of a statutory bond by such tort as would warrant exemplary damages; 57 Ia. 486; 33 Ala. 235; *contra*, 20 S. C. 514; 84 Ill. 511.

Exemplary damages have been allowed, where one trespassed and cut timber from another's land; 18 Tex. 228; so where armed men broke into a store, carried off the stock, threatened the plaintiff's life, and injured his trade; 36 Mo. 226; in actions for malicious prosecution, when bad faith was shown; 39 Barb. 253; for throwing vitriol in the plaintiff's eyes; 1 Mo. App. 484; for maliciouly setting fire to a person's woods, etc.; 84 Ill. 70; against an innkeeper for wrongfully turning a guest out of the inn; 22 Minn. 90; where a newspaper was informed of the falsity of a libellous article before publication; 94 Mich. 114; where a libel was recklessly or carelessly published, as well as one prompted by personal ill will; 66 Hun 626; for an assault and false imprisonment, against the liberty of a subject; 2 Wils. 205; for wilful trespass on land with intemperate behavior; 5 Taunt. 422; for seduction; 3 Wils. 18; adultery with the plaintiff's wife; 50 Pa. 359; 39 Ia. 478; 66 Ill. 206; perhaps for gross defamation; Poll. Torts 182; for negligently pulling down buildings, to an adjacent owner's injury, the defendant's conduct showing a contempt of the plaintiff's rights; 6 H. & N. 54; for injuries which are the result of negligence and accompanied with expressions of insolence; *id.* 58; where a passenger was improperly required to leave a street car in obedience to an order of a policeman called by the conductor to remove him; 166 Pa. 4; but not against a physician for malpractice unless gross negligence is proved; 13 Ia. 128; nor against a railway company, which, by reason of defective equipment, failed to return a passenger, with a return ticket, to his starting point; 115 N. C. 602, disapproving 108 *id.* 414.

Exemplary damages for personal injuries are recoverable only for negligence of a gross and flagrant character, evincing a reckless disregard of human life and safety; 30 Fla. 1.

It does not prevent a recovery, that the defendant is criminally liable for his wrongful act, and that he has been criminally punished for it; 45 Vt. 289; 64 *id.* 593; 10 Ohio St. 277; 41 Ia. 686; 151 Pa. 634; *contra*, 53 N. H. 342; 4 Cush. 273; 20 Ind. 190; 73 Ill. 63; but see 56 N. H. 456.

A master may be liable in exemplary damages for his servant's wanton act within the scope of his business; 114 Mass. 518; 37 S. C. 377. Wherever the servant would be liable in exemplary damages for an act, the master would be so liable for the same act, if done by the servant within the scope of his employment; 57 Me. 202; 36 Miss. 660; the same rule applies to corporations and their servants; Moraw. Priv. Corp. 728; 38 Ind. 116; s. c. 10 Am. Rep. 103; 48 N. H. 305. A distinction is made in New York, that the master is liable only when he also has been guilty of misconduct, as by the improper employment or retention of the servant, or by the nature of the orders given him; 56 N. Y. 44. See 6 T. & C. 409. The master would not be liable if the servant acted from an innocent motive and in the supposed discharge of his duty; 1 Misc. Rep. 368.

Exemplary damages must be given as a part of the verdict, and not as a separate finding; 56 N. H. 456; but see 38 Wis. 194; and only in cases where there has been *some* actual damage; 70 Ill. 28, 496. The jury may consider the defendant's pecuniary condition; 71 Ill. 562; Bull. N. P. 27; Wood's Mayne, Dam. 64; 34 Ia. 348; 48 Mo. 152. See Hale, Dam. ch. 7; 1 Sedg. Meas. Dam. ch. 11.

**Special Damages.** The damages recoverable for the actual injury incurred through the peculiar circumstances of the individual case, above and beyond those presumed by law from the general nature of the wrong.

These damages must be specially averred in the declaration, or they cannot be recovered; while damages implied by law are recoverable without any such special averment. Thus, in the case of an action for libel, the law presumes an injury as necessarily involved in the loss of reputation, and will award damages therefor without any distinct averment. But if there was any peculiar loss suffered in the individual case, as the plaintiff's marriage prevented or the plaintiff's business diminished, etc., this must be especially averred; Chit. Pl. 410; 4 Den. 319; 2 Johns. 149. When they are the natural and proximate result of the

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act or default they are general and are legally imported, otherwise they are special and must be pleaded; Sedg. Meas. Dam. § 1262; in equity as well as at law; 69 Ala. 343. *A fortiori* where the special damage is essential to support the action; 22 Pa. 471; 12 Mass. 398; Sedg. Meas. Dam. § 1262, note *b*, citing many cases.

**Double or Treble Damages.** In some actions statutes give double or treble damages; and they have been liberally construed to mean actually treble damages. In these cases the jury find such damages as they think proper, and the court enhances them in their judgment; Brooke, Abr. *Damages*, pl. 70: Co. 2d Inst. 416; 1 Wils. 426; 1 Mass. 155. For example, if the jury give twenty dollars damages for a forcible entry the court will award forty dollars more, so as to make the total amount of damages sixty dollars; 4 B. & C. 154; M'Clel. 567. The statute must be pleaded; 79 Ky. 48. As to the rule in patent cases, see PATENT.

The construction of the words *treble damages* is different from that which has been put on the words *treble costs;* in the case of damages they are actually doubled or trebled, while double or treble costs are assessed. See 6 S. & R. 288; 1 Browne, Pa. 9; 1 Cow. 160, 175, 584; 8 *id.* 115.

Single damages may be recovered if the claim under the statute is not made out; 36 Mich. 246.

**MECHANIC.** Any skilled worker with tools; a workman who shapes and applies material in the construction of houses; one actually engaged with his own hands in constructive work. 43 La. Ann. 1180. See 11 Lea 517; 13 Pa. 525. It has been held that a painter is not a mechanic; 107 Mich. 270; and that a printer is one; 53 Ia. 474. A dentist is a mechanic in Michigan; 17 Mich. 332; but not in Mississippi; 31 Miss. 567.

**MECHANICAL PURSUIT.** One closely allied to or incidental to some kind of manufacturing business. 65 Minn. 263. Mining of iron is a mechanical business; *id.* A mechanic who contracts and shapes materials with his hands is engaged in such a pursuit, in the sense of a statute exempting such from taxation; 43 La. Ann. 1180.

**MECHANIC'S LIEN.** See LIEN.

**MEDALS.** The word medals in a bequest will pass curious pieces of current coin kept by the testator with his medals. 3 Atk. 202; Wms. Ex. 1205.

**MEDIA ANNATA. In Spanish Law.** Profits of land received every six months. 5 Tex. 79.

**MEDIATE POWERS.** Those incident to primary powers, given by a principal to his agent. For example: the general authority given to collect, receive, and pay debts due by or to the principal is a primary power. In order to accomplish this, it is frequently required to settle amounts, adjust disputed claims, resist those which are unjust, and answer and defend suits; these subordinate powers are sometimes called mediate powers. Story, Ag. § 58. See 1 Campb. 43, note; 4 *id.* 163; 6 S. & R. 149.

**MEDIATION. In International Law.** States which are at war may accept an offer from a third power, or extend an offer to a third power, friendly to both, to mediate in their quarrel. But unless acceptable to both sides, any such interference amounts to intervention (*q. v.*), and possibly an act of war. Risley, Law of War 50.

It differs from intervention in being purely a friendly act. In the Middle Ages and down to the present time the Pope has been a frequent mediator. Mediation must be distinguished from *good offices.* The demand of good offices or their acceptance does not confer any right of mediation; 8 Encyc. Laws of Eng. 303.

"A mediator is a common friend who counsels both parties with a weight proportionate to their belief in his integrity and their respect for his power, but he is not an arbitrator, to whose decisions they submit their differences and whose award is binding upon them." *Id.*, quoting Sir James Mackintosh.

**MEDIATORS OF QUESTIONS.** Six persons authorized, under statute in the reign of Edw. III., to certify and settle, before the mayor and officers of the staple, questions arising among merchants, relating to the wool trade. Toml. *Staple.*

**MEDICAL ATTENDANCE.** See MEDICINE.

**MEDICAL EVIDENCE.** Testimony given by physicians or surgeons in their professional capacity as experts, or derived from the statements of writers of medical or surgical works.

This kind of evidence was first recognized by Charles V. of Germany, and incorporated in the "Caroline Code," framed at Ratisbon in 1532, wherein it was ordained that the opinion of medical men—at first surgeons only—should be received in cases of death by violent or unnatural means, when suspicion existed of a criminal agency. The publication of this code encouraged the members of the medical profession to renewed activity, tending greatly to advance their science and the cause of justice generally. Many books soon appeared on the subject of medical jurisprudence, and the importance of medical evidence was more fully understood. Elwell, Malp. & Med. Ev. 285.

The evidence of the medical witness is strictly that of an expert; Elwell, Malp. & Med. Ev. 275; 10 How. Pr. 289; 2 Conn. 514; 1 Chandl. Wis. 178; 2 Ohio 452; 27 N. H. 157; 17 Wend. 136; 7 Cush. 219; 1 Phill. Ev. 780; 1 Whart. Ev. § 441.

In the case of Rogers, 7 Metc. 505, Shaw, C. J., presiding, the court held that the proper question to be put to the professional witness was: "If the symptoms and indications testified to by other witnesses are proved, and if the jury are satisfied of the truth of them, whether in his [the witness's] opinion the party was insane, and what the nature and character of that insanity; and what state did they indicate, and what he would expect would be the conduct of such a person in any supposed circumstance." Under this ruling the medical witness passes upon the condition of the person whose

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condition is at issue. To do it correctly he must hear all the evidence that the jury hears; he must judge as to the relevance of the evidence of others, and make an application of the facts that legally and properly bear upon the case to it, and reject all others; in short, he is judge and jury in the case. Since the trial of Rogers, a different rule has been adopted by the courts in Massachusetts. In the case of the United States *v.* McGlue, reported in 1 Curt., Mr. Justice Curtis instructed the jury that medical experts "were not allowed to give opinions in the case."

See Elwell, Malp. & Med. Ev. 311; Tayl. Med. Jur. 61; EXPERTS; HYPOTHETICAL QUESTION; CONFIDENTIAL COMMUNICATION; PRIVILEGED COMMUNICATION; OPINION; PHYSICIAN.

**MEDICAL JURISPRUDENCE.** That science which applies the principles and practice of medicine to the elucidation and settlement of doubtful questions which arise in courts of law.

These questions are properly embraced in five different classes:—

The *first* includes questions arising out of the relations of sex: as, impotence and sterility, hermaphroditism, rape, pregnancy, legitimacy, delivery.

The *second*, injuries inflicted upon the living organization: as, infanticide, wounds, poisons. persons found dead.

The *third*, those arising out of disqualifying diseases: as, the different forms of mental alienation.

The *fourth*, those arising out of deceptive practice; as, feigned diseases.

The *fifth* is made up of miscellaneous questions: as, age, identity, presumption of seniorship, life assurance, and medical evidence.

See the several titles.

**MEDICINE.** The practice of medicine includes the application and use of medicines and drugs for the purpose of curing, mitigating, or alleviating bodily diseases, while the practice of surgery is limited to manual operations usually performed by surgical instruments or appliances. 24 Hun 633.

The primary meaning of the terms medical attendance or medical services is the rendering of professional medical services.

See DRUGGIST; DRUGS; PHYSICIAN.

**MEDICO-LEGAL.** Relating to the law concerning medical questions.

**MEDIETAS LINGUÆ** (Lat. half tongue). A term denoting that a jury is to be composed of persons one-half of whom speak the English and one-half a foreign language. See JURY.

**MEDIO ACQUIETANDO.** A judicial writ to distrain a lord for the acquitting of a mesne lord from a rent, which he had acknowledged in court not to belong to him. Reg. Jur. 129.

**MEDITATIO FUGÆ. In Scotch Law.** If a creditor apprehends that his debtor is about to fly the country, he may appear before a judge and swear that he believes his debtor to be *in meditatione fugæ*, when a warrant imprisoning him will be granted, which, however, is taken off on the debtor's finding *caution*, *i. e.* surety. Bell; Moz. & W.

**MEDITERRANEAN PASSPORT.** A pass issued by the admiralty of Great Britain under various treaties with the Barbary States in the eighteenth century. They were granted to British built ships and were respected by the Barbary pirates. See 2 Halleck, Int. L., Baker's ed. 100. They were also issued by the United States. The term is still retained in R. S. § 4191 (act of Mar. 2, 1803).

**MEDLEY.** An affray; a sudden or casual fighting; a hand-to-hand battle; a mêlée.

**MEDSCEAT.** A bribe; hush money. Anc. Inst. Eug.

**MEETING.** A number of people having a common duty or function, who have come together for any legal purpose, or the transaction of business of a common interest; an assembly. One person does not constitute a meeting. 2 Q. B. Div. 26.

An assemblage of the creditors of an insolvent or bankrupt duly summoned in accordance with the statute under which the case is proceeding is known as a creditors' meeting, and under such statutes certain powers are usually devolved upon it by law with respect to the management of the estate and the discharge of the debtor.

In the law of corporations the term applies to every duly convened assembly either of stockholders, or of directors, managers, etc.

A distinction is made between general stated meetings of a corporation and special meetings. The former occur at stated times usually fixed by the constitution and by-laws; the latter are called for special purposes or business. Generally speaking, every member of a corporation has a right to be present at every meeting thereof, and to be notified of the meeting, in some way; 22 N. Y. 128; 2 H. L. C. 789. In the absence of a by-law or a custom to the contrary, at least one full day's notice must be given of a directors' meeting of a corporation; 173 Pa. 30. An omission to give the required notice will generally, though it be accidental, invalidate the proceedings; 7 B. & C. 695; see 55 Ark. 473; but it will not, where the action taken thereat is duly ratified at a subsequent meeting; 35 Fed. Rep. 161. When all who are entitled to be present at a meeting are present, whether notice has been given or not, and no objection is made on account of the want of formalities, there is a waiver of the want of notice; 11 Wend. 604; 7 Ind. 647; 53 Minn. 381; but if any one member is absent or refuses to give his consent, the proceedings are invalidated; 14 Gray 440. Notice should be personal; 7 Conn. 214; in writing, and signed by the proper person; 23 N. J. Eq. 216; should state the time and place of meeting, and, if a special meeting, the business to be transacted; 14 Gray

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440; L. R. 2 Ch. 191. Ordinarily, notice of stated meetings is not required; 22 N. Y. 128. A general notice, not specifying the business to be transacted, is all that is necessary to authorize the transaction of the ordinary business affairs of the corporation; 138 N. Y. 557.

All proceedings carried on by the members of a corporation, while sitting outside of the state which created it, are void; 45 Ga. 34; 38 Me. 343; 19 So. Rep. (Fla.) 172; 148 Mass. 249; 64 Md. 85; but this rule does not apply to the meetings of the directors of a corporation; Moraw. Priv. Corp. § 533; 27 Ohio St. 343; 63 Barb. 415; and a corporation created by the laws of two states may hold its meetings and transact its business in either state; 31 Ohio St. 317. See Blackwell, Meetings; 2 Weimer, Corp. Law, App., for an interesting paper on corporate meetings, by Hon. George M. Dallas; FAMILY MEETINGS; DIRECTORS; STOCKHOLDERS; INSOLVENCY; PROXY; MAJORITY; QUORUM; MINUTES.

**MELANCHOLIA. In Medical Jurisprudence.** A name given by the ancients to a species of partial intellectual mania, now more generally known by the name of *monomania*. It bore this name because it was supposed to be always attended by dejection of mind and gloomy ideas. See MANIA.

**MELDFEOH.** A recompense given to a person who made discovery of any breach of penal laws committed by another person.

**MELIORATIONS. In Scotch Law.** Improvements of an estate, other than mere repairs; betterments. 1 Bell, Com. 73.

**MELIUS INQUIRENDUM VEL INQUIRENDO. In Old English Practice.** A writ which in certain cases issued after an imperfect inquisition returned on a *capias utligatum* in outlawry. This *melius inquirendum* commanded the sheriff to summon another inquest in order that the value, etc., of lands, etc., might be better or more correctly ascertained.

**MEMBER.** A limb of the body useful in self-defence. *Membrum est pars corporis habens destinatam operationem in corpore.* Co. Litt. 126 *a*.

An individual who belongs to a firm, partnership, company, or corporation. A statutory provision that all the members of a company shall, in certain cases, be liable, is not confined to such as were members when the debts were contracted; 12 Metc. 3. See CORPORATION; PARTNERSHIP; JOINT STOCK COMPANY.

One who belongs to a legislative body, or other branch of the government; as, a member of the house of representatives; a member of the court.

A child living with the father does not necessarily cease to be a member of his family on reaching his majority; 79 Ill. 584.

**MEMBER OF CONGRESS.** A member of the senate or house of representatives of the United States.

**MEMBERS. In English Law.** Places where a custom-house has been kept of old time, with officers or deputies in attendance; and they are lawful places of exportation or importation. 1 Chitty, Com. Law, 726.

**MEMBERS OF PARLIAMENT.** See HOUSE OF COMMONS; HOUSE OF LORDS; PARLIAMENT.

**MEMBRANA** (Lat.). **In Civil and Old English Law.** Parchment; a skin of parchment. Vocab. Jur. Utr.; Du Cange. The English rolls were composed of several skins, sometimes as many as forty-seven. Hale, Hist. Comm. Law 17.

**MEMOIRE. In French Law.** A document in the form of a petition by which appeals to the court of cassation are initiated.

**MEMORANDUM** (Lat. from *memorare*, to remember). An informal instrument recording some fact or agreement: so called from its beginning, when it was made in Latin. It is sometimes commenced with this word though written in English: as, "Memorandum, that it is agreed;" or it is headed with the words, Be it remembered that, etc. The term memorandum is also applied to the cause of an instrument.

A note to help the memory. 33 Conn. 517. A letter may be a memorandum. *Id.*

The word is also used in England to designate the objects for which a trading corporation is formed. The term prospectus is commonly used in the United States. See PROSPECTUS.

**In English Practice.** The commencement of a record in king's bench, now written in English, "Be it remembered," and which gives name to the whole clause.

It is only used in proceedings by bill, and not in proceedings by original, and was introduced to call attention to what was considered the bye-business of the court. 2 Tidd, Pract. 775. Memorandum is applied, also, to other forms and documents in English practice: *e. g. memorandum in error*, a document alleging error in fact and accompanied by an affidavit of such matter of fact. 15 & 16 Vict. c. 76, § 158. Kerr's Act. Law. Proceedings in error are now abolished in civil cases; Jud. Act, 1875. Also, a *memorandum of appearance*, etc., in the general sense of an informal instrument, recording some fact or agreement.

A *memorandum of association* is a document subscribed by seven or more persons for the purpose of forming themselves into an incorporated company, with or without limited liability. 3 Steph. Com. 20.

**In Contracts.** A writing required by the Statute of Frauds. See NOTE OR MEMORANDUM.

**In the Law of Evidence.** A witness may refresh his memory by referring to a written instrument, memorandum, or entry in a book, and may be compelled to do so,

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if the writing is in court; 20 Pick. 441; 11 S. C. 195; see 63 Hun 439; 31 Fla. 196; but the memorandum is not competent evidence to prove the facts stated, in itself; 96 Cal. 462; see 40 Minn. 325; nor is the memorandum admitted in evidence merely because the witness uses it to refresh his recollection; 130 U. S. 611. The writing need not be an original or made by the witness himself, provided, after inspecting it, he can speak from his own recollection, not relying wholly upon the writing; 10 N. H. 544; 14 Cent. L. J. 119; 10 N. C. 167; 39 Mich. 108; 87 Ga. 393; 33 Neb. 150; 53 Minn. 360. And a writing may be referred to by a witness, even if inadmissible as evidence itself; 8 East 273; 45 Ill. App. 368. A witness may refer to a writing which he remembers having seen before, and which he knew at that time to be correct, although he has no recollection of the facts contained therein; so, when he neither recognizes the writing nor remembers anything therein, but yet, knowing it to be genuine, his mind is so convinced, that he is enabled to swear to the fact, as where a banker's clerk is shown a bill of exchange with his own writing upon it; Whart. Ev. § 518; 1 Greenl. Ev. §§ 436–439. See 1 Houst. Cr. C. 476; 76 N. Y. 604; 18 Hun 443; 39 Mich. 405; 25 Minn. 160; 64 Vt. 511. The admission in evidence of a memorandum made by the witness is error if it does not appear that the witness could not have testified from memory; 47 Minn. 403. See 67 Hun 365.

A memorandum book, out of which some of the entries bearing on the cause of action have been torn after the action was commenced, is not admissible in evidence; 88 Va. 695. Memoranda, if admissible at all as independent evidence, cannot be admitted when it is not shown that they were made at the time of the transactions referred to, or why they were made; 151 U. S. 149.

A witness may refresh his memory by reference to a copy of a memorandum made by him, only where it is first shown that the copy is correct; 96 Ala. 363.

**In Insurance.** A clause in a policy limiting the liability of the insurer.

Policies of insurance on risks of transportation by water generally contain exceptions of all liability from loss on certain articles other than total, or for contributions for general average; and for liability for particular average on certain other articles supposed to be perishable or specially liable to damage, under specified rates on each, varying from three per cent. to twenty, and for any loss whatever under three or five per cent. Some seventy or eighty articles are subject to these exceptions of particular average in the divers forms of policy in use in different places; 1 Phill. Ins. § 54, n. These exceptions were formerly introduced under a "memorandum," or "N. B.," and hence have been called "memorandum articles," and the body of exceptions the "memorandum." The list of articles and rates of exceptions vary much in different places, and from time to time at the same place; 19 N. Y. 272.

The construction of these exceptions has been a pregnant subject in jurisprudence. 1 Stark. 436; 3 Campb. 429; 4 Maule & S. 503; 5 *id.* 47; 1 Ball & B. 358; 3 B. & Ad. 20; 5 *id.* 225; 4 B. & C. 736; 7 *id.* 219; 8 Bingh. 458; 16 E. L. & Eq. 461; 1 Bingh. N. C. 526; 2 *id.* 383; 3 *id.* 266; 3 Pick. 46; 5 Mart. La. N. S. 289; 2 Sumn. 366; 16 Me. 207; 31 *id.* 455; 1 Wheat. 219; 6 Mass. 465; 15 East 559; 9 Gill & J. 337; 7 Cra. 415; 8 *id.* 84; 1 Stor. 463; Stevens, Av. p. 214; Benecke, Av. by Phill. 402; 3 Conn. 357; 19 N. Y. 272; [1893] Prob. 209; *id.* 164.

**MEMORANDUM ARTICLES.** A term used to designate the articles of merchandise mentioned in the memorandum clause. See MEMORANDUM.

**MEMORANDUM CHECK.** It is not unusual among merchants, when one makes a temporary loan to another, to give the lender a check on a bank, with the express or implied agreement that it shall be redeemed by the maker himself, and that it shall not be presented at the bank for payment; such understanding being denoted by the word *memorandum* upon it. If passed to a third person, it will be valid in his hands like any other check; 4 Du. N. Y. 122; 11 Paige, Ch. 612; 12 Abb. Pr. N. S. 200. Being given by the maker to the payee rather as a memorandum of indebtedness than as a payment, between these parties it is considered as a due bill, or an I. O. U. It can be sued upon as a promissory note, without presentment to the bank, whereas the holder of a regular check must first demand its payment at bank, and be refused, before he can maintain an action against the drawer; Van Schaack, Bank Checks 184.

The fact that the word "memorandum" or an abbreviation of it is written on a check makes it a memorandum check, but the bank is not bound to pay any attention to these words, and if such a check is presented for payment and the drawer has sufficient funds to meet it the bank must honor it like any ordinary check; Norton, Bills and Notes 383. If the agreement between the maker and payee is that it shall not be presented for payment, any remedy of the drawer for the breach of such agreement is solely against the payee; Morse, Banks 313. Such a check has all the features of a negotiable instrument in the hands of a *bona fide* holder for value; *id.* See CHECK.

**MEMORANDUM CLAUSE.** A clause inserted in a marine insurance policy to prevent the underwriters from being liable for injury to goods of a peculiarly perishable nature, and for minor damages. Maude & P. Shipp. 371. See MEMORANDUM.

**MEMORANDUM IN ERROR.** A document alleging error in fact, accompanied by an affidavit of such matter of fact. 15 & 16 Vict. c. 76, s. 158.

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**MEMORIAL.** A petition or representation made by one or more individuals to a legislative or other body. When such instrument is addressed to a court, it is called a petition.

**MEMORIZATION.** No action will lie for pirating a play by means of *memorization* alone; 5 Term 245; see 14 Am. L. Reg. N. S. 207, where the subject is discussed in a note by Mr. J. A. Morgan.

**MEMORY.** Understanding; a capacity to make contracts, a will, or to commit a crime, so far as intention is necessary.

Memory is sometimes employed to express the capacity of the understanding, and sometimes its power; when we speak of a retentive memory, we use it in the former sense; when of a ready memory, in the latter. Shelford, Lun. Intr. 29, 30.

The reputation, good or bad, which a man leaves at his death.

This memory, when good, is highly prized by the relations of the deceased; and it is therefore libellous to throw a shade over the memory of the dead, when the writing has a tendency to create a breach of the peace, by inciting the friends and relations of the deceased to avenge the insult offered to the family. 4 Term 126; 5 Co. 125; Hawkins, Pl. Cr. b. 1, c. 73, s. 1. See LIBEL; PRIVACY.

As to witness refreshing his memory, see MEMORANDUM.

**MEMORY, TIME OF.** According to the English common law, which has been altered by 2 & 3 Will. IV. c. 71, the time of memory commenced from the reign of Richard the First, A. D. 1189. 2 Bla. Com. 31.

But proof of a regular usage for twenty years, not explained or contradicted, is evidence upon which many public and private rights are held, and sufficient for a jury in finding the existence of an immemorial custom or prescription; 2 Saund. 175 *a*, *d*; Peake, Ev. 336; 2 Price, Exch. 450; 4 *id.* 198.

**MEN OF STRAW.** Men who used in former days to ply about courts of law, so called from their manner of making known their occupation (*i. e.* by a straw in one of their shoes), recognized by the name of *straw-shoes*. An advocate or lawyer who wanted a convenient witness, knew by these signs where to find one, and the colloquy between the parties was brief. "Don't you remember?" said the advocate (the party looked at the fee and gave no sign; but the fee increased, and the powers of memory increased with it)—"To be sure I do." "Then come into court and swear it." And straw-shoes went into court and swore it. Athens abounded in straw-shoes. 13 L. Quart. Rev. 344.

**MENACE.** A threat; a declaration of an intention to cause evil to happen to another. The word menace is not restricted to threats of violence to person and property nor to threats of accusing a person of crime; it includes a threat to accuse one of immoral conduct; [1895] 1 Q. B. 706.

When menaces to do an injury to another have been made, the party making them may, in general, be held to bail to keep the peace; and when followed by any inconvenience or loss, the injured party has a civil action against the wrong-doer. Webb, Poll. Torts 210. Comyns, Dig. *Battery* (D); Viner, Abr.; Bacon, Abr. *Assault*; Co. Litt. 161 *a*, 162 *b*, 253 *b*; 2 Lutw. 1428. See THREAT.

**MENIAL.** Pertaining to servants or domestic service; servile. This term is applied to servants who live under their master's roof. See stat. 2 Hen. IV. c. 21; 1 Bla. Com. 425. It has been held not applicable to a housekeeper in a large hotel; I. R. 10 C. L. 188.

**MENS REA.** A term meaning a guilty intent and commonly used only in connection with the maxim, *actus non facit reum, nisi mens sit rea.*

The use of the term and the maxim has been criticised. "Though the phrase is in common use, I think it most unfortunate . . . and actually misleading. . . . It naturally suggests that, apart from all particular definitions of crimes, such a thing exists as a 'mens rea' or 'guilty mind,' which is always expressly or by implication involved in every definition. This is obviously not the case, for the mental elements of different crimes differ widely. 'Mens rea' means, in the case of murder, malice aforethought; in the case of theft an intention to steal. . . . In some cases it denotes mere inattention. For instance, in the case of manslaughter by negligence it may mean forgetting to notice a signal. It appears confusing to call dissimilar states of mind by one name. . . . To an unlegal mind, it suggests that, by the law of England, no act is a crime which is done from laudable motives; in other words, that immorality is essential to crime." Stephen, J., in L. R. 23 Q. B. D. 186.

The maxim about "mens rea" means no more than that the definition of all, or nearly all, crimes contains not only an outward and visible element, but a mental element, varying according to the different nature of different crimes. To comprehend "mens rea" we must have a detailed examination of the definitions of particular crimes, and therefore the expression is unmeaning. 2 Steph. Hist. Cr. L. 95.

In offences against the acts relating to adulterating food, etc., the defence of *mens rea* is not good unless the acts use the word "wilfully"; [1896] 1 Q. B. 65.

See 13 Cr. L. Mag. 831; 1 Bish. New Cr. L. §§ 287, 288, 308 *a*; 8 Eng. Rul. Cas. 16; IGNORANCE; MOTIVE.

**MENSA** (Lat.). An obsolete term, comprehending all goods and necessaries for livelihoods.

**MENSA ET THORO.** See DIVORCE; A MENSA ET THORO.

**MENSURA DOMINI REGIS.** The measure of our lord the king, being the weights and measures established under King Richard I. in his parliament at Westminster, 1197. 1 Bla. Com. 275; Moz. & W.

**MENTAL INCAPACITY.** See DELIRIUM; DELUSION; DEMENTIA; IDIOCY; IMBECILITY; INSANITY; MANIA.

**MENTAL RESERVATION.** A silent exception to the general words of a promise or agreement not expressed, on account of a general understanding on the subject. But the word has been applied to

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an exception existing in the mind of the one party only, and has been degraded to signify a dishonest excuse for evading or infringing a promise. Wharton.

**MENTAL SUFFERING.** Where mental suffering is the natural and proximate result of a tort or of a breach of contract it is a proper subject of compensation, but standing alone it will not support an action of which actual damages is the basis; Hale, Dam. §§ 39, 40.

It was the common-law rule that mental suffering unconnected with physical injury or other element of damage to person or property, is not a cause of action for which damages may be recovered; 68 Miss. 748; L. R. 10 Q. B. 122; 9 H. L. Cas. 577; 13 App. Div. N. Y. 253; 116 Mo. 34; 61 Mo. App. 586; 48 La. Ann. 1431; 85 Ill. 331; 27 Kan. 544; 6 Nev. 224; 18 R. I. 791; 3 Dak. 315; 32 Fla. 434.

This continues to be the prevailing rule with respect to all actions upon contracts of which the consideration is something having a specific value in money. In such cases mental suffering is treated as not being within the limitations of the doctrine of proximate cause and natural consequence as settled in Hadley *v.* Baxendale, 9 Excheq. 341; 6 Tex. Civ. App. 755; 2 *id.* 322; 107 N. C. 449. A line of cases *contra* is based upon a decision in 55 Tex. 308, which has been followed in several states; 89 Ala. 510; 111 *id.* 135; 86 Tenn. 695; 123 Ind. 294; 97 Tenn. 638; 77 Ia. 54; 71 Mo. 66; 11 Tex. Civ. App. 699; but the doctrine of these cases has been the subject of severe criticism. In 68 Miss. 748, Cooper, J., said:

"The rapid multiplication of cases of this character in the state of Texas, since the case of *So Relle*, indicates to some extent the field of speculative litigation opened up by that decision . . . Kentucky, Tennessee, Indiana, and Alabama have but recently established the rule, the dangers and difficulties of which are becoming apparent in Texas, the intolerable litigation invited and appearing in Texas has not yet fairly commenced in those states. It will, however, appear in due time, and the courts will be forced to resort to refined limitations, as Texas has done, to restrict it We prefer the safety afforded by the conservatism of the old law, as we understand it to be, and are of the opinion that no recovery for mental suffering can be had in this case."

The federal courts uniformly deny the right to recover damages in such cases: 44 Fed. Rep. 554; 54 *id.* 634; 55 *id.* 603; 59 *id.* 433; 57 *id.* 471. In the case last cited Pardee, J., after discussing the authorities, said:

"The general rule that mental anguish and sufferings, unattended by any injury to the person, resulting from simple actionable negligence, cannot be sufficient basis for an action for the recovery of damages, is maintained and supported by an unbroken line of English authorities, by the conceded state of the general law prior to the *So Relle Case*, 55 Texas, 308 (1881), and by the uniform decisions of the federal courts and decisions of the supreme courts of Nevada, Dakota, Kansas, Maine, Mississippi, Georgia, Massachusetts, and by the opinions of several text writers of unquestioned standing as expounders of the law."

In the latest federal case the mental suffering complained of was held on demurrer not to be the proximate cause of the injury, and this was said to render it unnecessary to pass upon the question whether it "is in California under any circumstances, a proper element of damages;" 73 Fed. Rep. 273.

It was early settled that substantial damages might be recovered in a class of actions of tort where the only injury suffered is mental, such as cases:—of assault without physical contact; 3 C. & P. 373; 57 Me. 202; 5 Md. 450; 45 Vt. 476; for false imprisonment, where the plaintiff has not been touched by the defendant; 6 C. & P. 774; 4 Bing. N. C. 212; 33 Ill. 473; for the mutilation of a husband's body by dissection; 47 Minn. 307; for wrongful or wanton removal of a child's body from a burial lot; 99 Mass. 281; for wrongful ejection from a train; 77 Ia. 54; for slander and libel; 17 N. Y. 54; for malicious prosecution; 49 Ind. 341; where a conductor kissed a woman passenger against her will; 36 Wis. 657. So also in cases upon contracts, of which the consideration is not pecuniary in its nature, mental suffering has been treated as a proper basis for damages. Exceptions to the general rule upon this footing are, breach of promise of marriage; 102 Mass. 395; 96 Mo. 424; 47 Cal. 194; 33 Md. 288; breach of an undertaker's contract to keep safely the body of a child; 125 Ind. 536; and so also in case of an action by a wife against a railroad company for negligence in transporting her husband's body; 82 Tex. 33; and by one arrested for failure to appear as a witness by reason of negligence of a policeman in signing in blank a warrant of arrest containing a false recital of service of subpœna on the witness; 68 Conn. 392.

Mental suffering accompanying physical pain is a subject of compensation; 4 Q. B. Div. 406; 20 How. 34; 1 Sawy. 539; 39 Fed. Rep. 315; 63 Ala. 266; 76 Ga. 311; 86 Ky. 565; 73 Ia. 241; 99 Mass. 552; 62 Barb. 364; the two cannot be disassociated; 131 U. S. 22; 92 Ala. 210. So is fright caused by apprehension of physical harm; 79 Ala. 328; or nervous shock produced by a false report of a husband's injury; [1897] 2 Q. B. 57; 73 Ia. 241; but see 47 N. E. Rep. (Mass.) 88; so loss of peace of mind and happiness; 21 Ind. 164; sense of insult or indignity, mortification or wounded pride; 5 Sawy. 107; 9 *id.* 386; 48 Ark. 396; 79 Ala. 328; 79 Ga. 358; 112 Ill. 295; sense of shame and humiliation; 32 Fed. Rep. 66; 131 Mass. 574; 119 Ind. 13; 72 Mo. 407; 36 Wis. 657.

Fright alone is not, in the absence of personal injury, a ground of recovery; 147 Pa. 40; 6 Nev. 224; 60 Fed. Rep. 557; 86 Tex. 402; 31 S. W. Rep. (Tex.) 1084; though it produced a miscarriage; 47 Hun 355; 151 N. Y. 107; *contra*, 60 Miss. 906; 36 Wis. 596; 76 Tex. 210. See, as to fright, 14 L. R. A. 666, n.

A nervous shock resulting in bodily illness, and caused by another's negligence, is too remote to enter into the measure of damages; 13 App. Cas. 222; but this point is said to be generally disapproved in Eng-

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land; Poll. Torts 49. Even in cases where mental suffering properly enters into the computation of damages, they are not allowed for such as result from mere disappointment; 8 U. S. App. 118; or apprehension of danger to one's family; 71 Me. 227; of the result of injury to a child from negligence; 8 Tex. Civ. App. 335; 18 R. I. 79.

See, generally, Sedgw. Dam. §§ 43–52; Hale, Dam. §§ 39, 40; Webb, Poll. Torts 54–57; 8 Eng. Rul. Cas. 405–419; MEASURE OF DAMAGES.

**MENU, LAWS OF.** Institutes of Hindu law, dating back probably three thousand years, though the Hindus believe they were promulgated "in the beginning of time, by Menu, son, or grandson, of Brahma, the first of created beings, and not the oldest only, but the holiest of legislators."

"Such rules of the system as relate to man in his social relations will be found singularly wise and just, and not a few of them embodying the substance of important rules, which regulate the complex system of business in our day." Our knowledge of these laws is derived chiefly from the translation of Sir William Jones, and a translation by A. L. Des Longchamps, 1833. See Maine's Anc. L.; 9 Am. Law Reg. o. s. 717; CODE.

**MERCANTILE AGENCY.** See COMMERCIAL AGENCY; PRIVILEGED COMMUNICATIONS; LIBEL.

**MERCANTILE LAW.** That branch of law which defines and enforces the rights, duties, and liabilities arising out of mercantile transactions and relations. As to the origin of this branch of law, see LAW MERCHANT; and for its various principles, consult the articles upon the various classes of commercial property, relations, and transactions.

**MERCANTILE LAW AMENDMENT ACTS.** The statutes 19 & 20 Vict. cc. 60 and 97, passed mainly for the purpose of assimilating the mercantile law of England, Scotland, and Ireland.

**MERCATUM** (Lat.). A market. Du Cange. A contract of sale. *Id.* Supplies for an army (*commeatus*). *Id.* See Bracton 56; Fleta, l. 4, c. 28, §§ 13, 14.

**MERCEN-LAGE.** The law of the Mercians. One of the three principal systems of laws which prevailed in England about the beginning of the eleventh century. It was observed in many of the midland counties, and those bordering on the principality of Wales. 1 Bla. Com. 65.

**MERCES** (Lat.). **In Civil Law.** Reward of labor in money or other things. As distinguished from *pensio*, it means the rent of farms (*prædia rustica*). Calvinus, Lex.

**MERCHANDISE** (Lat. *merx*). A term including all those things which merchants sell, either wholesale or retail: as, dry goods, hardware, groceries, drugs, etc. It is usually applied to personal chattels only, and to those which are not required for food or immediate support, but such as remain after having been used, or which are used only by a slow consumption. See Pardessus, n. 8; Dig. 13, 3, 1; 19, 4, 1; 50, 16, 66; 8 Pet. 277; 6 Wend. 335.

It may be and often is used as the synonym of "goods," "wares" and "commodities." If used in an insurance policy to describe the goods of a merchant it may very properly be limited to goods intended for sale. If used for the same purpose to describe the goods of a painter, it may be held to cover property intended for use, and not for sale; 84 Me. 524.

Mere evidences of value, as bank-bills, are not merchandise. "The fact that a thing is sometimes bought and sold does not make it merchandise." Story, J., 2 Stor. C. C. 10, 53, 54. See 2 Mass. 467; 20 Pick. 9; 3 Metc. Mass. 367; 2 Parsons, Contr. 331, note *w*.

"Goods, wares, merchandise," has been held to embrace animate, as well as inanimate, property, as oxen; 20 Mich. 353; or horses; 22 Vt. 655. "Merchandise" may include a curricle; Anth. N. P. 157; or shares in a joint-stock company; 60 Me. 430; 2 Mo. App. 51; or horses and trucks; 26 Fed. Rep. 766. See STACK.

**MERCHANT** (Lat. *mercator*, *merx*). A man who traffics or carries on trade with foreign countries, or who exports and imports goods and sells them by wholesale. Webster, Dict.; Lex Mercatoria 23. These are known by the name of shipping-merchants. See Comyns, Dig. *Merchant* (A); Dy. 279 *b*; Bacon, Abr. *Merchant*.

One whose business it is to buy and sell merchandise: this applies to all persons who habitually trade in merchandise. 1 W. & S. 469; 2 Salk. 445.

One who is engaged in the purchase and sale of goods; a trafficker; a trader. 4 Co. Ct. Rep. (Pa.) 378.

Merchants, in the statute of limitations, means not merely those trading beyond sea, as formerly held; 1 Chanc. Cas. 152; 1 W. & S. 469; but whether it includes common retail tradesmen, *quære;* 1 Mod. 238; 4 Scott N. R. 819; 2 Parsons, Contr. 369, 370. See, also, 5 Cra. 15; 6 Pet. 151; 12 *id.* 300; 5 Mas. 505; 2 Duv. 107; 9 Bush 569.

The term has been held to include: an ice-dealer; 36 Mo. App. 584; a hotel-keeper; 12 Duv. 107; a banker; 34 La. Ann. 576; the keeper of a boarding stable; 17 Bankr. Rep. 73; and a saloon-keeper; *id.* 102; but not a brewer; L. R. 7 Ex. 127; a commercial traveller or drummer; 58 Miss. 478; 34 Kan. 434; the superintendent and treasurer of a steamboat corporation; 7 Fed. Rep. 853; a theatrical manager; 4 *id.* 519; or a speculator in stocks; 5 Ben. 315; 8 *id.* 563; L. R. 2 Ch. 466, 77 Me. 275; a farmer; 3 T. B. Monr. 330; a druggist; 9 Bush 569; or the principal of a boarding school who provides the students with clothes and books; 5 Humph. 394.

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According to an old authority, there were four species of merchants: namely, merchant adventurers, merchants dormant, merchant travellers, and merchant residents; 2 Brownl. 99. See, generally, 9 Salk. 445; Bacon, Abr.; Comyns, Dig.; 1 Bla. Com. 75, 260; 1 Pardessus, *Droit Comm.* n. 78; 2 Show. 326; Bracton 334.

**MERCHANT APPRAISERS.** Merchants selected, under the revenue laws, to appraise the value of imports, where the importer is dissatisfied with the official appraisement, and there is no appraiser appointed by law. The collector appoints two respectable resident merchants; R. S. § 2609.

**MERCHANT SHIPPING ACTS.** Certain English statutes, beginning with the 16 & 17 Vict. c. 131, whereby a general superintendence of merchant shipping is vested in the board of trade. Provisions are made for the registration, etc., of merchant ships, the discipline and protection of seamen, the regulation of pilotage, etc.

**MERCHANTABLE.** This word in a contract means, generally, vendible in market. Merchandise is vendible because of its fitness to serve its proper purpose; 11 Ct. Cl. 680; 34 Barb. 204, 206. See, generally, 74 Me. 475; 24 Wis. 340; 2 Q. B. Div. 102; 51 Vt. 480; 37 Ohio St. 236; 102 Mass. 365.

**MERCHANTMAN.** A ship or vessel employed in the merchant-service.

**MERCHANT VESSELS, IMMUNITIES OF.** In international law, a merchant vessel in a foreign port is subject to the jurisdiction of the foreign state. In France, however, it is held that acts and offences connected solely with the discipline of the ship are not subject to the local laws; Snow, Int. Law 36. See VESSEL.

**MERCHANTS' ACCOUNTS.** Accounts between merchant and merchant, which must be current, mutual, and unsettled, consisting of debts and credits for merchandise. 6 How. (Miss.) 328; 4 Cra. C. C. 696; 6 Pet. 151.

The statutes of limitation in most of the states contain an exception in favor of such accounts, following the stat. 21 Jac. I. c. 16, § 3, which, however, was repealed in England by 19 & 20 Vict. c. 97, § 9, and has not been retained in the latest revised acts of limitation in this country. Whether the exception applied to accounts in which there had been no item for six years, has been the subject of conflicting adjudication, but was settled affirmatively in England, in Robinson *v.* Alexander, 8 Bligh N. S. 352. See 8 M. & W. 781; 20 Johns. 576; 7 Cra. 350; 61 Ala. 41; 24 Minn. 17; 30 N. J. Eq. 254; Ang. Lim. ch. xv.

**MERCHET.** A fine or composition paid by inferior tenants to their lord for liberty to dispose of their daughters in marriage. Cow.

**MERCIMOMATUS ANGLIÆ.** The impost of England upon merchandise.

**MERCY** (Law Fr. *merci;* Lat. *misericordia*).

**In Practice.** The arbitrament of the king or judge in punishing offences not directly censured by law. 2 Hen. VI. c. 2; Jacob, Law Dict. So, to be in mercy, signifies to be liable to punishment at the discretion of the judge.

**In Criminal Law.** The total or partial remission of a punishment to which a convict is subject. When the whole punishment is remitted, it is called a pardon; when only a part of the punishment is remitted, it is frequently a conditional pardon; or, before sentence, it is called clemency or mercy. Rutherforth, Inst. 224; 1 Kent 265; 3 Story, Const. § 1488.

As to the construction of "mercy" in the exception to the Sunday laws in favor of deeds of necessity and mercy, see 2 Pars. Contr. 262, notes. See IN MERCY.

**MERE** (Fr.). Mother. This word is frequently used, as, *in ventre sa mère*, which signifies a child unborn, or in the womb.

**MERE MOTION.** See EX MERO MOTU.

**MERE RIGHT.** A right of property without possession. 2 Bla. Com. 197.

**MERE-STONE.** A stone for bounding land. Yearb. P. 18 Hen. VI. 5.

**MERETRICIOUS.** Pertaining to unlawful sexual relations. Anderson, L. Dict. When persons who are under legal disabilities wed it is called a meretricious union; 1 Bla. Com. 436.

**MERGER.** The absorption of a thing of lesser importance by a greater, whereby the lesser ceases to exist but the greater is not increased.

The annihilation of one estate and its absorption in another by act of law.

The extinction of a security for a debt by the creditor's acquisition either of a higher security, or of the *corpus* of the property upon which his debt is a lien or charge.

Merger is distinguished from surrender and extinguishment, though in its effects not unlike both. "Strictly speaking" it has been said that it "should be confined to the sinking of one estate in another, or, at most, it should embrace, in addition, the extinction of an incorporeal hereditament through the union of its ownership with that of the land, in, over, or upon which it is exercisable." Ordinarily, however, the Roman doctrine of *confusio*, which we call extinguishment of a charge or equity, is also denominated merger, and, being governed by the same rules, it is here, and indeed generally, discussed under that title. See 3 Sharsw. & B. L. Cas. R. P. 228.

**Of Estates.** When a greater estate and less coincide and meet in one and the

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same person, without any intermediate estate, the less is immediately merged, that is, sunk or drowned, in the latter; but they must be in one and the same person, at one and the same time, in one and the same right; 2 Bla. Com., Sharsw. ed. 177, and note 16; Latch 153; Poph. 166; 6 Madd. 119; 1 Johns. Ch. 417; 3 *id.* 53; 3 Mass. 172; 32 Gratt. 305; 6 Conn. 373; 11 Ind. 351; 15 Barb. 14. But see 3 Prest. Conv. 277. See, also, 139 Pa. 309; 5 L. R. A. 721.

The estate in which the merger takes place is not enlarged by the accession of the preceding estate; and the greater or only subsisting estate continues, after the merger, precisely of the same quantity and extent of ownership as it was before the accession of the estate which is merged, and the lesser estate is extinguished; Prest. Conv. 7; Wash. R. P. As a general rule, equal estates will not merge in each other.

The merger is produced either from the meeting of an estate of higher degree with an estate of inferior degree or from the meeting of the particular estate and the immediate reversion in the same person; 4 Kent 98. See Wash. R. P. Index; 3 Prest. Conv.; 15 Viner, Abr. 361; 10 Vt. 293; 8 Watts 146.

A merger takes place only when the whole title, equitable as well as legal, unites in the same person; 74 Me. 362.

Merger is held to have taken place in the following cases: An antecedent life estate purchased by the owner of a consequent life estate limited on the former; 6 S. E. Rep. (S. C.) 305; life estate of the husband in the fee of the wife, both bought by the same person; 62 Conn. 143; life estate under a will, in remainder in fee, devolved upon the life-tenant by the death of her child, the tenant in remainder; 64 Conn. 344; where a tenant acquires the interest of the landlord, in which case the former cannot recover for breach of contract of the latter to repair; 105 Ala. 585; where the tenant for life acquires the fee; 6 Ohio Dec. 439; estate by the curtesy released to the owner of the fee; 179 Pa. 117. Where a lease for years and an equity of redemption come into the same hands, the legal estate may merge in the equitable, if the parties so intended; 41 S. W. Rep. (Mo.) 450; *contra*, 3 Cra. C. C. 416.

There has been held to be no merger in the following cases: where the tenant in tail acquires the reversion in fee; 2 Co. 61; 6 Conn. 373; a trust estate for life of testator's daughter, undisposed of after her death, in her fee by inheritance; 79 Hun 426; where the co-tenant for years is also the owner of the reversion, there is no merger so as to prevent a separate partition of the leasehold interest; 106 Cal. 682; where a landlord purchases improvements on property on which the lessee has forfeited his lease, it does not merge so as to entitle the holder of a mechanic's lien against the leasehold to enforce it against the fee; 10 Wash. 528; a conveyance in fee to husband and wife by entirety was held not to merge in an estate for life already vested in one of them; 4 Rich. Eq. 80; Co. Litt. 299 b; Litt. 525; *contra*, 2 Saund. 386 b. A life estate of the father by a conveyance to a trustee for ninety-nine years to secure payment of charges covenanted to be paid by the son, the succeeding tenant for life; 76 L. T. Rep. 489. Unassigned "dower" of husband in his wife's estate does not merge in the inheritance unless required for the promotion of justice; 6 Ohio Dec. 154.

Under the English judicature act of 1873, a life estate in possession conveyed to the next tenant for life in trust to pay a rent charge, and, subject thereto, to the use of the grantee in fee, does not merge the estate *per auter vie*, it being apparent that no merger was intended; [1892] 3 Ch. 110. See 30 L. R. A. 313 n.

Merger is not favored in equity and is only allowed to promote the intention of parties or for other special reason; 80 Md. 115; 140 Ind. 321; 113 Pa. 6; 118 Ill. 682; 68 Ia. 512; 4 Kent 102; Boone, Mort. 141–143; 2 Pom. Eq. Jur. § 788; Jones, Mort. 870–873; the intention actual or presumed is the criterion; 18 Ves. 390; 40 W. R. 603; if no intention is expressed, equity will examine the circumstances and presume an intention in accordance with the advantage to the acquirer of the two estates; 32 Beav. 244; 18 Ves. 390; 19 R. I. 4, 268; and wherever the legal and equitable estates are united in one owner, so long as his interest requires severance, he will be regarded as holding the titles separately; Jones, Mort. § 873. See 5 Ch. D. 634. And equity will not permit a merger in the case of an easement as against the interest of a third party, with the interest of a mortgagee; 81 Md. 537.

One equity will not swallow up another, hence several equitable claims may be acquired by one person without merger, which will take place when the legal title is acquired because the reason for their existence is then terminated; 140 Ind. 321.

Merger will not be permitted, and it may be prevented, in equity, where it would operate to assist or accomplish the perpetration of a fraud; 158 Ill. 544; 2 Pom. Eq. Jur. § 794; and a merger brought about by a fraudulent deed is destroyed when the deed is set aside; 1 Wend. 478; 49 N. Y. 111; 84 Ind. 144.

In Louisiana one who has once acquired ownership of a thing by one title cannot afterwards acquire it by another title, unless it be to supply a deficiency in the first title; Civ. Code 495; and in other states there are statutes designed to prevent or modify the effects of merger upon third parties. They are collected in 1 Stims. Am. Stat. L. § 1403.

**Of Liens.** The merger of liens is subject to the rule of intention as well as such other general principles, already stated, as are applicable. And it is also to be noted that while separate reference is here made to some classes of liens, the same rules are in the main applicable to all, though usually, for the sake of brevity, only once mentioned.



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Generally where a lien holder acquires the legal title to the land subject to his lien, and there is no contrary intention expressed or implied, or other circumstance requiring it to be kept alive, the latter is merged; 119 Ill. 312; 69 Ia. 755; 110 N. Y. 33; and the merger cannot be prevented by an assignment of the incumbrance directly to the owner or for his benefit; 10 Allen 466; 13 Gray 360; 13 Cal. 526; 12 N. J. Eq. 515; 32 Md. 501.

Where a mortgagee acquires the legal title, merger will not be applied to defeat the priority of the lien; 104 Mich. 120; 141 Ind. 322. And a mortgage will be continued in favor of a mortgagee, although the parties undertook to discharge it, unless it would work injustice; 31 N. J. L. 325; 44 N. H. 619. There is a presumption that the mortgage was extinguished; 3 Johns. Ch. 393, Kent, C. Probably all that can be said is that it is not so as a matter of course; 62 Ia. 661; and that the rule of intent governs; 8 Pick. 475.

There is no merger where the mortgagee acquires an incomplete equitable title, or only to a portion of the land; 140 Ind. 321; or where he purchases the equity of redemption and by consent of the mortgagor retains the mortgage to cut out subsequent liens by foreclosure; 104 Mich. 120. A purchase by a partner of partnership land sold under a mortgage assumed by the firm operates to satisfy the mortgage; 119 Mo. 280.

A conveyance by a mortgagor to a mortgagee creates no merger as against the assignee of the mortgage; 10 Misc. Rep. 341; 152 N. Y. 159. Where municipal bonds in aid of a railway were disputed, sued upon, and a judgment entered pursuant to a written compromise, for less than the face of the bonds, the town's liability on the bonds was merged in the judgment; 69 Ala. 305.

See as to mortgages, Lawson, Rts. & Rem. §§ 3052–3; 3 Sharsw. & B. L. Cas. R. P. 245.

The question of merger is one which arises frequently, especially in England, with respect to charges. There is a presumption that when the ownership of the fee and of the charge meet, the latter is merged; 18 Ves. 390; if it is of no advantage to the owner to have it kept alive; 10 Hare 79; 29 Beav. 203; or unless he is a limited owner; 7 *id.* 232; if a charge is paid off by a limited owner, with no expression of intention, he retains the benefit of it against the inheritance; 5 Ch. D. 645; a tenant in tail is not excepted because it is in his power to become absolute owner; 2 S. & S. 345. It results from the rule of intention that in case of an infant tenant in tail there is no merger, as a person not *sui juris* is not presumed to intend it; 24 Beav. 457; 2 Cow. 246. See 32 Sol. Jr. 397, 418. A charge on land of a husband in favor of his wife and her heirs did not merge in the fee which she took by a devise from the husband, recognizing the charge, to her in trust for her son for life; 49 Hun 608; nor did one created by a testatrix in favor of her children on land devised to their father merge on the fee inherited by the children from the father; 19 R. I. 4.

A mechanic's lien is merged in a conveyance of the land to the lien holder; 31 S. W. Rep. (Tex.) 419; but not in a judgment for the debt; 5 Col. App. 335; 40 W. Va. 194; nor by purchase of the property under circumstances from which a contrary intention would be presumed; 160 Ill. 115. Such merger discharges a guarantor of the lien which it destroys; 97 Ia. 77; or a surety for its payment; 77 L. T. Rep. 168. A mechanic's lien assigned to one who took a mortgage on the property affected, the consideration of which was used in the purchase of the lien, did not merge, since it did not appear to be the intention of the parties or required by justice; 37 Neb. 207.

If two foreclosure decrees rendered in the same action on different obligations in favor of different persons, become the property of one person, neither will merge; 62 N. W. Rep. (Ia.) 662.

**Of Contracts.** Oral agreements, proposals, or negotiations by letter merge in a subsequent written contract respecting the same subject-matter; 36 U. S. App. 749; s. c. 74 Fed. Rep. 94; 38 *id.* 116; 97 Tenn. 469; 165 Ill. 95; 10 Wash. 339; 86 Hun 189; 93 Wis. 23; so a written option to sell land is merged in the subsequent contract of sale; 38 Pac. Rep. (Col.) 601; and the seller of chattels is not liable for any breach of warranties not contained in the written contract; 73 Fed. Rep. 994; but this rule does not apply to a collateral agreement upon which the instrument is silent, not affecting its terms; 117 Cal. 96. A bank check is a contract in the sense that it merges all previous transactions leading up to it: 47 Ia. 671; so is a note; 4 Pa. 317; a charter party; 12 N. Y. 561; a bond of one party to a joint contract debt; 7 Mo. 604.

Generally the provisions of a contract of sale are merged in a deed made in execution thereof; 80 Md. 495; but not so as to prevent the enforcement in equity of a clause in the contract not inserted in the deed; 133 Ill. 385; or where the contract is for the sale of two distinct properties and the conveyance only of one; 172 Pa. 331; 6 Ohio Dec. 273; see 74 Mich. 183; 44 *id.* 15; but the mere absence from the deed of a provision contained in a contract does not necessarily operate to continue the latter; 26 Can. S. C. 181. A covenant in the contract to deliver possession to the purchaser is not merged in the covenants of title of the deed; 84 Hun 430. A parol agreement between father and son that the latter shall have the property after his parents' death, in consideration of help in carrying on the farm, does not merge as to the undivided half part not conveyed by a subsequent conveyance from the father to the son of an undivided half part of the property made in contemplation of the re-marriage of the father; 69 Vt. 535.

A specialty taken for a simple contract debt merges it: 40 W. Va. 194. A new con-

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tract with respect to the subject-matter of a former one, and which appears to be supplementary, does not merge the former; 43 Neb. 584. A note is not merged in a judgment note taken as additional security; 91 Va. 446. See 7 Wait, Act. & Def. 320. As to merger of the original cause of action in a judgment recovered upon it, see JUDGMENT.

**In Criminal Law.** When a greater crime includes a lesser, the latter is merged in the former; 1 East, P. C. 411; 72 N. C. 447; 1 Bish. N. Cr. L. § 786; Cl. Cr. L. 35, 36; 109 Mass. 349; 7 Misc. Rep. 478. Murder, when committed by blows, necessarily includes an assault and battery; a battery, an assault; a burglary, when accompanied with a felonious taking of personal property, a larceny: in all these and similar cases, the lesser crime is merged in the greater.

Merger of crimes exists only when a misdemeanor is an ingredient of a felony; formerly there was a distinct merger and the trial must be for the felony, but this is so no longer, as a general rule; the misdemeanor and the felony must now be a constituent part of the same act in order that acquittal of the latter may be pleaded in bar of prosecution for the former; 1 Whart. Cr. L., 9th ed. §§ 270, 395; 1 Bish. N. Cr. L. §§ 804–14; the essential result is thus well expressed: "The *same act* cannot be punishable both as a felony and as a misdemeanor;" 1 McClain, Cr. L. § 22. In many, probably most, of the states, under an indictment for certain felonies, which include a misdemeanor, there may be conviction of the latter. "When two crimes are of equal grade there can be no technical merger;" as, in the case of a conspiracy to commit a misdemeanor, and the subsequent commission of the misdemeanor in pursuance of the conspiracy; the two crimes being of equal degree, there can be no legal merger; 4 Wend. 265; 26 N. J. L. 313; 29 *id.* 453; 48 Me. 218; 36 Ind. 280.

The most frequent application of the principle of merger of crimes is in the common law rule which was generally followed in this country (subject to the exception just stated) that a conspiracy to commit a felony is merged in the latter, if it be accomplished; 5 Mass. 106; 5 Am. St. Rep. 900, note; if the felony is not in fact committed, there is no merger, and there may be a conviction of the conspiracy; 28 N. Y. 177; but when the crime is a misdemeanor at common law and a felony by statute, there is still a merger; 4 Park. Cr. Cas. 206. A very late authority considers that "the weight of the more recent cases" is that the conspiracy is not merged even if the crime intended be a felony; 2 McClain, Cr. L. § 979; and this view is strongly supported; 42 Fed. Rep. 829; 64 Mich. 252; 30 Conn. 500; 86 Ia. 216; and is expressly held in England; 11 Q. B. 929; 12 Cox, C. C. 87.

It has been held that where one in an effort to commit a misdemeanor does some act which is itself a felony, he can be punished only for the latter; 2 Moo. & R. 469; 5 C. & P. 553; but in referring to a case which precisely illustrates this point, where one seeking to obtain goods by false pretences, which is a misdemeanor, commits a forgery, which is a felony, Lord Denman considered that an acquittal of the latter ought to be no bar to an indictment for the former; 11 Q. B. 946. See 6 Biss. 259.

**Of Rights.** Rights are said to be merged when the same person who is bound to pay is also entitled to receive. This is more properly called a confusion of rights, or extinguishment.

When there is a confusion of rights, and the debtor and creditor become the same person, as by marriage, there can be no right to put in execution; but there is an immediate merger; 2 Ves. 264.

**In Torts.** Where a person in committing a felony also commits a tort against a private person, in this case the wrong is sunk in the felony, at least until after the felon's conviction.

The old rule, that a trespass is merged in a felony, has sometimes been supposed to mean that there is no redress by civil action for an injury which amounts to a felony. But it is now established that the defendant is liable to the party injured either after his conviction; Latch 144; Noy 82; W. Jones 147; 1 Hale, Pl. Cr. 546; or acquittal; 12 East 409; 2 Hayw. 108. If the civil action be commenced before, the plaintiff will be non-suited; Yelv. 90 *a*, n. See Ham. N. P. 63; Kel. 48; Cas. *temp.* Hardw. 350; Lofft 88; 3 Me. 458. Buller, J., says this doctrine is not extended beyond actions of trespass or tort; 4 Term 333. See, also, 1 H. Blackst. 583, 588, 594; 15 Mass. 78, 336; 1 Gray 88, 100.

This doctrine doubtless had its origin in the English system of relying on private prosecutors and forfeiture of felons' goods; but it has been repudiated in this country, and the civil remedy and the criminal prosecution go side by side, and neither has any dependence upon the other; 28 Fla. 96; 19 Ohio St. 462; 1 Gray 83; 30 Miss. 492; 6 N. H. 454; 6 B. Monr. 38; 1 Tex. Civ. App. 409; 67 Hun 579. Even in England it is said that "so much doubt has been thrown upon the supposed rule in recent cases that it seems, if not altogether exploded, to be only awaiting a decisive abrogation." Poll. Torts 235.

See, generally, as to this common law doctrine in the United States; 1 Ala. 8; 35 *id.* 184; 15 Mass. 336; 22 Wend. 285; 1 Coxe 115; 1 Miles 312; 6 Rand. 223; 1 Const. S. C. 231; 3 Root 90; 3 Hawks, N. C. 251; 16 Ga. 203; 17 Ind. 105; 19 Greenl. 392; 6 Humph. 433; 8 Tex. 6; 10 Wheat. 473, 494; 1 Hill. Torts 61.

In some states, as New York, it is provided that the right of action of any person injured by any felony shall not, in any case, be merged in such felony, or be in any manner affected thereby.

**Of Corporations.** Actual corporate union is usually called consolidation in

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America and amalgamation in England. Railroad corporations are more commonly the subject of such consolidation.

Consolidation requires legislative authority or consent; 101 U. S. 71; 30 Pa. 44; 88 Tenn. 138; 16 Ind. 46. Statutes exist in most, if not all, of the states, for this purpose. Many of them are abstracted in 1 Thomp. Corp. § 305. The state has the same power to authorize a consolidation of two existing corporations as it has to authorize individuals to incorporate; 46 Mich. 224.

A permit given in a charter of a railroad company to connect or unite with other roads, refers merely to physical connection of the tracks and does not authorize the purchase or even the lease of such roads or any union of franchises; 161 U. S. 677.

Where the charters of the constituent companies or some statute to which the charters are subject do not provide otherwise, the consent of all stockholders is required; 53 Tex. 96; 4 Biss. 78; 54 Barb. 42; a state legislature cannot ordinarily compel a stockholder to transfer his stock because the majority have voted to consolidate; 1 Wall. 25; but it has been held that the legislature may, when public necessity requires it, grant authority to consolidate existing connected railways, if it provide just compensation for dissenting stockholders; 24 N. J. Eq. 455. Where statutes existed before a consolidating company was chartered, or one is passed which is binding upon it, provisions in such statutes authorizing consolidation by the vote of a certain proportion of stockholders are binding upon a dissenting minority; such statutes commonly provide for the purchase of dissenting stock by a sale or on an appraisement. If there be no such statute or charter provision, a stockholder is not bound to consent to consolidation, nor to surrender his interest in the original corporation; 1 Thomp. Corp. § 343.

Equity will enjoin a consolidation at the suit of a dissenting stockholder, in cases where he is not bound by the action of the majority; 4 Biss. 78; 29 Vt. 45; it has been held that an injunction will be continued only till the dissenting stockholder's interest has been secured; 30 Pa. 42; 16 Ind. 46, a dictum. These two cases are criticised in 4 Biss. 78, and their doctrine disapproved in 1 Thomp. Corp. § 351. A stockholder's subscription in case of such a consolidation is held to be released; 9 Ind. 58; 4 Biss. 78.

After consolidation has been effected and a *de facto* corporation formed, only the state can attack the charter; 36 Kan. 121; especially if the new company has acted as a corporation for a considerable time; 51 Kan. 617.

The legal effect of consolidation is to extinguish the constituent companies and create a new corporation, with all the property, liabilities, and stockholders of the old companies; 41 Ark. 509; 64 Ala. 603; 16 Ind. 46; 27 S. C. 385; 123 Ill. 467; and all their franchises, ordinarily; *id.* Consolidation is not sale, and when two companies are authorized to consolidate their roads, it is to be presumed that the franchises and privileges of each continue to exist in respect to the several roads so consolidated; 109 U. S. 106; 92 U. S. 677; the respective roads and properties of two railroad companies which have been consolidated, retain their respective *status* towards the public and the state; *id.* Some cases appear to hold that the old companies continue to exist. See 123 Ill. 467; 42 Mo. 63; 151 Mass. 302 (where the statute so required). It is said in a leading case that "consolidation" has not acquired a recognized judicial construction; it may mean a union by which the old companies cease to exist, or the absorption of one by the other, the former thus securing enlarged powers. Where a statute merely authorizes consolidation upon terms to be agreed upon by the companies, the character of the consolidation is determined by the agreement; 64 Ala. 603.

Where a railroad consolidated with a smaller road, it was held that the former preserved its legal, though not its actual, identity, and that the latter and all its members passed into the former and became members thereof; 30 Pa. 45. The old companies are not of necessity dissolved; it depends upon the language of the statute; 92 U. S. 665, 676.

Technically, the consolidated company is a new corporation, but as regards the business of the old companies and their respective creditors, it is a continuation of the old companies under a new name; 39 Mo. App. 574. The new company is bound to perform the duties of the old companies; 68 Ill. 489; it usually has the powers of both of its constituents; 21 Ill. 451. "As a general rule, the new company succeeds to the rights, duties, obligations, and liabilities of each of the precedent companies, whether arising *ex contractu* or *ex delicto*. The charter powers, privileges, and immunities of the corporations pass to and become vested in the consolidated company," unless otherwise provided by law; 1 Thomp. Corp. § 365. See 61 Mo. 176.

But it has been held that the powers, etc., of the new company are no greater than those of the constituent company having the fewest privileges; 66 Me. 48; a difficult rule to apply.

The new corporation as an incident of consolidation assumes the debts and liabilities of the constituent companies, and is not an innocent purchaser for value of the property of those companies so as to protect it from liability for taxation; 35 Fla. 625.

Where two roads are consolidated, one of them having a right to exemption from taxes, and the old company being extinguished, its right of exemption does not pass to the new company; 152 U. S. 301. The legislature cannot increase the taxes of the exempt company after consolidation, but may tax that of the other precedent company; and where a taxable corporation is merged into an exempt company, the

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property of the former is taxable; 92 U. S. 665; 117 U. S. 139. It is held that where an exempt company and a taxable company consolidate, the property of each will continue as it was before, in relation to taxation; 99 Mo. 30; 37 N. J. L. 240; 110 N. C. 137. As to betterments on a consolidated company, one of whose constituents was not taxable, see 92 U. S. 682.

Where two companies were exempt except on net earnings above ten per cent dividends and this was based upon conditions which could only be performed by the constituent companies while operating separate lines (keeping accounts and rendering certain reports to the state), and the new company mingled the assets and ran continuous trains over its lines and could not show the net profits of each road, it was held that the new company had no right to the former exemption; 96 U. S. 508.

Consolidation does not abate a suit pending against one of the companies; 106 Mo. 594; 2 Grant (Pa.) 348; 52 Miss. 159; *contra*, 40 Kan. 192; 40 Ga. 706. The new company may be substituted under the original process without the issue of process against it; 39 Mo. App. 382.

A railroad company is not relieved from liability on the mortgage bonds of a constituent company by consolidation; 21 N. Y. S. 702. A consolidated company may use a patent under which both of the precedent companies were licensed; 1 Low. 338; and may occupy the streets of a city, if the constituent companies had the power; 53 Fed. Rep. 715. It may sue shareholders of either old company for calls; 18 C. B. 14; 18 Ohio St. 223. Non-assenting subscribers to stock are not released; 25 Kan. 261; *contra*, 10 Ind. 93. A consolidated company is entitled to a donation made by a town to one of the companies; 5 Ill. App. 579; 94 Ind. 1; but see 69 Mo. 150. The title to lands conveyed to a constituent company vests in the consolidated company; 128 Ind. 266; 67 How. Pr. 439; and its mortgage, secured upon its consolidated property is paramount to the unsecured indebtedness of the constituent companies; 15 Fed. Rep. 763.

A consolidated company is liable for the debts of the constituent companies; 29 Ind. 465; and they can be enforced only against it; 56 Tex. 609; see 106 Mo. 594; even in the absence of an express declaration to that effect; 117 Ind. 501. It is held to be liable in equity for such debts at least to the value of property received; 13 Fed. Rep. 522; and the remedy at law is said to be complete; 81 Ill. 429. It is liable on a judgment against a constituent company; 43 Ill. 199. Bonds that had no lien before consolidation do not acquire a lien by consolidation; 114 U. S. 587; but see 45 Ohio St. 592. The liability of the new company extends to damages due by a constituent company to a riparian owner; 75 Ill. 524; and damages due by a constituent company for breaking into a neighbor's mine; 47 L. J. Ch. 20; and for damages caused by its negligence; 49 Ala. 582; 41 Ark. 542; 62 Ga. 682; for the death of an employe; 17 Md. 489. A cause of action on a constituent company's debt is against the consolidated company alone; 62 N. Y. 307. The necessary facts to establish liability should be averred; 32 Mich. 251.

A railroad corporation is a corporation under the laws of its state, although consolidated with a like corporation created under the laws of another state; 94 U. S. 444; and a state can legislate for that part of a consolidated company which is within its limits, just as if no consolidation had taken place; 94 U. S. 164. A consolidated inter-state corporation has, in each state, all the powers which its constituent company had in that state, but not the powers which the constituent company of the other state had in such other state; 123 Ill. 467; it acts as a unit and may transact its corporate business in one state for both; 45 Fed. Rep. 812. So far as each state has control over the charter it grants, the corporations remain different and separate; 19 Fed. Rep. 804; it dwells in both states and is a corporate entity in each; it has a citizenship identical with each; 45 Fed. Rep. 812. A constituent company consolidated with a corporation of another state remains a citizen of its own state for the purposes of federal jurisdiction; 136 U. S. 356. A railroad extending in several states is not a citizen of each for purposes of federal jurisdiction; 167 U. S. 659.

A practical merger of corporations is sometimes effected by the purchase by one company of the shares of another. This likewise requires legislative authority. See 26 N. J. Eq. 398. Or a merger may be by the purchase of all the corporate property under a statute; 20 Ind. 457. The right to consolidate with another railroad corporation includes the right to make a fair and lawful agreement with it for the interchange of traffic and for the joint use of terminal facilities, the right to buy one-half of its stock for the shareholders of the purchaser and to guarantee the payment of its bonds; 73 Fed. Rep. 933.

As to merger by lease of railroads, see LEASE. Many of the cases depend largely upon the language of statutes and of the consolidating agreement, or articles of consolidation, and should be read in connection therewith.

In many states the merger of parallel and competing lines is prohibited by the constitution. The prohibition has been held not to extend to street railways; 136 Pa. 96. It includes a projected road in process of construction; 7 Atl. Rep. (Pa.) 368; and may extend to a case where the competition may arise from other lines owned or controlled by the lines proposing to consolidate; 75 Tex. 534. In Missouri the act applies only to roads within the state and to cases where the competition would have an appreciable effect on rates; 46 Fed. Rep. 88.

The constitution prohibits a scheme by which the control of the competing road is to be placed in the hands of persons

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named by the other road, which agreed to guarantee bonds of the competing road; 7 Atl. Rep. (Pa.) 368; and one where the existing road attempted to purchase the control of a competing road; *id.* All contracts for leasing or controlling competing roads are held to be void; 66 N. H. 100; and so is a pooling and traffic arrangement between two companies having two hundred miles of parallel tracks; 30 Fed. Rep. 2; and one where a company guarantees the bonds of a competing railroad, receiving half its stock in consideration thereof; 161 U. S. 646.

In Georgia any contract tending to defeat or lessen competition is void; 49 Fed. Rep. 412.

Two street railways are parallel when their directions are substantially the same for two and a-half miles, though their *termini* and general direction are wide apart; 39 Mo. 65.

Parallel lines are not necessarily competing lines as they may command the traffic of different territories; 161 U. S. 698.

Constitutional prohibitions against the merger of competing railways do not interfere with the power of congress over inter-state commerce; 161 U. S. 677, affirming 31 S. W. Rep. 476.

See, as to consolidation generally, 79 Am. Dec. 492; 2 L. R. A. 564; 13 *id.* 780; 8 Am. & Eng. R. Cas. 647; as to the effect of consolidation; 8 *id.* 572; 3 L. R. A. 435; as to how far a new corporation is created; 15 *id.* 82; as to effect on taxation; 17 Am. & Eng. R. Cas. 436; 41 *id.* 702; as to aid bonds; 5 L. R. A. 728; as to lands; 44 Am. & Eng. R. Cas. 5; as to inter-state corporations; 16 *id.* 490; 15 L. R. A. 82, 84; as to liability for rights and obligations of the constituent companies; 5 *id.* 726; 13 Am. & Eng. R. Cas. 138. See REORGANIZATION.

**MERITS.** The state of facts of deserving; intrinsic ground of consideration or reward. Cent. Dict. The word is used principally in matters of defence.

A defence upon the merits is one that rests upon the justice of the cause, and not upon technical grounds only; there is, therefore, a difference between a good defence, which may be technical or not, and a defence on the merits; 5 B. & Ald. 703; 1 Ashm. 4; 3 Johns. 245, 449; 2 Cow. 281.

In the New York Code of Procedure, it has been held to mean "the strict legal rights of the parties as contra-distinguished from those mere questions of practice which every court regulates for itself, and from all matters which depend upon the *discretion* or *favor* of the court." 4 How. Pr. 332.

**MERITORIOUS CONSIDERATION.** One based upon natural love and affection. 5 Encyc. Laws of Eng. 505. See CONSIDERATION.

**MERTON, STATUTE OF.** An ancient English ordinance or statute, 20 Hen. III. (1235), which took its name from the place in the county of Surrey where parliament sat when it was enacted. Its provisions related chiefly to dower, usury, legitimacy of children, the right of freeman to make suit by attorney at the lord's or any county court, the inclosure of common lands, wardships. 2 Inst. 79; Barring. Stat. 41, 46; Hale, Hist. Com. Law 9, 10, 18.

**MERX.** Merchandise.

**MESCROYANT.** Used in our ancient books. An unbeliever.

**MESE.** An ancient word used to signify house, probably from the French *maison*. It is said that by this word the buildings, curtilage, orchards, and gardens will pass; Co. Litt. 56.

**MESMERISM.** See HYPNOTISM.

**MESNALTY or MESNALITY.** A manor held under a superior lord. The estate of a mesne. T. L.; Whart. Dict.; 4 Phila. 71; 14 East 234.

**MESNE.** Intermediate; the middle between two extremes; that part between the commencement and the end, as it relates to time.

Hence the profits which a man receives between disseisin and recovery of lands are called *mesne profits*. Process which is issued in a suit between the original and final process is called *mesne process*.

An assignment made between the original grant and a subsequent assignment, is called a *mesne assignment*.

*Mesne incumbrances* are intermediate charges, or *incumbrances* which have attached to property *between* two given periods; as, between the purchase and the conveyance of land.

In England, the word mesne also applies to a dignity; those persons who hold lordships or manors of some superior who is called lord paramount, and grant the same to inferior persons, are called mesne lords.

**MESNE LORD.** See MESNE.

**MESNE PROCESS.** See MESNE.

**MESNE PROFITS.** The value of the premises recovered in ejectment, during the time that the lessor of the plaintiff has been illegally kept out of the possession of his estate by the defendant: such are properly recovered by an action of trespass, *quare clausum fregit*, after a recovery in ejectment. 11 S. & R. 55; Bacon, Abr. *Ejectment* (H); 3 Bla. Com. 205.

As a general rule, the plaintiff is entitled to recover for such time as he can prove the defendant to have been in possession, provided he does not go back beyond six years; for in that case the defendant may plead the statute of limitations; 3 Yeates 13; Bull. N. P. 88. The value of the use of land during the time it was unlawfully detained by a lessee is the proper measure of lessor's damages; 65 Vt. 485. In an action to recover mesne profits, plaintiff may either prove the profits actually received, or the annual rental value of the land; 70 Md.

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172. Defendant in ejectment cannot free himself from liability for mesne profits by permitting a third person to remain in actual possession; 68 Miss. 29. Exemplary damages are allowed in trespass for mesne profits, only when the defendant has acted maliciously or in bad faith; 15 R. I. 92.

The value of improvements made by the defendant may be set off against a claim for mesne profits; Wood. L. & T. 1390; but profits before the demise laid should be first deducted from the value of the improvements; 2 Wash. C. C. 165. See, generally, Wash. R. P.; Bacon, Abr. *Ejectment* (H); 2 Phill. Ev. 208; Adams, Ej. 13.

**MESNE, WRIT OF.** The name of an ancient and now obsolete writ, which lies when the lord paramount distrains on the tenant paravail: the latter shall have a writ of mesne against the lord who is mesne. Fitzh. N. B. 316.

**MESS BRIEF. In Danish Law.** A certificate of admeasurement granted by competent authority at the home-port of a vessel. Jacobsen, Sea-Laws 50.

**MESSAGE.** See TELEGRAPH.

**MESSAGE FROM THE CROWN.** The method of communicating between the sovereign and the house of parliament. A written message under the royal sign manual is brought by a member of the house, being a minister of the crown, or one of the royal household. Verbal messages are also sometimes delivered; May, Parl. Pr. ch. 17.

**MESSAGE, PRESIDENT'S.** The annual communication of the President of the United States to congress, pursuant to art. II. sec. 3, of the constitution. It is usually delivered at the commencement of the session, and embodies the president's views and suggestions concerning the general affairs of the nation. Since Jefferson's time, at least, it has been in writing. Special messages are sent to congress from time to time as the president may deem expedient. A public document edited by James D. Richardson containing all messages and state papers of the president is now in course of publication, having reached the close of the administration of Hayes in the 7th volume.

**MESSE THANE.** One who said mass; a priest.

**MESSENGER.** A person appointed to perform certain duties, generally of a ministerial character, such as carriers of messages employed by a secretary of state, or officers of a court of justice, called, in Scotland, messengers at arms. Toml.; Paterson.

The officer who takes possession of an insolvent or bankrupt estate for the judge, commissioner, or other such officer.

The messenger of the English court of chancery has the duty of attending on the great seal, either in person or by deputy, and must be ready to execute all such orders as he shall receive from the lord chancellor, lord keeper, or lords commissioners. Brown.

**MESSUAGE.** A term used in conveyancing, and nearly synonymous with dwelling-house.

A dwelling-house with the adjacent buildings and curtilage. 37 W. Va. 778.

A grant of a messuage with the appurtenances will not only pass a house, but all the buildings attached or belonging to it, as also its curtilage, garden, and orchard, together with the close on which the house is built; Co. Litt. 5 *b*; 2 Saund. 400; 4 Cruise, Dig. 321; 2 Term 502; 4 Blackf. 331. But see the cases cited in 9 B. & C. 681. This term, it is said, includes a church; 11 Co. 26; 2 Esp. 528; 1 Salk. 256; 8 B. & C. 25. And see 3 Wils. 141: 2 W. Blackst. 726; 4 M. & W. 567; 2 Bingh. N. C. 617; 1 Saund. 6; 2 Washb. R. P.

**METAL.** The word does not include precious metals. 2 B. & Ad. 597.

**METATUS.** A dwelling; a seat; a station; quarters; the place where one lives or stays. Spelman.

**METAYER SYSTEM.** A system under which land was divided into small farms among families, the landlord supplying the stock, and receiving in lieu of rent a fixed proportion of the produce. 1 Mill, Pol. Econ. 296, 363.

**METES AND BOUNDS.** The boundary-lines of land, with their terminal points and angles. Courses and distances control, unless there is matter of more certain description, *e. g.* natural monuments; 42 Me. 209. A joint tenant cannot convey by metes and bounds; 1 Hill. R. P. 582. See BOUNDARY.

**METHOD.** The mode of operating, or the means of attaining an object.

It has been questioned whether the method of making a thing can be patented. But it has been considered that a method or mode may be the subject of a patent, because when the object of two patents or effects to be produced is essentially the same, they may both be valid, if the modes of attaining the desired effect are essentially different. Dav. Pat. Cas. 290; 2 B. & Ald. 350; 2 H. Blackst. 492; 8 Term 106; 4 Burr. 2397; Perpigna, *Manuel des Inventeurs*, etc., c. 1, sect. 5, § 1, p. 22. See PATENT.

**METRE** (Greek). A measure. See MEASURE.

**METRIC SYSTEM.** A system of measures for length, surface, weight, values, and capacity, founded on the *metre* as a unit. See MEASURE.

**METROPOLITAN.** One of the titles of an archbishop. In England the word is frequently used to designate statutes relating exclusively to the city of London.

**METROPOLITAN BOARD OF WORKS.** A board for the better sewer-

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ing, draining, lighting, etc., of the metropolis. 18 & 19 Vict. c. 120. See LOCAL GOVERNMENT BOARD.

**METTESHEP, or METTENSCHEP.** An acknowledgment paid in a certain measure of corn; or a fine or penalty imposed on tenants for default in not doing their customary service in cutting the lord's corn.

**MEUBLES. In French Law.** Movables. Things are meubles from either of two causes: (1) From their own nature, *e. g.* tables, chairs; or (2) from the determination of the law, *e. g.* obligations. Rap. & Law. Dict.

**METUS** (Lat.). A reasonable fear of an intolerable evil, as of loss of life or limb, such as may fall upon a brave man (*virum constantem*). 1 Sharsw. Bla. Com. 131; Calvinus, Lex. And this kind of fear alone will invalidate a contract as entered into through duress. Calvinus, Lex.

In a more general sense, fear.

**MEXICO.** A federative republic. The president is elected for four years by the people and is assisted by seven secretaries of state. The senate consists of fifty-six members, two for each state, who are elected for two years by the people. Members of the house of representatives are elected by the people.

**MICHAELMAS TERM.** See TERM.

**MICHEL-GEMOT** (spelled, also, *micel-gemote*, *mycel-gemot*. Sax. great meeting or assembly). One of the names of the general council immemorially held in England. 1 Sharsw. Bla. Com. 147.

One of the great councils of king and noblemen in Saxon times.

These great councils were severally called *witena-gemotes*, afterwards *micel synoths* and *micel-gemotes*. Cowel, edit. 1727; Cunningham, Law Dict. *Micel-Gemotes*. See WITENAGEMOT.

The Saxon kings usually called a *synod*, or mixed council, consisting both of ecclesiastics and the nobility, three times a year, which was not properly called a *parliament* till Henry III.'s time. Cowel, ed. 1727; Cunningham, Law Dict. *Synod*, *Micel-Gemotes*.

**MICHEL-SYNOTH** (Sax. great council). See MICHEL-GEMOT.

**MICHERY.** Theft; cheating.

**MICHIGAN.** The name of one of the states of the United States of America.

It was admitted into the Union by act of congress of January 26, 1837.

The first constitution of the state was adopted June 24, 1835. This was superseded by the one at present in force, which was adopted August 15, 1850.

Every person above the age of twenty-one years, who has resided in the state three months, and in the township or ward in which he offers to vote ten days next preceding election, and who is either a male citizen, or a male inhabitant who resided in the state June 24, 1835, or a male inhabitant who resided in the state January 1, 1850, who had declared his intention to become a citizen of the United States pursuant to the laws thereof six months preceding an election, or who has resided in this state two years and six months and declared his intention as aforesaid, or who is a civilized male inhabitant of Indian descent, a native of the United States, and not a member of any tribe, is an elector and entitled to vote.

THE LEGISLATIVE POWER.—The *Senate* consists of thirty-two members, and the *House of Representatives* of not less than sixty-four nor more than one hundred members, elected in their respective districts for the term of two years. They must be citizens of the United States and qualified voters, senators of the district and representatives of the counties, respectively.

THE EXECUTIVE POWER.—The *Governor* is elected for the term of two years. He must be thirty years old at least; for five years a citizen of the United States, and for two years next preceding the election of the state; and no member of congress, nor any person holding office under the United States, may be governor. In case of a tie, the legislature must elect one of the candidates. The governor has the usual powers and duties, and may pardon, except for treason, in which case he may suspend execution and report the case to the legislature, which may either commute the sentence, or direct the execution, pardon, or reprieve.

The *Lieutenant-Governor* is elected at the same time, for the same term, and must possess the same qualifications as the governor. He is, by virtue of his office, president of the senate, and succeeds to the office of governor in case of vacancy. After him the succession is to the president *pro tempore* of the senate.

THE JUDICIAL POWER.—The *Supreme Court* consists of one chief and four associate justices, chosen by the electors of the state for the term of ten years. These are now all required to reside at the capital. One of the judges goes out of office every two years. Four terms are held annually, and three judges constitute a quorum. It has a general supervisory power over inferior courts, and general appellate jurisdiction of cases brought up by appeal, by certificate of judges of lower courts, or by consent of parties on agreed statements of facts. The court is required by rules of practice to simplify the practice as to the matters following: abolition of the distinction between law and equity; of fictions and unnecessary proceedings; shortening and simplification of pleadings; expediting decisions; regulation of decisions; remedying abuses and imperfections of practice; abolition of unnecessary forms and technicalities; non-abatement of suits through misjoinder or nonjoinder of parties, so far as justice will allow; providing for omitting parties improperly joined, and joining those improperly omitted.

*Circuit Courts*. The state is divided into thirty-five judicial circuits, each presided over by a circuit judge, elected by the district, and holding office for six years. This is the court of general original jurisdiction, having jurisdiction in all matters civil and criminal not expressly excepted, and appellate jurisdiction from all inferior courts and tribunals, and a supervisory control of the same. Its exclusive original jurisdiction as to amount is of cases involving more than one hundred dollars in tort and three hundred dollars in contract, and it has concurrent jurisdiction with justices of the peace, as stated *infra*. There is also exclusive jurisdiction of actions involving title to real estate, libel, slander, malicious prosecution, and municipal corporations. It has also power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, and other writs necessary to carry into effect its orders, judgments, and decrees, and give it a general control over inferior courts and tribunals within the respective districts. It sits also as a court of chancery, having powers co-extensive with the powers of the court of chancery in England, with various modifications, however, both constitutional and statutory. Two terms at least are held annually in each county organized for judicial purposes, and four terms in counties containing ten thousand inhabitants. The stated terms are also terms of the court of chancery. There is a *superior court* of Grand Rapids, which has concurrent jurisdiction with the circuit court of the county in cases involving over one hundred dollars, and in which a defendant is served in the city.

A *Probate Court* is held in each county by a judge elected by the people of the county for the term of four years and till a successor is chosen. It may take probate of wills, and has cognizance of all

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matters appertaining to the settlement of the estates of decedents and the care of minors, including the appointment and superintendence of guardians of minors, etc.

*Justices of the Peace* are elected by the people of each township for four years. Not more than four are to be elected in each township, and they are to be classified, and in the cities the number is to be provided by the charters. They have exclusive civil jurisdiction in all cases where the amounts involved are less than one hundred dollars, and concurrent jurisdiction over all sums less than three hundred dollars, except as to actions of which the circuit courts have exclusive jurisdiction. They have a criminal jurisdiction of minor offences arising in their respective counties.

A *Circuit Court Commissioner* is elected in each county for two years, who has the judicial power of a judge of the circuit court at chambers. He is to perform the duties of a master in chancery, has power to grant injunctions, etc. He must be an attorney and counsellor-at-law.

*Municipal Courts* exist in the larger cities. They are of two classes, civil and criminal.

The *Civil Courts* have the same general jurisdiction as the circuit courts as to actions of a transitory nature in which all or some of the parties are residents of the city where the court is situated.

The *Criminal Courts* have exclusive jurisdiction.

Michigan has no code of practice or procedure. The practice is that of the English common-law courts largely modified by statute and rules of court, by which special pleading is nearly dispensed with.

**MIDDLE THREAD.** See AD MEDIUM FILUM.

**MIDDLEMAN.** One who has been employed as an agent by a principal, and who has employed a sub-agent under him by authority of the principal, either express or implied. He is not, in general, liable for the wrongful acts of the sub-agent, the principal being alone responsible; 3 Campb. 4; 6 Term 411; 14 East 605.

A person who is employed both by the seller and purchaser of goods, or by the purchaser alone, to receive them into his possession, for the purpose of doing something in or about them: as, if goods be delivered from a ship by the seller to a wharfinger, to be by him forwarded to the purchaser, who has been appointed by the latter to receive them; or if goods be sent to a packer, for and by orders of the vendee, the packer is to be considered as a middleman.

The goods in both these cases will be considered *in transitu*, provided the purchaser has not used the wharfinger's or the packer's warehouse as his own, and have an ulterior place of delivery in view; 4 Esp. 82; 2 B. & P. 457; 3 *id.* 127, 469; 1 Campb. 282; 1 Atk. 245; 1 H. Blackst. 364; 3 East 93.

**MIDSHIPMAN.** A naval cadet in a ship of war whose business it is to second and transmit the orders of the superior officers and assist in the management of the ship and its armament. Webster. See LONGEVITY PAY.

**MIDWIFE. In Medical Jurisprudence.** A woman who practises midwifery; a woman who pursues the business of an *accoucheuse*.

A midwife is required to perform the business she undertakes with proper skill; and if she be guilty of any *mala praxis* she is liable to an action or an indictment for the misdemeanor. See Viner, Abr. *Physician;* Comyns, Dig. *Physician;* 8 East 348; 2 Wils. 259; 4 C. & P. 398, 407 *a*; 2 Russ. Cri. 388.

**MIESES. In Spanish Law.** Grain crops.

**MILE.** A length of a thousand paces, or seventeen hundred and sixty yards, or five thousand two hundred and eighty feet. It contains eight furlongs, every furlong being forty poles, and each pole sixteen feet six inches. 2 Stark. 89.

**MILEAGE.** A compensation allowed by law to officers for their trouble and expenses in travelling on public business.

It usually signifies an allowance for travelling, as so much by the mile. 7 Mont. 82.

In computing mileage, the distance by the road usually travelled is that which must be allowed, whether in fact the officer travels a more or less distant way to suit his own convenience; 16 Me. 431.

An allowance to a district attorney for mileage in the R. S. § 823, is simply a reimbursement for travelling expenses; 158 U. S. 346; irrespective of the amount of his compensation under the law; *id.;* he is allowed mileage for travelling from his place of abode to the place of examination, though the latter is his official headquarters, if his abode is elsewhere; 4 U. S. App. 386; it should be computed for the most convenient and practicable route and not by the shortest; *id.;* and will not be allowed one who goes home every Saturday and returns on Monday during a continuous session of the court; 153 U. S. 88.

See INTERSTATE COMMERCE COMMISSION; TICKET.

**MILES. In Civil Law.** A soldier, (*Vel a "militia" aut a "multitudine," aut a numero "mille hominum."* L. 1, § 1, D., *de testam. milit.*) Vocab. Jur. Utr.

**In Old English Law.** A knight, because military service was part of the feudal tenure. Also, a tenant by military service, not a knight. 1 Bla. Com. 404; Seld. Tit. Hon. 334.

**MILESTONES.** Stones set up to mark the miles on a road or railway. The highway rate, etc., act, 1882, constitutes the expense incurred in maintaining replacing, or setting up milestones, a lawful charge upon the highway rate.

**MILITARY.** Anything pertaining to war or to the army.

**MILITARY BOUNTY LAND.** Land granted by the United States to soldiers for services rendered in the army.

Claims for bounty land can be valid only on the following conditions: (1) The soldier must have been regularly mustered into the United States service (2) That his services were paid for by the United States; (3) That he served with the armed forces of the United States, subject to the military orders of a United States officer; 5 P. D. O. S. 92.

Title to bounty land is not impaired by the promotion to a commissioned officer of a private who subsequently continued in

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the service to the end of the war; 1 L. B. P. 115.

Under act March 3, 1850, title to bounty land is acquired, not only by militia or volunteers serving under the general command of the United States and in time of war, but also by those rendering military service, whether in war or not, and whether under the authority of the United States, or of a state or territory, if the United States has paid for the service. Service rendered in removing the Cherokee Indians is embraced by the act and gives title; 7 Op. Atty. Gen. 606.

Under R. S. § 2424, a soldier's widow who has remarried and has a husband living has no status as a claimant for a bounty-land warrant; 4 P. D. 36.

Under act of Sept. 28, 1850, a second marriage deprives a widow of title, unless she was a widow at the dates of the passage of the act and of filing her application; and if she be married or dead, the minor children are entitled; 2 L. B. P. 7.

Issuance of a bounty land warrant to a widow under the belief that her husband was dead, cannot be regarded as a satisfaction of his claim should it be shown that he is alive; 2 P. D. O. s. 482.

**MILITARY COURTS.** See COURT-MARTIAL.

**MILITARY EXPEDITION.** See NEUTRALITY.

**MILITARY FEUDS.** The genuine or original feuds which were in the hands of military men, who performed military duty for their tenures.

**MILITARY JURISDICTION.** There are under the constitution three kinds of military jurisdiction; one to be exercised both in peace and war; another to be exercised in time of foreign war, without the boundaries of the United States, or in time of rebellion and civil war, within the states or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of states maintaining adhesion to the national government, when the public danger requires its exercise. The first of these may be called jurisdiction under military law, and is found in acts of congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second may be distinguished as military government, superseding as far as may be deemed expedient, the local law, and exercised by the military commander under the direction of the president, with the express or implied sanction of congress; while the third may be denominated martial law proper, which title see; 4 Wall. 141.

**MILITARY LAW.** A system of regulations for the government of an army. 1 Kent 341, n.

That branch of the laws which respects military discipline and the government of persons employed in the military service. De Hart, Courts-Mart. 16.

Military law is to be distinguished from martial law. Martial law extends to all persons; military law to all military persons only, and not to those in a civil capacity. Martial law supersedes and suspends the civil law, but military law is superadded and subordinate to the civil law. Birk. Mil. G. & Mart. L. 1. See 2 Kent 10; 34 Me. 126; MARTIAL LAW; COURT-MARTIAL; MILITARY JURISDICTION.

The body of the military law of the United States is contained in the "act establishing rules and articles for the government of the armies of the United States," approved April 30, 1806, and various subsequent acts, some of the more important of which are those of May 29, 1830; August 6, 1846; July 29, 1861; August 3, 1861; August 5, 1861; December 24, 1861; February 13, 1862; March 13, 1862; March 13, 1865; February 18, 1875. See, also, Act of February 28, 1795; 5 Wheat 1; 3 S. & R. 156, 790; the general regulations, and the orders of the president.

The act of 1806 consists of three sections, the first section containing one hundred and one articles, which describe very minutely the various military offences, the punishments which may be inflicted, the manner of summoning and the organization of courts-martial. These articles are called the articles of war. Their provisions extend to the militia mustered into the United States service, and to marines when serving with the army.

The military law of England was contained in the Mutiny Act, which has been passed annually from April 12, 1689, to 1879, when the Mutiny Act was consolidated with the articles of war, and this act was amended in 1881 by the Army Act (see MUTINY ACT), and the additional articles of war made and established by the sovereign. 2 Steph. Com. 589.

In addition, there are in both countries various usages which constitute an unwritten military law, which applies to those cases where there are no express provisions. 12 Wheat. 19; Benêt, Mil. Law 8.

The sovereign, in England, has authority to ordain, by articles of war, with regard to crimes not specified by military law, every punishment not reaching to death or mutilation; the president of the United States cannot ordain any penalty for any military crime not expressly declared by act of congress.

The civil courts have no authority to review, control, or in any manner interfere with the action of the military tribunals, while regularly engaged in the exercise of their appropriate jurisdiction; 30 Fed. Rep. 176.

Consult Benêt; De Hart; Cross; Samuels; Tytler, Military Law; Risley, Law of War; see MILITIA.

**MILITARY OCCUPATION.** This at most gives the invader certain partial and

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limited rights of sovereignty. Until conquest, the sovereign rights of the original owner remain intact. Conquest gives the conqueror full rights of sovereignty and, retroactively, legalizes all acts done by him during military occupation. Its only essential is actual and exclusive possession, which must be effective.

The occupant administers the government and may, strictly speaking, change the municipal law, but it is considered the duty of the occupant to make as few changes in the ordinary administration of the laws as possible, though he may proclaim martial law if necessary. He may occupy public land and buildings; he cannot alienate them so as to pass a good title, but a subsequent conquest would probably complete the title. Ships of war, warlike stores and materials, treasure and like movable property belonging to the state vest in the occupant.

State archives and historical records, charitable, etc., institutions, public buildings, museums, monuments, works of art, etc., and public buildings of lesser political subdivisions are safe from seizure; so usually are public vessels engaged in scientific discovery.

Private lands and houses are usually exempt. Private movable property is exempt, though subject to contributions and requisitions. Under the rules of the Brussels conference, the former are payments of money, to be levied only by the Commander-in-Chief. The latter consist in the supply of food or transport, or articles for the immediate use of the troops, and may be exacted by the commander of any detached body of troops, with or without payment. This appears to be a modified species of pillage. Military necessity may require the destruction of private property, and hostile acts of communities or individuals may be punished in the same way. Property may be liable to seizure as *booty* on the field of battle, or when a town refuses to capitulate and is carried by assault. When military occupation ceases, the state of things which existed previously is restored under the fiction of *Postliminium* (*q. v.*) See Risley, Law of War 134; WAR.

**MILITARY TENURE.** Tenure in chivalry or knight service. See KNIGHT'S SERVICE.

**MILITARY TESTAMENT.** A nuncupative will, that is, one made by word of mouth, by which a soldier may dispose of his goods, pay, and other personal chattels, without the forms and solemnities which the law requires in other cases. 1 Vict. c. 12.

**MILITES.** Knights, and in Scotch law freeholders.

**MILITIA.** A part of the military force of the nation, consisting of citizens called forth to execute the laws of the Union, suppress insurrection, and repel invasion.

The constitution of the United States provides on this subject that congress shall have power to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions; to provide for organizing, arming, and disciplining the militia, and for governing such part of it as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers, and the authority of training the militia, according to the discipline prescribed by congress.

In accordance with the provisions of the constitution, congress, in 1792, act of May 8, passed an act relating to the militia, which has remained, with modifications, till the present time. Under these provisions the militia can be used for the suppression of rebellion as well as of insurrection; Birk, Mil. Gov. and Mart. L. 365; R. S. § 1642; 7 Wall. 700; 45 Pa. 288. The president of the United States is to judge when the exigency has arisen which requires the militia to be called out; 12 Wheat. 19; 8 Mass. 548. He may make his request directly to the executive of the state, or by an order directed to any subordinate officer of the state militia; 3 S. & R. 169, as provided by R. S. § 1642; and see 12 Wheat. 19; 5 Phila. 259.

When the militia are called into actual service, they are subject to the same rules and articles of war as the regular troops; R. S. § 1644, but a captain of a company of the National Guard of a state cannot summarily punish by imprisonment a member of his company for refusal to obey his orders when the company is not acting as a military force, unless that authority is conferred by statute; 67 N. W. Rep. (Minn.) 989. The president may specify their term of service, not exceeding nine months; R. S. § 1648. When in actual service the militia are entitled to the same pay as the regular troops; R. S. § 1650. The militia, until mustered into the United States service, is considered as a state force; 3 S. & R. 169; 5 Wheat. 1. See 1 Kent 262; Story, Const. §§ 1194-1210. See generally 94 Ill. 123; 116 U. S. 267; MILITARY LAW; MARTIAL LAW.

**MILK.** In England milk means, commercially speaking, skimmed milk. 14 Q. B. Div. 193, where it was held that the sale of milk which had been deprived of sixty per cent of its butter fat was not an offence under § 6, Sale of Food and other Drugs Act, although under § 9 of the same act the sale of skimmed milk as milk is an offence; 24 Q. B. Div. 358; 59 L. J. M. C. 45.

A milk standard may be established by law; 101 N. Y. 634; 64 N. H. 404; 11 Allen 264; and a state may by statute authorize inspectors of milk to enter all carriages used for its conveyance, and wherever they have reason to believe the milk to be adulterated, to take specimens to be analyzed or tested; 132 Mass. 12; and vendors of milk must furnish samples gratuitously; 15 So. Rep. (La.) 502. If upon inspection milk is found to be adulterated, the vendor may be compelled to pour it upon the

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ground, or return it to the person who supplied it; 45 N. J. L. 469; 10 Hun 435. Such ordinances and statutes do not deprive persons of property without due process of law; 15 So. Rep. (La.) 502; 113 U. S. 31; 113 Mo. 395. See ADULTERATION; POLICE POWER.

**MILL.** A complicated engine or machine for grinding and reducing to fine particles grain, fruit, or other substance, or for performing other operations by means of wheels and a circular motion.

The house or building that contains the machinery for grinding, etc. Webster, Dict.

Mills are so very different and various, that it is not easy to give a definition of the term. They are used for the purpose of grinding and pulverizing grain and other matters, to extract the juices of vegetables, to make various articles of manufacture. They take their names from the uses to which they are employed; hence we have paper-mills, fulling-mills, iron-mills, oil-mills, saw-mills, etc. In another respect their kinds are various; they are either fixed to the freehold or not. Those which are a part of the freehold are either water-mills, wind-mills, steam-mills, etc.; those which are not so fixed are hand-mills, and are merely personal property. Those which are fixed, and make a part of the freehold, are buildings with machinery calculated to attain the object proposed in their erection.

It has been held that the grant of a mill and its appurtenances, even without the land, carries the whole right of water enjoyed by the grantor, as necessary to its use, and as a necessary incident; Cro. Jac. 121. And a devise of a mill carries the land used with it, and the right to use the water; Washb. Easem, 52. 1 S. & R. 169. And see 5 *id.* 107; 10 *id.* 63; 2 Caines, Cas. 87; 3 N. H. 190; 7 Mass. 6; 6 Me. 154, 436; 16 *id.* 281.

The owner of a mill, whose dam and machinery are suited to the size and capacity of the stream, has a right to the reasonable use of the water to propel his machinery; but he must detain it no longer than is necessary for its profitable enjoyment, and must return it to its natural channel, before it passes upon the land of the proprietor below; 41 Ga. 162; s. c. 5 Am. Rep. 526. See 4 Ballard, R. P. § 878; DAM.

A mill means not merely the building in which the business is carried on, but includes the site, the dam, and other things annexed to the freehold, necessary for its beneficial enjoyment; Gould, Waters § 307; 3 Mass. 280; see 6 Me. 436; and a water power also when applied to a mill becomes a part of the mill, and is to be included in the valuation; 37 Vt. 622.

Whether manufacturing machinery will pass under the grant of a mill must depend mainly on the circumstances of each case; 3 Washb. R. P. 415; 1 Brod. & B. 506; Ewell, Fixt. 94. See 30 Conn. 18. As between mortgagor and mortgagee, a saw-mill and its appointments are *prima facie* part of the realty, if no intent is shown to change their character; 39 Mich. 777. When an estate for years was by a conveyance to the lessee merged in the fee, it was held that machinery by him firmly annexed to the premises, did not, by operation of law and without intent on his part, become a part of the realty; 76 N. Y. 23. See FIXTURES.

**MILL.** The tenth part of a cent in value.

**MILLED MONEY.** This term means merely coined money; and it is not necessary that it should be marked or rolled on the edges. Running's case, Leach, Cr. Cas. 708.

**MIL-REIS.** The name of a coin. The mil-reis of Portugal is taken as money of account, at the custom-house, to be of the value of one hundred and twelve cents. The mil-reis of Azores is deemed of the value of eighty-three and one-third cents. The mil-reis of Madeira is deemed of the value of one hundred cents; 5 Stat. at Large, 625.

**MINA.** A measure of corn or grain. Cowel.

**MINAGE.** A toll or duty paid for selling grain by the Mina. Cowel.

**MINATOR or MINERATOR.** A miner.

**MIND.** In its legal sense it means only the ability to will, to direct, to permit or assent. 43 N. J. L. 492.

**MIND AND MEMORY.** A testator must have a sound and disposing mind and memory. In other words, he "ought to be capable of making his will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, the persons who are the object of his bounty, and the manner in which it is to be distributed between them." *Washington*, J., 3 Wash. C. C. 585, 586; 4 *id.* 262; 1 Green Ch. 82, 85; 2 *id.* 563, 604; 26 Wend. 255, 306, 311, 312; 8 Conn. 265; 9 *id.* 105. Mind and memory are convertible terms; 54 Barb. 274.

**MINERALS** (L. Lat. *minera*, a vein of metal). All fossil bodies or matters dug out of mines or quarries, whence anything may be dug; such as beds of stone which may be quarried. 14 M. & W. 859, construing 55 Geo. III. c. 18; Broom, Leg. Max. 175*.

Any natural production, formed by the action of chemical affinities, and organized when becoming solid by the powers of crystallization. Webster, Dict. But see 5 Watts 34; 1 Crabb, R. P. 95; OIL.

The term mineral has been defined as "every substance which can be got from underneath the surface of the earth, for the purpose of profit;" L. R. 7 Ch. App. 699;

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and in another case it is said that the word does not include anything except that which is part of the natural soil; 33 Ch. D. 566. It has been held to include coal; 73 Mo. 96; paint-stone; 2 Stockt. 136; free-stone; L. R. 1 Ch. 303; and petroleum; 88 Pa. 198. See OIL.

The words *minerals and ores* have been held to include only minerals obtained by underground working; 147 N. Y. 495.

The term *mineral lands*, as used in the statutes relating to the public domain, embraces coal lands; 118 U. S. 271; and *mineral deposits* are not only metals proper but also salt, coal, and the like. 10 N. J. Eq. 128.

Minerals severed from the earth by artificial means are personal property and dealt with by the law as such; Barr. & Ad. Mines 5; being taxable as personalty; 94 U. S. 762; the subject of larceny; 35 Cal. 671; 156 Pa. 400; or recoverable in trover; 53 Pa. 261; or replevin; 62 *id.* 97. This is not the case, however, where the severance results from natural causes or incidentally from excavation; *id.*; hence a nugget of gold found upon loose rocks was held to savor of the realty and was not the subject of larceny; 64 N. C. 619. See MINES AND MINING.

**MINES AND MINING.** A mine is an excavation in the earth for the purpose of obtaining minerals.

Mines of gold and silver belonged, at common law, to the sovereign; 1 Plowd. 310; 3 Kent 378, n.; 17 Wall. 222; and it has been said that, though the king grant lands in which mines are, and all mines in them, yet royal mines (*q. v.*) will not pass by so general a description; Plowd. 336. In New York the state's right as sovereign was asserted at an early day, and reasserted by the legislature as late as 1828; 3 Kent 378, n. In Pennsylvania the Royal Charter to Penn reserved one-fifth of the precious metal as rent, and the patents granted by Penn usually reserved two-fifths of the gold and silver. An act passed in 1843 declared that all patents granted by the state pass the entire estate of the commonwealth. In California, after much discussion, it seems to be finally settled that minerals belong to the owner of the soil and not to the government as an incident of sovereignty; 17 Cal. 199; 3 Wall. 304; 2 Black 17. In 17 Cal. 199, Field, C. J., upon thorough examination of the subject, rejected the doctrine of sovereign title as an assertion of personal prerogative of the British crown, neither applicable to our institutions nor a necessary incident of sovereignty in the larger sense. The prerogative title of the sovereign was in Oregon treated as conceded; 5 Ore. 104. It was held that in Maryland the mines passed by royal grant to Lord Baltimore, subject to a reservation of one-fifth of gold and silver found and that the entire title passed to the state, the interest of the proprietor by confiscation, and that of the king by conquest; 147 U. S. 282. The same prerogative right was very early asserted in New Jersey; 30 N. J. Eq. 328, note. It is said that the question is not of practical importance since the title to mineral lands generally in the United States is derived from public grants, and the right to minerals therein is regulated by law; Barr. & Ad. Mines 179. As to mineral lands and claims and their location under the United States laws, see LANDS, PUBLIC; Barr. & Ad. Mines ch. 6. See Judge Dallas's note to Bainbr. Mines 37.

Minerals in the beds of navigable waters below low water mark are owned by the state against which an appropriator without a grant is a trespasser, although he has a good title against any one else; Barr. & Ad. Mines 180. See 32 Fla. 82; 38 Pa. 380; 81 *id.* 156; 144 U. S. 550; 22 S. C. 50. The same rule applies to minerals found under highways; 19 Ga. 89; 23 Minn. 186; 117 Ill. 411; 5 Mas. 195. See 14 A. & E. Ry. Cas. 486.

Where lands are taken under the right of eminent domain, strictly only a right of way passes, but it is sometimes held that the appropriator may use minerals taken therefrom for making or repairing the road-bed; 5 Watts 546; at least those above grade which must be excavated; 29 Mo. 141; but the better opinion is said to be that no such right exists and that minerals remain the property of the owner of the soil; Barr. & Ad. Mines 186; 124 Ind. 329; 53 Pa. 261; 2 Metc. 482. See 24 A. & E. Ry. Cas. 142.

All mineral lands of the general government, both surveyed and unsurveyed, are free and open to exploration and occupation, subject to such regulations as may be prescribed by law, and also to local customs or rules of miners when not in conflict with the laws of the United States. R. S. § 2319. See 94 U. S. 763; LANDS, PUBLIC.

It is the policy of the government to favor the development of mines of gold, silver, and other metals, and every facility is afforded for that purpose; but it exacts a faithful compliance with the conditions required; 128 U. S. 673. A mineral lode or vein whose location is perfected under the law is the property of the locators or their assigns, and not subject to disposal by the government; 127 U. S. 348.

Subject to the rights of the public, growing out of its original ownership, or as provided by law in special cases, the right to minerals belongs to the owner of the soil, and passes by a grant thereof, unless separated; 1 N. Y. 564; 82 *id.* 476; 19 Pick. 314; 53 Vt. 641; 21 W. N. C. Pa. 491; but the owner may convey his mines by a separate and distinct grant, so as to create one freehold in the soil and another in the mines; 1 Pa. 726; 7 Cush. 361; 8 *id.* 21; 5 M. & W. 50; 84 Ala. 228; 96 Ill. 279; and after such severance of the mines from the soil each is entirely independent of the other, separately inheritable, and capable of conveyance; Barr. & Ad. Mines 3.

In case of a separate ownership, the owner of the mine must support the superincumbent soil; 12 Q. B. 739; 5 M. & W. 60; 12 Exch. 259; and ancient buildings or

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other erections; 2 H. & N. 828. See 2 Cent. L. J 655; 24 *id.* 270; 12 Alb. L. J. 182. But in California a miner will not be enjoined against disturbance of crops, unless the appropriation of the land was anterior to the mining location; 23 Cal. 593.

A lessee having the right to mine coal under land over which a railroad is operated, can only mine so much of the coal as can be removed without injury to the surface; 75 Ia. 78. The lessor's measure of damages where there are sinks and depressions in the surface of the land due to lessee's negligence in operating a mine, is the depreciation in the value of the land; 155 Pa. 256.

The estate in the minerals as distinguished from the soil, is created under what are known as mining leases. Where the minerals are undisturbed as a part of the soil they are said to be *in place*. The severance of the estate in the soil and in the minerals may be by conveyance, by whatever name designated, of all, or a clearly defined part, of the minerals, in which case there passes to the grantee an estate in fee in the minerals, with the privilege of using the land so far as may be necessary for the purpose stated; 7 Fed. Rep. 634. This is the effect of a conveyance even if it be called a lease or limits a term of years within which the minerals are to be taken out; Barr. & Ad. Mines 36. The effect of this is said to be the somewhat paradoxical result of the limitation of a fee-simple estate for a term of years, and the resulting difficulty is sought to be avoided by treating the limitation of the term as not upon the estate but upon the appurtenant rights, without which it would be valueless, and in case of failure to take out the mineral within the specified time it is forfeited to the grantor; 143 Pa. 293; 128 *id.* 485; 105 *id.* 469; 21 N. J. Eq. 410, affirming 19 *id.* 202. A lease for mining purposes, the rent to be a certain part of the ore mined, is forfeited by failure to work the mines for a number of years; 112 N. C. 677. Such instruments, even where the term license is employed, are held to be not a mere license, but to pass a property or to create an estate in the minerals; 93 Mich. 90; 47 Ind. 105; 150 Ill. 344; 86 Va. 315. See Barr. & Ad. Mines 36, where the cases are collected and examined. A true leasehold interest in the land may be created with an appurtenant right to take minerals, in which case the lessee is a tenant for years, and his possession and property of the soil and the minerals are the same; 5 Jones, L. 440; 120 Pa. 590; 89 *id* 47; 52 Hun 363. Where the permission is to take all the coal and the term is indefinite, the lease expires when the latter is exhausted; 58 Ill. 210. In New York this doctrine is limited, so as to apply only where "the whole body of the coal, considered as of cubical dimensions and capable of descriptive separation from the earth above and around it, and as it lies in its place, is absolutely and presently conveyed. The thing sold must be such that it can be identified as land severed, as land, from the estate of which it forms a part;" 136 N. Y. 593, where Finch, J., citing the Pennsylvania cases, says: "Every case upholding the doctrine, which I have been able to examine, has that marked characteristic." In this case which reversed 122 *id.* 505, the "lease" of all the coal contained under a described contract designated it as including all the coal that could be economically mined or taken out.

There may be a license to take all of a certain mineral in a designated tract, which is an incorporeal right, of which the distinguishing character is that it does not carry with it a possession exclusive of the owner of the soil; Barr. & Ad. Mines 53. It must be created by deed; 73 Ill. 453; and it is not revocable except after breach of covenant; 66 Mo. 430. It carries the right of property in the minerals only after they are severed; 32 N. J. Eq. 248; it is termed a license irrevocable and the word "all" describes the extent to which it may be exercised, not its exclusiveness; 2 Wall. Jr. 81.

A mere parol license is a personal privilege, unassignable, concurrent with a right of the licensor to mine, revocable at will, and vests no title to the minerals until severed; Barr. & Ad. Mines 67; 32 Fed. Rep. 177; 53 Pa. 206; 123 N. Y. 298.

Opening new mines by a tenant is waste, unless the demise includes them; Co. Litt. 53 *b*; 2 Bla. Com. 282; 1 Taunt. 410; but if the mines be already open, it is not waste to work them even to exhaustion; 1 Taunt. 410; 19 Pa. 324; 103 *id.* 307; 6 Munf. 134; 1 Rand. 258; 10 Pick. 460; 1 Cow. 460. See Smith, Landl. & T. 192, 193, n. In a suit for redemption of a mortgage, the mortgagee was allowed for large sums expended in working a mine which he had a right to work; 25 L. J. Ch. 121, but in another case, expenses incurred in opening a mine were disallowed; 16 Sim. 445.

In California, the occupant of public lands, who holds them for agricultural purposes merely, holds them subject to the right of any person to dig for gold; 5 Cal. 36, 97: but the miner must take them as he finds them, subject to prior rights of the same character; 5 Cal. 140, 308; 6 *id.* 148; a miner cannot take private lands; 44 Cal. 460.

An injunction lies for interference with mines; 6 Ves. 147.

Mineral deposits are usually divided into what are termed lode or vein and placer deposits. The terms *lode* and *vein* are generally used interchangeably (see LODE). but they are usually "found together in the statutes and both are intended to indicate the presence of metal in rock; yet a lode may, and often does, contain more than one vein; Field, J., in 128 U. S. 673.

A *placer* is a superficial deposit occupying the bed of an ancient river. Barr. & Ad. Mines 476. In federal legislation it is defined to include "all forms of deposit excepting veins and quartz or other rock in place." R. S. § 2329. These statutes

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divide all deposits into two classes, veins or lodes, and placers, and the former being well defined, the latter is made to include all others; Barr. & Ad. Mines 476. See LANDS, PUBLIC.

The *dip* of a vein is its downward course, and this the locator may follow indefinitely even though it take him beneath the ground of another and outside of his own vertical side lines; Barr. & Ad. Mines 441.

The *strike* of a vein is "its onward course, its direction or trend across and through the country." *id.*

The *apex* of a vein is the highest point where it approaches nearest to the surface of the earth, and where it is broken at its edge so as to appear to be the beginning or end of a vein. 1 McCrary 480. If a vein at its highest point turns over and pursues its course downward, then such point is merely a swell in the mineral matter and not a true apex; *id.* This is a term used in mining law in what is known as the apex rule, as to which see LANDS, PUBLIC, subt. *Mineral Lands.*

A miner whose location is on the apex of a lode may follow it to any depth, although in its downward course it may enter the adjoining land; but no location made on the middle of a lode or otherwise than at the top or apex, will enable the locator to go beyond his line; 3 Fed. Rep. 368. The apex is not necessarily a point, but often a line of great length and any portion of it, if found within the limits of a claim, is sufficient to entitle the locator to obtain title. He may follow his vein into the territory of another beyond his side lines, but not further than his own end lines, beyond which it is subject to further discovery and appropriation; 144 U. S. 19; 50 Fed. Rep. 888; but where the apex which intersects an end line passes out of the claim across one of the side lines, the owner may still follow so much of the lode on the dip as lies between the end line, through which the vein passed, and its point of divergence from the claim; 66 Fed. Rep. 212. Where two claims are so located that to follow the dip beyond the side lines would cause a conflict, that having priority of location must prevail; 54 Fed. Rep. 284. See U. S. Rev. Stat. § 2336. See as to locator's property in vein, 13 A. & E. Corp. Cas. 551, 560, 575.

A *mining claim* is a parcel of land containing precious metal in its soil or rock. A *location* is the act of appropriating such parcel, according to certain established rules. If the miner has only one location that "location" is identical with "mining claim," and the two designations may be indiscriminately used to denote the same thing. 104 U. S. 649; if he acquires an adjoining location his claim covers both; *id.* See Lindl. Mines § 327. A transfer of a mining claim must be in writing; 73 Cal. 541.

A mining claim is real estate; 1 Mont. 245; and descends to the heir; 15 Col. 143; it is property; 2 Utah 54; subject to execution; 9 Cal. 137; and taxation; 12 *id.* 56; and a lien for unpaid taxes; 94 U. S. 762. An owner out of possession may maintain an ejectment or corresponding action; 7 Cal. 317; 4 N. M. 378; 1 Mont. 475; 17 Cal. 271; 34 Fed. Rep. 515; 116 U. S. 687; *contra*, 24 Ore. 265. See as to claims, 14 Am. & Eng. Corp. Cas. 152.

There is no right of dower in an unpatented mining claim; 163 U. S. 445; but in some cases dower has been allowed in mines; 92 Mich. 186; 73 Ill. 405; 150 *id.* 560; 13 N. J. Eq. 389; 61 Ind. 473; 1 Cow, 460; 3 Pick, 17. See as to dower, 7 U. S. App. 393; s. c. 52 Fed. Rep. 859.

Of joint owners, either may mine without the consent of the others, using the common property for the purpose intended, and it is no objection that the use is consumption; 64 Cal. 134; it is not waste; but he must account to his co-owners for ore mined; 25 Conn. 137; 178 Pa. 444; and any act for the benefit of the property, as the purchase of a paramount title, inures to the benefit of all; 22 Col. 129. The interest may be the subject of partition; 23 Cal. 502; but the mere fact of joint ownership does not give an equitable right to a division; the question must be fairly considered by a chancellor upon all the circumstances; 28 Fed. Rep. 220.

Joint owners who co-operate in working, constitute a mining partnership without any specific contract or agreement; Barr. & Ad. Mines 753. There may be an ordinary commercial partnership in the working of a mine, but this will arise only from agreement. A mining partnership, properly so called, is a relation springing only by implication from actual co-operation in the work; 102 U. S. 641; 13 Bush 67; 77 Mo. 52; 30 Cal. 290; 42 *id.* 636; 149 Ill. 575. A mining partnership is not dissolved by the death of a partner, nor by the sale of his interest to a stranger; in the latter case the purchaser becomes a partner; 42 Cal. 367; 52 *id.* 540; 5 Col. 107.

Mining partnerships are in some states effectually regulated by statute: Cal. C. C. §§ 2511-20; Mont. C. C. §§ 3350-9; Idaho, R. S. §§ 3301-9. In the latter state it has been said that a mining partnership, by virtue of the statute, "in all its essential elements is precisely like a corporation;" 33 Pac. Rep. (Ida.) 40, where the substance of the statute is given. See as to Mining partnerships; 28 Am. St. Rep. 488.

In most states where mining is an important industry, there are statutory provisions for securing the safety of those engaged in the employment. For a citation of these statutes see Barr. & Ad. Mines, 780, note 1, where it is said that a discussion of the cases arising under these statutes is impossible because they involve no general principle. Such statutes have been held constitutional; 75 Pa. 26; 4 Sup. Ct. Pa. 362. They are an exercise of the police power, as to the propriety and validity of which there can be little question. In their relation to the law of negligence these statutes enlarge and define the obligation of the mine owner, and fix absolutely his

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responsibility for injuries resulting from failure to comply with the act, wherever that failure is the proximate cause of the injury. But the violation of the statute does not excuse contributory negligence or authorize the employee to neglect his own safety; Barr. & Ad. Mines 785, where the cases are collected.

See Bainbridge; Blanchard & Weeks; MacSwinney; Collier; Barringer & Adams; Lindley, Mines; Morrison, Mining Rights; Wade, Am. Mining Law; Sickels, Mining Laws and Decisions; Washburn, R. P.; Tudor, L. Cas. R. P.; Copp, Am. Mining, Code; Copp, Decisions; COLLIERY; GAS; LODE; LANDS, PUBLIC; MINERALS; OIL.

**MINING COMPANIES.** Corporations or joint stock companies formed for the purpose of carrying out a mining project. See 15 Am. & Eng. Corp. Cas. 631.

**MINING PARTNERSHIP.** See MINES AND MINING.

**MINISTER. In Governmental Law.** An officer who is placed near the sovereign, and is invested with the administration of the government. Ministers are responsible to the king or other supreme magistrate who has appointed them. 4 Conn. 134.

**In Ecclesiastical Law.** One ordained by some church to preach the gospel. All clergymen of every denomination and faith. 35 Neb. 375. A person elected by a Methodist society to be one of their local preachers, and ordained as a deacon of that church, is a minister of the gospel, within a statute exempting ministers from taxation. 1 Me. 102. So is a person ordained as a Congregational minister and installed as such over a town. 2 Pick. 403. See L. R. 8 Q. B. 69.

Formerly the word was applied only to deacons, but it is now the most comprehensive ecclesiastical title. In the prayer-book it means the officiating clergyman, whether bishop, priest, or deacon. 14 P. D. 148.

Ministers are authorized in the United States, generally, to solemnize marriages, and are liable to fines and penalties for marrying minors contrary to the local regulations. As to the rights of ministers or parsons, see 3 Am. Jur. 268; Shepp. Touchst. Anthon ed. 564; 2 Mass. 500; 10 *id.* 97; 14 *id.* 333; 11 Me. 487. CLERGY; BENEFIT OF CLERGY; PARSON.

**In International Law.** An officer appointed by the government of one nation, with the consent of two other nations who have a matter in dispute, with a view by his interference and good offices to have such matter settled.

A name given to public functionaries who represent their country with foreign governments, including ambassadors, envoys, and residents.

A custom of recent origin has introduced a new kind of ministers, without any particular determination of character; these are simply called *ministers*, to indicate that they are invested with the general character of a sovereign's mandatories, without any particular assignment of rank or character.

The minister represents his government in a vague and indeterminate manner, which cannot be equal to the first degree; and he possesses all the rights essential to a public minister.

There are also *ministers plenipotentiary*, who, as they possess full powers, are of much greater distinction than simple ministers. These, also, are without any particular attribution of rank and character, but by custom are now placed immediately below the ambassador, or on a level with the envoy extraordinary; Vattel, liv. 4, c. 5, § 74; 1 Kent 48; Merlin, *Répert.*

Formerly no distinction was made in the different classes of public ministers, but the modern usage of Europe introduced some distinctions in this respect, which, on account of a want of precision, had become the source of controversy. To obviate these, the congress of Vienna, and that of Aix-la-Chapelle, put an end to these disputes by classing ministers as follows:— 1. Ambassadors, and papal legates or nuncios. 2. Envoys, ministers, or others accredited to sovereigns (*auprès des souverains*). 3. Ministers resident, accredited to sovereigns. 4. *Chargés d'affaires*, accredited to the minister of foreign affairs. Public ministers take rank among themselves, in each class, according to the date of the official notification of the arrival at the court to which they are accredited. *Recez, du Congrès de Vienne, du* 19 *mars*, 1815; *Protocol du Congrès d'Aix-la-Chapelle, du Novembre*, 1818; Wheaton, Int. Law § 211.

Consuls and other commercial agents are not, in general, considered as public ministers. See AMBASSADOR; CONSUL; RECALL.

**MINISTERIAL.** That which is done under the authority of a superior; opposed to judicial; as, the sheriff is a ministerial officer bound to obey the judicial commands of the court.

A ministerial act may be defined to be one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority without regard to or the exercise of his own judgment upon the propriety of the acts being done. 12 So. Rep. (La.) 940; 60 Conn. 448; 15 Fed. Rep. 16; 50 Tex. 501. Acts done out of court in bringing parties into court are, as a general proposition, ministerial acts; 54 Ind. 376. See 18 How. 396; 40 Wisc. 175; 49 Ala. 311.

When an officer acts in both a judicial and ministerial capacity, he may be compelled to perform ministerial acts in a particular way; but when he acts in a judicial capacity, he can only be required to proceed; the manner of doing so is left entirely to his judgment. See 10 Me. 377; Bacon, Abr. *Justices of the Peace* (E); 1 Conn. 295; 3 *id.* 107; 9 *id.* 275; 12 *id.* 464; MANDAMUS; OFFICE.

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**MINISTERIAL DUTY.** One in respect to which nothing is left to discretion. A simple definite duty, arising under conditions admitted or proved to exist, and imposed by law, the performance of which may, in proper cases, be required of the head of a department by judicial process. 4 Wall. 498; 61 Conn. 553.

**MINISTERIAL TRUSTS** (also called instrumental trusts). Those which demand no further exercise of reason or understanding than every intelligent agent must necessarily employ: as, to convey an estate. They are a species of special trusts, distinguished from discretionary trusts, which necessarily require much exercise of the understanding. 2 Bouvier, Inst. n. 1896.

**MINISTRY.** The term as used in England is wider than Cabinet and includes all the holders of public office who come in and go out with the Prime Minister. In this respect it may be contrasted with the Permanent Civil Service, whose tenure is independent of public changes. The Prime Minister decides on the number of ministers to be admitted to the Cabinet. The general officers of the Royal Household, such as the Lord Steward, etc., are a part of the ministry.

**MINNESOTA.** One of the states of the United States of America.

It was created a territory by act of congress, March 3, 1849, and admitted into the Union as a state, May 11, 1858, under a constitution framed and adopted by a convention at St. Paul, on the 29th day of August, 1857, pursuant to an act of congress of February 26, 1857, and submitted to and ratified by the people on the 13th of October, 1857.

THE LEGISLATIVE DEPARTMENT.—The *Senate* is composed of a number of senators not exceeding one for every five thousand inhabitants, elected for the term of four years. One-half the senate is elected every second year, the district numbered with odd and even numbers electing alternately, excepting that an entire new election shall be had after each new apportionment.

The *House of Representatives* is composed of a number of representatives not exceeding one for every two thousand inhabitants, elected by the people for the term of two years. A senator or representative must have resided one year in the state and six months next preceding the election in the district, and must be a qualified elector. Legislative sessions are held bi-ennially; session not to exceed sixty days.

THE EXECUTIVE POWER.—The *Governor* is elected by the people for the term of two years. He must have attained the age of twenty-five, be a citizen of the United States, and have resided in the state for one year next preceding his election. With the usual executive functions he has a pardoning and a veto power, and may appoint state officers to fill vacancies until the next general election.

The *Lieutenant-Governor* is elected at the same time, for the same term, and must possess the same qualifications as the governor. He presides over the senate, and acts as governor during any vacancy occurring in that office. A president *pro tempore* of the senate is elected at the close of each session by the senate, who becomes lieutenant-governor in case of vacancy in that office.

THE JUDICIAL POWER.—This is vested in a supreme court, district court, courts of probate, and justices of the peace; but the legislature may, by a two-thirds vote, establish other inferior courts, of which the judges must be elected, for a term not longer than seven years, by the electors of the district for which the courts are created.

The *Supreme Court* consists of one chief and four associate justices, elected by the people of the state at large for the term of seven years. Its original jurisdiction is prescribed by law, and it has appellate jurisdiction in all cases both in law and equity, but holds no jury terms.

The *District Court* consists of judges, elected by the voters of their respective districts for a term of seven years. The state is divided into sixteen districts, in which the number of judges varies. Each judge sits in his own district, except where convenience or the public interests require otherwise, when the judges may exchange services. One or more terms of the court are held in each county annually. The judges may sit in joint session for the trial and determination of any matter before the court, including the trial of jury cases. This court has original jurisdiction in all civil cases where the amount involved exceeds one hundred dollars, the distinction between suits at law and in equity being abolished, and in all criminal cases where the penalty is three months' imprisonment or more, or where a fine of more than one hundred dollars is imposed, and such appellate jurisdiction as may be conferred by law. It has power, also, to change the names of people, towns, or counties.

A *Probate Court* is held in each organized county, by a judge elected for two years. He must be a resident of the county at the time of his election, and continue to be during his term. The court has jurisdiction over the estates of decedents, and over persons under guardianship.

*Justices of the Peace* are elected for each town for two years. They have jurisdiction in civil cases where the amount involved is one hundred dollars or less, and in criminal cases where the criminal is imprisoned for three months or less, or a fine not exceeding one hundred dollars. They have no jurisdiction in any case involving the title to real estate, false imprisonment, libel, slander, malicious prosecution, crim. con. seduction, or on promise to marry, or against an executor or administrator as such.

**MINOR** (Lat. less; younger). One not a major, *i. e.* not twenty-one. Co. 2d Inst. 291; Co. Litt. 88, 128, 172 *b*; 6 Co. 67; 3 Bulstr. 143; Bracton, 340 *b*; Fleta, l. 2, c. 60, § 26.

Of less consideration; lower. Calvinus, Lex. *Major* and *minor* belong rather to civil law. The common-law terms are adult and infant. See LIMITATIONS.

**MINORA REGALIA.** The lesser prerogatives of the crown, relating to revenue. 1 Bla. Com. 241.

**MINORITY.** The state or condition of a minor; infancy. See FULL AGE; INFANT.

The smaller number of votes of a deliberative assembly: opposed to majority, which see.

The minority of a committee to which a corporate power has been delegated, cannot bind the majority, or do any valid act in the absence of any special provision otherwise: 127 U. S. 579.

**MINT.** The place designated by law where money is coined by authority of the government.

The mint was established by the act of April 2, 1792, 1 Story U. S. Laws, 227, and located at Philadelphia. There are mints of the United States now at Philadelphia, San Francisco, New Orleans, Carson, and Denver. R. S. § 3495. A failure by the director of the mint to observe a rule prescribing that he shall, at the annual settlement, require the weighing and counting of all bullion in the mints, does not relieve a superintendent of a mint of his responsibility for bullion in his custody; 77 Fed. Rep. 944. His receipt for a certain quantity of bullion, and his admissions in



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reports and accounts that he holds it, are at least *prima facie* evidence that it came into his possession; *id.* He and his bondsmen are responsible for the loss of bullion which he has received, and which he cannot produce, though it has been lost or stolen without any negligence or fault on his part; *id.* When he has, on assuming office, receipted for a certain quantity of bullion, the same is thereafter in his custody, though accepted by him under lock and seal on the faith of a certificate as to its amount; *id.*

See COIN; FOREIGN COIN; MONEY; ANNUAL ASSAY.

**MINT-MARK.** The masters and workers of the mint, in the indentures made with them, agree "to make a privy mark in the money they make, of gold and silver, so that they may know which moneys were of their own making; after every trial of the pix, having proved their moneys to be lawful, they are entitled to their *quietus* under the Great Seal, and to be thereanent discharged from all suits or actions; they then change the privy mark, so that the moneys from which they are not yet discharged may be distinguished from those for which they are; they use the new mark until another trial of the pix. Wharton.

**MINTAGE.** That which is coined or stamped.

**MINUS.** Less; less than.

**MINUTE. Measures.** In divisions of the circle or angular measures, a minute is equal to sixty seconds, or one-sixtieth part of a degree.

In the computation of time, a minute is equal to sixty seconds, or the sixtieth part of an hour. See MEASURE.

**In Practice.** A memorandum of what takes place in court, made by authority of the court. From these minutes the record is afterwards made up.

Toullier says they are so called because the writing in which they were originally was small: that the word is derived from the Latin *minuta* (*scriptura*), in opposition to copies which were delivered to the parties, and which were always written in a larger hand. 8 Toullier, n. 413.

Minutes are not considered as any part of the record; 1 Ohio 268. See 23 Pick. 184. It is not the office of the clerk's minutes to indicate the legal questions raised upon a trial and determined by the court; 94 N. Y. 514; 80 Ky. 377; 34 La. Ann. 369.

OF CORPORATE MEETINGS. It is usual for boards of directors of corporations to keep a regular record in writing of their proceedings. It has been said that such a record is essential either to the proof or validity of their acts and contracts. Such may be the case if the charter makes the keeping of such a record essential to the validity of corporate acts. But in the absence of a provision directing the keeping of such records, there appears to be no reason for any distinction between recording in writing the acts of a board of agents of a corporation, and of the agents of a natural person. Provisions in charters directing that minutes be kept are merely directory; a failure to keep them does not affect the validity of corporate acts; 12 Wheat. 75; Ang. & A. Corp. 291*a*; Green's Brice, *Ultra Vires* 522, n. b. See 96 U. S. 271; 111 Mass. 315; 32 Vt. 633. When such records are kept, they are the best evidence of the proceedings of a meeting; but if no minutes were kept, or if, in a suit against the corporation, and upon notice, the corporation neglects or refuses to produce its books, other evidence is admissible; 1 Beach, Priv. Corp. 487; 32 Vt. 633; 111 Mass. 315; Ang. & A. Corp. 291*a*.

**MINUTE-BOOK.** A book kept by the clerk or prothonotary of a court, in which minutes of its proceedings are entered.

**MINUTE TITHES.** Small tithes, usually belonging to the vicar; *e. g.* eggs, honey, wax, etc. 3 Burn, Eccl. Law 680; 6 & 7 Will. IV. c. 71, §§ 17, 18, 27.

**MIRROR DES JUSTICES.** The Mirror of Justices, a legal treatise once supposed to have been written during the reign of Edward II. Andrew Horne is its reputed author. But it has been thought that the germ of it was written before the Conquest and that Horne only made additions to it; Marv. Leg. Bibl. 396. But F. W. Maitland holds to the contrary; and also that the evidence that Horne wrote it is not conclusive. It was first published in 1642, and in 1646 it was translated into English by William Hughes. Some diversity of opinion seems to exist as to its merits. Pref. to 9 & 10 Co. Rep. As to the history of this celebrated book, see St. Armand's Hist. Essays on the Legislative Power of England 58; 2 Reeve, Hist. 358; 4 *id.* 116 n.

Maitland's opinion of the work may be gathered in a few words from his introduction to the reprint of it in 1893, by the Selden Society: "Is he [its author] lawyer, antiquary, preacher, agitator, pedant, faddist, lunatic, romancer, liar? A little of all, perhaps, but the romancer seems to predominate."

**MISADVENTURE.** An accident by which an injury occurs to another.

When applied to homicide, misadventure is the act of a man who, in the performance of a lawful act, without any intention to do harm, and after using proper precaution to prevent danger, unfortunately kills another person. The act upon which the death ensues must be neither *malum in se* nor *malum prohibitum*. The usual examples under this head are: 1, when the death ensues from innocent recreations; 2, from moderate and lawful correction *in foro domestico*: 3, from acts lawful and indifferent in themselves, done with proper and ordinary caution; 4 Bla. Com. 182; 1 East, Pl. Cr. 221. It happens in consequence of a lawful act; involuntary manslaughter, in consequence of an unlawful act; 98 Ala.

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57. See HOMICIDE; MANSLAUGHTER; CORRECTION.

**MISAPPROPRIATION.** It is not a technical term of law, but it is sometimes applied to the misdemeanor which is committed by a banker, factor, agent, trustee, etc., who fraudulently deals with money goods, securities, etc., entrusted to him, or by a director or public officer of a corporation or company who fraudulently misapplies any of its property. Sweet. L. Dict. See EMBEZZLEMENT.

**MISAPPLICATION.** As used in 7 Hen. IV. s. 44, the misapplication of public funds only covers cases of corrupt practices or of showing illegal favor. 30 H. L. 752.

**MISBEHAVIOR.** Improper or unlawful conduct. See 2 Mart. La. N. s. 683.

A party guilty of misbehavior, as, for example, to threaten to do injury to another, may be bound to his good behavior, and thus restrained. As to misbehavior of juries, see NEW TRIAL.

**MISCARRIAGE. In Medical Jurisprudence.** The expulsion of the ovum or embryo from the uterus within the first six weeks after conception. Between that time, and before the expiration of the sixth month, when the child may possibly live, it is termed abortion. When the delivery takes place soon after the sixth month, it is denominated premature labor. But the criminal act of destroying the fœtus at any time before birth is termed, in law, procuring miscarriage. Chitty, Med. Jur. 410; 2 Dungl. Hum. Phys. 364. See ABORTION; FŒTUS.

**In Practice.** A term used in the Statute of Frauds to denote that species of wrongful act for the consequences of which the wrongdoer would be responsible at law in a civil action.

By the English Statute of Frauds, 29 Car. II. c. 3, § 4, it is enacted that "no action shall be brought to charge the defendant upon any special promise to answer for the debt, default, or *miscarriage* of another person, unless the agreement," etc., "shall be in writing," etc.

The wrongful riding the horse of another, without his leave or license, and thereby causing his death, is clearly an act for which the party is responsible in damages, and, therefore, falls within the meaning of the word miscarriage: 2 B. & Ald. 516; Burge, Sur. 21.

**MISCASTING.** An error in auditing and numbering. It does not include any pretended miscasting or misvaluing. 4 Bouvier, Inst. n. 4128.

**MISCEGENATION.** (Lat. *miscere*, to mix, and *genere*, to beget). A mixture of races. The intermarriage of persons belonging to the white and black races. In many of the states this is prohibited by statute. The constitutionality of such statutes has been repeatedly affirmed; Cl. Cr. L. 321; 80 Mo. 175; McClain Cr. L. § 57; 3 Tex. App. 263; 58 Ala. 190; s. c. 30 Am. Rep. 131; 30 Gratt. 858; 3 Heisk. 287. It has been further held that a statute denouncing a severer penalty on persons of the two races living together in adultery, than that prescribed for a like offence between persons of the same race, is constitutional; 58 Ala. 190; s. c. 29 Am. Rep. 739; s. c. 106 U. S. 583; 2 Whart. Cr. L. § 1754. See CIVIL RIGHTS.

**MISCHIEF.** A term used in the law of statutory construction to designate the evil or danger intended to be cured or avoided by the statute. See MALICIOUS MISCHIEF.

**MISCOGNIZANT.** Ignorant, or not knowing. Stat. 32 Hen. VIII. c. 9. Little used.

**MISCONDUCT.** Unlawful behavior by a person intrusted in any degree with the administration of justice, by which the rights of the parties and the justice of the case may have been affected.

A verdict will be set aside when any of the jury have been guilty of such misconduct; and a court will set aside an award if it has been obtained by the misconduct of an arbitrator; 2 Atk. 501, 504; 2 Chitt. Bail. 44; 1 Salk. 71; 3 P. Wms. 362; 1 Dick. 66. See 98 Ala. 159; 36 Neb. 708.

Under a statute having reference to a divorce dissolving the marriage contract because of the misconduct of the wife, it relates to adultery; 133 N. Y. 540.

See NEW TRIAL.

**MISCONTINUANCE. In Practice.** A continuance of a suit by undue process. Its effect is the same as a discontinuance. 2 Hawk. Pl. Cr. 299; Jenk. Cent. Cas. 57.

**MISCREANT.** An apostate; an unbeliever; one who totally renounces Christianity. 4 Bla. Comm. 44.

**MISDELIVERY.** The delivery of property by a carrier to a person not authorized by the owner or person to whom the carrier is bound by his contract to deliver it. 133 Mass. 156.

**MISDEMEANANT.** A person guilty of a misdemeanor. See FIRST-CLASS MISDEMEANANT.

**MISDEMEANOR. In Criminal Law.** A term used to express every offence inferior to felony, punishable by indictment, or by particular prescribed proceedings. In its usual acceptation, it is applied to all those crimes and offences for which the law has not provided a particular name.

It has a common-law, a parliamentary, and a popular sense. In a parliamentary sense, as applied to officers, it means maladministration or misconduct, not necessarily indictable. Demeanor is conduct, and misdemeanor is misconduct, in the business of one's office. It must be in matters of importance, and be of a character

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to show a wilful disregard of duty; 6 Amer. Law Reg. (N. S.) 649; 37 Neb. 96.

The test whether or not a certain crime is a crime at common law, is, not whether precedents for so treating it can be found in the books, but whether it injuriously affects the public policy and economy; 97 Pa. 397, followed in 146 *id.* 83, where it was held that a solicitation to commit murder meets this test.

The word is generally used in contradistinction to felony; misdemeanors comprehending all indictable offences which do not amount to felony, as perjury, battery, libels, conspiracies, and public nuisances, but not including a multitude of offences over which magistrates have an exclusive summary jurisdiction, for a brief designation of which our legal nomenclature is at fault. Misdemeanors have sometimes been called misprisions. See 1 Bish. Cr. L. § 624. See FELONY; CRIME; MERGER.

**MISDESCRIPTION.** An erroneous or false description of a contract which is misleading in a material point.

**MISDIRECTION. In Practice.** An error made by a judge in charging the jury in a special case.

It is a rule, subject to the qualifications hereafter stated, that when the judge at the trial misdirects the jury on matters of *law* material to the issue, whatever may be the nature of the case, the verdict will be set aside, and a new trial granted; 6 Mod. 242; 2 Salk. 649; 2 Wils. 269; 4 Conn. 356; 59 Pa. 371; or, if such misdirection appear in the bill of exceptions, or otherwise upon the record, a judgment founded on a verdict thus obtained will be reversed. And although the charge of the court be not positively erroneous, yet, if it have a tendency to mislead the jury, and it be uncertain whether they would have found as they did if the instructions had been entirely correct, a new trial will be granted; 11 Wend. 83; 6 Cow. 682; 9 Humph. 411; 9 Conn. 107. When the issue consists of a mixed question of law and fact, and there is a conceded state of facts, the rest is a question for the court; 2 Wend. 596; and a misdirection in this respect will avoid the verdict. In England, under the Judicature Act of 1875, a new trial will not be granted on the ground of misdirection or of the improper admission or rejection of evidence, unless in the opinion of the court, to which the application is made, some substantial wrong has been thereby occasioned; and if it appear that such wrong or miscarriage affects part only of the matter in controversy, the court may give final judgment as to part thereof, and direct a new trial as to the other part only; 1 Sched. Ord. xxxix. v. 3; L. R. 10 Stat. 1875, 817.

Misdirection as to matters of *fact* will, in some cases, be sufficient to vitiate the proceedings. For example: misapprehension of the judge as to a material circumstance, and a direction to the jury accordingly; 1 Const. So. C. 200; or instructing them upon facts which are purely hypothetical, whereby they are misled; 8 Ga. 114; or an instruction which assumes a material fact to have been proved; 83 Ala. 445; 76 Cal. 242; 11 Colo. 80; 79 Ga. 687; 74 Ia. 154; 71 Md. 9; submitting as a contested point what has been admitted; 9 Conn. 216; giving to the jury a peremptory direction to find in a given way, when there are facts in the case conducive to a different conclusion; 7 J. J. Marsh. 410; 3 Wend. 102; 19 *id.* 402; 12 Mass. 22; 5 Humphr. 476; 47 Ill. App. 332; or where the evidence is so conflicting or rests so largely upon inference or circumstance, that a court could not rightfully sustain a demurrer to the evidence of the opposite party; 87 Ala. 305. See 73 Ia. 576; 74 *id.* 457; 35 Fed. Rep. 116. There are, however, many cases in which the court may instruct the jury, upon the whole evidence, to find for one or the other party; and when a verdict formed under such instruction is conformable to the law, the evidence, and the justice of the case, it is rarely disturbed; 3 Dana 566. But to warrant an unqualified direction to the jury in favor of a party, the evidence must either be undisputed or the preponderance so decided that a verdict against it would be set aside; 16 Wend. 663; 8 Misc. Rep. 512; 143 Ill. 242; 5 Wash. St. 371; 5 U. S. App. 179; and where a special verdict is directed, the court is not bound to give any instructions as to the general rules of law governing the case; 116 Ind. 278; 69 Tex. 124. When the court delivers its opinion to the jury on a matter of fact, it should be *as opinion*, and not as direction; 12 Johns. 513. But it is, in general, allowed a very liberal discretion in this regard; 1 M'Cl. & Y. 286. Where the question is one of mere fact, no expressions of the judge, however strong or erroneous will amount to a misdirection, provided the question is fairly presented to the jury and left with them for their decision; 5 Scott 28; 4 Moore & S. 295; 19 Wend. 186; 10 Pick. 252; 128 U. S. 171; 36 Fed. Rep. 166. The weight of evidence is solely for the jury; and an instruction thereupon is erroneous; 83 Ala. 40; 16 Or. 15, 173; 75 Mich. 127.

Unless the misdirection be excepted to, the party by his silence will be deemed to have waived it; 10 Mo. 515; 2 Pick. 145. But see 4 Wend. 514; 2 Barb. 420; see 8 C. C. App. 341; 97 Mich. 166; 157 Pa. 358; 144 Ill. 370.

As to its effects, the misdirection must be calculated to do injustice; for if it be entirely certain that justice has been done, and that a re-hearing would produce the same result, or if the amount in dispute be very trifling, so that the injury is scarcely appreciable, a new trial will not be granted; Thorn. Juries § 204; 2 Caines 85; 7 Me. 442; 10 Ga. 429; 3 Grah. & W. New Tr. 705; Hill. New. Tr. 96. See 82 Ga. 732; NEW TRIAL; CHARGE.

**MISE** (Lat. *mittere*, through the French *mettre*, to place). **In Pleading.** The issue in a writ of right. The tenant in a writ of right is said to *join the mise on the*

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*mere right* when he pleads that his title is better than the demandant's; 2 Wms. Saund. 45, *h*, *i*. It was equivalent to the general issue; and everything except collateral warranty might be given in evidence under it by the tenant; 3 Wils. 420; 7 Wheat. 31; 3 Pet. 133; 7 Cow. 52; 10 Gratt. 350. The payee in aid, on coming into court, joined in the mise together with the tenant; 2 Wms. Saund. 45 *d*. It was a more common practice, however, for the demandant to traverse the tenant's plea, when the cause could be tried by a common jury instead of the grand assize.

**In Practice.** Expenses. It is so commonly used in the entries of judgments, in personal actions: as, when the plaintiff recovers, the judgment is *quod recuperet damna sua* (that he recover his damages), and *pro misis et custagiis* (for costs and charges) so much, etc.

**MISE MONEY.** Money paid by way of contract or composition to purchase any liberty, etc. Blount.

**MISERABILE DEPOSITUM** (Lat.). **In Civil Law.** The name of an involuntary deposit, made under pressing necessity; as, for instance, shipwreck, fire, or other inevitable calamity. Pothier, Proc. Civ. pt. 5, ch. 1, § 1; La. Code § 2935.

**MISERERE.** The first word and usual name of one of the penitential psalms, being that which was commonly used to be given by the ordinary to such condemned malefactors as were allowed the benefit of clergy (*q. v.*); whence it is also called the psalm of mercy. Wharton. See NECK VERSE.

**MISERICORDIA** (Lat.). An arbitrary or discretionary amercement.

To be in mercy is to be liable to such punishment as the judge may in his discretion inflict. According to Spelman, misericordia is so called because the party is in mercy, and to distinguish this fine from redemptions, or heavy fines. Spelman, Gloss. See Co. Litt. 126 *b*; Madox 14. See IN MISERICORDIA.

**MISFEASANCE.** The performance of an act which might lawfully be done, in an improper manner, by which another person receives an injury.

It differs from malfeasance or nonfeasance. Misfeasance is the wrongful and injurious exercise of lawful authority, or the doing of a lawful act in an unlawful manner, while malfeasance is doing an act which is positively unlawful or wrongful. 23 L. Mag. & Rev. 139. See, generally, 2 Viner, Abr. 35; 2 Kent 443; Doctrina Plac. 62; Story, Bailm. § 9.

It seems to be settled that there is a distinction between misfeasance and nonfeasance in the case of mandates. In cases of nonfeasance the mandatory is not generally liable, because, his undertaking being gratuitous, there is no consideration to support it; but in cases of misfeasance the common law gives a remedy for the injury done, and to the extent of that injury; 5 Term 143; 4 Johns. 81; 2 Johns. Cas. 92; 1 Esp. 74; 2 Ld. Raym. 909; 33 Conn. 109; Story, Bailm. § 165; Bouvier, Inst. Index.

**MISFORTUNE.** It is equivalent to some adverse event not immediately dependent on the action or will of him who suffers from it, and of so improbable a character that no prudent man would take it into his calculations in reference to the interest of himself or of others. 20 Q. B. Div. 816.

**MISJOINDER. In Pleading.** The improper union of parties or causes of action in one suit at law or in equity.

**Of Actions.** The joining several demands which the law does not permit to be joined, to enforce by one proceeding several distinct, substantive rights of recovery. Gould, Pl. c. 4, § 98; Archb. Civ. Pl. 61; Dane, Abr.

*In equity*, it is the joinder of different and distinct claims against one defendant; Adams, Eq. 309; 7 Sim. 241; 3 Barb. Ch. 432. The grounds of suit must be wholly distinct, and each ground must be sufficient, as stated, to sustain a bill; 5 Ired. Eq. 313. See 21 Ala. N. S. 252; 9 Ga. 278; 3 Md. Ch. Dec. 46; 22 Conn. 171.

It may arise from the joinder of plaintiffs who possess distinct claims; 2 Sim. 331; 6 Madd. 94; 8 Pet. 123; see [1893] 1 Q. B. 771; but see 6 Johns. Ch. 150; 8 Paige, Ch. 605; or the joinder of distinct claims of the plaintiff in one bill; 2 S. & S. 79; 5 Misc. Rep. 43. But it seems that where there is a common liability of the defendants and a common interest in the plaintiffs, different claims *may* be united in the same suit; 1 M. & C. 623; 5 How. 127, 12 Metc. 323. And see 7 Sim. 241; 3 Price 164; 2 Y. & C. 389; Story, Eq. Pl. § 536, n.; MULTIFARIOUSNESS.

*At law*, misjoinder vitiates the entire declaration, whether taken advantage of by general demurrer; 1 Maule & S. 355; motion in arrest of judgment, or writ of error; 2 B. & P. 424; 4 Term 347. It may be aided by verdict in some cases; 2 Lev. 110; 11 Mod. 196; 2 Maule & S. 533; 1 Chitty, Pl. 188. Where a single count of a complaint contains one cause of action in tort and another in contract, and plaintiff is allowed over objections to introduce evidence to sustain both causes, the error is not cured by plaintiff's election after the trial, to recover in contract only, when the judgment rendered does not limit plaintiff's recovery of costs to those incurred in the action in contract; 84 Wis. 209.

**Of Parties.** The joining, as plaintiffs or defendants, parties who have not a joint interest.

In England, under the Judicature Act, 1875, by order xvi. v. 13, no action is to be defeated by the misjoinder of the parties. Different causes of action which cannot be tried together conveniently may be ordered by the court or a judge to be tried separately. Mozl. & W. Dict.

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In *equity*, the joinder of improper plaintiffs is a fatal defect; 2 Sandf. Ch. 186; 3 Edw. Ch. 48; 2 Ala. N. S. 406. But the court may exercise a discretion whether to dismiss the bill; 1 Barb. Ch. 59; 3 Ohio St. 129. See 5 Fla. 110. It may be dismissed wholly, or only as to a portion of the plaintiffs; 18 Ohio 72. The improper joinder of defendants is no cause of objection by a co-defendant; 2 Barb. Ch. 618; 6 Ired. Eq. 62; 7 Ala. N. S. 362; 12 Ark. 720; 23 Me. 269. See 7 Conn. 387; 86 Wis. 292.

The objection must be taken *before the hearing*; 15 How. 546; 2 Hill Ch. 566; 4 Paige Ch. 510; not, however, if it be vital; 30 N. H. 433; by *demurrer*, if apparent on the face of the bill; 9 Paige Ch. 410; 7 Ala. N. S. 362; 112 N. C. 578; but see 5 Ill. 424; *by plea and answer*; or otherwise; 13 Pet. 359; 1 T. B. Monr. 105; where the defect does not appear upon the face of the petition, objection must be raised by answer; 113 Mo. 623. A defendant who is improperly joined must plead or demur; 1 Mo. 410.

*At law*, see ABATEMENT; PLEADING.

An answer stating facts showing a misjoinder of plaintiffs, but not objecting to the action on that ground is not sufficient to save such an objection; 49 Mo. App. 273; where no objection is made in the court below to a misjoinder of parties defendant, no advantage can be taken of it on appeal; 2 Colo. App. 436.

**MISKENNING** (Fr. *mis*, wrong, and Sax. *cennan*, summon). A wrongful citation to appear in court. A variance in a plea. 1 Mon. Angl. 237; Chart. Hen. II.; Jacob, Law Dict.; Du Cange.

**MISNOMER.** The use of a wrong name.

In *contracts*, a mistake in the name will not avoid the contract, in general, if the party can be ascertained; 11 Co. 20; Ld. Raym. 304; Hob. 125. So of contracts of corporations; 2 Beasl. 427. See NAME. If a deed, note, etc., be made to a corporation under an erroneous name, the proper course is for the corporation to sue in its proper name and allege that the defendant made the deed, etc., to the corporation by the name mentioned in the instrument; 69 Ill. 658. A contract entered into by a corporation under an assumed name may be enforced by either of the parties, and the identity of the company may be established by the ordinary methods of proof; 37 W. Va. 778.

A *misnomer* of a legatee will not, in general, avoid a legacy, when the context furnishes the means of correction; Schoul. Wills § 583; see 19 Ves. 381; 1 Rop. Leg. 131; LEGACY. A legacy given to a corporation, either by its corporate name, or by description, is good; in the latter case it must be so designated as to be distinguished from every other corporation; 10 N. Y. 84. See 45 Me. 552; 37 Ala. 478.

When a corporation is misnamed in a statute, the statute is not inoperative if there is enough to designate what corporation is meant; 10 Co. 44, 57 *b*.

Misnomer of one of the parties to a suit must be pleaded in abatement. It has been held that misnomer of one of the partners of a firm in a *scire facias* sur mortgage is unimportant, if the name of the firm is correct in the mortgage itself; 64 Penn. 63. A slight variation in a corporate name will be disregarded unless the misnomer be taken advantage of by a plea in abatement; 30 Ill. 151; 19 Mich. 196. If a corporation, sued by an erroneous name, appears by that name without objection, the error is cured; Taney 418. See 36 Ark. 499. But a writ of mandamus issued against a corporation under an erroneous name is void; 2 Ld. Raym. 1238; and an error in the corporate name in an execution is fatal; 58 Ga. 280. The same is true when there is an error in the corporate name in a judgment; 1 Ld. Raym. 117; but see 11 Mass. 138.

The names of third persons must be correctly laid; for the error will not be helped by pleading the general issue; but, if a sufficient description be given, it has been held, in a civil case, that the misnomer was immaterial. Example: in an action for medicines alleged to have been furnished to defendant's wife, Mary, and his wife was named Elizabeth, the misnomer was held to be immaterial, the word wife being the material word; 2 Marsh. 159. See 10 U. S. App. 267. In indictments, the names of third persons must be correctly given; Rosc. Cr. Ev. 78. If a person is well known by the name in the indictment, the indictment is good; 7 Am. L. Reg. N. S. 445; the middle name of a defendant, if stated in an indictment, either in full or by the initial letter, must be correctly stated; 1 Am. L. Reg. 380. That a party is known by one name as well as another, is a good replication to a plea of misnomer; 43 Ill. App. 609. Accuracy is especially required in stating the correct name of a corporation in all criminal proceedings in which it may be concerned; 1 Leach 253; but see 35 Cal. 110. See Archbold; Chitty, Pleading; ABATEMENT; CONTRACT; PARTIES; LEGACY; NAME.

**MISPLEADING.** Pleading incorrectly, or omitting anything in pleading which is essential to the support or defence of an action, is so called.

Pleading not guilty to an action of debt is an example of the first; setting out a defective title is an example of the second. See 3 Salk. 365.

**MISPRISION. In Criminal Law.** A term used to signify every considerable misdemeanor which has not a certain name given to it by law. Co. 3d Inst. 36.

The concealment of a crime.

*Negative misprision* consists in the concealment of something which ought to be revealed.

*Misprision of felony* is the like concealment of felony, without giving any degree of maintenance to the felon; Act of Congress of April 30, 1790, s. 6, R. S. § 5390; for

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if any aid be given him, the party becomes an accessory after the fact.

*Misprision of treason* is the concealment of treason by being merely passive. Act of Congress of April 30, 1790, R. S. § 5333; 1 East, Pl. Cr. 139. If any assistance be given to the traitor, it makes the party a principal, as there are no accessories in treason.

*Positive misprision* consists in the commission of something which ought not to be done. 4 Bla. Com. c. 9.

It is the duty of every good citizen, knowing of a treason or felony having been committed, to inform a magistrate. Silently to observe the commission of a felony, without using any endeavors to apprehend the offender, is a misprision. 1 Russ. Cr. 43; 1 Bish. Cr. L. § 720; Hawk. Pl. Cr. c. 59; s. 6; 4 Bla. Com. 119.

Misprisions which are merely positive are denominated contempts or high misdemeanors: as, for example, dissuading a witness from giving evidence. 4 Bla. Com. 126.

**MISREADING.** When a deed is read falsely to an illiterate or blind man who is a party to it, such false reading amounts to a fraud, because the contract never had the assent of both parties; 5 Co. 19; 6 East 309; Dane, Abr. c. 86, a. 3, § 7; 2 Johns. 404; 12 *id.* 469; 3 Cow. 537. See 14 Pa. 496; 82 *id.* 203; 62 Wis. 480; 55 Mich. 592.

**MISRECITAL.** The incorrect recital of a matter of fact, either in an agreement or a plea: under the latter term is here understood the declaration and all the subsequent pleadings. See RECITAL.

**MISREPRESENTATION.** The statement made by a party to a contract that a thing relating to it is in fact in a particular way, when he knows it is not so.

The misrepresentation must be both false and fraudulent in order to make the party making it responsible to the other for damages; 3 Conn. 413; 10 Mass. 197; 1 Const. So. C. 328, 475; Metc. Yelv. 21 *a*, n. 1; Peake, Cas. 115; 3 Campb. 154; Marshall, Ins. b. 1, c. 10, s. 1. And see 5 Maule & S. 380; 12 East 638; 3 B. & P. 370; 45 Ill. App. 244. Misrepresentation as to a material part of the consideration will avoid an executory contract; 1 Phil. Ins. §§ 630, 675; 83 Va. 397; 147 Mass. 403; 124 Pa. 450; 97 Mich. 5.

A misrepresentation, to constitute *fraud*, must be contrary to fact; the party making it must know it to be so; 2 Kent 471; 1 Story, Eq. Jur. § 142; 4 Price 135; 3 Conn. 597; 22 Me. 511; 7 Gratt. 64, 239; 6 Ga. 458; 5 Johns. Ch. 182; 6 Paige, Ch. 197; 1 Stor. 172; 1 W. & M. 342; 85 Tenn. 139; 76 Ia. 11; 5 Ind. App. 474; 51 Kan. 144; 63 Vt. 463; excluding cases of mere mistake; 5 Q. B. 804; 9 *id.* 197; 10 M. & W. 147; 14 *id.* 651; 7 Cra. 69; 13 How. 211; 8 Johns. 25; 7 Wend. 10; 1 Metc. Mass. 1; 27 Me. 309; 7 Vt. 67, 79; 6 N. H. 99; and including cases where he falsely asserts a personal knowledge; 18 Pick. 96; 1 Metc. Mass. 193; 6 *id.* 245; 27 Me. 309; 16 Wend. 646; 16 Ala. 785; 1 Bibb 244; 4 B. Monr. 601; 3 Cra. 281; and one which gave rise to the contracting of the other party; 14 N. H. 331; 1 W. & M. 90, 342; 2 *id.* 298; 2 Strobh. Eq. 14; 2 Bibb 474; 8 B. Monr. 23; 4 How. Miss. 435; 6 *id.* 311; 25 Miss. 167; 3 Cra. 282; 3 Yerg. 178; 19 Ga. 448; 5 Blackf. 18. See 12 Me. 262; 13 Pet. 26; 23 Wend. 260; 7 Barb. 65; Poll. Cont. 542.

A contract is bad where a party is induced to enter into it by the innocent misstatement of facts by another; 51 Ia. 364; 39 Ohio 491; 89 Ind. 38; 2 Kent 471; but the misrepresentation must be the proximate and immediate cause of the transaction; 11 Col. 15; and part of the same transaction; 83 Va. 504; and the party seeking relief must have relied upon it; 86 Wis. 427. In an action for misrepresentation of facts, it is not always necessary to prove that it was made with a fraudulent intent and with guilty knowledge; 80 Wis. 540; but an innocent misrepresentation cannot be proved under a plea of fraud; 21 Can. S. C. R. 359.

To be material, the misrepresentation must be in respect to an ascertainable fact, as distinguished from a mere matter of opinion, judgment, probability, or expectation; if it is vague and indefinite in its nature and terms, or is merely a loose, conjectural, or exaggerated statement, it is not a material misrepresentation; 73 Tex. 465; 17 Ore. 347; 149 Mass. 188.

A representation concerning a man's private rights, though it may involve matters of law, is as a whole deemed to be a statement of fact; 13 Q. B. D. 363; as is a representation that one has extraordinary and supernatural power in curing disease; 36 Atl. Rep. (Md.) 1027. See also 15 W. N. C. Pa. 282. And representations from one bank to another that a business corporation is prosperous, well organized, doing a large business, and is a valued customer, and that an investigation has been made of its business and responsibility by a bank officer, are also representations of fact and not of opinion; 59 Fed. Rep. 838. "A suppression of the truth may amount to a suggestion of falsehood;" 128 U. S. 388; 51 Kan. 355; and a false pretence need not be in regard to a fact which does in reality exist, but may be that a fact exists when it does not; 14 Crim. L. Mag. 1.

Mere honest expression of opinion will not, as a rule, be regarded as fraud, either as a basis for an action of deceit, or as ground for setting aside a contract, although the opinion may prove to be erroneous; 141 N. Y. 596; 29 N. J. Eq. 257; 73 Tex. 465; 92 Va. 71; 34 Ill. App. 665; 125 U. S. 247; L. R. 13 Q. B. D. 562. And this rule applies ordinarily to statements of the value of property to be bought or sold; 124 Pa. 450; 90 N. Y. 272; 86 Mo. 293; 106 Cal. 623; but it cannot be laid down as a matter of law that value is never a material fact; 11 Mich. 68; as where the defendant was employed to value real estate for an intended mortgagee, and gave a valuation

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which was in fact no valuation at all, it was held that the defendant owed a duty to the plaintiff which he had failed to discharge, and had made reckless statements on which plaintiff had acted, and therefore defendant was liable to plaintiff for the loss he had sustained; 39 Ch. D. 39.

So the mere puffing of articles to be sold is held not to amount to such a misrepresentation as will amount to fraud; 72 Ill. 104; but this rule applies only when the purchaser has a full and fair opportunity to inspect the article and judge for himself, and not to things which are not the subject of any visible test or examination; 44 Ark. 216; and a vendor may be held guilty of deceit by reason of material untrue representations in respect to his own business or property, the truth of which representation he is bound and must be presumed to know; 150 U. S. 673. A person who makes representations of material facts, assuming or intending to convey the impression that he has adequate knowledge of the existence of such facts, when he is conscious that he has no such knowledge, is liable if he knew that they were false; *id.*

Statements as to future events are mere matters of opinion; 17 Abb. N. C. 1; 59 Mo. App. 130; and however contrary to good faith and sound morals, they cannot form the basis of an action at law or in equity; 1 Ark. 31; but see 87 Cal. 557, where although the question was not raised as to whether misrepresentations of prospects of property sold would entitle one to an action, yet as the measure of damages for such representations was decided, the court seem to have admitted that liability would arise therefrom.

One who makes a false statement which he believes to be true, incurs no liability; if the belief is honest, it makes no difference what their grounds are; Poll. Torts 273; *contra*, 41 S. W. Rep. (Ark.) 319; but the grounds of a belief are a "most important test of its reality;" 14 App. Cas. 375. If untrue statements are founded upon a belief destitute of all reasonable grounds, or which the least inquiry would immediately correct, such circumstances would be evidence, but only evidence, that the statement was not really believed to be true; and any liability therefor would be based, not upon the party having stated as true what he had not reasonable grounds to believe to be true, but as having stated as true what he did not believe to be trne; L. R. 1 Sc. App. 162, followed in 14 App. Cas. 337, a decision deemed by a learned writer to be unfortunate; Poll. Torts 275; and see 5 L. Quart. Rev. 410; 6 *id.* 73.

It is not necessary that the misrepresentation should have been made directly to the plaintiff; Poll. Torts 282; 2 M. & W. 519; they may be published generally with the intention that they may be acted upon by any who choose; 3 B. & Ad. 114; as a time-table of a railway company announcing a train, which is not, in fact, running; 5 E. & B. 860; or a prospectus; L. R. 6 H. L. 377.

Where one states that he knows a thing to exist, when he does not know it to exist, he is guilty of fraud; this rule applies to facts susceptible of actual knowledge, and not matters of opinion, etc.; one who does not know a fact to exist must ordinarily be deemed to know that he does not know; 147 Mass. 403. "If persons take upon themselves to make assertions as to which they are ignorant, whether they are true or untrue, they must, in a civil point of view, be held as responsible as if they had asserted that which they knew to be untrue"; L. R. 4 H. L. 79; this ignorance is conscious ignorance; 14 App. Cas. 371. Where one has honestly made a representation and discovers that it is false before it is acted upon, he is deemed, if he has the means of communicating the truth and does not do so, to be making a false representation with knowledge of its untruth; see 1 D. G. M. & G. 660.

There may be a false pretence by conduct, as where one not a member of the university put on a cap and gown at Oxford and thereupon obtained goods on credit; 7 C. & P. 784; so where one having no money goes into a restaurant and orders a good dinner and cannot pay for it, it was held to be incurring a liability by fraud; 42 Sol. Journ. 78.

An action to recover for false representations made by the seller of personal property does not survive as against his estate, under a statute providing that actions "of trespass and trespass on the case for damages done to... personal estate shall survive"; 35 Atl. Rep. (Vt.) 488.

In the absence of any bad faith, a principal is not affected by a representation made by his agent, which the former knew to be untrue, as he would be by a fraudulent representation made either by himself or his agent; 2 Kent 621, n.; 1 H. L. C. 615; 6 M. & W. 358; *contra*, 21 Vt. 129; 8 *id.* 98; 3 Q. B. 58. See Poll. Torts 384; Benj. Sales § 445; Broom, Leg. Max. 707. Where a purchaser has been induced to buy through the fraud of an agent, the vendor being innocent, he may rescind the contract or maintain an action of deceit against the agent personally, but against the principal he can maintain no action unless there was a warranty; Benj. Sales § 467, notes. See 3 Am. L. Rev. 430; Bigel. L. C. Torts 21; 16 Gray 436.

If a principal knows the representation of his agent to be false and authorizes him to make it, the former is liable; if the agent makes the representation without specific authority, but not believing it to be true, the principal is liable (6 M. & W. 373); as to whether, in such case if the agent does believe the representations to be true, the principal is liable, is doubtful in England; Poll. Torts 291. See AGENTS; See, generally, DECEIT; FRAUD.

**MISSAE PRESBYTER.** A Priest in Orders. Blount.

**MISSILIA.** **In Roman Law.** Gifts which the officers were in the habit of

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throwing among the people. Inst. 2, 1, 45.

**MISSING SHIP.** A ship which has been at sea and unheard from for so long a time as to give rise to the presumption that she has perished with all on board.

There is no precise time fixed as to when the presumption is to arise; and this must depend upon the circumstances of each case; 2 Stra. 1199; Park. Ins. 63; Marsh. Ins. 488; 2 Johns. 150; 1 Caines 525; Holt 242.

**MISSING WORD COMPETITIONS.** See LOTTERY.

**MISSIO. In Roman Law.** Letting go or sending away.

**MISSIO IN BONA.** Execution against the property of a debtor by which a creditor was empowered to take possession of the entire estate of the debtor. Sohm, Rom. L. 211.

**MISSIO IN POSSESSIONEM.** A writ by which a creditor obtained actual control, or mere detention of a thing as security for his claim, without any right of sale or action. Sohm, Rom. L. 275.

**MISSISSIPPI.** The name of one of the states of the United States.

The territory of Mississippi, embracing the present states of Alabama and Mississippi, was authorized to be organized by act of congress, of April 9, 1798, and organized on 22d January, 1799. Georgia, from which the territory was formed, ceded it to the United States on April 24, 1802.

The western part of the Mississippi territory was authorized to form a state government to be known as the state of Mississippi, by act of congress passed March 1, 1817, and the state was admitted into the Union December 10, 1817.

The first constitution of the state was adopted at Washington, August 15, 1817. The second at Jackson, October 26, 1832. This was amended in August, 1865, so as to strike out the word "white," and to abolish and to eliminate everything connected with the institution of slavery. The third, at Jackson, on May 15, 1868, ratified by the people on December 1, 1869, and went into operation in 1870, on the readmission of the state into the Union under the Reconstruction Acts of congress. The fourth was adopted in convention November 1, 1890, to take effect from that date.

THE LEGISLATIVE POWER. This is vested in the senate and house of representatives. Their action, except in impeachment trials, is subject to executive veto.

The *Senate* is composed of members elected for the term of four years, in the several districts as provided by law, the number being forty-five. A senator must have attained to the age of twenty-five years, must be an elector of the state for four years, and an actual resident of the district for two years before his election.

The *House of Representatives* is composed of members elected every four years in the counties and representative districts, as provided by law, the number being one hundred and thirty-three. They must be twenty-one years of age at least, and resident citizens of the state four years and of the county two years, immediately preceding their election. The seat of a senator or representative is vacated by removal from the district or county. The legislature meets in regular sessions once in four years, commencing on the first Tuesday after the first Monday in January 1892; and in special sessions every four years commencing on the same day in 1894. Special sessions may consider only appropriation and revenue bills and are limited to thirty days unless the governor extends them by proclamation. He may also convene extraordinary sessions, for action only upon subjects designated by him.

EXECUTIVE POWER.—The *Governor* is elected for four years. He must be at least thirty years of age, twenty years a citizen of the United States, and a resident in the state five years next preceding his election. He has the usual powers and may grant pardons, etc., after advertisement by the applicant of his petition, giving reasons for the application, except that pardon or reprieve for treason, or remission of forfeitures, requires the advice and consent of the senate. When the office of governor becomes vacant the *Lieut.-Governor* succeeds to the powers and duties of the office, and receives the same compensation as the governor, during the remainder of the term. He also acts in the absence from the state or disability of the governor. In case of disability, absence, or other incapacity of the lieutenant-governor the president of the senate, *pro tempore* acts in his stead; with succession to the speaker of the house of representatives, or if there be none of these officers to discharge the duties of governor, the secretary of state convenes the senate to elect a president *pro tempore*. In case of doubt as to the existence of a vacancy the secretary of state may submit the question to the supreme court.

THE JUDICIAL POWER.—There are in the state three courts of general jurisdiction: a supreme court, circuit courts and chancery courts. All the chancellors and judges are appointed by the governor, with the advice and consent of the senate. Judges of the supreme and the circuit courts and chancellors may, in term time and vacation, severally order the issuance of writs of *habeas corpus*, mandamus, *certiorari*, *supersedeas*, and attachments, and grant injunctions and all other remedial writs in proper cases, returnable to any court. They are also all conservators of the peace.

The *Supreme Court* consists of three judges, appointed for the term of nine years. The terms are so arranged that one expires every third year. The judge of longest continuous service is Chief Justice. The judges must be at least thirty years of age, and five years practising attorneys and citizens of the state. The terms of the court are held at Jackson, the seat of government, twice in each year, to wit: second Monday in October, and first Monday in March. The state is divided into three districts, and the dockets of the different districts are called at different times, which are fixed during the October term by statute, and during the March term by order of the court. The judges are required to be appointed from the districts, but removal to the state capital during the term of office shall not render them ineligible for election for another term from the district. It has conferred upon it by the constitution "such jurisdiction as properly belongs to a court of appeals."

*Circuit Court.* The state, by the constitution, is required to be divided into convenient judicial districts, and is now divided into nine. The judges are appointed for the term of four years, and are required to be at least twenty-six years of age; and for five years citizens and practicing lawyers of the state. The judges may alternate and make temporary changes of their circuits whenever the public interests require. At least two terms of the court shall be held each year in each county.

The court has original jurisdiction in all matters, civil and criminal; but in civil matters only when the principal amount in controversy exceeds two hundred dollars. It has appellate jurisdiction in all cases where appeals are granted by law from inferior tribunals.

*Chancery Courts* are established in each county in the state, with full jurisdiction in all matters in equity, and of divorce and alimony; in matters testamentary and of administration; in minor's business, also general chancery powers; and in cases of idiocy, lunacy, and persons non compos mentis. It may alter names, legitimate offspring, and decree adoption of children. All appeals are prosecuted directly to the supreme court.

The state is divided into convenient chancery districts, now into seven. Chancellors are appointed for each district in the same manner as circuit judges, and for the term of four years. The qualifications of the chancellors are regulated by statute, and are the same as those prescribed by the constitution for circuit judges. A court is required to be held in each county at least twice in each year.

The clerk of the chancery court is vested with large powers. At any time he may receive and file bills, petitions, motions, accounts, inventories, and reports, issue process and warrants of appraise-

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ment, allow and register claims against estates being administered in his court, may appoint administrators *ad colligendum*, may grant letters of administration to husband, or wife, or next of kin. At monthly rules, required to be held on the first Monday of each month, he may take the probate of wills, and grant letters testamentary, grant letters of administration, appoint guardians for minors, lunatics, and idiots, compel the return of inventories, the presentation of annual or final accounts and approve the same; may refer contested claims to auditors, and receive and act on their report; may do all things necessary to the settlement of insolvent estates; may require executors, or administrators, or guardians to give new sureties; may enter decrees nisi, and make all orders of course, orders of revivors, and orders pro confesso. All such orders are not final, but are subject to approval by the court.

*Justices of the Peace.* A competent number of justices of the peace are elected in each county for each district for four years, having resided two years in the district. The jurisdiction in civil matters is limited to causes in which the principal of the amount in controversy does not exceed two hundred dollars; and in criminal matters, concurrent with the circuit court, of all cases of offences where the punishment prescribed does not extend beyond a fine and imprisonment in the county jail. They are conservators of the peace. An appeal may be taken to the circuit court in all cases.

**MISSIVES. In Scotch Law.** Writings passed between parties as evidence of a transaction. Bell. Dict.

**MISSOURI.** The name of one of the states of the United States of America.

It was formed out of part of the territory ceded to the United States by the French Republic by treaty of April 30, 1803, and admitted into the Union by a resolution of congress approved March 2, 1821.

To this resolution there was a condition, which, having been performed, the admission of Missouri as a state was completed by the president's proclamation, dated August 10, 1821.

The convention which formed the constitution of this state met at St. Louis, on Monday, June 12, 1820, and continued by adjournment till July 19, 1820, when the constitution was adopted, establishing "an independent republic, by the name of the 'State of Missouri.'"

THE LEGISLATIVE POWER.—The General Assembly consists of a Senate and House of Representatives.

The *Senate* consists of thirty-four members, chosen for the term of four years; but one-half are chosen every second year. A senator must be a male citizen of the United States, thirty years old, a qualified voter of the state three years, and an inhabitant of the district which he may be chosen to represent one year, and shall have paid a state and county tax within one year, next before his election.

The *House of Representatives* consists of members to be chosen every second year by the several counties, the total number being about one hundred and forty, but varying with the apportionments, which are to be made after each decennial census, and are based on a ratio obtained by dividing the whole number of inhabitants of the state by two hundred. Each county is entitled to one representative, at least, and when counties have certain multiples of said ratio, they are entitled to representation proportionate thereto; such counties being divided into representative districts by the county or circuit court.

A representative must be twenty-four years of age at least, must have been a qualified voter of the state two years, and otherwise possess the same qualifications as a senator.

THE EXECUTIVE POWER.—The *Governor* is elected by the people, and holds his office for four years and until a successor is duly elected and qualified, but he is ineligible to re-election as his own successor. He must be at least thirty-five years old, a male, and must have been a citizen of the United States for ten years, and a resident of this state seven years next before his election. In addition to other usual powers, he may grant reprieves, commutations, and pardons, except in cases of treason and impeachment, and veto bills, which, however, may be passed over his objections by a two-thirds vote of all the members elect in both houses.

The *Lieutenant-Governor* is elected at the same time, in the same manner, and for the same term, and is to possess the same qualifications as the governor. He is, by virtue of his office, president of the senate, may debate in committee of the whole, and give the casting vote in the senate, and in joint vote of both houses. In case of death, conviction, or impeachment, failure to qualify, resignation, absence from the state, or other disability of the governor, the powers, duties, and emoluments of the office for the residue of the term, or until the disability shall be removed, devolve upon him.

A *Secretary of State*, *State Auditor*, *State Treasurer*, *Attorney General*, and *Superintendent of Public Schools*, each of whom must be at least twenty-five years old, a male citizen of the United States, and a resident of this state at least five years next before an election, and who are all elected for four years, complete the executive department.

THE JUDICIAL POWER.—The *Supreme Court* consists of five judges, elected by the people for ten years, one judge being elected every two years; but they may be removed from office, for inefficiency on account of continued sickness or infirmity, by the general assembly, two-thirds of the members concurring, with the approval of the governor. This process does not, however, take the place of impeachment. Judges must be citizens of the United States, not less than thirty years old, and citizens of this state for five years next before their election.

Three of the judges constitute a quorum, and the court is required to sit at the seat of government. It has an appellate and superintending jurisdiction over inferior courts, coextensive with the state (under limitations provided in the constitution), may issue, hear, and determine writs of *habeas corpus*, *mandamus*, *quo warranto*, *certiorari*, and other original remedial writs.

Appeals to, and writs of error from, the supreme court, lie in cases involving: 1st, a sum exceeding twenty-five hundred dollars; 2d, the construction of state or national constitution; 3d, a treaty, statute, or authority under the United States; 4th, the state revenue laws, or title to state office; 5th, title to real estate; 6th, cases in which a political subdivision, or an officer, of the state is a party; 7th, all cases of felony.

*Appellate Courts.* There are two district appellate courts, the St. Louis Court of Appeals and the Kansas City Court of Appeals. The jurisdiction of the former extends over the city of St. Louis and the eastern counties of the state named in the constitutional amendment establishing these courts. The latter embraces all other counties in the state. Each of said courts has within its own territorial district final and appellate jurisdiction from the circuit and other inferior courts in all cases except those which go to the supreme court directly, see *supra*. Also superintending control over inferior courts of record with power to issue writs of *habeas corpus*, *quo warranto*, *mandamus*, *certiorari*, and other remedial writs, and to hear and determine them. Each of these courts consists of three judges, two of whom constitute a quorum, to be elected by the qualified voters of the district for the period of twelve years, one judge being elected every four years. Judges must be residents of the district and must otherwise possess the same qualifications as judges of the supreme court.

The *Circuit Court* has jurisdiction over all criminal, and exclusive original jurisdiction over all civil cases, not otherwise provided for by law; concurrent jurisdiction with, and appellate jurisdiction from, inferior tribunals and justices of the peace, as may be required by law. It exercises superintending control over criminal, probate, county, and municipal corporation courts, justices of the peace, and inferior tribunals. It has full original jurisdiction in equity; and no other chancery court exists.

The state is divided into convenient circuits of contiguous counties, in each of which one judge is elected for six years, who must be thirty years old, a citizen of the United States five years, of this state three years, and a resident of the circuit. Any circuit judge may be removed by the general assembly, or may be impeached, in the same manner as supreme judges. In the city of St. Louis, (which is a distinct political subdivision of the state) there are five circuit judges, of co-ordinate jurisdiction, who sit separately in special term, for the trial of

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causes, and together in general term, to make rules of court and transact such other business as may be provided by law, but with no power to review proceedings had in special term.

The *Probate Court* is a court of record in each county, consisting of one judge, who is elected. It has jurisdiction in probate matters, letters testamentary, and of administration, guardians, curators, and all matters relating to apprentices. From its final judgments and orders an appeal lies to the circuit court of the county. Courts of common pleas are established in several cities. They are held by the circuit judge in May and September of each year.

The *County Court* is a court of record in each county, and has jurisdiction to transact all business relating to the property and financial affairs of the county and to administer the county institutions, and such other business as may be prescribed by law. It consists of one or more judges, not exceeding three, of whom the probate judge may be one.

*Justices of the Peace* are elected by the people. They have original civil jurisdiction over matters arising from contract and tort, and to recover statutory penalties when the amount involved does not exceed two hundred and fifty dollars (and in cities and counties having over fifty thousand inhabitants, three hundred dollars); in cities having three hundred thousand or more inhabitants they have original jurisdiction of all civil actions where the amount in dispute, exclusive of interest and costs does not exceed five hundred dollars; also in actions against railroad companies for injuries to animals in their townships, without regard to value or number of inhabitants.

They have criminal jurisdiction in breaches of the peace, concurrent original jurisdiction with the circuit court, coextensive with their counties, in misdemeanors, and authority to issue warrants for preliminary hearing, and to take bail, in cases of alleged felony.

In the city of St. Louis there are the *Criminal Court*, the *Court of Criminal Correction*, and, as in other cities, *Municipal Corporation Courts*.

The *Criminal Court* has the criminal jurisdiction in felony cases of the circuit courts of other counties.

The *Court of Criminal Correction* has exclusive original jurisdiction of all misdemeanors, committed in St. Louis, except in a few minor offences, where it is concurrent with justices of the peace; and power to hear and commit for indictment, with or without bail, all parties charged with felony. It has also an appellate jurisdiction from justices in criminal cases.

*Municipal Corporation Courts* exercise functions under the laws and ordinances of the city.

**MISSTAICUS.** A messenger.

**MISSURA.** The ceremonies used in a Roman Catholic church to recommend and dismiss a dying person.

**MISTAKE.** Some unintentional act, omission, or error arising from ignorance, surprise, imposition, or misplaced confidence. Story, Eq. Jur. § 110; 46 Wis. 118.

That result of ignorance of law or fact which has misled a person to commit that which, if he had not been in error, he would not have done. Jeremy, Eq. Jur. 358.

A mistake exists when a person, under some erroneous conviction of law or fact does, or omits to do, some act which, but for the erroneous conviction, he would not have done or omitted. It may arise either from unconsciousness, ignorance, forgetfulness, imposition, or misplaced confidence. Bishp. Eq. § 185. The essential element of mistake is a mental condition or conception or deviation of the understanding either in a passive or active state; when passive, it may consist of unconsciousness, ignorance, or forgetfulness, and when active, it may be a belief. The first condition must always concern a fact material to the transaction, while in the second, the belief may be that a matter or thing exists at the present time which really does not exist, or that it existed at some past time when it did not really exist. All particular errors which fall under either condition are mistakes of fact which are a ground of equitable relief. These mistakes may arise from ignorance; 19 Barb. 222; in forgetfulness of a fact past; 7 Johns. 442; of a fact present; 38 Pa. 491; in unconsciousness; 29 Vt. 238; 4 Bosw. 320; in belief of a thing which does not exist; 25 N. Y. 289; 19 *id.* 502; of things which have not existed; 8 N. Y. 335. See 6 L. R. A. 835.

As a general rule, both at law and in equity, mistakes of law do not furnish an excuse for wrongful acts or a ground of relief from the consequences of acts done in consequence of such a mistake; 94 N. C. 490; 107 Ind. 69; 9 M. & W. 54; 5 Hare 91; 9 How. 55; 7 Paige 99*, 187; 2 Johns. Ch. 60. See 2 M'Cord, Ch. 455; 6 H. & J. 500; 25 Vt. 603; 13 Ark. 129; 6 Ohio 169; 11 *id.* 480; 21 Ga. 118; Beasl. Ch. 165; 62 Mich. 473; 159 Pa. 531; 46 Ill. App. 387; 108 Ind. 61; 88 Mo. 621. But if a contracting party knows that the other party is proceeding upon a mistake in law, there might arise a consideration of fraud in his taking advantage of the other's mistake; 70 Pa. 425; 51 Ala. 154; 23 Ill. 579; 102 *id.* 208; 67 Me. 217; 82 N. C. 40; 36 N. J. Eq. 111. When both parties are under a common mistake of law as to the application of their contract, it can be applied only according to their intention and not otherwise; Leake, Contr. 347; 46 L. J. Q. B. 213. And, if parties contract under a common misapprehension as to their relative and respective rights, the contract may be liable to be set aside as inapplicable to the state of rights really existing; L. R. 2 H. L. 170; see 79 Hun 44; 48 Wis. 443; 36 N. J. L. 432. In this connection the word *jus* in the maxim *ignorantia juris haud excusat*, denotes general law and not private rights; *ibid.*; Add. Contr. 119. An agreement made for the purpose of settling rights, with full knowledge of the doubts arising upon them, will be enforced, and parties will not be allowed to state that they were under a misapprehension as to the law; 1 S. & S. 555; 51 Ala. 160; 3 Lead. Cas. Eq. 411; 7 W. & S. 253. This is particularly the case in relation to family settlements; 3 Swanst. 462; 64 Pa. 25. Inadvertence and mistake are, equally with fraud and wrong, grounds for judicial interference to devest a title acquired thereby; 138 U. S. 514.

The power of courts of equity to afford relief from the consequences of the mistakes of parties to written instruments is not strictly limited to mistakes of fact, but extends also to mistakes of law; 37 Minn. 30; 85 Wis. 240; see 141 U. S. 260; it will correct an instrument where it is clearly and fully inconsistent with a prior agreement and with the purpose for which it was designated, or if it fails to express the intention of the parties; 99 N. C. 30. See IGNORANCE.

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An act done or a contract made under a mutual mistake or ignorance of a material fact is voidable and relievable in equity; Poll. Contr. 442; Story, Eq. Jur. § 140; 142 U. S. 417. The rule applies to cases where there has been a studied suppression of facts by one side, and to cases of mutual ignorance or mistake; 26 Beav. 454; 12 Sim. 465; 9 Ves. 275; 2 Barb. 475; 11 Pet. 71; 8 B. Monr. 580; 4 Mas. 414; 5 R. I. 130; 85 Ky. 322; 150 Pa. 36; 5 Wash. St. 736; 78 Hun 462; 160 Mass. 438; 64 Conn. 28. See 128 U. S. 315; 132 *id.* 271; 31 Fla. 73; 148 Ill. 383. But the fact must be material to the contract, *i. e.* essential to its character, and an efficient cause of its concoction; 11 Gratt. 468; 2 Barb. 37; 2 Sandf. Ch. 298; 13 Pa. 371. See 28 N. J. Eq. 306; 75 N. Y. 55; 98 U. S. 55. And as a ground for reforming an instrument the mistake must be mutual; 71 Tex. 99; 49 Mo. App. 255; 66 Hun 635; 68 *id.* 299; 131 Mass. 316; 109 Ind. 354; 71 Iowa 446. But equity will not afford relief in cases of mutual mistake of legal rights where it is impossible to restore both parties to the *status quo;* 178 Pa. 154. A mistake will not be relieved against if it was the result of the party's negligence; 5 Oreg. 169; 12 Cl. & F. 248; 1 W. & M. 138; 5 R. I. 130; 122 Ill. 536; 103 Pa. 594; 70 Ga. 794. See 16 Oreg. 412. If the mistake, as to the expression of an agreement, is only on one side, there will be no relief. But if such a mistake on the part of one party be known to the other at the time, the contract can be avoided at common law, if not reduced to writing; L. R. 6 Q. B. 597. In equity, a mistake of one party known to the other may not only preclude the latter from obtaining specific performance, but may also be a ground for setting aside the contract altogether; Leake, Contr. 318; 30 Beav. 445. When a written contract contains a mistake common to both parties in expressing its terms, equity will give relief by restraining proceedings at law, or by rectifying the writing or setting it aside; Leake, Contr. 319. An act done intentionally and with knowledge, cannot be treated as a mistake; 22 Ct. Cls. 165.

Where an attorney acting under general instructions of his client to compromise a litigation consents to a compromise under a misapprehension, neither the client nor the counsel are bound thereby and the court will set it aside on application; [1895] 2 Ch. 638.

When a mistake in the expression of a written contract is so obvious, without extrinsic evidence, as to leave no doubt of the intention of the parties, the writing may be so construed as to correct the mistake; 5 H. L. C. 40; L. R. 9 Eq. 507. See 50 Ohio St. 394.

An award may be set aside for a mistake of law or fact by the arbitrators apparent on the face of the award; 2 B. & P. 371; 1 Dall. 487; 1 Sneed 321. See 6 Metc. 136; 17 How. 344; 6 Pick. 148; 2 Gall. 61; 4 N. H. 357; 3 Vt. 308; 15 Ill. 461; 2 B. & Ald. 691.

The word which the parties intended to use in an instrument may be substituted for one which was actually used by a clerical error, in equity; Adams, Eq. 169; 13 Gray, 373; 6 Ired. Eq. 462; 17 Ala. N. S. 562; 58 Fed. Rep. 918. Equity will not correct a mistake in a voluntary deed by inserting the word "heirs" omitted by inadvertence of the draughtsman; but otherwise, when the deed is supported by a valuable or meritorious consideration; 98 N. C. 426.

As to the rule for the correction of mistakes in wills, see Story, Eq. Jur. § 179; 2 Ves. 216; 3 *id.* 321; 1 Bro. Ch. 85; 3 *id.* 446; 1 Keen 692; 2 K. & J. 740; 1 Jones, Eq. 110; 22 Mo. 518; 2 Stockt. Ch. 582; [1893] Prob. 1; 45 Wis. 357; 56 Ia. 676.

A mistake sometimes prevents a forfeiture, in cases of violation of revenue laws; Paine 129; Gilp. 235; 4 Call 158; breach of embargo acts; 3 Day 296; Paine 16; 7 Cra. 22; 3 Wheat. 59; 11 How. 47; 1 Bish. Cr. Law, § 697; 1 Mass. 347. See Kerr, Fr. & Mist.; Bispham, Equity; Leake, Contr.; 3 Lead. Cas. Eq. 411. See ERROR.

**MISTERY.** A trade or calling. Cowel.

**MISTRIAL.** A trial which is erroneous on account of some defect in the persons trying, as if the jury come from the wrong county, or because there was no issue formed, as if no plea be entered, or some other defect of jurisdiction. 3 Cro. 284; 2 Maule & S. 270.

Where a jury is discharged without a verdict, the proceeding is properly known as a mistrial; 22 Fed. Rep. 427.

Consent of parties cannot help such a trial, when past; Hob. 5.

It is error to go to trial without a plea or an issue, in the absence of counsel and without his consent, although an affidavit of defence be filed in the case, containing the substance of a plea, and the court has ordered the case on the list for trial; 3 Pa. 501.

On an indictment for perjury, an infant under the age of twenty-one years, and not otherwise qualified, not having, in fact, been summoned, personated his father as a juror. Here was a mistrial, because the verdict in the case was the verdict of but eleven jurors. "To support a judgment," observed Justice Holroyd, "it must be founded on a verdict delivered by twelve competent jurors. This man was incompetent, and therefore there has been a mistrial." 7 D. & R. 684. See 4 B. & Ald. 430; 18 N. Y. 128; NEW TRIAL.

**MISUSER.** An unlawful use of a right. In cases of public offices and franchises, a misuser is sufficient to cause the right to be forfeited. 2 Bla. Com. 153; 5 Pick. 163.

**MITIGATION.** Reduction; diminution; lessening of the amount of a penalty or punishment.

Circumstances which do not amount to a justification or excuse of the act committed may yet be properly considered in mitigation of the punishment: as, for example, the fact that one who stole a loaf of bread was starving.

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In actions for the recovery of damages, matters may often be given in evidence in mitigation of damages which are no answer to the action itself. See DAMAGES; CHARACTER.

**MITIOR SENSUS.** See IN MITIORI SENSU.

**MITTENDO MANUSCRIPTUM PEDIS FINIS.** An abolished judicial writ, addressed to the treasurer and chamberlain of the exchequer to search for and transmit the foot of the fine acknowledged before justices in eyre into the common pleas. Reg. Orig. 14.

**MITTER** (L. Fr.). To put, to send, or to pass: as, *mitter avant*, to present to a court; *mitter l'estate*, to pass the estate; *mitter le droit*, to pass a right. 2 Bla. Com. 324; Bacon, Abr. *Release* (C); Co. Litt. 193, 273 *b*. *Mitter a large*, to put or set at large.

**MITTIMUS. In Old English Law.** A writ enclosing a record sent to be tried in a county palatine: it derives its name from the Latin word mittimus, "we send." It is the jury process of these counties, and commands the proper officer of the county palatine to command the sheriff to summon the jury for the trial of the cause, and to return the record, etc. 1 Mart. La. 278; 2 *id.* 88.

**In Criminal Practice.** A precept in writing, under the hand and seal of a justice of the peace, or other competent officer, directed to the jailer or keeper of a prison, commanding him to receive and safely keep a person charged with an offence therein named, until he shall be delivered by due course of law. Co. Litt. 590.

**MIXED ACTION.** See ACTION.

**MIXED CONTRACT.** See CONTRACT.

**MIXED GOVERNMENT.** A government established with some of the powers of a monarchial, aristocratical, and democratical government. See GOVERNMENT; MONARCHY.

**MIXED JURY.** A jury composed partly of white men and partly of negroes. See CIVIL RIGHTS.

One consisting partly of citizens and partly of aliens. See MEDIETAS LINGUÆ; JURY.

**MIXED LARCENY.** Compound larceny, which see.

**MIXED MARRIAGE.** A marriage between persons of different nationalities or of different races. See CIVIL RIGHTS.

**MIXED POLICY.** See POLICY.

**MIXED PRESUMPTION.** See PRESUMPTION.

**MIXED PROPERTY.** That kind of property which is not altogether real nor personal, but a compound of both. Heirlooms, tombstones, monuments in a church, and title-deeds to an estate, are of this nature. 2 Bla. Com. 428; 3 B. & Ad. 174; 4 Bingh. 106. See CONFUSION OF GOODS.

**MIXED QUESTION.** A question involving matters of law and of fact, or one arising from the conflict of foreign and domestic laws. See CONFLICT OF LAWS; LEX LOCI; JURY.

**MIXED TITHES. In Ecclesiastical Law.** "Those which arise not immediately from the ground, but from those things which are nourished by the ground:" *e. g.*, colts, chickens, calves, milk, eggs, etc. 3 Burn, Eccl. Law 380; 2 Bla. Com. 24.

**MIXED TRIBUNALS.** A name given to an international jurisdiction introduced into Egypt in 1878, after negotiations with the various Christian Powers of Europe. This tribunal made the administration of civil justice quite independent of the government of Egypt. They have jurisdiction over cases between persons of different nationalities, whether native or European, but criminal charges against natives are heard in the native criminal courts and those against Europeans in the proper consular courts. There are three mixed courts of First Instance and a Court of Appeal, whose decisions are final, and which sits at Alexandria. The two divisions of the Appeal Court are each composed of five European and three native judges; the Courts of First Instance are each composed of five judges, three European and two native. The judges are subjects of various European states, and of the United States and Brazil. They are appointed by their respective governments; Milner, England in Egypt. Changes in the organization are now being considered by a commission.

These courts were instituted for a period of five years only, and have been renewed at various times. The current period expires in February, 1899. See 8 Encyc. Laws of Eng. 445.

**MIXTION.** The putting of different goods or chattels together in such a manner that they can no longer be separated: as, putting the wines of two different persons into the same barrel, the grain of several persons into the same bag, and the like.

The intermixture may be occasioned by the wilful act of the party, or owner of one of the articles, by the wilful act of a stranger, by the negligence of the owner or a stranger, or by accident. See CONFUSION OF GOODS.

**MOB** (Lat. *mobilis*, movable). A tumultuous rout or rabble; a crowd excited to some violent or unlawful act. The word in legal use is practically synonymous with riot, but the latter is the more correct term.

At common law a municipal corporation is not liable for damage to property by a mob; Beach, Pub. Corp. § 746; 90 Pa. 397; s. c. 35 Am. Rep. 670; 46 Ala. 118; 25 Md. 107;

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nor for the failure of its officers to repress a mob; 53 Ala. 527; s. c. 25 Am. Rep. 656; 13 Blatch. 289. The legislature may, however, give a right of action against the corporation for damages caused by a mob, and provide the measure of damages; 9 Kan. 350; 24 Hun 562; 47 Cal. 531; 65 Me. 426. Such a right of action has been provided by statute in Pennsylvania against the county in which the damage was caused.

As all the parties in any way concerned with an unlawful killing by a mob are liable *in solido*, it is proper to join, as a party defendant with the individuals who participated in the killing, the city in which the act was committed, on the ground of its negligence in not preventing the killing; 50 Fed. Rep. 170; and independently of any misconduct on the part of the city or county to which the loss is attributed, a state may constitutionally compel such county or city to indemnify against losses of property from mobs and riots within their limits; 81 Fed. Rep. 317. See LYNCH LAW; RIOT.

**MOBBING AND RIOTING. In Scotch Law.** A general term, including all those convocations of the lieges for violent and unlawful purposes, which are attended with injury to the persons or property of the lieges, or terror and alarm to the neighborhood in which it takes place. The two phrases are usually placed together; but, nevertheless, they have distinct meanings, and are sometimes used separately in legal language,—the word mobbing being peculiarly applicable to the unlawful assemblage and violence of a number of persons, and that of rioting to the outrageous behavior of a single individual. Alison, Cr. Law 509.

**MOBILIA.** See MOVABLES.

**MOCK.** To deride, to laugh at, to ridicule, to treat with scorn and contempt. 34 Conn. 279.

**MODE.** The manner in which a thing is done; as the mode of proceeding, the mode of process. Anderson's L. Dict.

See, generally, 9 Pet. 360; 10 Wheat. 51; 48 Wis. 385.

**MODEL.** A machine made on a small scale to show the manner in which it is to be worked or employed.

A copy or imitation of the thing intended to be represented. 25 N. J. L. 602. See PATENT.

**MODERAMEN INCULPATÆ TUTELÆ. In Roman Law.** The regulation of justifiable defence. The term expresses that degree of force which a person might lawfully use in defence of his person or property, even though it should occasion the death of the agressor. Bell, Dict.

**MODERATA MISERICORDIA.** A writ founded on Magna Charta, which lies for him who is amerced in a court, not of record, for any transgression beyond the quality or quantity of the offence; it is addressed to the lord of the court, or his bailiff, commanding him to take a moderate amerciament of the parties. New Nat. Brev. 167; Fitzh. Nat. Brev. 76.

**MODERATE CASTIGAVIT. In Pleading.** The name of a plea in trespass by which the defendant justifies an assault and battery, because he *moderately corrected* the plaintiff, whom he had a right to correct. 2 Chitty, Pl. 576; 2 B. & P. 224. See CORRECTION; ASSAULT; 15 Mass. 347; 2 Phill. Ev. 147; Bacon, Abr. *Assault* (C).

This plea ought to disclose, in general terms, the cause which rendered the correction expedient; 3 Salk. 47.

**MODERATE SPEED.** The moderate speed of a steam vessel is such as will permit the steamer reasonably and effectually to avoid a collision by slackening speed, or by stopping and reversing within the distance at which an approaching vessel can be seen. 35 Fed. Rep. 609; 39 *id.* 480. Five knots is a moderate speed for a sailing vessel; 46 L. T. N. S. 840.

**MODERATOR.** A person appointed to preside at a popular meeting; sometimes he is called a chairman. The presiding officer of town meetings in New England is so called.

**MODIATIO.** A certain duty paid for every tierce of wine. Mon. Angl. t. ii. 144.

**MODIUS.** A measure, usually a bushel.

**MODO ET FORMA** (Lat. in manner and form). **In Pleading.** Technical words used to put in issue such concomitants of the principal matters as time, place, etc., where these circumstances were material. Their use when these circumstances were immaterial was purely formal. The words were translated literally, when pleadings began to be made in English, by "in manner and form." See Lawes, Pl. 120; Gould, Pl. c. 6, § 22; Steph. Pl. 213; Dane, Abr. Index; Viner, Abr. *Modo et Forma.*

**MODUS. In Civil Law.** Manner; means; way. Ainsworth, Lat. Dict. A rhythmic song. Du Cange.

**In Old Conveyancing.** *Manner: e. g.*, the *manner* in which an estate should be held, etc. A qualification, whether in restriction or enlargement of the terms of the instrument; especially with relation to the kind of grant called "*donatio*,"—the making those *quasi* heirs who were not in fact heirs according to the ordinary form of such conveyances. And this *modus* or qualification of the ordinary form became so common as to give rise to the maxim "*modus et conventio vincunt legem.*" Co. Litt. 19 *a*; Bracton, 17 *b*; 1 Reeve, Hist. Eng. Law 293. A consideration. Bracton, 17, 18.

**In Ecclesiastical Law.** A peculiar manner of tithing, growing out of custom. See MODUS DECIMANDI.

**MODUS DECIMANDI. In Eccle-**

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**siastical Law.** A peculiar manner of tithing, arising from immemorial usage, and differing from the payment of one-tenth of the annual increase.

To be a good *modus*, the custom must be —*first*, certain and invariable; *second*, beneficial to the person; *third*, a custom to pay something different from the thing compounded for; *fourth*, of the same species; *fifth*, the thing substituted must be in its nature as durable as the tithes themselves; *sixth*, it must not be too large: that would be a *rank modus*. 2 Bla. Com. 30. See 2 & 3 Will. IV. c. 100; 13 M. & W. 822.

**MODUS DE NON DECIMANDO. In Ecclesiastical Law.** A custom or prescription not to pay tithes, which is not good, except in case of abbey-lands. 2 Sharsw. Bla. Com. 31, n.

**MODUS LEVANDI FINES.** See FINE.

**MOERDA.** The secret killing of another; murder. 4 Bla. Com. 194.

**MOHAMMEDAN LAW.** A system of native law prevailing among the Mohammedans in India, and administered there by the British government. See HINDU LAW.

**MOHATRA. In French Law.** The name of a fraudulent contract made to cover a usurious loan of money.

It takes place when an individual sells merchandise on credit at a high price and afterward buys it back at a much less price for cash. 16 Toullier, n. 44; 1 Bouvier, Inst. n. 1118.

**MOIETY.** The half of anything: as, if a testator bequeath one moiety of his estate to A, and the other to B, each shall take an equal part. Joint tenants are said to hold by moieties. Littleton 125; 3 C. B. 274, 283.

**MOLESTATION. In Scotch Law.** The name of an action competent to the proprietor of a landed estate against those who disturb his possession. It is chiefly used in questions of commonty, or of controverted marches. Erskine, Inst. 4. 1. 48. See, generally, 12 Q. B. D. 539; 14 *id.* 792.

**MOLITURA.** Toll paid for grinding at a mill; multure. Not used.

**MOLLITER MANUS IMPOSUIT** (Lat.). He laid his hands on gently.

**In Pleading.** A plea in justification of a trespass to the person. It is a good plea when supported by the evidence; 12 Viner, Abr. 182; Hamm. N. P. 149; where an amount of violence proportioned to the circumstances; 20 Johns. 427; 4 Den. 448; 2 Strobh. 232; 17 Ohio 454; has been done to the person of another in defence of property; 3 Cush. 154; 3 Ohio St. 159; 9 Barb. 652; 23 Pa. 424; see 19 N. H. 562; 25 Ala. N. S. 41; 4 Cush. 597; or the prevention of crime: 2 Chitty, Pl. 574; Bac. Abr. *Assault and Battery* (C. 8).

**MOLMUTIAN LAWS.** The laws of Dunvallo Molmutius, sixteenth king of the Britons, who began his reign about 400 B. C. These laws were famous in the land till the conquest; Toml.; Moz. & W.

**MONARCHY.** That government which is ruled, really or theoretically, by one man, who is wholly set apart from all other members of the state.

According to the etymology of the word, monarchy is that government in which one person rules supreme—alone. In modern times the terms autocracy, autocrat, have come into use to indicate that monarchy of which the ruler desires to be exclusively considered the source of all power and authority. The Russian emperor styles himself Autocrat of all the Russias. Autocrat is the same with despot; but the latter term has fallen somewhat into disrepute. Monarchy is contradistinguished from republic. Although the etymology of the term monarchy is simple and clear, it is by no means easy to give a definition either of monarchy or of republic. The constitution of the United States guarantees a republican government to every state. What is a republic? In this case the meaning of the term must be gathered from the republics which existed at the time of the formation of our government, and which were habitually called republics. Lieber, in a paper on the question, "Shall Utah be admitted into the Union?" (in Putnam's Magazine), declared that the Mormons did not form a republic.

The fact that one man stands at the head of a government does not make it a monarchy. We have a president at the head. Nor is it necessary that the one person have an unlimited amount of power, to make a government a monarchy. The power of the king of England is limited by law and theory, and reduced to a small amount in reality; yet England is called a monarchy. Nor does hereditariness furnish us with a distinction. The pope is elected by the cardinals, yet the States of the Church were a monarchy; and the stadtholder of several states of the Netherlands was hereditary, yet the states were republics. We cannot find any better definition of monarchy than this: a monarchy is that government which is ruled (really or theoretically) by one man, who is wholly set apart from all other members of the state (called his subjects); while we call republic that government in which not only there exists an organism by which the opinion of the people, or of a portion of the people (as in aristocracies), passes over into public will, that is, law, but in which also the supreme power, or the executive power, returns, either periodically or at stated times (where the chief magistracy is for life), to the people, or a portion of the people, to be given anew to another person; or else, that government in which the hereditary portion (if there be any) is not the chief and leading portion of the government, as was the case in the Netherlands.

Monarchy is the prevailing type of gov-

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ernment. Whether it will remain so with our Caucasian race is a question not to be discussed in a law dictionary. The two types of monarchy as it exists in Europe are the limited or constitutional monarchy, developed in England, and centralized monarchy—to which was added the modern French type, which consisted in the adoption of Rousseau's idea of sovereignty, and applying it to a transfer of all the sovereign power of the people to one Cæsar, who thus became an unqualified and unmitigated autocrat or despot. It was a relapse into coarse absolutism.

Paley has endeavored to point out the advantages and disadvantages of the different classes of government—not successfully, we think. The great advantages of the monarchical element in a free government are: first, that there remains a stable and firm point in the unavoidable party struggle; and secondly, that supreme power, and it may be said the whole government, being represented by or symbolized in one living person, authority, respect, and, with regard to public money, even public morality, stand a better chance to be preserved.

The great disadvantages of a monarchy are that the personal interests or inclinations of the monarch or his house (of the dynasty) are substituted for the public interest; that to the chance of birth is left what with rational beings certainly ought to be the result of reason and wisdom; and that loyalty to the ruler comes easily to be substituted for real patriotism, and frequently passes over into undignified and pernicious man-worship. Monarchy is assuredly the best government for many nations at the present period, and the only government under which in this period they can obtain security and liberty; yet, unless we believe in a pre-existing divine right of the monarch, monarchy can never be anything but a substitute—acceptable, wise, even desirable, as the case may be—for something more dignified, which, unfortunately, the passions or derelictions of men prevent. The advantages and disadvantages of republics may be said to be the reverse of what has been stated regarding monarchy. A frequent mistake in modern times is this: that a state simply for the time without a king—a kingless government—is called a republic. But a monarchy does not change into a republic simply by expelling the king or the dynasty; as was seen in France in 1848. Few governments are less acceptable than an elective monarchy; for it has the disadvantages of the monarchy without its advantages, and the disadvantages of a republic without its advantages. See GOVERNMENT; ABSOLUTISM.

**MONASTERIUM.** A monastery; a church. Spel. Gloss.

**MONASTICON.** A book giving an account of monasteries, convents, and religious houses.

**MONETAGIUM.** An ancient tribute paid by tenants to their lord every third year, in consideration of the lord's not changing the money he had coined.

Mintage, or the right of coining money. Cowel.

**MONETARY UNION.** See LATIN MONETARY UNION.

**MONEY.** Gold and silver coins. The common medium of exchange in a civilized nation.

There is some difference of opinion as to the etymology of the word money; and writers do not agree as to its precise meaning. Some writers define it to be the common medium of exchange among civilized nations; but in the United States constitution there is a provision which has been supposed to make it synonymous with coins: "The congress shall have power to coin money." Art. 1, sect. 8. Again: "No state shall coin money, or make anything but gold and silver a legal tender in payment of debt." Art. 1, sect. 10. Hence the money of the United States consists of gold and silver coins. And so well has the congress of the United States maintained this point, that the copper coins heretofore struck, and the nickel cent of recent issues, although authorized to "pass current," are not money in an exact sense, because they are not made a legal tender beyond twenty-five cents. The question has been made whether a paper currency can be constitutionally authorized by congress and constituted a legal tender in the payment of private debts. Such a power has been exercised and adjudged valid by the highest tribunal of several of the states, as well as by congress in the legal-tender acts of 1862 and 1863. See LEGAL TENDER; 1 Am. L. Reg. N. S. 553; 11 *id.* 618; 12 *id.* 601; 47 Wisc. 551.

For many purposes, bank-notes; 1 Y. & J. 380; 3 Mass. 405; 4 Pick. 74; 2 N. H. 333; 20 Wisc. 217; 47 *id.* 557; 7 Cow. 662; Brayt. 24; 71 Ala. 554; 34 Mich. 490; treasury notes and national bank notes; 66 Miss. 298; greenbacks; 27 Fla. 196; a check; 4 Bingh. 179; negotiable notes; 3 Mass. 405; securities; 41 Ill. App. 579; and bonds; 19 C. C. R. 516; will be considered as money. But, ordinarily, standing alone, it means only that which passes current as money, including bank deposits; but in a bequest of money it has been held to include personal property; 65 Hun 159; see 92 N. Y. 234; 34 Ohio St. 352. But a charge that the defendant set up and kept a faro bank, at which *money* was bet, etc., is not sustained by proof that *bank-notes* were bet, etc.; 2 Dana 298; see 2 H. & G. 407; or where there is an indictment for the larceny of lawful money of the United States, evidence of the larceny of national bank notes, does not warrant a conviction; 60 Ind. 193. To support a count for money had and received, the receipt by the defendant of bank-notes, promissory notes; 9 Pick. 93; 14 Me. 285; 7 Johns. 132; credit in account in the books of a third person; 3 Campb. 199; or any chattel, is sufficient; 4 Pick. 71; 17 Mass. 560; and will be treated as money. See 7 Wend. 311;

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7 S. & R. 246; 3 B. & P. 559; 1 Y. & J. 380; 30 Tex. App. 475; 5 Lea 96. The mutilation of coins is forbidden by law. U. S. R. S. 2 Supp. 579. See LATIN UNION; GOLD; SILVER; COIN.

**MONEY BILLS.** Bills or projects of laws providing for raising revenue, and for making grants or appropriations of the public money.

A bill for granting supplies to the crown. Such bills commence in the House of Commons and are rarely attempted to be materially altered in the Lords; May, Parl. L. ch. 22.

The first clause of the seventh section of the constitution of the United States declares, "All bills for raising revenuesh all originate in the house of representatives; but the senate may propose or concur with amendments, as on other bills." See Story, Const. §§ 874-877; 58 Ala. 546; 126 Mass. 601; Cooley, Const. Lim., 4th ed. 160.

What bills are properly "bills for raising revenue," in the sense of the constitution, has been matter of some discussion. Tuck. Bla. Com. App. 261; Story, Const. § 880. In practice, the power has been confined to bills to levy taxes in the strict sense of the words, and has not been understood to extend to bills for other purposes which may incidentally create revenue; Story, Const. § 880; 2 Elliott, Deb. 283.

And a privilege conferred by a state constitution, to originate "money bills," has been held to be limited to such as transfer money from the people to the state, and not to include such as appropriate money from the state treasury; 126 Mass. 557. See REVENUE.

**MONEY BROKER.** A money changer; one who lends to or raises money for others.

**MONEY CLAIMS. In English Practice.** Under the Judicature Act of 1875, claims for the price of goods sold, for money lent, for arrears of rent, etc., and other claims where money is directly payable on a contract express or implied, as opposed to the cases where money is claimed by way of damages for some independent wrong, whether by breach of contract or otherwise. These "money claims" correspond very nearly to the "money counts" hitherto in use. Moz. & W. 410.

**MONEY COUNTS. In Pleading.** The *common counts* in an action of assumpsit.

They are so called because they are founded on express or implied promises to pay *money* in consideration of a precedent debt. They are of four descriptions; the *indebitatus assumpsit;* the *quantum meruit;* the *quantum valebant;* and the account stated. See these titles.

Although the plaintiff cannot resort to an implied promise when there is a general contract, yet he may, in many cases, recover on the common counts notwithstanding there was a special agreement, provided it has been executed; 12 East 1; 7 Cra. 299; 5 Mass. 391; 7 Johns. 132; 10 *id.* 136. It is, therefore, advisable to insert the money counts in an action of assumpsit, when suing on a special contract; 1 Chitty, Pl. 333.

**MONEY DEMAND.** A claim for a mixed amount of money, contradistinguished from damages.

**MONEY HAD AND RECEIVED. In Pleading.** The technical designation of a form of declaration in assumpsit, wherein the plaintiff declares that the defendant *had and received* certain money, etc.

An action of assumpsit will lie to recover money to which the plaintiff is entitled, and which in justice and equity, when no rule of policy or strict law prevents it, the defendant ought to refund to the plaintiff, and which he cannot with a good conscience retain, on a count for money had and received; 6 S. & R. 369; 3 J. J. Marsh. 175; 1 Harr. N. J. 447; 1 Harr. & G. 258; 7 Mass. 288; 6 Wend. 290; Add. Contr., 9th ed. 429; see 120 N. Y. 536; 109 *id.* 363; 66 Hun 627; 45 Ill. App. 276.

When the money has been received by the defendant in consequence of some tortious act to the plaintiff's property, as when he cut down the plaintiff's timber and sold it, the plaintiff may waive the tort and sue in assumpsit for money had and received; 1 Dall. 122; 1 Blackf. 181; 4 Pick. 452; 1 J. J. Marsh. 543; 3 Watts 277; 4 Call 451.

In general, the action for money had and received lies only where *money* has been received by the defendant; 14 S. & R. 179; 1 Pick. 204; 1 J. J. Marsh. 544; 11 Johns. 464; 77 N. Y. 400. But bank-notes or any other property received *as money* will be considered for this purpose as money; 3 Mass. 405; 17 *id.* 560; Brayt. 24; 7 Cow. 622; 4 Pick. 74. See 9 S. & R. 11. Money paid under an illegal contract which has been partially carried into effect cannot be recovered back; L. R. 24 Q. B. Div. 742.

No privity of contract between the parties is required in order to support this action, except that which results from the fact of one man's having the money of another which he cannot conscientiously retain; 17 Mass. 563, 579. See 2 Dall. 54; 5 Conn. 71; 127 Mass. 22. See QUASI CONTRACTS.

**MONEY OF ADIERO. In French Law.** Earnest money. See EARNEST.

**MONEY IN HAND.** There is no real difference between "money in hand" and "ready money." 12 L. J. Ch. 387.

**MONEY JUDGMENT.** One which adjudges the payment of a sum of money, as distinguished from one directing an act to be done or property to be restored or transferred.

**MONEY LAND.** A phrase sometimes applied to money held upon trust to be laid out in the purchase of land. See CONVERSION.

**MONEY LENT. In Pleading.** The technical name of a declaration in an action



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of assumpsit for that the defendant promised to pay the plaintiff for money lent.

To recover, the plaintiff must prove that the defendant received his money, but it is not indispensable that it should be originally lent. If, for example, money has been advanced upon a special contract, which has been abandoned and rescinded, and which cannot be enforced, the law raises an implied promise from the person who holds the money to pay it back as money lent; 7 Bingh. 266; 8 M. & W. 434; 9 *id.* 29. See 1 N. Chipm. 214; 3 J. J. Marsh. 377.

**MONEY-ORDER.** The act of June 8, 1872, c. 335, provided for the establishment of a uniform money-order system, at all suitable post-offices, which shall be called "money-order" offices. The applicant, upon depositing a sum, at one post-office, receives a certificate for that amount, which he mails to the payee, who can then obtain the money at the office designated in the order, upon presenting the latter and mentioning the name of his correspondent. The system is now established with several foreign countries, as well as at home, and is found very convenient for the transmission of small sums; R. S. §§ 4027–4048. Suppl. to R. S. p. 155. Under the law of March 3, 1883, it was provided that money-orders should not be issued for a larger sum than a hundred dollars; 1 Supp. R. S. p. 406; 2 *id.* 166.

**MONEY PAID. In Pleading.** The technical name of a declaration in assumpsit, in which the plaintiff declares for money paid for the use of the defendant.

When one advances money for the benefit of another with his consent, or at his express request, although he be not benefited by the transaction, the creditor may recover the money in an action of assumpsit declaring for money paid for the defendant; 5 S. & R. 9. But one cannot by a voluntary payment of another's debt make himself creditor of that other; 1 Const. S. C. 472; 1 Gill & J. 497; 3 Johns. 434; 14 *id.* 87; 2 Root 84; 2 Stew. Ala. 500; 4 N. H. 138; 1 South. 150; 121 Pa. 641. In order to enable one who has paid money to the use of another, to maintain an action for money paid, two things are essential: a legal liability on the part of the defendant to pay the original demand, and his antecedent request, or subsequent promise to pay; 86 Ala. 202.

Assumpsit for money paid will not lie where property, not money, has been given or received; 7 S. & R. 246; 14 *id.* 179; 7 J. J. Marsh. 18. But see 7 Cow. 662. Nor will an action lie to recover back money paid voluntarily with a full knowledge of the facts and circumstances; 12 Colo. 208; 69 Tex. 267.

But where money has been paid to the defendant either for a just, legal, or equitable claim, although it could not have been enforced at law, it cannot be recovered as money paid. See MONEY HAD AND RECEIVED.

The form of declaring is for "money paid by the plaintiff for the use of the defendant and at his request"; 1 M. & W. 511.

**MONEYED CAPITAL.** In a statute with reference to taxation of national bank stock, it is held to mean money employed in a business whose object is to make profit by investing in securities by way of loan, discount or otherwise, which from time to time are reduced again to money and reinvested. 59 Fed. Rep. 952.

The term has a more limited meaning than the term personal property, and applies to such capital as is readily solvable in money; 28 Fed. Rep. 777.

**MONEYED CORPORATION.** A corporation having the power to make loans upon pledges or deposits, or authorized by law to make insurance. 2 N. Y. Rev. Stat., 7th ed. 1371; 3 N. Y. 479; 48 Barb. 464; 6 Paige 497.

**MONIERS.** Ministers of the mint; also bankers. Cowel.

**MONITION. In Practice.** A process in the nature of a summons, which is used in the civil law, and in those courts which derive their practice from the civil law. In the English ecclesiastical courts it is used as a *warning* to a defendant not to repeat an offence of which he had been convicted. See Bened. Adm.; 76 Mo. 470.

*A general monition* is a citation or summons to all persons interested, or, as is commonly said, to the whole world, to appear and show cause why the libel filed in the case should not be sustained, and the prayer of relief granted. This is adopted in prize cases, admiralty suits for forfeitures, and other suits *in rem*, when no particular individuals are summoned to answer. In such cases the taking possession of the property libelled, and this general citation or monition served according to law, are considered constructive notice to the world of the pendency of the suit; and the judgment rendered thereupon is conclusive upon the title of the property which may be affected. In form, the monition is substantially a warrant of the court, in an admiralty cause, directed to the marshal or his deputy, commanding him, in the name of the president of the United States, to give public notice, by advertisements in such newspapers as the court may select, and by notifications to be posted in public places, that a libel has been filed in a certain admiralty cause pending, and of the time and place appointed for the trial. A brief statement of the allegations in the libel is usually contained in the monition. The monition is served in the manner directed in the warrant.

A *mixed monition* is one which contains directions for a general monition to all persons interested, and a special summons to particular persons named in the warrant. This is served by newspaper advertisements, by notifications posted in public places, and by delivery of a copy attested by the officer to each person specially

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named, or by leaving it at his usual place of residence.

A *special monition* is a similar warrant, directed to the marshal or his deputy, requiring him to give special notice to certain persons, named in the warrant, of the pendency of the suit, the grounds of it, and the time and place of trial. It is served by delivery of a copy of the warrant, attested by the officer, to each one of the adverse parties, or by leaving the same at his usual place of residence; but the service should be personal, if possible. Clerke, Prax. tit. 21; Dunlap, Adm. Pr. 135. See Conkl. Adm.; Pars. Marit. Law.

**MONITORY LETTER. In Ecclesiastical Law.** The process of an official, a bishop, or other prelate having jurisdiction, issued to compel, by ecclesiastical censures, those who know of a crime, or other matter which requires to be explained, to come and reveal it. Merlin, *Répert.*

**MONOCRACY.** A government by one person only.

**MONOCRAT.** A monarch who governs alone; an absolute governor.

**MONOGAMY.** The state of having only one husband or one wife at a time.

A marriage contracted between one man and one woman, in exclusion of all the rest of mankind. The term is used in opposition to bigamy and polygamy. Wolff, *Dr. de la Nat.* § 857.

**MONOGRAM.** A character or cipher composed of one or more letters interwoven, being an abbreviation of a name.

A signature made by a monogram would perhaps be binding provided it could be proved to have been made and intended as a signature; 1 Denio 471.

There seems to be no reason why such a signature should not be as binding as one which is altogether illegible.

**MONOMANIA. In Medical Jurisprudence.** Insanity only upon a particular subject, and with a single delusion of the mind.

A perversion of the understanding in regard to a single object, or a small number of objects, with the predominance of mental excitement. 2 Misc. Rep. 333.

See DELUSION; INSANITY; MANIA; and other titles there referred to.

**MONOPOLIUM.** The sole power, right, or privilege of sale; monopoly; a monopoly. Calvin.

**MONOPOLY. In Commercial Law.** The abuse of free commerce by which one or more individuals have procured the advantage of selling alone all of a particular kind of merchandise, to the detriment of the public.

Any combination among merchants to raise the price of merchandise to the injury of the public.

An institution or allowance by a grant from the sovereign power of a state, by commission, letters-patent, or otherwise, to any person or corporation, by which the exclusive right of buying, selling, making, working, or using anything is given. Bacon, Abr.; Co. 3d Inst. 181. Whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty they had before, or hindered in their lawful trade; 111 U. S. 754; 11 So. Rep. (La.) 239; 53 Fed. Rep. 452. Monopolies were, by stat. 21 Jac. I. c. 3, declared illegal and void, subject to certain specified exceptions, such as patents in favor of the authors of new inventions; 4 Bla. Com. 159; 2 Steph. Com. 25. See *passim* For. Cas. and Op. 421; Curtis, Robinson, Merwin, Walker; Patents.

A patent for a useful invention, under the United States laws, is not, in the old sense of the common law, a monopoly.

The constitutions of Maryland, North Carolina, and Tennessee declare that "monopolies are contrary to the genius of a free government, and ought not to be allowed."

The act of congress (26 St. L. 209) declaring illegal "every contract or combination in the form of trust, or otherwise in restraint of trade or commerce among the several states or with foreign nations," applies to combinations of laborers as well as of capitalists; 54 Fed. Rep. 994. To constitute the offence of monopolizing or attempting to monopolize under the above act of July 2, 1890, it is necessary to acquire, or attempt to acquire, an exclusive right in such commerce by means which will prevent others from engaging therein; 52 Fed. Rep. 104.

See COPYRIGHT; PATENT; TRUST; RESTRAINT OF TRADE.

**MONROE DOCTRINE.** A rule or principle of conduct by which any attempt on the part of any European power to extend its system of government to any part of the Western Hemisphere will be regarded as an act of unfriendliness to the United States.

The doctrine originated in 1823 when the European powers seemed inclined to assist Spain to regain the colonies she had lost in America, and was first stated by President Monroe in his message of December 2d of that year as follows:

"We owe it, therefore, to candor and to the amicable relations existing between the United States and those powers to declare that we consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety. With the existing colonies or dependencies of any European power we have not interfered, and shall not interfere. But with the governments who have declared their independence and maintained it, and whose independence we have, on great consideration and on just principles, acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny, by any European power, in

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any other light than as the manifestation of an unfriendly disposition toward the United States."

Monroe, it seems, had no thought of the important effect his words would have. He was expressing, however, not his own personal opinion, but a principle which the logic of events and the thought of others had been long evolving, See President Gilman's Life of Monroe. The doctrine is now regarded as the settled policy of the United States. It has been evoked on several occasions, notably by President Lincoln in the civil war when the Emperor of France attempted to establish Maximilian in Mexico, and by President Cleveland in the boundary dispute between Venezuela and Great Britain. See The Nicaragua Question, by Prof. L. M. Keasbey; Reddaway, The Monroe Doctrine. See Whart. Dig. Int. L.

**MONSTER.** An animal which has a conformation contrary to the order of nature. 2 Dungl. Hum. Phys. 422.

It is said that a monster, although born of a woman in lawful wedlock, cannot inherit. Those who have, however, the essential parts of the human form, and have merely some defect of conformation, are capable of inheriting, if otherwise qualified; 2 Bla. Com. 246; 1 Beck, Med. Jur. 366; Co. Litt. 7, 8; Dig. 1. 5. 14; 1 Swift, Syst. 331; Fred. Code, pt. 1, b. 1, t. 4, § 4.

No living human birth, however much it may differ from human shape, can be lawfully destroyed. Traill, Med. Jur. 47. See Briand, *Méd. Lég.* pt. 1, c. 6, art. 2, § 3; 1 Foderé, *Méd. Lég.* § 402.

**MONSTRANS DE DROIT** (Fr. showing of right). A common-law process by which restitution of personal or real property is obtained from the crown by a subject. Chitty, Prerog. of Cr. 345; 3 Bla. Com. 256. By this process, when the facts of the title of the crown are already on record, the facts on which the plaintiff relies, not inconsistent with such record, are shown, and judgment of the court prayed thereon. The judgment, if against the crown, is that of *ouster le main*, which vests possession in the subject without execution. Bac. Abr. *Prerogative* (E); 1 And. 181; 5 Leigh 512; 12 Gratt. 564.

*Monstrans de droit* was preferred either on the common-law side of the court of chancery, or in the exchequer, and will not come before the corresponding divisions in the high court of justice. (Jud. Act, 1873, s. 34.)

**MONSTRANS DE FAIT** (Fr. showing of a deed). A profert. Bac. Abr. *Pleas.*

**MONSTRAVERUNT, WRIT OF. In English Law.** A writ which lies for the tenants of an ancient demesne who hold by free charter, and not for those tenants who hold by copy of court-roll, or by the rod, according to the custom of the manor. Fitzh. N. B. 31.

**MONTANA.** One of the states of the United States.

Congress, by an act approved May 26, 1864 (R. S. § 1903), created the territory and defined its boundaries, providing also that the United States might divide the territory or change its boundaries in such manner as may be deemed expedient; and further, that the rights of person and property pertaining to the Indians in the territory shall not without their consent be included within the territorial limits of jurisdiction.

By act of congress approved March 1, 1872, a tract of land in the territories of Montana and Wyoming, lying near the headwaters of the Yellowstone River, is reserved and withdrawn from settlement under the laws of the United States and dedicated and set apart as a public park for the benefit and enjoyment of the people; R. S. § 2474; and by act of April 15, 1874, a tract of land at the northern boundary is set apart as a reservation for the Gros Ventre Piegan, Blood, Blackfoot, River Crow, and such other Indians as the President may, from time to time, see fit to locate therein. 18 Stat. at L. 28.

The act providing for the admission of Montana into the Union as one of the states was passed February 22, 1889, and the proclamation announcing its admission was on November 8, 1889.

The constitution was adopted August 17, 1889, and ratified by the people October 1, 1889.

The *legislative power* is vested in a *senate* and *house of representatives*, which is designated the legislative assembly of the state of Montana. Senators are elected for a term of four years and representatives for two years. The senate consists of sixteen members and the house of representatives of fifty-five members. The legislative assembly meets biennially on the first Monday of January.

The *executive department* consists of a *governor*, *lieutenant-governor*, *secretary of state*, *attorney-general*, *state treasurer*, *state auditor*, and *superintendent of public instruction*, each of whom holds his office for four years.

The *judicial power* is vested in the senate sitting as a court of impeachment, in a supreme court, district courts, justices of the peace, and such other inferior courts as the legislative assembly may establish in any incorporated city or town.

The *supreme court* consists of three justices who are elected by the people for a term of six years. It has appellate jurisdiction only, and is co-extensive with the state, and has a general supervisory control over all inferior courts. It has power in its discretion to issue, and to hear and determine writs of habeas corpus, mandamus, quo warranto, certiorari, prohibition, and injunction, and such other original and remedial writs as may be necessary and proper to the complete exercise of its appellate jurisdiction. When a jury is required in the supreme court to determine an issue of fact, the court has power to summon such jury. At least three terms of the supreme court are held each year at the seat of government.

The *district court* has original jurisdiction in all cases at law and in equity, including all cases which involve the title or right of possession of real property, or the legality of any tax, impost, etc., and in all cases where the amount in controversy exceeds fifty dollars; and in criminal cases amounting to felony, and certain other miscellaneous jurisdictions. It also has appellate jurisdiction in certain cases arising in justices' and other inferior courts. The state is divided into eight judicial districts, in each of which a district judge is elected for four years.

Two *justices of the peace* are elected in each organized township of each county for a term of two years. Justices' courts have original jurisdiction within their respective counties in matters in which the amount in controversy does not exceed three hundred dollars.

**MONTES PIETATIS, MONTS DE PIETE.** Institutions established by public authority for lending money upon pledge of goods.

In these establishments a fund is provided, with suitable warehouses and all necessary accommodations. They are managed by directors. When the money for which goods are pledged is not returned in proper time, the goods are sold to reim-

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burse the institutions. They are found principally on the continent of Europe. With us, private persons, called pawnbrokers, perform this office. See Bell, Inst. 5. 2. 2. A late statute in New York authorizes public pawnshops like those on the continent of Europe.

**MONTENEGRO.** A principality of Europe. The government is absolute and is vested in a prince. It has a state council of eight members, half of them nominated by the prince and half elected. There are district courts in the chief towns. The supreme court has jurisdiction, appellate and concurrent, over the principality. There is a final appeal to the prince.

**MONTH.** A space of time variously computed, as the term is applied to astronomical, civil or solar, or lunar months.

The *astronomical month* contains one-twelfth part of the time employed by the sun in going through the zodiac. In law, when a month simply is mentioned, it is never understood to mean an astronomical month.

The *civil* or *solar month* is that which agrees with the Gregorian calendar; and these months are known by the names of January, February, March, etc. They are composed of unequal portions of time. There are seven of thirty-one days each, four of thirty, and one which is sometimes composed of twenty-eight days, and in leap-years, of twenty-nine.

The *lunar month* consists of twenty-eight days.

The Roman names of the months, as settled by Augustus, have been used in all Christian countries except Holland, where a set of characteristic names prevail, the remains of the ancient Gaulish title, which were also used by our Anglo-Saxon ancestors. The French convention, in October, 1793, adopted a set of names similar to that of Holland.

By the law of England, a month means ordinarily, in common contracts, as in leases, a lunar month. A contract, therefore, made for a lease of land for twelve months would mean a lease for forty-eight weeks only; 2 Bla. Com. 141; 6 Co. 62; 1 Maule & S. 111. A distinction has been made between "twelve months" and a "twelve-month;" the latter has been held to mean a year; 6 Co. 61. In a contract for the hire of furniture at a weekly rental for so many months, "months" was held to mean lunar month; 45 L. T. Rep. N. s. 343.

But in mercantile contracts a month simply signifies a calendar month; 2 Wall. 190; 2 Dall. 402; 3 Cra. C. C. 218; 19 Pick. 532; 28 N. Y. 444; a promissory note to pay money in twelve months would, therefore, mean a promise to pay in one year, or twelve calendar months; 3 B. & B. 187; 1 M. & S. 111; 2 C. & K. 9; Story, Bills, §§ 143, 330; 19 Pick. 332; 6 W. & S. 179; 1 Johns. Cas. 99; 1 Q. B. 250; Benj. Sales § 684.

In general, when a statute speaks of a month, without adding "calendar," or other words showing a clear intention, it shall be intended a lunar month; Com. Dig. *Anno* (B); 15 Johns. 358; Dud. Ga. 107. See 2 Cow. 518, 605. But it is now otherwise in England by 13 Vic. c. 21, § 4. And by the Judicature Act of 1875, Ord. lvii. r. 1, it is provided that month shall mean calendar month when not otherwise expressed. In all legal proceedings, as in commitments, pleadings, etc., a month means four weeks; 3 Burr. 1455; 1 W. Bla. 540; Dougl. 446, 463; 12 Pa. Co. Ct. R. 543; 3 Johns. Ch. 74.

In Pennsylvania, Massachusetts, Nebraska, Florida, and Maryland, and perhaps some other states, a month mentioned generally in a statute has been construed to mean a calendar month; 2 Dall. 302; 4 *id.* 143; 4 Mass. 461; 4 Bibb 105; 34 Neb. 376; 27 Fla. 215; 74 Md. 86; 139 U. S. 137. In England in the ecclesiastical law, months are computed by the calendar; 3 Burr. 1455; 1 M. & S. 111; thirty days is not a month; 72 N. C. 146.

In New York, it is enacted that whenever the term "month" or "months" is or shall be used in any statute, act, deed, verbal or written contract, or any public or private instrument whatever, it shall be construed to mean a calendar, and not a lunar, month, unless otherwise expressed. Rev. Stat. pt. 2, c. 19, tit. 1, § 4; 28 N. Y. 444. But this has been modified as to computation of interest, so that a month shall be considered the twelfth part of a year, and as consisting of thirty days, and interest for any number of days less than a month shall be estimated by the proportion which such number of days bears to thirty; R. S. pt. 3, p. 2254, § 9.

See, generally, 2 A. K. Marsh. 245; 3 Johns. Ch. 74; 4 Dall. 143; 4 Mass. 461; 31 Cal. 173; 2 Harr. Del. 548; 72 N. C. 146; 29 N. H. 385; 12 Lawy. Rep. Ann. 770.

**MONUMENT.** A thing intended to transmit to posterity the memory of some one. A tomb where a dead body has been deposited.

In this sense it differs from a cenotaph, which is an empty tomb. Dig. 11. 7. 2. 6; 11. 7. 2. 42.

Coke says that the erecting of monuments in church, chancel, common chapel, or churchyard in convenient manner is lawful; for it is the last work of charity that can be done for the deceased, who whilst he lived was a lively temple of the Holy Ghost, with a reverend regard and Christian hope of a joyful resurrection.

The defacing of monuments is punishable by the common law; Year B. 9 Edw. IV. c. 14; and trespass may be maintained; 10 F. Moore 404; 1 Cons. S. C. 172; L. R. 3 A. & E. 113; 3 Bingh. 136. An heir may bring an action against one that injures the monument of his ancestor; Co. 3d Inst. 202; Gibs. 453. A gift for the perpetual repair of a tomb, if in a church, will be sustained; [1891] 3 Ch. 252; but see L. R. 4 Eq. 521: CHARITABLE USES. Although the fee of church or churchyard be in another, yet he cannot deface monuments; Co. 3d Inst. 202. The fabric of a church is not to be injured or deformed by the caprice of individuals; 1 Cons. S. C. 145; and a monument may be taken down if placed inconveniently; 1 Lee, Eccl. 640. A monument containing an improper inscription can be removed; 1 Curt. Eccl. 880.

As to inscriptions on monuments and their value as evidence, see INSCRIPTION.

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**MONUMENTS.** Permanent landmarks established for the purpose of indicating boundaries.

Monuments may be either natural or artificial objects: as, rivers, known streams, springs, or marked trees; 6 Wheat. 582; 6 Pet. 498; 1 Pet. C. C. 64; 3 Ohio 284; 5 N. H. 524; 3 Dev. 75; 125 Ind. 226. Even posts set up at the corners; 5 Ohio 534; and a clearing; 7 Cow. 723; are considered as monuments. But see 3 Dev. 75.

When monuments are established, they must govern, although neither courses nor distances nor computed contents correspond; 1 Cow. 605; 3 Pick. 401; 2 Harr. & J. 260; 5 *id.* 163, 255; 5 Ohio 534; 4 Hen. & M. 125; 1 Call 429; 11 Me. 325; 1 Hayw. 22; 3 Murph. 88; 4 T. B. Monr. 32; 5 J. J. Marsh. 578; 6 Wheat. 582; 4 Wash. C. C. 15; 72 Me. 90; 33 Fla. 261; 147 Ill. 76; 117 Mo. 438; 92 Cal. 623; 49 Minn. 268; 106 Mo. 231; 48 N. J. Eq. 170; 1 Washb. R. P. 406.

A monument established by the government surveyors as the true corner of sections will control courses and distances; 91 Mich. 29; 145 Ill. 98. See 79 Cal. 540; BOUNDARY.

In Mexican grants, while monuments control courses and distances, and courses and distances control quantity, where there is uncertainty in specific description, the quantity named may be of decisive weight and necessarily is so if the intention to convey only so much and no more is plain; 161 U. S. 208; 171 *id.* 220.

See METES AND BOUNDS.

**MOOE.** An officer in the Isle of Man similar to the English bailiff.

**MOOKTAR. In Hindu Law.** An agent or attorney.

**MOORAGE.** A sum due for fastening ships to a tree or post at the shore or to a wharf. 3 Bland 373.

**MOORING. In Maritime Law.** The securing of a vessel by a hawser or chain, or otherwise, to the shore, or to the bottom by a cable and anchor. The being "moored in safety," under a policy of insurance, is being moored in port, or at the usual place for landing and taking in cargo free from any immediate impending peril insured against; 1 Phil. Ins. 968; 3 Johns. 88; 2 Stra. 1243; 5 Mart. La. 637; 6 Mass. 313; Code de Comm. 152.

**MOOT** (from Saxon *gemot*, meeting together. Anc. Laws and Inst. of England). See FOLC GEMOTE; WITENAGEMOTE.

**In English Law.** A term used in the inns of court, signifying the exercise of arguing imaginary cases, which young barristers and students used to perform at certain times, the better to be enabled by this practice to defend their clients' cases. Orig. Jur. 212. *Mooting* was formerly the chief exercise of the students in the inns of court.

To plead a mock cause. (Also spelled *meet*, from Sax. *motain*, to meet; the sense of debate being from meeting, encountering. Webster, Dict.) A *moot question* is one which has not been decided.

**MOOT COURT.** A court where moot questions are argued. Webster, Dict.

In law schools this is one of the methods of instruction; an undecided point of law is argued by students appointed as counsel on either side of the cause, one or more of the professors sitting judicially in presence of the school. The argument is usually conducted as in cases reserved for hearing before the full bench.

**MOOT HILL.** Hill of meeting (*gemot*), on which the Britons used to hold their courts, the judge sitting on the eminence, the parties, etc., on an elevated platform below. Encyc. Lond.

**MORA.** A moor, barren or unprofitable ground; marsh; a heath; a watery bog or moor. Co. Litt. 5; Fleta, l. 2, c. 71. See IN MORA.

**MORAL ACTIONS.** Actions only in which men have knowledge to guide them and a will to choose for themselves. Ruth. Inst. Nat. L. lib. 1, c. i.

**MORAL CERTAINTY.** That degree of certainty which will justify a jury in grounding on it their verdict.

It is only probability; but it is called certainty, because every sane man assents to it necessarily from a habit produced by the necessity of acting. Beccaria on Crimes and Punishments, c. 14. Nothing else but a strong presumption grounded on probable reasons, and which very seldom falls and deceives us. Puffendorff, Law of Nature, b. 1. c. 2, § 11. A reasonable and moral certainty; a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it. A certainty beyond a reasonable doubt. *Shaw*, C. J., Commonwealth *v.* Webster. Bemis' Rep. of the trial, 469; 118 Mass. 1. Such a certainty "as convinces beyond all reasonable doubt." *Parke*, B., Best, Presumpt. 257, note; 6 Rich. Eq. 217.

**MORAL CONSIDERATION.** See CONSIDERATION; MORAL OBLIGATION.

**MORAL INSANITY. In Medical Jurisprudence.** A morbid perversion of the moral feelings, affections, inclinations, temper, habits, and moral disposition, without any notable lesion of the intellect or knowing and reasoning faculties, and particularly without any maniacal hallucination. Prichard, art. *Insanity*, in Cyclopædia of Practical Medicine.

A disorder which affects the feelings and affections, or what are termed the moral powers in contradistinction to those of the understanding or intellect. 3 Witth. & B. 269.

For a discussion on this subject and its legal relations, see INSANITY; MANIA.

**MORAL OBLIGATION.** A duty which one owes, and which he ought to perform, but which he is not legally bound to fulfil.

These obligations are of two kinds: 1st, those founded on a natural right: as, the obligation to be charitable, which can never be enforced by law. 2d, those which are supported by a good or valuable ante-

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cedent consideration: as, where a man owes a debt barred by the act of limitations, or contracted during infancy; this cannot be recovered by law, though it subsists in morality and conscience. A doctrine prevailed for some time in the courts of England and this country that an express promise made in discharge of an antecedent moral obligation created a valid contract, and the contract was then said to be supported by the previous moral obligation; Cowp. 290; 5 Taunt. 36; 4 Wash. C. C. 148; 13 S. & R. 177. This opinion appears to have been entertained by Lord Mansfield; 5 Taunt. 36. In a note to Wennall v. Adney, 3 B. & P. 249, this idea was controverted, and in Eastwood v. Kenyon, 11 Ad. & E. 438 (6 Eng. Rul. Cas. 41), the notion of the validity of a moral consideration was finally overruled. The rule existed, if it does not still exist, in Pennsylvania, as late as 24 Pa. 267, and see 140 *id.* 63; Hollingsworth, Contr.

Promises by an infant, after coming of age, to pay a debt incurred during infancy, of a bankrupt to pay a debt discharged in bankruptcy, and of a debtor to pay a debt barred by the statute of limitations, are sometimes considered as instances of contracts supported by moral considerations. But the promise of the infant is rather a ratification of a contract which was voidable, but not void. The promise of the bankrupt operates as a waiver of the defence given to the bankrupt by statute, the certificate of discharge not having extinguished the debt, but merely having protected the defendant from an action on it, by means of the statutory bar. In both of these cases the action is founded upon the original debt. The case of a promise to pay a debt barred by the statute of limitations is said to stand upon anomalous grounds. The true explanation of the doctrine seems to be that it was an ingenious device for evading the statute adopted at a time when the courts regarded it with disfavor. Here too the action is upon the old debt, and not upon the new promise; 3 Metc. Mass. 439. The subject is learnedly treated by Mr. Langdell (Contr. § 71). Some cases have held a feme bound by a promise after coverture to pay a debt contracted during coverture; 24 Pa. 371; see Ewell, L. C. Cov. 332.

Under the English Bankruptcy Act of 1869, debts discharged cannot be revived by a promise made after adjudication; and under the Infants' Relief Act of 1874, any promise made after full age to pay a debt contracted during infancy is void.

The discharge of a merely moral obligation of another will not create a debt, unless made in pursuance of an express request or actual agreement to that effect; Leake, Contr. 86.

**MORATUR or DEMORATUR IN LEGE.** He demurs in law. He rests on the pleadings of the case, and abides the judgment of the court.

**MORE OR LESS.** Words, in a conveyance of lands or contract to convey lands, importing that the quantity is uncertain and not warranted, and that no right of either party under the contract shall be affected by a deficiency or excess in the quantity. 17 Ves. 394; Powell, Pow. 397. So in contracts of sale generally. 2 B. & Ad. 106. These words added to a specification of quantity in a conveyance show it to be a mere estimate, and by necessary inference subordinates the quantity to fixed calls or monuments; 82 Wis. 206.

In case of an executory contract, equity will enforce specific performance without changing the price, if the excess or deficiency is very small; 17 Ves. 394; 24 Miss. 597; 13 Tex. 223; but not if the excess or deficiency is great, even though the price reserved be per acre. In 2 B. & Ad. 106, it was held that an excess of fifty quarters over three hundred quarters of grain was not covered by the words "three hundred more or less," if it was not shown that so large an excess was in contemplation; 1 Esp. 229. See 85 Me. 362; 27 Atl. Rep. (N. J.) 140. But a deed adding the words more or less to a description of the property is not a sufficient fulfilment of a contract to convey the described property, when more or less was not in such original contract, if there is an actual deficiency. But after such a conveyance is made and a note given for the purchase-money, the note cannot be defended against on the ground of deficiency; 2 Pa. 533; 9 S. & R. 80; 10 Johns. 297; 4 Mass. 414. These words more or less have been held to cover a deficiency of 10 acres where the deed called for 96 acres; 7 N. Y. 210; a deficiency of 54 acres in a deed calling for 451 acres; 54 Ind. 368; 50 feet from 220, where the true dimension was on record, in a purchase in gross; 99 Mass. 231.

In case of an executed contract, equity will not disturb it, unless there be a great deficiency; 2 Russ. 570; 1 Pet. C. C. 49; or excess; 8 Paige, Ch. 312; 2 Johns. 87; Ow. 133; 1 V. & B. 375; see 106 Ind. 185; or actual misrepresentation without fraud, and there be a material excess or deficiency; 14 N. Y. 143; see 91 Ga. 600; 26 Gratt. 721; 11 Q. B. Div. 255.

Eighty-five feet, more or less, means eighty-five feet, unless the deed or situation of the land in some way controls it; 20 Pick. 62.

The words more or less will not cover a distinct lot; 24 Mo. 574. See CONSTRUCTION; ABOUT.

The purchaser is not precluded by a recital of "more or less" in the deed from showing by parol evidence, under an allegation of fraud or mistake, an agreement contemporaneous with the execution of the deed, making the transaction a sale by the acre; 1 Tex. Civ. App. 600.

**MORGANATIC MARRIAGE.** A lawful and inseparable conjunction of a single man of noble and illustrious birth with a single woman of an inferior or

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plebeian station, upon this condition, that neither the wife nor children should partake of the title, arms, or dignity of the husband, nor succeed to his inheritance, but should have a certain allowance assigned to them by the morganatic contract.

This relation was frequently contracted during the Middle Ages; the marriage ceremony was regularly performed, the union was for life and indissoluble, and the children were considered legitimate, though they could not inherit. Fred. Code, b. 2, art. 3; Poth. Du Mar. 1, c. 2, § 2; Shelf. Marr. & D. 10; Pruss. Code, art. 835.

**MORMONISM.** The system of doctrines, practices (especially polygamy), ceremonies, and church government maintained by the Mormons. Cent. Dict. See MARRIAGE.

**MORT D'ANCESTOR.** An ancient and now almost obsolete remedy in English law. An assize of *mort d'ancestor* was a writ which was sued out where, after the decease of a man's ancestor, a stranger abated, and entered into the estate. Co. Litt. 159. The remedy in such case is now to bring ejectment.

**MORTGAGE.** Scientific legal writers reckon among proprietary rights "*jura in re aliena*," *i. e.* rights of dominion over tangible things of which the fundamental property right is in another. Of such rights the most important is Pledge, which, in this sense, covers those legal relations in which a right *in rem* is conferred by a debtor upon a creditor as security for a right *in personam*, *i. e.* for the debt or other personal obligation of the debtor; Holland, Jurispr. ch. xi. Practically we distinguish these securities as *Mortgage*, when the debtor transfers the title to the *res* to his creditor, retaining the possession of it, and *Pledge*, when he retains the title but transfers the possession. See PLEDGE.

Mortgage is the translation of *vadium mortuum*—dead pledge, so named because the land was turned over to the mortgagee or lender of the money, who received the profits or revenues of it without applying them in satisfaction of his debt, and the land thus became dead to the mortgagor or borrower who derived no benefit from it. This was regarded as in the nature of usury on the part of the lender and was looked upon with disfavor, in modern phrase as contrary to public policy. In contrast to this was *vadium vivum*, or live pledge, under which the borrower continued in possession of his property, receiving the profits or revenues of it. Another explanation of the words is that in the *vadium mortuum* the pledge was *dead* to the borrower if he failed to redeem, but in the other was *alive* to him until the lender secured possession of it on default; 1 Coote, Mortg., 4th ed. 5; Co. Litt. 205. (In the case of Welsh mortgages, now disused, the mortgagee entered into possession, taking the rents and profits, but applying them on account of the debt.) In attempting to avoid the difficulty lenders devised the plan of taking from the borrower a conveyance of the property to become absolute upon the failure of the borrower to redeem. Later, the plan was adopted of taking an absolute conveyance, with an agreement on the part of the lender to re-convey on payment of the debt, the transaction being in form an absolute sale of land with an option to buy it back by payment of the loan at a fixed time. Another form was to convey the land to a trustee who was to hold to the creditor's use, and on default was to sell it for the payment of the debt. All these devices were intended to protect the lender by enabling him to secure the land on his debtor's default. All of them were modified or softened by the courts refusing to allow the forfeiture or to treat the transaction as other than a method of pledging the land as security for the debt, the debtor retaining what came to be known as the equity of redemption, and being protected against the strict enforcement of his contract; H. W. Chaplin, in 4 Harv. L. Rev. 1. See EQUITY OF REDEMPTION.

In modern times although the old forms are still followed, it is everywhere recognized that the real owner of the land is the mortgagor, and the mortgage is a mere security for the debt or obligation, giving the mortgagee a chattel interest which passes to his personal representatives and not to his heirs. Some of the states have abrogated the old rule and declared by statute that the effect of a mortgage shall be merely to give a lien and not to pass an estate to the mortgagee. But in England and in most of the states the old rule remains nominally in force, and in courts of law the mortgage is recognized as conveying an estate, while equity treats it as merely conferring a lien. Originally this was burdensome, since there was an actual distinction between the rules applied in the different jurisdictions, and redress had to be sought in equity against the severities of the law, but the principle adopted in Pennsylvania in the eighteenth century, of administering equity through common law forms has been gradually making its way until it reached its most signal triumph in the adoption of the Judicature Act of 1873 in England providing that where "there is any conflict between the rules of equity and the rules of common law, the rules of equity shall prevail." To day it may be safely said that the equitable doctrine has completely supplanted the legal, but as the form of the transaction is still the same, some confusion exists, and doubtless always will exist, in the definitions given of mortgage. Some of these are as follows:—

The conveyance of an estate by way of pledge for the security of debt, and to become void on payment of it. 4 Kent 136.

An estate created by a conveyance absolute in its form, but intended to secure the performance of some act, such as the payment of money, and the like, by the grantor

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or some other person, and to become void if the act is performed agreeably to the terms prescribed at the time of making such conveyance. 2 Washb. R. P., 5th ed. *475.

A conditional conveyance of land designed as a security for the payment of money, the fulfilment of some contract, or the performance of some act, and to be void upon such payment, fulfilment or performance. 44 Me. 299.

A contract by which specific property is hypothecated for the performance of an act without the necessity of a change of possession. 2 S. Dak. 346. It is a mere security for a debt or obligation; 60 Conn. 24; 53 *id.* 175; 15 Wall. 322.

"A concise definition of mortgage which should embrace both its equitable and its legal character is virtually impossible. . . . These attempted definitions are all erroneous upon any theory of the instrument; they do not go beyond the literal import of the language in which a mortgage is usually expressed, and they utterly ignore all the equitable elements which are as much and as truly constituent parts of the mortgage as the legal elements. Any true definition based upon the original common law and equitable system must embody and express all the double features of the mortgage—that it is both a lien in equity and a conveyance at law." Pomeroy, Eq. Jur. § 1191.

Both real and personal property may be mortgaged, and in substantially the same manner, except that a mortgage being in its nature a transfer of title, the law respecting the necessity of possession in case of personal property and the nature of the instruments of transfer, require the transfer to be made differently in the two cases.

All kinds of property, real or personal, which are capable of an absolute sale, may be the subject of a mortgage; rights in remainder and reversion, franchises, and choses in action, may, therefore, be mortgaged. But a mere possibility or expectancy, as that of an heir, cannot; 2 Story, Eq. Jur. § 1012; 4 Kent 144; 32 Barb. 328; 13 Cal. 536; 45 Ill. 264; 12 N. J. Eq. 174; 108 Mass. 347: 68 Ill. 98 (see EXPECTANCY). Where real estate is mortgaged, all accessions thereto, subsequent to the mortgage, will be bound by it; 32 N. H. 484; 51 Cal. 620; 52 Ala. 123; 19 Wall. 544; 24 Mich. 416; 64 Pa. 366; and if specifically stated to bind after-acquired property, it will have that effect; 51 Barb. 45; 56 Me. 458; 14 Gray 566; 11 Wall. 481; 19 Md. 472; 29 Conn. 282. A mortgage in terms covering after-acquired property creates a charge on property to which the mortgagor subsequently acquires either the legal or equitable title; 75 Md. 445. See *infra*. A mortgage of property to be acquired *in futuro* is constructively fraudulent as to the creditors of the mortgagor other than the mortgagee; 85 Ky. 591.

A mortgage to secure future advances is valid as between the parties; 31 Vt. 122; 23 How. 14; but if a second mortgage be executed of which the holder of the first mortgage have notice before he makes advances the latter will not be protected; 36 Pa. 170; 9 H. L. C. 514; but see, *contra*, 16 Vt. 300; but he will be where the first mortgagee binds himself to make the advances, though they be made after the execution of the subsequent mortgage; 13 Mich. 380; 31 Conn. 74; and in either case it is said the first mortgagee will be protected if the advances be made without notice of the subsequent mortgage; *id.*; the record of the second mortgage is constructive notice; 13 Mich. 380. See, generally, 3 Va. L. Reg. 834.

As to the *form*, a mortgage must be in writing, when it is intended to convey the legal title; 1 Pa. 240. It is either in one single deed which contains the whole contract,—which is the usual form,—or it is two separate instruments, the one containing an absolute conveyance and the other a defeasance; 2 Johns. Ch. 189; 12 Mass. 456; 1 N. H. 39; 5 McLean 281; 55 Pa. 311; 21 Minn. 520; 53 Me. 463; 13 Wis. 264; 38 Mo. 349; 65 N. C. 520; 18 Ia. 376; 17 Ohio 356; and generally, whenever it is proved that a conveyance was made for purpose of security, equity treats it as a mortgage, and attaches thereto its incidents; 9 Wheat. 489; 2 Des. Eq. 564; 38 N. H. 22; 25 Vt. 273; 1 Md. Ch. Dec. 536; 1 Murph. 116; 3 J. J. Marsh. 353; 5 Ill. 156; 4 Ind. 101; 2 Pick. 211; 20 Ohio 464; 36 Me. 115; 1 Cal. 203; 1 Wis. 527; 9 S. & R. 434; 100 N. C. 316; 24 Neb. 692; 1 Tex. Civ. App. 391; 71 Hun 349. Whether the intention that it was a security for money appears from the same instrument or from any other, it is always considered, in equity, a mortgage; 86 Ky. 679; 39 Minn. 137; 62 Mich. 414; 69 Tex. 420; 24 Neb. 79; 129 Ill. 72; 76 Ia. 96; 85 Tenn. 363; 75 Cal. 271; 45 N. J. Eq. 208. The true test in determining whether an instrument purporting to convey title in payment of a debt be a mortgage or not, is, was the old debt at that time cancelled and absolutely paid; 71 Tex. 418. In law, the defeasance must be of as high a nature as the conveyance to be defeated; 1 N. H. 39; 2 Johns. Ch. 191; 7 Watts 361; 13 Mass. 433; 53 Me. 963; 14 Pet. 201.

The rule as to the admission of parol evidence to establish the character of a conveyance as a mortgage varies in the different states. It is safe to state that where the equitable principle admitting parol evidence to vary a writing on the ground of fraud, accident, or mistake can be invoked, it would universally be applied. In some states the rule is still more liberal, and the evidence is admitted more upon the principle of making the intention of the parties govern the transaction. If excluded in any state it would probably be for statutory reasons: Thus in *New Hampshire* no deed shall be defeated, nor any estate encumbered, unless by condition inserted in the conveyance; 57 N. H. 117. In *Georgia* a deed absolute in form and supported by possession shall not be shown by parol evidence to be a mortgage, unless fraud be the

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issue; 83 Ga. 303; 88 *id.* 191. In *Pennsylvania* no defeasance shall have the effect of reducing a deed absolute to a mortgage unless the defeasance is contemporaneous with the deed and is in writing, signed, sealed, acknowledged, and delivered, and is recorded within sixty days. See 118 Pa. 30; 31 Am. L. Reg. 378. In *Colorado*, on the other hand, it is provided that parol evidence may be admitted to convert a deed into a mortgage; 12 Col. 491. Where a conveyance is in form absolute, in order to change its character to that of a mortgage, the proof must clearly and satisfactorily show such intent; and evidence which leaves the mind in serious doubt is not sufficient; 126 Ill. 301; 35 Fed. Rep. 445; 83 Ala. 396; 75 Ia. 89; 7 Mont. 585; 20 Can. S. C. R. 548; 98 Cal. 281; 1 App. D. C. 133. See DEFEASANCE.

The mortgagor has, technically speaking, in law, a mere tenancy, subject to the right of the mortgagee to enter immediately, unless restrained by his agreement to the contrary; 34 Me. 187; 9 S. & R. 302; 1 Pick. 87; 19 Johns. 325; 2 Conn. 1; 4 Ired. 122; 5 Bingh. 421. In equity, the mortgage is held a mere security for the debt, and only a chattel interest; and until a decree of foreclosure the mortgagor is regarded as the real owner; 2 J. & W. 190; 4 Johns. 41; 11 *id.* 534; 4 Conn. 235; 1 Rawle 329; 45 Pa. 463; 5 Harr. & J. 312; 3 Pick. 484; 7 Johns. 273. Both in law and equity a mortgage is held to be only a chattel interest; 12 Ia. 539. It has been held frequently that the legal fee is in the mortgagee until default, and an absolute fee afterwards; 3 Gray 517; 22 Conn. 587; 13 Ohio St. 419; but it may be considered as the general rule, in modern practice, that the mortgagor, before entry, is the legal owner as to third persons and his conveyance is a transfer of the fee, if the mortgage is afterwards paid; 36 N. H. 141; 15 Pick. 82.

The mortgagee, at law, is the owner of the land, subject, however, to a defeat of title by performance of the condition, with a right to enter at any time; 21 N. H. 460; 9 Conn. 216; 19 Me. 53; 2 Den. 170. He is, however, accountable for the profits before foreclosure, if in possession; 31 Me. 104; 5 Paige, Ch. 1; 24 Conn. 1; 1 Halst. Ch. 346; 2 Cal. 387; 6 Fla. 1; 148 Mass. 300; 49 Ark. 508; 42 Ill. App. 202; 48 N. J. Eq. 399; 1 Washb. R. P. *577. The different states fluctuate somewhat between the rules of equity and those of law, or, rather, have engrafted the equitable rules upon the legal to an unequal extent; 31 Pa. 295; 10 Ga. 65; 27 Barb. 503; 3 Mich. 581; 4 Ia., 571; 4 M'Cord 336; 9 Cal. 123, 365; 1 Washb. R. P. *517; Jones, Mort. § 17.

Case lies by a mortgagor for injuries done the mortgaged premises by a mortgagee not in possession; 64 N. H. 591. A mortgagee cannot maintain trover for fixtures severed from the mortgaged premises prior to the foreclosure; 66 Hun 635; but he may maintain a bill to prevent injury to the mortgaged property; 53 Fed. Rep. 515; 84 *id.* 369.

Mortgages are to be distinguished from sales with a contract for repurchase. The distinction is important; 2 Call 428; 7 Watts 401; but turns rather upon the evidence in each case than upon any general rule of distinction; 6 Blackf. 113; 12 How. 139; 5 Ala. N. s. 698; 3 Tex. 119; 2 J. J. Marsh. 113; 4 Ind. 101; 3 Tex. 119; 37 Me. 543; 7 Ired. Eq. 13, 167; 2 Sch. & L. 393; 30 Md. 495; 33 Cal. 326; 19 Ia. 335; 80 Ill. 188; 41 Cal. 22; 35 Vt. 125; 70 Pa. 434; 21 Minn. 449; 8 Nev. 147; 49 Ga. 133; 62 Mo. 202; 73 Ill. 156; 50 N. Y. 441; 109 Mass. 130; 51 Miss. 329; 129 U. S. 58; 149 id. 17; 86 Ala. 333; 72 Mich. 645; 7 Mont. 585; 5 C. C. App. 394; 59 Conn. 170.

A mortgage differs from a pledge: the general property passes by a mortgage, whilst by a pledge only the possession or, at most, a special property, passes. Possession is inseparable from the nature of a pledge, but is not necessary to a mortgage; 3 Mo. 516; 5 Johns. 258; 2 Pick. 610; 2 N. H. 13; 5 Vt. 532; 26 Me. 499.

*Assignment of mortgages* must be made in accordance with the requirements of the statute of frauds; 15 Mass. 233; 6 Gray 152; 32 Me. 197; 7 Blackf. 210; 5 Den. 187; 3 Ohio St. 471; 5 Halst. Ch. 156; 21 Ala. n. s. 497; 51 Me. 121; 22 Tex. 464; 31 Pa. 142; 21 Wis. 476; 71 N. C. 492; 56 N. H. 105.

A parol assignment of a mortgage note is an equitable transfer of the mortgage; 85 Ala. 80; and the transfer of the debt carries with it the security, without assignment or delivery thereof; 82 Va. 190; 113 N. C. 532. One to whom an overdue note and mortgage are assigned, takes them subject to all equities existing in favor of the mortgagor or of any other person; 134 N. Y. 514.

*Assumption of mortgage by grantee.* The question whether the acceptance by a grantee of a deed subject to a specified mortgage as part of the consideration, in the absence of an express promise to pay it, implies such a promise on his part, has been the subject of conflicting decisions. But the more generally accepted view is, that the clause "under and subject" in a deed or conveyance, is a covenant of indemnity only as between grantor and grantee for the protection of the former; 88 Pa. 450; 173 *id.* 275 (but see 171 *id.* 328); 154 Ill. 627; 48 Ill. App. 505; 48 N. Y. 556; 4 N. J. Eq. 454; 124 Mass. 254; 49 Conn. 191; 46 Pac. Rep. (Kas.) 58. A different view has been held in New York, based in the later cases on the doctrine that when one makes a promise for the benefit of a third person, the latter may maintain an action upon it; 24 N. Y. 178; 48 *id.* 253; 71 *id.* 26. But this doctrine is for the most part confined to New York; see 26 Am. Rep. 660, n.; 115 U. S. 505; 143 *id.* 187; 14 Wash. 507; 1 Jones, Mort. § 758. In Pennsylvania, by statute, a grantee does not assume a liability for an incumbrance, unless by agreement in writing, and the words "under and subject" in his deed do not impose such liability.

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As to the rights of a mortgagee holding more than one mortgage of the same mortgagor, see TACKING.

Where it is sought to give the lien of a junior mortgage precedence over the lien of a senior one, the claim must be based either on an agreement to that effect, or on the superior equity of the junior mortgage; 23 Neb. 703. See MARSHALLING. An agreement between mortgagor and mortgagee extending the time of payment of the mortgage debt, and providing for the compounding of interest, cannot be enforced to the prejudice of junior lienholders whose liens were created prior to such agreement; 84 Ky. 411. The vested priority of a mortgagee is beyond the power of the mortgagor or the legislature thereafter to disturb; 134 U. S. 296. Failure to show that a mortgage was recorded before a judgment, is fatal to the mortgagee's claim of priority; 79 Ga. 111. The re-delivery of a mortgage which has been paid, upon an agreement that it shall secure another debt, does not create a lien; 83 Ky. 311. A mortgage cannot be continued in effect so as to cover a new indebtedness by an oral agreement; 30 Pa. 378; 29 Kan. 124; but where money has been paid thereunder, the party making payments will be protected as against the mortgagor, or his vendee with knowledge of the facts; 10 Allen 74; L. R. 12 Eq. 516.

*The remedies* upon a mortgage by the mortgagee on default of payment are various. In cases of real estate he may (1) bring ejectment on his legal title; (2) file a bill and obtain a decree of foreclosure, or a sale of the property mortgaged; 4 Kent *180; (3) exercise a power of sale, if such power be in the mortgage; (4) take possession of the land, if he can do so peaceably, his title becoming sure, and the equity of redemption being barred after the lapse of twenty years or a period equal to the lapse of time necessary to bar a writ of entry, or in some states for a less period provided by law; (5) by proceeding in accordance with statutory enactments which vary in the different states. The general rule is that the mortgagor may pursue all his remedies at the same time; 4 Kent *183.

In cases of chattel mortgages, the mortgagee's remedy is either (1) to bring a bill in equity, obtain a decree of foreclosure, and a sale; (2) if he have the thing mortgaged in his possession, to sell it after giving to the mortgagor notice of such sale, and also of the amount of the debt due.

A remedy by foreclosure is barred where the obligation secured by the mortgage is barred; 23 Tex. 561; 41 Ill. 516; *contra*, 35 Vt. 104; 26 Miss. 599.

In some cases a reconveyance by the mortgagee is necessary when the mortgage has been paid after default; L. R. 5 Ch. 227; 10 Wall. 536; in other cases no reconveyance is necessary; 12 B. Monr. 497.

A tender after default discharges the mortgage lien; 54 N. Y. 599; 13 Mich. 306; *contra*, 34 N. J. L. 505; 9 Allen 522.

It is held in England that a mortgagee's purchase at a foreclosure sale, under a power of sale, by having another buy for him, does not pass a title free from the interest of the mortgagor unless the right to purchase is conferred by the mortgage; [1894] A. C. 150; 106 Ala. 417; if the power is conferred by the mortgage, the mortgagee may buy at his own sale; 161 Mass. 335; 109 N. C. 520; 127 Ill. 591. A mere power to sell has been held to confer on the mortgagee the right to purchase; 96 Ga. 246. But in *scire facias* proceedings in Pennsylvania the mortgagee may buy at his own sale; and it is everywhere a familiar practice in the foreclosure of corporate mortgages for the bondholders to unite to buy in the property.

A strict foreclosure is the barring of the equity of redemption of the mortgagor, after default in payment, when such default continues after due notice to redeem; 4 Kent *180. It was by bill in equity, by which the lands became the absolute property of the mortgagee. This is a common English practice and obtains also in certain New England states, with a liberal period, by statute or by practice in equity, for redemption; 4 Kent *181. But it is common to decree a sale of the mortgaged premises and apply the proceeds to the payment of the incumbrances in their order of priority. A more common practice, both in England and here, is for the mortgagee, or a trustee appointed for the purpose, to sell the land under a power of sale inserted in the mortgage. This takes the place of a foreclosure. It is the usual practice in the foreclosure of corporation mortgages, except that the sale by the trustee named in the mortgage is usually made in the course of legal proceedings and under a decree of the court, the fund being distributed to the lienholders according to their respective priorities, and the surplus, if any, paid over to the mortgagor.

A mortgagee may proceed to judgment on his bond secured by the mortgage; and such judgment has a lien as of the date of the mortgage; the purchaser at a sale under the judgment holds the land discharged of the lien of the mortgage; 6 Whart. 210.

The general rule is that the mortgagee may pursue all his rights at the same time; 4 Kent *183; but it is said that there are difficulties attending the sale of the equity of redemption by execution at law, and it has been forbidden by statute in New York; and is disapproved in Massachusetts, North Carolina, and Kentucky; 4 Kent *184.

The satisfaction of a mortgage on the record is only *prima facie* evidence of its discharge, and the owner may prove that the cancellation was done by fraud, accident, or mistake; and if he does this, his rights will not be affected by the improper cancellation of it; 32 W. Va. 244.

The object of recording a mortgage is to give notice to third persons; as between the parties thereto, a mortgage is just as effectual for all purposes without recording as with; 131 U. S. 258.

The receipt of insurance money by a

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mortgagee in whose behalf the premises were insured, does not constitute a payment of the mortgage, where such is not the intent of the parties, and the money is delivered to the mortgagor for rebuilding; 64 Vt. 337.

An honest mortgage is not affected by its proximity to an assignment for creditors; 62 Mich. 420; nor is it affected by the fact that it was given for a larger sum than is actually due, or in some particulars misdescribes the note in fact secured; 38 Minn. 443; and because it was given for a larger amount than the actual indebtedness, is not conclusive evidence of fraud; 22 Neb. 82.

An *equitable mortgage* is one in which the mortgagor does not actually convey the property, but does some act, by which he manifests his determination to bind the same as a security. See EQUITABLE MORTGAGE.

A *chattel mortgage* is a transfer of personal property as security for the obligation of the mortgagor. In form it is usually a bill of sale with a clause of defeasance. In some states its form is prescribed by statute; in the greater number, however, this is not the case, and any form may be adopted. A mortgage is to be distinguished from a pledge, the former being a transfer of title, the latter a transfer of possession (see PLEDGE); also from a conditional sale, the test being that if after the transfer the mere relation of debtor and creditor exists the transaction is a mortgage, if not, a conditional sale. The courts lean toward construing the transaction as a mortgage.

The subject-matter of the transaction being a chattel, the law is in some respects simpler than the law as to mortgages of realty which is complicated by rules of conveyancing. The courts seek, in dealing with chattel mortgages, as in the case of other contracts, to arrive at the intention of the parties, and form is generally of little importance. But on the other hand the subject is complicated by the transitory nature of the subject-matter and the devices resorted to to secure the mortgagee and at the same time protect from fraud the creditors of the mortgagor, in other words by the recording acts. These are the very life of the chattel mortgage, and without them it cannot exist. For example, it was held in Pennsylvania (where chattel mortgages formerly did not exist at all, and are now recognized only to a limited extent) that while such a mortgage between citizens of Maryland would be recognized and enforced, when the question arose between the mortgagee and a citizen of Pennsylvania who had in good faith purchased the mortgaged chattel from the mortgagor, the mortgage could not be regarded because in the absence of statutory provisions the common law rule prevails in Pennsylvania that a sale of personal property unaccompanied by delivery of possession is void as against the intervening rights of creditors and purchasers; 9 Phila. 615; 4 D. R. (Pa.) 270.

The problem is how to restrict a transaction by which the mortgagor, though retaining possession of his goods, gives a valid lien upon them as security for a debt, so that innocent parties shall not be injured by giving credit to the mortgagor on the strength of the apparent ownership of the goods. Manifestly the only way to secure this end is by requiring the transaction to be made a matter of record.

Accordingly, the statutes provide for recording the instrument, usually in the county or town in which the mortgagor resides, or, if he is a non-resident, in the county or town in which the chattels are situated. Commonly this is sufficient record while the mortgaged property remains within the state, but some of the acts require re-recording if the property be removed to another county. In some acts it is provided that the wife of the mortgagor must join. In many states are found provisions to punish any removal or disposition of the property by the mortgagor in prejudice of the rights of the mortgagee. See LEX REI SITÆ; CONFLICT OF LAWS.

The property must be described with such accuracy as the nature of it will admit, and the description should be sufficient to enable third parties to identify the property. As a general rule it may be said that any personal property may be mortgaged, but this with the reservation that in a number of states the right is restricted to classes of articles, more or less numerous. Naturally, a common subject of such a mortgage is a shopkeeper's stock of goods employed by him in regular course of business. As to this, every variety of rule from the absolute prohibition of such mortgages to their freest use will be found. In some cases they bind the stock at the time the mortgage is created, in others they bind the stock at the time of foreclosure, in others they bind what is left of the original stock, but not the accessions; in others they bind the accessions, provided no other specific lien has attached before the mortgagee secures possession of them.

Where animals are mortgaged, the natural increase will be covered by the mortgage, in the absence of a statutory provision to the contrary. A mortgage on an article in process of manufacture will cover it when completed if still capable of identification. Growing crops are frequently the subject of mortgage, and the mortgage is valid at any stage of their development, and even in anticipation of their planting. See LIENS. As to a mortgage in its terms covering after acquired property see *supra*, and also corporation mortgages *infra*.

CORPORATION MORTGAGES OR DEEDS OF TRUST. The power to give a mortgage is said to be inherent, unless prohibited by statute, in all corporations except railway companies. In the case of the latter, the power does not exist unless conferred by charter or statute; Cook, Stock and Stockh. § 780. In practice, however, this power is usually—perhaps universally—possessed by railroad companies; Short,

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Rwy. Bonds, ch. viii.; 31 U. S. App. 486. See, generally, 7 Rul. Cas. 673.

A corporate mortgage should be executed with the same formalities as a deed. As it is incident to the general business of a corporation, unless restrained by statutory or charter provision, the directors can authorize a mortgage, though it is customary, and perhaps better practice, that authority should be given by the stockholders. In form it may correspond to the mortgage of an individual and be made directly to the holder of the bond which it secures; but as it is usually given to secure an issue of a number of bonds, it is ordinarily in form a deed of trust conveying the mortgaged property to a trustee for the bondholders, and this trustee is usually a corporation.

Corporate mortgages usually contain covenants or provisions which are wanting in a mortgage given by an individual. Provisions commonly found in such mortgages are (1) that until default the mortgagor may remain in possession of the property mortgaged; (2) an express covenant that the mortgagor will pay the principal and interest of the bonds secured, when due; (3) that the mortgagor shall have power to sell, free from lien of the mortgage, worn out or damaged material (usually accompanied by some provision for replacing the same); (4) provisions as to the payment of taxes and assessments upon the mortgaged property (which are usually assumed by the mortgagor) and providing against the suffering of liens to be established against it; (5) provisions as to the maturing of the principal of the mortgage debt in case of default in the covenants for payment of interest, or other covenants, by the mortgagor; (6) exemption of the trustee from liability except for gross negligence; (7) provision for the substitution of a trustee in case the trustee named should decline to act, or, usually, in case a substitution be desired by a majority or some larger number of the bondholders; (8) any other provisions, not illegal, which may be desired, such as provisions for the conversion of bonds into stock, provisions in regard to maintaining a sinking fund, etc. It is customary for the trustee to accept the trust expressly, or to become a party to the deed, and also to certify upon each bond that it is one of the issue secured under the mortgage. Where such certificate is forged the bond is void, though in the hands of an innocent purchaser for value; 83 N. Y. 223. But signature by vice-president is good though the bond calls for signature of the president; 161 Pa. 391. A trustee's certificate is a warranty of the facts recited therein (as that the bond is secured by a first mortgage duly recorded) on which the trustee is liable; 76 Fed. Rep. 919; 79 *id.* 848; 175 Pa. 318.

The mortgage should be recorded in each county in which real estate covered by it is situated, and if it covers also personal property the provisions of the law in regard to chattel mortgages should ordinarily be complied with and the mortgage recorded as a chattel mortgage, at any rate in the county in which the principal office of the mortgagor is situated. These matters are frequently governed by statutes. See RECORDING.

A railroad mortgage is made with reference to the law of the state in which the subject-matter of the contract is, and in which the contract is made; and the law enters into and becomes a part of the contract as if it were there in express terms; 25 U. S. App. 415.

In the absence of a provision to the contrary, all bonds secured by a mortgage have an equal lien irrespective of the time at which they were negotiated; 55 Ohio St. 23; 122 Pa. 565; 44 N. E. Rep. (Ohio) 596. First mortgage bonds are prior to second mortgage bonds, even if subsequently negotiated; 8 Fed. Rep. 118. The invalidity of some of the bonds does not invalidate the mortgage; 118 U. S. 161.

The negotiable character of the bonds extends also to the mortgage securing them, against which the mortgagor cannot defend on grounds which it cannot set up against *bona fide* holders of bonds; 16 Wall. 271, 452; 136 U. S. 268; 64 Me. 37; 122 Mass. 67; 39 Wis. 146; the rule in Ohio and Illinois is said to be different; 14 Ohio St. 396; 93 Ill. 433; see 79 Ala. 587. In case of default, an individual bondholder may sue the corporation, but after securing judgment cannot have execution on property covered by the mortgage, which is security for all the bondholders alike. As to the effect of recitals in bonds as notice, see RECITALS.

In the surrender of corporate bonds and the substitution of new bonds, the latter will retain the security of the mortgage, unless an extinguishment was intended; 96 N. C. 298; see, also, 98 Ala. 92; 76 Fed. Rep. 43 (where under a reorganization plan the old bonds were deposited and were to be held by a trustee as additional security for the old bonds); but not where the mortgage was satisfied of record; 96 N. C. 298. A mere change in the form of the mortgage debt, such as substituting new bonds for the old, will not affect the lien; novation, especially when against the interest of the bondholders, must be clearly proved; 76 Fed. Rep. 38; and the funding of overdue interest and the issue of new evidence of indebtedness in place of the overdue coupons will not constitute a novation unless there be clear proof of an intention to waive the lien; 3 Hughes 320; 33 Gratt. 586.

A corporate mortgage may cover property acquired by the corporation after the mortgage is given. This has been sustained upon the theory that though ineffective as a conveyance, the mortgage operates as an executory agreement attaching to the property when acquired; 63 Fed. Rep. 891. This rule, though contrary to the common law, has been established from necessity in the case of railroads, public policy requiring that a railroad be preserved intact as *quasi*-public property. The rule will be applied only where the

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mortgage expressly covers the subsequently acquired property. A railroad mortgage covers the road, although the route differs from that originally laid out. It covers, also, a right of way acquired subsequently to the mortgage, though here the mortgage would be strictly construed, and while held to apply to property used for railroad purposes, it would be held not to apply if not so used; 122 U. S. 82. It covers terminal facilities upon a line of railroad constructed or to be constructed between the named *termini*, together with all stations, etc.; 138 U. S. 414. See TERMINAL FACILITIES. It applies not only to legal titles but also to equitable rights and interests subsequently acquired either by or for the company; 149 U. S. 327; 130 *id.* 413; 164 *id.* 1; it embraces the lease of a belt line around a city acquired after the execution of the mortgage; 22 U. S. App. 54. It does not cover uncalled capital; [1897] 1 Ch. 406. Where the property acquired is at the time subject to existing liens, these liens are prior in right to the lien of the mortgage; 12 Wall. 362; 81 Fed. Rep. 772. See FUTURE ACQUIRED PROPERTY. And if property was fraudulently acquired, the vendor may rescind as against the mortgagee.

Another rule resting upon the *quasi*-public character of a railroad is that which prohibits creditors from levying an attachment or execution upon the railroad, or parts of it, even subject to the mortgage. To permit such action would be to permit the disintegration of the railroad and the destruction of the power to discharge the public obligation of the corporation.

*Foreclosure.* The mortgage or deed of trust contains provisions for enforcing the rights of bondholders in case of default of the mortgagor. It usually provides for (1) Entry by the trustee. This is seldom now resorted to, since by operating the property, the trustee becomes liable as the mortgagor would have been, and as default implies that the property has been operated at a loss, the trustee will seldom consent to exercise this right, and never unless sufficiently indemnified by the bondholders. (2) Trustee's sale of the property after prescribed advertisement, which is seldom resorted to. (3) The usual method of procedure is by a bill of foreclosure, usually accompanied by a prayer for a receiver (see *supra;* RECEIVERS) and for the establishing of liens or claims against the property. No provision in the mortgage can exclude the right of a trustee to apply to a court of equity for foreclosure. The provision usually found that a majority of the bondholders may by an instrument in writing waive the right to declare that a default has occurred will be sustained by the court, though such provision is not favored, as being inimical to the rights of a minority. Provisions unreasonably limiting the right to foreclose are void. When a provision required the request of one-fourth of the bondholders to compel the trustee to begin foreclosure, the fact that three-fourths of the bonds were held by a company operating the mortgagor company was held to justify action by a single bondholder; 73 Fed. Rep. 320. In case the trustee refuses to act, a bondholder may bring suit for foreclosure on behalf of himself and such others as may join; 74 Fed. Rep. 67; 77 *id.* 525; in such case the refusal of the trustee must be set out and the trustee should be made a party defendant; 79 Fed. Rep. 25; 80 *id.* 569. If a single bondholder has the right to institute proceedings he is bound to act for all standing in a similar position; 143 U. S. 42. See PARTIES.

Railroad foreclosure suits are begun generally in the federal courts, thus securing the appointment of the same receiver or receivers for the entire property, and avoiding, to a certain extent, possible prejudice in a state court. For the latter reason, perhaps, the same jurisdiction is sought in many cases of corporations other than railroads. The jurisdiction of the federal courts in such cases depends on the citizenship of the parties. Federal courts sitting in equity cannot be ousted of jurisdiction to enforce a right of an equitable nature by a state statute which prescribes an action at law to enforce such right; 149 U. S., 574. See JURISDICTION.

Where a federal court has jurisdiction and possession of the property of a railroad company, it acquires jurisdiction of a subsequent suit to foreclose a mortgage on the same property, irrespective of the citizenship of the parties thereto; 137 U. S. 171; 52 Fed. Rep. 671.

Demand for payment is not necessary before proceeding for foreclosure, though a corporation could of course show that payment would have been made if demanded; 95 U. S. 10.

The court having acquired jurisdiction takes control of the entire property of the corporation through its receiver, and usually in the case of a railroad, though exceptionally in the case of other corporations, operates the property through such receiver. See RECEIVERS.

After the receiver takes possession, supplies, even though not covered by the mortgage, cannot be taken in execution by creditors. Prior to such taking possession, such assets are ordinarily subject to execution, or can be reached by attachment or bill in equity. Income, such as earnings, or interest or accounts collected subsequently to the appointment of the receiver, are taken by him and administered for the benefit of all the creditors. See RECEIVERS; OPERATING EXPENSES.

Provision is then made for ascertaining the liens, or claims, against the property and determining the liabilities of the corporation and their several priorities. This is preliminary to a sale of the property, in order that parties interested may know what the incumbrances upon, or claims against, the property are, and may bid intelligently, or make provision to redeem the property without a sale; 63 Fed. Rep 891. See Foreclosure decree in 88 *id.* 843.

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Decrees for the sale of mortgaged property usually provide that a part of the bid may be paid in bonds of the issue secured.

On the foreclosure sale of the property of a corporation, bonds should not be received in payment of a bid except for such proportion of the bid as the purchaser, on a distribution of the purchase money, is entitled to receive on account of his bonds, and the right to bid in bonds should be extended to all bondholders on the same terms; 73 Fed. Rep. 956.

The receivership usually terminates in a sale under order of court, either for the purpose of carrying out a plan of reorganization (see REORGANIZATION), or for the purpose of realizing upon the property of the corporation. For the form of a bill of foreclosure and decree, see 3 Hughes 320.

A purchaser of real estate at a foreclosure sale is punishable as for contempt in refusing to obey an order of the court requiring him to complete the sale; see 47 N. Y. Supp. 835, reversing *id.* 693. Inability to pay the price will not relieve the party; 47 N. Y. Suppl. 835; *contra*, 92 N. C. 304.

It is to be observed that in a foreclosure it is by no means certain that the lien of the mortgage will be determined to be the first lien upon the corporate property. In many cases it develops that claims subsequent to the mortgage in time are held to be prior liens, and while for many purposes the filing of a bill or appointment of a receiver fixes the liabilities, it may be that claims arising even subsequent to the receivership will be held to precede the claim of the mortgage bondholders.

The first payment out of the fund realized from the property is for the expenses of the litigation, always provided for from a fund under the control of a court. Included under this head are receivers' certificates, since these were issued by order of the court. See OPERATING EXPENSES; RECEIVERS.

Taxes are prior in lien to all other liens except judicial costs; 3 Woods 434; 110 N. Y. 250; 41 N. J. L. 235.

In many states liens are given by statutes to certain favored creditors, who thus acquire priority over mortgage bonds prior to the inception of their claims. The ordinary mechanic's lien statute does not apply to railroads unless expressly declared to do so. The contractor who constructs a railroad has no lien thereon as a matter of right. The fact that he has possession does not give him a lien; 1 Wall. 254; 11 *id.* 459. The courts construe such statutes strictly. Thus, a statute giving a lien for materials, supplies, and labor does not give a lien for money loaned to pay for them; 39 Fed. Rep. 436. And a lien for materials will be allowed only for such materials as pass into the permanent structure, and not for trucks, scales, etc.; 27 Fed. Rep. 178. A contractor's lien for work done will be limited to the embankments and structures actually made by him, as distinguished from the land and right of way; 83 Fed. Rep. 386. It has been held that a statute giving a lien to persons furnishing supplies necessary to the operation of a manufacturing company prior to the lien of an earlier mortgage is not unconstitutional as special or class legislation; 90 Va. 126. Such "supplies" are only such things as contribute directly to carrying on the work in which the company is engaged and not, *e. g.*, goods supplied to a "company store" maintained by a furnace company; 81 Fed. Rep. 451. But, while the courts construe such statutes strictly in determining the kind of claims to be admitted under their provisions, they construe them liberally as remedial statutes in determining the formalities to be observed under their provisions; 35 Fed. Rep. 442.

A very common statutory lien of this class is the lien for labor, usually limited as to the duration of the labor for which a lien can be filed, and also as to the class of employes entitled to take advantage of the provisions of such a statute; 35 Fed Rep. 436; 81 *id.* 453.

The "six months' rule," or as it is usually called, from the case in which it was adopted by the Supreme Court of the United States (99 U. S. 235), the rule in Fosdick *v.* Schall, allows parties who have furnished labor or supplies within six months antecedent to the receivership priority, at least so far as income received during the receivership is concerned, over mortgage bondholders. It has been held that the rule applies only to railroads; 128 U. S. 416; not to manufacturing corporations; 35 Fed, Rep. 436; 42 *id.* 372; nor to steamship lines; 50 *id.* 312; nor to a hotel company; 106 N. Y. 423. But see, *contra*, an Alabama case discussing the authorities and extending the rule to private corporations generally; 29 L. R. A. 623. See RECEIVERS.

As to the right of a mortgagee to possession, see 5 Harv. L. Rev. 245.

See ROLLING STOCK; RECITALS; TRUSTEE; TRUST DEED; MERGER; LEASE; MAJORITY.

Consult Kent; Washburn; Williams, Real Property; Story; Pomeroy, Equity; Jones, Mortgages and also Chattel Mortgages; Cook, Stock and Stockholders; Short, Railway Bonds; Thompson, Corporations.

Mortgages in the civil law are of two kinds, conventional and legal. A conventional mortgage results from the direct act or covenant of the parties. A legal mortgage arises by mere act of law.

A mortgage may be acquired in three ways.

*First*, with the consent of the debtor, by his agreement.

*Second*, without the owner's consent, by the quality and bare effect of the engagement, the nature of which is such that the law has annexed to it the security of a mortgage.

*Third*, where a mortgage is acquired by the authority of justice: as where a creditor who had no mortgage obtains a decree of condemnation in his favor.

When the creditor is put into possession of the thing, movable or immovable, he

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has a right to keep it until he is paid what is owing him; and the debtor cannot turn the creditor out of possession, nor make use of his own thing without the consent of the creditor.

*Effect of a mortgage.* *First*, the creditor has a right to sell the thing pledged, whether the creditor has it in his possession or not. Under the French law, it was a right to have it sold. Cushing's Domat, p. 647.

*Second*, a right on the part of the creditor to follow the property, into whosesoever hands it has come, whether movable or immovable.

*Third*, a preference of the first creditor to whom the property is mortgaged, and a right on his part to follow the property into the hands of the other creditors.

*Fourth*, the mortgage is a security for all the consequences of the original debt, as damages, interest, expenses in preserving, etc.

With respect to mortgages under the modern civil law of France and Louisiana, the distinction between movables and immovables is important. Such a thing as a chattel mortgage is not recognized under either system. "But some things movable in their nature become immovable by destination under certain circumstances," as: animals intended for and used in the cultivation of a plantation and placed on it by the owner for that purpose; though the animal cannot be mortgaged by itself, a mortgage of a plantation will cover the animals so attached to it; Howe, Stud. Civ. L. 76; 14 La. Ann. 15. See LIEN; PACT DE NON ALIENANDO.

See, generally, Domat, part i. lib. iii. tit. i.; Guyot, *Rep. Univ.* tit. *Privilegium;* Cushing's Domat.

**MORTGAGEE.** He to whom a mortgage is made. See MORTGAGE.

**MORTGAGOR.** He who makes a mortgage. See MORTGAGE.

**MORTIFICATION. In Scotch Law.** A term nearly synonymous with mortmain.

**MORTMAIN.** A term applied to denote the possession of lands or tenements by any corporation, sole or aggregate, ecclesiastical or temporal. These purchases having been chiefly made by religious houses, in consequence of which lands became perpetually inherent in one dead hand, this has occasioned the general appellation of mortmain to be applied to such alienations. 2 Bla. Com. 268; Co. Litt. 2 *b*; Erskine, Inst. 2. 4. 10; Barrington, Stat. 27, 97. See Story, Eq. Jur., 13th ed. § 1137 n. (4); Shelf. Mortm. In England the common-law right of every corporation to take and hold lands and tenements has been restrained by the statutes of mortmain, which subject the power to acquire lands to the discretion of the crown or parliament as to the grant of a license; 8 H. L. C. 712; 15 How. 367, 404. These statutes have not been re-enacted or considered in force in this country except in Pennsylvania, where they are judicially recognized to the extent of prohibiting the dedication of property to superstitious uses, and grants to a corporation without a statutory license; 7 S. & R. 313; though the title is good till office found, and may be conveyed subject to the right of the state to defeat it; *id.* See 101 U. S. 352. The commonwealth only can object; 7 Pa. 233.

Ordinarily, a corporation may take and hold such land as may be within the purposes of the charter, whether it acquires it by deed or devise; Clark, Corp. 129. Statutes sometimes restrict the amount that can be taken. Where a limit of value is specified it is ascertained as of the taking; 4 Sandf. Ch. 633.

In the United States the term mortmain acts is applied to statutes which exist in some states restricting the right of religious corporations to hold land and the power to make conveyances, devises, or bequests to religious societies or charitable uses. Such statutes are aimed at the same mischief which gave rise to the English statutes of mortmain, and either avoid the deed or will, *quoad hoc*, altogether, or when without valuable consideration, or when the real estate is above a specified valuation, or if made within a specified time before the death of the grantor or testator. See Stims. Am. Stat. L. §§ 403, 1446, 2618.

In England, by the Mortmain Act of 1736, 9 Geo. II. c. 36, the power of devising land by will to charitable purposes was absolutely destroyed; 6 Ch. D. 214. This act and various amending acts were repealed by the act of 1888, but practically the then existing law was re-enacted; Whitehead, Church Law 174.

The act of 1888 is in effect a codification of the law on the subject; 5 L. Quart. Rev. 387. It is in four distinct parts: I. Assurances in mortmain are void and the land liable to forfeiture, if made otherwise than under authority of a statute or of a license from the queen, who is empowered to grant it. II. Assurances for charitable uses are treated substantially on the basis of the statute 9 Geo. II., and charitable objects are enumerated in the language of the statute 43 Eliz. c. 4; they must take effect immediately, without any power of revocation, reservation, etc., except as to a nominal rent, mines and minerals, or easements, building contract, or the like; or, in case of *bona fide* sale, of a rent charge or annual payment to the vendor; they can never be made by will, but only by deed made with prescribed formalities. III. Exemptions are made of specified quantities of land for parks, museums, and schoolhouses, which may be made by will; also land for the two universities and other named colleges is excepted from the provisions in the second part of the act. IV. Scotland and Ireland are excluded, and existing charters, etc., are saved.

By the Mortmain and Charitable Uses Act of 1891, land may be assured by will to or for the benefit of any charitable use, but such land shall, notwithstanding anything in the will contained to the contrary, be sold within one year from the death of the testator unless the time is extended by the high court, or a judge at chambers, or the charity commissioners, who have power to sanction the retention or acquisition of such land where it is required for actual occupation for purposes of charity. Land under the mortmain acts, 1888 and 1891, is defined to include tenements and hereditaments, corporeal or incorporeal, of any tenure, but not any money, secured on land or any personal estate arising from or connected with land; 54 & 55 Vict. c. 73, § 3.

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Statutes of mortmain are local in their application and do not affect wills of persons domiciled in British colonies. A bequest by a testator, domiciled in a colony, of money, to his trustees for the purchase of land in England for a charitable object, is valid; 7 H. L. Cas. 124.

See Whitehead, Church Law 174; Tyssen, Char. Beq. 561; 1 Brett, Com. ch. xix.; CHARITABLE USE.

**MORTUARY. In Ecclesiastical Law.** A burial-place. A kind of ecclesiastical heriot, being a customary gift of the second best living animal belonging to the deceased, claimed by and due to the minister in many parishes, on the death of his parishioners, whether buried in the churchyard or not. These mortuaries, like lay heriots, were originally voluntary bequests to the church in lieu of tithes or ecclesiastical dues neglected in lifetime. See SOUL SCOT. They were reduced to a certain amount by 21 Hen. VIII. c. 6. They were sometimes payable to the lord; Paroch. Antiq. 470. The mortuary seems to have been carried to church with the corpse, and was therefore sometimes called corpse-present. 2 Burn, Eccl. Law 563. Anciently, a parishioner could not make a valid will without an assignment of a sufficient mortuary or gift to the church. 2 Bla. Com. 427.

**MORTUARY TABLES.** See LIFE TABLES.

**MORTUUM VADIUM.** A mortgage.

**MORTUUS** (Lat.). Dead. Ainsworth, Lex. So in Sheriff's return *mortuus est*, he is dead. O. Bridgm. 469; Brooke, Abr. *Retorne de Briefe*, pl. 125; 19 Viner, Abr. *Return*, lib. 2, pl. 12.

**MOTEER.** A customary service or payment at the moot or court of the lord from which some were exempted by charter or privilege. Cowel.

**MOTHER.** A woman who has borne a child.

It is generally the duty of a mother to support her child when she is left a widow, until he becomes of age or is able to maintain himself; 8 Watts 366; 16 Mass. 135; 3 N. H. 29; 52 N. J. Ch., 92; and even after he becomes of age, if he be chargeable to the public, she may, perhaps in all the states, be compelled, when she has sufficient means, to support him. But when the child has property sufficient for his support, she is not, even during his minority, obliged to maintain him; 1 Bro. Ch. 387; 2 Mass. 415; *id.* 97; but will be entitled to an allowance out of the income of his estate, and, if need be, out of the principal, for his maintenance; 2 Fla. 36; 2 Atk. 447; 5 Ves. 194; 3 Dutch. 388. During the life of the father she is not bound to support her child, though she have property settled to her separate use and the father be destitute; 4 Cl. & F. 323; 11 Bligh, N. S. 62.

When the father dies without leaving a testamentary guardian at common law, the mother is entitled to be the guardian of the person and estate of the infant until he arrives at fourteen years, when he is able to choose a guardian; Littleton § 123; 3 Co. 38; Co. Litt. 84 *b*; 2 Atk. 14; Comyns, Dig. *Feme*; 7 Ves. 348. See 10 Mass. 135, 140; Harp. 9; 1 Root 487; 22 Barb. 178; 2 Green, Ch. 221; 3 Dev. & B. 325; 9 Ala. 197; 29 W. Va. 751. The right of the widowed mother to the earnings and services of her minor child does not appear to have been precisely determined; but it is by no means so absolute as that of the father; 31 Me. 240; 15 N. H. 486; 4 Binn. 487; 3 Hill N. Y. 400; 14 Ala. 123; 15 Mass. 272.

In Pennsylvania, when the father dies without leaving a testamentary guardian, the orphans' court will appoint a guardian until the infant shall attain his fourteenth year. During the joint lives of the parents, the father has the only control and custody of the children, except when in special cases, as when they are of tender years, or when the habits of the father render him an unsuitable guardian, the mother is allowed to have possession of them; 6 Rich. Eq. 344; 2 S. & R. 174; 13 Johns. 418; 2 Phill. 786; 2 Coll. 661.

The right of the father or mother to the custody of their minor child is not an absolute right to be accorded them under all circumstances, for it may be denied to either of them if it appears to the court that the parent, otherwise entitled to this right, is unfit for the trust; 29 W. Va. 751; 82 Va. 433.

A child will not be taken from the custody of its father and given to its mother when it does not appear that his welfare required the change; 4 Misc. Rep. 235.

The mother of a bastard child, as natural guardian, has a right to the custody and control of such child, even as against the putative father, and is bound to maintain it; 12 Mass. 387, 433; 2 Johns. 375; 6 S. & R. 255; but after her death the court will, in its discretion, deliver such child to the father in opposition to the claims of the maternal grandfather; 1 Ashm. 55; Stra. 1162.

As a general rule the mother of an illegitimate cannot recover damages for his death, under a statute giving a right of action to the relatives or representatives of one killed through the negligence of another; 2 Ont. 658; 46 Fed. Rep. 269. See, *contra*, 25 S. W. Rep. (Mo.) 179. See BASTARD.

**MOTHER-IN-LAW.** The mother of one's wife or of one's husband.

**MOTION. In Practice.** An application to a court by one of the parties in a cause, or his counsel, in order to obtain some rule or order of court which he thinks becomes necessary in the progress of the cause, or to get relieved in a summary manner from some matter which would work injustice.

It is said to be a written application for an order; 83 Ia. 471, but it is frequently made verbally.



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Where the object of the motion may be granted merely on request, without a hearing, it is a motion *of course;* those requiring a hearing are *special;* such as may be heard on the application of one party alone, *ex parte;* those requiring notice to the other party, *on notice.*

When the motion is made on some matter of fact, it must be supported by an affidavit that such facts are true; and for this purpose the party's affidavit will be received, though it cannot be read on the hearing; 1 Binn. 145. See 3 Bla. Com. 305; 15 Viner, Abr. 495; Graham, Pr. 542; Smith, Ch. Pr. Index; Mitchell, Motions and Rules.

Under the English Bankruptcy Rules of 1870, all applications to a court having jurisdiction in bankruptcy, in the exercise of its primary jurisdiction, must in general be made by motion. Any application made to a divisional court of the high court of justice, or to a judge in an action, under the rules appended to the Judicature Act, 1875, must be made by motion. Moz. & W.

**MOTION FOR DECREE.** This has hitherto been (since its introduction by stat. 15 & 16 Vict. c. 86) for the plaintiff in an English chancery suit to obtain the decree to which he claims to be entitled. It must be distinguished from interlocutory motions. See Hunt, Eq. Pl. i. ch. 4; Moz. & W.

**MOTION FOR JUDGMENT. In English Practice.** A proceeding whereby a party to an action moves for the judgment of the court in his favor, which he may adopt under various circumstances enumerated under the Judicature Act, 1875.

**MOTIVE.** The inducement, cause, or reason why a thing is done.

It is an inducement, or that which leads or tempts the mind to indulge the criminal act; it is resorted to as a means of arriving at an ultimate fact, not for the purpose of explaining the reason of a criminal act which has been clearly proved, but from the important aid it may render in completing the proof of the commission of the act when it might otherwise remain in doubt; 49 N. Y. 148. It is not indispensable to conviction for murder that the particular motive for taking the life of a human being shall be established by proof to the satisfaction of the jury; 151 U. S. 396.

An act legal in itself, which violates no right, is not actionable on account of the motive which actuated it; 34 Conn. 529; 28 Vt. 49; [1898] 1 Ch. 274; [1898] A. C. 1. See the learned paper on the doctrine of the last cited case, Allen *v.* Flood, by L. C. Krauthoff, in Rep. Am. Bar Assoc. 1898.

See MALICE; LIBEL; LUCRI CAUSA; CAUSE; CONSIDERATION; MISTAKE; WITNESS.

**MOURNING.** The apparel worn at funerals, and for a time afterwards, in order to manifest grief for the death of some one, and to honor his memory.

The expenses paid for such apparel.

It has been held, in England, that a demand for mourning furnished to the widow and family of the testator is not a funeral expense; 2 C. & P. 207. See 14 Ves. 346; 1 V. & B. 364. See 2 Bell, Com. 156.

**MOVABLES.** Such subjects of property as attend a man's person wherever he goes, in contradistinction to things immovable.

Things movable by their nature are such as may be carried from one place to another, whether they move themselves, as cattle, or cannot be removed without an extraneous power, as inanimate things. So in the civil law *mobilia;* but this term did not properly include living movables, which were termed *moventia.* Calvinus, Lex. But these words *mobilia* and *moventia* are also used synonymously, and in the general sense of "movables." *Ibid.* Movables are further distinguished into such as are in possession, or which are in the power of the owner, as a horse in actual use, a piece of furniture in a man's own house; and such as are in the possession of another, and can only be recovered by action, which are therefore said to be in action, as a debt. But it has been held that movable property, in a legacy, strictly includes only such as is corporeal and tangible; not, therefore, rights in action, as judgment or bond debts; 19 Conn. 238, 245; 2 Dall. 142; 1 Wm. Jones 225. But see 17 Pick. 404. See PERSONAL PROPERTY; Pow. Mortg. Index; 2 Bla. Com. 384; 2 Steph. Com., 11th ed. 26; 1 P. Wms. 267.

In a will, "movables" is used in its largest sense, but will not pass growing crops, nor building materials on ground; nor, as stated above, rights in action; 2 Wms. Exec. 1014; 3 A. K. Marsh. 123; 2 Dall. 142. See MORTGAGE.

**In Scotch Law.** Every right which a man can hold which is not heritable; opposed to heritage. Bell, Dict.

**MOVE.** To apply to the court to take action in any matter. See MOTION. To propose a resolution, or recommend action in a deliberative body.

**MUIRBURN. In Scotch Law.** To set fire to a muir or moor. The time in which muirburn may be practised is regulated by statute. See 1 Bro. C. C. 78.

**MULATTO.** A person born of one white and one black parent. 7 Mass. 88; 1 Bailey 270; 2 *id.* 558; 18 Ala. 276.

Properly a mulatto is a person one of whose parents is wholly black and the other wholly white; but the word does not always, though perhaps it does generally, require so exactly even a mixture of blood, nor is its signification alike in all the states. 1 Bish. Mar. & D. § 308.

**MULCT.** A fine imposed on the conviction of an offence.

An imposition laid on ships or goods by a company of trade for the maintenance of consuls and the like. It is obsolete in the

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latter sense, and but seldom used in the former.

**MULE.** A mule is not a mare, horse, or gelding. 4 D. R. Pa. 172.

**MULIER.** Anciently *mulier* was taken for a wife, as it is commonly used for a woman, and sometimes for a widow; but it has been held that a virgin is included under the name *mulier*. Co. Litt. 170, 253; 2 Bla. Com. 248.

The term is used always in contradistinction to a bastard, *mulier* being always legitimate, Co. Litt. 243, and seems to be a word corrupted from *melior*, or the French *meilleur*, signifying lawful issue born in wedlock. But by Glanville, lawful issue are said to be *mulier*, not from *melior*, but because begotten *e muliere*, and not *ex concubina*, for he calls such issue *filios mulieratos*, opposing them to bastards. Glanville, lib. 7, c. 1. If the said lands "should, according to the queen's lawes, descend to the right heire, then in right it ought to descend to him, as next heire being *mulierlie* borne, and the other not so borne." Hollnshed, Chron. of Ireland, an. 1558.

**MULIER PUISNE.** See BASTARD EIGNE; EIGNE.

**MULTA.** A fine imposed *ex arbitrio* by magistrates on the *præsides provinciarum*. Inst. 4. 1.

A fine given to the king that the bishop might have the power to make his will and to have the probate of other men's, and the granting adminstrations. Toml. Law Dict.

**MULTIFARIOUSNESS. In Equity Pleading.** The demand in one bill of several matters of a distinct and independent nature against several defendants. Cooper, Eq. Pl. 182; 18 Ves. 80; 2 Mas. 201; 4 Cow. 682; 2 Gray 467. See Dan. Ch. Pr. 2093. See PATENT.

The uniting in one bill against a single defendant several matters perfectly distinct and unconnected. More commonly called misjoinder of claims. See MISJOINDER.

Multifariousness of the first kind is where the plaintiff joins several distinct claims against the same defendant and prays relief in respect to all; and of the second kind is where a plaintiff having a valid claim against one defendant joins another person as defendant in the same suit with a large part of which he is not connected.

The objection is discouraged where it might defeat the ends of justice; 12 Ga. 61; but joinder will be allowed unless it is apparent that the defence will be seriously embarrassed by confusing different issues and proofs in the same litigation; 4 Blatchf. 376. See 61 Ga. 520. A bill is multifarious where there is a misjoinder of distinct and independent causes of action. See 17 Ala. 119. Thus, unconnected demands against different estates cannot be united in the same bill, though the defendant is executor in both; 6 Dana 186; nor will a bill lie against two different partnerships, though one defendant is a partner in both; 10 Md. 364; nor a bill combining individual claims with claims in a representative capacity; 3 Story 25; but a bill may be brought by several persons claiming under a common title but in different shares; 18 How. 253; and where there is a joinder of a legal and an equitable claim and a prayer for relief as to both, the bill is not multifarious; 18 Ala. 439. To justify dismissal on this ground, it must appear that the interests are so diverse that they cannot be properly included in one decree: 21 Ala. 813.

A bill framed with a double aspect is not multifarious; 1 S. & M. 221, 208.

There is no general rule by which to determine whether a bill is multifarious because it joins another person as defendant in a suit with a large part of which he is unconnected; it must be left to the discretion of the court; 3 How. 333; 18 *id.* 259; the courts do not disregard previous decisions, but have a due regard to general convenience and the advancement of justice; 3 Md. Ch. 47.

Defendants should not be put to the unnecessary trouble and expense of answering litigated matters in a bill in which they are not interested; 3 Barb. Ch. 432; but where the interests of different parties are so complicated in different transactions that entire justice could not be conveniently done without uniting the whole, the bill is not multifarious; 3 How. 411; 59 N. H. 507. The objection is confined to cases where the cause of each defendant is entirely different in subject-matter from that of his co-defendants, but it does not apply to a case where a general right is claimed by the plaintiff, though the defendants may have separate and distinct rights; 95 N. C. 303; 69 Mo. 436. To render a bill multifarious it must contain not only separate and distinct matters, but such that each entitles the complainant to separate equitable relief; Adams, Eq. 310.

The objection should be raised by demurrer; 9 Gill & Johns. 280; filing an answer and taking the testimony on the merits waives the objection, and it cannot be made on appeal after a decree *pro confesso; id;* 100 Ill. 297; or after a final decree on the merits of one part of the bill; 18 Ala. 787. In 57 Pa. 247, it was held that it was too late to object at the hearing. But in such case it has also been held that its allowance rests in the discretion of the court; 17 Ala. 425. It may be taken by plea, answer, or demurrer, but not at the hearing; but the court may raise it at any time; 3 How. 332.

One defendant cannot demur on the ground of the joinder of another defendant who does not object. See 38 N. J. Eq. 88, n.

A demurrer goes to the whole suit, and, if sustained, the bill should be dismissed; 3 Md. Ch. 46; 16 Ala. 87. See MISJOINDER.

**MULTIPLE POINDING. In Scotch Law.** Double distress; a name given to an action, corresponding to proceedings by way of interpleader, which may be brought by a person in possession of goods claimed by different persons pretending a right thereto, calling the claimants and all others to settle their claims, so that the party who sues may be liable only "in once

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and single payment." Bell, Dict.; 2 Bell, Com. 299; Stair, Inst. 3. 1. 39.

**MULTIPLICITY OF ACTIONS, OR SUITS.** Numerous and unnecessary attempts to litigate the same right. For such cases equity provides a proceeding called a bill of peace, *q. v.*, and a court of common law may grant a rule for the consolidation of different actions; L. R. 2 Ch. 8; Story, Eq. Pl. 234; Bisph. Eq. 415.

**MULTITUDE.** The meaning of this word is not very certain. By some it is said that to make a multitude there must be ten persons at least, while others contend that the law has not fixed any number. Co. Litt. 257. That two cannot constitute a multitude, see 104 Mass. 595.

**MULTURE. In Scotch Law.** The quantity of grain or meal payable to the proprietor of a mill, or to the multurer, his tacksman, for manufacturing the corns. Erskine, Inst. 2. 9. 19; Ersk. Prin. 210.

**MUMMIFICATION.** In medical jurisprudence, the complete drying up of the body as the result of burial in a dry, hot soil, or the exposure of the body to a dry, cold atmosphere.

**MUNERA.** The name given to grants made in the early feudal ages, which were merely tenancies at will or during the pleasure of the grantor. Dalrymple, Feud. 198, 199; Wright, Ten. 19.

**MUNICEPS** (Lat. from *munus*, office, and *capere*, to take). **In Roman Law.** Eligible to office.

A freeman born in a municipality or town other than Rome, who had come to Rome, and though a Roman citizen, yet was looked down upon as a provincial, and not allowed to hold the higher offices (*dignitates*).

The inhabitants of a municipality entitled to hold municipal offices. Voc. Jur. Utr.; Calvinus, Lex.

**MUNICIPAL.** Strictly, this word applies only to what belongs to a city. It is used in this sense in the terms *municipal court*, *municipal ordinance*, *municipal officer*.

It has two meanings: (1) relating to cities, towns, and villages; (2) relating to the state or nation; 3 Wyo. 597. See 43 Ala. 598.

Among the Romans, cities were called *municipia*: these cities voluntarily joined the Roman republic in relation to their sovereignty only, retaining their laws, their liberties, and their magistrates, who were thence called *municipal magistrates*. With us this word has a more extensive meaning: for example, we call *municipal law* not the law of a city only, but the law of the state. 1 Bla. Com. 44. Municipal is used in contradistinction to international: thus, we say, an offence against the law of nations is an international offence, but one committed against a particular state or separate community is a municipal offence. See MUNICIPIUM.

**MUNICIPAL BONDS.** Evidences of indebtedness issued by a municipality.

In the ordinary commercial sense, they are negotiable bonds. 85 Tex. 520.

This class of securities is issued for sale in the market, with the object of raising money, under the express authority of the legislature. As to the power of municipal corporations to issue and sell bonds and borrow money, see MUNICIPAL CORPORATIONS. Notwithstanding they are under seal, they are clothed with all the attributes of negotiable or commercial paper, pass by delivery or indorsement, and are not subject to prior equities (where the power to issue them exists) in the hands of holders for value, who took before maturity and without notice. Payment of interest on such bonds for a number of years will estop the corporation from setting up a mere irregularity in their issue, as against *bona fide* holders for value; 80 Fed. Rep. 672. The coupons usually attached to such bonds are likewise negotiable, and may be detached and held separately from the bond, and may be sued on by the holder in his own name without his being the owner of the bonds to which they were originally attached; 1 Dill. Mun. Corp. § 486; 3 Wall. 327; 1 Dill. 338; whether he has given consideration for them or not; 80 Fed. Rep. 672.

Coupons when severed from the bonds cease to be incidents of the bonds, and become independent claims, and do not lose their validity, if for any cause the bonds are cancelled or paid before maturity; 20 Wall. 583. See as to coupons as distinct and separate instruments, 6 L. R. A. 562, n.; COUPONS.

The fact that such bonds are payable out of a special fund, known as a "sinking fund," does not prevent the holder from suing at law to enforce collection; 75 Fed. Rep. 967.

A very important principle with respect to municipal bonds was settled by the leading case of Gelpcke *v.* Dubuque, 1 Wall. 175, in which it was held that bonds which were valid under the decisions of the state court of Iowa at the time they were issued, will be sustained by the federal court, although the state court had subsequently overruled its earlier decisions and held that they were issued without authority. See 3 *id.* 294; 7 *id.* 181. See also an article sustaining this doctrine in 4 Harv. L. Rev. 311, by Prof. J. B. Thayer, in a preliminary note to which are cited a number of adverse criticisms of it.

Purchasers of the bonds of a municipality issued to aid the building of a railway, which recite a compliance with the law authorizing their issue, are not required to ascertain conditions imposed by the proposition voted on, which do not appear in the bonds; 82 Fed. Rep. 873; they have a right to assume that the conditions have been complied with; 73 *id.* 966.

See 5 Am. & Eng. R. R. Cas. 241; 36 Cent. L. J. 133; and as to power to subscribe; 12 Am. & Eng. R. R. Cas. 689; 15 *id.* 621, 655; ratification; 12 Am. & Eng. R. R. Cas. 651; effect of recitals; 12 *id.* 524; 15 *id.* 584, 675; 2 Am. & Eng. Corp. Cas. 291, 320; 35 Corp. L. T. 438, 460. See also an extended discussion of cases on municipal bonds in aid

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of railroads, in the supreme court of the United States; 17 Am. L. Reg. N. S. 209, 609.

See, generally, as to municipal bonds for public purposes, Coler; Burhans, Mun. Bonds; Burroughs, Pub. Sec. in America; Dillon, Mun. Corp.; Jones, Railroad Securities, ch. 7; Report Mo. Bar Ass'n, 1891, 221; 1 L. R. A. 787, note; 15 Am. & Eng. Corp. Cas. 356; 86 Fed. Rep. 594, 263; as to election for issue; 40 *id.* 543; negotiability; 5 *id.* 593; over issue; 40 *id.* 535; limit of indebtedness; *id.* 584; 26 *id.* 473; fraudulent circulation; 2 *id.* 263; estoppel to deny validity; 2 Am. Ry. Corp. Cas. 525; power to issue; 5 L. R. A. 726; *bona fide* holder; 23 Am. L. Reg. N. S. 310; 29 *id.* N. S. 380; mandamus, to enforce subscription; 12 Am. & Eng. Ry. Cas. 609; to enforce payment; 15 *id.* 629.

**MUNICIPAL CORPORATION.** A public corporation, created by government for political purposes, and having subordinate and local powers of legislation: *e. g.* a county, town, city, etc. 2 Kent 275; Ang. & A. Corp. 9, 29; Baldw. 222. An incorporation of persons, inhabitants of a particular place, or connected with a particular district, enabling them to conduct its local civil government. Glover, Mun. Corp. 1. In the United States, until recently, municipal corporations have been created singly, each with its special or separate charter passed by the legislature of the state. These charters define the territorial boundaries; provide for a governing body, usually styled the town or city council, with representatives to be chosen from different wards of the city or town; fix the qualifications of voters; specify the mode of holding elections; provide for the election of a mayor; and contain a minute and detailed enumeration of the powers of the city council; 1 Dill. Mun. Corp., 4th ed. § 39.

A state is the proper party to impeach the validity of a municipal charter, and its corporate existence cannot be collaterally attacked; 167 U. S. 646. There must be both population and territory; 75 Ill. 156; 29 Mich. 451; and there cannot be two municipal corporations, at the same time, over the same territory; 25 Fla. 371.

There are territorial subdivisions, not incorporated, but which are like municipal corporations, instrumentalities of local government for certain definite purposes. Such are in some states, the counties, or towns, or school districts where they are not incorporated. They are termed *quasi-corporations*, which title see. They are not included in the phrase "counties or municipal corporations" in a statute; 44 Wis. 489.

The term municipal corporation has been held to include the District of Columbia; 129 U. S. 141; a city; 250 Ohio St. 143; a village; 27 Neb. 770.

Where a municipal charter is repealed, and the same, or substantially the same, inhabitants are erected into a new corporation, whether with extended or restricted territorial limits, such new corporation is the successor of the old one and entitled to its property and subject to its liabilities; 167 U. S. 646.

Public duties are required of such corporations as counties and districts as a part of the machinery of the state government, and in order that they may properly perform these duties they are invested with certain corporate powers, but their functions are wholly of a public nature, and they are at all times subject to the will of the legislature, unless restrained by the constitution; 30 W. Va. 424.

In England, the municipal corporation acts, 5 & 6 Will. IV. ch. 76, abolish all special charters, with enumerated exceptions, and enact general provisions for the incorporation, regulation, and government of municipal corporations. These acts have been followed in many of the United States. The usual scheme is to grade corporations into classes, according to their size, as into cities of the first class, second class, etc., and towns or villages, and to bestow on each class such powers as the legislature deems expedient; but the powers and mode of organization of corporations of each class are uniform; 1 Dill. Mun. Corp. § 41, n.

The scope of legislative authority over municipal corporations is limited only by the terms of the state and federal constitutions, and the necessary implications derived therefrom; 24 Mich. 44; s. c. 9 Am. Rep. 108; 142 U. S. 366. Those matters which are of concern to the state at large, although exercised within defined limits, such as the administration of justice, the preservation of the public peace, and the like, are held to be under legislative control; while the enforcement of municipal by-laws proper, the establishment of gas works, of water works, the construction of sewers, and the like, are matters which pertain to the municipality as distinguished from the state at large; 69 Ill. 326; 62 Mo. 370; 51 Cal. 15; 28 Mich. 228; s. c. 15 Am. Rep. 202; 97 U. S. 284; 61 Fed. Rep. 782. See 160 Pa. 511.

As ordinarily constituted, municipal corporations have a dual character, the one governmental, legislative, or public; the other, proprietary or private. In their public capacity a responsibility exists in the performance of acts for the public benefit, and in this respect they are merely a part of the machinery of government of the sovereignty creating them, and the authority of the state is supreme. But in their proprietary or private character their powers are supposed to be conferred not from considerations of state, but for the private advantage of the particular corporation as a distinct legal personality.

"The functions of such municipalities are obviously two-fold: (1) political, discretionary, and legislative, being such public franchises as are conferred upon them for the government of their inhabitants and the ordering of their public officers, and to be exercised solely for the public good, rather than their special advantage; (2) those ministerial specified duties which are assumed in consideration of the privileges conferred by their charter." 17 Gratt. 375. And it was said by Folger, J., in 62 N. Y. 160, "There are two kinds of duties which are imposed upon a municipal corporation. One is

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of that kind which arises from the grant of a special power in the exercise of which the municipality is as a legal individual; the other is of that kind which arises or is implied from the use of political rights under the general law, in the exercise of which it is sovereign. The former power is private and is used for private purposes; the latter is public and is used for public purposes; the former is not held by the municipality as one of the political divisions of the state, the latter is." The distinction is quite clear and well settled and the process of separation practicable. To this end regard should be had, not so much to the nature and character of the various powers conferred, as to the object and purpose of the legislature in conferring them. If granted for public purposes exclusively they belong to the corporate body in its public, political, or municipal character; but if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation *quoad hoc* is to be regarded as a private company." 3 Hill 531.

As to powers of the non-public nature and as to property acquired thereunder, and contracts made with reference thereto, they are to be considered as *quoad hoc* private corporations; Dill. Mun. Corp. § 66; 102 Mass. 489; 122 *id.* 359; s. c. 23 Am. Rep. 332. And in like manner, as such corporations they are liable for the misuser or nonuser of their powers of this nature. A city is liable for wrongfully permitting the accumulation of sewage in a cellar, thereby causing the death of a person who lived in the house over such cellar; 21 App. Div. N. Y. 311. But counties, though by modern legislation frequently constituted municipal corporations, are permitted greater immunity from liability for negligence than cities. On this principle in a recent case it was held that the act of 1892, declaring a county to be a municipal corporation, did not change the common-law rule as to its non-liability in such cases, and, consequently, it was not liable for personal injuries sustained by an individual by reason of a defective bridge which it was bound to maintain; 154 N. Y. 675. If a municipal corporation becomes indebted, the rights of creditors cannot be impaired by any subsequent legislative enactment; 4 Wall. 535; 19 Wis. 468; 100 U. S. 374; but authority to a city to borrow money, and to tax all the property therein to pay the debt thus incurred, does not necessarily deprive the state of the power to modify taxation, if the rights of creditors be not thereby impaired; 27 Ohio St. 426; s. c. 22 Am. Rep. 321. So, also, as trustee for the general public, the legislature has control over the public property and the subordinate rights of municipal corporations. It can authorize a railroad company to occupy the streets of a city without its consent and without payment; 31 N. Y. 164; 13 La. Ann. 326. It can direct a municipal corporation to build a bridge over a navigable watercourse within its limits, or appoint agents of its own to build it, and empower them to create a loan for the purpose, payable by the corporation; 58 Pa. 320; 17 Wall. 322; 104 Mass. 236; 47 Md. 145. The legislature may compel a city to pay its bonds, by taxation, but not to pay an obligation for which no consideration had been received; 95 U. S. 644. In the absence of constitutional restraint, it may extend the boundaries of an existing municipal corporation without the consent, or even against the remonstrance, of the majority or of all of the inhabitants of the existing corporation; 73 Tex. 538. And in general the legislature may, by subsequent legislation, validate acts of a municipal corporation otherwise invalid; 97 U. S. 687; Cooley, Const. Lim. 371; 101 U. S. 196. The legislature may also interfere with the administration of public charitable trusts by municipal corporations; 64 Pa. 169; but not with those of a private character where a contract has been constituted; 11 Me. 118; 4 Wheat. 518; 53 N. H. 575. A contract made by a city with a water works company, so far as the city's rights are concerned, is subject to the will of the legislature, and a statute may authorize a change therein; 142 U. S. 79; and property acquired by it for the purpose of furnishing water is not held by it as a private corporation so as to prevent the legislature from modifying the management of it; 7 Houst. 44.

See as to special legislation, as applied to corporate powers of municipal corporations, 35 Cent. L. J. 266; as to the power of the legislature over the streets of municipalities, 26 Am. L. Rev. 520; as to municipal power of taxation, 35 Cent. L. J. 227.

"A municipal corporation possesses and can exercise the following powers, and no others: first, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not simply convenient but indispensable." 70 N. C. 14; 93 Ill. 236; 3 Wall. 320; 1 Dill. Mun. Corp., 4th ed. § 89; 22 Am. Rep. 261; 134 U. S. 198; 145 *id.* 135; 78 Ga. 683; 130 Ind. 149. No powers can be implied except such as are essential to the purposes of the corporations as created; they can bind the people and property only to the extent of their powers; 108 U. S. 110; 13 Ore. 17. Where discretionary powers are granted, the corporation thereby acquires a control and discretion as absolute as that originally possessed by the legislature; 5 Cow. 541; 7 Mart. (La.) N. S. 5; 78 Ill. 550; 37 N. J. L. 146; a grant of express power carries with it the right to determine the mode of its execution; 101 N. Y. 132; 58 Wis. 403; and its discretion in that respect should not be interfered with by courts except where it is clearly abused; 47 Mich. 115. Acts in excess of the express or implied powers are void; 114 Ill. 659. See as to municipal powers, express and implied, 1 L. R. A. 169; 2 *id.* 54.

A strict, rather than a liberal, construction of the powers of a municipal corporation is adopted; 43 Ia. 524; s. c. 22 Am. Rep. 261; 23 How. 435; 31 Mo. App. 237; and only such can be implied as are essential to the corporate objects and purposes; 108 U. S. 110; 79 Ia. 587; 13 Ore. 17. But, bearing this in mind, it is also true that a

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municipal corporation may do many acts not expressly authorized by its charter, and it has been said that "it is a mistake to assume that municipal corporations should not keep abreast with the progress and improvements of the age;" 160 Pa. 511. This fairly expresses the elasticity which characterizes the decisions with respect to their implied powers. The functions of such corporations are so well understood that there is usually little difficulty in deciding whether a particular power is essential to its purpose or necessarily implied. These powers have been recognized:—To grade and pave streets; 84 Pa. 487; to establish and maintain a sewerage system; 2 Grant 291; 21 Ohio St. 499; provide for a water supply and an electric light plant; 91 Wis. 131; erect public buildings; 3 Allen 9; prevent damage by fire; 7 Cow. 349; 28 Mo. 488; and to that end appropriate money to fire companies; 27 Vt. 70; 26 Ga. 678; to make pleasure drives around public squares; 171 Pa. 542; regulate poles and electric wires; 148 Pa. 117; even to the extent of requiring them to be placed underground; 6 Am. Elec. Cas. 64 (it is settled that this power may be exercised by the legislature in the exercise of the sovereign power of the state; 145 U. S. 175; 107 N. Y. 593; 125 *id.* 641; 38 Fed. Rep. 552); so it may make police regulations; 61 Ga. 572; 5 Wash. 303; 93 Mich. 135; offer a reward for the detection of criminals; 7 Gray 374; 92 U. S. 73; *contra*, 57 Me. 174; appropriate public money for a police pension fund; 182 Pa. 373; or, where it will promote the interests of the inhabitants generally, for a survey for a ship canal: 183 Pa. 202; issue bonds in aid of a railway; see BONDS; and it was held that the city of Philadelphia had power to send the Liberty bell, owned by it absolutely, to the Atlanta Exposition; 4 D. R. Pa. 523.

Power in municipal corporations is denied:—To provide for fireworks on the fourth of July; 116 N. C. 296; or to prohibit screens in bar rooms; 135 Ind. 466; or issue commercial paper; 47 Ill. App. 254; 121 U. S. 165. See 110 *id.* 192. The municipal authorities may provide not only for the immediate, but also for the prospective, needs of the city, and may make temporary appropriation, as by lease for private use of such public property as is not presently needed; 37 Wis. 400; 25 Fed. Rep. 202; 131 Mass. 23.

A subject of the utmost importance is the power of a municipal corporation with respect to nuisances. Without legislative authority it cannot authorize a common nuisance; 9 Houst. 396; nor by ordinance prohibit, as one, the fencing by a railroad of its right of way; 30 Ore. 478; but in the exercise of a granted power to suppress nuisances it may invoke the aid of a court of equity; 66 N. W. Rep. (S. Dak.) 815. In the Oregon case just cited, the subject was examined and the conclusion reached that even authority by charter to declare what shall constitute a nuisance does not authorize a city by ordinance to declare a particular use of property a nuisance, unless such use is such by common law or statute.

See 36 L. R. A. 593; 39 *id.* 520, 609, 649; for full annotations covering the entire ground of municipal power in regard to nuisances. See NUISANCE.

The power to borrow money and issue bonds therefor is not included among the implied powers of a municipal corporation, but when a debt has been lawfully incurred, it is not prohibited from issuing bonds for its payment; 84 Pa. 487; 51 Fed. Rep. 165; but see 19 Wall. 468; 5 Dill. 165.

They possess the incidental or implied power to borrow money and issue bonds therefor in order to carry out their express powers, or any affecting their legitimate objects; 7 Ohio 31; 11 Wis. 470.

The power to borrow money or to create a debt should not be implied against the spirit and policy clearly manifested by contemporaneous legislation as well as by the organic law in force when the legislation giving such power was enacted; 67 Tex. 519. It can only be implied from a special duty imposed, for the discharge of which it is necessary; the power to raise money does not include the power to borrow; 119 N. Y. 289.

It was generally held that where express power is given to borrow money it includes the power to issue negotiable bonds or other securities to the lender; 1 Wall. 272; 48 Ill. 423; 15 Ind. 395; 3 Wall. 654; 34 Pa. 496. But, in cases very much discussed, it has been held by the United States supreme court that the power conferred upon a municipal corporation to borrow money or to incur indebtedness merely authorized it to issue the usual evidences of indebtedness, but not "to issue for sale, in open market, a bond, as a commercial security, with immunity, in the hands of a *bona fide* holder for value, from equitable defences;" Merrill *v.* Monticello, 138 U. S. 673. This case, it was claimed, was plainly at variance with Rogers *v.* Burlington, 3 Wall. 654, and Mitchell *v.* Burlington, 4 Wall. 270; though it did not in terms overrule them. But that they were considered overruled by the later cases was expressly stated in 144 U. S. 173, which was re-argued before eight judges, by reason of the death of Bradley, J., pending its decision, and from the final decision in which Harlan, Brewer, and Brown, JJ., dissented. The decision was squarely to the effect that the power to borrow money did not authorize the issue of negotiable bonds, and that "even a *bona fide* holder of them cannot have a right to recover upon them or their coupons." See a critical review of these cases, 5 Harv. L. Rev. 157; 6 *id.* 53; BONDS; MUNICIPAL BONDS.

Where a statute confers power to borrow money and fixes the limit of the amount which can be borrowed, a municipality cannot exceed that amount under power conferred by a general provision to borrow money for any purpose within its discretion; 107 U. S. 68.

By constitutional provision in several of

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the states the legislature is required to restrict municipal corporations in their power to borrow money, contract debts, or pledge their credit. These provisions vary, but are most commonly in the nature of a restriction of possible indebtedness to a certain percentage of the assessed value of property; see 176 Pa. 80; and for a note collecting authorities on the municipal power to borrow money, see 7 L. R. A. 759. Constitutional limitations on state indebtedness apply to the state alone and not to her political or municipal subdivisions; 13 Cal. 175; 19 Ill. 406; 2 Ohio 607. As to both constitutional and statutory limitations, see 23 L. R. A. 402.

There can be no union of public and private funds or credit, nor of that which is produced by such funds or credit; 6 Ohio Dec. 1; and a statute authorizing the union of public and private capital or credit in any enterprise whatever is unconstitutional; 23 Ohio St. 78; 37 *id.* 97; but a joinder of a city with a county in purchasing a building for a city hall has been upheld; 2 Cal. 289; where it was held that they could take as tenants in common.

Such corporations have not the power of taxation, unless such is conferred by the legislature, and when it is so conferred the statute must be strictly construed; 82 Va. 324; 83 Ala. 608; 99 N. C. 210. A grant of the power of taxation by the legislature to a municipal corporation is subject to revocation, modification, and control by the legislature of the state; 130 U. S. 189.

While the power to make laws cannot be delegated, the creation of municipalities exercising local self-government cannot be held to trench upon that rule; 129 U. S. 141. See LEGISLATIVE POWER. So from necessity, these corporations exercise a large measure of police power (*q. v.*). A city council may by ordinance authorize police officers to arrest without warrant persons engaged in a breach of the peace, and an officer who, from the outside of a house, hears a disturbance or disorderly conduct within it, may, acting in good faith under such authority, enter the house and arrest the person guilty thereof as being the inmate of a disorderly house; 95 Wis. 492.

The delegation of power to municipal councils to determine between alternative methods for payment of assessments for municipal improvements is authorized by a constitutional provision directing the legislature to provide for municipal corporations; 44 Pac. Rep. (Cal.) 915.

Delegations of power to municipal corporations have been held valid to provide for the increase of justices in proportion to population, and authorizing the appointment of the additional justices by county commissioners; 45 Pac. Rep. (Col.) 357; allowing existing municipal corporations to elect to continue under their old charter or adopt the general incorporation law; 72 Miss. 950; authorizing a township committee to determine what territory shall be included in a proposed city; 33 Atl. Rep. (N. J.) 858; authorizing cities of a given class to make laws for their local self-government, subject to the general laws of the state; 11 Wash. 435; 13 *id.* 17.

The delegation, by the state to a city, of authority to act for it in granting franchises to build and operate street railways, does not include the power to institute and maintain actions for their forfeiture for misuse or abuse, and such forfeiture must be decreed in an action in the name of the state; 95 Wis. 39.

The delegated power of legislation involved in the authority of municipal corporations to enact ordinances springs naturally from the nature and functions of these corporations as an instrumentality of local government. Such ordinances, by the legislative body of the municipality, are the usual means of expressing the corporate will and enacting municipal laws and regulations. Such regulations may be by resolution as well as by ordinance where the charter is silent on the subject; 148 U. S. 591; 50 Wis. 204; 70 Ia. 105; 130 Ind. 149; 35 Pa. 231; 54 N. J. L. 325; if, however, the charter requires action by ordinance, a resolution is ineffective; 55 N. J. L. 285; 54 *id.* 474; 32 Kan. 456; and where an ordinance is required in a particular form it cannot be repealed by resolution; 89 Tex. 79; so even if an ordinance has been passed, where a resolution would have been sufficient, the latter is not sufficient to repeal it; 88 Ia. 558. Where the charter authorized action by ordinance, a resolution is sufficient if adopted and approved by the mayor with such formalities as an ordinance would require; 49 Mo. App. 612; and where an ordinance requires the approval of the mayor, a resolution not presented to him is unavailing; 113 Mo. 395. See ORDINANCE.

The principles upon which rests the right to enact penal ordinances is thus stated: (1) Unless forbidden by the constitution, the legislature can clothe municipal government with power to prohibit and punish any act made penal by the state laws, when done within the municipal limits. (2) Such an ordinance is not invalid, merely because it prescribes the same penalties as the state law for the commission or omission of the same act. (3) It is no valid objection to such an ordinance, that the offender may be tried and punished for the same act under both the ordinance and the state law. (4) A conviction or acquittal by the municipal courts, under such an ordinance, is no bar to a prosecution under the state law. (5) Such an ordinance is not invalid, merely because the trial thereunder is without a jury. (6) Nor is it invalid, because it excepts from its operation certain business pursuits that are not excepted from the operation of the state law on the same subject; 34 Fla. 440. To the same effect is *id.* 504. See 1 Am. L. Reg. & Rev. N. S. 669, 869.

Ordinances must not only not conflict with constitutional or general statute law, but they must be reasonable. It is, how-

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ever, said that what may be reasonable under ordinary circumstances, as a prohibition against driving on the street at a greater speed than six miles an hour, would be unreasonable and void as applied to the members of a salvage corps or fire patrol responding to an alarm; 64 Minn. 287. An ordinance providing that "no person shall on any street or public place, or on land adjacent thereto, sing or recite any profane or obscene song or ballad, or use any profane or obscene language," was held unreasonable and therefore invalid; [1896] 1 Q. B. 290. It is suggested that the real ground of objection in this case was that the words "or on land adjacent thereto," were too wide, and that the other objection alone ought to be untenable because the use of profane or obscene language necessarily implies annoyance; 35 Am. L. Reg. N. S. 327. But an ordinance which conforms to a definite statutory grant of power cannot be set aside as unreasonable; 38 Atl. Rep. (N. J.) 857. A statutory power to make ordinances regulating trade does not warrant one making it unlawful to carry on a lawful trade in a lawful manner; [1896] A. C. 88.

Municipal ordinances must be specific and definite, and they will not be construed as forbidding an act by implication; 7 Mart. 486; and, like a statute, they may be valid in some of their provisions and invalid as to others; 84 Ala. 17; 98 *id.* 134; but where the invalid provisions are inseparably connected with the valid ones, the ordinance is void; 54 N. J. L. 75: 49 Ill. App. 60. When a city council is vested with full power over a subject, and the mode of exercising it is not limited by the charter, it may exercise it in any manner most convenient; 16 Ore. 334. A city ordinance in conflict with the general policy and laws of the state is void; 45 La. Ann. 34. See ORDINANCE.

With respect to the liabilities of municipal corporations it may be said generally that as parties to a contract where they act *qua* private corporations, they are liable on their contract, and contracting parties are liable to them in the same manner as private persons and corporations are. A city can bind parties by such contracts only as it is authorized by its charter to make; 116 N. Y. 167. Those who contract with them are protected where their contracts are made according to law; 71 Mich. 227; 11 Colo. 483; and those who deal with them must exercise reasonable diligence to ascertain whether there be legally provided the funds from which the obligation to be created may be met; and the public is not estopped from setting up the illegality of the obligation by the fact that the other party has acted in reliance upon its validity; 50 N. J. L. 665.

Contracts may be entered into by the officers of a corporation, binding upon it, without the use of the corporate seal; 12 Mich. 138. Without express legislative authority, a municipality cannot act as surety or guarantee; 19 Ia. 199. Where the statute provides that no city officer should be interested in a municipal contract, and that any such contract contrary to that provision should be void, a contract with a school director for street work was held void; 98 Cal. 427; and the same is true if the interest of the officer is indirect merely, as the member of a contracting firm or corporation; 28 Atl. Rep. (N. J.) 578; such contract may be ratified by subsequent municipal action after the officer has ceased to be such, for it is a new contract; 132 Ind. 558. Even if there be no penal statute prohibiting the execution of such contract, it is void on grounds of public policy, but so long as it is executory it is voidable merely, and if entered into in good faith for a proper purpose and the city has received the benefit, there may be a recovery on a *quantum meruit*; 1 Kan. App. 35. For cases on the general subject of the liability of municipal corporations on contracts, see 6 L. R. A. 318, note.

The liability of private corporations for the misfeasance, or negligent nonfeasance, of its officers, is affected primarily by the distinction between their public functions as an instrumentality of government, and their private relations as a corporation transacting ordinary business. See *supra*. Within the sphere of the former they are entitled to exemption from liability, inasmuch as the corporation is a part of the government, and to that extent its officers are public officers, and as such, entitled to the protection of this principle; but within the sphere of the latter, they drop the badges of their governmental offices and stand forth as the delegates of a private corporation in the exercise of private franchises, and it is amenable as such to the fundamental doctrine of liability for the acts of a servant; 17 Gratt. 375. Although the difference between the two kinds of powers is plain and marked, yet, as they approximate each other, it is sometimes difficult to ascertain the exact line of distinction. All that can be done with safety is to determine, as each case arises, under which class it falls; 5 N. Y. 369.

Where a city or town is exercising the judicial, discretionary, or legislative authority conferred by its charter, or is discharging a duty imposed solely for the benefit of the public, it incurs no liability for the negligence of its officers, though acting under color of office, unless some statute (expressly or by necessary implication) subjects the corporation to pecuniary responsibility for such negligence; Dill. Mun. Corp. § 965; but where such corporations are not in the exercise of their purely governmental functions, but are exercising, as corporations, private franchises, powers, and privileges which belong to them for their ordinary corporate benefit, or dealing with property held by them for their corporate advantage, gain, or emolument, though enuring ultimately to the benefit of the general public, then they become liable for the negligent exercise of such powers precisely as though they

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were individuals; 122 Mass. 344; 36 N. H. 284; 17 How. 161; Dill. Mun. Corp. § 966.

The obligation and duty of a municipal corporation in the construction of public work is only the exercise of reasonable care; it does not insure against damage; 120 N. Y. 164. The inquiry must be whether the department or officer whose action or non-action is complained of is part of the machinery for carrying on the municipal government, and whether it was then engaged in discharging a duty resting upon it; 116 N. Y. 558. To constitute negligence in such actions, there must be a duty imperfectly discharged; 81 N. Y. 21; 8 C. B. N. S. 568; and if the duty is owed to the public, there is no action by an individual to whom the duty was not specially owed; 34 Md. 265; 8 Cow. 153; 44 N. H. 246; 43 Conn. 562. As illustrating the effect of their two-fold character, municipal corporations have been held liable for injuries resulting from negligence in the management of a public building rented out for profit; 102 Mass. 499; otherwise, if let gratuitously; 128 *id.* 561. So they are liable for torts of their agents amounting to the negligent breach of municipal duty; 22 Pa. 54. Upon this theory rests the exception to the general rule of exemption from liability for negligence in performance of a public duty, recognized in many states, as to defective highways; 24 Ala. 112; see 5 L. R. A. 143, 253; 10 *id.* 734; as is also in many jurisdictions the liability for defective drains and sewers; 78 Cal. 588; 1 L. R. A. 296; 7 *id.* 156; but it was held that there was no liability for damage by fire resulting from failure to keep fire plugs, etc., in order; 78 Ga. 241; 35 S. W. Rep. (Tex.) 341; or from not preventing the erection of a wooden building within the fire limits; 72 Mich. 278.

There is no liability for omission to exercise discretionary powers: 107 Ill. 334; 56 Vt. 228; there must be a corporate duty imposed; 76 N. Y. 506; 79 Ind. 491; L. R. 2 Q. B. 534; as, for example, a city is not liable for failure of its police to prevent crime which is a public duty, as distinguished from a strictly corporate duty; 1 Marvel, Del. 5. But if the corporation receives a benefit, it may be liable; 126 Mass. 324. It is then the general rule that they are not liable for misfeasance or nonfeasance of their agents. The cases on this point are very numerous.

The municipality has been held not liable for injuries resulting from negligence of a physician in charge of a pest-house; 65 Me. 402; see 1 L. R. A. 844; or for tortious acts of agents in their nature unlawful; 90 Mo. 377; 79 Me. 343; as a constable making an unlawful sale; 100 N. Y. 577; for negligence of an officer in whose selection there was no negligence; 34 Ala. 469; or of officers selected under a statute independently of municipal control; 71 Ill. 357; 17 Gratt. 382; see 1 L. R. A. 844; for negligence of police; 113 Pa. 269; unless there is statutory liability, express or implied; 89 Mo. 208; or of firemen; 84 Minn. 402; or of a civil engineer in establishing a grade for the benefit of an individual for whom he was bound to do it on payment of a fee; 69 Ia. 541; for damages resulting from the firing of a cannon under a license from the mayor authorized by ordinance; 148 Mass. 578; for the publication of defamatory matter contained in an official report of an investigating committee duly selected; 159 Mass. 434; for the wrongful act of its officers in closing an exhibition with intent to injure the owner thereof; 6 C. C. App. 627; see 76 Hun 390; for failure of its officers to provide by special tax a fund to pay street grade warrants; 16 Wash. 698. See 3 L. R. A. 257, note; MANDAMUS; QUASI CORPORATIONS.

Municipal corporations may be dissolved in England; (1) by act of parliament; Co. Litt. 176, n.; (2) by the loss of an integral part; 9 Gill & J. 365; (3) by a surrender of their franchises; 6 Term 277; (4) by forfeiture of their charter; 6 Beav. 220; 76 Ill. 419.

In the United States these modes of dissolution are not applicable, there can be no dissolution except by an act of the legislature which created the corporation. See 113 Ill. 491; 72 Tex. 182; 102 U. S. 472; 116 *id.* 289; 93 *id.* 258.

The change of name does not dissolve a municipal corporation; 7 Wall. 1; 93 U. S. 266; but the power of so changing exists only in the legislature.

Nor does the failure of the inhabitants of a municipality to elect officers operate as a dissolution of it; 71 Tex. 65; 72 *id.* 182; nor is a municipal charter forfeited by mere non-user for any period of time; 98 Ala. 358.

Upon the division of a municipal corporation into two separate towns, each is entitled to hold in severalty the public property within its limits; 2 Wend. 159. See 40 Minn. 13.

In actions generally, the original minutes or records of a corporation are competent evidence of its acts and proceedings; 6 Wend. 651. It is competent for the legislature to delegate to municipal corporations the power to make by-laws and ordinances which have, when authorized, the force, in favor of the municipality and against the persons bound thereby, of laws passed by the legislature of the state; 44 Ia. 508; s. c. 24 Am. Rep. 756; but ordinances cannot enlarge or change the charter by enlarging, diminishing, or varying its powers; 22 How. 422; 12 Wall. 349. See DELEGATION; POLICE POWER.

**MUNICIPAL COURTS.** At common law, municipal corporations frequently enjoyed the franchise of holding a court, and the franchise being a public right, could not be lost by non-user. A. & E. Encyc. L. See Dillon, Mun. Corp., 3d ed. § 424; 4 D. P. C. 562.

In the United States, in many of the larger cities, there are courts so designated, with statutory jurisdiction in criminal or

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civil cases, or both, usually limited not only in amount, but by the requirement that suits can only be instituted against residents, and crimes prosecuted which are committed within the city.

**MUNICIPAL LAW.** In contradistinction to international law, the system of law proper to any single nation or state. It is the rule or law by which a particular district, community, or nation is governed. 1 Bla. Com 44.

Municipal law contrasts with international law, in that it is a system of law proper to a single nation, state, or community. In any one state the municipal law of another state is foreign law. See FOREIGN LAW. A conflict of laws arises where a case arising in one state involves foreign persons or interests, and the foreign and the domestic laws do not agree as to the proper rule to be applied. See CONFLICT OF LAWS.

The various provinces of municipal law are characterized according to the subjects with which they respectively treat: as, *criminal or penal law*, *civil law*, *military law*, and the like. *Constitutional law*, *commercial law*, *parliamentary law*, and the like, are departments of the general province of civil law, as distinguished from criminal and military law.

**MUNICIPAL ORDINANCE.** A statute or regulation enacted or adopted by a municipal corporation for the proper conduct of its affairs or the government of its inhabitants. See MUNICIPAL CORPORATION; ORDINANCE.

**MUNICIPAL SECURITIES.** The evidences of indebtedness issued by cities, towns, counties, townships, school districts, and other such territorial divisions of the state. There are two general classes: (1) municipal warrants, orders, or certificates; (2) municipal negotiable bonds. A. & E. Encyc. See MUNICIPAL CORPORATION.

**MUNICIPALITY.** The body of officers taken collectively, belonging to a city, who are appointed to manage its affairs and defend its interests.

**MUNICIPIUM. In Roman Law.** A free town which retained its original right of self-government, but whose inhabitants also acquired certain rights of Roman citizens. Morey, Rom. L. 51. See MUNICIPAL.

**MUNIMENTS.** The instruments of writing and written evidences which the owner of lands, possessions, or inheritances has, by which he is enabled to defend the title of his estate. *Termes de la Ley*; Co. 3d Inst. 170. Cathedrals, collegiate churches, etc., sometimes have a muniment house, where the seal, evidences, charter, etc., of such cathedral are kept. Cowel.

**MUNUS.** A gift; an office; a benefice, or feud. A gladiatorial show or spectacle. Calvinus, Lex.; Du Cange.

**MURAGE.** A toll formerly levied in England for repairing or building public walls.

**MURAL MONUMENTS.** Monuments made in walls.

Owing to the difficulty or impossibility of removing them, secondary evidence may be given of inscriptions on walls, fixed tables, gravestones, and the like. 2 Stark. 274.

**MURDER. In Criminal Law.** The wilful killing of any subject whatever, with malice aforethought, whether the person slain shall be an Englishman or a foreigner. Hawk. Pl. C. b. 1, c. 13, s. 3. Russell says, the killing of any person under the king's peace, with malice prepense or aforethought, either express, or implied by law. 1 Russ. Cr. 421; 5 Cush. 304; Archb. Cr. Pr. & Pl. 727 note; Whart. Cr. L. 303. When a person of sound mind and discretion unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, either express or implied. Co. 3d Inst. 47.

The latter definition, which has been adopted by Blackstone, 4 Com. 195; 2 Chitty, Cr. Law, 794, and others, has been severely criticised. What, it has been asked, are sound mind and discretion? What has soundness of memory to do with the act? be it ever so imperfect, how does it effect the guilt? If discretion is necessary, can the crime ever be committed? for is it not the highest indiscretion in a man to take the life of another, and thereby expose his own? If the person killed be an idiot or a newborn infant, is he a reasonable creature? Who is in the king's peace? What is malice aforethought? Can there be malice aforethought? Livingston, Pen. Law, 186. It is, however, apparent that some of the criticisms are merely verbal, and others are answered by the construction given in the various cases to the requirements of the definition. See, especially, 5 Cush. 304.

According to Coke's definition, there must be, *first*, sound mind and memory in the agent. By this is understood there must be a *will* and legal *discretion*. *Second*, an actual killing; but it is not necessary that it should be caused by direct violence; it is sufficient if the acts done apparently endanger life, and eventually prove fatal; Hawk. Pl. Cr. b. 1, c. 31, s. 4; 1 Hale, Pl. Cr. 431; 1 Ashm. 289; 9 C. & P. 356. *Third*, the party killed must have been a reasonable being, alive in the king's peace. To constitute a birth, so as to make the killing of a child murder, the whole body must be detached from that of the mother; but if it has come fully forth, but is still connected by the umbilical cord, such killing will be murder; 2 Bouvier, Inst. n. 1722, note. Fœticide would not be such a killing; he must have been *in rerum natura*. *Fourth*, malice, either express or implied. It is this circumstance which distinguishes murder from every description of homicide. 83 Ala. 26. See MALICE.

Murder may be committed as the result of some illegal act, whether the design to take life is actually present or not; 30 S. C. 74. Wilful omission of duty resulting in death is murder, where the exposure or neglect clearly shows danger to life; 8 Mont. 95. It being contrary to the law of the land to commit suicide, if two persons meet together and agree so to do, and one of them dies, the other is guilty of murder; 10 Crim. L. Mag. 862. One who fires with deliberate purpose of killing A., and kills B., is as guilty as if he had killed A.; 160 Pa. 451; 69 Me. 163; 1 Houst. Cr. Cas.

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568; but see 100 Mich. 518; obstructing a railroad track, by which a human being is killed, is murder in the first degree; 59 Ala. 98.

In some of the states, by legislative enactments, murder has been divided into degrees. In Pennsylvania, by the act of April 22, 1794, "all murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree; and the jury before whom any person indicted for murder shall be tried shall, if they find the person guilty thereof, ascertain in their verdict whether it be murder of the first or second degree; but if such person shall be convicted by confession, the court shall proceed, by examination of witnesses, to determine the degree of the crime, and give sentence accordingly." Many decisions have been made under this act, to which the reader is referred. See Whart. Cr. Law.

Similar enactments have been made in many other states; 3 Yerg. 283; 6 Rand. 721; 23 Ind. 231; 49 N. H. 399; Wright 20; 8 Mont. 110; 97 Mo. 31; 73 Ia. 32; 25 Tex. App. 631; 32 Fla. 462; 77 Va. 284; 101 Mass. 1.

The power of a state to punish crimes is limited to such as are committed within its territory, and consequently it cannot provide for the punishment, as crimes, of acts committed beyond the state boundary; 2 Park. Cr. Rep. 590; 36 Miss. 593; Cooley, Const. Lim. [128]; but if the ultimate and injurious result of an unlawful act committed outside of a state is effected within it, the perpetrator may be punished by it as an offender; *id.*; and it was held constitutional to punish in Michigan a homicide committed by a mortal blow in Canada waters from which death resulted in the state; 8 Mich. 320. See Cooley, Const. Lim. [128]. See also 16 Wis. 398; 35 U. C. 603. A murder committed on a United States battleship lying within territory ceded to the United States by New York, is triable in the United States court for the Southern District of New York; 84 Fed. Rep. 622. See JURISDICTION.

A question much discussed is whether a person who commits murder may take property by will or descent from his victim. It has been held that a child who murdered a parent was not thereby debarred of his heirship; 170 Pa. 203; 6 Ohio C. C. 357; so of a father who murdered his daughter; 41 Neb. 631, reversing 31 *id.* 61; a woman who murdered her husband; [1892] 1 Q. B. 147; and one who was an accessory to her husband's murder was held entitled to dower; 100 N. C. 240. In one case the contrary view was taken, and it was held that the devise was not rendered void, but equity might interfere to deprive the devisee of the fruits of his crime, but that his petition to compel payment of his distributive share would not be heard until after his trial on the indictment; 115 N. Y. 506. Neither the beneficiary in a life insurance policy, who has feloniously killed the assured, nor his assignee can recover on it; 117 U. S. 591. This was also held in [1892] 1 Q. B. 147, *supra*, where, although the wife could not take the money as a beneficiary, it passed to her as the legal representative of the assured as part of his estate.

See address of Judge Leslie W. Russell before the New York State Bar Association, Jan., 1898, reviewing these cases; 18 N. Y. L. J. 1390.

See, generally, Bishop, Gabbett, Russell, Wharton, Cri. Law; Roscoe, Cri. Ev.; Archb. Cri. Pra.; Hawkins, Hale, Pleas of the Crown.

**In Pleading.** In an indictment for murder, it must be charged that the prisoner "did kill and murder" the deceased; and unless the word murder be introduced into the charge, the indictment will be taken to charge manslaughter only; Bish. Cr. Prac. § 548; Fost. Cr. Law 424; Yelv. 205; 1 Chitty, Cr. Law *243, and the authorities and cases there cited.

**MURDRUM. In Old English Law.** During the times of the Danes, and afterwards till the reign of Edward III., murdrum was the killing of a man in a secret manner; and in that it differed from simple homicide.

When a man was thus killed, and he was unknown, by the laws of Canute he was presumed to be a Dane, and the vill was compelled to pay forty marks for his death. After the conquest, a similar law was made in favor of Frenchmen, which was abolished by 3 Edw. III.

The fine formerly imposed in England upon a person who had committed homicide *per infortunium* or *se defendendo*. Prin. Pen. Law 219, note.

**MURORUM OPERATIO.** The service of work and labor done by inhabitants and adjoining tenants in building or repairing the walls of a city or castle. Cowel.

**MURTHRUM. In Old Scotch Law.** Murder.

**MUSICAL COMPOSITION.** The acts of congress of February 3, 1831, and July 8, 1870, authorize the granting of a copyright for a musical composition. A question was formerly agitated whether a composition published *on a single sheet of paper* was to be considered a book: and it was decided in the affirmative; 2 Campb. 28, n.; 11 East 244. Not only an original composition, but any substantially new arrangement or adaptation of an old piece of music, is a proper subject of copyright; Taney, Dec. 72; L. R. 2 C. P. 340; s. c. 3 *id.* 223; 2 Blatchf. 39; 7 C. B. 4; Drone, Copyright 175. See COPYRIGHT.

**MUSTER.** To collect together and exhibit soldiers and their arms. To employ recruits, and put their names down in a book to enroll them. In the latter sense

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the term implies that the persons mustered are not already in the service; 8 Allen 480. The same term is applied to a list of soldiers in the service of a government. Articles of War, R. S. § 1342.

**MUSTER-ROLL.** A written document containing the names, ages, quality, place of residence, and, above all, place of birth, of every person of the ship's company. It is of great use in ascertaining the ships's neutrality. Marsh. Ins. p. 407; Jacobsen, Sea Laws 161; 2 Wash. C. C. 201.

**MUSTIZO.** A name given to the issue of an Indian and a negro. Dudl. S. C. 174.

**MUTATION. In French Law.** This term is synonymous with change, and is particularly applied to designate the change which takes place in the property of a thing in its transmission from one person to another. Permutation therefore happens when the owner of the thing sells, exchanges, or gives it. It is nearly synonymous with transfer. Merlin, *Répert.*

**MUTATION OF LIBEL. In Practice.** An amendment allowed to a libel, by which there is an alteration of the substance of the libel, as by propounding a new cause of action, or asking one thing instead of another. Law, Eccl. Law 165–167; 1 Paine 435; 1 Gall. 123; 1 Wheat. 261.

**MUTATIS MUTANDIS** (Lat.). The necessary changes. This is a phrase of frequent practical occurrence, meaning that matters or things are generally the same, but to be altered when necessary, as to names, offices, and the like.

**MUTE** (*mutus*). When a prisoner upon his arraignment totally refuses to answer, insists upon mere frivolous pretences, or refuses to put himself upon the country, after pleading not guilty, he is said to stand mute.

In the case of the United States *v.* Hare *et al.*, Circuit Court, Maryland Dist., May sessions, 1818, the prisoner standing mute was considered as if he had pleaded not guilty. See 19 Blatch. 251; 13 Fed. Rep. 27; 48 Ark. 39. In consequence an act of congress of March 8, 1825, provided that if any person, in case of an offence *not capital*, shall stand mute, the trial shall proceed as upon a plea of not guilty. A similar provision is to be found in the laws of many states, and, in England, the same practice is adopted by the court.

In former times, in England, the terrible punishment or sentence of *penance* or *peine* (probably a corrupted abbreviation of *prisone*) *fort et dure* was inflicted where a prisoner would not plead, and stood obstinately mute. See PEINE FORTE ET DURE. Prisoners sometimes suffered death in this way to save their property from forfeiture. In treason, petit felony, and misdemeanors, however, wilfully standing mute was equivalent to a conviction, and the same punishment might be imposed. Giles Corey, accused of witchcraft, was perhaps the only person pressed to death in America for refusing to plead. 3 Bancroft's Hist. U. S. 93. See DEAF AND DUMB.

**MUTILATION. In Criminal Law.** The depriving a man of the use of any of those limbs which may be useful to him in fight, the loss of which amounts to *mayhem*. 1 Bla. Com. 130. See MAYHEM.

**MUTINY. In Criminal Law.** The unlawful resistance of a superior officer, or the raising of commotions and disturbances on board of a ship against the authority of its commander, or in the army in opposition to the authority of the officers; a sedition; a revolt. See Whart. Cr. L. § 1876.

By the act for establishing rules and articles for the government of the armies of the United States, it is enacted as follows: Article 22. Any officer or soldier, who begins, excites, or causes, or joins in, any mutiny or sedition in any troop or company in the service of the United States, or in any party, post, detachment, or guard, shall suffer death, or such other punishment as a court-martial shall direct. Article 23. Any officer or soldier who, being present at any mutiny or sedition, does not use his utmost endeavors to suppress the same, or, having knowledge of any intended mutiny, does not without delay give information thereof to his commanding officer, shall be punished by death, or suffer such other punishment as a court-martial may direct.

And by the act for the better government of the navy of the United States, it is enacted as follows: Article 4. Any person in the naval service who makes, or attempts to make, any mutinous assembly, or, being witness to or present at any mutiny, does not do his utmost to suppress it, or knowing of any mutinous assembly, or of any intended mutiny, does not immediately communicate his knowledge to his superior or commanding officer, shall suffer death or such other punishment as a court-martial may adjudge. And any person as aforesaid who utters any seditious or mutinous words, or joins in or abets any combination to weaken the lawful authority of, or lessen the respect due to, his commanding officer, or treats his superior officer with contempt, or is disrespectful to him, while in the execution of his office, may be punished by such punishment as a court-martial may adjudge. R. S. § 1624.

Mutiny, revolt, and the endeavor to make a revolt or mutiny, on board merchant-vessels, are made criminal, and a punishment provided for them; R. S. § 4596; 2 Curt. C. C. 225; 1 Woodb. & M. 306; 2 Sumn. C. C. 582.

**MUTINY ACT. In English Law.** A statute, annually passed, to punish mutiny and desertion, and for the better payment of the army and their quarters. It was first passed 12th of April, 1689. The passage of this bill was the only provision for the payment of the army. 1 Sharsw. Bla. Com. 416, 417, n. In 1879, the army discipline act, 42 and 43 Vict., s. c. 33, consolidated the provisions of the mutiny act with the articles of war.

**MUTUAL ACCOUNTS.** Such as contain mutual credits between the parties; or an existing credit on one side which constitutes a ground for credit on the other, or where there is an understanding that mutual debts shall be a set-off *pro tanto*, between the parties. 27 Ark. 343. Such accounts, of however long standing, are not barred by the statute of limitations, if there be any items within the prescribed limit; 6 Term 189; Ang. Lim. 138. See MERCHANTS' ACCOUNTS; LIMITATIONS.

**MUTUAL BENEFIT ASSOCIA-**

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**TIONS.** See BENEFICIAL SOCIETIES; INSURANCE.

**MUTUAL CONSENT.** Mutual consent is of the essence of every contract, and therefore it must always exist, in legal contemplation, at the moment when the contract is made. See Add. Contr. 13. It never, however, is the subject of direct allegation or proof, partly because it is generally incapable of direct proof, and partly because every contract is made by acts performed. Proof of the necessary acts carries with it presumptive proof of mutual consent. Thus, if two separate agreements be drawn up, signed and sealed, each of them purporting to be a contract between A. and B., and the parties, intending to deliver one of the instruments, deliver the other by mistake, there is no contract made; Langd. Contr. 193. Where the plaintiff's acceptance of the defendant's offer inadvertently made a slight change in a date, there was no contract, because there had not been mutual consent; 4 Bing. 653. Mutual consent must extend to the consideration as well as to the promise; Langd. Contr. 82.

**MUTUAL CREDITS.** Credits given by two persons mutually, *i. e.* each giving credit to the other. It is a more extensive phrase than mutual debts. Thus, the sum credited by one may be due at once, that by the other payable *in futuro;* yet the credits are mutual, though the transaction would not come within the meaning of mutual debts; 7 Term 378. And it is not necessary that there should be intent to trust each other: thus, where an acceptance of A. came into the hands of B, who bought goods of A, not knowing the acceptance to be in B's hands, it was held a mutual credit; 3 Term 507, n.; 3 Ves. 65; 8 Taunt. 156, 499; 2 Sm. Lead. Cas. 179; 26 Barb. 310; 4 Gray 284; 9 N. J. Eq. 44; 7 D. & E. 378. See 85 N. Y. 590; 9 N. J. Eq. 49.

**MUTUAL INSURANCE.** That form of insurance in which each person insured becomes a member of the company, and the members reciprocally engage to indemnify each other against losses, any loss being met by an assessment laid upon all the members. See INSURANCE.

**MUTUAL PROMISES.** Promises simultaneously made by two parties to each other, each promise being the consideration of the other. Ans. Contr. 72; 1 Pars. Contr. 464; Hob. 88; 14 M. & W. 855; Add. Contr. 13. If one of the promises be voidable, it will yet be good consideration, but not if void; Story, Contr. § 81; 2 Steph. Com. 114.

**MUTUALITY.** Reciprocity; an acting in return. Webster, Dict.; Add. Contr. 622; 9th ed. 13, 14; 26 Md. 37. See 83 Ky. 371.

**MUTUARY.** A person who borrows personal chattels to be consumed by him and returned to the lender in kind; the person who receives the benefit arising from the contract of mutuum. Story, Bailm. § 47.

**MUTUATUS.** A loan of money. See Gilbert, Com. Pleas 5.

**MUTUUM.** A loan of personal chattels to be consumed by the borrower and to be returned to the lender in kind and quantity; as, a loan of corn, wine, or money which is to be used or consumed, and is to be replaced by other corn, wine, or money. Story, Bailm. § 228; Edw. Bailm. § 120; Add. Contr. 724. See LOAN FOR USE.

**MYSTERY** (said to be derived from the French *mestier*, now written *metièr*, a trade). A trade, art, or occupation. Co. 2d Inst. 668.

Masters frequently bind themselves in the indentures with their apprentices to teach them their art, trade, and *mystery.* See Hawk. Pl. Cr. c. 23, s. 11.

**MYSTIC TESTAMENT.** A will placed in a sealed envelope. La. Civ. Code, art. 1567; 5 Mart. La. 182; Schoul. Wills. § 9; 5 La. 396.

# N.

**N. E. I.** See NON EST INVENTUS.

**NAAM.** See NAMIUM.

**NABOB.** Originally the governor of a province under the Mogul government of Hindostan, whence it became a mere title of any man of high rank, upon whom it was conferred without any office being attached. Wils. Gloss; Whart.

**NAIF.** See NEIF.

**NAIL.** A measure of length, equal to two inches and a quarter. See MEASURE.

**NAIL COUSINS.** See SIB-SHIP.

**NAKED.** This word is used in a metaphorical sense to denote that a thing is not complete, and for want of some quality it is either without power or it possesses a limited power. A naked contract is one made without consideration, and for that reason it is void. See CONSIDERATION. A naked authority is one given without any right in the agent, and wholly for the benefit of the principal. 2 Bouvier, Inst. n. 1302. See NUDUM PACTUM.

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**NAKED TRUST.** A dry or passive trust; one which requires no action on the part of the trustee, beyond turning over money or property to the *cestui que trust.* See TRUST.

**NAKED TRUSTEE.** See TRUSTEE.

**NAM.** Distress; seizure. Anc. Inst. Eng. See NAMIUM.

**NAMATION.** The act of distraining or taking a distress. Cowel. See NAMIUM.

**NAME.** One or more words used to distinguish a particular individual: as Socrates, Benjamin Franklin.

Names are Christian, as Benjamin, or surnames, as Franklin. One Christian name only is recognized in law; 1 Ld. Raym. 562; Bacon, Abr. *Misnomer* (A); 7 Cold. 69; 5 Johns. 84; though two or more names usually kept separate, as John and Peter, may undoubtedly be compounded, so as to form in contemplation of law but one; 5 Term 195. An initial is no part of a name. See INITIAL. Nor is the title junior (*q. v.*); nor the prefix *Mrs.*; 13 Vroom 69; 33 Ill. App. 109. But it has been held that where Lewis R. instead of Lewis S. was inserted in a writ of *sci. fa.* to revive a judgment, the writ was not notice to purchaser for value in a chain of title, in which Lewis S. was the actual name; 1 Sup. Ct. Pa. 198. See 140 Pa. 335.

The name of a corporation is said to be "the very being of the constitution;" Bac. Abr. *Corp.* (C); 30 Ala. 664; and in general a corporation must contract and sue and be sued in its corporate name; 8 Johns. 295; 19 *id.* 300; 4 Rand. 359.

In the name of a corporation, which frequently consists of several descriptive words, the transposition, omission, or alteration of some of them may make no essential difference in the sense; 10 N. H. 124; 1 B. & Ald. 699; 10 Mass. 360; see 87 Ga. 734; if there is no possibility of mistaking the identity of the corporation; 12 La. 444. See 20 Me. 41; 2 Va. Cas. 362; 16 Mass. 141; 12 S. & R. 389.

A corporation, like an individual, may take a name by reputation; 2 N. H. 310; 10 Mass. 360; or may acquire it by usage; it is not indispensable that the name should be given by the charter; 30 Ala. 664; see 2 McLean 195; and after its name has been changed, it may continue under the old name and thus, by usage, regain the latter and sue thereunder; 28 N. J. Eq. 90. But it is held that a change of corporate name requires statutory authority, whether done directly or by user, though it may acquire a name by user when not given at incorporation; 132 Ill. 32; such change does not in any way affect its identity or rights; and an action against it by its former name cannot be defeated by showing the change, if the membership remains the same; 83 Va. 768. When a corporation is sued, a mistake in the name, in words and syllables, but not in substance, will not be regarded, unless pleaded in abatement; but if the mistake be in substance, the suit cannot be regarded as against the corporation; 1 B. & P. 39. Where the name in a contract in suit differed from the name in the declaration, but the identity was apparent, the variance was held not to constitute a defence; 31 Me. 290. There is said to be a distinction between a misnomer which incorrectly *names*, but correctly *describes*, a corporation and the statement in the pleading of an entirely different party; the former is curable by amendment, the latter is not; 30 Ala. 650. A grant to a corporation by the wrong name is good if the corporation really intended be apparent; 2 Kent 292; 1 Dill. Mun. Corp. § 179; so of a contract; 6 S. & R. 12; and of a gift by will; 11 Eng. L. & Eq. 191. If a corporation conveys by the wrong name it cannot defeat its grant, if it has received the consideration; 132 Ill. 32.

As to the protection of a corporation in the use of its corporate name, see Moraw. Priv. Corp. § 355; TRADE-MARK.

See GOOD-WILL; PARTNERSHIP; PARTNERS; MISNOMER.

The real name of a party to be arrested must be inserted in the warrant, if known; 8 East 828; 6 Cow. 456; 9 Wend. 320; if unknown, some description must be given; 1 Chitty, Cr. Law 39; with the reason for the omission; 1 Mood. & M. 281.

Proof may be given that the maker of an instrument habitually applied a nickname or peculiar designation used therein to a particular person or thing; 26 Ohio St. 604. As to mistakes in devises, see LEGACY. As to the use of names having the same sound, see IDEM SONANS; 1 Over. 434. As to the effect of using a name having the same derivation, see 2 Rolle, Abr. 135; 1 Wash. C. C. 285. At common law one could change his name; 10 Fed. Rep. 894; 123 Mass. 415; 3 B. & Ald. 544; and a person not having a fraudulent or criminal purpose in so doing may enter into a contract by any name he may choose to assume; 74 N. W. Rep. (Minn.) 147; 38 Minn. 361; 42 N. Y. Super. Ct. 567; 31 N. C. 184; 31 Mo. 188. Under this rule, legal proceedings against a married woman under an assumed name have been held good after judgment; 19 Kan. 522; and obligations incurred by or with third parties under her maiden name are mutually binding; 73 Wis. 646; 96 Cal. 609; see Schoul. Dom. Rel. 40; although until a decree in divorce giving a married woman leave to resume her maiden name goes into effect, or widowhood is succeeded by a new marriage, she keeps her former husband's surname; 2 P. D. 263.

A person, not having a fraudulent or criminal purpose in doing so, may enter into a contract by any name he may choose to assume; it is only a question of identity; 74 N. W. Rep. (Minn.) 147; 41 N. Y. Super. 567. A grant of land under an assumed name will pass title: and evidence is admissible to prove identity; 38 Minn. 361.

When a person uses a name in making a contract under seal, he will not be permitted to say that it is not his name: as,

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if he sign and seal a bond "A and B" (being his own and his partner's name), and he had no authority from his partner to make such a deed, he cannot deny that his name is A and B; 1 T. Raym. 2; 1 Salk. 214. And if a man describes himself in the body of a deed by the name of James, and signs it John, he cannot, on being sued by the latter name, plead that his name is James; 3 Taunt. 505; Cro. Eliz. 897, n. *a*. See 3 P. & D. 271; 11 Ad. & E. 594; 19 Abb. N. C. 123. A man may sue by the name by which he has been known from childhood, instead of by that given him by his parents; 31 Wkly. Law Bul. 102.

The right to the exclusive use of a name in connection with a trade or business is familiar to the law; and any person using that name, after a relative right of this description has been acquired by another, is considered guilty of a fraud, or at least an invasion of another's rights, and renders himself liable to an action, or he may be restrained from the use of the name by injunction. But the mere assumption of a name which is the patronymic of a family by a stranger who has never been called by that name is a grievance to the family for which the law affords no redress; L. R. 2 P. C. 441. See 11 Beav. 112; L. R. 2 Ch. 307. A name may be a trade-mark; L. R. 10 Ch. D. 436; 1 Eq. 518; 13 Beav. 209; 13 Am. Rep. 111. A person cannot, however, have an exclusive right of trade-mark in a name as against all others bearing the same name, and honestly using the name in competition, unless the defendant uses the same brand or stamp in connection with the name; 122 Mass. 139; 96 U. S. 245; 50 Barb. 236. Nor in the name of the city in which a thing is made; 44 Fed. Rep. 277. But such exclusive right to a name may be acquired as against a corporation called by the same name. See 11 Cent. L. J. 3; Poll. Torts 152; ELECTION; TRADE-MARK.

**NAMED.** Mentioned *nominatim*, if not by all their names, by some at least, either Christian or surnames. 22 L. J. Ch. 393. It is sometimes used, but only in a secondary sense, as meaning mentioned or referred to. 34 S. J. 129.

**NAMELY.** A difference, in grammatical sense, in strictness exists between the words namely and including. Namely imports interpretation, *i. e.* indicates what is included in the previous term; but including imports addition, *i. e.* indicates something not included. 2 Jarm. Wills 222.

**NAMIUM.** An old word which signifies the taking or distraining another person's movable goods. 2 Inst. 140; 3 Bla. Com. 149. A distress. Dalrymple, Feud. Pr. 113.

**NAMIUM VETITUM.** The unjust taking of another person's cattle and driving them to an unlawful place, under pretence of damage having been done by them, in which case the owner may demand satisfaction for the injury. Cowel.

**NANTISSEMENT. In French Law.** The contract of pledge; if of a movable, it is called *gago*, and if of an immovable, *antichrèse*; Brown, Dict.

**NARR.** (an abbreviation of the word *narratio*). A declaration in a cause.

**NARRATIO.** A common-law name for the plaintiff's count or declaration as being a narrative of facts on which he relies.

**NARRATIVE CLAUSE. In Scotch Law.** The first clause in an original charter which follows immediately after the name and designation of the grantor. Ersk. Prin. 129.

**NARRATOR.** A pleader who draws narrs. *Serviens narrator*, a serjeant-at-law. Fleta, l. 2, c. 37. Obsolete.

**NARROW SEAS. In English Law.** Those seas which adjoin the coast of England. Bacon, Abr. *Prerogative* (B 3).

**NASCITURUS.** Not yet born. This term is applied in marriage settlements to the unborn children of a particular marriage, *natus* (born) being used to designate those already born.

**NATALE.** The state or condition of a man acquired by birth.

**NATIO.** A native place. Cowel.

**NATION.** An independent body politic. A society of men united together for the purpose of promoting their mutual safety and advantage by the joint efforts of their combined strength.

But every combination of men who govern themselves independently of all others will not be considered a nation; a body of pirates, for example, who govern themselves, is not a nation. To constitute a nation, another ingredient is required. The body thus formed must respect other nations in general, and each of its members in particular. Such a society has its affairs and interests; it deliberates and takes resolutions in common,—thus becoming a moral person, who possesses an understanding and will and is susceptible of obligations and rights. Vattel, Prelim. §§ 1, 2; 5 Pet. 52.

It belongs to the government to declare whether they will consider a colony which has thrown off the yoke of the mother-country as an independent state; and until the government have decided on the question, courts of justice are bound to consider the ancient state of things as remaining unchanged; 1 Johns. Ch. 543; 13 Johns. 141, 561. See 5 Pet. 1; 1 Kent 22.

In American constitutional law the word *state* is applied to the several members of the American Union, while the word *nation* is applied to the whole body of the people embraced within the jurisdiction of the federal government; Cooley, Const. Lim. See 7 Wall. 720.

**NATIONAL BANKS.** Banks created and governed under the provisions of the "National Bank Act."

They are private corporations organized under a general law of congress, by individual stockholders, with their own capital, for private gain, and managed by officers,

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agents, and employes of their own selection. They constitute no part of any branch of the government of the United States, and whatever public benefit they contribute to the country in return for grants and privileges conferred upon them by statute, is of a general nature arising from their business relations to the people through individual citizens, and not as direct representatives of the state as a body politic in exercising its legal and constitutional functions; 12 Ct. Cl. 281; but they are instruments designed to aid the government in an important branch of the public service; 91 U. S. 29. See 164 U. S. 347. Congress in the exercise of an undisputed constitutional power to provide a currency for the whole country, may constitutionally secure the benefit of it to the people by appropriate legislation, and to that end may restrain the circulation of any notes not issued under its authority; 8 Wall. 548.

Any number of persons, not less than five, may organize a national bank. They must sign, acknowledge before a court of record or notary public, and transmit to the comptroller of the currency, an organization certificate, containing the name of the bank, its place of business, the amount of capital stock and the number of shares into which it is to be divided, the names and residences of the shareholders, and the number of shares held by them, and that the applicants desire to avail themselves of the act of congress. The comptroller decides whether the bank is lawfully entitled to begin business; see 19 Mich. 196; if he so finds, his certificate of this fact must be published in a newspaper of the place where the bank is to do business for sixty days.

One hundred thousand dollars is the minimum capital allowed, except in places not exceeding 6,000 inhabitants, when, by consent of the comptroller, the capital may be $50,000; where the population exceeds 50,000 the capital must be at least $200,000. The term capital does not refer to borrowed money, but to the property or moneys of the bank permanently invested in its business; 21 Wall. 284. The capital stock is divided into shares of $100 each, which are personal property. At least fifty per cent. thereof must be paid in before organization, and the rest in monthly instalments of ten per cent. each. The stock of stockholders not paying these instalments may be sold, on notice; stockholders are individually responsible, in addition to what they have invested in their shares, for all contracts, debts, and engagements of the bank, to the extent of their stock at its par value. This liability is several and not joint; 8 Wall. 505. The estate of a deceased owner of bank stock is liable to an assessment levied against his executor in consequence of the failure of the bank after his death; 60 Fed. Rep. 326; 121 U. S. 27.

Upon its organization a national bank has the usual corporate powers, also the right of succession for twenty years, and the power to exercise, by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, etc.; by receiving deposits, by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of title 62 of the Revised Statutes.

They have not the same rights in all the states. For all practical purposes they exercise their functions only within the limits of the state in which they are located and they have no authority to carry on business outside those limits; 2 McCrary 95; 6 Hun 71.

The powers of national banks are to be measured by the act creating them; 18 Wall. 589; 72 Pa. 456; 62 Mo. 329; 139 U. S. 67; the words of the act above quoted, "by discounting and negotiating promissory notes, etc.," are not to be read as limiting the mode of exercising the "incidental powers" necessary to carry on the business of banking, but as descriptive of the kind of business which is authorized; 22 Ohio St. 516. A national bank may buy negotiable notes and bills of exchange; 33 Minn. 40; 23 S. C. 339; 20 Kan. 440. This power, it has been held, simply implies an authority to realize upon such commercial paper as the bank may receive in the lawful conduct of its business, by negotiating, selling, and transferring it by means of a re-discount obtained or otherwise. It gives no implied authority to speculate or traffic in paper of this character or in financial securities of any description; 24 Minn. 140; 52 Md. 78. In the last case, by a divided court, the opinion was qualified by the remark that a national bank might invest its surplus capital in notes. The purchasing and discounting of paper has been held to be only a mode of loaning money; 26 Ohio 141; but it cannot discount a conditional note; 27 Alb. L. J. 447. It may collect notes; 9 Pac. Rep. (Utah) 709; deal in national bonds; 31 Ia. 69; 69 N. Y. 382; and own coupons on state bonds; 16 Blatch. 53; and it may deal in stocks; 12 Hun 97; but the tendency of the decisions is *contra;* 89 Pa. 324; 72 *id.* 456; 92 U. S. 122; 42 Md. 581; 3 S. W. Rep. (Ky.) 124. It may lend on collateral security, including United States bonds; 44 Md. 47; or the stock of another national bank; 99 U. S. 628; or a warehouse receipt for merchandise; 40 Ohio 176; or a locomotive; 8 Biss. 158; 1 Hughes 101; but it may not lend its credit; 3 *id.* 467; 55 Fed. Rep. 465. It may borrow money on its own notes, and pledge its assets for its repayment; 41 Bank. Mag. 131. It may, in a fair and *bona fide* compromise of a contested claim against it, growing out of a legitimate banking transaction, pay a larger sum than would have been exacted in satisfaction of a demand, so as to obtain by the arrangement a transfer of stocks, if done



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in the belief that by turning the stocks into money under more favorable circumstances a loss which would otherwise accrue from the transaction might be averted or diminished; 92 U. S. 122, affirming 39 Md. 600.

It has authority to receive special deposits and is responsible for their loss if occasioned by gross negligence; 100 U. S. 699, affirming 79 Pa. 106; 26 Ia. 562; 99 Mass. 605; 58 Ga. 369; 33 Ohio 105; 80 N. Y. 82, affirming 17 Hun 419; 29 Fed. Rep. 498. See *contra*, 47 Vt. 546; 50 *id.* 388.

It may take legal proceedings to recover stolen property for itself or for depositors, and will be held responsible for lack of diligence, skill, and care in performing such an undertaking; 119 U. S. 361, affirming 15 Fed. Rep. 428.

A national bank has no power to indorse a note for compensation; 27 Hun 109; but, should it do so, only the government may object; *id.*, citing 82 N. Y. 291; 96 U. S. 640; 84 N. Y. 190; 103 U. S. 99; but it may guarantee a note; 101 U. S. 183. It may not receive deposits when insolvent; 99 N. Y. 131. It cannot be garnisheed for a deposit of a trust estate or pay out funds of a bankrupt except upon a warrant of an assignee in bankruptcy of the district or by the register in bankruptcy of the district; 6 Thomp. & C. 346.

National banks may purchase, hold, and convey real estate for the following purposes, and for no others: 1. Such as shall be necessary for its immediate accommodadation in the transaction of its business. 2. Such as shall be mortgaged to it in good faith by way of security, for debts previously contracted. 3. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings. 4. Such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it; title in the latter case to be held for no longer than five years.

It is now settled that a bank may lawfully take a mortgage to secure future indebtedness; 93 N. Y. 269; 31 Gratt. 228; 71 Mo. 228; 94 Pa. 64; 78 Ind. 19; 85 N. C. 240; 94 Ill. 349. Such a loan of money on real estate security by a national bank is valid between the parties; 98 U. S. 621, reversing 62 Mo. 329; *contra*, 72 Pa. 456; 87 Ill. 151; and that it had so loaned money in violation of the prohibition of the national banking law does not give the debtor a right to object; the United States alone can complain; 45 La. Ann. 75; 103 U. S. 99; 112 *id.* 439. It may take a purchase-money mortgage on real estate sold by it; 29 La. Ann. 355; and it may purchase real estate at a judgment sale; 70 Ind. 106; 112 U. S. 405; 120 Mass. 153; 88 Ill. 352; and a prior mortgage if needful to protect the interest of the bank; 90 Ind. 332. A converted bank may take real estate belonging to it whilst it was a state bank; 9 Neb. 316; it may accept personal property in payment upon the sale of real estate belonging to it; 73 Ia. 145; and the assignment of a mortgage on land to secure a loan made at the time of the assignment; 7 Wash. 261.

A transfer of stock in a national bank which is insolvent at the time, made with an intent to avoid liability, where the transferee has reason to believe that the bank is insolvent, will not relieve the transferor from the residuary liability to pay the debt of the bank, and such a transfer may be treated by the receiver as inoperative without regard to the financial condition of the transferee; but if the bank is solvent at the time of the transfer the motive with which it is made is immaterial; 169 U. S. 1.

When not defined by a board of directors the duties of the president and cashier are only such as may be incident to their offices respectively in their very nature, in the absence of anything to the contrary in the act of incorporation; 22 Gratt. 58. Neither of these officers, nor both acting together, can give up a debt or liability to the bank, nor make any admissions which would release the maker of a note due to the bank from his legal responsibility; *id.*; 6 Pet. 51; 8 *id.* 12; 50 How. Pr. 447. The president has no power to sell or surrender securities and receive others of an inferior value; 33 Mich. 520. Ordinarily his authority is very limited; he may bring actions at law and employ counsel for the purpose of protecting the rights of the bank, but he is not its executive officer nor has he charge of its money operations. He has no more power of management nor disposal of the property of the corporation than any other member of the board of directors unless further powers are conferred upon him by the charter of the bank or by the action of the managing board; 21 Neb. 280. He may not make an agreement binding on the bank and embodying a transaction not within the usual course of business of the bank; 89 Pa. 324; but see 7 Neb. 201; 9 Biss. 253.

A bank is liable upon notes, executed by it through its cashier, for loans made by another bank in an amount not so great as to create suspicion, where the actual management of the bank was left entirely to such cashier, and the negotiation and all the correspondence were such as might lead the officers of the lending bank to believe that he was acting on authority and in good faith and honest intention, though the money was used by him for his own individual purposes, and the signature of the president was forged; 80 Fed. Rep. 859; but where the affairs of a national bank were managed entirely by the cashier, who was universally believed to be honest and capable, but whose dishonesty and reckless management resulted in wrecking the bank, the president and directors, most of whom were farmers knowing little of banking, were not guilty of negligence so as to be liable for losses to creditors because they failed to examine the books, the statements being prepared and furnished them by the

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cashier, and reporting the bank to be in a prosperous condition, and there being no grounds of suspicion known to them; 82 Fed. Rep. 181, following 141 U. S. 132.

The circuit courts of the United States have jurisdiction of all suits by or against national banks established in the district for which the court is held; R. S. § 629; see 3 Dill. 298; irrespective of the amount in controversy or the citizenship of the parties; Fed. Cas. No. 9670. A national bank may bring suit in the circuit court out of its district, against a citizen of the district where the court sits; 8 Blatch. 137; 9 Nev. 134. A national bank may waive its right to be sued in its own district; 2 Conn. 298; and state courts have jurisdiction of suits brought by national banks; 49 Vt. 1; 93 U. S. 130; but this must be a state court of its locality; 14 Wall. 383; 101 Mass. 240.

Mortgages held by national banks are not subject to taxation by a state; 21 Nev. 404; nor can the stock in a national bank be taxed in any state other than that in which the bank is located; 55 N. J. L. 110.

A national bank may go into liquidation and be closed by a vote of the shareholders of two-thirds of its stock; R. S. § 5220; although it be contrary to the wishes and against the interests of the owners of the minority of the stock; 51 Kan. 254. In case of a failure to pay its circulating notes, the comptroller may appoint a receiver to wind up national banks; R. S. § 5234.

State banks may be changed into national banks; the change when made is a transit, and not a creation; see 40 Mo. 140; and does not affect its identity or its right to sue upon obligations or liabilities incurred to it by its former name; 143 U. S. 293. See DEPOSIT; INTEREST; PROXY; RESERVE; BANK.

**NATIONAL CHURCH.** A church established by law in a country or nation. 25 Gratt. 965.

**NATIONAL CURRENCY.** Notes issued by national banks and by the government. See CURRENT MONEY; MONEY; LEGAL TENDER.

**NATIONAL DEBT.** A sum owing by the government to individuals who have advanced money to it for public purposes, either in anticipation of the produce of the particular branches of the revenue, or on credit of the general power which the government possesses of levying the amount necessary to pay interest for the money borrowed or to repay the principal. See FUNDING SYSTEM.

**NATIONAL DOMAIN.** See LANDS, PUBLIC.

**NATIONAL DOMICIL.** See DOMICIL.

**NATIONAL ENSIGN.** The National flag. See FLAG.

**NATIONAL GOVERNMENT.** A government of the people of a single state or nation, united as a community by what is termed the social compact, and possessing complete and perfect supremacy over persons and things so far as they can be made the lawful objects of civil government. A federal government is distinguished from a national government by its being the government of a community of independent and sovereign states united by compact. 6 Ohio St. 393.

**NATIONAL GUARD.** A name given to the organized militia in some parts of the United States.

**NATIONALITY.** Character, status, or condition with reference to the rights and duties of a person as a member of some one state or nation rather than another.

Nationality may be determined from origin, naturalization, domicil, residence, trade, or other circumstances; 1 Halleck, Int. L. 403.

The term is in frequent use with regard to ships. Nationality determined by one's birthplace or parentage is called *nationality of origin*; that which results from naturalization, is *by acquisition*. A woman upon marriage acquires the nationality of her husband; Morse on Citizenship 142. In feudal times, nationality was determined exclusively by the place of birth, *jure soli;* but under the laws of Athens and Rome the child followed that of the parents, *jure sanguinis*. "Of these two tests, the place of birth and the nationality of the father, neither is at present adopted without qualification by British, French, or American law. The laws of these countries exhibit, in fact, different combinations of the two, Great Britain and the United States laying chief stress on the place of birth, while in France the father's nationality determines, though not absolutely and in all cases, that of the child; and this latter theory has found acceptance among other European nations," as Belgium, Bavaria, Prussia, and Spain. Morse, Citizenship 10.

Subject to the act of 1870, English jurists almost unanimously deny the right of expatriation to the extent of a change of primitive allegiance, without the consent of the liege lord. By the laws of France, a Frenchman loses his native character by naturalization in a foreign country, by accepting office under a foreign government without the permission of his own, or by so establishing himself abroad as to show an intention of never returning. In Austria national character is lost by authorized emigration from the empire without the intention of returning, and it is equally lost if effected without permission. In Germany, it is lost by unauthorized emigration except in the case of a German naturalized in the United States. Spain and the Spanish American Republics provide for the loss of Spanish nationality upon the acquisition of a new national character; 1 Halleck, Int. L. 403. The native, national

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character lost or suspended by a foreign domicil, easily reverts; *id.* 429.

A general rule is recommended by Westlake: "Legitimate children, wherever born, are regularly members of the state of which their parents form part the moment of their birth; but they may choose as their nationality the place of their birth." See 2 Kent 49; Cock. Nat.; Whart. Confl. Laws; Westlake, Priv. Int. Law. See, generally, ALLEGIANCE; CITIZEN; DENIZEN; DOMICIL; EXPATRIATION; NATURALIZATION.

**NATIONS, LAW OF.** See INTERNATIONAL LAW.

**NATIVE, NATIVE CITIZEN.** A natural-born subject. 1 Bla. Com. 366. Those born in a country, of parents who are citizens. Morse, Citizenship 12. See CITIZEN. There is no distinction between *native born* as used in the French Extradition treaty and *natural born* as used in the extradition act; 37 W. R. 269.

**NATIVO HABENDO.** A writ which lay for a lord when his villein had run away from him. *Termes de la Ley.*

**NATIVUS.** See NEIF.

**NATURAL AFFECTION.** The affection which one naturally feels towards those who are nearly allied to him. It sometimes supplies the place of a valuable consideration in contracts; and natural affection is a good consideration in a deed. 2 Steph. Com., 11th ed. 68. See BARGAIN AND SALE; COVENANT TO STAND SEIZED; CONSIDERATION.

**NATURAL ALLEGIANCE.** See ALLEGIANCE.

**NATURAL AND REASONABLE WEAR AND TEAR.** Wear and tear by use. Damage by operation of nature, as by freshets, is not included therein. 20 N. J. L. 544.

**NATURAL-BORN.** See NATURALIZATION.

**NATURAL-BORN SUBJECT.** See NATURALIZATION.

**NATURAL CHILDREN.** Bastards; children born out of lawful wedlock. But in a statute declaring that adopted children shall have all the rights of "natural" children, the word "natural" was used in the sense of legitimate; 9 Am. L. Reg. 747.

**In Civil Law.** Children by procreation, as distinguished from children by adoption.

**In Louisiana.** Illegitimate children who have been adopted by the father. La. Civ. Code, art. 220.

**NATURAL DAY.** That space of time included between the rising and the setting of the sun. See DAY.

**NATURAL DEATH.** See DEATH.

**NATURAL EQUITY.** That which is founded in natural justice, in honesty and right, and which arises *ex æquo et bono.*

It corresponds precisely with the definition of justice or natural law, which is a constant and perpetual will to give to every man what is his. This kind of equity embraces so wide a range that human tribunals have never attempted to enforce it. Every code of laws has left many matters of natural justice or equity wholly unprovided for, from the difficulty of framing general rules to meet them, from the almost impossibility of enforcing them, and from the doubtful nature of the policy of attempting to give a legal sanction to duties of imperfect obligation, such as charity, gratitude, or kindness. 4 Bouvier, Inst. n. 3730. See EQUITY.

**NATURAL FOOL.** An idiot; one born without the reasoning powers or a capacity to acquire them.

**NATURAL FRUITS.** The natural production of trees, bushes, and other plants, for the use of men and animals, and for the reproduction of such trees, bushes, or plants.

This expression is used in contradistinction to artificial or figurative fruits: for example, apples, peaches, and pears, are natural fruits; interest is the fruit of money, and this is artificial.

**NATURAL GAS.** See GAS.

**NATURAL HEIRS.** As used in a will and by way of executory devise, they are considered as of the same legal import as "heirs of the body." 19 Conn. 112.

**NATURAL INFANCY.** A period of non-responsible life, which ends with the seventh year. Whart. Dict.

**NATURAL LAW.** See LAW OF NATURE.

**NATURAL LIBERTY.** See LIBERTY.

**NATURAL LIFE.** The period between birth and natural death. The use of the word natural before life in a sentence of solitary confinement in a state prison for life, is a surplusage and does not affect the sentence; 89 Mich. 70. See DEATH.

**NATURAL OBLIGATION.** One which in honor and conscience binds the person who has contracted it, but which cannot be enforced in a court of justice. Pothier, nn. 173, 191. See OBLIGATION; MORAL OBLIGATION.

**NATURAL PERSONS.** See PERSON.

**NATURAL PRESUMPTIONS. In Evidence.** Presumptions of fact; those which depend upon their own form and efficacy in generating belief or conviction in the mind, as derived from those connections which are pointed out by experience.

**NATURALEZA. In Spanish Law.** The state of a natural-born subject. White, New Recop. b. 1, t. 5, c. 2.

**NATURAL WATERCOURSE.** A natural stream flowing in a defined bed

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or channel, with banks and sides, and having permanent sources of supply. 86 N. Y. 140; 55 N. W. Rep. (Ia.) 78. See WATERCOURSE.

**NATURALIZATION.** The act by which an alien is made a citizen of the United States of America.

The act of adopting a foreigner and clothing him with all the privileges of a native-born citizen. 9 Wheat. 827; 9 Op. Atty.-Gen. 359.

A nation, or the sovereign who represents it, may grant to a stranger the quality of a citizen, by admitting him into the body of the political society. This is called naturalization. Vattel, Laws of Nat., bk. 1, ch. xix. §§ 212–214.

It is believed that every state in Christendom accords to foreigners, with more or less restrictions, the right of naturalization, and that each has some positive law or mode of its own for naturalizing the native-born subjects of other states, without reference to the consent of the latter for the release of the transfer of the allegiance of such subjects. See Morse, Citizenship 66.

The fourteenth amendment to the federal constitution provides that "all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the states where they reside."

It affirms the ancient rule of citizenship by birth, within the territory, in the allegiance, and under the protection of the country, including all children here born of resident aliens, with the exception of the children of foreign sovereigns or their ministers, or born on a foreign public ship, or, of enemies, within and during a hostile occupation of part of our territory, and children of members of the Indian tribes owing direct allegiance to their several tribes. It includes a child, born in the United States, of parents of Chinese descent, who at the time of his birth are subjects of the Emperor of China, but have a permanent residence and domicile in the United States, and not employed in any diplomatic capacity; 169 U. S. 649, a learned opinion by Gray, J., Fuller, C. J., and Harlan, J., dissenting.

At common law a natural-born subject included every child born in England of alien parents except the child of an ambassador or diplomatic agent or of an alien enemy in hostile occupation of the place where the child was born; 169 U. S. 649. It made no difference whether the parents were permanently or only temporarily residing in England; Cockb. Nat. 7.

The term natural-born citizen used in the federal constitution is not therein defined. Its meaning must be gathered from the common law. An alien enemy cannot be naturalized; R. S. § 2171.

An applicant for naturalization must have been a resident of the United States for five years next preceding his admission to citizenship, but uninterrupted habitation is not required; R. S. § 2165. Naturalization, of itself, conveys no right of suffrage; Pars. Rights, Amer. Citizen 190; though by it a foreigner becomes, to all intents and purposes, a citizen of the United States, with no disability except that he cannot become president or vice-president. It does not operate as a bar against prosecution in one's native country for prior offences; 2 Whart. Dig. Int. L. § 180. The provision of the constitution applies to persons of foreign birth only; 19 How. 419; but not to Mongolians, or American Indians; 5 Sawy. 55; 7 Op. Atty.-Gen. 746; and not, formerly, to a freeman of color, born in the United States; 26 Ind. 299. Indians may be naturalized by act of congress; 19 How. 393. Entire communities have been naturalized by a single act of national sovereignty; 36 Cal. 658; 143 U. S. 135. The act of July 14, 1870, extended the naturalization laws to persons of African descent. Under R. S. § 1994, providing that "any woman who is now or hereafter may be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen," applies to women of African blood; 86 Fed. Rep. 951.

An alien over twenty-one years who has enlisted in the United States army may, without previous declaration of intention, be naturalized on one year's residence, good moral character and honorable discharge; Act of July 17, 1862, § 21. An alien seaman may become a citizen by declaring his intention and serving three years on a merchant vessel of the United States; R. S. § 2174.

Minor children, though born out of the United States, if living within the United States at the time of the naturalization of the parents, become citizens by virtue of the naturalization of the parents; 97 Mo. 311; but not so if they came after the father had been naturalized; 135 Ill. 591. As to whether a child of a naturalized British subject is himself a British subject, see 5 L. Quart. Rev. 438.

A married woman may be naturalized; 1 Cra. C. C. 372; even without the concurrence of her husband; 16 Wend. 617; and an alien woman becomes a citizen when her husband is naturalized, even if she is not of age at the time; 44 N. Y. Sup. Ct. 635; and though she may have lived in a foreign country for years and has never come to the United States until after his death; 14 Op. Atty.-Gen. 402.

The federal constitution, art. 1, § 8, vests in congress the power to establish a uniform rule of naturalization. "It follows from the very nature of the power that to be useful it must be exclusive, for a concurrent power in the states would bring back all the evils and embarrassments which the constitution was designed to remedy, and accordingly, though there was a momentary hesitation when the constitution first went into operation as to whether the power might not still be exercised by the states subject only to the control of congress so far as the legislation of the latter extended as the supreme law, yet the

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power is now firmly established to be exclusive;" 2 Story, Const. § 1104; 7 How. 556; 19 *id.* 393; 5 Cal. 300; 56 Fed. Rep. 576; and no state can pass a law which contravenes the acts of congress on the subject; 2 Rand. 276. A state may confer such rights of citizenship as it pleases so far as relates to itself only; 19 How. 393; 16 Wis. 443; but this is not to be confounded with the right of citizenship of the United States; 19 How. 393; 143 U. S. 160; and no state can make a citizen of the United States; 4 Dill. 425.

By act of April 14, 1802, congress has conferred power to naturalize upon state courts having common-law jurisdiction and a seal and clerk; 18 B. Monr. 693; 83 Me. 489; and it may invest state courts with jurisdiction to naturalize; 33 N. H. 89; but it is held that it cannot *impose* the duty of naturalization upon state courts; 3 D. R. (Pa.) 728; nor require them to act upon applications for naturalization; 32 Atl. Rep. (N. J.) 743. See 37 Neb. 299. In 10 Ark. 631, the court say, "Whether the state courts are bound to exercise concurrent jurisdiction permitted to be retained by them even when enjoined upon them by act of congress, is not altogether well settled. Some strong intimations to the contrary have been given by the judges of the supreme court of the United States, and in some instances the courts of the particular states have refused to exercise this jurisdiction." No state can confer jurisdiction on any court, which does not come within the terms of the act of congress; 50 N. H. 245.

Courts of record, in naturalizing foreigners, act judicially, ascertaining the facts and applying the law to them; 4 Pet. 407; the certificate of naturalization issued by a court of competent jurisdiction is conclusive proof of the citizenship of the person named therein; 147 Ill. 514; though not the only proof. The judgment of the court, like every judgment, has been decided to be complete evidence of its own validity; *id.*

When no record can be produced showing the naturalization of a foreigner, naturalization may be inferred from the fact that for a long time he voted, held office, and exercised all the rights and privileges of a citizen; 143 U. S. 135. The subject is fully discussed in Morse, Citizenship. See Miller, Const. 285, 302; 4 Am. Lawy. 348; 30 L. R. A. 761; CHINESE; CITIZEN; ALLEGIANCE; EXPATRIATION.

**NATURALIZED CITIZEN.** One who, being born an alien, has lawfully become a citizen of the United States under the constitution and laws.

In foreign countries he has a right to be treated as such, and will be so considered, even in the country of his birth, at least for most purposes; 1 B. & P. 430. See CITIZEN; DOMICIL; INHABITANT; NATURALIZATION.

**NATURALLY.** According to the usual course of things. 71 Cal. 164.

**NAUCLERUS** (Lat.). The master or owner of a vessel. Vicat, Voc. Jur.; Calvinus, Lex.

**NAUFRAGE. In French Maritime Law.** When, by the violent agitation of the waves, the impetuosity of the winds, the storm, or the lightning, a vessel is swallowed up, or so shattered that there remain only the pieces, the accident is called *naufrage.*

It differs from *échouement*, which is when the vessel remains whole, but is grounded; or from *bris*, which is when it strikes against a rock or a coast; or from *sombrer*, which is the sinking of the vessel in the sea when it is swallowed up, and which may be caused by any accident whatever. Pardessus, n. 643. See WRECK.

**NAUGHT.** Bad; defective.

**NAULAGE.** See NAULUM.

**NAULUM** (Lat.). Freight or passage money. 1 Pars. Mar. Law 124, n.; Bened. Adm. § 288; Dig. 1. 6, § 1, *qui potiores in pignore.*

**NAUTA** (Lat.). One who charters (*exercet*) a ship. L. 1, § 1, ff. *nautæ, caupo;* Calvinus, Lex. Any one who is on board a vessel for the purpose of navigating her. 3 Sumn. 213; Vicat, Voc. Jur.; 2 Emerigon 448; Pothier, Pand. lib. 4, tit. 9, n. 2; lib. 47, tit. 5, nn. 1, 2, 3, 8, 10. A carrier by water. 2 Ld. Raym. 917.

**NAUTICAL ASSESSORS.** Experienced shipmasters or other persons having special knowledge of navigation and nautical affairs, who are called to the assistance of a court of admiralty in difficult cases involving questions of negligence, and who sit with the judge during the argument and give their advice upon questions of seamanship or the weight of testimony. 19 Fed. Rep. 559.

**NAVAGIUM.** A duty on certain tenants to carry their lord's goods in a ship. 1 Mon. Ang. 922.

**NAVAL COURTS.** Courts held abroad in certain cases to inquire into complaints by the master or seamen of a British ship, or as to the wreck or abandonment of such ship.

**NAVAL COURTS MARTIAL.** See COURT MARTIAL.

**NAVAL LAW.** A system of regulations for the government of the navy. 1 Kent 377, n. Consult act of April 3, 1800; act of December 21, 1861; act of July 17, 1862; Homans, Nav. Laws; De Hart, Courts-Martial.

**NAVAL OFFICER.** An officer of the customs of the United States.

His office relates to the estimating duties, countersigning permits, clearances, etc., certifying the collectors' returns, and similar duties.

**NAVAL PRIZE ACT.** The act of 27 & 28 Vict. c. 25, which regulates questions of prize. See PRIZE.

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**NAVARCHUS, NAVICULARIUS** (Lat.). **In Civil Law.** The master of an armed ship. *Navicularius* also denotes the master of a ship (*patronus*) generally. Cic. Ver. 4, 55; also, a carrier by water (*exercitor navis*). Calvinus, Lex.

**NAVIGABLE WATERS.** Those waters which afford a channel for useful commerce. 20 Wall. 430. See Patterson, Fed. Rest. 45.

The test by which the character of a stream as public or private is determined, is its navigability in fact; 122 Pa. 191; 100 N. C. 477.

In its technical sense, the term navigable, at common law, is only applied to the sea, to arms of the sea, and to rivers which flow and reflow with the tide,—in other words, to tide-waters, the bed or soil of which is the property of the crown. All other waters are, in this sense of the word, unnavigable, and are, *prima facie*, strictly private property; but in England even such waters, if navigable in the popular sense of the term, are, either of common right or by dedication, subject to the use of the public as navigable highways, the fee or soil remaining in the riparian proprietors; Davies 149; 5 Taunt. 705; 20 C. B. N. S. 1; 1 Pick. 180; 5 *id.* 199.

In the United States, this technical use of the term has been adopted in many of the states, in so far as it is employed to designate and define the waters, the bed or soil of which belongs to the state; 4 N. Y. 472; 4 Pick. 268; 2 Conn. 481; 3 Me. 269; 16 Ohio 540; 1 Halst. 31; 4 Wis. 486; 2 Swan 9. See 3 Abb. N. C. 88; 122 Pa. 191. But in Pennsylvania; 2 Binn. 475; 14 S. & R. 71; in North Carolina; 3 Ired. 277; 2 Dev. 30; in Iowa; 3 Ia. 1; 4 *id.* 199; and in Alabama; 11 Ala. 436; the technical use of the term has been entirely discarded, and the large fresh-water rivers of those states have been decided to be navigable, not only as being subject to public use as navigable highways, but also as having their bed or soil in the state.

The rule of the common law, by which the ebb and flow of the tide has been made the criterion of navigability, has never been adopted in any of the United States, or, if adopted, it has been in a form modified and improved to fit the condition of the country and the wants of its inhabitants. According to the rule administered in the courts of this country, all rivers which are found "of sufficient capacity to float the products of the mines, the forests, or the tillage of the country through which they flow, to market;" 8 Barb. 239; or which are capable of use "for the floating of vessels, boats, rafts, or logs"; 31 Me. 9 (but see 6 Cal. 443; 17 Or. 165); 50 Fed. Rep. 429; 58 N. W. Rep. (Wis.) 257; are subject to the free and unobstructed navigation of the public, independent of usage or of legislation; 5 Wend. 358; 42 Me. 552; 18 Barb. 277; 5 Ind. 8; 2 Swan 9; 29 Miss. 21; 6 Cal. 180; 2 Stockt. 211. See 51 Me. 256; 3 Ore. 445; 42 Wis. 202; 111 N. C. 661; 107 U. S. 682. Water navigable for pleasure boating must be regarded as navigable; 108 Mass. 456.

The navigable waters of the United States are such as are navigable in fact; 16 U. S. App. 152; and which by themselves, or in connection with other waters, form a continuous channel for commerce with foreign countries or among the states; 109 U. S. 385; 11 Wall. 411.

A river may be navigable below the ebb and flow of the tide in the sense of the common law, and, in fact, navigable above; and the question of boundary in respect to lands adjoining it will be determined by one principle above, and by another below tide-water; 12 N. J. Eq. 1. It is not necessary that the stream should be navigable all the year round; 31 Mich. 336; 25 Fla. 1. See 86 Ala. 88. There can be no prescriptive right to maintain or continue an obstruction to the navigation of a public stream; 86 Ala. 88.

In 108 Mass. 447, Gray, J., says: "The term 'navigable waters,' as commonly used in the law, has three distinct meanings: first, as synonymous with 'tide-waters,' being waters whether fresh or salt wherever the ebb and flow of the sea is felt; or, second, as limited to tide-waters which are capable of being navigated for some useful purpose; or third, as including all waters, whether within or beyond the ebb and flow of the tide which can be used for navigation." See 19 Am. L. Reg. N. S. 147; Ang. Waterc. § 542; 19 Abb. N. C. 159. In North Carolina the test of navigability is not whether the stream is subject to the ebb and flow of the tide, but whether it is navigable for sea-going vessels; 114 N. C. 787; while in South Carolina the test is its navigable capacity, without regard to the character of the craft; 19 S. E. Rep. (S. C.) 963.

In New York, it seems that courts are bound to take judicial notice of what streams are, and what are not, highways, at common law; 8 Barb. 239; but it has been held that what is a navigable stream is a mixed question of law and fact; if a stream is not navigable the legislature cannot declare it to be so, because the legislature cannot appropriate it to public use without provision for compensation; 35 N. Y. 454. See WATERS; WATERCOURSE; RIVERS; LAKE; RIPARIAN PROPRIETORS; TIDE-WATER.

**NAVIGATING.** A vessel which, though touching bottom, forces her way by her own screw through the soft mud is navigating. 59 Fed. Rep. 365.

**NAVIGATION ACT.** The stat. 12 Car. II. c. 78. It was repealed by 6 Geo. IV. cc. 109, 110, 114. See 16 & 17 Vict. c. 107; 17 & 18 Vict. cc. 5 and 120; 3 Steph. Com. 145.

**NAVIGATION, RULES OF.** Rules and regulations which govern the motions of ships or vessels when approaching each

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other under such circumstances that a collision may possibly ensue.

These rules are firmly maintained in the United States courts. A federal question is presented by a ruling of a state court which substantially ignores the obligatory force of rules of navigation; 150 U. S. 674.

The rules of navigation which prevailed under the general maritime law, in the absence of statutory enactments, will be considered, although, as hereinafter stated, they have lately been superseded by express enactment in most of the commercial countries of the world.

These rules were derived mainly from the decisions of the high court of admiralty in England, and of the superior courts of the United States, and they are based upon the rules promulgated by the corporation of the Trinity House on the 30th of October, 1840, and which may be found in full in 1 W. Rob. 488. Though now codified, see *infra*, they are here continued as in the former edition as a matter of historical interest.

*For sailing-vessels about to meet.* 1. Those having the wind *fair* shall *give way* to those on a wind [or close-hauled].

2. When both are going by the wind, the vessel on the starboard tack shall keep her wind, and the one on the larboard tack bear up, thereby passing each other on the larboard hand.

3. When both vessels have the wind large or abeam, and meet, they shall pass each other in the same way, on the larboard hand; to effect which two last-mentioned objects the helm must be put to port.

*For a sailing and a steam vessel about to meet.* 1. Steam-vessels are to be considered in the light of vessels navigating with a fair wind, and should give way to sailing-vessels on a wind on either tack.

2. A steam-vessel and a sailing-vessel going large, when about to meet, should each port her helm and pass on the larboard side of the other; 1 W. Rob. 478; 2 *id.* 515.

But in the United States courts it has been almost uniformly held, and the rule is now firmly established, that when a sailing-vessel and a steamer are about to meet, the sailing-vessel must, under ordinary circumstances, and whether going large, or before the wind, or close-hauled by the wind, keep her course, and the steamer must take all the measures necessary to avoid a collision; 10 How. 557; 17 *id.* 152, 178; 18 *id.* 581; 3 Blatch. 92; Desty, Adm. § 357; 48 Fed. Rep. 760; 54 *id.* 411; 37 *id.* 330; 144 U. S. 371.

*For steam-vessels about to meet.* 1. When steam-vessels on different courses are about to meet under such circumstances as to involve the risk of collision, each vessel must put her helm to port, so as always to pass on the larboard side of the other.

2. A steam-vessel passing another in a narrow channel must always leave the vessel she is passing on the larboard hand.

The following abstract of authorities may also be referred to as furnishing rules of decision (in addition to the general rules of navigation) in the particular cases alluded to; and they will be found generally applicable in cases of collision arising under the new regulations, as well as in cases arising under the general maritime law.

When a steamer or other vessel is about to pass another vessel proceeding in the same general direction, she must allow the foremost boat to keep her way and course, and must take the necessary measures to avoid a collision; 23 How. 448; Abb. Adm. Pr. 108; Olc. 505; 1 Blatch. 363.

A vessel under sail or steam is bound to keep clear of a vessel stationary or at anchor, provided the latter is in a proper place, and exhibits a proper light,—the presumption in such cases being that the vessel in motion is at fault; 1 How. 89; 19 *id.* 103; 3 Kent 231; Daveis 359; 1 Swab. 88; 3 W. Rob. 49.

A vessel entering a harbor is bound to keep the most vigilant watch to avoid a collision; 18 How. 584; Daveis 359; see 51 Fed. Rep. 766; and in the night-time she ought generally to have her whole crew on deck; Daveis 359. And see 3 Kent 231; 1 Dods. 467.

By the general maritime law, vessels upon the high seas were not ordinarily required constantly to exhibit a light; 2 W. Rob. 4; 3 *id.* 49; 2 Wall. Jr. 268; but the subject is now regulated by statute in the various maritime countries.

Regulations made by various governments are binding upon all vessels within the jurisdiction of that government; Story, Confl. Laws, ch. 14; 1 Swab. 38, 63, 96; 1 How. 28; 14 Pet. 99; but it is beyond power of the legislature to make rules applicable to foreign vessels when beyond their jurisdiction; that is, more than a marine league from their shores; 1 Swab. 96. And see 18 How. 223; 21 *id.* 184. It has, accordingly, been held that an English rule is not applicable in a case of collision on the high seas between a British and a foreign vessel, and that the latter could not set up in its defence a violation of the English statute by the British vessel; 1 Swab. 63, 96; and it was declared that in such a case the general maritime law must be the rule of the court. See 92 U. S. 31.

The British Government, by an Order in Council, in 1863, promulgated certain regulations for preventing collisions at sea. An Order in Council, in 1879, promulgated new regulations, to take effect on September 1, 1880. These were adopted in pursuance of the recommendation of representatives of different nations, and are stated in the last-mentioned Order to have been very generally adopted by commercial nations. They were adapted to the United States with regard to vessels on the high seas and in coast waters, in 1864 (R. S. § 4233). A revised code was adopted by England in 1884, and then was adopted by the United States with reference to vessels on the high seas in 1885. In 1890 by international agreement congress adopted a complete system of rules of the road governing vessels both on the ocean and on our own inland waters. These rules

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consist of: 1. The International Rules agreed upon by all nations, which went into effect July 1, 1897; 1 R. S. Sup. 781. 2. Rules for the navigation of rivers, harbors, and inland waters of the United States, navigable by sea-going vessels, which went into effect October 7, 1897; 2 R. S. Sup. 620. 3. Rules to regulate the navigation on the Great Lakes and their connecting and tributary waters as far east as Montreal, which went into effect March 1, 1895; 2 R. S. Sup. 320. 4. Rules for the navigation of the Red River of the North and rivers entering into the Gulf of Mexico and its tributaries, which are the same as were formerly in use, and are to be found in R. S. § 4233 and its amendments, and rules made pursuant to R. S. § 4412 by the Board of Supervising Inspectors of steam-vessels. Copies of all these rules are furnished on application by the Commissioner of Navigation. These various codes of rules are too long to be set forth here.

It is evident that these rules and regulations were intended to supersede all other rules of navigation, and every other system of vessels' lights, wherever they may be adopted. They establish a well-devised and complete system of vessels' lights, and furnish plain and simple rules of navigation applicable to all the ordinary cases of vessels approaching each other under such circumstances as to involve the risk of collision,—leaving extraordinary cases, such as the meeting of vessels in extremely narrow or other very difficult channels (in respect to which no safe general rule can be devised), to the practical good sense and professional skill of those in charge of such vessels. Under all ordinary circumstances a vessel discharges her full duty to another vessel by a faithful and literal observance of the international rules; 158 U. S. 187. Where there were no positive rules of navigation on a foreign river, but there was a certain practice, it was held that a vessel which disregarded the practice was responsible for a collision occurring thereby; L. R. 15 P. D. 194. A departure from the rules, to be justifiable, must *be necessary in order to avoid immediate* danger. But that necessity must not have been caused by the negligence or fault of the party disobeying the rule; and courts of admiralty lean against the exceptions; 18 How. 581, 583; 1 W. Rob. 157, 478. And see 2 Curt. C. C. 141, 363; 18 How. 581; 150 U. S. 674; 123 *id.* 349. It is no excuse that a vessel, in departing from the navigation rules, when rounding the Battery at New York, to say that vessels often agree with each other to do so, when it appears that the vessel in question took upon herself the responsibility of departing from the rules for her own convenience; 14 U. S. App. 684.

The maritime law, however, requires that in collision cases every violation of a rule of navigation, and every other act or omission alleged to be a fault, shall be considered in connection with all the attending circumstances; and when by inevitable accident, or the fault of one of two colliding vessels, a vessel free from fault is suddenly brought into such circumstances of imminent danger as probably to render the deliberate or proper exercise of the judgment and skill of an experienced seaman impossible, an error of judgment, or other mistake, is not regarded as a legal fault; 3 Blatch. 92; 12 How. 461; 14 Wall. 199; 19 *id.* 54; 54 Fed. Rep. 411; 123 U. S. 349; 144 *id.* 37.

The proper and continual exhibition of the bright and colored lights which these rules and regulations prescribe, and their careful observance by the officer of the deck and the lookout of every vessel, constitute the very foundation of the system of navigation established by such rules and regulations. The exhibition of such lights, and the strict compliance with the rules in respect to *stationing* and *keeping* a competent and careful person in the proper place and exclusively devoted to the discharge of the duties of a lookout, are of the utmost importance.

The stringent requirements of our maritime courts in respect to lookouts may be learned by consulting the following authorities: 10 How. 585; 12 *id.* 443; 18 *id.* 108, 223; 21 *id.* 548, 570; 23 *id.* 448; 3 Blatch. 92; 5 C. C. App. 390; 58 Fed. Rep. 669; 60 *id.* 1022. This rule admits of no exception on account of size, in favor of any craft capable of committing injuries; 56 Fed. Rep. 271. A sailing-vessel is entitled to assume that a steam-vessel, approaching her, is being navigated with a proper lookout and with reasonable attention to the obligations laid upon her; 1 U. S. App. 11. The absence of a lookout is not material where the presence of one would not have availed to prevent a collision; 144 U. S. 371.

The neglect to carry or display the lights prescribed by these rules and regulations will always by held, *prima facie*, a fault, in a collision case; 5 How. 441, 465; 21 *id.* 548, 556; 3 W. Rob. 191; Swab. 120, 245, 253, 519; 1 Lush. 382; 2 Wall. 538. And, upon the same principles, the neglect, in a fog, to use the prescribed fog-signals will also be considered, *prima facie*, a fault; Desty, Adm. § 360. See FOG.

It will be observed that the duty of slackening speed, in all cases when risk of collision is involved, is absolutely and imperatively imposed upon every steam-vessel, by these regulations, and that they require that every steam-vessel shall stop and reverse her engine when necessary to avoid a collision.

The duty of slackening speed in order to avoid a collision had been frequently declared by the maritime courts before the adoption of these regulations; 3 Hagg. Adm. 414; 3 Blatch. 92; Swab. 138; 2 W. Rob. 1; 3 *id.* 95, 270, 377; 10 How. 557; 12 *id.* 443; 18 *id.* 108; but there was no inflexible rule requiring a steamer to slacken speed in all cases when there was risk of collision; and the neglect to do it was held to be a fault only in those cases where its necessity was shown by the proofs. This

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left the question open to be determined by the courts in each particular case, and perhaps upon vague and unreliable estimates of time and distance and bearings, or upon conflicting and unsatisfactory testimony; but the legislature, in view of the great power and speed of the steamers now in general use, and the very disastrous consequences of a collision of such vessels when running at their ordinary speed, has wisely made the duty imperative; 5 Blatch. 256; 10 How. 586; 91 U. S. 200; 7 U. S. App. 20. See COLLISION; MARITIME LAW.

**NAVIRE. In French Law.** A ship. Emerig. *Traite des Assur.* c. 6, § 1.

**NAVY.** The whole shipping, taken collectively, belonging to the government of an independent nation, and appropriated for the purposes of naval warfare. It does not include ships belonging to private individuals nor (in the United States, at least) revenue vessels or transports in the service of the war department.

Under the constitution, congress has power to provide and maintain a navy. This power authorizes the government to buy and build vessels of war, to establish a naval academy, and to provide for the punishment of desertion and other crimes, and to make all needful rules for the government of the navy. See 3 Wheat. 337; 20 How. 65; 3 Wheat. 370.

**NAVY BILLS.** Bills drawn by the officers of the British navy for their pay, etc.

A bill of exchange drawn by the paymaster of a United States vessel, while abroad, to procure money for the expenses of his ship or fleet.

**NAVY DEPARTMENT.** See DEPARTMENT.

**NAVY LIST.** An official account of the officers of the British navy, with a list of the ships, published quarterly.

**NAVY REGISTER.** An official list published semi-annually of the officers of the United States navy, their stations, rates of pay, etc., with a list of the ships.

**NE ADMITTAS** (Lat.). The name of a writ now practically obsolete, so called from the first words of the Latin form, by which the bishop is *forbidden to admit* to a benefice the other party's clerk during the pendency of a *quare impedit.* Fitzh. N. B. 37; Reg. Orig. 31; 3 Bla. Com. 248; 1 Burn, Eccl. Law 31.

**NE BAILA PAS** (he did not deliver). **In Pleading.** A plea in detinue, by which the defendant denies the delivery to him of the thing sued for.

**NE DISTURBA PAS. In Pleading.** The general issue in *quare impedit.* Hob. 162. See Rast. Entr. 517; Winch, Entr. 703. Andr. Steph. Pl. 230.

**NE DONA PAS, NON DEDIT. In Pleading.** The general issue in formedon. It is in the following formula: "And the said C D, by J K, his attorney, comes and defends the right, when, etc., and says that the said E F did not give the said manor, with the appurtenances, or any part thereof, to the said G B, and the heirs of his body issuing, in manner and form as the said A B hath in his count above alleged. And of this the said C D puts himself upon the country." 10 Wentw. Pl. 182; Andr. Steph. Pl. 230.

**NE EXEAT REPUBLICA, NE EXEAT REGNO** (Lat.). **In Practice.** The name of a writ originally employed in England as a high prerogative process, for political purposes; Story, Eq. Jur. § 1467; 50 N. H. 353; but now applied in civil matters only, issued by a court of chancery, directed to the sheriff, reciting that the defendant in the case is indebted to the complainant, and that he designs going quickly into parts without the state, to the damage of the complainant, and then commanding him to cause the defendant to give bail in a certain sum that he will not leave the state without leave of the court, and for want of such bail that he, the sheriff, do commit the defendant to prison.

This writ is a part of the English chancery practice and is usually a part of that practice in states where it is in force. It may be issued by the United States District Courts; 48 Fed. Rep. 492.

This writ has been expressly abolished in very many of the states. Yet its place has been filled by other methods of procedure, similar in effect. The constitutions of Vermont, Pennsylvania, Kentucky, Mississippi, and Louisiana prohibit any restraint upon emigration. In Arkansas the writ is abolished, and in the code of New York a system of arrest and bail is substituted. In Ohio and California it is abolished; 27 Ohio 654; 49 Cal. 465. In those jurisdictions where *ne exeat* is still recognized, the circumstances under which the writ will be granted, and the requisites to its issuance, are largely regulated by statute; but certain general principles govern in nearly every case. These will be found set forth in Rhodes *v.* Cousins, 6 Rand. 191. See 14 Amer. Dec. 560, n.

This writ is issued to prevent debtors from escaping from their creditors. It amounts, in ordinary civil cases, to nothing more than process to hold to bail, or to compel a party to give security to abide the decree to be made in his case; Bisp. Eq. § 36; 2 Kent 32; 1 Clark 551; Beames, *Ne Exeat;* 13 Viner, Abr. 537; 1 Suppl. to Ves. Jr. 33, 352, 467; 1 Bla. Com. 138; Madd. Ch. Pr.; 1 Smith, Ch. Pr. 576; 19 V. & B. 312; 6 Johns. Ch. 138; 27 Ohio 666; 46 Vt. 708; 1 Del. Ch. 32; *id.* 295; 6 Phila. 143.

Arrest under this writ is not in violation of a constitutional provision that a person shall not be imprisoned for debt, unless in cases of tort, or where there is a strong presumption of fraud; 16 Colo. 75.

The *writ* may be issued against foreigners subject to the jurisdiction of the court, citizens of the same state, or of another state, when it appears by a positive affidavit that the defendant is about to leave the state, or has threatened to do so, and that the debt would be lost or endangered by his departure; 3 Johns. Ch. 75, 412; 7 *id.* 192; 1 Hopk. Ch. 499. On the same principle which has been adopted in the courts of

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law that a defendant could not be held to bail twice for the same cause of action, it has been decided that a writ of *ne exeat* was not properly issued against a defendant who had been held to bail in an action at law; 8 Ves. 594.

This writ can be issued only for equitable demands; 4 Des. Eq. 108; 6 Johns. Ch. 138; 1 Hopk. Ch. 499; and not where the plaintiff by process of law may hold the defendant to bail; 3 Bro. C. C. 218; 8 Ves. Jr. 593; 36 Ga. 573; 18 N. J. Eq. 249; 28 Wisc. 245; and where there is an adequate remedy at law, the writ will be dissolved; 30 Ga. 965. It may be allowed in a case to prevent the failure of justice; 2 Johns. Ch. 191. When the demand is strictly legal, it cannot be issued, because the court has no jurisdiction. When the court has concurrent jurisdiction with the courts of common law, the writ may, in such case, issue, unless the party has been already arrested at law; 2 Johns. Ch. 170. In all cases when a writ of *ne exeat* is claimed, the plaintiff's equity must appear on the face of the bill; 3 Johns. Ch. 414.

The writ may be provided for in the final decree and will continue in force until dissolved by the court or until the decree is satisfied; 48 Fed. Rep. 492. It is not superseded by a subsequent bond for the performance of final decree; 36 Atl. Rep. (N. J.) 951. It may be granted on motion founded on affidavit, but where the facts charged in the bill are such as to entitle the complainant to the writ, it is sufficient to refer to them as showing the ground of the complainant's demand without restating them in the affidavit; 1 Del. Ch. 32.

The amount of bail is assessed by the court itself; and a sum is usually directed sufficient to cover the existing debt and a reasonable amount of future interest, having regard to the probable duration of the suit; 1 Hopk. Ch. 501.

The defendant arrested upon a writ of *ne exeat* may obtain a discharge of the writ upon giving bond, with surety, to answer and be amenable to the process of the court; 141 U. S. 260.

**NE INJUSTE VEXES** (Lat.). **In Old English Law.** The name of a writ which issued to relieve a tenant upon whom his lord had distrained for more services than he was bound to perform.

It was a prohibition to the lord, *not unjustly* to distrain or *vex* his tenant. Fitzh. N. B. Having been long obsolete, it was abolished in 1833.

**NE LUMINIBUS OFFICIATUR** (Lat.). **In Civil Law.** The name of a servitude which restrains the owner of a house from making such erections as obstruct the light of the adjoining house. Dig. 8. 4. 15. 17; SERVITUDE.

**NE RECIPIATUR** (Lat.). That it be not received. A caveat or words of caution given to a law officer, by a party in a cause, not to receive the next proceedings of his opponent. 1 Sell. Pr. 8.

**NE RELESSA PAS** (Law Fr.). The name of a replication to a plea of release, by which the plaintiff insists he *did not release*. 2 Bulstr. 55.

**NE UNQUES ACCOUPLE** (Law Fr.). **In Pleading.** A plea by which the party denies that he ever was lawfully married to the person to whom it refers. See the form, 2 Wils. 118; 10 Wentw. Pl. 158; 2 H. Bla. 145; 3 Chitty, Pl. 599.

**NE UNQUES EXECUTOR. In Pleading.** A plea by which the party who uses it denies that the plaintiff is an executor, as he claims to be; or that the defendant is executor, as the plaintiff in his declaration charges him to be. 1 Chitty, Pl. 484; 1 Saund. 274, n. 3; Comyns, Dig. *Pleader* (2 D 2); 2 Chitty, Pl. 498.

**NE UNQUES SEISIE QUE DOWER. In Pleading.** A plea by which a defendant denies the right of a widow who sues for and demands her dower in lands, etc., late of her husband, because the husband was not on the day of her marriage with him, or at any time afterwards, seised of such estate, so that she could be endowed of the same. See 2 Saund. 329; 10 Wentw. Pl. 159; 3 Chitty, Pl. 598, and the authorities there cited.

**NE UNQUES SON RECEIVER. In Pleading.** The name of a plea in an action of account-render, by which the defendant affirms that he never was receiver of the plaintiff. 12 Viner, Abr. 183.

**NE VARIETUR** (Lat. that it be not changed). A form sometimes written by notaries public upon bills or notes, for the purpose of identifying them. This does not destroy their negotiability. 8 Wheat. 338.

**NEAP TIDES.** Those tides which happen between the full and change of the moon, twice in every twenty-four hours. 18 Cal. 21.

**NEAR.** Close or at no great distance. 109 N. C. 358. Near is a relative term, and its precise meaning depends upon circumstances; 44 Mo. 197; 5 Allen 221; 39 N. J. Eq. 435; 108 U. S. 211; 31 Fed. Rep. 872.

Two and one half miles was held to be near; 44 Mo. 197.

**NEAREST.** Not necessarily nearest by geographical measurement, but by convenience of access, having regard to the usual travelled route. 54 Tex. 307. See MILEAGE.

**NEAT, NET.** The exact weight of an article, without the bag, box, keg, or other thing in which it may be enveloped.

**NEAT CATTLE.** Oxen or heifers. Whart. Dict. "Beeves" may include neat stock, but all neat stock are not beeves; 36 Tex. 324; 32 *id.* 479. The term neat cattle includes a cow. 17 S. W. Rep. (Mo.) 745.

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**NEAT LAND.** Land let out to the yeomanry. S. W. Cowel.

**NEATNESS. In Pleading.** The statement in apt and appropriate words of all the necessary facts and no more. Lawes, Plead. 62.

**NEBRASKA.** One of the states of the American Union, being the thirty-seventh admitted to the Union.

Its territory formed a part of the province of Louisiana as ceded by France, and was afterwards included in the *district* and the *territory* of Louisiana as organized in 1804 and 1805, respectively, and in the territory of Missouri, to which the name of the last-named territory was changed in 1812. The territory of Nebraska, extending beyond the limits of the present state westward to the summit of the Rocky Mountains, and northward to the British possessions, was organized by the act of May 30, 1854. An enabling act for the formation of a state government was passed April 19, 1864; a state constitution was adopted June 21, 1866; on the 9th of February, 1867, an act was passed for the admission of the state into the Union, on condition that civil rights and the elective franchise should be secured to all races, excepting Indians not taxed; and on the first of March, 1867, a proclamation by the president announced the acceptance of this condition, whereupon by the terms of the act the admission of the state became complete. The present constitution was adopted October 12, 1875.

THE LEGISLATURE.—The *legislative power* is vested in a senate and a house of representatives. The senate consists of thirty-three members, and the house of one hundred, apportioned according to population every five years. The regular sessions are bienuial, and begin on the first Tuesday in January. The pay of members is limited to a session of forty days. A majority of the members elected to each house is necessary for the passage of a bill. Acts of the legislature take effect three months after the end of the session at which passed, unless in case of an emergency declared by the vote of two-thirds of the elected members of each house.

THE EXECUTIVE.—The supreme executive power is vested in a *Governor*, who, with the Lieutenant-Governor, Secretary of State, Auditor of Public Accounts, Treasurer, Superintendent of Public Instruction, Attorney General, and Commissioner of Public Lands and Buildings, is elected biennially. The governor must be at least thirty years of age, and have been for two years a citizen of the United States and of the state. The governor has the pardoning power, except in treason, when it rests with the legislature, and in cases of impeachment; and has a qualified veto, which may be applied to single items of appropriation. The treasurer is ineligible to the same office for two years after two consecutive terms.

THE JUDICIARY.—The courts of record are the *Supreme Court*, *District Courts*, and *County Courts*. Judges are elected. The *Supreme Court* is composed of three judges, elected alternately, for six years, the senior judge presiding. The supreme court has original jurisdiction in civil cases in which the state is a party, in revenue cases, and in matters of *mandamus*, *quo warranto*, and *habeas corpus*. Terms are held twice a year at the capital. The state is divided into fifteen judicial districts, in each of which a judge is elected for four years, who holds the district court in the several counties in his district successively. This is a court of first instance in civil cases involving over $100; and is the criminal trial court in all but petty cases. Inferior to the district courts are the county courts, with jurisdiction of probate business, and of minor civil and criminal matters; and police courts, and courts of justices of the peace, with the ordinary functions of such tribunals. Appeals lie in all cases from these lower courts to the district courts.

*Jurisprudence.*—The common law of England is the basis of the law of this state. Practice is under a code of procedure, based on that of Ohio. The distinction between legal and equitable proceedings is abolished. There is one form of civil action. The pleadings are the *petition*, the *answer*, and the *reply*. There is a very liberal rule as to amendments. Actions are in the name of "the real party in interest." Married women have full civil and property rights. Exemptions are broad; and there is a liberal stay law.

**NECATINE.** The act of killing.

**NECESSARIES.** Such things as are proper and requisite for the sustenance of man, including food, clothing, medicine, and habitation. 47 Minn. 250.

The term necessaries is not confined merely to what is requisite barely to support life, but includes many of the conveniences of refined society. It is a relative term, which must be applied to the circumstances and conditions of the parties; Add. Contr. 382; 7 S. & R. 247. Ornaments and superfluities of dress, such as are usually suitable to the party's rank and situation in life; 1 Campb. 120; 7 C. & P. 52; 8 Term 578; 47 Minn. 250; some degree of education; 4 M. & W. 727; 16 Vt. 683; lodging and house-rent; 1 B. & P. 340; see 12 Metc. 559; 1 M. & W. 67; 5 Q. B. 606; board bill; 83 Me. 305; pew rent; 40 Conn. 75; horses, saddles, bridles, liquors, pistols, but powder, whips, and fiddles have been held not to be necessaries; 1 Bibb 519; 2 N. & M'C. 524. Nor is an infant liable on a contract for the erection of a dwelling-house; 78 Hun 603. But a racing bicycle is a necessary for an apprentice earning 21*s.* a week and living with his parents; 78 L. T. 296.

The rule for determining what are necessaries is that whether articles of a certain *kind* or certain *subjects* of expenditure are or are not such necessaries as an infant may contract for, is a matter of law, and for instruction by the court; but the question whether any particular things come under these classes, and the question, also, as to *quantity*, are generally matters for the jury to determine; 10 Vt. 225; 12 Metc. 559; 11 N. H. 51; 1 Bibb 519; 2 Humphr. 27; 3 Day 37; 6 M. & W. 42; 6 C. & P. 690; Ans. Contr. 113; Poll. Contr. 67.

Infants, when not maintained by parent or guardian, may contract for necessaries; 4 M. & W. 727; 16 Mass. 28; 10 Mo. 451; 9 Johns. 141; 25 Atl. Rep. (R. I.), 345. But when living with and supported by their parents they are not liable for necessaries; 4 Wend. 403; 61 Ill. 177; 48 Mo. App. 59; Ewell, Lead. Cas. 55. Nor can an infant pledge his father's credit, as a wife can her husband's, for abandonment of duty; 17 Vt. 348; 6 M. & W. 482; Schoul. Dom. Rel. 328. Infants are not liable at law for borrowed money, though expended for necessaries; 10 Mod. 67; 1 Bibb 519; 7 W. & S. 83, 88; 10 Vt. 225. See 1 P. Wms. 558; 7 N. H. 368; 2 Hill S. C. 400; 32 N. H. 345. Otherwise in equity; 1 P. Wms. 558; 2 Duvall 149; 7 W. & S. 88. But they are liable for money advanced at their request to a third party to pay for necessaries: 1 Den. 460; 10 Cush. 436; 7 N. H. 368; 2 Hill S. C. 400; 83 Me. 305. An infant is not liable upon a bill of exchange at the suit of an indorsee of the bill, although it was accepted for the price of necessaries; [1891] 1 Q. B. 413. Services rendered by an attorney to an infant in examining the public records and advising him as to his rights to certain property are not necessaries; 48 Neb. 391. Necessaries for the infant's wife and children are necessaries for himself;

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Stra. 168; Com. Dig. *Enfant* (B 5); 1 Bibb 519; 2 N. & M'C. 523; 9 Johns. 144; 16 Mass. 31; 14 B. Monr. 232. As to a note or acceptance by an infant for necessaries, see 35 Cent. Law J. 208. See INFANT.

When a wife is living with her husband, it is presumed that she has his assent to pledge his credit for necessaries. See 35 Me. 332; 83 *id.* 132; 79 Wis. 147; 64 Hun 634. But this presumption may be rebutted by showing a prohibition on his part or that he has already supplied her with necessaries. The fact of cohabitation is not conclusive of the husband's assent; 2 Ld. Raym. 1006; 34 N. H. 420; 39 N. Y. 351; Schoul. Dom. Rel. 80; 29 Am. L. Reg. 324. But if the husband altogether neglects to supply the wife, she may pledge his credit notwithstanding he has forbidden tradesmen to trust her; the law here raising a presumption of agency to enforce the marital obligation and protect the wife; 41 Barb. 558; 15 Conn. 535; Schoul. Dom. Rel. 77; 2 Misc. Rep. 49. A wife is ordinarily authorized to purchase clothing on the husband's credit only in case of necessity, and where the wife has habitually clothed herself out of her separate income which is adequate for that purpose, the husband is not liable for clothing ordered by her; 47 N. E. Rep. 408; 114 Mass. 424; 133 *id.* 513. See 67 Me. 238. The husband is also liable when away from his wife without her fault or by his own misconduct; 24 Ala. 337; 8 Ia. 51; 8 Gray 172; 2 Kent 146; 43 Ill. App. 39; 160 Mass. 149. In order to charge a husband with necessaries sold to his wife, it must affirmatively appear that the goods were sold on the husband's credit; 7 Misc. Rep. 118. But otherwise where it is the wife's fault; 10 Ill. 569; 29 N. H. 63; 40 Vt. 68; 19 Wisc. 268. But if the wife elopes, though it be not with an adulterer, he is not chargeable even for necessaries; the very fact of the elopement and separation is sufficient to put persons on inquiry, and whoever gives credit to the wife afterwards gives it at his peril; 1 Stra. 647; 11 Johns. 281; 3 Pick. 289; 2 Halst. 146; 2 Kent 123; Bacon, Abr. *Baron and Feme* (H); 1 Hare & W. Sel. Dec. 104, 106; 6 C. B. N. S. 519; 19 Wisc. 268. See MARRIED WOMAN. Insane persons are liable for necessaries; Pars. Contr. 420, note 2; 5 B. & C. 170; 10 Allen 59; 56 Me. 308. See, generally, Schouler, Dom. Rel.; Ewell, Lead. Cas. on Coverture, etc.; 29 Am. L. Reg. 324; 32 Mich. 204; 12 Lawy. Rep. Ann. 859; MARRIED WOMAN.

**NECESSARY.** Reasonably convenient. 19 So. Rep. 202.

This word has great flexibility of meaning. It is used to express mere convenience, or that which is indispensable to the accomplishment of a purpose, 43 Ill. 307. It frequently imports no more than that one thing is convenient, or useful, or essential to another; 4 Wheat. 414.

As used in a code exempting the wages of a laboring man when *necessary for the support of his family in whole or in part*, it does not mean that his wages must be absolutely indispensable to the bare subsistence of the family and that the family could not live without them, but is used in a broader and less rigid sense looking rather to the comfort and well being of the family, and contemplates the furnishing to it whatever is necessary to its comfort and well-being as distinguished from luxuries. 29 Pac. Rep. (Mont.) 337.

Witness fees are not *necessary disbursements* where witnesses were not called at the trial, unless the party shows why he did not call them; 28 N. Y. Supp. 663.

*Necessary material for the construction of a railroad* includes the railroad as a completed structure, station buildings, depots, machine shops, side tracks, turn outs, and water tanks. 150 U. S. 1.

*Necessary help.* A physician may be appointed by a warden of a state prison under authority to appoint all necessary help. 13 Nev. 419.

*Necessary implication.* In construing a will, not a natural necessity, but so strong a probability that a contrary construction cannot be supported. 1 V. & B. 466.

**NECESSITOUS CIRCUMSTANCES.** In the civil code of Louisiana the words are used relative to the fortune of the deceased and to the condition in which the claimant lived during the marriage. 43 La. Ann. 1140.

**NECESSITY.** That which makes the contrary of a thing impossible.

Necessity is of three sorts: of conservation of life; see DURESS; of obedience, as the obligation of civil subjection, and, in some cases, the coercion of a wife by her husband; and necessity of the act of God, or of a stranger. Jacob; Moz. & W.

Whatever is done through necessity is done without any intention; and as the act is done without will (*q. v.*) and is compulsory, the agent is not legally responsible; Whart. Cr. L. § 95; Bacon, Max. Reg. 5. Hence the maxim, Necessity has no law; indeed, necessity is itself a law which cannot be avoided nor infringed. *Clef des Lois Rom.*; Dig. 10. 3. 10. 1; Comyns, Dig. *Pleader* (3 M 20, 3 M 30). As to the circumstances which constitute necessity, see 1 Russ. Cr. 16, 20; 2 Stark. Ev. 713; 31 Ind. 189; 4 Cush. 243; 55 Ga. 126.

**NECK-VERSE.** The Latin sentence *Miserere mei, Deus*, Ps. li. 1, because the reading of it was made a test for those who claimed *benefit of clergy* (*q. v.*).

> If a monk had been taken
> For stealing of bacon,
> For burglary, murder, or rape;
> If he could but rehearse
> (Well prompt) his *neck-verse*,
> He never could fail to escape.
> Brit. Apollo 1710; Whart. Dict.

**NEEDLESSLY.** In a statute with reference to the needless killing or bad treatment of animals, it denotes an act done without any useful motive, in a spirit of wanton cruelty, or for the mere pleasure of destruction. 29 N. E. Rep. (Ill.) 933; 37 Ark. 460; 4 Mo. App. 215.

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**NEFAS.** That which is against right or divine law; a wicked thing or act. Calv. Lex.

**NEGATIVE.** Negative propositions are usually much more difficult of proof than affirmative, and in cases where they are involved, it is often a nice question upon which side lies the burden of proof. The general rule has been thus stated: Whoever asserts a right dependent for its existence upon a negative, must establish the truth of the negative, except where the matter is peculiarly within the knowledge of the adverse party. Otherwise rights of which a negative forms an essential element may be enforced without proof; 72 Ind. 113; s. c. 37 Am. Rep. 141; 78 N. Y. 480. Thus inactions for malicious prosecution, the plaintiff must prove that there was no probable cause; 67 Ind. 375; 2 Greenl. Ev. § 454. The rule applies whenever the claim is founded in a breach of duty in not repairing highways, and in cases of mutual negligence; 78 N. Y. 480; Shearm. & Red. Neg. 312. So one must prove the allegation that a negotiable promissory note was not taken in payment of a debt; 68 Ind. 254. So the *onus* is on a plaintiff who assigns as a breach by tenant that he did not repair; 9 C. & P. 734; 6 H. L. C. 672; 12 Mod. 526. In all actions for breach of warranty of the soundness of a personal chattel, the plaintiff must prove the negative. "It may be stated as a test admitting of universal application, that whether the proposition be affirmative or negative, the party against whom judgment would be given, as to a particular issue, supposing no proof to be offered on either side, has on him, whether he be plaintiff or defendant, the burden of proof which he must satisfactorily sustain." 1 Whart. Ev. § 357; see 14 M. & W. 95; 5 Cra. C. C. 298; 119 Mass. 469; 47 Pa. 476; 62 N. Y. 448; 33 Miss. 292; 39 Wis. 520; 69 Ill. 423; 52 Mo. 390; 123 U. S. 317; article in 25 Alb. L. Jour. 124; BURDEN OF PROOF; Tayl. Ev. § 365.

**NEGATIVE AVERMENT. In Pleading.** An averment in some of the pleadings in a case in which a negative is asserted.

**NEGATIVE CONDITION.** One where the thing which is the subject of it must not happen. 1 Bouvier, Inst. n. 751. See POSITIVE CONDITION.

**NEGATIVE COVENANT.** See COVENANT.

**NEGATIVE EASEMENT.** See EASEMENT.

**NEGATIVE PREGNANT. In Pleading.** Such a form of negative expression as may imply or carry within it an affirmative. 134 Ind. 46.

Thus, where a defendant pleaded a license from the plaintiff's daughter, and the plaintiff rejoined that he did not enter by her license, the rejoinder was objected to successfully as a negative pregnant; Cro. Jac. 87. The fault here lies in the ambiguity of the rejoinder, since it does not appear whether the plaintiff denies that the license was given or that the defendant entered by the license; Steph. Pl. 381.

This ambiguity constitutes the fault; Hob. 295; which, however, does not appear to be of much account in modern pleading; Com. Dig. *Pleader* (R 6); Gould, Pl. c. 6, § 36.

A special denial in the words of the allegation denied is a mere negative pregnant and a motion to make more definite and certain will lie; 60 Hun 582. A mere denial in the language of the complaint, that a partial payment was made on a specified day, is an admission that the payment was made on some other day; 81 Wis. 581.

**NEGATIVE STATUTE.** One which is enacted in negative terms, and which so controls the common law that it has no force in opposition to the statute. Bac. Abr. *Statutes* (G); Brook, Abr. *Parliament*, pl. 72; Bish. Writ. L. § 153.

**NEGGILDARE.** To claim kindred. Jac. L. Dict.

**NEGLECT.** To omit, as to neglect business, or payment, or duty, or work. It does not generally imply carelessness or imprudence, but simply an omission to do or perform some work, duty, or act. 54 N. Y. 262. See NEGLIGENCE.

**NEGLIGENCE.** The omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or the doing something which a prudent and reasonable man would not do. 11 Ex. 784. See Webb, Poll. Torts 537; 4 Ind. App. 515. The standard is not that of a particular man, but of the average prudent man; 3 Bing. N. C. 468.

The failure to observe, for the protection of the interests of another person, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury. Cooley, Torts 630; 91 Cal. 296.

The absence of care according to circumstances. See 78 Pa. 219; 46 Tex. 356; 9 W. Va. 252.

Such an omission by a reasonable person, to use that degree of care, diligence, and skill which it was his legal duty to use for the protection of another person from injury as, in a natural and continuous sequence, causes unintended injury to the latter. 25 Fla. 1.

The failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or the doing what such a person under the existing circumstances would not have done. 95 U. S. 441. See 82 Wis. 408.

Negligence, in its civil relation, is such an inadvertent imperfection, by a responsible human agent, in the discharge of a legal duty, as immediately produces, in an ordinary and natural sequence, a damage to another. Whart. Negl. § 3. It is con-

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ceded by all the authorities that the standard by which to determine whether a person has been guilty of negligence is the conduct of the prudent or careful or diligent man. Bigelow, Torts 261; 72 Tex. 592; 85 Ky. 423; 129 Ill. 335; 85 Tenn. 465. See 116 Mo. 450.

It is synonymous with, or about equivalent to, common prudence. 79 Ga. 44.

The opposite of care and prudence, the omission to use the means reasonably necessary to avoid injury to others. 39 Ill. 353. Opposed to diligence or carefulness. 95 Cal. 279.

The result of a failure to perform a duty. 109 Mo. 187; 33 Neb. 802. It implies a duty as well as its breach, and the fact can never be found in the absence of a duty; 55 Ark. 428.

When a contract creates a duty, the neglect to perform that duty, as well as the negligent performance of it, is a ground of action for tort. Hence it is at the election of the party injured to sue either on the contract or on the tort; Whart. Negl. § 435; 4 Gray 485; 24 Conn. 392; but there must be privity of contract between the parties, therefore an attorney who made a mistake in drawing a will is not liable to a person who, by the mistake, is deprived of a gift intended for him by the testator; 110 Cal. 339.

It is said that liability for negligence depends on the probability of the consequences, *i. e.* its capability of being foreseen by a reasonable man; Poll. Torts 37.

A person is expected to anticipate and guard against all reasonable consequences, but not against that which no reasonable man would expect to occur. See 5 Ex. 248. Some cases have gone to the extent of maintaining an action in tort even where no attempt has been made to perform a contract; 13 Ired. 39; 11 Cl. & F. 1.

It is said not to be essential to constitute negligence that the damage caused might reasonably have been expected from the negligent act; Whart. Negl. § 16. Thus Gray, C. J., says, in 107 Mass. 494: "A man who negligently sets fire on his own land and keeps it negligently, is liable to an action at common law for any injury done by the spreading or communication of the fire directly from his own land to the property of another, whether through the air or along the ground, and whether he might or might not have reasonably anticipated the particular manner in which it was communicated." And in L. R. 6 C. P. 14, where a railway company left a pile of rubbish in hot weather by the side of their track, and the pile was ignited by sparks from an engine, and the fire crossed a field and burned the plaintiff's cottage, Channell, B., said: "When there is no direct evidence of negligence, the question what a reasonable man might foresee is of importance in considering the question whether there is evidence for the jury of negligence or not, . . . but when it has been once determined that there has been evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not."

Where a person unlawfully injures another, he is liable in damages, without regard to the intention with which the act was done; 32 N. J. L. 554; 44 N. H. 211; and good faith does not excuse negligence; 32 Vt. 652; 3 Sneed 677. As to the right of action for negligence resulting in the death of the injured person, see ACTIO PERSONALIS MORITUR CUM PERSONA.

The damage caused must arise from inadvertence. If it be intentional, a suit for negligence will not lie; the remedy is in trespass and not case.

One negligent person cannot escape liability for his negligence because the negligence of another concurred in producing the injury; 119 Ind. 583.

*Proof of negligence.* The first requisite for the plaintiff is to show the existence of the duty which he alleges has not been performed, and then he must show a failure to observe this duty; that is, he must establish negligence on the defendant's part. This is an affirmative fact, the presumption always being, until the contrary appears, that every man will perform his duty; Cooley, Torts 659. It is not sufficient for the plaintiff to prove a state of facts consistent with the accident having been caused either by the negligence of the defendant or by that of the person injured. He must prove that it was caused by the defendant; 12 App. Cas. 41. In many cases evidence of the injury done makes out a *prima facie* case of negligence on the defendant's part; for instance, when a bailee returns in an injured condition an article loaned to him, or when a passenger on a railway train is injured without fault on his part.

As a general rule this liability cannot be avoided by stipulation; thus, a common carrier will not be permitted to contract for immunity from the results of its own negligence or that of its agents; 4 Ohio St. 362; 114 Pa. 523; 111 N. C. 482; 94 Ind. 281; 34 Ga. 315; 90 Tenn. 17; 2 Hill N. Y. 623; 101 Mo. 631; 84 Ill. 239; 14 Bush 590; 89 Ala. 294; 3 Col. 280; 41 Conn. 333; 4 Sandf. 136; 102 Mass. 552; 26 Gratt. 328; 3 Kan. 205; 69 Miss. 191; 9 Ir. R. C. L. 20; 75 Tex. 300; 4 Ben. 271; this may be considered as the rule generally followed in this country, in which the leading case is Railroad Co. *v.* Lockwood, 17 Wall. 357, where the authorities are collected by Bradley, J. In England, however, the courts seem to find no conclusive objection to sustaining such contracts when specially made; L. R. 10 Q. B. 212; 5 East 438; 23 U. C. Q. B. 600; and in New York, though the contracts are upheld, it is only when expressed in clear and specific language and not by mere general words in the usual printed bills of lading or receipts: 1 Jones & S. 423; 19 *id.* 196, following 56 N. Y. 168; 71 *id.* 180. So the liability may be limited in consideration of a reduced rate of transportation; 86 Va. 481; L. R. 8 H. L. 703; L. R. 10 Q. B. D. 250; 18 C. B. 805;

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29 L. J. Ex. 441; or by special contract, for all negligence except gross; 42 Ill. App. 322. Such a contract, made in New York, was enforced in an action in Pennsylvania according to the law of New York; 128 Pa. 217. See 35 A. & E. R. Cas. 672; COMMON CARRIERS; FLAG.

By an act of February 13, 1893 (Harter Act), common carriers by land or sea cannot exempt themselves from responsibility for loss or damage arising from the negligence of their own servants, and any stipulation for such exemption is contrary to public policy and void. The Harter Act (*q. v.*) provides that if the owner of a vessel transporting merchandise to or from any port in the United States shall exercise due diligence to make the said vessel in all respects seaworthy, when properly manned, etc., neither the vessel, or her owner or charterer, shall be liable for errors in navigation or in the management of the vessel. In England, except so far as controlled by the railway and canal traffic act of 1854, carriers can exempt themselves from responsibility for loss occasioned by the negligence of servants; 42 Ch. D. 321; 168 U. S. 116.

Taking precaution after an accident against the future is not to be construed as an admission of responsibility for the past; 20 U. S. App. 326; so a subsequent alteration or repair of the machine which caused an injury is not evidence of negligence in its original construction; 144 U. S. 202.

There is a rule exempting public charitable corporations from liability for negligence, but the Young Men's Christian Association is not within the rule; 165 Mass. 280.

*Law or fact.* It is generally said that the question of negligence is a mixed question of law and fact, to be decided by the court when the facts are undisputed or conclusively proved, but not to be withdrawn from the jury when the facts are disputed, and the evidence is conflicting; Whart. Negl. § 420; 134 Ind. 269; see 17 R. I. 658; 36 W. Va. 329. In the great majority of cases the question is left to the jury to determine whether the defendant's conduct was reasonable under the circumstances. When a well-recognized legal duty rested upon the plaintiff, it is usual for the court to define this duty to the jury, and leave to it the question as to whether the plaintiff fulfilled this duty. More recently the courts have drawn a distinction between what is evidence of negligence for the jury and what is negligence *per se*, and therefore a question of law for the court, and the tendency has been rather to increase the number of cases in which the question of negligence is passed upon by the court. In Pennsylvania, when the standard of duty is defined by law, and is the same under all circumstances, and when there has been such an obvious disregard of duty and safety as amounts to misconduct, the courts have withdrawn the case from the consideration of the jury. It is said to be clear, by most of the authorities, that when the facts are found, and it is perfectly manifest that a prudent man would or would not do as the defendant has done, the court may rule accordingly, or rather, may direct the jury to find accordingly. The same is also true when the law has prescribed the nature of the duty, and also when there exists a well-known practice in the community, of a proper character. In other cases, the inference concerning negligence is left to the jury; Bigelow, Torts 263; 35 W. Va. 389. See Bigelow, L. C. Torts 589. When the evidence is conflicting, the court should instruct the jury that there would or would not be negligence, accordingly as they might find the facts; 110 N. C. 58.

"When the circumstances of a case are such that the standard of duty is fixed, when the measure of duty is defined by law and is the same under all circumstances, its omission is negligence and may be so declared by the court. But it is said that when the negligence is clearly defined and palpable, such that no verdict of a jury could make it otherwise, or when there is no controversy as to the facts, and from these it clearly appears what course a person of ordinary prudence would pursue under the circumstances, the question of negligence is purely one of law." 2 Thomp. Negl. 1236.

"As a general rule, a question whether a party has been guilty of negligence or not, is one of fact, not of law. Where, however, the plaintiff brings action for a negligent injury, and the action of the two parties must have concurred to produce it, it devolves upon him to show that he was not himself guilty of negligence; and if he gives no evidence to establish that fact, the court may properly instruct the jury that they should return a verdict for defendant. Where, however, the question of negligence depends upon a disputed state of facts, or when the facts, though not disputed, are such that different minds might honestly draw different conclusions from them, the court cannot give such positive instructions, but must leave the jury to draw their own conclusions upon the facts, and upon the question of negligence depending upon them. To warrant the court in any case in instructing the jury that the plaintiff was guilty of negligence, the case must be a very clear one against him, and one which would warrant no other inference." Per Cooley, C. J., in 17 Mich. 99.

It is true, in many cases, that when the facts are undisputed, the effect of them is for the judgment of the court. That is true in that class of cases when the existence of such facts comes in question, rather than when deductions or inferences are to be made from the facts (and see 25 Kan. 391). In some cases, too, the necessary inference from the proof is so certain that it may be ruled as a question of law. Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used; another man, equally sensible, equally impartial, would infer that proper care had

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been used. It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and of little education, men of learning and men whose learning consists in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experiences of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given, it is the final effort of the law to obtain; 17 Wall. 663. Although the facts are undisputed, it is for the jury and not for the judge to determine whether proper care was given or whether they established negligence; 73 Ind. 261; 34 N. E. Rep. (Ind.) 613; 48 Neb. 563.

The terms "ordinary care," "reasonable prudence," and such like terms have a relative significance, and cannot be arbitrarily defined; and, when the facts are such that reasonable men differ as to whether there was negligence, the determination of the matter is for the jury; 144 U. S. 408; as it is in all cases where the inference from the facts is not so plain as to make it a legal conclusion that there was negligence; 163 *id.* 93; and it is only where they would draw the same conclusion that it is a question of law for the court; *id.* 353; 23 U. S. App. 1; 65 Fed. Rep. 181; and a decision of the trial judge on the question is subject to review; *id.*

Whether a railroad company should erect guards at its car windows is a question for the jury; 13 U. S. App. 655; so also where a workman, returning from his work on the train and being ordered by the conductor to jump off at a station when the train was moving about four miles an hour and where the platform was about a foot lower than the car step, jumped and was seriously injured, the question of contributory negligence was for the jury; 163 U. S. 93.

It is said that a presumption of negligence arises from the occurrence of an accident in the course of a business, which may, according to expert testimony, be safely carried on if conducted with due care; 107 Cal. 549.

See 13 Am. L. Reg. N. S. 284, where the subject is fully treated and the earlier decisions collected by states.

In the absence of a contract between the parties, the burden of proof of negligence is on the plaintiff, and if the "evidence is equally consistent with the existence or non-existence of negligence, it is not competent to the judge to leave the matter to the jury;" 11 C. B. N. S. 588; but the rule of the burden of proof is modified when there is a relation of contract between the parties; Poll. Torts 416; as in cases of common-carriers, or where the thing which was the cause of the mischief was "under the management of the defendant or his servants, and the accident was such as in the ordinary course of things does not happen, if those who have the management use proper care;" 3 H. & C. 596.

In actions for negligence the English rule is said to be that the "judge has to say whether any facts have been established from which negligence *may be* reasonably inferred; the jurors have to say whether, from those facts, negligence *ought to be* inferred;" 3 App. Cas. 197; or better, whether, as reasonable men, they *do* infer it; Poll. Torts 420.

*Contributory negligence.* If the evidence shows that the plaintiff himself was guilty of negligence contributing to the injury, there can be no recovery; Beach, Contrib. Neg. 14. The distinction, however, must be drawn between condition and causes, between *causa causans* and *causa sine qua non*. The question must always be considered whether the act of the plaintiff had a natural tendency to expose him directly to the danger which resulted in the injury complained of. If it had not, the plaintiff's negligence is not considered in law as contributing to the injury. Thus, when the defendant was driving carelessly along the highway, and ran into and injured the plaintiff's donkey, which was straying improperly on the highway with his fore feet fettered, it was held that the plaintiff's negligence had not contributed to the accident; 10 M. & W. 546. It has also been held that if the plaintiff could by the exercise of reasonable care, at or just before the happening of the injury to him, have avoided the same, he cannot recover; 5 C. B. N. S. 573; 75 Mich. 557; 126 Ill. 381. One who sees or could have seen if he had looked, and has the faculties to understand the dangers to which he is exposed, is charged with a knowledge of them; and his failure to act on the knowledge as a prudent and cautious man would act under like circumstances, is negligence which, notwithstanding the negligence of the defendant, will defeat a recovery; 73 Cal. 137. And when it appears that the plaintiff, by the defendant's misconduct, became frightened, and in endeavoring to escape the consequence of the defendant's misconduct, rushed into danger and was injured, the plaintiff's conduct does not contribute to the injury; 56 N. Y. 585. If, through the defendant's negligence, the injured person is placed in a position of peril and confronted with sudden danger, the law does not require him to exercise the same degree of care and caution that it does of a person who has ample opportunities for the full exercise of his judgment; 143 Ill. 409; 155 Pa. 279. See 152 U. S. 262. It is a general principle that one who invites another upon his premises is bound to exercise more than ordinary care towards him. If the person giving the invitation is alone benefitted he is responsible for even the slightest negligence. So a storekeeper, who either expressly or impliedly invites the public to enter his place of business for the purpose of trading must exercise a high degree of care to keep his premises in a safe condition, and where such person is acci-



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dentally injured the shopkeeper is liable in the absence of negligence on the part of the person injured; 80 Cal. 574; 26 Neb. 118; 82 Mich. 1; 27 Ill. App. 391; 82 Ia. 652; 48 N. Y. 1046; 84 Ala. 186; 134 Pa. 203; so letter-carriers have an implied invitation to enter certain buildings for the purpose of placing mail in boxes; 152 Mass. 513; 52 N. Y. 601; and an employe and contractor for the construction of a building is not a trespasser and may maintain an action for injuries; 58 Hun 610; 12 N. Y. 482. See Webb, Elevators. A person invited to come upon a ship for the purpose of business is entitled to be protected by the exercise of such care and prudence as would render the premises reasonably safe; 8 U. S. App. 129; and one who, while riding in a private carriage of another at his invitation, is injured by the negligence of a third party, may recover against the latter, notwithstanding the negligence of the driver of the carriage may have contributed to the injury; 4 U. S. App. 542. But the owner of land and of buildings is not liable to one who is on his premises as a mere licensee. As one who enters on premises by permission only, without any inducement being held out to him by the occupant, cannot recover for injuries caused by obstructions or pitfalls; 143 Ill. 182; unless it was unlawful to erect the machine or contrivance, or the injury was wilful and wanton; the wilfulness will be presumed from gross negligence; 70 Tex. 400; 23 N. Y. 548; where an elevator is out of order or is intended for freight only and not for passengers, and notice of such fact is duly posted, one who has a reasonable opportunity for seeing and reading such posted notice assumes the risk of venturing on or near such elevator; 137 Ind. 15; 58 Hun 60; 148 Mass. 95; 156 *id.* 511. There is an ambiguity in the use of the word license in decisions relating to negligence. It is sometimes used for sufferance of a trespass; L. R. 1 C. P. 274; sometimes equivalent to invitation; 4 C. B. N. S. 563, 567. See, also, 2 C. P. D. 310. When the defendant might, by proper care, have avoided the consequences of the plaintiff's negligence, the plaintiff may still recover; 85 N. C. 512; 144 U. S. 408; 139 *id.* 551. See 70 Tex. 602. Contributory negligence has been held to be no defence where defendant's negligence was reckless or wanton; 39 Kan. 531. See 111 N. C. 80.

Contributory negligence is a good defence to an action for damages for a personal injury; and it is immaterial to what extent it is proven, provided it contributed to the injury; 8 Houst. 185; 29 W. Va. 98; in order to bar a recovery, the contributory negligence must have been a proximate cause of the injury; 97 N. C. 11; 100 *id.* 230; 84 Va. 498; 17 Nev. 245.

In some cases it has been held that the plaintiff must show affirmatively that he was in the exercise of due care, when the injury happened; 83 Ill. 354; 19 Conn. 566; 78 N. Y. 480; 101 Mass. 455; 3 Misc. Rep. 224; 43 Ill. App. 534; 84 Me. 334; 24 U. S. App. 326. This is frequently termed the Illinois rule. Probably the proof need not be direct, but may be inferred from the circumstances of the case; 104 Mass. 137; 2 Thomp. Negl. 1178, n. In other states, contributory negligence is a matter of defence, the burden of proving which is on the defendant; 66 Pa. 30; 85 *id.* 275; 22 Minn. 152; 65 Mo. 34; 35 Ohio St. 627; 3 Mo. App. 565; 50 Cal. 70; 11 W. Va. 14; 43 Wis. 513; 95 Ala. 397; 88 Ga. 599; 6 U. S. App. 381; 147 U. S. 571; 151 *id.* 73; 157 Pa. 593; 28 Am. Rep. 558, where the cases are discussed. But even in these courts, if the plaintiff's own showing disclose contributory negligence, he cannot recover. The rule that a plaintiff cannot recover, if himself guilty of contributory negligence, applies where the party inflicting the injury is not guilty of negligence indulged in after the position of the injured party was discovered, or, by the exercise then of reasonable care, could have been discovered; 23 U. S. App. 443.

The fact that the plaintiff lived in his home near a powder magazine, with knowledge of the danger, does not constitute contributory negligence; 12 U. S. App. 665.

The burden of showing contributory negligence is on the defendant; 24 U. S. App. 176; 147 U. S. 571. It has been said that the true rule is that the onus of proving contributory negligence rests in the first instance on the defendant, although the plaintiff may disclose upon his own case such evidence of it as to relieve the defendant of that primary obligation and shift on to the plaintiff the onus of displacing the effect of his own evidence; 12 Q. B. D. 71.

If the plaintiff, by ordinary care, could have avoided the effect of the negligence of the defendant, he is guilty of contributory negligence, no matter how careless the defendant may have been at the last or any preceding stage; Tuff *v.* Warman, 2 C. B. N. S. 740. "The true ground of contributory negligence being a bar is that it is the proximate cause (or 'decisive' cause) of the mischief; and negligence on the plaintiff's part, which is only part of the inducing cause (*i. e.* a 'condition,' not a 'cause'; Whart. Negligence) will not disable him"; Poll. Torts 434; and it "would seem that a person who has by his own act or default deprived himself of ordinary ability to avoid the consequences of another's negligence, can be in no better position than if, having such ability, he had failed to avoid them; unless, indeed, the other has notice of his inability in time to use care appropriate to the emergency; in which case the failure to use that care is the decisive negligence." Poll. Torts 434.

No one is bound to anticipate that others will be guilty of negligence. See L. R. 5 H. L. 45.

Where one is in danger through fault of another and chooses between two methods of escape, he is not negligent if he chooses that which, otherwise, would not be prudent; 12 Q. B. 439. See, further, 15 Wall.

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401; 41 Wis. 105; 44 N. Y. 465; 28 Am. Rep. 563, n.; 20 Alb. L. J. 304, 359.

The question of contributory negligence is one of fact for the jury, under proper instructions, and is not one of law for the court; 9 Utah 141; 144 U. S. 408; 71 Hun 526; 44 Ill. App. 418; 6 Ind. App. 390. Where the evidence of contributory negligence is not of such a conclusive character as would warrant the court in setting aside a verdict, the question should be left to the jury; 147 U. S. 571.

*Comparative negligence.* In Illinois a rule of comparative negligence has been laid down. If, on comparing the negligence of the plaintiff with that of the defendant, or the negligence of the person injured with that of the person inflicting the injury, the former is found to have been slight and the latter gross, the plaintiff may recover. See 20 Ill. 478; 83 *id.* 405; 95 *id.* 25. In 36 Ill. 409, it was said: "The rule of this court is that negligence is relative, and that the plaintiff, although guilty of negligence which may have contributed to the injury, may hold the defendant liable if he has been guilty of a higher degree of negligence, amounting to wilful injury. The fact that the plaintiff is guilty of slight negligence does not absolve the defendant from the use of care and the use of reasonable efforts to avoid the injury." It has also been held that the negligence of the plaintiff must be but slight, and that of the defendant gross in comparison; and both of these terms, "gross" and "slight," or their equivalents, should be used in every instruction to a jury on the subject. "Want of ordinary care is not equivalent to gross negligence;" 8 Bradw. 133; a mere preponderance of negligence against the defendant will not make him liable; 96 Ill. 42. The doctrine of comparative negligence has no application unless the person injured observed ordinary care for his safety with reference to the particular circumstances involved; 44 Ill. App. 56.

This doctrine has been adopted to a certain extent in Kansas; 14 Kan. 37; and perhaps in Georgia. See 30 Fla. 1; 35 W. Va. 389; 87 Mich. 400.

In admiralty, where both ships are in fault, the damages are equally divided; Marsden, Coll. ch. 6; this rule is preserved by the Judicature Act in the Admiralty Division. See 2 L. Quart. R. 357; 13 *id.* 17; COLLISION; Report, Int. Law Asso. 1895.

*Imputed negligence.* In cases of actions brought by infants of tender years for damages caused by the defendant's negligence, it has sometimes been held that the negligence of the parent or guardian of the infant, in permitting it to become exposed to danger, is to be imputed to the infant so as to bar its right of action. This rule was laid down in Hartfield *v.* Roper, 21 Wend. 615. The doctrine has been much discussed, and this case has been followed, sometimes with modification. See 104 Mass. 53; 88 Ill. 441; 28 Ind. 287; 2 Neb. 319; 52 Cal. 602; 83 Ala. 371; 78 Hun 248; but in other states, especially Pennsylvania (57 Pa. 187; 81 *id.* 19), its doctrine has been denied; 22 Vt. 213; 59 Tex. 64; 78 Ia. 598; 64 Mich. 514; 16 Neb. 139; 36 Mo. 489; 23 Vroom 446; 142 Mass. 301. The weight of authority is against the New York rule; 30 Ohio St. 451; 19 S. E. Rep. (N. C.) 730; 26 S. W. Rep. (Tex.) 446. But see L. R. 1 Ex. 239. See, as to injuries to infants, 31 Am. Rep. 206; 14 Cent. L. J. 282. See 15 N. J. L. J. 262.

A child of such tender years as to be incapable of exercising any judgment or discretion is not chargeable with contributory negligence; but where he has attained such an age as to be capable of exercising judgment and discretion, he is held to such a degree of care as might be reasonably expected of one of his age and mental capacity; 39 Minn. 164; 46 Ohio St. 283; 70 Tex. 530; 83 Ala. 371; 81 Ga. 397; 39 Kan. 531; 129 Ill. 91.

At what age an infant's responsibility for negligence is presumed to begin is a question of law for the court; 20 N. Y. S. 262.

The negligence of a gripman on a cable car in running across the crossing of another road undergoing repairs, at an excessive rate of speed, is imputable to the conductor of such car in control of such gripman, and will prevent him recovering for injuries sustained by reason of such negligence; 53 Mo. App. 276.

A vessel colliding with an obstruction to navigation cannot be charged with the negligence of a tug acting as an independent contractor in towing her, and wholly controlling her movements; 63 Fed. Rep. 626.

In England, where a passenger has been injured by concurrent negligence of his own carrier and a third party, it was formerly held that the carrier's negligence was imputed to the passenger and barred his recovery; Thorogood *v.* Bryan, 8 C. B. 115. But the doctrine has been overruled in 13 App. Cas. 1. It was rejected in 47 N. J. L. 161; 19 N. Y. 341; 36 Ohio St. 86; 105 Ill. 364; and, after a review of the authorities, in 116 U. S. 366. It was followed in 39 Ia. 523; 105 Mass. 77; 43 Wis. 513.

The negligence of a husband cannot be imputed to his wife, who was riding with him over a defective highway, unless it be shown that he was at that time under her control and direction; 48 Pac. Rep. (Kan.) 134. Such is the weight of the authorities; 36 Fed. Rep. 164; 111 N. Y. 199. There are cases to the contrary; 50 Conn. 379; 46 Ill. 402; 60 Ia. 429; 62 Tex. 344.

**NEGLIGENT ESCAPE.** The omission on the part of a gaoler to take such care of a prisoner as he is bound to take, when in consequence thereof the prisoner departs from his confinement without the knowledge or consent of the gaoler, and eludes pursuit.

For a negligent escape, the sheriff or keeper of the prison is liable to punish-

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ment, in a criminal case; and in a civil case he is liable to an action for damages at the suit of the plaintiff. In both cases the prisoner may be retaken; 3 Bla. Com. 415. See ESCAPE.

**NEGOTIABLE. In Mercantile Law.** A term applied to a contract, the right of action on which is capable of being transferred by indorsement (of which delivery is an essential part), in case the undertaking is to A or his order, A or his agent, and the like, or by delivery alone, in case the undertaking is to A or bearer,—the assignee in either case having a right to sue in his own name.

That which is capable of being transferred, by assignment, indorsement, or by delivery. 148 Pa. 583.

At common law, *choses in action* were not assignable; but exceptions to this rule have grown up by mercantile usage as to some classes of simple contracts, and others have been introduced by statute, so that now bills of exchange, promissory notes, and bank-notes, to order or bearer, are universally negotiable; and notes not to order or bearer have become *quasi* negotiable; that is, an indorsement will give a right of action in the name of the assignor; and in some states, by statute, bonds and other specialties are assignable by indorsement.

**NEGOTIABLE INSTRUMENTS.** Besides notes, bills, and checks, the following have been held to be negotiable instruments: exchequer bills; 4 B.& Ald. 1; 12 Cl. & F. 787, 805; state and municipal bonds; 3 B. & C. 45; 96 U. S. 51; 3 Wall. 327; 113 U. S. 135; corporate bonds; L. R. 3 Ch. App. 758, 154; L. R. 11 Eq. 478; 21 How. 575; [1892] 3 Ch. 527; coupon bonds of an individual; 6 Ben. 175; coupon bonds of a corporation; 9 Wall. 477; 14 *id.* 282; 20 *id.* 583; 66 N. Y. 14; 44 Pa. 63 (the question has been whether such coupons are negotiable apart from the bonds to which they were formerly attached, and the decisions establish their negotiability; 102 Mass. 503); government scrip; L. R. 10 Ex. 337; U. S. treasury notes; 21 Wall. 138; 57 N. Y. 573; post-office orders; 65 Law Times 52; certificates of deposit; 13 How. 218; Pars. Bills 1, 2, 26; 34 Neb. 71; 40 *id.* 484. The following have been held not to be negotiable: lottery tickets; 8 Q. B. 134; dividend warrants; 9 Q. B. 396; iron scrip notes; 3 Macq. 1; debentures, on which authorities differ; L. R. 8 Q. B. 374; pass-book of savings bank; 60 Conn. 300; a treasury warrant not presented for three years, the amount having been covered back into the treasury; 27 Ct. Cls. 177.

In some of the states statutes have been enacted in regard to the nature and operation of bills of lading and warehouse receipts, but the statutes and interpretations of them lack uniformity. Warehouse receipts, bills of lading; 14 M. & W. 403; 44 Md. 11; 115 Mass. 224; 12 Barb. 310; 101 U. S. 559; letters of credit; 2 How. 249; 40 Tex. 306; 10 Pet. 482; 22 Pick. 228; 1 Macq. H. L. C. 513; certificates of stock; 28 N. Y. 600, 604; 86 Pa. 80; 74 N. Y. 226 (but see 53 N. W. Rep. (Ia.) 291); county warrants are negotiable, transferable, or assignable; but not in the sense of the law merchant; 103 U. S. 74.

The weight of authority is in favor of the negotiability of instruments payable to bearer; 14 Conn. 362; [1891] 1 Ch. 270.

An instrument in the form of a promissory note drawn by a corporation, and bearing its seal, is not a promissory note negotiable by the law merchant; per Blatchford, J., in 8 Fed. Rep. 534.

Any addition to the form of a note which destroys its essential quality of a promise to pay, "simple, certain, unconditional, not subject to any contingency," will destroy its negotiable character; 84 Pa. 409. Thus, the addition of the words, "given as collateral security with agreement;" 127 Mass. 293: "a warrant to confess judgment;" 77 Pa. 131; "in facilities;" 14 Mass. 322; "foreign bills;" 4 *id.* 245; "and it is the understanding it will be renewed at maturity;" 126 Pa. 195; "return notice ticket with this order," and "deposit book must be at bank before money can be paid;" 139 Pa. 53; "with exchange" in varying forms with respect to place; 28 Fed. Rep. 865; 38 *id.* 283; 23 U. C. C. P. 503; 4 N. Dak. 30; 15 Ind. App. 563; *contra*, 39 Mich. 137; 55 N.W. Rep. (Minn.) 988; 3 N. M. 45; 4 Biss. 473; with counsel fees, expenses of collection, or other words to the same effect; 84 N. C. 27; 63 Mo. 35; 14 Fed. Rep. 705; 37 *id.* 708; 60 Wis. 206; *contra*, 32 Ia. 184; 31 Fed. Rep. 649; 16 *id.* 89; 2 *id.* 44; 18 Kan. 432.

A note containing a tax clause is not negotiable; 35 L. R. A. 537; 110 N. Y. 469; nor is one given for rent and subject to set-off for repairs; 40 S. W. Rep. (Tex.) 1010.

Contracts are not necessarily negotiable because by their terms they inure to the benefit of the bearer. Hence, a receipt acknowledging that a person has received from another named so many shares of stock in a specified corporation, entitling the bearer to so many dollars in certain bonds to be issued, is not free in the hands of a transferee from equities which would have affected it in the hands of the original recipient; 7 Wall. 392.

Indorsements of payment on the back of a promissory note before delivery do not destroy negotiability; 182 Pa. 24.

The rule in Illinois that a negotiable note, secured by a mortgage, transferred to a *bona fide* holder before maturity, is held subject to all equities between the original parties, is not binding on the federal courts, which hold in such cases that in a suit in equity brought to foreclose the mortgage, no other defences are allowed against it than would be allowed in an action at law to recover on the notes; 31 Fed. Rep. 858. Coupons attached to a railroad bond and payable to bearer, when detached and negotiated, are no longer incidents of the bond, but independent negotiable instruments; 34 Fla. 424. See COUPONS.

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"By the decisive weight of authority in this country where negotiable paper has been put in circulation, and there is no infirmity or defence between the antecedent parties thereto, a purchaser of such securities is entitled to recover thereon, as against the maker, the whole amount, irrespective of what he may have paid therefor." 149 U. S. 327. See 107 Mass. 552; 25 Wis. 544; 33 Ia. 140.

A negotiable instrument act, codifying the law on the subject, went into effect in New York, October 1, 1897. It has also been enacted by Connecticut, Colorado, Maryland, Massachusetts, Virginia, and Florida. One of the most important changes is in the rule of Coddington *v.* Bay, 5 Johns. Ch. 54, and provides that an antecedent indebtedness is a valuable consideration.

As to the early history of negotiable instruments, see 9 Law Quart. Rev. 70.

See, generally, Dos Passos, Stock Brokers; 7 Harv. L. Rev. 1; Daniel, Negotiable Instruments; PROMISSORY NOTES; BILLS OF EXCHANGE: BOND; COUPONS.

**NEGOTIATE.** The power to negotiate a bill or note is the power to indorse and deliver it to another, so that the right of action thereon shall pass to the indorser or holder. 42 Md. 581. See 69 N. Y. 386; 30 Minn. 408. A note transferred by delivery is negotiated: 49 Mo. App. 153. A national bank, under the power to negotiate evidences of debt, may exchange government bonds for registered bonds; 69 N. Y. 383.

**NEGOTIATION.** The deliberation which takes place between the parties touching a proposed agreement.

That which transpires in the negotiation makes no part of the agreement, unless introduced into it. It is a general rule that no evidence can be given to add to, diminish, contradict, or alter a written instrument; Leake, Contr. 26; 1 Dall. 426: 3 S. & R. 609. But this rule has been much modified, and parol evidence is now held admissible to contradict, vary, or even avoid a written instrument where it would not have been executed but for the oral stipulation, except in the case of negotiable paper: 90 Pa. 82. See EVIDENCE.

As to negotiations preceding a contract, see MERGER.

**In Mercantile Law.** The act by which a bill of exchange or promissory note is put into circulation by being passed by one of the original parties to another person.

The transfer of a bill or note in the form and manner prescribed by the law merchant, with the incidents and privileges annexed thereby, *i. e.*:—

The transferee can sue all parties to the instrument in his own name;

The consideration for the transfer is *prima facie* presumed;

The transferor can under certain conditions give a good title, although he has none himself;

The transferee can further negotiate the bill with the like privileges and incidents.

There are two modes of negotiation, viz.: by delivery and by indorsements. The former applies to bills, etc., payable to bearer; the latter to those payable to order. See Chalm. Dig. of Bills, etc. § 106; 1 Pars. Notes & B. 14; Byles, Bills 169.

Until an accommodation bill or note has been negotiated, there is no contract which can be enforced on the note; the contract, either express or implied, that the party accommodated will indemnify the other, is, till then, conditional; 2 M. & G. 911. See CONTRACT; MERGER.

**NEGOTIORUM GESTOR** (Lat.). **In Civil Law.** One who spontaneously, and without authority, undertakes to act for another, during his absence, in his affairs.

In cases of this sort, as he acts wholly without authority, there can, strictly speaking, be no contract; but the civil law raises a *quasi* mandate by implication for the benefit of the owner, in many such cases; Mackeldey, Civ. Law, § 460; 2 Kent 616, n.; Story, Bailm. §§ 82, 189.

**NEGRO.** A black man descended from the black race of Southern Africa; it has been held not to include a mulatto; 18 Ala. 726. See MIXED JURY; CIVIL RIGHTS; RAILROAD; MISCEGENATION.

**NEIF, NAIF, NATIVUS. In Old English Law.** A woman who was born a villein, or a bond-woman.

**NEIGHBORHOOD.** A surrounding or adjoining district. It depends upon no arbitrary rule of distance or topography. The neighborhood of a person will cover a larger space in a sparsely settled country than in a city; 116 Mo. 162. See 22 Ill. App. 179; 63 N. H. 246.

It is not synonymous with territory or district, but is a collective noun, with the suggestion of proximity, and refers to the units which make up its whole, as well as to the region which comprehends those units. A district or locality, especially when considered with relation to its inhabitants or their interests. 32 Pac. Rep. (Cal.) 803.

**NEMINE CONTRADICENTE** (usually abbreviated *nem. con.*). Words used to signify the unanimous consent of the house to which they are applied. In England, they are used in the house of commons; in the house of lords, the words used to convey the same idea are *nemine dissentiente.*

**NEPHEW.** The son of a brother or sister. Ambl. 514; 1 Jac. 207.

The Latin *nepos*, from which *nephew* is derived, was used in the civil law for nephew, but more properly for grandson; and we accordingly find *neveu*, the original form of nephew, in the sense of grandson. Britton, c. 119.

According to the civil law, a nephew is in the third degree of consanguinity; according to the common law, in the second; the latter is the rule of common law; 2

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Bla. Com. 206. But in this country the rule of the civil law is adopted ; 2 Hill. R. P. 194.

Nephews and nieces may be shown by circumstances to include grand-nephews and grand-nieces, and even a great-grand-niece ; 3 Barb. Ch. 466 ; 131 N. Y. 456 ; but in a bequest, would not include, without special mention, nephews and nieces by marriage ; 42 Pa. 25. See LEGACY.

**NEPOS** (Lat.). A grandson. See NEPHEW.

**NEPTIS** (Lat.). Granddaughter ; sometimes great-granddaughter. Calv. Lex. ; Vicat, Voc. Jur. ; Code 33. See LEGACY.

**NET.** Clear of all charges and deductions ; that which remains after the deduction of all charges or outlay, as net profit. 22 Wall. 148.

**NET BALANCE.** In commercial usage it means the balance of the proceeds after deducting the expenses incident to the sale. 71 Pa. 74.

**NET EARNINGS.** The excess of the gross earnings over the expenditures defrayed in producing them, aside from, and exclusive of, the expenditure of capital laid out in constructing and equipping the works themselves. 99 U. S. 420. See 27 Fed. Rep. 1 ; 10 Blatchf. 271 ; 22 Wall. 148 ; 110 U. S. 205 ; 25 S. W. Rep. (Ky.) 494.

**NET PROFITS.** This term does not mean what is made over the losses, expenses, and interest on the amount invested ; it includes simply the gain that accrues on the investment, after deducting the losses and expenses of the business. 50 Ga. 350. See 40 N. J. Eq. 114. See PROFITS.

**NETHER HOUSE OF PARLIAMENT.** The house of commons so called in the time of Henry VIII.

**NETHERLANDS, THE.** A monarchy of Europe.

The first constitution after its reconstruction as a kingdom was given in 1814. It has been revised, especially in 1848 and in 1887. It is a constitutional and hereditary monarchy.

*The executive power* consists of the Sovereign and the States-General. He has the command of the army and navy, the control of the colonies and the right to create nobles, etc. *The Council of State* of which the members are appointed by the Sovereign advises His Majesty. *The Cabinet Ministers* appointed by the Sovereign are responsible to the country. *The First Chamber of the States-General* consists of fifty members appointed by the Provincial States from the highest direct tax-payers. *The Second Chamber* consists of one hundred members elected by the male electors of the country. *The Provincial States*, elected by the male electors of the province, regulate the affairs of the province. *The Parish Corporations*, elected by the male electors of the parish, regulate the affairs of the parish. *Justice* is administered in the name of the Sovereign. *Religion* is free. *Taxes* are decreed by the law.

The judiciary consists of :

1. *The Court of the Canton*, of which there are one hundred and six, each having its judge, who decides without appeal all cases of civil or commercial nature in which the claim does not exceed fl. 50 ($20) ; and all criminal cases, subject to appeal, where the penalty does not exceed fl. 25 ($10). 2. The *Arrondissement* (or District) *Court*, of which there are twenty-three having from five to twenty-four judges each, and settling without appeal all civil and commercial cases in which the claim does not exceed fl. 400 ($160) ; all appeals from the Court of the Canton ; and in criminal matters where the penalty does not exceed fl. 150 ($60). 3. The *Court of Justice*, of which there are five having from nine to twelve judges each, decides all appeals in civil, commercial and criminal cases from the Arrondissement Court. 4. The *High Court of Justice*, which has fourteen to sixteen judges and decides all cases in which the Sovereign, or the Royal House, or the State are the defendants ; cases of appeal from the Courts of Justice ; all criminal cases in which high officials of the State are implicated ; and all cases outside the jurisdiction of the lower courts.

The Netherlands legislation is based on the French law as introduced by Napoleon, and the earlier provincial law, which is for the greater part of German origin.

**NEUTRAL PROPERTY.** Property which belongs to neutral owners, and is used, treated, and accompanied by proper *insignia* as such.

Where the insured party has property and commercial establishments and depositories in different countries, if the property and concern of any one are in, or belong to, a belligerent country, they will have the national character of such country though the national character of the owner may be that of a neutral ; 1 Phil. Ins. § 164 ; 5 W. Rob. 302 ; 1 Wheat. 159 ; 16 Johns. 128. The declaration of war by a nation subsequently to the time in reference to which the policy takes effect will, however, only affect ownership thereafter acquired or acts thereafter done ; 6 Cra. 274 ; 4 Mas. 256 ; 1 Johns. 192 ; 14 *id.* 308 ; 1 C. Rob. 107, 336 ; 6 *id.* 364 ; 3 Wheat. 245 ; 3 Gall. 274 ; 12 Mass. 246.

The description of the subject in a policy of insurance as neutral or belonging to neutrals, is, as in other cases, a warranty that the property is what it is described to be, and it must, accordingly, in order to comply with the warranty, not only belong to neutral owners at the time of making the insurance, but must continue to be so owned during the period for which it is insured, and must, so far as it depends upon the assured, be accompanied by the usual *insignia*, as such, and in all respects represented, managed, and used as such ; 1 Johns. 192 ; 1 Wash. C. C. 219; 6 Cra. 274 ; 4 Mas. 256 ; 1 C. Rob. 26, 336 ; 2 *id.* 133, 218.

**NEUTRALITY.** The state of a nation which takes no part between two or more other nations at war with each other.

"Strictly speaking, [neutrality] consists in abstinence from any participation in a public, private, or civil war, and in impartiality of conduct toward both parties, but the maintenance unbroken of peaceful relations betweeen two powers when the domestic peace of one of them is disturbed, is not neutrality in the sense in which the word is used when the disturbance has acquired such head as to have demanded the recognition of belligerency ; and, as mere matter of municipal administration, no nation can permit unauthorized acts of war within its territory in infraction of its sovereignty, while good faith towards friend-

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ly nations requires their prevention." 166 U. S. 52.

"The relation of neutrality will be found to consist in two principal circumstances: Entire abstinence from any participation in the war, and impartiality of conduct towards both belligerents." 3 Phill. Int. L. 225. They remain the common friends of the belligerents, favoring the arms of neither to the detriment of the other; 2 Halleck, Int. L., Baker's ed. 141.

A recent writer (Risley, Law of War) has classified the rights and duties of neutrals thus:—

A neutral state must *abstain* from the following acts:—

Furnishing either belligerent with troops, arms, warlike materials, ships of war, or money. Allowing passage of forces of either belligerent across its territory. Deciding in its courts upon the validity of captures made by either belligerent. Acquiring, during the war, any conquest made by either belligerent.

It must *restrain* the conduct of its subjects in the following respects:—

Pecuniary gifts or gratuitous loans to either belligerent. Enlistment within its jurisdiction in the forces of either belligerent.

It must *prevent* the following by all persons within its jurisdiction:—

The issue of commissions by persons acting for either belligerent within the jurisdiction. The fitting out of hostile expeditions on behalf of either belligerent. The use of its ports by the ships of either belligerent as a base of operations and supplies.

It must *suffer* certain interferences with the trade of its subjects by permitting both belligerents to exercise the following rights: To prevent carriage of contraband and breach of blockade; to capture enemy ships carrying neutral goods; and to exercise the right of search.

It has been said that there should be, on the part of a neutral state, not an impartiality of action, but of non-action; Massé, *Droit Com.* 199.

Where a neutral has bound itself, by previous treaty, to one belligerent, assistance under such treaty does not necessarily forfeit its neutral character; 2 Halleck, Int. L., Baker's ed. 142.

The recognition of the belligerency of insurgents relieves the parent state from all responsibility for damages for any irregularities committed against neutrals by the other belligerent, which claims could be enforced against the parent nation if the injuries were committed by insurgents.

Maritime warfare, with its incidents of blockade and the right of search, imposes heavy burdens and restrictions upon all commercial nations; in the view of international law it is the right of sovereigns alone; 25 Fed. Rep. 408.

The public ships of a neutral are inviolable; and so are its private ships, subject, however, to laws relating to a breach of blockade, contraband, and search. Neutral territory, including the sea for a distance of three miles from low-water mark, is inviolable. If a ship is captured in neutral waters, in violation of neutrality, the neutral power is bound to enforce its restoration or compensate the injured belligerent; and, in general, a neutral is bound to prevent and punish a violation of its rights as a neutral by either belligerent; Halleck, Int. L., Baker's ed. 143.

Where a United States war vessel captured a Confederate steamer in a neutral port of Brazil and brought it to a United States port, and it was there sunk by a collision, and the United States disavowed the action of its ship in making the capture, it was held that as the capture was unlawful, or had been disavowed by the government, it was as if it had never been made; 101 U. S. 37. A neutral may demand the return of a captured vessel and further redress. But where a neutral ship chooses to resist capture in neutral waters, its capture is not an offence against the neutral; Cobb, Int. L. Cas. 230.

Where neutral immunity is violated by illegal outfit and equipment, the offence is deposited after the termination of the voyage; 6 Wheat. 348. A neutral ship should, ordinarily, submit to capture and seek its remedies in the courts for damage; 1 Rob. 374.

It has been suggested that a belligerent who has begun an attack on another belligerent outside of neutral territory or water may continue the contest within the neutral waters and complete the capture; 5 C. Rob. 365; but on the other hand it is said that the inviolability of neutral territory should allow of no exceptions, and that property captured under such circumstances must be restored, though it actually belonged to the enemy; 5 C. Rob. 15; 3 Phill. Int. L. 386.

It belongs exclusively to the neutral government to raise the question of a capture made within neutral territory; 6 Wall. 266; the owner of the captured ship must assert his claim through his government; 1 Kent 121; an enemy cannot do so; 5 Wall. 517; but whenever a capture is made by a belligerent in violation of neutral rights, if the prize come voluntarily within the jurisdiction of the neutral, it should be restored to its original owner; 3 Phill. Int. L. 532; 6 Wheat. 385.

A public vessel of a belligerent may enter a neutral port to make such repairs or to take in such coal and provisions as may be necessary; but the ordinary rule is that it must not remain more than twenty-four hours, except in case of necessity.

A belligerent vessel may bring a prize into a neutral port and sell it there, with the consent of the neutral; 5 Mas. 77; and a neutral may permit a prize to be brought into its ports for repairs; 1 Op. A. G. 603; but neutrals may prohibit this and have often, by proclamation, done so; 2 Halleck, Int. L., Baker's ed. 148.

Where a neutral allows the right of passage through its territory to one belligerent, it must accord it to both; 3 Phill. Int.

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L. 183; 1 Kent *120; 21 *Rev. de Dr. Int.* 117. The troops of a belligerent cannot cross neutral territory, nor can even the wounded be taken across neutral territory, without the express permission of the neutral, which, in the case of the Franco-Prussian War of 1870, was refused by Belgium; nor can a neutral allow its ports and waters to be used as a base of operations or supplies, or as a point from which to watch the other belligerent. Rules are generally laid down by neutrals in each war to regulate these questions.

The subjects of neutral states are entitled to carry on, upon their own account, a trade with a belligerent; this doctrine is well settled; 3 Phill. Int. L. 300. But it was considered unlawful, under the common law, for an English subject to raise a loan to support the subjects of a foreign state at war with a government in alliance with his own; 3 Phill. Int. L. 247; yet it now appears to be the opinion that, although the neutral state cannot loan money, yet the individual citizens of a neutral state may, and such loans are not considered a violation of neutrality any more than the sales of arms and ammunition; Snow, Lect. Int. Law 119. But such loans to an insurgent state or colony have been considered unlawful; Risley, Law of War; 9 Moore, P. C. 586.

A neutral will not permit a belligerent's ship to coal in its ports except in case of necessity, and then only to the extent necessary to carry them to their nearest home port; and a belligerent vessel cannot take on coal again at any port of such neutral within three months.

It was formerly held that citizens of a neutral state may send armed vessels as well as munitions of war to a belligerent port for sale; 7 Wheat. 283; though they would be subject, of course, to capture as contraband. But this doctrine has been modified as between the United States and Great Britain by the treaty relating to the Alabama claims, by which those nations agreed that "A neutral state is bound: 1. To use due diligence to prevent the fitting out, arming, or equipping, etc., within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or carry on war against a power with which it is at peace, and also to use due diligence to prevent the departure from its jurisdiction of any vessel, etc., such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use." 2. "Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men." It is said that there is a growing consensus of nations in favor of some rule resembling these; Risley, Law of War 204.

A belligerent may capture certain articles as contraband of war when carried in neutral ships and having a hostile destination. This includes munitions of war. Other articles are of doubtful use, *ancipitis usus*, and may be contraband or not according to circumstances. There is no settled definition of contraband, nor any practice in regard to its exact limits. Provisions, money, or coal destined for the use of a belligerent army or fleet have been included within the term. Coal is declared contraband in the proclamation of President McKinley, April 26, 1898, and by the British government on the breaking out of the Hispano-American war. Where things are of doubtful use, that is, occasional contraband, they are not usually confiscated, but are bought by the captor at a fair price. This is called Pre-emption (*q. v.*), and usually applies to cargoes of provisions. See CONTRABAND; 1 Kent 138.

The question whether a belligerent may take the goods of its enemy, not contraband, which are being carried in a neutral ship, has been much discussed, and also whether innocent goods of a neutral can be transported in a belligerent's vessel without being confiscated when the vessel is captured. Formerly it was held that a belligerent might take enemy's goods from neutral custody, on the high seas. But the Declaration of Paris changed the rule of the nations, except the United States, Spain, and Venezuela, and a neutral flag now covers enemy's goods with the exception of contraband of war. This is a general rule of international law, although some treaties made by the United States have laid down a different rule; Snow, Int. Law 164; it was applied by the United States during the war of the Rebellion; 1 Kent 128; and adopted by it in the Hispano-American war of 1898.

By the Declaration of Paris (*q. v.*) the following principles were adopted:—The neutral flag covers enemy's goods, except contraband of war. Neutral goods, except contraband of war, are not liable to capture under an enemy's flag.

Neutral goods on an armed belligerent cruiser are not subject to capture, though there was resistance to capture by the vessel, provided the neutral owner did not aid in the armament or the resistance, notwithstanding he had chartered the whole vessel and was on board at the capture; 9 Cra. 388; 3 Wheat. 409; *contra*, 1 Dods. 443. If the neutral vessel is in the direct employ of the enemy, both ships and goods are liable to capture; 24 Fed. Rep. 33; and so are neutral goods on a neutral vessel, if the latter be under the enemy's protection; 27 Ct. Cls. 99.

It is lawful for a neutral ship to carry contraband goods, but the right is always exercised subject to capture. Ordinarily the neutral ship is not subject to confiscation and will be released in the prize court, unless she belongs to the owner of the contraband, or her owner is privy to the carriage of the contraband goods, or uses false papers; Risley, Law of War 232; 1 Kent 143.

When two states are at war, it has become the practice of modern times for other

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states to issue a proclamation of neutrality to protect their commercial interests and territory.

The subjects of a neutral power residing in a belligerent territory are not entitled to any special protection for their property or to exemption from military contributions to which they may be liable in common with the inhabitants of the place in which they reside or in which their property may be situated; 2 Halleck, Int. L., Baker's ed. 144.

By Convention of the Great Powers, 1887 and 1888, the Suez Canal is neutralized, and is to remain open in war or peace, to vessels of commerce and war of all nations. See *id.* 149. In 1815, the Rhine was neutralized, as between the States of the Rhine, to a certain extent. In 1829, entrance into the Black Sea was admitted to belong to Russia and to powers at amity with Russia. By the treaty of Paris the Black Sea was neutralized, but this was largely abrogated in 1871. By the Clayton-Bulwer treaty, 1850, Great Britain and the United States agreed that any canal built between the Atlantic and Pacific oceans should be forever neutral.

The neutrality acts of the United States, which regulate the conduct of its citizens and of aliens while within its jurisdiction, constitute Title LXVII. of the Revised Statutes. Their origin and scope are as follows:—President Washington, in his annual message to Congress, December 3, 1793, said: "The original arming and equipping of vessels in the ports of the United States by any of the belligerent parties for military services, offensive or defensive, is deemed unlawful." The act of 1794, which has been generally recognized as the first instance of municipal legislation in support of the obligations of neutrality, and a remarkable advance in the development of international law, was passed in accordance with this recommendation. The acts of 1817 and 1818 were successively passed and carried forward into R. S. Title LXVII., which forbids citizens from accepting a commission from a foreign prince against a foreign prince with whom we are at peace; enlisting or hiring or retaining another to enlist, or going away to enlist in the army or navy of such foreign prince; fitting out or arming a vessel in the service of a foreign prince to commit hostilities against a foreign prince, etc, (the vessel to be forfeited—one half to the informer); increasing the force of any vessel of war of such foreign prince by adding any equipment solely applicable to war; preparing any military expedition in the United States to be carried on thence against any foreign prince with whom we are at peace.

Sec. 5288 provides that the president may employ the land and naval forces of the United States and militia in compelling any foreign vessel to depart the United States in all cases in which by the laws of nations or the treaties of the United States she ought not to remain therein. Sec. 5289 provides that the owners or consignees of every armed vessel sailing out of our ports belonging wholly or in part to citizens thereof shall before clearing give bond in double the value of the vessel and cargo, conditioned that she shall not commit any hostilities against any foreign prince, etc., with whom we are at peace. Sec. 5290 provides that the United States shall detain any vessel manifestly built for warlike purposes and about to depart the United States, the cargo of which consists principally of munitions of war, when the number of men on board or other circumstances render it probable that it is intended to commit hostilities against any such foreign prince, etc., until the decision of the president is had thereon or the owner gives bond and securities as required in cases under § 5289. Sec. 5291 provides that this title shall not extend to subjects of any foreign prince, etc., transiently within the United States, who enlist on a vessel of war or privateer which at the time of its arrival here was equipped as such, or who employ other citizens of the same foreign prince, etc., to enlist on board such vessel of war, etc., if the United States shall then be at peace with such foreign prince, etc. Offences under these sections are made high misdemeanors.

The act does not prohibit armed vessels belonging to citizens from sailing out of our ports, but only requires their owners to give security; 6 Pet. 445.

The word "people," as used in § 5283, covers any insurgent or insurrectionary body conducting hostilities, although its belligerency has not been recognized; 166 U. S. 1.

Where a vessel is chartered by a foreign government to carry a cargo of arms to that government, she is not liable to seizure; 87 Fed. Rep. 799. It is not the intent of § 5286 to interfere with the commercial activities of citizens of the United States, but to prevent complications between this government and foreign powers, and fitting out military expeditions against friendly nations; 84 *id.* 609, per Bradford, J.

The offence covered by the act consists of an act done in the United States, with the intent to commit an offence against the act; the intent is a necessary ingredient; 38 Fed. Rep. 431; and it must be formed and exist within the United States: 24 *id.* 33. The offence is complete when the expedition is organized; 53 *id.* 536; and although it is formed and detached in separate parts; 18 *id.* 529.

No particular number of men is necessary to constitute a military expedition under the act; its character may be determined by the designation of the officers, the organization of the men in regiments or companies, and the purchase of military stores; 53 *id.* 536. Where insurgents carrying on war against a foreign country sent a vessel to procure arms in the United States, the purchase of such arms and placing them on board the vessel was held not within § 5286, though they were intended to be used by

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the insurgents in carrying on war against a foreign country, if they are not designed to constitute any part of the furnishings of the vessel herself; 48 *id.* 99. Placing munitions of war on a vessel, with intent to carry them to insurgents in a foreign country, but without intent that they shall constitute any part of the furnishings of the vessel, is not within the act; 49 *id.* 646. One who provides the means for transporting a military expedition on any part of its journey, with knowledge of its ultimate destination and unlawful character, commits an offence under § 5286; 84 *id.* 799. Sec. 5283 is not applicable to such a case; 13 Op. Att. Gen. 177.

A proceeding under § 5283 is a simple suit in admiralty, where the decree is that the libel be dismissed, or the vessel condemned; and no decree of restitution is necessary; 38 Fed. Rep. 431.

The British Foreign Enlistment Act of 1819 forbade British subjects to enlist or to induce others to enlist, or to leave or to induce others to leave the queen's dominions in order to enlist; and forbade ship-owners to take aboard their ships persons illegally enlisted. It is a substantial copy of the American act of 1818; 166 U. S. 60. In 1870 a new British act was passed.

See BELLIGERENCY; CAPTURE; CONTRABAND; FREE SHIPS; INSURGENCY; INTERNATIONAL LAW; INTERVENTION; PREEMPTION; PRIZE; RANSOM BILLS; RECAPTURE; SEARCH; SHIPS OF WAR; WAR.

**NEVADA.** One of the states of the United States of America.

It was admitted into the Union, Oct. 31, 1864. Its boundaries were defined by an enabling act, approved March 21, 1864, as amended by the act of May 5, 1866.

THE LEGISLATIVE POWER.—The legislative authority is vested in a senate and assembly, designated "the legislature of the state of Nevada." The sessions are biennial, commencing on the third Monday of January.

Senators and members of the assembly must be duly qualified electors of their respective districts, and the number of members of the senate must not be less than one-third, nor more than one-half of that of members of the assembly.

The members of the assembly are chosen biennially, at the general state election, for two years from the day next after the election. Senators are chosen at the same time and place as members of the assembly, for four years from the day next after their election.

THE EXECUTIVE POWER.—The *governor* is elected at the time and place of voting for members of the legislature, for four years, and until his successor is qualified. He must be a qualified elector, and, at the time of election, of at least the age of twenty-five and a citizen of the state for two years next preceding the election. He has the usual powers, including those of appointing officers and adjourning the legislature.

The governor, justices of the supreme court, and attorney general, or a major part of them, of w' om the governor shall be one, may remit fines and forfeitures, commute punishments and grant pardons after conviction in all cases, except treason and impeachment, subject to such regulations as may be provided by law relative to the manner of applying for pardons.

*A lieutenant-governor* is elected at the same time and places and in the same manner as the governor, and his term of office and qualifications are the same. He is president of the senate, and in case of the death, removal, inability, or absence of the governor, the duties of his office shall devolve upon the lieutenant-governor for the remainder of his term, or until the disability shall cease. A *secretary of state*, a *treasurer*, a *controller*, a *surveyor general*, and an *attorney general* are elected at the same time, and in the same manner as the governor and for the same term. Any elector is eligible to those offices.

THE JUDICIAL POWER.—The judicial power is vested in a supreme court, district courts, and in justices of the peace. The legislature may also establish courts for municipal purposes only, in incorporated towns and cities.

The *supreme court* consists of a chief justice and two associate justices, a majority of whom constitute a quorum, but the legislature may provide for the election of two additional associate justices, in which case three shall constitute a quorum.

The justices of the supreme court are elected at the general election and hold office for the term of six years. The jurisdiction of this court is appellate in all cases in equity; and also in all cases at law in which is involved the title or right of possession to, or the possession of real estate or mining claims, or the legality of any tax, imposts, assessment, toll, or municipal fine, or in which the demand (exclusive of interest) or the value of the property in controversy exceeds three hundred dollars; also in all other civil cases not included in the general subdivisions of law and equity, and also in questions of law alone in all criminal cases in which the offence charged amounts to felony. This court also has power to issue writs of *mandamus*, *certiorari*, prohibition, *quo warranto*, and *habeas corpus*, and all writs necessary or proper for the complete exercise of its appellate jurisdiction.

The state is divided into nine judicial districts, the judges of which are elected and hold office for four years. After the first Monday in January, 1899, the number of districts is reduced to five.

The *district courts* have original jurisdiction in all cases in equity; and also all cases at law, involving the title to or possession of real property or mining claims, or the legality of any tax, impost, etc., in which the demand or value exceeds three hundred dollars, exclusive of interest; also in all cases relating to the estates of deceased persons, the persons and estates of minors and insane persons, and of the action of forcible entry and detainer, and all criminal cases not otherwise provided for by law. They have final appellate jurisdiction in cases arising in justices' courts and such other inferior tribunals as may be established by law. They have also the power to issue writs of *mandamus*, injunction, *quo warranto*, *certiorari*, etc.

The *Justices of the Peace* have jurisdiction in such cases as the legislature may determine; provided, that the amount of the demand or value of the property does not exceed three hundred dollars, and that they shall not have jurisdiction in cases wherein the title to real estate or mining claims or questions of boundaries to land are involved, or of cases that conflict in any manner with the jurisdiction of the state courts of record.

**NEVER INDEBTED.** A plea to an action of *indebitatus assumpsit*, by which the defendant asserts that he is not indebted to the plaintiff. 6 C. & P. 545; 1 M. & W. 542; 1 Q. B. 77. The plea of never indebted has, in England, been substituted for *nil debet*, in certain actions specified in schedule B (36) of the Common Law Procedure Act of 1852; and the effect of the plea never indebted is to deny those facts from which the liability of the defendant is alleged. In actions on negotiable bills or notes, never indebted is inadmissible; Reg. Gen. Hil. T. 1833, §§ 6, 7; 3 Chitty, Stat. 560. By the judicature act, 1875, Ord. xix. r. 20, a defendant is no longer allowed to deny generally the facts alleged by the plaintiff; Whart. Lex. A defendant cannot, under the plea of "never indebted," contend that, though a contract was made in fact, it was void in point of law, for the facts from which its invalidity is inferred must form the subject of a special plea; Moz. & W.

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**NEW.** This term in its ordinary acceptation, when applied to the same subject or object, is the opposite of old. 14 Pet. 364.

**NEW AND USEFUL INVENTION.** A phrase used in the act of congress relating to patents for inventions. See PATENT.

**NEW ASSIGNMENT.** A re-statement of the cause of action by the plaintiff, with more particularity and certainty, but consistently with the general statement in the declaration. Steph. Pl. 241; 20 Johns. 43.

Its purpose is to avoid the effect of an evasive plea which apparently answers the declaration, though it does not really apply to the matter which the plaintiff had in view; 1 Wms. Saund. 299 *b*. Thus, if a defendant has committed two assaults on the plaintiff, one of which is justifiable and the other not, as the declaration may not distinguish one from the other, the defendant may justify, and the plaintiff not being able either to traverse, demur, or confess and avoid, must make a new assignment.

There may be several new assignments in the course of the same action; 1 Chitty, Pl. 614. A plaintiff may reply to a part of the plea and also make a new assignment. A new assignment is said to be in the nature of a new declaration; 1 Saund. 299 *c*; but is more properly considered as a repetition of the declaration; 1 Chit. Pl. 602; differing only in this, that it distinguishes the true ground of complaint, as being different from that which is covered by the plea. Being in the nature of a new or repeated declaration, it is, consequently, to be framed with as much certainty or specification of circumstances as the declaration itself. In some cases, indeed, it should be even more particular; Gould, Pl. 339 n.; Bac. Abr. *Trespass* (I 4, 2); 1 Chit. Pl. 610. See 3 Bla. Com. 311; Archb. Civ. Pl. 286. In England, under the Judicature Act, 1875, Ord. xix. r. 14, no new assignment is necessary or is to be used; but everything which has heretofore been alleged by way of new assignment is to be introduced by way of amendment of the statement of claim; Whart. Dict.

**NEW BRUNSWICK.** One of the provinces of the dominion of Canada.

It was originally part of the French province of Acadie (see NOVA SCOTIA), but was made a distinct province in 1784, having been first settled by the French A. D. 1639, ceded to the English in 1713 by the treaty of Utrecht, and settled by the British government in 1764. By the Imperial Act, known as the British North American Act, which went into operation July 1, 1867, New Brunswick became a province of the Dominion of Canada. It has an Executive Council of seven, a Legislative Assembly of forty-one members, and a Legislative Council of fifteen members. The seat of government is Fredericton. Justice is administered by a chief justice, an equity judge, five puisne judges, and five county court judges. See CANADA.

**NEW FOR OLD.** A term used in marine insurance in cases of adjustment of a loss when it has been but partial. In making such adjustment, the rule is to apply the old materials towards the payment of the new, by deducting the value of them from the gross amount of the expenses for repairs, and to allow the deduction of one-third *new for old* upon the balance. See 1 Cow. 265; 4 Ohio 284; 7 Pick. 259. The deduction, in the United States, is usually one-third, and is made from the cost of labor and material, and in practice also from the incidental expenses of repairs, as towage, etc.; but see, as to this last, 3 Sumn. 45; 9 Wall. 203. The deduction is without regard to the age of the vessel; 11 Johns. 315. A writer criticises the rule of *thirds*, and suggests that the increase of iron hulls will change the rule of law; Gourlie, Gen. Av. In Liverpool, no deduction is made on iron vessels for the first eighteen months.

**NEW FOREST.** The royal forest in Hampshire, founded by William the Conqueror. See FOREST LAW.

**NEWFOUNDLAND AND LABRADOR.** The most easterly parts of North America.

They are part of British North America, but are not included in the Dominion of Canada. The government is vested in a Governor assisted by an Executive Council not exceeding seven members, a Legislative Council not exceeding fifteen members, and a House of Assembly of thirty-six members elected by the people. It has a chief justice, two assistant justices, three district court judges, and twenty-two magistrates. Its capital is St. Johns.

**NEW HAMPSHIRE.** The name of one of the original thirteen United States of America.

It was subject to Massachusetts from 1641 to 1680. It was governed as a province, under royal commissions, by a governor and council appointed by the king, and a house of assembly elected by the people, until the revolution.

In January, 1776, a temporary constitution was adopted, which continued till 1784. The constitution adopted in 1784 was amended by a convention of delegates held at Concord, approved by the people in their town-meetings, and established by the convention in February, 1792. This constitution was amended in 1850, by abolishing the property qualifications for certain offices, and amended again in 1877, changing it in eleven particulars, the principal of which were the abolition of the religious test, and adoption of biennial elections, increasing the number of senators, and changing the election from March to November.

THE LEGISLATIVE POWER.—This is lodged in the senate and house of representatives, and which together are styled the *General Court of New Hampshire*.

The *Senate* is composed of twenty-four members elected for two years. A senator must be at least thirty years old, an inhabitant of the district, and, for seven years next before his election, of the state.

*Representatives* are elected biennially, for the term of two years. A representative must be an inhabitant of the town for which he is elected, and, for two years next preceding his election, of the state.

THE EXECUTIVE POWER.—This is lodged in a governor and council.

The *Governor* is elected biennially. In case of a vacancy, the president of the senate exercises the powers of the office, but cannot then act as senator. The governor must be of at least the age of thirty years, and an inhabitant of the state for seven years next preceding his election.

The governor has a limited veto power.

*Councillors* are elected biennially, must have the qualifications of senators, and hold office for the same term as the governor. The state is divided by law into five districts, in each of which a councillor is elected, and vacancies are filled by a like election.

The *governor and council* may adjourn or pro-

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rogue the general court, in case of disagreement of the two houses, for any period not exceeding ninety days. They nominate and appoint all judicial officers, the attorney-general and coroners, and all general and field officers of the militia,—each having a negative upon the other. Nominations must be made three days before an appointment can be made, unless a majority of the council assent.

The power of pardoning offences—after conviction only, however—is vested in the governer and council, except in cases of impeachment. No money can be drawn from the treasury of the state but by warrant of the governor, with the advice and consent of the council.

THE JUDICIAL POWER.—The *Supreme Court* consists of a chief justice and six assistant justices, appointed by the governor and council, to hold during good behavior, until seventy years of age. It has original jurisdiction of all cases and proceedings at common law, civil and criminal, except those in which justices of the peace have jurisdiction; of all cases in equity; in all cases of divorce and alimony; and appellate jurisdiction in all appeals from courts of probate, and in all appeals from police courts and from justices of the peace.

*Judges of Probate* are appointed by the governor and council in each county, who hold their office during good behavior, unless sooner removed by address of both houses or by impeachment. They have jurisdiction of all matters relating to the estates of persons deceased and the guardianship of minors, insane persons, and spendthrifts.

*Justices of the Peace* are appointed in sufficient number by the governor and council, who hold their office during the term of five years, unless sooner removed by address of both houses of the legislature. They have jurisdiction of all civil causes at common law in which the damages demanded do not exceed thirteen dollars and thirty-three cents, and where the title to real estate is not involved, and in many minor criminal cases, subject to appeal to the supreme court. They have authority to arrest, examine, and bind over for trial at the supreme court, persons charged with higher offences.

*Police Courts* have exclusive jurisdiction, in the cities and places where they are established, in all cases where justices of the peace have jurisdiction elsewhere.

**NEW INDUSTRY.** See LABOR.

**NEW INN.** An inn of chancery. See INNS OF COURT.

**NEW JERSEY.** The name of one of the original thirteen states of the United States of America.

The territory of which the state is composed was included within the patent granted by Charles II. to his brother James, duke of York, bearing date on the 12th of March, 1663-4. This grant comprised all the lands lying between the western side of Connecticut river and the east side of Delaware bay, and conferred powers of government over the granted territory. At this time the province was in the possession and under the government of Holland. Before the close of the year the inhabitants of the province submitted to the government of England, on the 23d and 24th of June, 1664. The duke of York, by deeds of lease and release, conveyed to John Lord Berkeley and Sir George Carteret, their heirs and assigns forever, "all that tract of land adjacent to New England and lying and being to the westward of Long Island and Manhitas Island, and bounded on the east part by the main sea, and part by Hudson river, and hath upon the west Delaware bay or river, and extendeth southward to the main ocean as far as Cape May at the mouth of Delaware bay, and to the northward as far as the northernmost branch of the said bay or river of Delaware, which is in 41 degrees and 40 minutes of latitude, and crosseth over thence in a straight line to Hudson's river in forty-one degrees of latitude; which said tract of land is hereafter to be called Nova Cæsaria, or New Jersey."

This grant first defined the boundaries and gave the name of the province. It conferred upon the grantees, with the territory, powers of government in as full and ample manner as they were conferred by the crown upon the duke of York. Lord Berkeley and Sir George Carteret, being by virtue of this conveyance the sole proprietors of New Jersey, on the 10th of February, 1664-5, signed a constitution which they published under the title of "The concessions and agreement of the lords proprietors of the province of Nova Cæsaria, or New Jersey, to and with all and every of the adventurers, and all such as shall settle or plant there." This document, under the title of "The Concessions," was regarded as the first constitution of New Jersey, and continued in force until the division of the province in 1676. The instrument was considered as irrevocable, and therefore of higher authority than the acts of assembly, which were subject to alteration and repeal. War having been declared by England against Holland in 1673, the Dutch were again in possession of the country, and the inhabitants submitted to their authority.

By the treaty of peace between England and Holland on the 9th of February, 1674, the country was restored to the possession of the English. On the conclusion of peace, in order to remove all grounds of objection to his title on account of the recapture of the country by the Dutch, the duke of York obtained from the crown a new patent, similar to the first, and dated on the 29th of June, 1674. On the 20th of July in the same year, the duke of York made a second grant of a portion of the province to Sir George Carteret individually. The partition which this patent was intended to secure, in addition to the confirmation of Carteret's grant, was accomplished by deeds of partition executed July 1, 1676, between Carteret and the trustees of Byllinge. In 1702, the proprietors of th two provinces, called respectively East New Jersey and West New Jersey, surrendered their powers of government to Queen Anne, still retaining their title to the land. The two divisions constituted thenceforth but one colony. The colony was governed by a governor and council appointed by the crown, and an assembly of the representatives of the people chosen by the freeholders. This form of government continued till the American revolution.

The first constitution of the *state* of New Jersey was adopted by the provisional congress on the second day of July, 1776. This body was composed of representatives from all the counties of the state, who were elected on the fourth Monday of May, and convened at Burlington on the tenth day of June, 1776. It was finally adopted on the second day of July, but was never submitted to a popular vote. This constitution continued in force until the first day of September, 1844, when it was superseded by the existing constitution. The new constitution was adopted May 14, 1844, by a convention composed of delegates elected by the people in pursuance of an act passed by the legislature. The constitution thus framed, having been submitted to and adopted by the people at an election held on the thirteenth day of August, took effect and went into operation, pursuant to one of its provisions, on the twenty-second of September, 1844. This constitution was amended at a special election held September 7, 1875.

THE LEGISLATIVE POWER.—This is lodged in a senate and general assembly, which meet the second Tuesday in January each year.

The *Senate* is composed of one senator from each county, elected for three years. They are divided into classes, so that one-third of the senate is changed each year. A senator must be entitled to vote, at least thirty years old, have been a citizen and inhabitant of the state for four years, and of the county for which he is chosen one year, next before election.

*The General Assembly* is composed of members elected annually. Each member must be entitled to vote, at least twenty-one years old, must have been a citizen and inhabitant of the state for two years, and of the county for which he is chosen one year, next before his election.

THE EXECUTIVE POWER.—The *Governor* is elected for the term of three years. He is incapable of holding the office for three years next after his term of service. He must be not less than thirty years of age, and have been for twenty years at least a citizen of the United States, and a resident of this state seven years next before his election, unless he has been absent during that time on the public business of the United States or of this state.

He has the usual executive powers and may, except in cases of impeachment, suspend the collection of fines and forfeitures, and grant reprieves, to extend until the expiration of a time not exceeding ninety days after conviction; he may in connection with the chancellor and the six judges of the court

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of errors and appeals, or the major part of them, remit fines and forfeitures, and grant pardons in all cases after conviction, except impeachment. In case of a vacancy, the succession is to the president of the senate, and speaker of the house of assembly, in turn, but in such case another governor shall be chosen at the next election for members of the legislature, unless such vacancy occur within thirty days preceding such election, in which case a governor shall be chosen at the next succeeding election for members of the legislature.

THE JUDICIAL POWER.—The *Court of Errors and Appeals* consists of a chancellor, the justices of the supreme court, and six judges. These six judges are appointed for six years by the governor, with the consent of the senate, and the seat of one of the judges is vacated each year; so that one judge is annually appointed. Three sessions are held annually, at Trenton. It is the highest court of appeals from decisions of the supreme court, court of chancery, and circuit court. After decision pronounced, the cause is remitted to the inferior courts for judgment and execution according to the decision.

The *Court of Chancery* consists of a chancellor, appointed by the governor for seven years, who is also the ordinary or surrogate general and judge of the prerogative court. Appeals lie from the order or decree of the orphans' court to the prerogative court. The chancellor is assisted by five vice-chancellors, who are appointed by the chancellor for five years.

The *Supreme Court* consists of one chief and eight associate justices, appointed by the governor, with the advice and consent of the senate, for the term of seven years. This number may be increased or decreased by law, but may never be less than two. The judges are *ex officio* justices of the inferior court of common pleas, orphans' court, and court of general quarter sessions. This is the court of general inquiry, common-law jurisdiction. When issues of fact arise, they are sent to the circuit to be found by a jury and single judge.

*Circuit Courts* are held in every county in the state, by one or more justices of the supreme court, or a judge appointed for the purpose. For this purpose the state is divided into nine districts, and one judge assigned to each district. In all cases within the county, except in those of a criminal nature, these courts have common-law jurisdiction concurrent with the supreme courts; and any final judgment of a circuit court may be docketed in the supreme court, and operates as a judgment obtained in the supreme court from the time of such docketing. Final judgments in any circuit court may be removed by writ of error into the supreme court, or directly into the court of errors and appeals; and questions of law which arise are to be certified by the presiding judge to the supreme court for decision.

*Court of Common Pleas.* This is a county court of common law. Since the Act of March 26, 1896, it has been held by one judge.

*Court of Oyer and Terminer* has cognizance of all crimes committed in the county wherein the court is held. It has the jurisdiction of the Oyer and Terminer and of the Court of General Jail Delivery. It is held in each county by a justice of the supreme court and the judge of common pleas of the county. In the absence of the latter, the supreme court justice may hold the court alone. In counties having more than 300,000 inhabitants the common pleas judge may hold the court alone.

*Court of Quarter Sessions.* The judge of the Common Pleas in each county holds this court, which has cognizance of all crimes except indictments for treason and murder, which must be tried by the Oyer and Terminer or the Supreme Court.

*Court of Special Sessions* is held by the same judge, and has power to hear without a jury persons charged on oath before the Quarter Sessions, who, in writing, waive indictment and trial by jury and request a trial immediately before the court.

*The Orphans' Court* is held in each county by the judge of the Common Pleas. It has original jurisdiction of the probate of wills, estates of decedents, appointment and control of administrators and executors, and the care of minors, including the appointment and control of guardians. An appeal lies to the chancellor's prerogative court.

*District Courts* exist in all cities of over 20,000 inhabitants and exercise the civil jurisdiction of justices of the peace. In cities of over 100,000 inhabitants there are two such courts. This court has jurisdiction in civil causes at law where the matter in dispute does not exceed $300, except when the title to land may come in question.

*Justices of the Peace* have the usual powers to hear complaints and issue warrants and hold to bail in criminal cases, and except in cities where district courts exist, they have jurisdiction in civil causes at law where the real debt or demand does not exceed $200, and where the title to land does not come in question, except actions of replevin, slander, or trespass for assault, battery, or imprisonment. A jury of six men in a suit for not over $50, and twelve men for a larger case must be impanelled on demand of either party.

*Police Courts* are established in all cities of the second class in the state, having a population of fifty thousand and over. It is a court of record. The justices are appointed by the governor for a term of five years. These justices exercise the powers in criminal matters of justices of the peace.

**NEW MATTER. In Pleading.** Matter not previously alleged. Statements of fact not previously alleged by either party to the pleadings. Where special pleading prevails, such matter must be pleaded in avoidance, and it must, in general, be followed by a verification; Gould, Pl. c. 3, § 195; 1 Chitty, Pl. 538; Steph. Pl. 251; Comyns, Dig. *Pleader* (E 32); 1 Wms. Saund. 103, n. 1; Ventr. 121. See PLEA.

*In equity*, new matter, discovered by either plaintiff or defendant, may be introduced by cross or supplemental bill before a decree has been pronounced, but not by amendment after an answer has been filed; 1 Paige, Ch. 200; Harr. Ch. 438.

**NEW MEXICO.** One of the territories of the United States.

By act of congress, approved September 9, 1850, the territory of New Mexico was constituted and described. A proviso was annexed that the United States might divide the territory into two or more, and that when admitted as a state the said territory, or any portion of the same, should be received into the Union with or without slavery, as their constitution might prescribe at the time of admission.

Colorado was partly formed from New Mexico in 1861, and in 1863 the entire territory of Arizona, which reduced New Mexico to its present boundaries. By the organic act, the powers of the territory are lodged in three branches,—the legislative, executive, and judicial. The operation of this act was suspended until the Texan boundary was agreed upon, when it went into force by proclamation of the president, December 13, 1850.

THE LEGISLATIVE POWER.—The *Council* is composed of thirteen members, elected by the people of the districts into which the territory is divided, for the term of two years.

The *House of Representatives* consists of twenty-six members, elected by the people of the districts into which the territory is divided, for the term of one year.

THE EXECUTIVE POWER.—The *Governor* is appointed by the president of the United States, by and with the advice and consent of the senate, for four years, but he may be sooner removed. He must reside in the territory. He is commander-in-chief of the military of the territory; is superintendent of Indian affairs, is to approve all acts passed by the legislature before they can become laws; may grant pardons and remit fines for offences against the laws of the territory, and reprieves for offences against the laws of the United States till the will of the president can be known; must take care that the laws be executed.

A *Secretary of the Territory* is also appointed in the same manner and for the same time. He is to record and preserve laws passed by the legislature, and acts done by the governor, in his executive capacity, and to transmit copies, etc.

The JUDICIAL POWER.—The *Supreme Court* consists of a chief and four assistant justices, appointed by the president of the United States, with the advice and consent of the senate, for the term of four years. Two of the three judges constitute a quorum.

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The jurisdiction is appellate solely, and extends to all matters of appeal and writs of error that may be taken from the judgments or decrees of the district courts, in cases of errors apparent on the face of the record.

Special terms may be called by the chief justice for the hearing of causes in both civil and criminal matters, when the parties or the accused, and the district attorney, agree. No jury trials are held by this court. An appeal lies to the supreme court of the United States as from a decision of the United States circuit court, where the amount involved exceeds the sum of one thousand dollars.

The *District Court* is held in each of the five districts into which the territory is divided for the purpose, by one of the judges of the supreme court. It has exclusive original jurisdiction of all matters at law or in equity, except those of which justices of the peace have concurrent jurisdiction, and of all crimes and misdemeanors, except those of which justices of the peace have exclusive cognizance.

*Probate Courts* are also to be provided for by law. They have, in general, the control of the settlement of the estates of decedents, and the appointment and control of guardians.

*Justices of the Peace* have a jurisdiction coextensive with the county, of all civil cases where the amount involved does not exceed one hundred dollars, except in actions for slander, libel, and false imprisonment, or where the title or to boundary of lands shall come in question. Act. 1876, ch. 27.

**NEW PROMISE.** A contract made after the original promise has, for some cause, been rendered invalid, by which the promisor agrees to fulfil such original promise. Within the meaning of the statute of frauds the renewal of a promise to pay is a new promise; 24 Atl. Rep. (R. I.) 576. See LIMITATIONS.

**NEW SOUTH WALES.** The oldest of the Australian Colonies of the British government. The Governor is appointed by the Crown and has a Cabinet of ten ministers. There is a parliament of two houses, the Legislative Council of not less than twenty-one members nominated by the Crown, and a Legislative Assembly of one hundred and twenty-five members elected by the people. It has a chief justice, six puisne judges, and seven district court judges.

**NEW TRIAL. In Practice.** A re-examination of an issue in fact before a court and a jury, which has been tried at least once before the same court; Hill. N. Tr. 1. A rehearing of the legal rights of the parties, upon disputed facts, before another jury, granted by the court on motion of the party dissatisfied with the result of the previous trial, upon a proper case being presented for the purpose; 4 Chitty, Gen. Pr. 30; Grah. & W. N. Tr. 32. It is either upon the same, or different, or additional evidence, before a *new* jury, and probably, but not necessarily, before a different judge. It is a re-examination of an issue of fact in the same court after a trial and decision by a jury, court or referee; 99 Cal. 265.

The origin of the practice of granting new trials is of extremely ancient date, and, consequently, involved in some obscurity. Blackstone gives the most connected and satisfactory account of it of any writer; 3 Com. 387.

Courts have, in general, a discretionary power to grant or refuse new trials, according to the exigency of each particular case, upon principles of substantial justice; 1 Burr. 390. That the trial judge is not satisfied with a verdict is not binding on the court in banc, but deserves serious consideration; L. J. 55 Q. B. 403. This discretion is generally not reviewable on error; 10 Vt. 520; 14 N. H. 441; 20 Pick. 285; 10 Ga. 93; 132 U. S. 103. It should be exercised with great caution where a new trial is asked only because the verdict is against the weight of the evidence; 31 W. Va. 428.

Where one party moves for a new trial and the opposing party consents thereto, the court is not compelled to grant the same; 44 Kan. 144; 45 Ill. App. 426. An order granting a new trial operates to set aside the judgment; 76 Cal. 90.

The usual grounds for a new trial may be enumerated as follows:

The *not giving the defendant sufficient notice* of the time and place of trial, unless waived by an appearance and making a defence, will be a ground for setting aside the verdict; 3 Price 72; 1 Wend. 22. But the defendant's ignorance must not have been owing to his own negligence, and the insufficiency of the notice must have been reasonably calculated to mislead him; 2 Bibb 177; 3 B. & P. 1; 13 Tex. 516; 32 Conn. 402; 36 N. H. 74.

*Pleadings.* Failure of the complaint to state a cause of action is available on motion for a new trial; 46 Pac. Rep. (Ariz.) 74; so of one which shows the cause of action alleged to be barred; 26 S. E. Rep. (W. Va.) 431.

*Misconduct of parties, counsel, or witnesses.* The use of crutches by plaintiff in going to and from the witness stand, when just before and after the trial he walked readily without them, is ground for a new trial; 42 N. Y. S. 941; but plaintiff's hysteria while on the witness stand is not; 45 N. E. Rep. (Ill.) 290; nor is a controversy, between court and counsel, during the trial, not prejudicial to the defeated party; 37 S. W. Rep. (Mo.) 115; nor improper remarks made by counsel in his argument; 27 U. S. App. 663.

*Mistakes or omissions of officers* in summoning and drawing jurors, when the irregularity deprives the party complaining of a substantial right, will entitle him to a new trial; 2 Halst. 244; 16 Ark. 37; 12 Pick. 496. Likewise, where the officer summoning the jury is nearly related to one of the parties; 10 S. & R. 334; 1 South. 364; 20 Tex. 234; 1 Dev. & B. 196; or is interested in the event; 5 Johns. 133; unless the objection to the officer was waived by the party; 3 Me. 215; 21 Pick. 457; or the authority of the officer be so circumscribed as to put it out of his power to select an improper jury; 7 Ala. 253; 7 Cow. 720. A verdict will be set aside for the following causes: The unauthorized interference of a party, or his attorney, or the court, in selecting or returning jurors, unless the interference can be satisfactorily explained; 8 Humphr. 412; that a juror not regularly summoned and returned personated an-

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other; 77 Ga. 108; 7 Dowl. & R. 684; but not if the juror personated another through mistake, was qualified in other respects, and no injustice has been done; 12 East 229; 12 Ohio Cir. Ct. 367. That a juror sat on the trial after being challenged and stood aside, unless the party complaining knew of it, and did not object; 3 Yeates 318; that a juror was discharged without any sufficient reason, after being sworn; 1 Ohio St. 66; but not if the juror was discharged by mistake and with the knowledge and acquiescence of the party; 9 Metc. Mass 572; 5 Ired. 58; that the jury were not sworn, or that the oath was not administered in the form prescribed by law; 1 How. 497; 2 Me. 270.

The *disqualification of jurors*, if it has not been waived, will be ground for a new trial; but a principal cause of challenge to a juror, not discovered during the trial, will not require a new trial in a criminal case, unless injustice resulted to the prisoner from the fact that such juror served; 36 W. Va. 729; that a juror was also a member of the grand jury finding the bill will not sustain a motion in arrest of judgment, where no objection was made to the juror on the trial; 30 S. C. 105; 41 La. Ann. 688; 4 Utah 42. The want of a necessary property qualification is ground for a new trial; 4 Term 473; 15 Vt. 61; irregularity in selection, which results in injury to the defeated party; 59 Mo. 417; but after a plea of not guilty and conviction, defendant may not object to the venire or to jurors summoned under it; 9 Humphr. 626; or to a juror whose name was not in the box, on the list, or on the books of the tax receiver; 63 Ga. 791; but not if it appears that injustice was not done; 31 W. Va. 459; and there was a fair trial, and the verdict was fully warranted by the evidence; 53 Fed. Rep. 565. Relationship to one of the parties; 32 Me. 310; or to one of the counsel; 81 Me. 158; 17 S. E. Rep. (Ga.) 631; or business relations with the counsel; 42 N. Y. S. 569; is ground; but knowledge of such relation must not have been obtained before trial, else the disqualification is waived; 84 Me. 304; unless the relationship be so remote as to render it highly improbable that it could have had any influence; 12 Vt. 661. So is interest in the event; 2 Johns. 194; 21 N. H. 438; concealment of his interest by juror; 111. Ind. 59; bias or prejudice; 3 Dall. 515; where a juror was deputy prosecuting attorney; 100 Ind. 357; conscientious scruples against finding a verdict of guilty; 13 N. H. 536; 16 Ohio 364; 13 Wend. 351; an opinion held by juror which would have excluded him if discovered before he was sworn; 36 W. Va. 729; and mental or bodily disease unfitting jurors for the intelligent performance of their duties; 6 Humphr. 59; 8 Ill. 368; alienage; 6 Johns. 332; 2 Ill. 476; 60 Vt. 449 (but not criminality of juror; 10 Oreg. 145; 15 Colo. 270; but see 8 Ill. 202; 4 Dall. 353). The want of purely statutory qualifications, such as citizenship, age, property, etc., which are not essential to an intelligent and impartial discharge of duty by a juror, are not treated with the same strictness as bias and like causes; 22 Fed. Rep. 234. See 2 N. H. 349.

When *indirect measures have been resorted to, to prejudice the jury*, or tricks practised or disingenuous attempts made to suppress or stifle evidence or thwart the proceedings, or to obtain an unconscionable advantage, they will be defeated by granting a new trial. For example: where papers material on the point in issue, not previously submitted, are surreptitiously handed to the jury; Cas. *temp.* Hardw. 116; 2 Yeates 273; or where the party, or some one in his behalf, directly approaches the jury on the subject of the trial; 7 S. & R. 458; 13 Mass. 218; or where one not a member of the jury slept in the same room with them, and had a conversation with one or two of them, in which he made statements reflecting on the character of the party against whom the verdict was rendered; 78 Ia. 207. But if the other party is aware of such attempts, and neglects to correct them when in his power, he will be deemed to have waived all objection; 11 Mod. 118. If the interference with the jury comes from a stranger, be without fault in the jury, and without the knowledge of the parties, and no injury has thereby ensued, the verdict will not be disturbed; 5 Mo. 525; 3 Bibb 8; 11 Humphr. 169, 491. But see 9 Miss. 187; 16 *id.* 465; 20 *id.* 398. Where the jury, after retiring to deliberate, examined witnesses in the case, a new trial was granted; Cro. Eliz. 189; 2 Bay 94; 1 Brev. 16; so, also, when one of their number communicates to his fellows private information possessed by him, which influences the finding; 1 Swan 61; 2 Yeates 166; 4 Yerg. 111; 36 Neb. 708; or the judge addresses a note to them, or privately visits them, after they have retired to deliberate; 1 Pick. 337; 10 Johns. 238; or a juror takes a private view; 157 Mass. 579; 57 Fed. Rep. 898; 52 Minn. 329.

*Misconduct of the jury* will sometimes avoid the verdict; as, for example, jurors betting as to the result; 4 Yerg. 111; sleeping during the trial; 8 Ill. 368; see 181 Pa. 172; unauthorized separation; 1 Va. Cas. 271; 11 Humphr. 502; 3 Harr. N. J. 468; but see 101 N. C. 761; 7 Mont. 489; 147 Ill. 385; taking refreshment at the charge of the prevailing party; 4 Wash. C. C. 32; 23 Neb. 171; see 49 Kan. 643; drinking spirituous liquor; 4 Cow. 17, 26; 4 Harr. 367; 78 Cal. 317; if any mental incapacity results therefrom; 8 Mont. 57; but see 40 La. Ann. 739; 8 Mont. 57; 7 id. 489; 100 N. C. 528; talking to strangers on the subject of the trial; 3 Day 223; 9 Humphr. 646; but not general conversation; 36 W. Va. 729; determining the verdict by a resort to chance; 15 Johns. 87; 8 Blackf. 32; 49 Cal. 275; 21 Ia. 379; 4 Wis. 67; 1 Minn. 156; 45 N. H. 408; by returning as the verdict the quotient obtained by dividing by twelve the total of the sums named by the jurors; 15 Johns. 87; 85 Tenn. 240; 35 Fed. Rep. 649; 11 L. R. A.

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706. But every irregularity which would subject jurors to censure will not overturn the verdict, unless there be some reason to suspect that it may have had an influence on the final result. See 26 Tex. App. 260; 40 Kan. 258; 40 La. Ann. 751. In general, if it does not appear that the misconduct was occasioned by the prevailing party or any one in his behalf, does not indicate any improper bias, and the court cannot see that it either had or might have had an effect unfavorable to the party moving for a new trial, the verdict will not be disturbed. For gross misconduct of the jury a new trial may be granted on grounds of public policy; Hilly. New T. 198. Where the jury after returning an informal verdict were discharged, and within thirty seconds recalled and the verdict corrected, the separation will not vitiate the verdict; 26 Tex. App. 689. When the jury were kept out eighty-four hours it was held that their agreement was coerced and a new trial ordered; 156 N. Y. 268; s. c. 19 N. Y. L. J. 967.

*Error of the judge* will be ground for a new trial; such as, admitting illegal evidence which has been objected to,—unless the illegal evidence was wholly immaterial, or it is certain that no injustice has been done; 77 Ga. 692; and where the illegal testimony was admitted in gross violation of the well-settled principles which govern proof, it has been deemed *per se* ground for a new trial, notwithstanding the jury were directed to disregard it; 13 Johns. 350; but see 6 N. H. 333; improperly rejecting evidence tending in any degree to aid the jury in determining a material fact; 3 J. J. Marsh. 329; the admission of incompetent evidence, although of slight importance, if the party has suffered or might have suffered prejudice by its admission; 101 N. C. 134; 78 Ga. 480; 80 *id.* 549; 81 *id.* 93; (but the objection that the jury were not allowed to take to their room letters introduced in evidence cannot first be raised on a motion for a new trial; 70 N. W. Rep. (Ia.) 769; nor the admission of improper evidence not objected to at the trial; 37 S. W. Rep. (Mo). 115;) withdrawing testimony once legally before the jury,—unless the excluded testimony could not be used on a second trial; 4 Humphr. 22; denying to a party the right to be heard through counsel; 2 Bibb 76; 3 A. K. Marsh. 465; erroneously refusing to grant a nonsuit; 19 Johns. 154; improperly restricting the examination or cross-examination of witnesses, or allowing too great latitude in that respect, under circumstances which constitute a clear case of abuse; 6 Barb. 383; refusing to permit a witness to refer to documents to refresh his memory, where, by the denial, the complaining party has sustained injury; 3 Litt. 338; improperly refusing an adjournment, whereby injustice has been done; 2 South. 518; 9 Ga. 121; improperly denying the right to open and close at the trial; 76 Ga. 79; refusing to give such instructions to the jury as properly arise in the case, where it is manifest that the jury erred through want of instruction; 4 Ohio 389; 9 Mo. 305; giving to the jury binding instructions, when there are circumstances in the case which ought to have been submitted to them,—unless the verdict is in strict accordance with the weight of evidence; 19 Wend. 402; 5 Humphr. 476; giving an erroneous exposition of the law on a point material to the issue,—unless it is certain that no injustice has been done, or the amount in dispute is very trifling, so that the injury is scarcely appreciable; 4 Conn. 356; 5 Sandf. 180; 3 Johns. 239; misleading the jury by a charge which is not explicit, or which is absurd and impossible, or contradictory, or argumentative and evasive; 9 Humphr. Tenn. 411; 11 Wend. 83; 6 Cow. 682; erroneous instruction as to the proof that is requisite; 3 Bibb 481; 21 Me. 20; misapprehension of the judge as to a material fact, and a direction to the jury accordingly, whereby they are misled; 1 Mills 200; see MISDIRECTION; instructing the jury as to the law upon facts which are purely hypothetical,—but not if the charge was correct in point of law, and the result does not show that the jury were misled by the generality of the charge; 8 Ga. 114; 2 Ala. N. S. 694; submitting as a contested point what has been admitted; 9 Conn. 216; erroneously leaving to the jury the determination of a question that should have been decided by the court, whereby they have mistaken the law; charging as to the consequences of the verdict; 1 Pick. 106; 2 Graham & W. New Tr. 595. Neither the rejection nor admission of immaterial evidence is cause for a new trial; 77 Ga. 692.

*Surprise, as a ground for setting aside the verdict*, is cautiously allowed. When it is occasioned by the act of the adverse party, or by circumstances out of the knowledge and beyond the control of the party injured by it, this has sometimes been held to constitute grounds for relief; but not when he might have been fully informed by the exercise of ordinary diligence; 6 Halst. 242; 12 Colo. 125; although even when the complainant is not entirely free from fault, the court, in cases where great wrong would otherwise be done, will, for the sake of promoting justice, grant a new trial. Among the cases of surprise may be enumerated the following: the unexpectedly being summoned and detained as a witness or juror in another court, or sudden and serious illness, which prevents the party from attending at the trial; 3 T. B. Monr. 113; 4 Litt. 1; 1 Halst. 344; that the cause was brought on prematurely, in the absence of the party; 6 Dana 89; erroneous ruling of the court as to the right to begin, which has worked manifest injustice; 4 Pick. 156; but see 8 Conn. 254, 296; perturbation of counsel, arising from sudden and dangerous sickness occurring in his family and coming to his knowledge during the trial; 14 Pick. 494; where some unforeseen accident has prevented the attendance of a material

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witness; 6 Mod. 22; 1 Harp. 267; that testimony beyond the reach of the party injured, and completely under the control of the opposite party, was not produced at the trial; 7 Yerg. 502; 7 Wend. 62; that competent testimony was unexpectedly ruled out on the trial; 9 Dana 26; 2 Vt. 573; 2 J. J. Marsh. 515; where a party's own witnesses, through forgetfulness, mistake, contumacy, or perjury, testify differently than anticipated, or where evidence is unexpectedly sprung upon a party by his opponent; 8 Ga. 136; 18 Miss. 326; see 69 Tex. 437; the withdrawal of a material witness before testifying, attended with suspicions of collusion; 25 Wend. 663; that a material witness was suddenly deprived of the power of testifying by a paralytic stroke, or other affection, or that the testimony of the witness was incoherent on account of his being disconcerted at the trial; 1 Root 175; where it is discovered after the trial that a material witness who testified is interested in the event, or where it is probable that the verdict was obtained by false testimony, which the party injured could not until after the trial contradict or expose; 2 C. B. 342; 1 Me. 322. But a new trial cannot be obtained on the ground of surprise caused by evidence which was clearly within the issues presented by the pleadings; 1 Tex. Civ. App. 343. There is no such ground for granting a new trial as mistake or inadvertence, as distinguished from accident or surprise; 96 Cal. 38. Accident or surprise which ordinary prudence could not have guarded against, does not include ignorance, mistake, nor misapprehension of an attorney, not occasioned by the adverse party, nor mismanagement of the defence by the attorney, through design, ignorance, or neglect; 52 Kan. 743; 107 Mo. 500.

New trials *on account of after-discovered testimony* are granted but rarely, and with great caution. The court, in order to set aside the verdict on this ground, must be satisfied that the evidence has come to the applicant's knowledge since the trial; 3 Stor. 1; 21 N. H. 166; see 76 Ga. 602; that it is not owing to the want of diligence that it did not come sooner; 6 Johns. Ch. 479; 80 Fed. Rep. 85; 91 Ga. 171; 99 Cal. 607; see 132 Mass. 341; 49 How. Pr. 53; 19 S. W. Rep. (Mo.) 1107; 73 Hun 195; 1 Blackf. 367; 49 Ill. App. 224; that it is so material that it will probably produce a different result; 1 Dudl. 85; 43 Ill. App. 417; see 76 Ga. 585; 41 Kan. 345; 29 W. Va. 410; 88 Tenn. 430; and that it is not cumulative; Woodb. & M. 348; as mere cumulative evidence is insufficient to warrant a new trial; 78 Cal. 41; 76 Ga. 602; 129 Ill. 101; 120 Ind. 138; 39 Minn. 190; 69 Tex. 679; 83 Va. 581; but the rule does not apply where it is cumulative evidence to prove an *alibi;* 3 Wash. 206. Nor must the sole object of the newly-discovered evidence be to impeach witnesses examined on the former trial; 7 Barb. 271; 8 Gratt. 637; 79 Ga. 633; 116 Ind. 84; 39 Kan. 320; 102 N. C. 347; 85 Va. 205; 43 Ill. App. 161; 41 La. Ann. 787. The moving party must state what the evidence is, and what diligence he has used in the preparation of his case; and his application must be accompanied by affidavits of the newly-discovered witness, unless some cause be shown why they cannot be produced; 5 Halst. 250; 1 Tyl. Vt. 441; 22 Me. 246. Evidence which could have been procured before the trial by the exercise of reasonable diligence is not sufficient; 76 Ga. 618; 73 Ia. 698; 41 Kan. 485; 62 Mich. 186; 69 Tex. 437; 82 Va. 827.

When a continuance on account of absent testimony is refused, and it subsequently appears that such evidence is necessary and material to the defendant, he should be awarded a new trial; 25 Tex. App. 27, 247; 26 *id.* 668.

*Excessive damages* may be good cause for granting a new trial; first, where the measure of damages is governed by fixed rules and principles, as in actions on contracts, or for torts to property, the value of which may be ascertained by evidence; second, in suits for personal injuries, where, although there is no fixed criterion for assessing the damages, yet it is clear that the jury acted from passion, partiality, or corruption; 10 Ga. 37.

A new trial should be granted for an error of law, where the general merits of the case, as one for a recovery at all, are doubtful, and where the damages are apparently excessive; 80 Ga. 602. In actions for personal torts, a new trial will not, in general, be granted on account of the smallness of the damages, unless the verdict is the result of contrivance by the defendant, or surprise on the plaintiff, or of partiality or misconduct of the jury, or unless the finding is entirely disproportioned to the injury. See 49 L. J. Q. B. 233, where a verdict of £7,000 in favor of a physician for damages, caused by defendant's negligence, was set aside on the ground of the damages being insufficient.

A state statute forbidding new trials on account of inadequate damages, if binding on the federal courts, would be in violation of the constitutional right of a trial by jury; 80 Fed. Rep. 72. Where the verdict is for an amount exceeding the damages laid in the writ, it will be set aside unless the plaintiff will release the excess; 7 Wend. 330. See JURY; DAMAGES.

It is within the discretion of the trial court, after a verdict awarding excessive damages, to make an order denying a motion for a new trial on the condition that the plaintiff will remit a certain part of the verdict; 98 Cal. 13; 130 U. S. 69; see 48 Mo. App. 79; 70 Ga. 119; 91 *id.* 813. It is error to set aside a verdict as excessive unless the amount is such as to show misconduct and impropriety on the part of the jury; 74 Hun 284. Where the question of damages is peculiarly for the jury, if the court grant a new trial, it should be granted absolutely and not on condition of a refusal to file a remittitur; 26 L. R. A. 653.



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*When the verdict is clearly against the law*, it will be set aside, notwithstanding the jury had power to decide both the law and the fact, or the issue was one exclusively of fact and there have been concurrent verdicts by two successive juries; 1 Dudl. 213; 4 Ga. 193; see 79 Ga. 770; if, however, substantial justice has been done, a new trial will not be granted though the law arising on the evidence would have justified a different result; 1 Burr. 54; 4 Term 468.

Courts are at all times reluctant to grant a new trial *on the ground that the verdict is against the evidence;* and where the jury have passed upon a mere question of fact, they will only do so when the verdict is palpably against the evidence; injustice must have been done by the verdict, and there must be a probability that justice will be done on a retrial; 21 Conn. 245; 5 Ohio 509; 3 Strobh. 358. A statute forbidding courts to set aside a third verdict in the same action, does not apply to a case where there is *no* evidence, and thus construed, is constitutional; 89 Tenn. 311. See 134 U. S. 614; 36 Neb. 642. Where the verdict is founded on circumstantial evidence, the court will rarely, if ever, interfere with it; 16 Mass. 345; 11 Ill. 36. On the other hand, when the issue approximates to a purely legal question, courts are somewhat more liberal in granting new trials; 2 McMull. 44. The verdict will be set aside where the witnesses upon whose testimony it was obtained have since the trial been convicted of perjury; 3 Dougl. 24; so where the testimony on which the verdict is founded derives its credit from circumstances, and those circumstances are afterwards clearly falsified by affidavit; 1 B. & P. 427; 3 Grah. & W. N. Tr. 1203.

The verdict may be void for *obscurity or uncertainty;* 1 S. & R. 367; and where special findings are contradictory on essential questions, a new trial should be granted; 111 N. C. 661. It will be set aside where it is not responsive to the issue, or does not comprehend all of the issues, unless the finding of one or more of the issues will be decisive of the cause; 2 Ala. N.S. 359; 11 Pick. 45; or where it is contrary to the instructions, whether the latter are right or wrong; 74 Ia. 330; or where the verdict shows that it includes items not shown by the evidence to be due; 45 Ill. App. 328. So, where the findings on the issues are contradictory, thus rendering the general verdict inconsistent and unintelligible; 97 N. C. 66. That it was not recorded in open court, or was received in the absence of the plaintiff, or was altered after it was recorded and the jury dismissed, will be ground for a new trial; 1 Ill. 109; 1 Wend. 36; 16 S. & R. 414. If rendered on Sunday, it will, in general, be void; but there are many instances in which verdicts have been sustained though rendered on that day; 1 South. 156; 15 Johns. 119; 3 Watts 56; 13 Ohio 490.

In the United States courts no exception lies to the overruling of a motion for a new trial; 7 U. S. App. 359; 85 Fed. Rep. 957; or where a new trial on the ground of after discovered evidence is refused; 24 U. S. App. 601.

The Pennsylvania act of 1891 provides that "the supreme court shall have power in all cases to affirm, reverse, amend, or modify a judgment, decree, etc., and to enter such judgment or decree as it may deem proper, without returning the record to the court below, and may order a verdict and judgment to be set aside and a new trial had." In 178 Pa. 481, it was said by the court that this was "a new power, a wide departure from the policy of centuries in regard to appellate courts and clearly exceptional in character;" but the act was held to be constitutional, and the court ordered the verdict set aside.

An act of Montana authorizing its supreme court to grant a new trial for excessive damages, was upheld in 131 U. S. 29, where it was held that the court below could order a new trial, or, with the plaintiff's consent, reduce the verdict, but could not enter judgment itself for a lesser sum than the verdict.

*Courts of equity* have always proceeded with great caution in awarding new trials at law. At the present day they are but seldom applied to for this purpose, as courts of law are liberal in exercising the same jurisdiction, and it has been held to be unconscionable and vexatious to bring into courts of equity a discussion which might have been had at law; 1 Sch. & L. 201. But, in general, when it would have been proper for a court of law to have granted a new trial if the application had been made while that court had the power, it is equally proper for a court of equity to do so if the application be made on grounds arising after the court of law can no longer act; 1 A. K. Marsh. 237. A court of equity will not grant a new trial at law to enable a party to impeach a witness, or because the verdict is against evidence; 1 Johns. Ch. 432; or when the new trial can be obtained by application to a law court; 52 N. J. Eq. 387. It will only interpose in cases of newly-discovered evidence, surprise, fraud, or the like, where the party is deprived of the means of defence by circumstances beyond his control; 1 Litt. 140; 2 Bibb 241; 2 Hawks 605; Will. Eq. Jur. 357.

A court of equity will often grant a second, and sometimes a third, fourth, and even fifth trial of a feigned issue, in cases where a court of law would not disturb a first verdict; 1 Edw. Ch. 96. This arises from the consideration that the responsibility of the decision rests upon the judge in equity; 3 Grah. & W. N. Tr. 1570.

New trials may be granted *in criminal* as well as in civil cases, at the solicitation of the defendant, when he is convicted even of the highest offences. But a person once lawfully convicted on a sufficient indictment can never after, against his consent, be a second time put in peril for the same offence, unless the former conviction was instituted by the fraudulent procurement

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of the defendant with a view to shield himself from adequate punishment ; 2 Grah. & W. N. Tr. 61. Where the accused has been acquitted, and his acquittal has not been procured by his own fraud or evil practice, the law, mingling justice with mercy *in favorem vitæ et libertatis*, does not permit a new trial ; 16 Conn. 54. In civil actions for the recovery of penalties, and in some cases where the form of proceeding is criminal, if the object be only to establish a civil right, as in cases of *quo warranto* and the like, new trials may be granted even after acquittal. But, in such cases, when the verdict is for the defendant, it will not, in general, be disturbed unless some rule of law be violated in the admission or rejection of evidence or in the charge of the court to the jury ; 4 Term 753 ; 2 Cow. 811; 2 Graham & W. New Tr. 61. See Graham & Waterman ; Hilliard, New Trials ; JURY ; MISDIRECTION ; CHARGE; MISTRIAL.

**NEW WORKS.** By a new work is understood every sort of edifice or other work which is newly commenced on any ground whatever. Where the ancient form of work is changed, either by an addition being made to it or by some part of the ancient work being taken away, it is styled also a new work. La. Civ. Code, Art. 856.

**NEW YORK.** The name of one of the original states of the United States of America.

In its colonial condition this state was governed from the period of the revolution of 1688 by governors appointed by the crown, assisted by a council, which received its appointments also from the parental government, and by the representatives of the people. 1 Story, Const. b. 1, ch. 10.

There have been four constitutions adopted by the state since its colonial period : one in 1777, which remained in force until January 1, 1823, when the second went into operation. This second constitution remained until January 1, 1847, when a constitution, adopted by a convention of the people at Albany, went into force. This constitution was amended in certain particulars, and remained in force until January 1, 1895, when the present constitution was adopted by a convention at Albany and went into effect on January 1, 1895, except article six, relating to the courts, which became operative January 1, 1896.

THE LEGISLATIVE POWER.—This is lodged in a senate and assembly.

The *Senate* consists of fifty members, chosen, one for each senatorial district, for the term of two years.

The *Assembly* consists of one hundred and fifty members, elected for the term of one year, one from each of the assembly districts, according to an apportionment by the legislature, and each county, except Hamilton, is to be always entitled to one member. No town is to be divided in forming assembly districts.

THE EXECUTIVE POWER.—The *Governor* is elected biennially, for the term of two years, by the people, or by the legislature in consequence of a failure to elect by the people. He must be a citizen of the United States, thirty years old at least, and have been for five years next preceding his election a resident within the state. He has the usual executive powers including that of granting pardons and a veto subject to be overruled by a vote of two-thirds of both houses.

The *Lieutenant-Governor* is elected at the same time, for the same term, and must possess the same qualifications, as the governor, whose powers he exercises in case of a vacancy either permanent or temporary. He is president of the senate,—with only a casting vote therein. If the office of governor and lieutenant-governor are both vacant the succession is to the president of the senate and speaker of the assembly in that order.

A *Secretary of State*, a *Comptroller*, a *Treasurer*, an *Attorney-General*, and a *State Engineer and Surveyor* are elected by the people biennially, for the term of two years each.

THE JUDICIAL POWER.—The *Court of Appeals* consists of the chief judge and six associate judges, who are chosen by the electors for the term of fourteen years, from and including the first day of January next after their election. Five members of the court form a quorum, and the concurrence of four is necessary to a decision.

It is the court of final appellate jurisdiction, limited to the review of questions of law, except in capital cases. No unanimous decision of the appellate division of the supreme court that there is evidence to support a verdict or finding not directed by the court, may be reviewed by the court of appeals. Except in capital cases appeals may be taken, as of right, only from judgments or orders entered upon decisions of the appellate division of the supreme court finally determining actions of special proceedings, and from orders granting new trials on exceptions where the appellants stipulate for final judgment upon affirmance. But the appellate division may allow an appeal on any question which, in its opinion, ought to be reviewed. The legislature may further restrict the jurisdiction and right of appeal, but the latter shall not depend upon the amount involved.

The *Supreme Court*.—There are four judicial districts for the appellate jurisdiction and eight for the election of judges. Seven justices in New York county and five in each of the other departments constitute the appellate division. In each department four constitute a quorum ; the concurrence of three is necessary to a decision and no more than five shall sit in any case. From all the justices elected to the supreme court those who constitute the appellate division in each department and the presiding justice thereof are designated by the governor from time to time. The presiding justice remains such during his term, and must be a resident of the department, as must also be a majority of the other justices, all of whom are designated for terms of five years, or the unexpired portions of their terms of office if less. The jurisdiction is the same formerly exercised by the general terms of the supreme court and of the court of common pleas of the city of New York, the superior court of the cities of New York and Buffalo, and the city court of Brooklyn, and additional jurisdiction may be conferred by the legislature.

The supreme court has general and original jurisdiction in law and equity throughout the state, subject to the appellate jurisdiction of the appellate division and of the court of appeals. It has also the jurisdiction formerly vested in the courts of oyer and terminer which were abolished by the amended constitution, as were also the superior court and court of common pleas of the city of New York, the superior court of Buffalo, and the city court of Brooklyn, all their jurisdiction being transferred to the supreme court.

The *County Courts* in each county are held by a single judge elected for six years, except that in Kings County there are two judges. They have original civil jurisdiction only against resident defendants in cases involving not more than $2,000, and subject to these restrictions of residence and amount involved, the legislature may enlarge or restrict their jurisdiction. Except in the county of New York, they have also the jurisdiction formerly exercised by the court of sessions in each county, the latter being abolished by the amended constitution. They have also jurisdiction in cases of partition, dower, specific performance, and foreclosure and redemption of mortgages of real estate within the county ; and the enforcement of liens on chattels within the county not exceeding $2,000. A county judge may hold court in any other county upon the request of the judge thereof.

The *Surrogates' Courts* in New York, Kings, and some of the larger counties are held by a surrogate elected for six years, excepting New York city where the terms is fourteen years. In the other counties the duties of surrogate are performed by the county judge. The surrogate has jurisdiction of the probate of wills, letters testamentary and of administration, accounts of executors, administrators, and trustees, and of the settlement of decedent's estates and the disposition of real property

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belonging thereto, for the payment of debts and the appointment of guardians.

*Justices of the Peace* are selected in each town and certain cities and villages of New York, for the term of four years, in number and classes as directed by law. They have jurisdiction of cases involving not more than $200 (or upon confession, $500), for breach of contract other than marriage, tortious injury of person or property, penalties, bonds conditioned for the payment of money, judgments of courts not of record, actions for the recovery of chattels, and not (over $200) upon surety bonds taken by them though the amount involved is more than $200. There are expressly excepted from their jurisdiction, actions where the people of the state are concerned, except for penalties not exceeding $200, and where the title to land comes in question, and actions for an assault and battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation, and seduction, and matters of account where the sum total of the accounts exceeds four hundred dollars, and actions against an executor, administrator, heir, or devisee as such, and actions for damages for causing death. There are also justices' courts of Albany and Troy, and district courts of New York city, and the municipal court of the city of Rochester.

In New York city the *city court* has common law jurisdiction except against executors or administrators as such, where the amount involved is not above $2,000 and process is served in the city of New York. It has also jurisdiction to foreclose mechanics liens on property in the city, and the limitation as to amount does not apply to actions on undertakings in the court or for damages for breach of promise of marriage, and certain specified causes of action known as marine causes. By the charter of greater New York the jurisdiction of this court remains territorially as before. See MARINE COURT IN THE CITY OF NEW YORK.

The *Municipal Court of New York* is held in twenty-three districts of greater New York and has general common law jurisdiction where the amount does not exceed $500, except as affecting title to real property or where the recovery is for certain specified personal torts.

The *Court of General Sessions* is a criminal court divided into four parts, presided over by the recorder, the city judge, and two of three other judges known as judges of the court of general sessions. They have co-ordinate jurisdiction. For the general criminal administration greater New York is divided into two divisions in each of which there are courts of special sessions and also city magistrates, the latter of whom punish summarily petty offences and also act as magistrates.

**NEW ZEALAND.** A colony of Great Britain which was constituted a separate colony in 1841. It has a Governor appointed by the Crown. The legislation is vested in a Governor and General Assembly of two houses. The legislative council consists of forty-six members nominated by the Crown, and a house of representatives of seventy-five members elected for three years.

**NEWLY DISCOVERED EVIDENCE. In Practice.** Proof of some new and material fact in the case, which has been ascertained since the verdict. See NEW TRIAL.

**NEWSPAPERS.** Papers for conveying news, printed and distributed periodically.

A paper issued every day of the week except one is a daily newspaper; 45 Cal. 30.

A paper devoted principally to legal intelligence is a newspaper in which notices required by statute may be published; 75 Ill. 51; but see 25 Minn. 147.

Publication of notice from June 26 to July 26, both dates inclusive, is a sufficient compliance with an ordinance directing publication for thirty days, although the paper in which the publication is made is not issued on Sundays or on the 4th of July; 60 Fed. Rep. 961. See 7 Exch. 113; 4 Op. Atty. Gen. 11; LIBEL; LIBERTY OF THE PRESS.

**NEXI. In Roman Law.** Persons bound (*nexi*); that is, insolvents, who might be held in bondage by their creditors until their debts were discharged. Heineccius, Antiq. Rom. ad Inst. lib. 3, tit. 330; Calvinus; Mackeldey, Civ. Law § 486 *a*.

**NEXT.** Nearest or nighest, not in the sense of propinquity alone, as, for example, three persons on three chairs, one in the midst, those on each side of the middle one are equally near, each "next" to the middle one; but it signifies also order, or succession, or relation as well as propinquity. 27 L. J. Ch. 654. See generally 3 Q. B. 723; 4 Johns. Ch. 26; 3 Cai. (N. Y.) 89.

**NEXT FRIEND.** One who, without being regularly appointed guardian, acts for the benefit of an infant, married woman, or other person not *sui juris*. Where a person of unsound mind, not found so by inquisition, conveys his land by deed to another, the proper mode of proceeding in equity to have such deed cancelled, annulled, and made void is not by information exhibited by the attorney-general on the relation of others, but by a bill in the name of the incompetent person by a responsible next friend; 5 Del. Ch. 328, where the practice in such cases was elaborately discussed, both in argument and by Saulsbury, Ch., who permitted an information in the name of the attorney-general to be amended into a bill by next friend, and whose decision was affirmed on appeal, where the only question was the propriety of the amendment. It has been held in other states that such suit may be brought by next friend in behalf of a person not adjudged insane and having no guardian appointed; 11 Tex. Civ. App. 677; 72 Miss. 838; but in Ohio it was held that such action must be by guardian, not next friend; 41 N. E. Rep. 239; and in Iowa that it could not be done independently of statute; 96 Ia. 560. In such cases the court may supersede a next friend by a guardian *ad litem*, and in its discretion stay proceedings instituted by the former; 64 Fed. Rep. 331. See 2 Bish. Mar. Div. & Sep. 513, 514; PROCHEIN AMI.

Where an infant is so young as to be incapable of making a selection of a person to represent him, the court will permit any person to institute suit in his behalf, exercising, however, discretion to prevent any abuse of that right; 134 U. S. 650.

**NEXT OF KIN.** This term is used to signify the relations of a party who has died intestate.

In general, no one comes within this term who is not included in the provisions of the statutes of distribution; 3 Atk. 422, 761; 1 Ves. Sen. 84; 28 How. Pr. 417. The

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phrase means relation by blood ; 72 N. Y. 312. It has been held, on the other hand, that next of kin in a will means "nearest of kin;" 10 Cl. & F. 215; 63 N. C. 242; 47 Ill. App. 292. A wife cannot, in general, claim as next of kin of her husband, nor a husband as next of kin of his wife ; 113 Mass. 430 ; 113 *id.* 431 ; 4 Ired. Eq. 56 ; 14 Ves. 372 ; 44 Ill. 446 ; 106 Pa. 176. But see 34 Barb. 410 ; 28 Ohio 192 ; 84 Iowa 655. But when there are circumstances in a will which induce a belief of an intention to include them under this term, they will be so considered, though in the ordinary sense of the word they are not ; Hovenden, Fr. 288, 289 ; 1 My. & K. 82 ; the same rule holds as to the interpretation of statutes ; 7 Ohio Cir. Ct. Rep. 185 ; 51 N. W. Rep. (Ia.) 145 ; 25 Alb. L. J. 496. This phrase as used in the act of March 3, 1891 (French Spoliation claims), means next of kin living at the date of the act, to be determined according to the statutes of distribution of the respective states of the domicil of the original sufferers ; 162 U. S. 439 ; 160 Pa. 391, reversing 150 Pa. 85 ; 20 D. C. 261 ; 49 Leg. Int. 147, a Maryland case.

In the construction of wills and settlements, after a considerable conflict of opinions, the established rule of interpretation in England is that next of kin when found in ulterior limitations must be understood to mean nearest of kin without regard to the statute of distribution ; 2 Jarm. Wills 108 ; 162 U. S. 464. This rule was followed in 144 Mass. 135 ; 63 N. C. 242, but it was not approved in 95 N. Y. 17 ; 57 N. H. 226.

See LEGACY : DESCENT AND DISTRIBUTION ; KIN ; KINDRED.

**NEXUM** (Lat.). **In Roman Law.** The transfer of the ownership of a thing, or the transfer of a thing to a creditor as a security.

In one sense *nexum* includes *mancipium* ; in another sense, *mancipium* and *nexum* are opposed, in the same way as sale and mortgage or pledge are opposed. The formal part of both transactions consisted in a transfer *per æs et libram*. The person who became *nexus* by the effect of a *nexum* placed himself in a servile condition, not becoming a slave, his *ingenuitas* being only in suspense, and was said *nexum inire*. The phrases *nexi datio*, *nexi liberatio*, respectively express the contracting and the release from the obligation.

The Roman law as to the payment of borrowed money was very strict. A curious passage of Gellius (xx. 1) gives us the ancient mode of legal procedure in the case of debt, as fixed by the Twelve Tables. If the debtor admitted the debt, or had been condemned in the amount of the debt by a *judex*, he had thirty days allowed him for payment. At the expiration of this time he was liable to the *manus injectio*, and ultimately to be assigned over to the creditor (*addictus*) by the sentence of the prætor. The creditor was required to keep him for sixty days in chains, during which time he publicly exposed the debtor on three *nundinæ*, and proclaimed the amount of his debt. If no person released the prisoner by paying the debt, the creditor might sell him as a slave or put him to death. If there were several creditors, the letter of the law allowed them to cut the debtor in pieces and take their share of his body in proportion to their debt. Gellius says that there was no instance of a creditor ever having adopted this extreme mode of satisfying his debt. But the creditor might treat the debtor, who was *addictus*, as a slave, and compel him to work out his debt ; and the treatment was often very severe. In this passage Gellius does not speak of *nexi*, but only of *addicti*, which is sometimes alleged as evidence of the identity of *nexus* and *addictus*, but it proves no such identity. If a *nexus* is what he is here supposed to be, the laws of the Twelve Tables could not apply ; for when a man became *nexus* with respect to one creditor, he could not become *nexus* to another ; and if he became *nexus* to several at once, in this case the creditors must abide by their contract in taking a joint security. This law of the Twelve Tables only applied to the case of a debtor being assigned over by a judicial sentence to several creditors, and it provided for a settlement of their conflicting claims. The precise condition of a *nexus* has, however, been a subject of much discussion among scholars. See Smith, Dict. Rom. & Gr. Antiq.; MANCIPIUM.

**NICARAGUA.** A republic of Central America. The president is elected for four years. The Senate of eighteen members is elected for six years and the House of Representatives of twenty-one members is elected for four years.

By a treaty of January 15, 1898, it was provided that Honduras, Nicaragua, Costa Rica, Guatemala, and San Salvador should constitute one republic in respect of their relations with foreign countries, to be called the Greater Republic of Central America. The treaty was to be ratified by the several republics. It has been ratified by Honduras, Nicaragua, and San Salvador, which are now known as states of the Greater Republic.

**NICHILLS or NIHILS.** Debts due to the exchequer which the sheriff could not levy, and as to which he returned *nil*. These sums were transcribed once a year by the clerk of the nichills, and sent to the treasurer's remembrancer's office, whence process was issued to recover the "nichill" debts. Both of these offices were abolished in 1833 ; Manning's Exch. Pr. 321 ; Moz. & W.

**NICKNAME.** A short name ; one *nicked* or cut off for the sake of brevity, without conveying any idea of opprobrium and frequently evincing the strongest affection or the most perfect familiarity. Busb. Eq. 74.

**NIDERLING.** A vile, base person or sluggard ; chicken-hearted. Spelm. Sometimes Nidering and Nithing. Toml. Dic.

**NIECE.** The daughter of a brother or sister. Ambl. 514 ; 1 Jac. 207. See NEPHEW ; LEGACY.

**NIEFE.** See NEIF.

**NIENT COMPRISE** (Law Fr. not included). An exception taken to a petition because the thing desired is not contained in that deed or proceeding whereon the petition is founded. Toml. Law Dict.

**NIENT CULPABLE** (Law Fr. not guilty). The name of a plea used to deny any charge of a criminal nature, or in an action for a tort.

**NIENT DEDIRE** (Law Fr. to say nothing). Words used to signify that judgment be rendered against a party because he does not deny the cause of action : *i. e.* by default.

When a fair and impartial trial cannot

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be had in the county where the venue is laid, the practice in the English courts is, on an affidavit of the circumstances, to change it, in transitory actions; or, in local actions, they will give leave to enter a suggestion on the roll, with a *nient dedire*, in order to have the trial in another county. 1 Tidd, Pr. 655.

**NIENT LE FAIT** (Law Fr.). **In Pleading.** The same as *non est factum*, a plea by which the defendant asserts that the deed declared upon is not his deed.

**NIENT SEIST. In Old Pleading.** Not seised. The general plea in a writ of annuity. Crabb, Eng. L. 424.

**NIGHT.** That space of time during which the sun is below the horizon of the earth, except that short space which precedes its rising and follows its setting, during which by its light the countenance of a man may be discerned. It is night when there is daylight, *crepusculum* or *diluculum*, enough left or begun to discern a man's face withal. 1 Hale, Pl. Cr. 550; 4 Bla. Com. 224; Bac. Abr. *Burglary* (D); 2 Russ. Cr. 32. See 47 Conn. 182; 78 Ill. 295.

The common-law rule has been modified by statute in some of the states, and by the stat. 9 Geo. IV. c. 69, the night, for purposes of poaching, was held to begin one hour after sunset, and end one hour before sunrise. By the stat. 24 & 25 Vict. c. 96, the night, during which a burglary may be committed, is deemed to commence at 9 P. M., and end at 6 A. M.; 4 Steph. Com. 105. But see 88 Wis. 163, where it was held that such an instruction is erroneous, as it is day when there is daylight enough by which to discern a person's face.

In the time of the English Saxons and even till Henry I., time was computed by nights: as fortnight for two weeks.

**NIGHT WALKERS.** Persons who sleep by day and walk by night; 5 Edw. III. c. 14; that is, persons of suspicious appearance and demeanor, who walk by night. In many of the states there are statutes against it; 1 Bish. Cr. L. § 501, n. See 45 N. H. 543.

Watchmen may undoubtedly arrest them; and it is said that private persons may also do so; 2 Hawk. Pl. Cr. 120. But see 3 Taunt. 14; Hamm. N. P. 135.

**NIHIL CAPIAT PER BREVE** (Lat. that he take nothing by his writ). **In Practice.** The form of judgment against the plaintiff in an action, either in bar or in abatement. When the plaintiff has commenced his proceedings by bill, the judgment is *nihil capiat per billam*. Co. Litt. 363.

**NIHIL DICIT** (Lat. he says nothing). The name of the judgment rendered against a defendant who fails to put in a plea or answer to the plaintiff's declaration by the day assigned. In such a case, judgment is given against the defendant of course, as he says nothing why it should not. See 15 Viner, Abr. 556; Dane, Abr. Index.

**NIHIL EST** (Lat. there is nothing). A form of return made by a sheriff where he has been unable to serve the writ. "Although *non est inventus* is the more frequent return in such case, yet it is by no means so full an answer to the command of the writ as is the return of *nihil*. That amounts to an averment that the defendant has nothing in the bailiwick; no dwelling-house, no family, no residence; and no personal presence to enable the officer to make the service required by the act of assembly. It is, therefore, a full answer to the exigency of the writ." 33 Pa. 139.

**NIHIL HABET** (Lat. he has nothing). The name of a return made by a sheriff, marshal, or other proper officer, to a *scire facias* or other writ, when he has not been able to serve it on the defendant. 5 Whart. 367.

Two returns of *nihil* in proceedings *in rem* are, in general, equivalent to a service; Yelv. 112; 1 Cow. 70; 1 Law Rep. N. C. 491; 4 Blackf. 188; 5 S. & R. 211; 24 Pa. 491; 71 *id.* 81.

**NIHILS.** See NICHILLS.

**NIL DEBET** (Lat. he owes nothing). **In Pleading.** The general issue in debt on simple contract. Gould. Pl. 284. It is in the following form: "And the said C D, by E F, his attorney, comes and defends the wrong and injury, when, etc., and says that he does not owe the said sum of money above demanded, or any part thereof, in manner and form as the said A B hath above complained. And of this the said C D puts himself upon the country." When, in debt on specialty, the deed is the only inducement to the action, the general issue is *nil debet*. Steph. Pl. 174, n.; 8 Johns. 83. In English practice, by rule 11, Trinity Term, 1853, the plea of *nil debet* was abolished; 2 Chitty, Pl. 275.

**NIL HABUIT IN TENEMENTIS.** (Lat.). **In Pleading.** A plea by which the defendant, who is sued by his landlord in debt for rent upon a lease, but by deed indented, denies his landlord's title to the premises, alleging *that he has no interest in the tenements*. 2 Lilly, Abr. 214; 12 Viner, Abr. 184.

**NISI PRIUS** (Lat. unless before). **In Practice.** For the purpose of holding trials by jury. Important words in the writ (*venire*) directing the sheriff to summon jurors for the trial of causes depending in the superior courts of law in England, which have come to be adopted, both in England and the United States, to denote those courts or terms of court held for the trial of civil causes with the presence and aid of a jury.

The origin of the use of the term is to be traced to a period anterior to the institution of the commission of *nisi prius* in its more modern form. By Magna Charta it was provided that the common pleas should be held in one place, and should not follow the person of the king; and by another clause, that assizes of novel disseisin and of mort d'ancestor, which were the two commonest forms of actions to recover land, should be held *in* the

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various counties before the justices in eyre. A practice obtained very early, therefore, in the trial of trifling causes, to continue the cause in the superior court from term to term, provided the justices in eyre did not sooner (*nisi prius justiciarii*) come into the county where the cause of action arose, in which case they had jurisdiction when they so came. Bracton, l. 3, c. 1, § 11. By the statute of *nisi prius*, 13 Edw. I. c. 30, enforced by 14 Edw. III. c. 16, justices of assize were empowered to try common issues in trespass and other suits, and return them, when tried, to the superior court, where judgment was given. The clause was then left out of the continuance and inserted in the venire, thus: "*Præcipimus tibi quod venire facias coram justiciariis nostris apud Westm. in Octavis Scti Michœlis*, nisi *talis et talis, tali die et loco, ad partes illas venerint, duodecim*," etc. (we command you that you cause to come before our justices at Westminster, on the octave of Saint Michael, *unless* such and such a one, on such a day and place, shall come to those parts, twelve, etc.). Under the provisions of 42 Edw. III. c. 11, the clause is omitted from the venire, and the jury is respited in the court above, while the sheriff summons them to appear before the justices, upon a *habeas corpora juratorum*, or, in the king's bench, a *distringas*. See Sell. Pr. Introd. lxv.; 1 Spence, Eq. Jur. 116; 3 Shars. Bla. Com. 352-354; 1 Reeve, Hist. Eng. Law 245, 382.

See, also, ASSIZE; COURT OF ASSIZE AND NISI PRIUS; JURY.

**NISI PRIUS ROLL. In Practice.** The transcript of a case made from the record of the superior court in which the action is commenced, for use in the nisi prius court.

It includes a history of all the proceedings in the case, including the declaration, plea, replication, rejoinder, issue, etc. It must be presented in proper manner to the nisi prius court. When a verdict has been obtained and entered on this record, it becomes the *postea*, and is returned to the superior court.

Under the Judicature Act of 1875, 1st Sched. Ord. xxxvi. r. 17, the party entering the action for trial is to deliver to the officer a copy of the pleadings for the use of the judge. Moz. & W.

**NITHING.** See NIDERLING.

**NO AWARD.** The name of a plea in an action on an award. 2 Ala. 520; 1 N. Chipm. 131; 3 Johns. 367.

**NO BILL.** Words frequently indorsed on a bill of indictment by the grand jury when they have not sufficient cause for finding a true bill. They are equivalent to *Not found*, or *Ignoramus*. 2 N. & M'C. 558.

**NOBILE OFFICIUM. In Scotch Law.** An equitable power of the court of sessions, by which it is able, to a certain extent, to give relief when none is possible at law. Stair, Inst. b. iv. tit. 3, § 1; Erskine, Inst. 1. 3. 22; Bell, Dict.

**NOBILITY.** An order of men, in several countries, to whom special privileges are granted. The constitution of the United States provides, Art. 1, § 10, that "no state shall grant any title of nobility," and § 9, that "no title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, without the consent of congress, accept of any title of any kind whatever, from any king, prince, or foreign state." It is singular that there should not have been a general prohibition against any citizen whatever, whether in private or public life, accepting any foreign title of nobility. An amendment for this purpose has been recommended by congress, but it has not been ratified by a sufficient number of states to make it a part of the constitution, probably from a growing sense that it is unnecessary; Rawle, Const. 120; Story, Const. §§ 1350-52; Fed. No. 84.

**NOCTANTER** (By night). An abolished writ which issued out of chancery and returned to the queen's bench for the prostration of inclosures, etc. It was repealed by 7 & 8 Geo. IV. c. 27.

**NOCTES DE FIRMA.** In Domesday book understood of entertainment of meat and drink for so many nights. Toml. Law Dict. See NIGHT.

**NOCUMENTUM** (Lat. harm, nuisance). **In Old English Law.** A thing done whereby another man is annoyed in his free lands or tenements. Also, the *assize* or writ lying for the same. Fitzh. N. B. 183; Old N. B. 108, 109. Manw. For. Laws, c. 17, divides *nocumentum* into *generale, commune, speciale*. Reg. Orig. 197, 199; Coke, Will Case. *Nocumentum* was also divided into *damnosum*, for which no action lay, it being done by an irresponsible agent, and *injuriosum et damnosum*, for which there were several remedies. Bracton 221; Fleta, lib. 4, c. 26, § 2.

**NOISE.** See NUISANCE; INJUNCTION.

**NOL. PROS.** See NOLLE PROSEQUI.

**NOLENS VOLENS** (Lat.). Whether willing or unwilling.

**NOLISSEMENT. In French Law.** Affreightment. Ord. Mar. liv. 3, t. 1.

**NOLLE PROSEQUI. In Practice.** An entry made on the record, by which the prosecutor or plaintiff declares that he will proceed no further. See Tr. & H. Pr. 566.

A *nolle prosequi* may be entered either in a criminal or a civil case. In *criminal* cases, before a jury is impanelled to try an indictment, and also after conviction, the attorney-general has power to enter a *nolle prosequi* without the consent of the defendant; but after a jury is impanelled a *nolle prosequi* cannot be entered without the consent of the defendant; 17 Pick. 395; 12 Vt. 93; 3 Hawks 613; 7 Humphr. 152; 1 Bail. 151; 9 Ga. 306. See 102 Mass. 487; 49 N. H. 155. It is for the prosecuting officer to enter a *nol. pros.* in his discretion; 3 Hawks 613; but in some states leave must be obtained of the court; 1 Hill N. Y. 377; 1 Va. Cas. 139; 12 Vt. 93; 7 Smith, Pa. Laws 227.

It may be entered as to one of several defendants; 11 East 307.

The effect of a *nolle prosequi*, when obtained, is to put the defendant without

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day; but it does not operate as an acquittal; for he may be afterwards reindicted, and, it is said, even upon the same indictment fresh process may be awarded; 6 Mod. 261; Com. Dig. *Indictment* (K); 2 Mass. 172; 4 Cush. 235; 13 Ired. 256. See 3 Cox, C. C. 93; 7 Humphr. 159; 57 Ga. 478; 61 Mo. 173.

A *nolle prosequi* as to some of the counts in an indictment works no acquittal, but leaves the prosecution just as though such counts had never been inserted in the indictment; 152 U. S. 539.

In *civil cases*, a *nolle prosequi* is considered not to be of the nature of a *retraxit* or release, as was formerly supposed, but an agreement only not to proceed either against *some* of the defendants, or as to *part* of the suit. See 1 Wms. Saund. 207, note 2, and the authorities there cited; 1 Chitty, Pl. 546. A *nolle prosequi* is now held to be no bar to a future action for the same cause, except in those cases where, from the nature of the action, judgment and execution against one is a satisfaction of all the damages sustained by the plaintiff; 3 Term 511; 1 Wils. 98.

In civil cases, a *nolle prosequi* may be entered as to one of several counts; 7 Wend. 301; or to one of several defendants; 1 Pet. 80; as in the case of a joint contract, where one of two defendants pleads infancy, the plaintiff may enter a *nolle prosequi* as to him and proceed against the other: 1 Pick. 500. See, generally, 1 Pet. 74; 2 Rawle 334; 1 Bibb 337; 3 Cow. 335, 374; 5 Gill & J. 489; 5 Wend. 224; 3 Watts 460.

**NOMEN** (Lat.). **In Civil Law.** A name of a person or thing. In a stricter sense, the name which declared the *gens* or family: as, Porcius, Cornelius; the *cognomen* being the name which marked the individual: as Cato, Marcus; *agnomen* a name added to the cognomen for the purpose of description. The name of the person himself: *e. g. nomen curiis addere.* The name denoting the condition of a person or class: *e. g. nomen liberorum*, condition of children. Cause or reason (*pro causa aut ratione*): *e. g. nomine culpæ*, by reason of fault. A mark or sign of anything, corporeal or incorporeal. *Nomen supremum, i. e.* God. Debt or obligation of debt. A debtor. See Calvinus, Lex.

**In Old English Law.** A name. The Christian name, *e. g.* John, as distinguished from the family name: it is also called *prænomen.* Fleta, lib. 4, c. 10, §§ 7, 9; Law Fr. & Lat. Dict.

**In Scotch Law.** *Nomen debiti.* Right to payment of a debt.

**NOMEN COLLECTIVUM** (Lat.). A word in the singular number which is to be understood in the plural in certain cases.

Misdemeanor, for example, is a word of this kind, and when in the singular may be taken as *nomen collectivum* and including several offences. 2 B. & Ad. 75. *Heir*, in the singular, sometimes includes all the heirs. *Felony* is not such a term.

**NOMEN GENERALISSIMUM** (Lat.). A most universal or comprehensive term: *e. g.* land. 2 Bla. Com. 19; 3 *id.* 172; Tayl. Law Gloss. So *goods.* 2 Will. Ex. 1014.

**NOMINAL DAMAGES. In Practice.** A trifling sum awarded where a breach of duty or an infraction of the plaintiff's right is shown, but no serious loss is proved to have been sustained.

Those awarded where, from the nature of the case, some injury has been done, the amount of which the proofs fail entirely to show; 5 Wash. 807.

Wherever any act injures another's right, and would be evidence in future in favor of a wrong-doer, an action may be sustained for an invasion of the right without proof of any specific injury; 1 Wms. Saund. 346 *a*; 28 N. H. 438; 13 Conn. 269; and wherever the breach of an agreement or the invasion of a right is established, the law infers some damage, and if none is shown will award a trifling sum: as, a penny, one cent, six and a quarter cents, etc.; 14 Ill. 301; 4 Denio 554; Sedgw. Dam. 47; Field, Damages § 860.

Thus, such damages may be awarded in actions for flowing lands; 2 Stor. 661; 1 Rawle 27; 12 Me. 183; 28 N. H. 438; injuries to commons; 2 East 154; violation of trade-marks; 4 B. & Ad. 410; and see 7 Cush. 322; 2 R. I. 566; infringement of patents; 1 Gall. 429, 483; 49 Fed. Rep. 747; diversion of water-courses; 5 B. & Ad. 1; 17 Conn. 288; 2 Ill. 544; 6 Ind. 39; 32 N. H. 90; but see 21 Ala. N. S. 309; 6 Ohio St. 187; trespass to lands; 24 Wend. 188; 2 Tex. 206; see 4 Jones, N. C. 139; neglect of official duties, in some cases; 5 Metc. Mass. 517; 1 Denio 548; 27 Vt. 563; 12 N. H. 341; breach of contracts; 2 Hill N. Y. 644; 6 Md. 274; 129 N. Y. 148; 61 Conn. 56; 62 Fed. Rep. 136; 42 Mo. App. 659; when substantial damages have not been sustained; 44 Ill. App. 358; and many other cases where the effect of the suit will be to determine a right; 12 Ad. & E. 488; 13 Conn. 361; 20 Mo. 603; 28 Me. 505; 19 Miss. 98; 2 La. Ann. 907; 89 Ga. 815; 51 Mo. App. 601; 8 Wash. 307; 45 La. Ann. 1401. And see, in explanation and limitation; 10 B. & C. 145; 1 Q. B. 636; 22 Vt. 231; 1 Dutch. 255; 14 B. Monr. 330; 5 Ind. 250; 6 Rich. 75.

The title or right is as firmly established as though the damages were substantial; Sedgw. Dam. 47. As to its effect upon costs, see *id.* 55; 2 Metc. Mass. 96.

**NOMINAL PARTNER.** One who allows his name to appear as a member of a firm, wherein he has no real interest. See PARTNER.

**NOMINAL PLAINTIFF.** One who is named as the plaintiff in an action, but who has no interest in it, having assigned the cause or right of action to another, for whose use it is brought.

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In general, he cannot interfere with the rights of his assignee, nor will he be permitted to discontinue the action, or to meddle with it; 1 Wheat. 233; 7 Cra. 152; 1 Johns. Cas. 411; 1 Johns. 532, n.; Bisp. Eq. § 172; Greenl. Ev. § 173.

**NOMINATE CONTRACT.** A contract distinguished by a particular name, the use of which name determines the rights of all the parties to the contract: as, purchase and sale, hiring, partnership, loan for use, deposit and the like. The law thus supersedes the necessity for special stipulations, and creates an obligation in the one party to perform, and a right in the other to demand, whatever is necessary to the explication of that contract. In Roman law there were twelve nominate contracts, with a particular action for each. Bell, Dict. *Nominate and Innominate;* Mackeldey, Civ. Law §§ 395, 408; Dig. 2. 14. 7. 1.

**NOMINATION** (from Lat. *nominare*, to name). An appointment: as, I nominate A B executor of this my last will.

A proposal or naming. The word nominate is used in this sense in the constitution of the United States, art. 2, s. 2, § 2: the president "shall nominate, and by and with the consent of the senate shall appoint, ambassadors," etc.

In an agreement for reference, a provision that each party shall nominate a referee means not only naming him, but also the communication of the nomination to the other party. 17 L. J. Q. B. 2; 11 Q. B. 7.

As to nominations under modern ballot laws, see ELECTION.

**NOMINE PŒNÆ** (Lat. in the nature of a penalty). **In Civil Law.** A condition annexed to heirship by the will of the deceased person. Domat, Civ. Law; Hallifax, Anal.

**At Common Law.** A penalty fixed by covenant in a lease for non-performance of its conditions. 2 Lilly, Abr. 221.

It is usually a gross sum of money, though it may be anything else, appointed to be paid by the tenant to the reversioner, if the duties are in arrear, in addition to the duties themselves. Hamm. N. P. 411.

To entitle himself to the *nomine pœnæ*, the landlord must make a demand of the rent on the very day, as in the case of a reentry; 1 Saund. 287 *b*, note; 7 Co. 28 *b*; Co. Litt. 202 *a*; 7 Term 117. A distress cannot be taken for a *nomine pœnæ* unless a special power to distrain be annexed to it by deed; 3 Bouvier, Inst. n. 2451. See Bac. Abr. *Rent* (K 4); Woodf. Landl. & T. 253; Dane, Abr. Index.

**NOMINEE.** One who has been named or proposed for an office.

**NOMOCANON.** A body of canon law with the addition of imperial laws bearing upon ecclesiastical matters; also a collection of the canons of the ancient church and fathers without regard to the imperial constitutions.

**NON-ABILITY.** Inability; an exception against a person. Fitz. Nat. Brev. 35, 65.

**NON ACCEPTAVIT** (Lat. he did not accept). **In Pleading.** The name of a plea to an action of assumpsit brought against the drawee of a bill of exchange upon a supposed acceptance by him. See 4 M. & G. 561.

**NON-ACCESS.** The non-existence of sexual intercourse between husband and wife is generally expressed by the words non-access of the husband to the wife; which expressions, in a case of bastardy, are understood to mean the same thing. 2 Stark, Ev. 218, n. See ACCESS.

**NON-AGE.** By this term is understood that period of life from birth till the arrival at twenty-one years. In another sense it means under the proper age to be of ability to do a particular thing: as, when non-age is applied to one under the age of fourteen, who is unable to marry. See AGE.

**NON-APPARENT OR NON-CONTINUOUS EASEMENTS.** Discontinuous easements. Such that have no means specially constructed or appropriated to their enjoyment, and that are enjoyed at intervals, leaving between these intervals no visible sign of their existence; such as a right of way, or right of drawing a seine upon the shore. 18 N. J. Eq. 262. See EASEMENT.

**NON ASSUMPSIT** (Lat. he did not undertake). **In Pleading.** The general issue in an action of assumpsit. Andr. Steph. Pl. 231.

Its form is, "And the said C D, by E F, his attorney, comes and defends the wrong and injury, when, etc., and says that he did not undertake or promise, in manner and form as the said A B hath above complained. And of this he puts himself upon the country."

Under this plea almost every matter may be given in evidence, on the ground, it is said, that as the action is founded on the contract, and the injury is the non-performance of it, evidence which disaffirms the obligation of the contract, at the time when the action was commenced, goes to the gist of the action. Salk. 279; 2 Stra. 738; 1 B. & P. 481. See 12 Viner, Abr. 189; Com. Dig. *Pleader* (2 G 1).

**NON ASSUMPSIT INFRA SEX ANNOS** (Lat. he has not undertaken within six years). **In Pleading.** The plea by which, when pleadings were in Latin, the defendant alleged that the obligation was not undertaken and the right of action had not accrued within six years, the period of limitation of the right to bring suit. See LIMITATION. It is still in use.

**NON BIS IN IDEM. In Civil Law.** A phrase which signifies that *no one shall be twice tried for the same offence:* that is,

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that when a party accused has been once tried by a tribunal in the last resort, and either convicted or acquitted, he shall not again be tried. Code 9. 2. 9. 11; Merlin, *Répert.* See JEOPARDY.

**NON CEPIT MODO ET FORMA** (Lat. he did not take in manner and form). **In Pleading.** The plea which raises the general issue in an action of replevin; or rather which involves the principal part of the declaration, for, properly speaking, there is no general issue in replevin; Morris, Repl. 142.

Its form is, "And the said C D, by E F, his attorney, comes and defends the wrong and injury, when, etc., and says that he did not take the said cattle (*or*, goods and chattels, according to the subject of the action) in the said declaration mentioned, or any of them, in manner and form as the said A B hath above complained. And of this the said C D puts himself upon the country."

It denies the taking the things and having them in the place specified in the declaration, both of which are material in this action. Steph. Pl., Andr. ed. 239, n.; 1 Chitty, Pl. 490.

**NON-CLAIM.** An omission or neglect by one entitled to make a demand within the time limited by law: as, when a continual claim ought to be made, a neglect to make such claim within a year and a day.

**NON-COMMISSIONED OFFICER.** A subordinate officer who holds his rank not by commission from the executive authority of a state or nation, but by appointment by a superior officer.

**NON COMPOS MENTIS** (Lat. not of sound mind, memory, or understanding). A generic term, including all the species of madness, whether it arise from idiocy, sickness, lunacy, or drunkenness. Co. Litt. 247; 4 Co. 124; 4 Comyns, Dig. 613; 5 *id.* 186; Shelf. Lun. 1. See INSANITY, and titles there referred to.

**NON CONCESSIT** (Lat. he did not grant). **In English Law.** The name of a plea by which the defendant denies that the crown granted to the plaintiff by letters-patent the rights which he claims as a concession from the king: as, for example, when a plaintiff sues another for the infringement of his patent right, the defendant may deny that the crown has granted him such a right. It does not deny the grant of a patent, but of the patent as described in the plaintiff's declaration; 3 Burr. 1544; 6 Co. 15 *b*. Also a plea resorted to by a stranger to a deed, because estoppels do not hold with respect to strangers. It brought into issue the title of the grantor as well as the operation of the deed; Whart. Dict.

**NON-CONFORMISTS. In English Law.** A name given to certain dissenters from the rites and ceremonies of the church of England.

**NON CONSTAT** (Lat. it does not appear. It is not certain). Words frequently used, particularly in argument, to express dissatisfaction with the conclusions of the other party: as, it was moved in arrest of judgment that the declaration was not good, because *non constat* whether A B was seventeen years of age when the action was commenced. Swinb. pt. 4, § 22, p. 331.

**NON CULPABILIS** (Lat.). **In Pleading.** Not guilty. It is usually abbreviated *non cul.*; 16 Viner, Abr. 1.

**NON DAMNIFICATUS** (Lat. not injured). **In Pleading.** A plea in the nature of a plea of performance to an action of debt on a bond of indemnity, by which the defendant asserts that the plaintiff has received no damage. 1 B. & P. 640, n. *a*; 1 Saund. 116, n. 1; 2 *id.* 81; 14 Johns. 177; 10 Wheat. 396, 405; 3 Halst. 1.

**NON DECIMANDO.** See DE NON DECIMANDO.

**NON DEDIT. In Pleading.** The general issue in formedon. See NE DONA PAS.

**NON DELIVERY.** Neglect, failure, or refusal to deliver goods on the part of a carrier, vendor, etc. See COMMON CARRIER.

**NON DEMISIT** (Lat. he did not demise). **In Pleading.** A plea proper to be pleaded to an action of debt for rent, when the plaintiff declares on a parol lease. Gilb. Debt 436; Bull. N. P. 177; 1 Chitty, Pl. 477. A plea in bar, in replevin, to an avowry for arrears of rent, that the avowant did not demise. Morris, Repl. 179. It cannot be pleaded when the demise is stated to have been by indenture; 12 Viner, Abr. 178; Com. Dig. *Pleader* (2 W 48).

**NON DETINET** (Lat. he does not detain). **In Pleading.** The general issue in an action of detinue. Its form is as follows: "And the said C D, by E F, his attorney, comes and defends the wrong and injury, when, etc., and says that he does not detain the said goods and chattels (or 'deeds and writings,' according to the subject of the action) in the said declaration specified; or any part thereof, in manner and form as the said A B hath above complained. And of this the said C D puts himself upon the country." Andr. Steph. Pl. 231.

It puts in issue the detainer only: a justification must be pleaded specially; 8 Dowl. Pract. Cas. 347. It is a proper plea to an action of debt on a simple contract in the case of executors and administrators. 6 East 549; Bac. Abr. *Pleas* (I); 1 Chitty, Pl. 476. See DETINET.

**NON EST FACTUM** (Lat. is not *his* deed). **In Pleading.** A plea to an action of debt on a bond or other specialty.

Its form is, "And the said C D, by E F, his attorney, comes and defends the wrong and injury, when, etc., and says that the said supposed writing obligatory (or 'indenture,' or 'articles of agreement,' ac-

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cording to the subject of the action) is not his deed. And of this he puts himself upon the country." 6 Rand. 86; 1 Litt. 158.

It is a proper plea when the deed is the foundation of the action; 1 Wms. Saund. 38, note 3; 2 *id.* 187 *a*, note 2; 2 Ld. Raym. 1500; 11 Johns. 476; and cannot be proved as declared on; 4 East 585; on account of non-execution; 6 Term 317; or variance in the body of the instrument; 1 Campb. 70; 4 Maule & S. 470; 2 D. & R. 662. Under this plea the plaintiff may show that the deed was void *ab initio;* 2 Campb. 272; 12 Johns. 337; 10 S. & R. 25; see 2 Salk. 275; 6 Cra. 219; or became so after making and before suit; 5 Co. 119 *b*; 11 *id.* 27. See 1 Chitty, Pl. 417, n.

In covenant, the defendant may, under this plea, avail himself of a mis-statement or omission of a qualifying covenant; 2 Stra. 1146; 9 East 188; 1 Campb. 70; or omission of a condition precedent; 11 East 639; 7 D. & R. 249. See Jud. Act, 1875, Ord. xix. rr. 20, 23.

**NON EST INVENTUS**, (Lat. he is not found). **In Practice.** The sheriff's return to a writ requiring him to arrest the person of the defendant, which signifies that he is *not to be found* within his jurisdiction. The return is usually abbreviated *N. E. I.* Chitty, Pr. The English form "not found" is also commonly used.

**NON-FEASANCE.** The non-performance of some act which ought to be performed.

When a legislative act requires a person to do a thing, its non-feasance will subject the party to punishment: as, if a statute require the supervisors of the highways to repair such highways, the neglect to repair them may be punished. See 1 Russ. Cr. 48; MANDATUM.

**NON FECIT** (Lat. he did not make it). The name of a plea, for example, in an action of assumpsit on a promissory note. 3 M. & G. 446. Rarely used.

**NON FECIT VASTUM CONTRA PROHIBITIONEM** (Lat. he did not commit waste against the prohibition). **In Pleading.** The name of a plea to an action founded on a writ of estrepement, that the defendant did not commit waste contrary to the prohibition. 2 Bla. Com. 226, 227.

**NON IMPEDIVIT** (Lat. he did not impede). **In Pleading.** The plea of the general issue in *quare impedit.* 3 Bla. Com. 305; 3 Woodd. Lect. 36. In law French, *ne disturba pas.*

**NON IMPLACITANDO ALIQUEM DE LIBERO TENEMENTO SINE BREVI.** A writ to prohibit bailiffs, etc., from levying a distress upon any man without the king's writ touching his freehold. Cowel.

**NON INFREGIT CONVENTIONEM** (Lat. he has not broken the covenant). **In Pleading.** A plea in an action of covenant. This plea is not a general issue: it merely denies that the defendant has broken the covenants on which he is sued. It being in the negative, it cannot be used where the breach is also in the negative. Bacon, Abr. *Covenant* (L); 3 Lev. 19; 2 Taunt. 278; 1 Aik. 150; 4 Dall. 436; 7 Cow. 71.

**NON-INTERCOURSE.** The refusal of one state or nation to have commercial intercourse with another. See EMBARGO.

**NON-INTERCOURSE ACT.** An act passed by congress in February, 1809, forbidding intercourse with certain nations. It remained in force till March 15, 1809, so far as related to all countries but France and Great Britain, and as to them, after the end of the next session of congress. On June 12, 1798, intercourse with France and her dependencies was forbidden by an act of congress. See EMBARGO; WAR.

**NON INTROMITTENDO QUANDO BREVE DE PRÆCIPI IN CAPITE SUBDOLE IMPETRATUR.** A writ which used to be directed to the justices of the bench or in eyre, commanding them not to give one who had (under cover of entitling the king to land, etc., as holding of him *in capite*) deceitfully obtained the writ, the benefit of the same, but to put him to his writ of right if he thought fit to use it. Cowel.

**NON-ISSUABLE PLEAS.** Those upon which an issue would not determine the action upon the merits, as a plea in abatement.

**NON-JOINDER. In Pleading.** The omission of one or more persons who should have been made parties to a suit at law or in equity, as plaintiffs or defendants.

**In Equity.** It must be taken advantage of before the final hearing; 1 Ala. N. S. 580; 24 Conn. 586; 1 Des. 315; 1 Stockt. Ch. 401; 10 Paige, Ch. 445; 2 McLean, 376; 47 Fed. Rep. 583; except in very strong cases; 1 Pet. 299; as, where a party indispensable to rendering a decree appears to the court to be omitted; 14 Vt. 178; 19 Ala. N. S. 213; 5 Ill. 424; 24 Me. 119. See 64 N. H. 2. The objection may be taken by demurrer, if the defect appear on the face of the bill; 5 Ill. 424; 1 Des. 315; 8 Ga. 506; 4 Rand. 451; or by plea, if it do not appear; 9 Mo. 605. The objection may be avoided by waiver of rights as to the party omitted; 4 Wisc. 54; or a supplemental bill filed, in some cases; 4 Johns. Ch. 605. It will not cause dismissal of the bill in the first instance; 3 Cra. 189; 6 Conn. 421; 17 Ala. 270; 1 T. B. Monr. 189; 1 Dev. Eq. 354; 1 Hill S. C. 53; but will, if it continues after objection made; 17 Ala. 270; 5 Mas. 561; without prejudice; 5 Mas. 561; 1 J. J. Marsh. 76; 4 B. Monr. 594; 7 Paige, Ch. 451. The cause is ordered to stand over in the first instance; 20 Me. 59; 9 Cow. 320; 2 Edw. Ch. 242. See JOINDER; PARTIES MISJOINDER.

**In Law.** See ABATEMENT; PARTIES.

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In England, the Judicature Act of 1875, Ord. xvi., has made very full provisions as to the joinder of parties, and the consequences of misjoinder and non-joinder. All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative.

**NON JURIDICUS.** See DIES NON.

**NON JURORS. In English Law.** Persons who refuse to take the oaths, required by law, to support the government. See 1 Dall. 170.

**NON LIQUET** (Lat. it is not clear). **In Civil Law.** Words by which the judges (*judices*), in a Roman trial, were accustomed to free themselves from the necessity of deciding a cause when the rights of the parties were doubtful. On the tablets which were given to the judges wherewith to indicate their judgment, was written N. L.

**NON MERCHANDIZANDO VICTUALIA.** An ancient writ directed to justices of assize commanding them to inquire whether the officers of certain towns sold victuals in gross or by retail during the exercise of their office, contrary to a statute then in force, and to punish them accordingly. Cowel; Reg. Orig. 184.

**NON MOLESTANDO.** A writ which lay for him who was molested, contrary to the king's protection granted him. Cowel.

**NON OBSTANTE. In English Law.** These words, which literally signify *notwithstanding*, were used to express the act of the English king by which he dispensed with the law, that is, authorized its violation.

He would by his license or dispensation make an offence dispunishable which was *malum in se;* but in certain matters which were *mala prohibita* he could, to certain persons and on special occasions, grant a *non obstante*. Vaugh. 330; Lev. 217; Sid. 6, 7; 12 Co. 18; Bacon, Abr. *Prerogative* (D 7); 2 Reeve, Eng. C. L. 8, p. 83. But the doctrine of *non obstante*, which set the prerogative above the laws, was demolished by the bill of rights at the revolution; 1 W. & M. Stat. 2, c. 2; 1 Bla. Com. 342; 1 Steph. Com., 11th ed. 441.

**NON OBSTANTE VEREDICTO.** Notwithstanding the verdict. See JUDGMENT.

Judgment *non obstante veredicto*, strictly and technically, is a judgment given for the plaintiff, on his motion, where the defendant had a verdict, but it appears from the record that, either from some matter growing out of the pleading, or because the fact found by the jury is immaterial, the defendant is not, in law, entitled to the judgment. In such cases where the common-law practice prevails, a writ of inquiry is awarded to assess the damages; 2 Tidd, Pr. 920. "The right method . . . is not to state the entry of judgment upon the verdict by rule, but to enter the verdict upon record, and then the judgment for the plaintiff *non obstante veredicto*." *Id.* For a statement of the nature and effect of such a judgment at common law, see JUDGMENT, sub-title *Classification*, 1, (3). As appears from the definition there given, this was a judgment for the plaintiff, and in many of the states, it has been uniformly held that judgment *non obstante veredicto* can only be given for a plaintiff; the remedy for a defendant is to have the judgment arrested; 2 Ohio St. 287; 2 Hill 86; 6 Rich. 208. A motion by a defendant for a judgment *non obstante veredicto* is never allowable; 10 Ia. 402; 15 N. H. 546; 4 Wend. 486; 89 Wis. 6; 65 Vt. 231; 17 R. I. 208, 544; Steph. Pl. [98]; 1 Freem. Judg. § 7; 1 Black, Judg. § 16; unless the well-settled common-law rule has been relaxed by statute or decisions; 58 Fed. Rep. 144; 19 U. S. App. 24.

A motion for such judgment must be founded on the record alone; 8 Vt. 309; 62 *id.* 92; 2 Wend. 624; it cannot be rendered after a judgment upon a verdict has been entered; 14 Miss. 218; 12 S. W. Rep. (Ky.) 628. It is allowed where a verdict has been found for the defendant on an insufficient plea in avoidance; 1 G. Green 134; 5 Pick. 187; that is, where the plea confesses the action and entirely fails to avoid it; 14 Ind. 115; 7 Blackf. 384; or if found true, is neither bar nor answer; 14 Ohio 204; or if an immaterial issue tendered by the plaintiff was found for the defendant and a repleader was unnecessary to effect justice; 7 Mo. 473; or if on motion for a new trial it is clear that in no event could damages be recovered on the cause of action; 5 R. I. 419.

It has been said that in Pennsylvania, where a point of law is reserved at the trial, the jury is instructed to find for the plaintiff, whereupon the defendant moves for judgment on the point reserved *non obstante veredicto*. See 2 Brewster, Prac. 1219. And, in some other states, the technical common-law rule that this form of judgment should not be given for the defendant, has not been observed; though it would seem that this change of practice is due, in some degree, to the confusion of this subject with judgment on special verdicts and points reserved, and to the fact that judgments are frequently entered under the name *non obstante veredicto*, which properly and technically would not be such if the common-law distinctions were carefully observed. Such judgment for defendant has been entered in an action for damages where a plea of contributory negligence was not controverted; 35 S. W. Rep. (Ky.) 924; or where plaintiff's evidence is a mere *scintilla;* 155 Pa. 156; or where special findings in plaintiff's favor were set aside as against undisputed evidence, and defendant moved for judgment on the remaining findings and undisputed evidence; 91 Wis. 447. But such motion by defendant will not be granted where the defence is a general denial; 115 N. C. 402; or where the pleadings and evidence raise questions of fact proper for a jury; 67 N. W. Rep. (Wis.) 730; or where

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the evidence supports a verdict for plaintiff, but the undisputed facts show the transaction to be within the statute of frauds; 25 S. W. Rep. (Tex.) 736. A reservation of "the question whether there is any evidence in this case, to be submitted to the jury, on which plaintiff is entitled to recover," does not present a "point reserved" to authorize judgment for defendant *non obstante veredicto*; 170 Pa. 346; 164 *id.* 73; nor can such judgment be rendered for plaintiff where verdict is for defendant, subject to the question reserved, whether, notwithstanding the findings, plaintiff was not entitled to recover; 151 *id.* 415.

A motion for such judgment is properly denied, after verdict upon an issue distinctly raised by the answer and submitted to the jury without objection; 112 N. C. 402; or where the evidence is sufficient to support the verdict; 15 Ind. App. 188; or where there is a general finding for the party against whom the motion is made; 33 N. E. Rep. (Ind.) 1060; or where, after reserving a point on certain facts, other evidence is submitted to the jury, and it is uncertain on which evidence the jury found; 110 Pa. 1.

It is not sufficient that the verdict was contrary to the weight of the evidence; 42 Neb. 712; and the judgment can be entered only when the moving party is entitled to it upon the pleadings of the party who had the verdict; 43 Neb. 132.

In Ohio, judgment against a general verdict cannot be entered unless all the facts necessary to support such judgment are expressly found; 66 Fed. Rep. 471. In Indiana, a judgment *non obstante* will not be granted unless there is an irreconcilable conflict between the general verdict and the answer to the interrogatories; 5 Ind. App. 204; 6 *id.* 52, 340, 646; 132 Ind. 278. When the special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly; 51 Kan. 731. In Oregon, there is a statutory provision authorizing judgment for the other party where the verdict does not correspond with pleadings, and it is held that that right is not impaired by failing to move for judgment before verdict; 21 Ore. 495. In Minnesota, such judgment can be given only to a party who, after the testimony, moved to direct a verdict in his favor; 64 Minn. 136.

In many states there are statutes on the subject which must be considered in connection with the decisions.

**NON OMITTAS** (Lat. more fully, *non omittas propter libertatem*, do not omit on account of the liberty or franchise). **In Practice.** A writ which lies when the sheriff returns on a writ to him directed, that he hath sent to the bailiff of such a franchise, which hath return of writs, and he hath not served the writ; then the plaintiff shall have this writ directed to the sheriff, that he *omit not on account of any franchise*, but himself enter into the franchise and execute the king's writ.

This clause is now usually inserted in all processes addressed to sheriffs. Wharton, Lex., 9th ed.; 2 Will. IV. c. 39; 3 Chitty, Stat. 494; 3 Chitty, Pr. 190, 310.

**NON PONENDIS IN ASSISSIS ET JURATIS.** A writ which lay for persons who are summoned to attend the assizes or to sit on a jury and wish to be freed and discharged from the same. Reg. Orig. 100.

**NON-PLEVIN. In Old English Law.** A neglect to replevin land taken into the hands of the king upon default, within fifteen days, by which seisin was lost, as by default. Heugh. de Magn. Ch. c. 8. By 9 Edw. III. c. 2, no man shall lose his land by *non-plevin*.

**NON PROCEDENDO AD ASSISSAM REGE INCONSULTO.** A writ to put a stop to the trial of a cause appertaining unto one who is in the king's service, etc., until the king's pleasure respecting the same be known. Cowel.

**NON PROS.** An abbreviation of *non prosequitur*, he does not pursue. Where the plaintiff, at any stage of the proceedings, fails to prosecute his action, or any part of it, in due time, the defendant enters *non prosequitur*, and signs final judgment, and obtains costs against the plaintiff, who is said to be *non pros'd.* 2 Archb. Pr., Chitty ed. 1409; 3 Bla. Com. 296; 3 Chitty, Pr. 10; Caines, Pr. 102. The name *non pros.* is applied to the judgment so rendered against the plaintiff; 1 Sell. Pr.; Steph. Pl. 195.

In modern English practice under the Jud. Act, 1875, a plaintiff, failing to deliver a statement of his claim in due time, may have his action dismissed for want of prosecution, And the same course may be taken with a plaintiff who fails to comply with an order to answer interrogatories; besides that the party so making default renders himself liable to "attachment." If the plaintiff fail in due time to give "notice of trial," the defendant may do so for him; Moz. & W.

**NON-RESIDENCE. In Ecclesiastical Law.** The absence of spiritual persons from their benefices.

**NON-RESIDENT.** Not residing in the jurisdiction. Service of process on non-resident defendants is void, excepting cases which proceed *in rem*, such as proceedings in admiralty or by foreign attachment, and the like, or where the property in litigation is within the jurisdiction of the court.

One does not necessarily become a non-resident by absconding or absenting himself from his place of abode; 52 Mo. App. 291; nor does a mere casual or temporary absence on business or pleasure render one a non-resident, even if he may not have a house of usual abode in the state; 4 Barb. 504; 15 Abb. Pr. 221; if there be no intent to change his residence; 54 N. W. Rep.

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(Ia.) 225; 59 N. W. Rep. (Minn.) 199. But where a man has a settled abode, for the time being, in another state for the purpose of business or pleasure, he is a non-resident; 82 Cal. 631; and it has been held that one who departs from the state with his family and remains absent for about a year is a non-resident, though he has not acquired a residence elsewhere, and though he intended to return in a few months; 69 Hun 308. See HOME; DOMICIL; RESIDENCE; PROCESS; SERVICE.

**NON RESIDENTIA PRO CLERICUS REGIS.** A writ addressed to a bishop charging him not to molest a clerk employed in the king's service, by reason of his non-residence. Cowel; Reg. Orig. 58.

**NON SOLVENDO PECUNIAM AD QUAM CLERICUS MULCTATUR PRO NON RESIDENTIA.** A writ prohibiting an ordinary from taking a pecuniary mulct imposed upon a clerk of the king's for non-residence. Cowel.

**NON SUBMISSIT** (Lat.). The name of a plea to an action of debt on a bond to perform an award, by which the defendant pleads that he did not submit. Bacon, Abr. *Arbitration, etc.* (G).

**NON SUM INFORMATUS** (Lat.). **In Pleading.** I am not informed. See JUDGMENT.

**NON TENENT INSIMUL** (Lat. they do not hold together). **In Pleading.** A plea to an action in partition, by which the defendant denies that he holds the property which is the subject of the suit, together with the complainant or plaintiff.

**NON TENUIT** (Lat. he did not hold). **In Pleading.** The name of a plea in bar in replevin, when the defendant has avowed for rent-arrear, by which the plaintiff avows that he did not hold in manner and form as the avowry alleges. Rosc. Real Act. 628.

**NON-TENURE. In Pleading.** A plea in a real action, by which the defendant asserted that he did not hold the land, or at least some part of it, as mentioned in the plaintiff's declaration; 1 Mod. 250; in which case the writ abates as to the part with reference to which the plea is sustained. 8 Cra. 242. It may be pleaded with or without a disclaimer. It was a dilatory plea, though not strictly in abatement; 2 Saund. 44, n. 4; Dy. 210: Booth, Real Act. 179; 3 Mass. 312; 11 *id.* 216; but might be pleaded as to part along with a plea in bar as to the rest; 1 Lutw. 716; Rast. Ent. 231 *a*, *b*; and was subsequently considered as a plea in bar; 14 Mass. 239: 1 Me. 54; 2 N. H. 10; Bac. Abr. *Pleas* (I 9).

**NON-TERM.** The vacation between two terms of a court.

**NON-TRADING PARTNERSHIP.** A partnership organized for the purpose of carrying on the business of sawing lumber pickets and lath is non-trading in character; 145 U. S. 512, reversing 30 Fed. Rep. 413. See PARTNERSHIP.

**NON-USER.** The neglect to make use of a thing.

A right which may be acquired by use may be lost by non-user; and an absolute discontinuance of the use for twenty years affords presumption of the extinguishment of the right in favor of some other adverse right; 5 Whart. 584; 23 Pick. 141; but non-user of the franchise of a corporation is held insufficient to constitute a dissolution of the same without a judicial adjudication thereof; 34 S. W. Rep. (Tenn.) 209. See DISSOLUTION; FORFEITURE. A right of way, whether acquired by grant or prescription, is not extinguished by the habitual use by its owner of another way, equally convenient, instead of it, unless there is an intentional abandonment of the former way; 121 Mass. 3. See ABANDONMENT; EASEMENT.

Every public officer is required to use his office for the public good: a non-user of a public office is, therefore, a sufficient cause of forfeiture; 2 Bla. Com. 153; 9 Co. 50. Non-user for a great length of time will have the effect of repealing an old law. But it must be a very strong case which will have that effect; 13 S. & R. 452.

**NONSENSE.** That which in a written agreement or will is unintelligible.

It is a rule of law that an instrument shall be so construed that the whole, if possible, shall stand. When a matter is written grammatically right, but it is unintelligible and the whole makes nonsense, some words cannot be rejected to make sense of the rest: 1 Salk. 324; but when matter is nonsense by being contrary and repugnant to some precedent sensible matter, such repugnant matter is rejected; 14 Viner, Abr. 142; 15 *id.* 560. The maxim of the civil law on this subject agrees with this rule: *Quæ in testamento ita sunt scripta, ut intelligi non possent; perinde sunt ac si scripta non essent.* Dig. 50. 17. 73. 3. See AMBIGUITY; CONSTRUCTION; INTERPRETATION.

In pleading, when matter is nonsense by being contradictory and repugnant to something precedent, the precedent matter, which is sense, shall not be defeated by the repugnancy which follows, but that which is contradictory shall be rejected: as in ejectment where the declaration is of a demise on the *second* day of January, and that the defendant *postea scilicet*, on the *first* of January, ejected him, here the *scilicet* may be rejected as being expressly contrary to the *postea* and the precedent matter; 5 East 255; 1 Salk. 324.

**NONSUIT.** The name of a judgment given against the plaintiff when he is unable to prove a case, or when he refuses or neglects to proceed to the trial of a cause after it has been put at issue, without determining such issue.

A *voluntary* nonsuit is an abandonment of his cause by plaintiff, who allows a judg-

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ment for costs to be entered against him by absenting himself or failing to answer when called upon to hear the verdict. 1 Dutch. 556. See 77 Me. 344.

An *involuntary* nonsuit takes place when the plaintiff, on being called, when his case is before the court for trial, neglects to appear, or when he has given no evidence on which a jury could find a verdict. 13 Johns. 334. See 73 Mich. 258.

At common law the plaintiff cannot be nonsuited against his will; for a party cannot be compelled to make default.

An involuntary nonsuit is not ordered against a plaintiff who has given evidence of his claim, in the federal courts; 103 U. S. 264; 1 Pet. 469; 1 McCrary 436; 7 U. S. App. 359; nor in many of the state courts; 9 Ind. 551; 6 Ark. 44; 14 *id.* 706; 57 *id.* 468; 2 Dougl. (Mich.) 125; 13 Mo. 312; 19 *id.* 101; 2 Or. 57; 4 Yerg. 528; 4 Vt. 363; 1 Wash. Va. 87, 219; 23 Md. 312; 12 Sm. & M. 550; but in other states if the evidence is insufficient to support the action a nonsuit may be granted; 40 Pa. 364; 155 Mass. 96; 36 Minn. 122; 15 R. I. 213; 30 N. J. L. 460; 15 Nev. 59; 13 Neb. 37; 45 Ia. 661; 13 Johns. 334; 24 N. Y. 430; 3 McCord 131; 42 Me. 259; 26 N. H. 351; 4 Ohio St. 628; 12 Or. 329; 17 Ill. 494; 126 *id.* 466; 1 Cal. 109; 103 *id.* 153; 16 Ga. 154.

In Pennsylvania, by statute, the plaintiff may be nonsuited compulsorily. This may be done in two cases: (1) under the act of March 11, 1836, when the defendant has offered no evidence, and the plaintiff's evidence is not sufficient in law to maintain his action; (2) under the act of April 14, 1846, confined to Philadelphia, when the cause is reached and the plaintiff or his counsel does not appear, or, if he appears, does not proceed to trial, and does not assign and prove a sufficient legal cause for continuance.

The granting of a nonsuit for want of sufficient evidence to warrant a verdict for the plaintiff is no infringement of the right of trial by jury; 164 U. S. 301.

The defendant cannot assign as error the denial of his motion for a nonsuit if thereafter he proceeds to examine witnesses and try the cause on the merits; 80 Fed. Rep. 638.

A nonsuit is no bar to another action for the same cause; Freeman, Judgt. § 261; 5 Allen 158; 9 N. J. L. 38; 77 Hun 30.

A judge has no power to nonsuit a plaintiff on the opening statement of his counsel without his consent; [1892] 1 Q. B. 122; nor is a nonsuit warranted unless it appears that plaintiff is not entitled to recover after giving him the most favorable view that a jury would be warranted in taking of the evidence; 137 N. Y. 389; 156 Pa. 34; but where the evidence is sufficient to sustain a verdict for plaintiff the court should not grant a nonsuit; 69 Hun 373.

A nonsuit may be asked for at any time before verdict; 38 S. C. 507; 103 Cal. 251; see 31 Fla. 56; and, if it is proper, to grant it prematurely is harmless error; 102 Cal. 450. Defendant waives his motion for a nonsuit and cannot base any claim of error upon it, where, after it is overruled, he proceeds with his defence and introduces testimony; 149 U. S. 17; 153 *id.* 216; 123 *id.* 710; 124 *id.* 405. Exception cannot be taken to the court's refusal to enter a compulsory nonsuit; 161 Pa. 87.

After the trial is begun, plaintiff's right to take a nonsuit is not absolute, but lies in the discretion of the court, and will be denied when plaintiff gets all his own evidence in and is not surprised by defendant's evidence; 59 Fed. Rep. 670.

After a voluntary nonsuit taken by the plaintiff, the court cannot reinstate the case without defendant's consent; 36 Pittsb. L. J. Pa. 356.

The formality of calling the plaintiff when he is to suffer a nonsuit is obsolete in most of the states.

**NORMAN FRENCH.** See LANGUAGE.

**NORROY.** See HERALD.

**NORTH.** In a description in a deed, unless qualified or controlled by other words, it means due north. Northerly in a grant, where there is no object to direct its inclination to the east or west, must be construed to mean north. 1 Johns. 156; 96 Col. 505. See 115 Mass. 578.

**NORTH CAROLINA.** The name of one of the original states of the United States of America.

The territory which now forms this state was included in the grant made in 1663 by Charles II., to Lord Clarendon and others, of a much more extensive country. The boundaries were enlarged by a new charter granted by the same prince to the same proprietaries in the year 1665. By this charter the proprietaries were authorized to make laws, with the assent of the freemen of the province or their delegates, and they were invested with various other powers. Being dissatisfied with the form of government, the proprietaries procured the celebrated John Locke to draw up a plan of government for the colony, which was adopted, and proved to be impracticable: it was highly exceptionable on account of its disregard of the principles of religious toleration and national liberty, which are now universally admitted. After a few years of unsuccessful operation it was abandoned. The colony had been settled at two points, one called the Northern and the other the Southern settlement, which were governed by separate legislatures. In 1729 the proprietaries surrendered their charter, when it became a royal province, and was governed by a commission and a form of government in substance similar to that established in other royal provinces. In 1732 the territory was divided, and the divisions assumed the names of North Carolina and South Carolina.

A constitution of North Carolina was adopted December 18, 1776. To this constitution amendments were made in convention June 4, 1835, which were ratified by the people, and took effect on January 1, 1836. There was a second constitution of 1868, and the amended constitution of 1876.

THE LEGISLATIVE POWER.—The *Senate* consists of fifty members, chosen biennially, for the term of two years. Each senator must be twenty-five years of age, a resident of the state as a citizen for two years, and usually a resident of the district.

The *House of Representatives* is composed of one hundred and twenty representatives. They are elected biennially, for the term of two years. The qualifications required are that each representative be a qualified elector of the state and a resident in the county for which he is chosen, one year immediately preceding his election.

THE EXECUTIVE POWER.—The *Governor* is elected

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for the term of four years from the first day of January next following his election. He is not eligible more than four years in any term of eight years, unless the office shall have been cast upon him as lieutenant-governor or president of the senate. He must be thirty years of age, and a citizen of the United States five years, and a resident of the state for two years next before election.

There are also a lieutenant-governor, a secretary of state, an auditor, a treasurer, a superintendent of public instruction, and an attorney-general, elected for a term of four years by the qualified electors of the state.

THE JUDICIAL POWER.—The distinction between law and equity is done away with. There is but one form of action in all civil actions. Feigned issues also are abolished, and the issue is tried before a jury.

The *Supreme Court* is composed of a chief justice and four associate justices, elected by the qualified voters; they hold their office for eight years. Of these, one is selected by his associates to preside, and is styled the chief justice. It is almost entirely an appellate tribunal, having original jurisdiction only in proceedings by a bill in equity, or an information in the nature of a bill in equity, filed on behalf of the state, in the name of the attorney-general, to repeal grants and other letters patent obtained by fraud or false suggestions, and such decisions are merely recommendations to the general assembly. It has appellate jurisdiction over all cases in law or equity brought before it by appeal or otherwise from a superior court of law or a court of equity. It has also power to issue writs of *certiorari*, *scire facias*, *habeas corpus*, and other writs which may be necessary for the exercise of its jurisdiction, and agreeable to the principles and usages of law. Criminal cases are to be certified to the superior court from which the appeal was taken, which court proceeds to judgment in accordance with the decision of the supreme court.

A *Superior Court* is held by one judge, in each county of the state, twice in each year. For this purpose the state is divided into twelve judicial districts. The judges are elected in the same manner and for the same term as the supreme judges. The superior courts have general original jurisdiction, unless otherwise provided, of all pleas, real, personal, and mixed, and also all suits and demands relative to dower, partition, legacies, filial portions, and estates of intestates; and, unless it be otherwise provided, of all pleas of the state, and criminal matters of what nature, degree, or denomination soever, whether brought before them by original or by mesne process, or by *certiorari*, writ of error, appeal from any inferior court, or by any other way or manner whatsoever; and they are hereby declared to have full power and authority to give judgment and to award execution and all necessary process therein, etc. For money demands the superior courts have exclusive original jurisdiction whenever the principal sum demanded exceeds $200.

The same judges who hold the superior courts of law hold, at the same times and places, courts of equity, and in doing so "possess all the powers and authorities within the same that the court of chancery, which was formerly held in this state under the colonial government, used and exercised, and that are properly and rightfully incident to such a court, agreeable to the laws and usages now in force and practice."

*Justices of the Peace* have jurisdiction of civil actions founded on contract, where the sum demanded does not exceed two hundred dollars, and where the title to real estate is not in controversy, and all criminal matters arising within their counties, where the punishment cannot exceed a fine of fifty dollars or imprisonment for thirty days. In issues of fact, on demand of either party, a jury of six men is summoned to try the same.

**NORTH DAKOTA.** One of the states of the United States.

By the act of congress of February 22, 1889 (1 Supp. Rev. Stat. 645), the area comprising the territory of Dakota was divided on the line of the seventh standard parallel produced due west to the western boundary of said territory, and that portion north of said parallel forms the state of North Dakota. The proclamation announcing the admission of this state into the Union was made by the President on November 2, 1889.

THE EXECUTIVE POWER is vested in a governor who holds his office for the term of two years.

THE JUDICIAL POWER is vested in the supreme court, district courts, county courts, justices of the peace, and in such other courts as may be created by law for cities, incorporated towns, and villages.

The *Supreme Court*, except as otherwise provided in the constitution, has appellate jurisdiction only, which is co-extensive with the state, and has a general superintending control over all inferior courts. It has power to issue writs of *habeas corpus*, *mandamus*, *quo warranto*, *certiorari*, injunction, and such other original and remedial writs as may be necessary to the proper exercise of its jurisdiction. It consists of three judges, a majority of whom are necessary to form a quorum. The judges are elected for a term of six years.

The *District Courts* have original jurisdiction, except as otherwise provided, of all causes both at law and equity, and such appellate jurisdiction as may be conferred by law. They have power to issue writs of *habeas corpus*, *quo warranto*, *certiorari*, injunction, and other original and remedial writs. The state is divided into six judicial districts, in each of which there is elected one judge of the district court, whose term of office is four years.

The *County Court* has exclusive original jurisdiction in probate and testamentary matters, etc., and when the majority of the voters of a county desire, the county courts shall have concurrent jurisdiction with the district courts in civil actions where the amount in controversy does not exceed $1,000, and in all criminal actions below the grade of felony.

*Justices of the Peace* are elected in each county. They have concurrent jurisdiction with the district courts in civil actions, where the amount in controversy does not exceed $200, and under certain conditions to hear and determine cases of misdemeanor.

**NORTHWEST PROVINCES.** A territory of British India.

**NORTHWEST TERRITORIES.** One of the provinces of the Dominion of Canada which was formerly known as Rupert's Land. Its government is vested in a lieutenant-governor and an executive council, consisting of seven appointed members and twenty-two elected members. The seat of government is Regina.

**NORTHWEST TERRITORY.** A name formerly applied to the territory northwest of the Ohio river. See OHIO.

**NORTHAMPTON TABLES.** See LIFE TABLES.

**NORWAY.** The most northerly country of Europe. It is a limited hereditary monarchy under the same sovereign as Sweden, but independent of that country, except that they are united in foreign and diplomatic relations. The executive power is vested in a king and a ministry, and the legislative in a Storthing consisting of an upper and a lower house.

**NOSOCOMI. In Civil Law.** Persons who have the management and care of hospitals for paupers. *Clef Lois Rom.* mot *Administrateurs.*

**NOT FOUND.** Words indorsed on a bill of indictment by a grand jury, when they have not sufficient evidence to find a true bill. See IGNORAMUS.

**NOT GUILTY. In Pleading.** The general issue in several sorts of actions.

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In *trespass*, its form is as follows: "And the said C D, by E F, his attorney, comes and defends the force and injury, when, etc., and says that he is not guilty of the said trespasses above laid to his charge, or any part thereof, in the manner and form as the said A B hath above complained. And of this the said C D puts himself upon the country."

Under this issue the defendant may give in evidence any matter which directly controverts the truth of any allegation, which the plaintiff on such general issue will be bound to prove; 1 B. & P. 213; and no person is bound to justify who is not *primâ facie* a trespasser; 2 B. & P. 359; 2 Saund. 284 *d*. For example, the plea of not guilty is proper in trespass to *persons*, if the defendant have committed no assault, battery, or imprisonment, etc.; and in trespass to *personal* property, if the plaintiff had no property in the goods, or the defendant were not guilty of taking them, etc.; and in trespass to *real* property, this plea not only puts in issue the fact of trespass, etc., but also the title, which, whether freehold or possessory in the defendant or a person under whom he claims, may be given in evidence under it, which matters show *primâ facie* that the right of possession, which is necessary in trespass, is not in the plaintiff, but in the defendant or the person under whom he justifies; 7 Term 354; 8 *id*. 403; Willes 223; Steph. Pl. 178; 1 Chitty, Pl. 491, 492.

In *trespass on the case in general* the formula is as follows: "And the said C D, by E F, his attorney, comes and defends the wrong and injury, when, etc., and says that he is not guilty of the premises above laid to his charge, in manner and form as the said A B hath above complained. And of this the said C D puts himself upon the country."

This, it will be observed, is a mere traverse, or denial, of the facts alleged in the declaration, and therefore, on principle, should be applied only to cases in which the defence rests on such a denial. But here a relaxation has taken place; for, under this plea, a defendant is permitted not only to contest the truth of the declaration, but, with some exceptions, to prove any matter of defence that tends to show that the plaintiff has no cause of action, though such matters be in confession and avoidance of the declaration; as, for example, a release given, or satisfaction made; Steph. Pl. 182, 183; 1 Chitty, Pl. 486; McKelv. Pl. 31.

In *trover*. It is not usual in this action to plead any other plea, except the statute of limitations; and a release, and the bankruptcy of the plaintiff, may be given in evidence under the general issue; 7 Term 391.

In *debt* on a judgment suggesting a *devastavit*, an executor may plead not guilty; 1 Term 462.

In *criminal cases*, when the defendant wishes to put himself on his trial, he pleads not guilty. This plea makes it incumbent upon the prosecutor to prove every fact and circumstance constituting the offence, as stated in the indictment, information, or complaint. On the other hand, the defendant may give in evidence under this plea not only everything which negatives the allegations in the indictment, but also all matter of excuse and justification.

In English practice, under the Jud. Act, 1875, it is not sufficient for a defendant to deny generally the facts alleged by the plaintiff's statement of claim, but he must deal specifically with each allegation of fact of which he does not admit the truth. But this does not affect defendant's right to plead "not guilty by statute," which is a plea of the general issue by a defendant in a civil action, when he intends to give special matter in evidence by virtue of some act or acts of parliament; in which case he must add the reference to such act or acts, and state whether they are public or otherwise. But if a defendant so plead, he will not be allowed to plead any other defence without the leave of the court or a judge. Jud. Act, 1875, 1st Sched. Ord. xix. r. 16. Moz. & W.

**NOT POSSESSED. In Pleading.** A plea sometimes used in actions of trover, when the defendant was not possessed of the goods at the commencement of the action. 3 M. & G. 101, 103. See McKelv. Pl. 34. This plea would probably be held "evasive" within the meaning of Ord. xix. r. 22, Jud. Act, 1875. Moz. & W.

**NOT PROVEN. In Scotch Criminal Law.** It is a peculiarity of the Scotch jury system in criminal trials that it admits a verdict of not proven, corresponding to the *non liquet* of the Roman law. The legal effect of this is equivalent to not guilty; for a prisoner in whose case it is pronounced cannot be tried again. According to the homely but expressive maxim of the law, no man can be made to thole an assize twice. But, although the verdict of not proven is so far tantamount to an acquittal that the party cannot be tried a second time, it falls very far short of it with regard to the effect upon his reputation. He goes away from the bar of the court with an indelible stigma upon his name. There stands recorded against him the opinion of a jury that the evidence respecting his guilt was so strong that they did not dare to pronounce a verdict of acquittal. When Sir Nicholas Throckmorton was tried and acquitted by an English jury in 1554, he said, "It is better to be tried than to live suspected." But in Scotland a man may be not only tried, but acquitted, and yet live suspected, owing to the sinister influence of a verdict of not proven. Forsyth, Hist. Trial by Jury 334.

**NOTARIUS. In Civil Law.** One who took notes or draughts in shorthand of what was said by another, or of proceedings in the senate or in a court. One who draughted written instruments, wills, conveyances, etc. Vicat, Voc. Jur.; Calvinus, Lex.

**In English Law.** A notary. Law Fr. & Lat. Dict.; Cowel.



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**NOTARY, NOTARY PUBLIC.** An officer appointed by the executive or other appointing power, under the laws of different states.

Notaries are of ancient origin; they existed in Rome during the republic, and were called *tabelliones forenses*, or *personæ publicæ*. Their employment consisted in the drawing up of legal documents. They exist in all the countries of Europe, and as early as A. D. 803 were appointed by the Frankish kings and the popes. Notaries in England are appointed by the archbishop of Canterbury. 25 Hen. VIII. c. 21, § 4. They are officers of the civil and canon law; Brooke, Office & Pr. of a Notary 9. In most of the states, notaries are appointed by the governor alone, in others by the governor, by and with the advice of his council, in others by and with the advice and consent of the senate; in the District of Columbia they are appointed by the President of the United States. As a general rule, throughout the United States, the official acts of a notary public must be authenticated by seal as well as signature; 10 Iowa 305; 49 Ala. 242; 12 Ill. 162.

Their duties differ somewhat in the different states, and are prescribed by statute. They are generally as follows: to protest bills of exchange and draw up acts of honor; to authenticate and certify copies of documents; to receive the affidavits of mariners and draw up protest relating to the same; to attest and take acknowledgments of deeds and other instruments, and to administer oaths. Ordinarily notaries have no jurisdiction outside the county or district for which they are appointed; but in several states they may act throughout the state.

By act of congress, Sept. 16, 1850, notaries are authorized to administer oaths and take acknowledgments in all cases where under the laws of the United States justices of the peace were formerly authorized to act.

By act of Aug. 15, 1876, c. 304, notaries are authorized to take depositions and do all other acts in relation to taking testimony to be used in the courts of the United States, and to take acknowledgments and affidavits with the same effect as commissioners of the United States circuit courts may do. R. S. § 1778. They may protest national bank circulating notes; R. S. § 5226; take acknowledgment of assignment of claims upon the United States; *id.* § 3477; and administer oaths of allegiance to persons prosecuting such claims; *id.* § 3479. By act of June 22, 1874, c. 390, notaries may take proof of debts against the estate of a bankrupt. By act of Feb. 26, 1881, c. 82, reports of national banks may be sworn to before notaries, but such notary must not be an officer of the bank; R. S. § 5211. By act of Aug. 18, 1856, c. 127, every secretary of legation and consular officer may, within the limits of his legation, perform any notarial act; R. S. § 1750. A statute which authorizes a *notary public* to commit for contempt a witness who has been duly subpœnaed to testify before him and who refuses to be sworn or give his deposition, is unconstitutional; 48 Pac. Rep. (Kan.) 574.

The acts of notaries are respected by the custom of merchants and the law of nations. Their protest of a bill is received as evidence in the courts of all civilized countries. Except in cases of protest of bills, the signature of a notary to an instrument going to a foreign country ought to be authenticated by the consul or representative of that country.

The notaries of England have always considered themselves authorized to administer oaths; and the act of 5 & 6 Will. IV. has placed it beyond dispute. In this country they do not exercise the power unless authorized by statute, except in cases where the oath is to be used out of the state or in the courts of the United States.

Upon the general principle they cannot act in cases in which they are interested; 95 Am. Dec. 378, note; 37 Ga. 374; but where a notary public was intermediary between a borrower and lender on mortgage and took the acknowledgment of the mortgage, his act was held valid, there being nothing on the face of the papers to indicate to third parties that there was any incapacity to act; 84 Fed. Rep. 515; and the mere fact that he is an officer of a corporation does not make its acknowledgment before him invalid; 37 L. R. A. 434.

The books or registers of a deceased notary are admissible to prove his official acts as to presentment, demand, and notice of non-payment of negotiable paper; 8 Wheat. 326; 1 Gray 175; and so are entries of a notary's clerk; 51 N. Y. 84. When produced, the handwriting of the deceased person must be proved; 18 Wall. 516.

Where an action is brought against a notary for a false certificate of acknowledgment, the presumption is that the defendant, acting in his judicial capacity, did so on reasonable information, and discharged his full duty. The burden of proof is on the plaintiff to prove a clear and intentional dereliction of duty; 97 Pa. 228; Proff. Notaries, 2d ed. §§ 48, 175; Notary's Manual. It has been held an actionable libel for a notary falsely and maliciously to protest for non-payment the acceptance of a person, and then send the draft with such protest to the source from whence it came; 88 Ga. 308.

One who has lost his chattel mortgage lien by the negligence of the notary in making a defective acknowledgment, can recover no damages from such notary, where the property covered by the mortgage is absolutely worthless; 75 Cal. 182.

**NOTATION.** The act of making a memorandum of some special circumstance on a probate or letters of administration.

**NOTCHELL.** "Crying the wife's Notchell" seems to have been a means of preventing her running up debts against her husband. See 20 Law Mag. & Rev. 280.

**NOTE A BILL.** When a foreign note has been dishonored it is usual for a

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notary public to present it again on the same day. If it is not then paid he makes a minute consisting of his initials, the day, month and year, and reason, if assigned, of non-payment, which proceeding is termed "noting the bill."

**NOTE OF A FINE.** The fourth step of the proceedings in acknowledging a fine, which is only an abstract of the writ of covenant and the concord, naming the parties, the parcel of land, and the agreement, and enrolled of record in the proper office. 2 Sharsw. Bla. Com. 351, App. n. iv. § 3; 1 Steph. Com., 11th ed. 542.

**NOTE OF ALLOWANCE.** A note delivered by a master to a party to a cause, who alleged that there was error in law in the record and proceedings, allowing him to bring error.

**NOTE OF HAND.** A popular name for a promissory note.

**NOTE OF PROTEST.** A note or minute of the protest, made by the notary, at time of protest, on the bill, to be completed or filled out at his leisure. Byles, Bills, 15th ed. 214.

**NOTE OR MEMORANDUM.** An informal note or abstract of a transaction required by the statute of frauds.

The form of it is immaterial; but it must contain the essential terms of the contract expressed with such a degree of certainty that it may be understood without reference to parol evidence to show intent of parties; Browne, Stat. of Fr. 353, 386; 43 Me. 158; 4 R. I. 14; 14 N. Y. 584; 31 Miss. 17; 11 Cush. 127; 9 Rich. 215; 23 Mo. 423; 17 Ill. 354; 3 Ia. 430. In some states, and in England, the consideration need not be stated in the note or memorandum; 4 B. & Ald. 595; 5 Cra. 142; 17 Mass. 122; 6 Conn. 81.

A memorandum of the terms of an agreement was signed by plaintiff but not by defendant; the latter subsequently wrote to plaintiff referring to "our agreement for the hire of your carriage," and "my monthly payment." There was no other arrangement between the parties, to which these expressions could refer. *Held*, that the letter and the document containing the terms of the arrangement together constituted a note and memorandum signed by defendant, within the fourth section of the statute of frauds; 45 L. T. Rep. N. S. 348; S. C. 25 Alb. L. J. 70. See 99 U. S. 100; 139 *id.* 210; 149 *id.* 481; 32 N. J. Eq. 828; 66 Ind. 474.

See Browne; Reed, Stat. of Frauds; MEMORANDUM.

**NOTES.** See JUDGE'S NOTES.

**NOTICE.** The information given of some act done, or the interpellation by which some act is required to be done. Knowledge.

A statutory notice is not binding unless given as the law directs or allows; 100 N. C. 225; 45 Ill. App. 572.

*Actual notice* exists when knowledge is actually brought home to the party to be affected by it. This statement is criticised, as being too narrow, in Wade, Notice 4. This writer divides actual knowledge into two classes, express and implied; the former includes all knowledge of a degree above that which depends upon collateral inference, or which imposes upon the party the further duty of inquiry; the latter imputes knowledge to the party because he is shown to be conscious of having the means of knowledge, though he does not use them, choosing to remain ignorant of the fact, or is grossly negligent in not following up the inquiry which the known facts suggest; Wade, Notice 5. In 42 Conn. 146, there is a division into "particular or explicit" and "general or implied" notice. Information which a prudent man believes to be true, and which if followed by inquiry must lead to knowledge, is equivalent to knowledge; 6 Or. 407.

Any fact which is sufficient to put a purchaser of land on inquiry, is adequate notice; 83 Va. 397; 84 *id.* 348; and of everything to which such inquiry may lead; 151 U. S. 607.

*Constructive notice* exists when the party, by any circumstance whatever, is put upon inquiry (which is the same as *implied notice, supra*), or when certain acts have been done which the party interested is presumed to have knowledge of on grounds of public policy; 2 Mas. 531; 14 Pick. 224; 4 N. H. 397; 14 S. & R. 333. The *recording* a deed; 23 Mo. 237; 25 Barb. 635; 28 Miss. 354; 4 Kent 182, n.; an *advertisement in a newspaper*, when authorized by statute as a part of the process, *public acts* of government, and *lis pendens* (but see LIS PENDENS), furnish constructive notice. Judge Story defines the term as "knowledge" imputed by the court on presumption, too strong to be rebutted, that the information must have been communicated; Story, Eq. Jur. § 399; and see 2 Anstr. 432. "Constructive notice is a legal inference of notice, of so high a nature, as to be conclusive, unless disproved, and is in most cases insusceptible of explanation or rebuttal by evidence that the purchaser had no actual notice, and believed the vendor's title to be good;" 2 Lead. Cas. Eq. 77. Constructive notice is sometimes called notice in law; 1 Johns. Ch. 261. The constructive notice given by the record of a deed is sometimes called record notice. Where an instrument affecting the title to real estate is properly recorded, the record thereof is notice to subsequent purchasers, etc., from the same grantor; Wade, Notice, 2d ed. § 97; 38 Tex. 530; 30 Ark. 407; 28 N. J. Eq. 49.

The possession of land is notice to all the world of the possessor's rights thereunder; 24 Neb. 692; 74 Ia. 294; 125 Pa. 470; 29 S. C. 147; 142 U. S. 417.

Notice to an agent in the same transaction is, in general, notice to the principal; 25 Conn. 444; 10 Rich. 293; 3 Pa. 67; 39 N. Y. 70; 11 Colo. 223. See 25 Am. L. Reg.

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1; 40 Minn. 390; 23 Neb. 334. A principal imposing confidence in an agent, and therefore neglecting some source of knowledge which he might have sought, is not chargeable with what he might have found out upon inquiry aroused by suspicion; 130 U. S. 505. Notice to the trustees is notice to the beneficiaries in a deed of trust; 133 U. S. 670; 32 W. Va. 244.

A principal is not bound by his agent's knowledge where it is not the duty of the agent to communicate it; 75 Ia. 689.

The giving notice in certain cases is in the nature of a condition precedent to the right to call on the other party for the performance of his engagement, whether his contract were express or implied. Thus, in the familiar instance of bills of exchange and promissory notes, the implied contract of an indorser is that he will pay the bill or note, provided it be not paid, on presentment at maturity, by the acceptor or maker (being the party *primarily* liable), and provided that he (the indorser) has due *notice* of the dishonor, and without which he is discharged from all liability: consequently, it is essential for the holder to be prepared to prove affirmatively that *such notice was given*, or some facts dispensing with such notice; 1 Chitty, Pr. 493; 1 Pars. Notes & B. 516.

Whenever the defendant's liability to perform an act depends on another occurrence which is *best known* to the *plaintiff*, and of which the defendant is not legally bound to take notice, the plaintiff must prove that due notice was in fact given. So, in cases of insurances on ships, a *notice of abandonment* is frequently necessary to enable the assured plaintiff to proceed as for a total loss when something remains to be saved, in relation to which, upon notice, the insurers might themselves take their own measures.

Notice may be written or oral, in many cases, at the option of the party required to give it; but written notice is generally preferable, both as avoiding doubt and ambiguity in its terms, and as admitting more easy and exact proof of delivery; 2 Dan. Neg. Inst. 972. See KNOWLEDGE.

**NOTICE, AVERMENT OF. In Pleading.** The statement in a pleading that notice has been given.

When the matter alleged in the pleading is to be considered as lying more properly in the knowledge of the plaintiff than of the defendant, then the declaration ought to state that the defendant had notice thereof: as, when the defendant promised to give the plaintiff as much for a commodity as another person had given or should give for the like.

But where the matter does not lie more properly in the knowledge of the plaintiff than of the defendant, notice need not be averred; 1 Saund. 117, n. 2; 2 *id.* 62 *a*, n. 4; Freem. 285. Therefore, if the defendant contracted to do a thing on the performance of an act by a stranger, notice need not be averred; for it lies in the defendant's knowledge as much as the plaintiff's, and he ought to take notice of it at his peril; Com. Dig. *Pleader* (C 65). See Com. Dig. *Pleader* (C 73, 74, 75); Viner, Abr. *Notice;* Hardr. 42; 5 Term 621.

The omission of an averment of notice, when necessary, will be fatal on demurrer or judgment by default; Cro. Jac. 432; but may be aided by verdict; 1 Stra. 214; 1 Saund. 228 *a*; unless in an action against the drawer of a bill, when the omission of the averment of notice of non-payment by the acceptor is fatal, even after verdict; Dougl. 679.

**NOTICE OF DISHONOR.** A notice given to a drawer or indorser of a bill, or an indorser of a negotiable note, by a subsequent party, that it had been dishonored either by non-acceptance in the case of a bill, or by non-payment in the case of an accepted bill or a note.

The notice must contain a description of the bill or note; Byles, Bills 220; 5 Cush. 546; 14 Conn. 362; 1 Fla. 301; 1 Wisc. 264; sufficient to leave no doubt in the mind of the indorser, as a reasonable man, what note was intended; 3 Metc. Mass. 495; 7 Ala. N. S. 205; 12 N. Y. 551; 26 Me. 45; 11 Wheat. 431; 56 N. J. L. 11. As to what is a misdescription, see 7 Exch. 578; 9 Q. B. 609; 9 Pet. 33; 11 Wheat. 431; 17 How. 606; 7 N. Y. 19; 2 Mich. 238; 12 Mass. 6; 14 Pa. 483; 2 Ohio St. 345.

It must also contain a clear statement of the dishonor of the bill; 1 Bingh. N. C. 194; 2 Cl. & F. 93; 2 M. & W. 799; 3 Metc. Mass. 495; 18 Conn. 361; and something more than the mere fact of non-acceptance or non-payment must be stated; 10 Ad. & E. 125; 2 Q. B. 388; 11 Wheat. 431; 3 Metc. Mass. 595; 5 Barb. 190; 1 Spears 244; 2 Ohio St. 345; 3 Md. 202, 251; 2 Hawks 560; 5 How. Miss. 552; except in some cases: 5 Cush. 546; 1 Md. 59, 504; see as to effect of the use of the word *protested*, 11 Wheat. 431; 7 Ala. N. S. 205; 2 Dougl. Mich. 379; 9 Rob. La. 161; 14 Conn. 362; 5 Cush. 546; 1 Wisc. 264; 4 N. J. 71. See some cases where the notice was held sufficient; 2 M. & W. 109, 799; 6 *id.* 400; 7 *id.* 515; 14 *id.* 7, 44; 6 Ad. & E. 499; 10 *id.* 131; 2 Q. B. 421; 1 E. & B. 801; 5 C. B. 687; 1 H. & W. 3; and others where it was held insufficient; 2 Exch. 719; 1 E. & B. 801; 4 B. & C. 339; 10 Ad. & E. 125; 7 Bingh. 530; 3 Bingh. N. C. 688; 8 C. & P. 355; 2 Q. B. 388; 1 M. & G. 76; 53 Minn. 386; 91 Tenn. 301; 63 Hun 625.

As to whether there must be a statement that the party to whom the notice is sent is looked to for payment, see 11 M. & W. 372; 7 C. B. 400; 4 D. & L. 744.

The notice is generally *in writing*, but may be oral: 16 Barb. 146; 3 Metc. Mass. 495; 8 Mo. 336; 7 C. B. 400; 8 C. & P. 355. It need not be personally served, but may be sent by mail; 7 East 385; 6 Wheat. 102; 1 Pick 401; 28 Vt. 316; 15 Md. 285; 5 Pa. 178; 1 Conn. 329; 2 R. I. 467; 23 Mo. 213; 13 N. Y. 549; otherwise, perhaps, if the parties live in the same town; see 5 Metc.

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Mass. 352; 10 Johns. 490; 3 McLean 96; 28 N. H. 302; 15 Me. 141; 15 Md. 285; 3 Rob. La. 261; 6 Blackf. 312; 3 Harr. Del. 419; 8 Ohio 507; 85 Va. 95; or left in the care of a suitable person, representing the party to be notified; 15 Me. 207; 2 Johns. 274; 20 Miss. 332; 16 Pick. 392; 14 La. 494; 19 Ill. 598; Holt 476; 98 Ala. 550; see 84 Va. 41.

It should be sent to the place where it will most probably find the party to be notified most promptly; 6 Metc. 1, 7; 1 Pet. 578; whether the place of business; 1 Pet. 578; 3 McLean 96; 5 Metc. 212, 352; 11 Johns. 231; 15 Me. 139; 5 Pa. 178; 3 Harr. Del. 419; 6 Blackf. 312; 1 La. Ann. 95; 1 Maule & S. 545; or place of residence; 4 Wash. C. C. 464; 28 Vt. 316; 1 Conn. 329. The word residence in the law of negotiable instruments may be satisfied by a temporary, partial, or even constructive residence; 148 Mass. 181. When sent by mail, it should be to the post-office to which the party usually resorts; 2 Pet. 543; 4 Wend. 328; 5 Pa. 160; 3 McLean 91; 15 La. 38; 4 Humphr. 86; 3 Ga. 486; 11 Md. 486; 3 Ohio 307; 8 Mo. 443; 6 Metc. 106; 6 H. & J. 172; 8 Misc. Rep. 503; see 159 Mass. 404. If properly addressed and mailed it will charge the indorser, whether he has received it or not; 8 Misc. Rep. 516.

Every person who, by and immediately upon the dishonor of the note or bill, and only upon such dishonor, becomes liable to an action either on the paper or on the consideration for which the paper was given, is entitled to immediate notice; 1 Pars. Notes & B. 499. The holder need give notice only to the parties and to the indorser whom he intends to hold liable; 25 Barb. 138; 19 Me. 62; 11 La. Ann. 137; 1 Ohio St. 206; 49 Ohio St. 351; 5 Miss. 272; 17 Ala. 258; 15 M. & W. 231; 61 Mich. 402. A second indorser duly notified cannot defend on the ground that the first was not so notified; 20 D. C. 26.

Notice may be given by any party to a note or bill not primarily liable thereon as regards third parties, and not discharged from liability on it at the time notice is given; 8 Mo. 336; 16 S. & R. 157; 3 Dana 126; 5 Miss. 272; 17 Ala. 258; 25 Barb. 138; 15 Md. 150; 15 La. 321; 14 Mass. 116; 5 Maule & S. 68; 15 M. & W. 231. The late English doctrine that any party to a note or bill may give the notice by which an antecedent party may be held liable to subsequent parties, is now quite firmly established; Wade, Notice § 709. Such notice may be by the holder's agent; 4 How. 336; 11 Rob. La. 454; 21 Tex. 680; 8 Mo. 704; 7 Ala. N. S. 205; 15 M. & W. 231; and in the agent's name; 99 Cal. 143; may be by an indorsee for collection; 3 N. Y. 243; a notary; 2 How. 66; 28 Mo. 339; the administrator or executor of a deceased person; Story, Pr. Notes § 304; the holder of the paper as collateral security; 14 C. B. N. S. 728. It has been held that notice by a stranger, pretending to be the holder, may be ratified by the real holder; 2 C. & K. 1016. Mere knowledge on the part of an indorser of a note, learned from the maker that it had been dishonored, is not a notice, since notice must come from a party who is entitled to look to the indorser for payment: 53 Minn. 386.

The notice must be forwarded as early as the day after the dishonor, by a mail which does not start at an unreasonably early hour; 9 N. H. 558; 24 Me. 458; 2 R. I. 437; 24 Pa. 148; 4 N. J. L. 71; 1 Ohio St. 206; 9 Miss. 261, 644; 13 Ark. 645; 7 Gill & J. 78; 4 Wash. C. C. 464; 2 Stor. 416; 4 Bingh. 715; Big. Notes & B. 293; see 155 Pa. 227.

An indorser is entitled to notice of demand and non-payment of a note, notwithstanding that he has collateral security; 15 R. I. 44; 4 W. & S. 328.

Notice of dishonor may be excused: where it is prevented by inevitable accident, or overwhelming calamity; by the prevalence of a malignant disease which suspends the operations of trade; by war, blockade, invasion, or occupation by the enemy; by the interdiction of commerce between the countries from which or to which the notice is to be sent; by the impracticability of giving notice, by reason of the party entitled thereto having absconded or having no fixed place of residence, or his place of business or residence being unknown, and incapable of being ascertained upon reasonable inquiries. These are the excuses of a general nature given by Story, on Pr. Notes and on Bills. Special excuses are: That the note was for the accommodation of the indorser only; an original agreement on the part of the indorser, made with the maker or other party at all events to pay the note at maturity; the receiving security or indemnity from the maker, or other party for whose benefit the note is made, by the indorser, or money to take it up with; receiving the note as collateral security for another debt where the debtor is no party to the note, or if a party has not indorsed it; an original agreement by the indorser to dispense with notice; an order or direction from the makee to the maker not to pay the note at maturity. See Story, Pr. Notes §§ 293, 357.

Consult Bayley; Byles; Chitty; Story, on Bills of Exchange; Story, Promissory Notes; Parsons, Notes and Bills; Daniel, Negotiable Instruments; Wade, Notice.

**NOTICE OF EXECUTION.** Under an exemption act which requires an execution, the debtor desiring to avail himself of its benefits should make a schedule of all his personal property within ten days after notice of execution. The sheriff should, whenever practical, give personal notice, and an ambiguously worded notice by mail from which the debtor may infer that personal demand will be made on him at some time in the future, is insufficient; 46 Ill. App. 150.

**NOTICE OF INQUIRY.** The plaintiff must give a written notice of execu-

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ting a writ of inquiry to the defendant or his solicitor; 2 Chit. Arch. Prac.; Wharton.

**NOTICE OF JUDGMENT.** In several of the states it is provided by statute that a written notice shall be served by the party entering the judgment upon his adversary or his attorney, stating the time when the judgment is entered.

**NOTICE OF LIS PENDENS.** A notice filed for the purpose of warning all persons that the title to certain property is in litigation. See LIS PENDENS.

**NOTICE OF MOTION.** A notice in writing, entitled in a cause, stating that, on a certain day designated, a motion will be made to the court for the purpose stated. Burrill.

**NOTICE OF PROTEST.** A notice given to a drawer or indorser of a bill, or to an indorser of a note, that the bill or note has been protested for refusal of payment or acceptance. See NOTICE OF DISHONOR.

**NOTICE OF TRIAL.** The plaintiff may give notice of trial at any time after the issues of fact are ready for trial; and if not given within a certain time the defendant may give notice of same or move to dismiss the action for want of prosecution.

**NOTICE TO ADMIT.** In the practice of the English high court either party may call upon the other to admit a document, and on refusal or neglect to admit he must bear the costs of proving the document, unless the judge certifies that the refusal was reasonable. Rules of Court XXXII; Whart.

**NOTICE TO PLEAD.** Written notice to defendant, requiring him to plead within a certain time. It must always be given before plaintiff can sign judgment for want of a plea. 1 Chitty, Archb. Pr. 221. Notice to plead, indorsed on the declaration or delivered separately, is sufficient without demanding plea or rule to plead, in England, by statute.

**NOTICE TO PRODUCE PAPERS.**

**In Practice.** When it is intended to give secondary evidence of a written instrument or paper which is in the possession of the opposite party, it is, in general, requisite to give him notice to produce the same on the trial of the cause, before such secondary evidence can be admitted. See 50 Kan. 436.

To this general rule there are some exceptions: *first*, in cases where, from the nature of the proceedings, the party in possession of the instrument has notice that he is charged with the possession of it, as in the case of trover for a bond. 14 East 274; 4 Taunt. 865; 6 S. & R. 154; 4 Wend. 626; 1 Campb. 143; 48 Me. 218; 30 Barb. 338; 58 N. H. 68; *second*, where the party in possession has obtained the instrument by fraud; 4 Esp. 256. See 1 Phill. Ev. 425; 1 Stark. Ev. 362; Rosc. Ev., 16th ed., 8.

In general, a notice to produce papers ought to be given in writing, and state the title of the cause in which it is proposed to use the papers or instruments required; 2 Stark. 19. It seems, however, that the notice may be by parol; 1 Campb. 440. It must describe with sufficient certainty the papers or instruments called for, and must not be too general and by that means be uncertain; Ry. & M. 341; M'Cl. & Y. 139.

The notice may be given to the party himself, or to his attorney; 2 Term 203, n.; 3 *id.* 306; Ry. & M. 327.

The notice must be served a reasonable time before trial, so as to afford an opportunity to the party to search for and produce the instrument or paper in question; 1 Stark. 283; 92 Mich. 542; 66 Ia. 292.

When a notice to produce an instrument or paper in the cause has been proved, and it is also proved that such paper or instrument was, at the time of the notice, in the hands of the party or his privy, and upon request in court he refuses or neglects to produce it, the party having given such notice and made such proof will be entitled to give secondary evidence thereof. See 66 Hun 626; 155 Mass. 233.

Where a party is notified to produce certain writings, and the same are shown not to be within the state, copies may be introduced; 99 Ala. 331; 82 Tex. 368.

**NOTICE TO QUIT.** A request from a landlord to his tenant to quit the premises leased, and to give possession of the same to him, the landlord, at a time therein mentioned. 3 Wend. 337, 357; 7 Halst. 99.

*The form of the notice.* The notice or demand of possession should contain a request from the landlord to the tenant or person in possession to quit the premises which he holds from the landlord (which premises ought to be particularly described, as being situate in the street and city or place, or township and county), and to deliver them to him on or before a day certain,—generally, when the lease is for a year, the same day of the year on which the lease commences. But where there is some doubt as to the time when the lease is to expire, it is proper to add, "or at the expiration of the current year of your tenancy." 2 Esp. 589. It should be dated, signed by the landlord himself, or by some person in his name, who has been authorized by him, and directed to the tenant. The notice must include all the premises under the same demise; for the landlord cannot determine the tenancy as to part of the premises demised and continue it as to the residue. For the purpose of bringing an ejectment, it is not necessary that the notice should be in writing, except when required to be so under an express agreement between the parties; Com. Dig. *Estate by Grant* (G 11, n. p.); 2 Campb. 96. But it is the general and safest practice to give written notices; and it is a precaution which should always, when possible, be observed, as it prevents mistakes and renders the evidence certain. Care should be taken that the words of a notice be clear and decisive, without ambiguity or giving an alternative to the tenant; for if it be really

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ambiguous or optional, it will be invalid; Ad. Ej. 204.

*As to the person by whom the notice is to be given.* It must be given by the person interested in the premises, or his agent properly appointed; Ad. Ej. 120. See 3 C. B. 215. As the tenant is to act upon the notice at the time it is given to him, it is necessary that it should be such as he may act upon with security, and should, therefore, be binding upon all the parties concerned at the time it is given. Where, therefore, several persons are jointly interested in the premises, they need not all join in the notice; but, if any of them be not a party at the time, no subsequent ratification by him will be sufficient by relation to render the notice valid. But see 2 Phill. Ev. 184; 1 B. & Ad. 135; 7 M. & W. 139. But if the notice be given by an agent, it is sufficient if his authority is afterwards recognized; 3 B. & Ald. 689. But see 10 B. & C. 621.

*As to the person to whom the notice should be given.* When the relation of landlord and tenant subsists, difficulties can seldom occur as to the party upon whom the notice should be served. It should invariably be given to the tenant of the party serving the notice, notwithstanding a part may have been underlet or the whole of the premises may have been assigned; Ad. Ej. 119; 5 B. & P. 330; 14 East 234; 6 B. & C. 41; unless, perhaps, the lessor has recognized the sub-tenant as his tenant; 10 Johns. 270. When the premises are in possession of two or more as joint tenants or tenants in common, the notice should be to all. A notice addressed to all and served upon one only will, however, be a good notice; Ad. Ej. 123. The delivery of a notice to quit to the wife of a tenant, she being in possession of the premises, is a good service upon the husband; 30 Ill. App. 300.

*As to the mode of serving the notice.* The person about serving the notice should make two copies of it, both signed by the proper person, then procure one or more respectable persons for witnesses, to whom he should show the copies, who, upon comparing them and finding them alike, are to go with the person who is to serve the notice. The person serving the notice then, in their presence, should deliver one of these copies to the tenant personally, or to one of his family, at his usual place of abode, although the same be not upon the demised premises; 2 Phill. Ev. 185; or serve it upon the person in possession; and where the tenant is not in possession, a copy may be served on him, if he can be found, and another on the person in possession. The witnesses should then, for the sake of security, sign their names on the back of the copy of the notice retained, or otherwise mark it so as to identify it; and they should also state the manner in which the notice was served. In the case of a joint demise to two defendants, of whom one alone resided upon the premises, proof of the service of the notice upon him has been held to be sufficient ground for the jury to presume that the notice so served upon the premises has reached the other who resided in another place; 7 East 553; 5 Esp. 196. In ejectment the defence of adverse possession is inconsistent with a tenancy, and exempts the plaintiff from the necessity of proving a notice to quit; 92 Mich. 136; 126 Ill. 228; 75 Cal. 342.

*At what time it must be served.* At common law it must be given six calendar months before the expiration of the lease; 1 Term 159; 8 Cow. 13; 1 Vt. 311; 5 Yerg. 431; 4 Ired. 291; 17 Mass. 287; see 8 S. & R. 458; 2 Rich. 346; and three months is the common time under statutory regulations; and where the letting is for a shorter period the length of notice is regulated by the time of letting; 6 Bing. 362; 5 Cush. 563; 23 Wend. 616. Where a tenant under a lease for a term assents to the termination of his lease and continues to hold from day to day under a new arrangement, he is not entitled to a month's notice to quit; 94 Mich. 474; a tenant or sub-tenant holding over is not entitled to notice to quit; 31 Ill. App. 592. Difficulties sometimes arise as to the period of the commencement of the tenancy; and when a regular notice to quit on any particular day is given, and the time when the term began is unknown, the effect of such notice, as to its being evidence or not of the commencement of the tenancy, will depend upon the particular circumstances of its delivery; if the tenant, having been applied to by his landlord respecting the time of the commencement of the tenancy, has informed him it began on a certain day, and in consequence of such information a notice to quit on that day is given at a subsequent period, the tenant is concluded by his act, and will not be permitted to prove that in point of fact the tenancy has a different commencement; nor is it material whether the information be the result of design or ignorance, as the landlord is in both instances equally led into error; Ad. Ej. 141; 2 Esp. 635; 2 Phill. Ev. 186. In like manner, if the tenant at the time of delivery of the notice assent to the terms of it, it will waive any irregularity as to the period of its expiration; but such assent must be strictly proved; 4 Term 361; 2 Phill. Ev. 183. When the landlord is ignorant of the time when the term commenced, a notice to quit may be given not specifying any particular day, but ordering the tenant in general terms to quit and deliver up the possession of the premises at the end of the current year of his tenancy thereof, which shall expire next after the end of three months from the date of the notice. See 2 Esp. 589. Where a notice to quit is necessary, the day named therein must be the day of, or corresponding to the day of, the conclusion of the tenancy; 55 N. J. L. 217.

*What will amount to a waiver of the notice.* The acceptance of rent accruing subsequently to the expiration of the notice is the most usual means by which a waiver

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of it may be produced; but the acceptance of such rent is open to explanation; and it is the province of the jury to decide with what views and under what circumstances the rent is paid and received; Ad. Ej. 139; 2 Campb. 387. If the money be taken with an express declaration that the notice is not thereby intended to be waived, or accompanied by other circumstances which may induce an opinion that the landlord did not intend to continue the tenancy, no waiver will be produced by the acceptance; the rent must be paid and received *as rent*, or the notice will remain in force; Cowp. 243. The notice may also be waived by other acts of the landlord; but they are generally open to explanation, and the particular act will or will not be a waiver of the notice, according to the circumstances which attend it; 2 East 236; 1 Term 53. It has been held that a notice to quit at the end of a certain year is not waived by the landlord's permitting the tenant to remain in possession an entire year after the expiration of the notice, notwithstanding the tenant held by an improving lease,—that is, to clear and fence the land and pay the taxes; 1 Binn. 333. In cases, however, where the act of the landlord cannot be qualified, but must of necessity be taken as a confirmation of the tenancy, as if he distrain for rent accruing after the expiration of the notice, or recover in an action for use and occupation, the notice of course will be waived; Ad. Ej. 144; 1 H. Bla. 311; 19 Wend. 391. See 13 C. B. 178.

A tenant becomes a trespasser at the expiration of the time specified in a due notice to quit; and the landlord has a right during the tenant's absence to re-enter and take possession, and eject the tenant's goods and to keep the possession so obtained; 16 R. I. 524. A tenant at will, after a notice to quit, has a reasonable time in which to vacate the premises; 60 Vt. 386.

See LANDLORD AND TENANT; LEASE.

**NOTING.** A term denoting the act of a notary in minuting on a bill of exchange, after it has been presented for acceptance or payment, the initials of his name, the date of the day, month, and year when such presentment was made, and the reason, if any has been assigned, for non-acceptance or non-payment, together with his charge. The noting is not indispensable, it being only a part of the protest; it will not supply the protest; 4 Term 175.

**NOTIO.** The power of hearing and trying a matter of fact. Calv. Lex.

**NOTORIOUS.** As used in defining adverse possession, it means that the character of the holding must possess such elements of notoriety that the owner may be presumed to have notice of it and of its extent. 33 Fla. 261. See 94 Mo. 187.

**NOTORIOUSLY.** Well and generally understood. 46 Fed. Rep. 724.

**NOTOUR. In Scotch Law.** Open; notorious. A notour bankrupt is a debtor who, being under diligence by horning and caption of his creditor, retires to sanctuary, or absconds, or defends by force, and is afterwards found insolvent by court of sessions. Bell, Dict.

**NOVA CUSTOMA.** An imposition or duty. See ANTIQUA CUSTOMA.

**NOVA SCOTIA.** A province of the Dominion of Canada. It is governed by a Lieutenant-Governor and an Executive Council of seven members. The Legislature consists of a Council of eighteen members appointed by the governor, and an Assembly of thirty-eight members, chosen by the people. The seat of government is Halifax. It has a chief justice, an equity judge and five assistant judges, and seven county court judges.

England founds her claim to the original discovery of this province upon the patent granted by Queen Elizabeth to Sir Humphrey Gilbert, A. D. 1578.

This was followed by De la Roche's unfortunate attempt to colonize the Isle of Sable.

De Monts, having in 1603 received an appointment from Henri IV. of France, sailed the following year, with Champlain, De Poutrincourt, and others.

After exploring the outer shore of the peninsula, having entered the Bay of Fundy, De Poutrincourt settled Port Royal, 1605,—the first permanent settlement in British North America. From this time the English began to assert their claims, and colonists from Virginia expelled the colony of De Monts.

The French regained possession, but only to be again expelled by the strong force sent against them by Cromwell, 1654.

Thirteen years later, England ceded the province to France by the treaty of Breda, 1667; but in the new wars it was again ravaged by the English, who reacquired it, 1713; and in 1749 it was formally colonized by the British Government

The French colonists, having resisted and joined the Indians, were defeated by the British, and their stronghold, Louisburgh, on Cape Breton, was taken by Massachusetts colonists, acting under a plan suggested by a Massachusetts lawyer.

In 1758 the province received its constitution, and in 1763 France, by the treaty of Paris, ceded all rights whatsoever.

In 1784 New Brunswick and Cape Breton were separated from Nova Scotia; but Cape Breton was reattached in 1819.

In 1867 it became a province of the Dominion of Canada. See CANADA.

**NOVA STATUTA.** New statutes. A term including all statutes passed in the reign of Edw. III. and subsequently. See VETERA STATUTA.

**NOVÆ NARRATIONES.** New counts or talys. A book of such pleadings as were then in use, published in the reign of Edw. III. 3 Bla. Com. 297; 3 Reeve, Hist. Eng. Law 439.

**NOVATION** (from Lat. *novare*, *novus*, new). The substitution of a new obligation for an old one, which is thereby extinguished.

A transaction whereby a debtor is discharged from his liability to his original creditor by contracting a new obligation in favor of a new creditor by the order of the original creditor. 1 Pars. Cont. 217; 136 N. Y. 152; 137 *id.* 542.

It is a mode of extinguishing one obligation by another—the substitution, not of a

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new paper or note, but of a new obligation in lieu of an old one—the effect of which is to pay, dissolve, or otherwise discharge it. 85 Ala. 401.

**In Civil Law.** There are three kinds of novation.

*First*, where the debtor and creditor remain the same, but a *new debt* takes the place of the old one. Here, either the subject-matter of the debt may be changed, or the conditions of time, place, etc., of payment.

*Second*, where the debt remains the same, but a *new debtor* is substituted for the old. This novation may be made without the intervention or privity of the old debtor (in this case the new agreement is called *expromissio*, and the new debtor *expromissor*), or by the debtor's transmission of his debt to another, who accepts the obligation and is himself accepted by the creditor. This transaction is called *delegatio*. Domat lays down the essential distinction between a delegation and any other novation, thus: that the former demands the consent of all three parties, but the latter that only of the two parties to the new debt. See DELEGATION.

*Third*, where the debt remains the same, but a *new creditor* is substituted for the old. This also is called *delegatio*, for the reason adduced above, to wit: that all three parties must assent to the new bargain. It differs from the *cessio nominis* of the civil law by completely cancelling the old debt, while the *cessio nominis* leaves the creditor a claim for any balance due after assignment.

In every novation the old debt is wholly extinguished by the new. To effect such a transformation, several things are requisite.

*First*, there must be an *anterior obligation* of some sort, to serve as a basis for the new contract. If the old debt be void, as being, *e. g.*, *contra bonos mores*, then the new debt is likewise void; because the consideration for the pretended novation is null. But if the old contract is only voidable, in some cases the new one may be good, operating as a ratification of the old. Moreover, if the old debt be conditional, the new is also conditional unless made otherwise by special agreement,—which agreement is rarely omitted.

*Second*, the parties innovating must *consent* thereto. In the modern civil law, every novation is voluntary. Anciently, a novation not having this voluntary element was in use. And not only consent is exacted, but a *capacity* to consent. But capacity to make or receive an absolute payment does not of itself authorize an agreement to innovate.

*Third*, there must be an *express intention* to innovate,—the *animus novandi*. A novation is never presumed. If an intent to destroy the old debt be not proved, two obligations now bind the debtor,—the old and the new. Conversely, if the new contract be invalid, without fraud in the transaction, the creditor has now lost all remedy. The anterior obligation is destroyed without being replaced by a new one.

An important rule of novation is that the extinction of the debt destroys also all rights and liens appertaining thereto. Hence, if any hypothecations be attached to the ancient agreement, they are cancelled by the new one, unless express words retain them. The second contract is simple and independent, and upon its terms is the action *ex stipulatu* to be brought. Hence, too, the new parties cannot avail themselves of defences, claims, and set-offs which would have prevailed between the old parties.

Obviously, a single creditor may make a novation with two or more debtors who are each liable *in solido*. In this case any one debtor may make the contract to innovate; and if such a contract be completed, all his fellow-debtors are discharged with him from the prior obligation. Therefore Pothier says that, under the rule that novation cancels all obligations subsidiary to the main one, *sureties* are freed by a novation contracted by their principal. The creditor must specially stipulate that co-debtors and guarantors shall consent to be bound by the novation, if he wish to hold them liable. If they do not consent to such novation, the parties all remain, as before, bound under the old debt. So in Louisiana the debt due to a community creditor is not necessarily novated by his taking the individual note of the surviving spouse, with mortgages to secure its payment; 11 La. Ann. 687.

It follows that the new debtor, in a delegation, can claim nothing under the old contract, since he has consented to the destruction of that contract. For the same reason, a creditor cannot proceed against the discharged debtor. And this is true though the new debtor should become insolvent while the old remains solvent. And even though at the time of the novation the new debtor was insolvent, still the creditor has lost his remedy against the old debtor. But the rule, no doubt, applies only to a *bona fide* delegation. And a suit brought by the creditor against a delegated debtor is not evidence of intention to discharge the original debtor; 11 La. Ann. 93.

In a case of *mistake*, the rule is this: If the new debtor agree to be substituted for the old, under the belief that he himself owes so much to the discharged debtor, although he do not in fact owe the amount, yet he is bound to the creditor on the novation; because the latter has been induced to discharge the old debtor by the contract of the new, and will receive only his due in holding the new debtor bound. But where the supposed creditor had really no claim upon the original debtor, the substitute contracts no obligation with him; and even though he intended to be bound, yet he may plead the fact of no former debt against any demand of the creditor, as soon as this fact is made known to him.

A novation may be made dependent on

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a condition. In that case the parties remain bound, as before, until the condition is fulfilled. The new debtor is not freed from a conditional novation as to the creditor until the condition happens; and he is not liable in an action to the old debtor until it is performed.

Any obligation which can be destroyed at all may be destroyed by novation. Thus, legacies, judgments, etc., with mortgages, guarantees, and similar accessories, are as much the subjects of novation as simple contract debts. But a covenant by the obligee of a bond not to sue the obligor within a certain time is not an example of the civil-law novation. The agreement was not a release, not a substituted contract, but a covenant merely, for the breach of which the obligee has his action; 19 Johns. 129.

**At Common Law.** The common-law doctrine of novation mainly agrees with that of the civil law, but in some parts differs from it.

The term novation is rarely employed. The usual common-law equivalent is assignment, and sometimes merger. Still, this form of contract found its way into common-law treatises as early as Fleta's day, by whom it was called *innovatio. Item, per innovationem, ut si transfusa sit obligatio de una persona in aliam, quæ in se susceperit obligationem.* Fleta, lib. 2, c. 60, § 12. The same words here quoted are also in Bracton, lib. 3, c. 2, § 13, but we have *novationem* for *innovationem.* In England, recently, the term novation has been revived in some cases.

A case of novation is put in Tatlock *v.* Harris, 3 Term 180. "Suppose A owes B £100, and B owes C £100, and the three meet, and it is agreed between them that A shall pay C the £100: B's debt is extinguished, and C may recover that sum against A."

The subject of novation has been much before the courts in reference to the transfers of the business of life assurance companies. In order to constitute a novation the old obligation must be discharged; and it has often been the interest of claimants on the transferor company, where the transferee company has become insolvent, to contend that there is no "novation," but that the old obligation is still in force. In England the questions which have arisen on this matter are for the most part set at rest by the stat. 35 & 36 Vict. c. 41, s. 7, providing that no policy-holder shall be deemed to have abandoned any claim against the original company, and to have accepted in lieu thereof the liability of the new company, unless such abandonment and acceptance shall have been signified by some writing signed by him, or by his agent lawfully authorized. Moz. & W.

There must always be a debt once existing and now cancelled, to serve as a *consideration* for the new liability. The action in all cases is brought on the new agreement. But in order to give a right of action there must be an extinguishment of the original debt; 4 B. & C. 163; 1 M. & W. 124; 14 Ill. 34; 4 La. Ann. 281; 15 N. H. 129; 110 Mass. 52; 53 Vt. 345; 78 Ia. 718; 46 Ark. 163. See 93 Mich. 342.

Where there is a substitution of a new contract for an old one, the new contract must be a valid one upon which the creditor can have his remedy; 57 Wis. 534; and the previous obligation of which novation is sought must be a valid one; 59 Ind. 509; 64 *id.* 413.

No mere agreement for the transformation of one contract into another is of effect until actually carried into execution and the consent of the parties thereto obtained. A good novation is an accord executed; 5 B. & Ad. 925; 3 N. & M'C. 171; 1 La. 410; 24 Conn. 621; otherwise, if there be no satisfaction; 2 Scott N. R. 938. The discharge of the old debt must be contemporaneous with, and result from the consummation of, an arrangement with the new debtor; 39 Minn. 407.

But where an agreement is entered into by deed, that deed gives in itself a substantial cause of action; and the giving such deed may be a sufficient accord and satisfaction for a simple contract debt; Co. Litt. 212 *b*; 1 Burr. 9; 2 Rich. 608; 3 W. & S. 276; 1 Hill N. Y. 567.

In the civil law *delegatio,* no new creditor could be substituted without the debtor's consent. This rule is observed in the common law. Hence, without this consent and promise to pay, a new creditor can have no action against the debtor, because there is no privity of contract between them. To establish such privity there must be a new promise founded on sufficient consideration; 3 Mer. 652; 5 Wheat. 277; 12 Ga. 406; 5 Ad. & E. 115; 7 Harr. & J. 213, 219; 21 Me. 484; 39 Minn. 407; 123 Mass. 28; 74 Wis. 456; 14 La. Ann. 54.

But in equity a creditor may assign his claim fully to another without any intervention of the debtor; and the assignee is not even compelled to sue in his assignor's name; 14 Conn. 141; 3 Swanst. 392; 4 Rand. 392; Mart. & Y. 378.

The extinction of the prior debt is consideration enough to support a novation. If A holds B's note, payable to A, and assigns this for value to C, B is by such transfer released from his promise to A, and this is sufficient consideration to sustain his promise to C; 1 Pars. Contr. ch. 13; 2 Barb. 349; Ans. Contr. 220; 37 Ohio 279; 95 Ind. 452; 53 Vt. 30. And a consideration need not be expressed in the contract of novation; though one must be proved in order to defend in a suit brought by creditors of the assignor.

When assent or consideration is wanting, the novation operates only as a species of collateral security. The transferee cannot sue in his own name, and will be subject to all the equitable defences which the debtor had against the original creditor. This assent on the debtor's part is said to be essential, for the reason that he may have an account with his assignor, and he shall not be barred of his right to a set-off.

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Still, if anything like an assent on the part of a holder of money can be inferred, he will be considered as the debtor; 4 Esp. 203; 6 Tex. 163; if the debtor's assent be not secured, the order of transfer may be revoked before it is acted on.

In a delegation, if the old debtor agree to provide a substitute, he must put his creditor into such a position that the latter can claim full satisfaction from the delegated debtor, or otherwise the original liability remains, and there is no novation; 19 Mo. 322, 637. See 3 B. & Ald. 64; 2 M. & W. 484; 6 Cra. 253; 12 Johns. 409; 21 Wend. 450; 1 Misc. Rep. 176; 57 Wis. 534.

One who has contracted to pay the debts of another, and has been notified by a creditor that he accepts the arrangement, cannot be released from liability to such creditor by rescinding the contract without his consent; 25 Ill. App. 130.

The existing Louisiana law is based upon the doctrines of the Civil Code considered above. It is held in numerous cases that "novation is not to be presumed:" hence the receipt of a bill or note is not necessarily a novation, or extinguishment of the debt for which it is given. An express declaration to that effect is required in most of our states, or else acts tantamount to a declaration. An intention to discharge the old debt must be shown in all cases; and this intention is sufficient to work a novation; 4 La. Ann. 329, 543; 6 *id.* 669; 9 *id.* 228, 497; 12 *id.* 299. "The delegation by which the debtor gives to the creditor another debtor, who obliged himself towards such creditor, does not operate as a novation unless the creditor has expressly declared his intention to discharge the debtor who made the delegation." 13 La. Ann. 238.

One of the most common of modern novations is the surrender and destruction of an old promissory note or bill of exchange, and the receipt of a new one in payment thereof. The rules of novation apply as completely to debts evidenced by mercantile paper as to all other obligations; Story, Bills § 441; Pothier, *de Change*, n. 189; Thoms. Bills, ch. 1, § 3. Hence, everywhere, if the parties *intend* that a promissory note or bill shall be absolute payment, it will be so considered; Ans. Contr. 273, n.; 10 Ad. & E. 593; 4 Mas. 336; 1 Rich. 37, 112; 9 Johns. 310; 13 Vt. 452. In some states, the receipt of a negotiable promissory note is *prima facie* payment of the debt upon which it is given, and no action lies upon the account unless the presumption is controverted; 12 Mass. 237; 113 *id.* 194; 132 *id.* 538; 8 Me. 298; 79 Me. 62; 29 Vt. 32; 59 *id.* 154; 68 Ind. 254; 111 *id.* 137; 7 Or. 39. "If a creditor gives a receipt for a draft in payment of his account, the debt is novated;" 2 La. 109. But see the cases cited *supra* for the full Louisiana law. In most states, however, the rule is, as in England, that, whether the debt be pre-existing or arise at the time of giving the note, the receipt of a promissory note is *prima facie* a conditional payment only, and works no novation.

It is payment only on fulfilment of the condition, *i. e.* when the note is paid; 5 Beav. 415; 6 Cra. 264; 2 Johns. Cas. 438; 27 N. H. 253; 11 Gill & J. 416; 4 R. I. 383; 8 Cal. 501; 2 Rich. 244; 15 S. & R. 162.

If a vendor transfer his vendee's note, he can only sue on the original contract when he gets back the note, and has it in his power to return it to his vendee; 1 Pet. C. C. 262; 4 Rich. 59.

Where the holder of a note agrees to accept another as debtor in place of the maker, there is a complete novation of the debt, and the indorsers are discharged; 22 Can. S. C. R. 479.

A novation is not a promise to pay the debt of another, within the statute of frauds, and need not be in writing; 18 So. Rep. (Tex.) 646. See 2 Misc. Rep. 301; 45 Ill. App. 648; 54 Mo. App. 221; 160 Mass. 225; 39 Atl. Rep. (Me.) 551.

See Dixon, Substituted Liabilities; 6 Harv. Law Rev. 184; DISCHARGE; PAYMENT; MORTGAGE; MERGER.

**NOVEL ASSIGNMENT.** See NEW ASSIGNMENT.

**NOVEL DISSEISIN.** The name of an old remedy which was given for a new or recent disseisin.

When a tenant in fee-simple, fee-tail, or for term of life, was put out and disseised of his lands or tenements, rents, and the like, he might sue out a writ of assize or novel disseisin; and if, upon trial, he could prove his title and his actual seisin, and the disseisin by the present tenant, he was entitled to have judgment to recover his seisin and damages for the injury sustained; 3 Bla. Com. 187. This remedy is obsolete.

**NOVELLÆ LEONIS.** The ordinances of the Emperor Leo, which were made from the year 887 till the year 893, are so called. These novels changed many rules of the Justinian law. This collection contains one hundred and thirteen novels, written originally in Greek, and afterwards, in 1560, translated into Latin by Agilæus.

**NOVELS, NOVELLÆ CONSTITUTIONES. In Civil Law.** The name given to the constitutions or laws of Justinian and his immediate successors, which were promulgated soon after the Code of Justinian.

It appears to have been the intention of Justinian, after the completion of the second and revised edition of the Code, to supply what had not been foreseen in the preceding laws, together with any necessary amendments or alterations, not by revising the Code, but by supplementary laws. Such laws he promulgated from time to time; but no official compilation of them is known to have been made until after his death, when his laws, 159 in number, with those of the reigns of Justin II. and Tiberias, nine in number, were collected, together with some local edicts, under this name. They belong to various times between 535 and 565.

Although the Novels of Justinian are the best known, and when the word Novels only is mentioned those of Justinian are always intended, he

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was not the first who used that name. Some of the acts of Theodosius, Valentinian, Leo, Severus, Authennius, and others, were also called Novels. But the Novels of the emperors who preceded Justinian had not the force of law after the legislation of that emperor. Those Novels are not, however, entirely useless: because, the Code of Justinian having been compiled to a considerable extent from the Theodosian Code and the earlier Novels, the latter frequently remove doubts which arise on the construction of the Code.

The original language of the Novels was for the most part Greek: but they are represented in the Corpus Juris Civilis by a Latin translation of 134 of them. These form the fourth part of the Corpus Juris Civilis. They are directed either to some officer, or an archbishop or bishop, or to some private individual of Constantinople; but they all had the force and authority of law.

The 118th Novel is the foundation and groundwork of the English Statute of Distribution of Intestates' Effects, which has been copied in many states of the Union. See 1 P. Wms. 27; Prec. in Chanc. 593; CIVIL CODE; CODE.

**NOVELTY. In Patent Law.** See PATENT.

**NOVIGILD.** A pecuniary satisfaction for an injury, amounting to nine times the value of the thing for which it was paid. Spelman.

**NOVUS HOMO** (Lat. a new man). This term is applied to a man who has been pardoned of a crime, by which he is restored to society and is rehabilitated.

**NOW.** At this time, or at the present moment; or at a time contemporaneous with something done. 15 Ore. 426. At the present time. 26 Ct. Cl. 15. In a will the word now is construed to mean at the death of the testator; 53 L. J. Ch. 1163 (reversed on other grounds, 30 Ch. D. 50); except where persons or classes must be ascertained or a description of property fixed; 30 L. J. Ex. 230; 6 H. & N. 583, where the word *now* is held to refer to the date of the will.

**NOXA** (Lat.). **In Civil Law.** Damage resulting from an offence committed by an irresponsible agent. The offence itself. The punishment for the offence. The slave or animal who did the offence, and who is delivered up to the person aggrieved (*datur noxæ*) unless the owner choose to pay the damage. The right of action is against whoever becomes the possessor of the slave or animal (*noxa caput sequitur*). D. *de furt.* L. 41; Vicat, Voc. Jur.; Calv. Lex.

**NOXAL ACTION.** See NOXA.

**NOXIOUS.** Hurtful; offensive. Within the meaning of a statute prohibiting noxious or offensive trade or manufactures, brick-making is not included. 32 L. J. M. C. 135; 13 C. B. N. S. 479.

A thing is noxious if capable of doing harm. And if noxious as administered, although innoxious if differently administered; 49 L. J. M. C. 44; 5 Q. B. Div. 307; 13 Cox 547; 12 *id* 463.

**NUBILIS** (Lat.). **In Civil Law.** One who is of a proper age to be married. Dig. 32, 51.

**NUDE.** Naked. Figuratively, this word is now applied to various subjects.

A nude contract, *nudum pactum*, is one without a consideration. Nude matter is a bare allegation of a thing done, without any evidence of it.

**NUDUM PACTUM.** A species of contract in the civil law. See CONSIDERATION. It is now commonly used to express a contract made without a consideration.

**NUISANCE.** Anything that unlawfully worketh hurt, inconvenience, or damage. 3 Bla. Com. 5, 216. See Cooley, Torts 670.

That class of wrongs that arises from the unreasonable, unwarrantable, or unlawful use by a person of his own property, either real or personal, or from his own improper, indecent, or unlawful personal conduct, working an obstruction of or to the right of another, or of the public, and producing such material annoyance, inconvenience, discomfort, or hurt that the law will presume a consequent damage. Wood, Nuisance.

A *private* nuisance is anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another. It produces damage to but one or a few persons, and cannot be said to be public; 36 N. Y. 297; 35 N. H. 357; 5 R. I. 185; Ad. Eq. 210; 3 Bla. Com. 215; Webb, Poll. Torts 484.

A *public* or common nuisance is such an inconvenience or troublesome offence as annoys the whole community in general and not merely some particular person. It produces no special injury to one more than another of the people; 1 Hawk. Pl. Cr. 197; 4 Bla. Com. 166.

A *mixed* nuisance is one which, while producing injury to the public at large, does some special damage to some individual or class of individuals; Wood, Nuisance 35.

It is difficult to say what degree of annoyance constitutes a nuisance. If a thing is calculated to interfere with the comfortable enjoyment of a man's house, it is a nuisance; 3 Jur. N. S. 571. In relation to offensive trades, it seems that when such a trade renders the enjoyment of life and property uncomfortable it is a nuisance; 1 Burr. 333; 13 Allen 95; 116 E. C. L. 608; 45 Cal. 55; 35 Ia. 221; 34 Tex. 230; 15 N. Y. Supp. 701; for the neighborhood have a right to pure and fresh air; 2 C. & P. 485; 22 N. J. Eq. 26; 58 Pa. 275; 4 B. & S. 608. Every citizen holds his property subject to the implied obligation that he will use it in such way as not to prevent others from enjoying the use of their property; 97 N. C. 477.

A thing may be a nuisance in one place which is not so in another; therefore the situation or *locality* of the nuisance must be considered. A tallow-chandler, for example, setting up his business among other tallow-chandlers, and increasing the noxious smells of the neighborhood, is not guilty of setting up a nuisance unless the annoyance is much increased by the new manufactory; Peake 91. Such an es-

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tablishment might be a nuisance in a thickly populated town of merchants and mechanics where no such business was carried on; 3 Grant 302. The same doctrine obtains as regards other trades or employments. Persons living in populous manufacturing towns must expect more noise, smoke, and disturbance than those living elsewhere, and the circumstances of every case must govern; 21 Conn. 213; 58 Pa. 275; 54 Me. 272; 15 Ohio Cir. Ct. Rep. 228. A private hospital in a fashionable square in Dublin is an offensive trade; [1896] 1 I. R. 76. A private lunatic asylum is not an offensive trade; 2 A. & E. 161.

Coal burning was at one time decided to be a nuisance, and on petition Edw. II. issued a proclamation against the using it in London; Chamb. Encyc. tit. *Coal*, cited in 8 Ont. Q. B. Div. 583, where it was held that a barbed wire fence is not a nuisance. A city ordinance declaring a public laundry to be a nuisance if carried on in a city except in designated parts of it, is unconstitutional as contravening the fourteenth amendment of the United States constitution; 82 Fed. Rep. 623. Carrying on an offensive trade for several years in a place remote from buildings and public roads does not entitle the owner to continue it in the same place after houses have been built and roads laid out in the neighborhood, to the occupants of and travellers upon which it is a nuisance. Formerly the contrary doctrine obtained, on the ground that the complainants were in fault in *coming to a nuisance*. This doctrine is now very properly exploded, as it is manifest that an observance of it would interfere greatly with the growth of towns and cities; 6 Gray 473; 7 Blackf. 534; 2 C. & P. 483; 23 Wend. 446; 8 Phila. 10; 5 Scott 500; 3 Barb. 167; 52 N. J. Eq. 675; 82 Mich. 471; 11 H. L. Cas. 642; 18 N. J. Eq. 397; 38 *id.* 58; 62 Ia. 540; 18 Fed. Rep. 753. The trade may be offensive for *noise*; 51 N. Y. 300; 10 L. T. (N. S.) 241; 2 Bing. 34; L. R. 4 Ch. App. 388; 2 Sim. N. S. 133; L. R. 8 Ch. App. 467; 22 Vt. 321; 6 Cush. 80; 14 Mo. App. 590; see 146 Mass. 349; 133 *id.* 289; or *smell*; 2 C. & P. 485; 13 Metc. Mass. 365; 1 Den. 524; 34 Tex. 230; 100 Mass. 597; 33 Conn. 121; 43 N. H. 415; 74 Ia. 169; or for other reasons; 1 Johns. 78; 1 Swan 213; 3 Jur. N. S. 570; 73 Pa. 84; L. R. 5 Eq. Ca. 166; 52 N. H. 262; 51 N. J. L. 42; 25 Fla. 881.

To constitute a *public* nuisance, there must be such a number of persons annoyed that the offence can no longer be considered a private nuisance; 1 Burr. 337; 2 Chitty, Cr. L. 607; 8 Ind. 494; 1 Wheat. 469; 37 Barb. 301. Where pugilistic entertainments were given at a club and crowds collected outside, and men whistled for cabs during late hours, it was held a nuisance which would be enjoined; 63 L. T. 65.

Public nuisances arise in consequence of following *particular trades*, by which the air is rendered offensive and noxious; Cro. Car. 510; Hawk. Pl. Cr. b. 1, c. 75, § 10; 2 Ld. Raym. 1163; 1 Burr. 333; 1 Stra. 686; 4 B. & S. 608; 23 Vt. 92; 52 N. J. Eq. 675; also where rendered offensive from stagnant ponds; 134 N. Y. 414; 71 Hun 149; from acts of public *indecency*, as bathing in a public river in sight of the neighboring houses; 2 Campb. 89; 29 Ind. 517; 18 Vt. 574; 5 Barb. 203; 20 Ala. 65; 5 Rand. 627; or for acts tending to a *breach of the public peace*, as for drawing a number of persons into a field for the purpose of pigeon-shooting, to the disturbance of the neighborhood; 3 B. & Ald. 184; or for rude and riotous sports or pastimes; 5 Hill 121; 8 Cow. 169; 1 S. & R. 40; 6 C. & P. 324; or keeping a *disorderly house*; 13 Gray 26; 5 Cranch 304; 8 Blackf. 208; 1 Salk. 282; 30 N. J. Eq. 103; or a *gaming house*; Hawk. Pl. Cr. b. 1, c. 75, § 6; or a *bawdy-house*; 9 Conn. 350; 13 Gray 26; 26 N. Y. 190; 54 Barb. 299; 128 N. Y. 341; 85 Me. 288; or a *merry-go-round*; 21 S. E. Rep. (W. Va.) 906; or a *dangerous animal*, known to be such, and suffering him to go at large, as a large bulldog accustomed to bite people; 28 Wisc. 430; 40 Vt. 347; or *exposing a person having a contagious disease*, as the smallpox, in public; 4 M. & S. 73, 472; and the like. The bringing a horse infected with the glanders into a public place, to the danger of infecting the citizens, is a misdemeanor at common law; 2 H. & N. 299; 16 Conn. 272; 41 Barb. 329. The selling of tainted and unwholesome food is likewise indictable; 4 Bla. Com. 162; 3 Hawks 376; 3 M. & S. 11. The leaving unburied the corpse of a person for whom the defendant was bound to provide Christian burial, as a wife or child, is an indictable nuisance, if he is shown to have been of ability to provide such burial; 2 Den. Cr. Cas. 325. So of storing combustible articles in undue quantities or in improper places; 56 Barb. 72; 3 East 192; 57 Pa. 274; 2 Hen. & M. 345; or the placing of a powder magazine in dangerous proximity to a city; 34 Ill. App. 364; or the erection and maintenance of purprestures; Story, Eq. § 921; 9 Wend. 571; 28 N. Y. 396; 55 Barb. 404; 10 Pet. 623; 23 Vt. 92; 2 Wall. 406; 10 *id.* 557; or the keeping of a coal-shed by a railroad in a thickly settled part of a city; 134 Ill. 281; or maintaining a powder magazine within the city limits, against an ordinance; 12 U. S. App. 665.

Private nuisances may be to *corporeal* inheritances: as, for example, if a man should build his house so as to throw the rain-water which fell on it on my land; Fitzherbert, Nat. Brev. 184; 39 Barb. 400; 5 Rep. 101; have a tree projecting over the land of another; Poll. Torts 62; keep hogs or other animals so as to incommode his neighbor and render the air unwholesome; 9 Co. 58; 139 Mass. 198; or to *incorporeal* hereditaments; as, for example, obstructing a right of way by ploughing it up or laying logs across it, and the like; Fitzherbert. Nat. Brev. 183; 2 Rolle, Abr. 140; 80 Ga. 659; or obstructing a spring; 1 Campb. 463; 6 East 208; or "shooting" a gas well;

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131 Ind. 408; or making musical and other sounds, for the purpose of vexing and annoying the next door neighbor; [1893] 1 Ch. 316; interfering with a franchise, as a ferry or railroad, by a similar erection unlawfully made; or with a navigable stream by a railroad bridge erected without authority; 28 Ga. 398; 122 Mass. 1. Any annoyance arising from odors, smoke, unhealthy exhalations, noise, interference with water power, etc., etc., whereby a man is prevented from fully enjoying his own property, may be ranked as a private nuisance. See 131 Ind. 375; 153 Pa. 366; 50 Kan. 478; 67 Hun 401; [1893] 2 Ch. 447; polluting a stream by discharge of drainage; 35 Atl. Rep. (Conn.) 499; 39 N. E. Rep. (Md.) 909; lowering the grade of a highway; 17 U. C. Q. B. 165; building a railway across it unlawfully; 4 Gray 22; failing to keep a street railway in repair; 87 Tenn. 746. So making noises in the street and thereby occasioning damage to citizens; 6 Cush. 80; and making a great outcry and clamor in the streets, by which people are drawn together and the highway obstructed; 74 Phila. 365; 101 Mass. 29; and even though the noise disturbed but a single person; 113 Mass. 8; and a continuous and daily beating of drums on the street; 105 Cal. 558; if it be so troublesome as to annoy the whole community; 72 N. C. 27. See several full notes on nuisances in 39 L. R. A.; and see MUNICIPAL CORPORATIONS; ORDINANCE.

A person is not liable in damages for a nuisance erected on land by his grantor until after a request to abate; 42 Ill. App. 421; but see 57 Fed. Rep. 901.

The remedies are by an *action* for the damage done, by the owner, in the case of a private nuisance; 3 Bla. Com. 220; or by any party suffering special damage, in the case of a public nuisance; 4 Wend. 9; 3 Vt. 529; 1 Pa. 309; Vaugh. 341; 3 M. & S. 472; 2 Bingh. 283; 28 Vt. 142; 36 Cal. 193; 2 R. I. 493; 74 Cal. 463; 76 Ga. 804; 51 N. J. L. 26; 74 Ia. 127; 34 Atl. Rep. (Pa.) 974; by *abatement* by the owner, when the nuisance is private; 2 Rolle, Abr. 565; 3 Dowl. & R. 556; 37 Pa. 503; 8 Dana 158; and in some cases when it is *public;* Add. Torts 71. But in neither case must there be any riot, and very pressing exigency is requisite to justify summary action of this character, particularly in the case of a public nuisance; 14 Wend. 397; 11 Ark. 252; 16 Q. B. 546; by *injunction*, which is the most usual and efficacious remedy; see INJUNCTION; or by *indictment* for a public nuisance; 2 Bish. Cr. L. § 856; Whart. Cr. L. § 1410, etc.; 57 Vt. 144; 91 Tenn. 445. A private individual cannot abate a nuisance in a public highway, unless it does him special injury, and then only so far as is necessary to the exercise of his right of passing along the highway; 26 U. S. App. 486; 9 Co. 55; 2 Salk. 458; 3 Bla. Com. 5.

Every continuance of a nuisance or recurrence of the injury is an additional nuisance forming in itself the subject-matter of a new action; 38 Minn. 179.

See Wood, Nuisance, as to municipal authority to abate a nuisance; 9 L. R. A. 711, n.

According to the principles of equity as recognized in the courts of the United States, a state can obtain relief by a suit in equity to restrain a public nuisance; 144 U. S. 550.

**NUL AGARD** (L. Fr. no award). **In Pleading.** A plea to an action on an arbitration bond, when the defendant avers that there was no legal award made. 3 Burr. 1730; 2 Stra. 923.

**NUL DISSEISIN. In Pleading.** No disseisin. A plea in a real action, by which the defendant denies that there was any disseisin. It is a species of the general issue.

**NUL TIEL RECORD** (Fr. no such record). **In Pleading.** A plea which is proper when it is proposed to rely upon facts which disprove the existence of the *record* on which the plaintiff founds his action. Andr. Steph. Pl. 234.

Any matters may be introduced under it which tend to destroy the validity of the record as a record, provided they do not contradict the recitals of the record itself; 10 Ohio 100. It is frequently used to enable the defendant to deny the jurisdiction of the court from which the alleged record emanates; 2 McLean 129; 22 Wend. 293.

It is said to be the proper plea to an action on a foreign judgment, especially if of a sister state, in the United States; 2 Leigh 72; 17 Vt. 302; 6 Pick. 232; 11 Miss. 210; 1 Pa. 499; 2 South. 778; 2 Breese 2; though it is held that *nil debet* is sufficient; 33 Me. 268; 3 J. J. Marsh. 600; especially if the judgment be that of a justice of the peace; 8 Harr. N. J. 408. It has been held that *nul tiel record* is an inappropriate plea to suits upon foreign judgments, since such judgments do not create a merger, and are only *prima facie* evidence of an indebtedness; 88 Me. 406.

See CONFLICT OF LAWS.

**NUL TORT** (L. Fr. no wrong). **In Pleading.** A plea to a real action, by which the defendant denies that he committed any wrong. It is a species of general issue.

**NUL WASTE. In Pleading.** The general issue in an action of waste. Co. 3d Inst. 700 *a*, 708 *a*. The plea of *nul waste* admits nothing, but puts the whole declaration in issue: and in support of this plea the defendant may give in evidence anything which proves that the act charged is no waste, as that it happened by tempest, lightning, and the like; Co. Litt. 283 *a*; 3 Wms. Saund. 238, n. 5.

**NULL.** Properly, that which does not exist; that which is not in the nature of things. In a figurative sense it signifies that which has no more effect than if it did not exist. 8 Toullier, n. 320.

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**NULLA BONA** (L. Lat. no goods). The return made to a writ of *fieri facias* by the sheriff, when he has not found any goods of the defendant on which he could levy.

**NULLITY.** An act or proceeding which has absolutely no legal effect whatever. See Chitty, Contr., 12th ed. 671.

**NULLITY OF MARRIAGE.** The requisites of a valid and binding marriage have been considered in the article on that subject. If any of these requisites are wanting in a given case, the marriage is either absolutely void, or voidable at the election of one or both of the parties. The more usual imperfections which thus render a marriage void or voidable are: 1. Unsoundness of mind in either of the parties. 2. Want of age, *i. e.* fourteen in males and twelve in females. 3. Fraud or error; but these must relate to the *essentials* of the relation, as personal identity, and not merely to the *accidentals*, as character, condition, or fortune. 4. Duress. 5. Physical impotence, which must exist at the time of the marriage and be incurable. 6. Consanguinity or affinity within the prohibited degrees. 7. A prior subsisting marriage of either of the parties. The fifth and sixth are termed canonical, the remainder, civil, impediments.

The distinction between the two is important,—the latter rendering the marriage absolutely *void*, while the former only renders it *voidable*. In the one case, it is not necessary (though it is certainly advisable) to bring a suit to have nullity of the marriage ascertained and declared: it may be treated by the parties as no marriage, and will be so regarded in all judicial proceedings. In the other case, the marriage will be treated as valid and binding until its nullity is ascertained and declared by a competent court in a suit instituted for that purpose; and this must be done during the lifetime of both parties: if it is deferred until the death of either, the marriage will always remain good. But the effect of such sentence of nullity, when obtained, is to render the marriage null and void from the beginning, as in the case of civil impediments.

For the origin and history of this distinction between void and voidable marriages, see 1 Bish. Mar. Div. & Sep. § 252.

A suit for nullity is usually prosecuted in the same court, and is governed by substantially the same principles, as a suit for divorce; 2 Bish. Mar. Div. & Sep. § 39.

In its consequences, a sentence of nullity differs materially from a divorce. The latter assumes the original validity of the marriage, and its operation is entirely prospective. The former renders the marriage void from the beginning, and nullifies all its legal results. The parties are to be regarded legally as if no marriage had ever taken place: they are single persons, if before they were single; their issue are illegitimate; and their rights of property as between themselves are to be viewed as having never been operated upon by the marriage. Thus, the man loses all right to the property, whether real or personal, which belongs to the woman; and the woman loses her right to dower; 2 Bish. Mar. Div. & Sep. §§ 907, 1597.

Neither is the woman, upon a sentence of nullity, entitled to permanent alimony; though the better opinion is that she is entitled to alimony *pendente lite;* 2 Bish. Mar. Div. & Sep. §§ 907, 1597. See ALIMONY; MARRIAGE; DIVORCE.

**NULLIUS FILIUS** (Lat.). The son of no one; a bastard.

A bastard is considered *nullius filius* as far as regards his right to inherit. But the rule of *nullius filius* does not apply in other respects, and has been changed by statute in most states so as to make him the child of his mother, in respect of inheritance.

The mother of a bastard, during its age of nurture, is entitled to the custody of her child, and is bound to maintain it; 6 S. & R. 255; 2 Johns. 375; 2 Mass. 109; 4 B. & P. 148. But see 5 East 224, n.

The putative father, too, is entitled to the custody of the child as against all but the mother; 1 Ashm. 55. And it seems that the putative father may maintain an action, as if his child were legitimate, for marrying him without his consent, contrary to law; Add. Pa. 212. See BASTARD; CHILD; FATHER; MOTHER; PUTATIVE FATHER.

**NULLUM ARBITRIUM** (Lat.). **In Pleading.** The name of a plea to an action on an arbitration bond for not fulfilling the award, by which the defendant asserts that there is *no award.*

**NULLUM FECERUNT ARBITRIUM** (Lat.). **In Pleading.** The name of a plea to an action of debt upon an obligation for the performance of an award, by which the defendant denies that he submitted to arbitration, etc. Bac. Abr. *Arbitr. etc.* (G).

**NULLUM TEMPUS ACT.** The statute 3 Geo. III. c. 16. See 32 Geo. III. c. 58, and 7 Will. c. 3. It was so called because the right of the crown to sue, etc., was limited by it to sixty years, in contradiction to the maxim, *Nullum tempus occurrit regi.* 3 Chitty, Stat. 63.

**NUMBER.** A collection of units.

In pleading, numbers must be stated truly when alleged in the recital of a record, written instrument, or express contract; Lawes, Pl. 48; 4 Term 314; Cro. Car. 262; Dougl. 669; 2 W. Bla. 1104. But in other cases it is not, in general, requisite that they should be truly stated; because they are not required to be strictly proved. If, for example, in an action of trespass the plaintiff proves the wrongful taking away of any part of the goods duly described in his declaration, he is entitled to recover *pro tanto;* Bac. Abr. *Trespass* (I 2); Lawes, Pl. 48.

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And sometimes, when the subject to be described is supposed to comprehend a multiplicity of particulars, a general description is sufficient. A declaration in trover alleging the conversion of "a library of books," without stating their number, titles, or quality, was held to be sufficiently certain; 3 Bulstr. 31; Carth. 110; Bac. Abr. *Trover* (F 1); and in an action for the loss of goods by burning the plaintiff's house, the articles may be described by the simple denomination of "goods" or "divers goods"; 1 Kebl. 825; Plowd. 85, 118, 123; Cro. Eliz. 837; 1 H. Bla. 284. The singular number may be included within the plural; 83 Ind. 228; 71 Ala. 157; 29 Kan. 734; 77 Mo. 246; Bish. Stat. Crimes § 213.

**NUMERATA PECUNIA** (Lat.). **In Civil Law.** Money counted or paid; money given in payment by count. See PECUNIA NUMERATA and PECUNIA NON-NUMERATA. L. 3, 10, C. *de non numerat. pecun.*

**NUNC PRO TUNC** (Lat. now for then). A phrase used to express that a thing is done at one time which ought to have been performed at another.

A *nunc pro tunc* entry is an entry made now, of something which was actually previously done, to have effect as of the former date. Its office is not to supply omitted action by the court, but to supply an omission in the record of action really had, but omitted through inadventure or mistake. 31 N. E. Rep. (Ind.) 670.

Leave of court must be obtained to act in legal proceedings *nunc pro tunc;* and this is granted to answer the purposes of justice, but never to do injustice. A judgment *nunc pro tunc* can be entered only when the delay has arisen from the act of the court; 3 C. B. 970. See 1 V. & B. 312; 1 Moll. 462; 13 Price 604; 52 Kan. 562. Entering a decree *nunc pro tunc*, and thereby restricting the time for appeal, is not prejudicial error, where the defeated party succeeds in perfecting his appeal; 144 Ill. 248, 651.

A plea *puis darrein* continuance may be entered *nunc pro tunc* after an intervening continuation, in some cases; 11 N. H. 299; and lost pleadings may be replaced by new pleadings made *nunc pro tunc;* 1 Mo. 327. See 159 U. S. 687.

**NUNCIATIO. In Civil Law.** A formal proclamation or protest. It may be by acts (*realis*) or by words. Mackeldey, Civ. Law § 237. Thus, *nunciatio novi operis* was an injunction which one man could place on the erection of a new building, etc., near him, until the case was tried by the prætor. *Id.;* Calv. Lex. An information against a criminal. Calv. Lex.

**NUNCIO.** The name given to the pope's ambassador. Nuncios are ordinary or extraordinary; the former are sent upon usual missions, the latter upon special occasions.

**NUNCIUS. In International Law.** A messenger; a minister; the pope's legate, commonly called a *nuncio.* See LEGATE.

**NUNCUPATIVE WILL.** An oral will, declared by a testator *in extremis*, or under circumstances considered equivalent thereto, before witnesses, and afterwards reduced to writing. Beach, Wills 5; 4 Kent 576; 2 Bla. Com. 500; 1 Jarm. Wills, 6th Am. ed. *78; Schoul. Wills § 360.

When a man lieth languishing for fear of sudden death, dareth not stay the writing of his testament, and therefore he prayeth his curate and others to bear witness of his last will, and declareth by word what his last will is. Perk. Conv. § 476; Bac. Abr. 305; 24 Atl. Rep. 370.

In early times this kind of will was very common, and before the statute of frauds, by which it was virtually abolished, save in the case of soldiers and sailors, was of equal efficacy, except for lands, tenements, and hereditaments, with a written testament. Such wills are subject to manifest abuses, and by stat. 1 Vict. c. 26, §§ 9, 11 (preceded by 1 Will. IV. c. 20), the privilege is confined to soldiers in actual service, and sailors at sea, and extends only to personal estate. Similar provisions have been enacted in Massachusetts, Minnesota, New York, Rhode Island, Virginia, West Virginia, and Montana. In Georgia, the statute embraces both real and personal property. In California and the Dakotas, the decedent must have been in actual military service, or at sea, and in immediate fear of death. In the other states, nuncupative wills by persons *in extremis* are still recognized, subject to restrictions as to amount of property bequeathed, similar to those of the English statute of frauds.

The following principles, among others, are well established: Statutes relating to nuncupative wills are strictly construed; 2 Phillim. 194; 78 Ill. 287; 47 Pa. 31; 33 Miss. 629. The testator must be *in extremis*, overtaken by violent sickness, in contemplation of death, and without time to make a written will; 1 Addams 389; 20 Johns. 502; 6 W. & S. 184; 10 Gratt. 548; 84 Ga. 619; but see 2 Ala N. S. 242; 82 Ill. 50; the deceased must have clearly intimated by word or sign to those present that he intended to make the will; 9 B. Monr. 553; 27 Ill. 247; 26 N. H. 372; 14 La. Ann. 729; 36 Md. 630; 2 Greenl. 298; 63 Ill. 455; 78 *id.* 287; 46 Ia. 694; 63 N. C. 637; testamentary capacity must be most clearly proved; 12 Gill & J. 192; 78 Ill. 287. In "actual military service," is held to mean during warfare, and while on an expedition; 3 Curt. 531; 53 Me. 561; but this rule has been somewhat freely treated; 39 Vt. 498; 1 Abb. Pr. U. S. 112. See 53 Me. 561. Sailors must be *serving* on shipboard; 2 Curt. 339; 2 R. I. 133. The term mariner applies to every one in the naval or mercantile service; 4 Bradf. 154. See note to Sykes *v.* Sykes, 20 Am. Dec. 44; 24 Atl. Rep. 370. See MILITARY TESTAMENT.

**NUNDINÆ** (Law Lat.). **In Civil**

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**and Old English Law.** Fair or fairs. Dion. Halicarnass. lib. 2, p. 98; Law Fr. & Lat. Dict. Hence *Nundination*, traffic at fairs.

**NUNQUAM INDEBITATUS** (Lat. never indebted). **In Pleading.** A plea to an action of indebitatus assumpsit, by which the defendant asserts that he is not indebted to the plaintiff. McKelv. Pl. 31; 6 C. & P. 545; 1 M. & W. 542; 1 Q. B. 77.

In England, this plea has been substituted for *nil debet*, *q. v.*, as the general issue in debt on a simple contract.

**NUNTIUS, NUNCIUS. In Old English Practice.** One who made excuse for absence of one summoned. An apparitor, beadle, or sergeant. Cowel. A messenger or legate: *e. g.* pope's nuncio. Jacob, L. Dict. *Essoniator* was sometimes wrongly used for *nuntius* in the first sense. Bracton, fol. 345, § 2.

**NUPER OBIIT** (Lat. he or she lately died). **In Practice.** The name of a writ which in the English law lay for a sister coheiress dispossessed by her coparcener of lands and tenements whereof their father, brother, or any common ancestor died seized of an estate in fee-simple. Fitzh. N. B. 197. Abolished in 1833.

**NURTURE.** The act of taking care of children and educating them. See CHILD.

**NURUS** (Lat.). A daughter-in-law. Dig. 50. 16. 50.

# O.

**OATH.** An outward pledge given by the person taking it that his attestation or promise is made under an immediate sense of his responsibility to God. Tyler, Oaths 15.

The term has been variously defined: as, "a solemn invocation of the vengeance of the Deity upon the witness if he do not declare the whole truth, so far as he knows it;" 1 Stark. Ev. 22; or, "a religious asseveration by which a person renounces the mercy and imprecates the vengeance of Heaven if he do not speak the truth;" 2 Leach 482; or, as "a religious act by which the party invokes God not only to witness the truth and sincerity of his promise, but also to avenge his imposture or violated faith, or, in other words, to punish his perjury if he shall be guilty of it;" 10 Toullier, n. 343–348; Puffendorff, b. 4, c. 2, § 4. The essential idea of an oath would seem to be, however, that of a recognition of God's authority by the party taking it, and an undertaking to accomplish the transaction to which it refers as required by his laws.

In its broadest sense, the term is used to include all forms of attestation by which a party signifies that he is bound in conscience to perform the act faithfully and truly. In a more restricted sense, it excludes all those forms of attestation or promise which are not accompanied by an imprecation.

*Assertory* oaths are those required by law other than in judicial proceedings and upon induction to office: such, for example, as custom-house oaths.

*Extra-judicial* oaths are those taken without authority of law. Though binding *in foro conscientiæ*, they do not; when false, render the party liable to punishment for perjury.

*Judicial* oaths are those administered in judicial proceedings.

*Promissory* or *official* oaths are oaths taken, by authority of law, by which the party declares that he will fulfil certain duties therein mentioned: as, the oath which an alien takes, on becoming naturalized, that he will support the constitution of the United States: the oath which a judge takes that he will perform the duties of his office. The breach of this does not involve the party in the legal crime or punishment of perjury; 3 Zabr. 49. Where an appointee neglects to take an oath of office when required by statute to do so, he cannot be considered qualified, nor justify his doings as an officer; 2 N. H. 202; s. c. 9 Am. Dec. 50.

*Qualified oaths* are circumstantial oaths. Rap. & L. Dict.

The *form* of administering the oath may be varied to conform to the religious belief of the individual, so as to make it binding upon his conscience; 4 Bla. Com. 43; 1 Whart. Ev. §§ 386–8; 16 Pick. 154; 2 Gall. 346; 3 Park. Cr. 590; 2 Hawks 458; 7 Ill. 540; Ry. & M. 77. The most common form is upon the gospel, by taking the book in the hand: the words commonly used are, "You do swear that," etc., "so help you God," and then kissing the book: 9 C. & P. 137. The oath was in common use long prior to the Christian era; Willes 545, 1744; the oath and Christianity became associated during the reign of Henry VIII. in England; 3 Robertson's Charles V. 257. The origin of this oath may be traced to the Roman law; Nov. 8, tit. 3; Nov. 74, cap. 5; Nov. 124, cap. 1. In ancient times a Bible containing the Gospels was placed upon a stand in view of the prisoner. The jurors placed their hands upon the book, and then the accused had a full view of "the peer" who was to try him. This was called the "corporal oath" because the hand of the person sworn touched the book. Probably, out of reverence, the book may have been kissed sometimes, as a Catholic priest now kisses it in a Mass;



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but it is doubtful if kissing the book was ever essential to the validity of the "corporal oath"; 22 Law Mag. & Rev. 59.

The terms "corporal oath" and "solemn oath" are synonymous, and an oath taken with the uplifted hand is properly described by either term in an indictment for perjury; 1 Ind. 184. In New England, New York, and in Scotland the gospels are not generally used, but the party taking the oath holds up his right hand and repeats the words here given; 1 Leach 412, 498.

Kissing the book has been abolished by statute (1895) in Pennsylvania.

Where a justice asks affiant if he swears to the affidavit, and he replies that he does, the oath is sufficient though he does not hold up his hands and swear; 65 Miss. 454.

Another form is by the witness or party promising holding up his right hand while the officer repeats to him, "You do swear by Almighty God, the searcher of hearts, that," etc., "and this as you shall answer to God at the great day."

In another form of attestation, commonly called an affirmation (*q. v.*), the officer repeats, "You do solemnly, sincerely, and truly declare and affirm that;" which is the form prescribed in England by 8 Geo. I. ch. 6.

A general oath that the evidence "shall be the truth, the whole truth, and nothing but the truth," etc., is all that is necessary for a witness who testifies to the signing of an instrument in his presence, and translates the language of such instrument for the benefit of the jury; 18 Or. 563.

A Jew is sworn on the Pentateuch, or Old Testament, with his head covered; Stra. 821, 1113; a Mohammedan, on the Koran; 1 Leach 54; a Gentoo, by touching with his hand the foot of a Brahmin or priest of his religion; a Brahmin, by touching the hand of another such priest; Wils. 549; 1 Atk. 21; a Chinaman, by breaking a china saucer; 1 C. & M. 248. See 25 Alb. L. J. 301; 92 Mo. 395.

After a witness has taken the oath according to the custom and religion of his country, it is not error to require him to take the statutory oath; 47 Pac. Rep. 961.

The requirement of an "oath" as used in any act or resolution of congress shall be deemed complied with by making affirmation in the judicial form; U. S. R. S. § 1.

The form and time of administering oaths, as well as the person authorized to administer, are usually fixed by statute. See Gilp. 439; 4 Wash. C. C. 555; 2 Blackf. 35; 2 McLean 135; 9 Pet. 238; 1 Va. Cas. 181; 8 Rich. So. C. 456; 1 Swan 157; 5 Mo. 21; 48 Cal. 197; 41 Conn. 206. The administering of unlawful oaths is an offence against the government; Whart. Lex.

The subject of oaths has undergone much revision of late years by parliment. By the Promissory Oaths Act (31 & 32 Vict. c. 72) a number of unnecessary oaths have been abolished, and declarations substituted. The act of 1885 provides that in case of rape of a child under thirteen, the victim or a witness, if too young to be sworn, may give evidence not under oath. See also Promissory Oaths Act, 1871.

In Arkansas, California, Florida, Indiana, Iowa, Kansas, Michigan, Minnesota, Nebraska, Nevada, New York, Ohio, Oregon, and Wisconsin there are constitutional provisions intended to exclude any religious test for the competency of witnesses.

The Bible is not an indispensable requisite in the adminstration of an oath; 4 Seld. 67.

**OATH AGAINST BRIBERY.** One which could have been administered to a voter at an election for members of parliament. Abolished in 1854. Whart. Lex.

**OATH OF CALUMNY. In Civil Law.** An oath which a plaintiff was obliged to take that he was not actuated by a spirit of chicanery in commencing his action, but that he had *bona fide* a good cause of action. Pothier, Pand. lib. 5, tt. 16, 17, s. 124. This oath is somewhat similar to our affidavit of a cause of action. See Dunl. Adm. Pr. 289, 290; JURAMENTUM CALUMNIÆ.

**OATH DECISORY. In Civil Law.** An oath which one of the parties defers or refers back to the other for the decision of the cause.

It may be deferred in any kind of civil contest whatever, in questions of possession or of claim, in personal actions, and in real. The plaintiff may defer the oath to the defendant whenever he conceives he has not sufficient proof of the fact which is the foundation of his claim; and in like manner the defendant may defer it to the plaintiff when he has not sufficient proof of his defence. The person to whom the oath is deferred ought either to take it or refer it back; and if he will not do either, the cause should be decided against him. Pothier, Obl. pt. 4, c. 3, s. 4.

The decisory oath has been practically adopted in the district court of the United States for the district of Massachusetts; and admiralty causes have been determined in that court by the oath decisory. But the cases in which this oath has been adopted have been where the tender has been accepted; and no case is known to have occurred there in which the oath has been refused and tendered back to the adversary. Dunl. Adm. Pr. 290.

It was familiar to the Roman tribunals, and could be administered by the court to either party for the satisfaction of his conscience, when in doubt. 3 Greenl. Ev., Lewis ed. § 412.

**OATH EX OFFICIO.** The oath by which a clergyman charged with a criminal offence was formerly allowed to swear himself to be innocent; also the oath by which the compurgators swore that they believed in his innocence. 3 Bla. Com. 101, 447; Moz. & W.

**OATH IN LITEM.** An oath which in

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the civil law was deferred to the complainant as to the value of the thing in dispute, on failure of other proof, particularly when there was a fraud on the part of the defendant and he suppressed proof in his possession. See Greenl. Ev. § 348; 1 Eq. Cas. Abr. 229; 1 Me. 27; 1 Yeates 34.

In general, the oath of the party cannot, by the common law, be received to establish his claim, but is admitted in two classes of cases: *first*, where it has been already proved that the party against whom it is offered has been guilty of some fraud or other tortious or unwarrantable act of intermeddling with the complainant's goods, and no other evidence can be had of the amount of damages. See 1 Pet. 591; 9 Wheat. 486; 5 Pick. 436; 16 Johns. 193; 17 Ohio 156; 3 N. H. 135: as, for example, where a trunk of goods was delivered to a shipmaster at one port to be carried to another, and on the passage he broke the trunk open and rifled it of its contents, in an action by the owners of the goods against the shipmaster, the facts above mentioned having been proved *aliunde*, the plaintiff was held a competent witness to testify as to the contents of the trunk; 1 Me. 27; 11 *id.* 412. And see 10 Watts 335; 1 Greenl. Ev. § 348; 12 Metc. 44; 12 Mass. 360. *Second*, the oath *in litem* is also admitted on the ground of public policy where it is deemed essential to the purposes of justice; 1 Pet. 596; 6 Mood. 137; 2 Stra. 1186. But this oath is admitted only on the ground of necessity. An example may be mentioned of a case where a statute can receive no execution unless the party interested be admitted as a witness; 16 Pet. 203. Parties in interest are now everywhere, and in most cases, permitted to testify.

**OATH PURGATORY.** An oath by which one destroys the presumptions which were against him, for he is then said to purge himself, when he removes the suspicions which were against him: as, when a man is in contempt for not attending court as a witness, he may purge himself of the contempt, by swearing to a fact which is an ample excuse. See PURGATION.

**OATH SUPPLETORY. In Civil and Ecclesiastical Law.** An oath required by the judge from either party in a cause, upon half-proof already made, which being joined to half-proof, supplies the evidence required to enable the judge to pass upon the subject. See 3 Bla. Com. 270.

**OBEDIENCE.** The performance of a command.

Officers who obey the command of their superiors, having jurisdiction of the subject-matter, are not responsible for their acts. A sheriff may, therefore, justify a trespass under an execution, when the court has jurisdiction, although irregularly issued; 3 Chitty, Pr. 75; Hamm. N. P. 48.

A child, an apprentice, a pupil, a mariner, and a soldier owe respectively obedience to the lawful commands of the parent, the master, the teacher, the captain of the ship, and the military officer having command; and in case of disobedience submission may be enforced by correction. See ASSAULT; CORRECTION.

**OBEDIENTARIUS.** A monastic officer. Du Cange. See 1 Poll. & Maitl. 417.

**OBEDIENTIAL OBLIGATION.** See OBLIGATION.

**OBIT.** That particular solemnity or office for the dead which the Roman Catholic church appoints to be read or performed over the body of a deceased member of that communion before interment; also, the office which upon the anniversary of his death was frequently used as a commemoration or observance of the day. Dy. 313.

**OBITER DICTUM.** See DICTUM.

**OBJECT.** That which is perceived, known, thought of, or signified; that toward which a cognitive act is directed. Cent. Dict. The term includes whatever may be presented to the mind as well as to the senses; whatever also is acted upon or operated upon affirmatively or intentionally influenced by anything done, moved, or applied thereto; 8 Blatchf. 257; it may be used as having the sense of effect; 3 Wash. Ter. 131; and for all practical purposes the words subject and object are synonymous; *id.* But the subject of action cannot be the object of action; the latter is the remedy demanded, the relief prayed for, and is no part of the subject of action or the causes of action; 18 Kan. 406.

**OBJECTION.** Where evidence is objected to at the trial, the nature of the objections must be distinctly stated, whether an exception be entered on the record or not, and, on either moving for a new trial on account of its improper admission, or on arguing the exception, the counsel will not be permitted to rely on any other objections than those taken at *nisi prius*; 3 Tayl. Ev., Chamb. ed. § 1881 *d*; objections must state the specific ground; 40 Cal. 390; 99 Ind. 588; 35 Mo. 226; and counsel cannot change his ground on the argument in the appellate court; 70 N. Y. 34; general objections, such as irrelevant, incompetent, and the like, are said to be too general in their terms; 91 Mo. 138; 50 N. H. 121; evidence to which such objections are made will be held in the appellate court to have been properly admitted, if admissible for any purpose; 46 Cal. 397; one who has not objected to evidence when introduced is not entitled to have the court instruct the jury to disregard it; 85 Mo. 106; nor will an objection be heard if made for the first time on the motion for a new trial; 40 Ind. 516; or in the appellate court; 105 U. S. 4.

When testimony was received without objection, the court should not sign a bill of exceptions; if it does, it will be disregarded above; 38 Pa. 56.

Ordinarily, where an objection has been

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made and overruled, it is not necessary to repeat it to each succeeding question open to the same objection; Thomp. Trials § 705.

Objecting to a judge's instruction is said to be regarded as having the same force as excepting; 98 Mo. 640. See BILL OF EXCEPTIONS.

Where objections have been twice presented and regularly allowed, it is not necessary that they should be renewed at the termination of the testimony of a witness; 163 U. S. 532.

**OBJECTS OF A POWER.** The persons who are intended to be benefited by the distribution of property settled subject to a power.

**OBJURGATRICES.** Scolds or unquiet women punished with the cucking stool (*q. v.*).

**OBLATIO** (Lat.). **In Civil Law.** A tender of money in payment of debt made by debtor to creditor. L. 9, C. *de solut.* Whatever is offered to the church by the pious. Calv. Lex.; Vicat, Voc. Jur.

**OBLATION. In Ecclesiastical Law.** Offerings; obventions. See OBVENTIONS.

**OBLIGATIO. In Roman Law.** A legal bond which obliges us to the performance of something in accordance with the law of the land. Ortolan, Inst. 2, § 1179.

It corresponded nearly to our word contract. Justinian says, "*Obligatio est juris vinculum quo necessitate adstringimur alicujus solvendæ rei, secundum nostræ civitatis jura.*" Pr. J. 3. 13.

The Romans considered that obligations derived their validity solely from positive law. At first the only ones recognized were those established in special cases in accordance with the forms prescribed by the strict *jus civilis*. In the course of time, however, the prætorian jurisdiction, in mitigation of the primitive rigor of the law, introduced new modes of contracting obligations and provided the means of enforcing them: hence the twofold division made by Justinian of *obligationes civiles* and *obligationes prætoriæ*. Inst. 1. 3. 13. But there was a third class, the *obligationes naturales*, which derived their validity from the law of nature and nations, or the natural reason of mankind. These had not the binding force of the other classes, not being capable of enforcement by action, and are, therefore, not noticed by Justinian in his classification; but they had, nevertheless, a certain efficacy even in the civil law: for instance, though a debt founded upon a natural obligation could not be recovered by an action, yet if it was voluntarily paid by the debtor he could not recover it back, as he might do in the case of money paid by mistake, etc., where no natural obligation existed. L. 38, pr. D. 12. 6. And see Ortolan 2, § 1180.

The second classification of obligations made by Justinian has regard to the way in which they arise. They were, in this aspect, either *ex contractu* or *quasi ex contractu*, or *ex maleficio* or *quasi ex maleficio*; Inst. 2. 3. 13. These will be discussed separately.

*Obligationes ex contractu*, those founded upon an express contract, are again subdivided into four classes, with reference to the mode in which they are contracted. The contract might be entered into *re*, *verbis*, *literis*, or *consensu*.

A contract was entered into *re* by the actual transfer of a *thing* from one party to the other. Though in such cases the understanding of the parties as to the object of the transfer, and the conditions accompanying it, formed an essential part of the contract, yet it was only by the actual delivery of the thing that the contract was generated. The only contracts which could be entered into in this way were those known to our law as bailments,—a term derived from the French word *bailler*, to deliver, and evidently pointing to the same characteristic feature in the translation which the Romans indicated by the word *re*. These were the *mutuum*, or loan of a thing to be consumed in the using and to be returned in kind, the *commodatum*, or gratuitous loan of a thing to be used and returned, the *depositum*, or delivery of a thing to be kept in safety for the benefit of the depositor, and the *pignus*, or delivery of a thing in pledge to a creditor, as security for his debt. See MUTUUM; COMMODATUM; DEPOSITUM; PIGNUS; Ortolan, Inst. § 1208; Mackeldey, Röm. Recht § 396. Besides the above named *contractus reales*, a large class of contracts which had no special names, and were thence called *contractus innominati*, were included under this head, from the fact that they, like the former, gave rise to the *actio præscriptis verbis*. Some of these were the contracts of exchange, of mutual compromise, of doubtful or contested claims (somewhat resembling our accord and satisfaction), of factorship, etc. See Mackeldey § 409.

Contracts were entered into *verbis*, by a formal interrogation by one party and response by the other. The interrogation was called *stipulatio*, and the party making it, *reus stipulandi*. The response was called *promissio*, and the respondent, *reus promittendi*. The contract itself, consisting of the interrogation and response, was often called *stipulatio*. In the time of the earlier jurists, the stipulation could only be entered into by the use of certain formulary words by the parties: as, for instance, *Spondes?* do you promise? *Spondeo*, I promise; *Dabis?* will you give? *Dabo*, I will give; *Facies?* will you do this? *Faciam*, I will do it, etc., etc. But by a constitution of the emperor Leo, A. D. 469, the obligation to use these particular words was done away, and any words which expressed the meaning of the parties were allowed to create a valid stipulation, and any language understood by the parties might be used with as much effect as Latin. Such contracts were called *verbis*, because their

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validity depended entirely upon the use of the words. The mere agreement of the parties without using the question and response could not beget a stipulation; and, on the other hand, if the question and response had been used, the obligation was created although there might be an absence of consent. In this latter case, however, equitable relief would be granted by the prætor; Ortolan, Inst. § 1250. Stipulations, and, indeed, all other forms of contracts, might be made either *pure*, *i. e.* absolutely, or *in diem*, *i. e.* to take effect at a future day, or *sub conditione*, *i. e.* conditionally. But some kinds of conditions, such as those physically impossible, were inadmissible, and invalidated the contract; while others, such as those which were absurd, were themselves invalidated, and the contract was considered as having been made absolutely. Mackeldey § 415–421; Ortolan, Inst. § 1235; Inst. 3. 13.

Contracts entered into *literis* were obsolete in the reign of Justinian. In the earlier days of Roman jurisprudence, every citizen kept a private account-book. If a creditor, *at the request of his debtor*, entered in such book his charge against his debtor, such entry, in pursuance of the request, constituted not merely evidence of a contract, but the contract itself. This was the contract formed *literis*, in writing. The debtor, on his part, might also make a corresponding entry of the transaction in his own book. This was, in fact, expected of him, and was generally done; but it seems not to have been necessary to the validity of the contract. The entry was made in the form of a fictitious payment; it was allowable only in pecuniary transactions; it must be simple and unconditional, and could not be made to take effect at a future day. The charge might be made against the original debtor, *a re in personam*, or against a third person who agreed to take his place, *a persona in personam*. This species of literal contract was called *nomina*, *nomina transcriptitia* or *acceptilatio et expensilatio*. Ortolan, Inst. § 1414. This species of contract seems never to have been of great importance; they had disappeared entirely before the time of Justinian; Hadley, Rom. Law 216.

There were two other literal contracts known to the early jurisprudence, called *syngraphia* and *chirographia*; but these even in the times of Gaius had become so nearly obsolete that very little is known about them. All these, it must be borne in mind, were contracts themselves, not merely evidences of a contract; and this distinguishes them from the instruments of writing in use during the latter ages of the civil law. Ortolan, Inst. § 1414; Mackeldey § 422.

Contracts were made *consensu*, by the mere agreement of the contracting parties. Although such agreement might be *proved* by a written instrument, as well as in other ways, yet the writing was only evidence of the contract, not the contract itself. This species of consensual contracts are *emptio et venditio*, or sale, *locatio et conductio*, or hiring, *emphyteusis*, or conveyance of land reserving a rent, *societas*, or partnership, and *mandatum*, or agency. See these words; HIRE.

*Obligationes quasi ex contractu.* In the Roman law, persons who had not in fact entered into a contract were sometimes treated as if they had done so. Their legal position in such cases had considerable resemblance to that of the parties to a contract, and is called an *obligatio quasi ex contractu*. Such an obligation was engendered in the cases of *negotiorum gestio*, or unauthorized agency, of *communio incidens*, a sort of tenancy in common not originating in a contract, of *solutio indebiti*, or the payment of money to one not entitled to it, of the *tutela* and *cura*, resembling the relation of guardian and ward, of the *additio hereditatis* and *agnitio bonorum possessionis*, or the acceptance of an heirship, and many others. Some include in this class the *constitutio dotis*, settlement of a dower. Ortolan, Inst. § 1522; Mackeldey § 457.

*Obligationes ex maleficio* or *ex delicto*. The terms *maleficium*, *delictum*, embraced most of the injuries which the common law denominates torts, as well as others which are now considered crimes. This class includes *furtum*, theft, *rapina*, robbery, *damnum*, or injury to property, whether direct or consequential, and *injuria*, or injury to the person or reputation. The definitions here given of *damnum* and *injuria* are not strictly accurate, but will serve to convey an idea of the distinction between them. All such acts, from the instant of their commission, rendered the perpetrator liable for damages to the party injured, and were, therefore, considered to originate an *obligatio*. Inst. 4. 1; Ortolan, Inst. § 1715.

*Obligationes quasi ex delicto*. This class embraces all torts not coming under the denomination of *delicta* and not having a special form of action provided for them by law. They differed widely in character, and at common law would in some cases give rise to an action on the case, in others to an action on an implied contract. Ortolan, Inst. § 1781.

*Obligationes ex variis causarum figuris*. Although Justinian confined the divisions of obligations to the four classes which have been enumerated, there are many species of obligations which cannot properly be reduced within any of these classes. Some authorities have, consequently, established a fifth class, to receive the odds and ends which belonged nowhere else, and have given to this class the above designation, borrowed from Gaius, l. 1, pr. § 1, D. 44, 7. See Mackeldey § 474. See, generally, Hadley, Rom. Law 209, etc.

**OBLIGATION** (from Lat. *obligo*, *ligo*, to bind). A duty.

A tie which binds us to pay or do something agreeably to the laws and customs of the country in which the obligation is made. Inst. 3. 14.

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A bond containing a penalty, with a condition annexed, for the payment of money, performance of covenants, or the like, and which differs from a bill, which is generally without a penalty or condition, though it may be obligatory. Co. Litt. 172.

A deed whereby a man binds himself under a penalty to do a thing. Com. Dig. *Obligation* (A); 2 S. & R. 502; 6 Vt. 40; 1 Blackf. 241; Harp. 434; Baldw. 129. The word has a very broad and comprehensive legal signification and embraces all instruments of writing, however informal, whereby one party contracts with another for the payment of money or the delivery of specific articles. 103 N. C. 344; 6 Minn. 353; 23 Fed. Rep. 535.

An *absolute* obligation is one which gives no alternative to the obligor, but requires fulfilment according to the engagement.

An *accessory* obligation is one which is dependent on the principal obligation; for example, if I sell you a house and lot of ground, the principal obligation on my part is to make you a title for it; the accessory obligation is to deliver you all the title-papers which I have relating to it, to take care of the estate till it is delivered to you, and the like.

An *alternative* obligation is where a person engages to do or to give several things in such a manner that the payment of one will acquit him of all.

Thus, if A agrees to give B, upon a sufficient consideration, a horse, or one hundred dollars, it is an *alternative* obligation. Pothier, Obl. pt. 2, c. 3, art. 6, no. 245.

In order to constitute an alternative obligation it is necessary that two or more things should be promised disjunctively; where they are promised conjunctively, there are as many obligations as the things which are enumerated; but where they are in the alternative, though they are all due, there is but one obligation, which may be discharged by the payment of any of them.

The choice of performing one of the obligations belongs to the obligor, unless it is expressly agreed that it shall belong to the creditor; Dougl. 14; 1 Ld. Raym. 279; 4 Mart. La. N. S. 167. If one of the acts is prevented by the obligee or the act of God, the obligor is discharged from both. See 2 Evans, Pothier, Obl. 52; Viner, Abr. *Condition* (S b); CONJUNCTIVE; DISJUNCTIVE; ELECTION.

A *civil* obligation is one which has a binding operation in law, and which gives to the obligee the right of enforcing it in a court of justice; in other words, it is an engagement binding on the obligor. 4 Wheat. 197; 12 *id.* 318, 337.

Civil obligations are divided into express and implied, pure and conditional, primitive and secondary, principal and accessory, absolute and alternative, determinate and indeterminate, divisible and indivisible, single and penal, and joint and several. They are also purely personal, purely real, or mixed.

A *conditional* obligation is one the execution of which is suspended by a condition which has not been accomplished, and subject to which it has been contracted.

A *determinate* obligation is one which has for its object a certain thing: as, an obligation to deliver a certain horse named Bucephalus. In this case the obligation can only be discharged by delivering the identical horse.

A *divisible* obligation is one which, being a unit, may nevertheless be lawfully divided, with or without the consent of the parties.

It is clear that it may be divided by consent, as those who made it may modify or change it as they please. But some obligations may be divided without the consent of the obligor: as where a tenant is bound to pay two hundred dollars a year rent to his landlord, the obligation is entire; yet, if his landlord dies and leaves two sons, each will be entitled to one hundred dollars; or if the landlord sells one undivided half of the estate yielding the rent, the purchaser will be entitled to receive one hundred dollars and the seller the other hundred. See APPORTIONMENT.

*Express* or conventional obligations are those by which the obligor binds himself in express terms to perform his obligation.

*Imperfect* obligations are those which are not binding on us as between man and man, and for the non-performance of which we are accountable to God only: such as charity or gratitude. In this sense an obligation is a mere duty. Pothier, Obl. art. prél. n. 1.

An *implied* obligation is one which arises by operation of law: as, for example, if I send you daily a loaf of bread, without any express authority, and you make use of it in your family, the law raises an obligation on your part to pay me the value of the bread.

An *indeterminate* obligation is one where the obligor binds himself to deliver one of a certain species: as, to deliver a horse, where the delivery of any horse will discharge the obligation.

An *indivisible* obligation is one which is not susceptible of division: as, for example, if I promise to pay you one hundred dollars, you cannot assign one-half of this to another, so as to give him a right of action against me for his share. See DIVISIBLE.

A *joint* obligation is one by which several obligors promise to the obligee to perform the obligation. When the obligation is only joint, and the obligors do not promise separately to fulfil their engagement, they must be all sued, if living, to compel the performance; or, if any be dead, the survivors must all be sued. See PARTIES.

A *natural* or *moral* obligation is one which cannot be enforced by action, but which is binding on the party who makes it in conscience and according to natural justice.

As, for instance, when the action is barred by the act of limitation, a natural obligation still subsists, although the civil obligation is extinguished; 5 Binn. 573. Although natural obligations cannot be

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enforced by action, they have the following effect: *first*, no suit will lie to recover back what has been paid or given in compliance with a natural obligation; 1 Term 285; 1 Dall. 184; *second*, a natural obligation has been held to be a sufficient consideration for a new contract; 2 Binn. 591; 5 *id.* 33; Yelv. 41 *a*, n. 1; Cowp. 290; 2 Bla. Com. 445; 3 Bos. & P. 249, n.; 2 East 506; 3 Taunt. 311; 5 *id.* 36; 3 Pick. 207; Chitty, Contr., 12th ed. 38; Hare, Contr. 264; Poll. Contr. 168; but see MORAL OBLIGATION; CONSIDERATION.

*Obediential obligations.* Such obligations as are incumbent on parties in consequence of the situation or relationship in which they are placed. Ersk. Prin. 60.

A *penal* obligation is one to which is attached a penal clause, which is to be enforced if the principal obligation be not performed. See LIQUIDATED DAMAGES.

A *perfect* obligation is one which gives a right to another to require us to give him something or not to do something. These obligations are either natural or moral, or they are civil.

A *personal* obligation is one by which the obligor binds himself to perform an act, without directly binding his property for its performance.

It also denotes an obligation in which the obligor binds himself only, not including his heirs or representatives.

A *primitive* obligation, which in one sense may also be called a principal obligation, is one which is contracted with a design that it should itself be the first fulfilled.

A *principal* obligation is one which is the most important object of the engagement of the contracting parties.

A *pure* or simple obligation is one which is not suspended by any condition, either because it has been contracted without condition, or, having been contracted with one, it has been fulfilled.

A *real* obligation is one by which real estate, and not the person, is liable to the obligee for the performance.

A familiar example will explain this. When an estate owes an easement as a right of way, it is the thing, and not the owner, who owes the easement. Another instance occurs when a person buys an estate which has been mortgaged, subject to the mortgage: he is not liable for the debt, though the estate is. In these cases the owner has an interest only because he is seized of the servient estate or the mortgaged premises, and he may discharge himself by abandoning or parting with the property. The obligation is both personal and real when the obligor has bound himself and pledged his estate for the fulfilment of the obligations.

A *secondary* obligation is one which is contracted and is to be performed in case the *primitive* cannot be. For example, if I sell you my house, I bind myself to give a title: but I find I cannot, as the title is in another: then my *secondary* obligation is to pay you damages for my non-performance of my obligation.

A *several* obligation is one by which one individual, or, if there be more, several individuals, bind themselves separately to perform the engagement. In this case each obligor may be sued separately; and if one or more be dead, their respective executors may be sued. See PARTIES.

A *single* obligation is one without any penalty: as where I simply promise to pay you one hundred dollars. This is called a single bill, when it is under seal.

**OBLIGATION OF CONTRACTS.** A state statute which authorizes the redemption of property sold upon foreclosure of a mortgage, where no right of redemption previously existed, or which extends the period of redemption beyond the time formerly allowed, cannot constitutionally apply to a sale under a mortgage executed before its passage; 163 U. S. 118. The subject is treated under IMPAIRING THE OBLIGATIONS OF CONTRACTS.

**OBLIGATORY PACT. In Civil Law.** An informal obligatory declaration of consensus, which the Roman law refused to acknowledge. Sohm, Rom. L. 321.

**OBLIGATORY RIGHTS. In the Civil Law.** One class of private rights between debtors and creditors.

**OBLIGEE.** The persons in favor of whom some obligation is contracted, whether such obligation be to pay money or to do or not to do something. La. Code, art. 3522, no. 11.

Obligees are either several or joint. An obligee is several when the obligation is made to him alone; obligees are joint when the obligation is made to two or more; and in that event each is not a creditor for his separate share, unless the nature of the subject or the particularity of the expression in the instrument lead to a different conclusion. 2 Pothier, Obl., Evans ed. 56; Hob. 172; Cro. Jac. 251. The words obligee and payee have been held to have a technical and definite meaning under an act relative to promissory notes, bonds, etc., and apply only to notes, bonds, or bills whether given for the payment of money or for the performance of covenants and conditions, and not to mortgages; 2 Ill. 142.

**OBLIGOR.** The person who has engaged to perform some obligation. La. Code, art. 3522, no. 12. One who makes a bond.

Obligors are joint and several. They are joint when they agree to pay the obligation jointly; and then the survivors only are liable upon it at law, but in equity the assets of a deceased joint obligor may be reached; 1 Bro. Ch. 29; 2 Ves. 101, 371. They are several when one or more bind themselves and each of them separately to perform the obligation. In order to become an obligor, the party must actually, either himself or by his attorney, enter into the obligation and execute it as his own. If a

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man sign and seal a bond as his own and deliver it, he will be bound by it although his name be not mentioned in the bond; 4 Ala. 479; 4 Hayw. 239; 4 M'Cord 203; 7 Cow. 484; 5 Mass. 538; 2 Dana 463; 4 Dev. 272. When the obligor signs between the penal part and the condition, still the latter will be a part of the instrument; 7 Wend. 345; 3 Hen. & M. 144.

The execution of a bond by the obligor, in blank, with verbal authority to fill it up, does not bind the obligor, though it is afterwards filled up, unless the bond is redelivered or acknowledged or adopted; 1 Yerg. 69, 149; 1 Hill N. Y. 267; 2 N. & M'C. 125; 2 Brock. 64; 1 Ohio 368; 2 Dev. 369; 6 Gill & J. 250. But see, *contra*, 17 S. & R. 438; and see 6 *id.* 308; Wright Ohio 742; BLANK.

All obligors in a joint bond are presumed to be principals, except such as have the word "security" opposite their names; 82 Va. 751.

**OBLITERATION.** In the absence of statutory provisions to the contrary, the obliteration of part of a will, leaving it otherwise complete, with the intention by the testator to annul only what was cancelled, leaves the residue valid; 123 Mass. 102; 19 Alb. L. J. 328; 39 L. T. (N. S.) 581; 22 N. J. Eq. 463. But under the Wills Act in England; 1 Vict. c. 26; any obliterations or other alterations must be duly attested as is required for the execution of a will, except that such attestation may be limited to the alterations; 1 Wms. Exec. 144. A line drawn through the writing is, doubtless, an obliteration, though it may leave it as legible as it was before; 58 Pa. 244. For a review of the cases see note to 25 Am. Rep. 35; WILLS.

**OBEAS.** Works or trades which men carry on in houses or in covered places. White, New Recop. b. 1, t. 5, c. 3, § 6.

**OBLOQUY.** Censure; reproach. 70 Cal. 275.

**OBREPTION.** Acquisition of escheats, etc., from a sovereign, by making false representations. Bell, Dic. *Subreption;* Calv. Lex.

**OBROGATION.** The annulling a law, in whole or in part, by passing a law contrary to it. The alteration of a law. Calv. Lex.

**OBSCENE.** Ordinarily, something which is offensive to chastity; something that is foul and filthy, and for that reason is offensive to a pure-minded person. 38 Fed. Rep. 732. That which is offensive to chastity and modesty. 45 Fed. Rep. 414; 50 *id.* 918. See OBSCENITY.

**OBSCENITY. In Criminal Law.** Such indecency as is calculated to promote the violation of the law and the general corruption of morals. It is that form of indecency which is calculated to promote the general corruption of morals. 51 Fed. Rep. 41. In all cases an indictment for obscenity must aver exposure and offence to the community generally; mere private indecency is not indictable at common law; 2 Whart. Cr. L. § 1431.

The exhibition of an obscene picture is an indictable offence at common law, although not charged to have been exhibited in public, if it be averred that the picture was exhibited to sundry persons for money; Arch. Cr. Pr. 1034; 2 S. & R. 91. The stat. 20 and 21 Vict. c. 83, gives summary powers for the searching of houses in which obsence books, etc., are suspected to be kept, and for the seizure and destruction of such books. By various acts of congress, the importation and circulation, through the mails or otherwise, of obscene literature or articles of any kind is rendered punishable with fine or imprisonment; R. S. §§ 2491, 3893, 5389. See 8 Phila. 453; 126 Mass. 46; 92 Ill. 182; 51 Fed. Rep. 41. R. S. § 3893, as amended by act of congress (19 Stat. L. p. 90), prohibiting the mailing of obscene papers, is not in contravention of the first amendment to the constitution providing that the freedom of the press shall not be abridged; 96 U. S. 727; 143 *id.* 110; 50 Fed. Rep. 921. An obscene book or paper within the act relating to nonmailable matter means one which contains immodest and indecent matter, the reading whereof would have a tendency to deprave and corrupt the minds of those in whose hands the publication might fall, and whose minds are open to such immoral influences; 38 Fed. Rep. 732. Mailing a private sealed letter containing obscene matter is an offence within the statute; 162 U. S. 420; 50 Fed. Rep. 410. The character of a publication as to whether obscene or otherwise is not to be determined by the motives of the author or sender in making or sending it; 38 Fed. Rep. 500. An indictment for selling an obscene book need not set out the obscene matter nor even describe the same in general terms, if it identifies the book and states that the contents are too indecent to be placed upon the record; 43 N. Y. Supp. 1046.

The fact that a woman, in whose presence obscene language is used, is herself in the habit of using such language, can in no case constitute a justification, but may mitigate the offence; 86 Ala. 601.

Legislative provisions forbidding the keeping, exhibition, or sale of indecent books or pictures, and authorizing their destruction if seized, are within the police powers of the states and are constitutional; Cooley, Const. Lim. 749.

**OBSERVE. In Civil Law.** To perform that which has been prescribed by some law or usage. Dig. 1. 3. 32.

**OBSOLETE.** A term applied to laws which have lost their efficacy without being repealed.

A positive statute, unrepealed, can never be repealed by non-user alone; 4 Yeates 181, 215; 1 P. A. Bro. App. 28; 13 S. & R. 447. The disuse of a law is at most only presumptive evidence that society has con-

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sented to such a repeal; however this presumption may operate on an unwritten law, it cannot, in general, act upon one which remains as a legislative act on the statute-book; because no presumption can set aside a certainty. A written law may indeed become obsolete when the object to which it was intended to apply, or the occasion for which it was enacted, no longer exists; 1 P. A. Bro. App. 28. "It must be a very strong case," says Chief Justice Tilghman, "to justify the court in deciding that an act standing on the statute-book, unrepealed, is obsolete and invalid. I will not say that such case may not exist,—where there has been a non-user for a great number of years,—where, from a change of times and manners, an ancient sleeping statute would do great mischief if suddenly brought into action,—where a long practice inconsistent with it has prevailed, and especially where from other and later statutes it might be inferred that in the apprehension of the legislature the old one was not in force." 13 S. & R. 452; Rutherford, Inst. b. 2, c. 6, s. 19; Merlin, *Répert*, *Desuetude*.

**OBSTANTE.** Withstanding; hindering. See NON OBSTANTE.

**OBSTA PRINCIPIIS.** Withstand beginnings. It is the duty of the court to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon. Their motto should be *obsta principiis*. 116 U. S. 635.

**OBSTRUCTING A STREET.** To block up; to hinder or impede. To omit, after notice, to remove an obstruction, is to wilfully obstruct a highway; 12 Q. B. D. 121; as is the leaving on the side of a highway anything calculated to frighten horses; 12 *id.* 110. A certain use of the streets by carriages, either in front of private residences, hotels, clubs, theatres, churches, and similar buildings, is a legitimate use of the street as such, and when they are occupied temporarily and reasonably by a licensed coachman or by a private carriage, the practice does not amount to a nuisance; N. Y. Sup. Ct. (1896).

See STREET; NUISANCE; HIGHWAY.

**OBSTRUCTING MAIL.** See POSTAL SERVICE.

**OBSTRUCTING PROCESS. In Criminal Law.** The act by which one or more persons attempt to prevent, or do prevent, the execution of lawful process.

The officer must be prevented by actual violence, or by threatened violence accompanied by the exercise of force, or by those having capacity to employ it, by which the officer is prevented from executing his writ. The officer is not required to expose his person by a personal conflict with the offender; 2 Wash. C. C. 169. See 3 *id.* 335; 12 Ala. N. S. 199; 37 Wis. 196; 17 Tex. App. 232; Whart. Cr. L. § 652.

This is an offence against public justice of a very high and presumptuous nature; and more particularly so where the obstruction is of an arrest upon criminal process. A person opposing an arrest upon criminal process becomes thereby *particeps criminis*; that is, an accessory in felony, and a principal in high treason; 4 Bla. Com. 128; 1 Russ. Cr. 360. See 2 Gall. 15; 2 Chitty, Cr. L. 145; 3 Vt. 110; 25 *id.* 415; 2 Strobh. 73; 15 Mo. 486; 4 Am. L. J. 489; 10 Ky. L. Rep. 289; 148 U. S. 197.

The fact that a person whom a mayor attempts to arrest does not know that he is authorized by the charter of the city to make arrests, does not change his responsibility for acts committed in resisting arrest; 36 S. C. 493; but where a person, who is not vested by law with authority to make an arrest, attempts to do so, he acts as a private citizen, and one who opposes him therein is not guilty of opposing an officer; 48 Fed. Rep. 554.

**OBSTRUCTING PUBLIC WORSHIP.** See DISTURBANCE OF PUBLIC WORSHIP.

**OBSTRUCTING RAILWAYS.** Acts constituting the obstruction of railroad tracks a crime exist in many states, *e. g.* Alabama, California, Indiana, Iowa, Massachusetts, Minnesota, Mississippi, Nebraska, New Hampshire, New York, and Tennessee, and in England. The motive with which it is done is not material; 73 Ala. 473; it need not appear that an obstruction maliciously placed on the track did actually hinder the trains; 38 Ia. 257. It is the intent of the act and not the natural consequences which makes a crime; 25 Alb. L. J. 419. A driver of a vehicle who refuses to turn off a street railway track, when notified, may be guilty of obstructing a railway track; 14 Gray 69. In Texas it must be shown that the obstruction was such as would endanger human life; 7 Tex. App. 462. If a person's wagon accidentally becomes caught in a crossing, he is not liable on an indictment for obstructing the track, though he was negligent; 3 L. T. 665.

Permitting cars to remain for an unnecessarily long time on a highway is a nuisance; 95 N. C. 602; whether it be in bad faith or not; 120 Ind. 298.

See NUISANCE; RAILROAD.

**OBVENTIO** (Lat. *obvenire*, to fall in). **In Civil Law.** Rent or profit accruing from a thing, or from industry. It is generally used in the plural.

**In Old English Law.** The revenue of spiritual living, so called. Cowel. Also, in the plural, offerings. Co. 2d Inst. 661.

**OBVIOUS.** Apparent; evident; manifest. An obvious imitation of a patent does not mean obvious to an uneducated or unskilled eye, but obvious to a judge or jury, sitting as experts; 15 Ch. D. 181; 50 L. T. 420. See 15 Ct. Sess. Cas., 4th ser. 660.

**OCCASIO.** A tribute imposed by the lord on his vassals or tenants.

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**OCCUPANCY.** The taking possession of those things corporeal which are without an owner, with an intention of appropriating them to one's own use.

Pothier defines it to be the title by which one acquires property in a thing which belongs to nobody, by taking possession of it with design of acquiring it. *Tr. du Dr. de Propriété*, n. 20. The Civil Code of Louisiana, art. 3375, nearly following Pothier, defines occupancy to be "a mode of acquiring property by which a thing which belongs to nobody becomes the property of the person who took possession of it with an intention of acquiring a right of ownership in it." The basis of its origin seems to be not an instinctive bias towards the institution of property, but a presumption, arising out of the long continuation of that institution, that everything should have an owner. Maine, Anc. L. 249. Occupancy is sometimes used in the sense of occupation or holding possession; indeed it has come to be very generally so used in this country in homestead laws, public-land laws, and the like; 21 Ill. 178; 25 Barb. 54; Act of Cong. May 29, 1830 (4 Stat. at L. 420); 36 Wisc. 73; see 47 Minn. 13; 12 Q. B. Div. 356; 2 *id.* 588; but this does not appear to be a common legal use of the term, as recognized by English authorities.

To constitute occupancy, there must be a taking of a thing corporeal, belonging to nobody, with an intention of becoming the owner of it; Co. Litt. 416.

A right by occupancy attaches in the finder of lost goods unreclaimed by the owner; in the captor of beasts *ferœ naturæ*, so long as he retains possession; 2 Bla. Com. 403; the owner of lands by accession, and the owner of goods acquired by confusion.

It was formerly considered, also, that the captor of goods contraband of war acquired a right by occupancy; but this is now held otherwise, such goods being now held to be primarily vested in the sovereign, and as belonging to individual captors only, to the extent and under such regulations as positive laws may prescribe; 2 Kent 290. See PRIZE.

**OCCUPANT.** One who has the actual use or possession of a thing. See 12 Nev. 65.

When the occupiers of a house are entitled to a privilege in consequence of such occupation, as to pass along a way, to enjoy a pew, and the like, a person who occupies a part of such house, however small, is entitled to some right, and cannot be deprived of it; 2 B. & Ald. 164; 1 Chitty, Pr. 209; 4 Comyns, Dig. 64; 5 *id.* 199. See 30 Ia. 242; 3 Q. B. 449.

**OCCUPATION.** Use or tenure: as, the house is in the occupation of A B. A trade, business, or mystery: as, the occupation of a printer. See 99 Ill. 506.

A putting out of a man's freehold in time of war. Co. Litt. s. 412. See MILITARY OCCUPATION.

**OCCUPAVIT** (Lat.). **In Old Practice.** The name of a writ which lies to recover the possession of lands when they have been taken from the possession of the owner by occupation (*q. v.*).

**OCCUPIER.** One who is in the enjoyment of a thing.

A tenant, though absent, is, generally speaking, the occupier of premises; 1 B. & C. 178; but not a servant or other person who may be there *virtute officii*; 26 L. J. C. P. 12; 47 L. J. Ex. 112; L. R. 1 Q. B. 72.

**OCCUPY.** To hold in possession; to hold or keep for use: as, to occupy an apartment. 107 U. S. 343. In legal acceptation, actual use, possession, and cultivation. 11 Johns. 202; 37 N. J. Eq. 486.

**OCCUR.** To happen. 91 Ill. 95.

**OCHLOCRACY.** A government where the authority is in the hands of the multitude; the abuse of a democracy. Vauméne, *Dict. du Langage Politique*. Mob rule. See GOVERNMENT.

**OCTAVE** (Law Lat. *utas*). **In Old English Practice.** The eighth day inclusive after a feast. 3 Bla. Com. 277.

**OCTO TALES** (Lat. eight such). If, when a trial at bar is called on, the number of jurors in attendance is too small, the trial must be adjourned, and a *decem* or *octo tales* awarded, according to the number deficient; as, at common law, namely, a writ to the sheriff to summon eight more such men as were originally summoned. 3 Bla. Com. 364.

**ODHAL RIGHT.** An allodial right.

**ODIO ET ATIA.** See DE ODIO ET ATIA.

**OF.** The word has been held equivalent to after; 5 Term 283; 10 L. J. Q. B. 10; at; 3 Taunt. 147; belonging to; 2 B. & S. 703; 38 Ohio St. 506; manufactured by; 2 Bing. N. C. 668; by; 107 Mass. 355; residing at; 3 Wend. 329; 8 A. & E. 232.

**OF COUNSEL.** A phrase commonly applied in practice to the counsel employed by a party in a cause.

**OF COURSE.** That which may be done in the course of legal proceedings without making any application to the court; that which is granted by the court, without further inquiry, upon its being asked: as, a rule to plead is a matter of course.

**OFFENCE. In Criminal Law.** The doing that which a penal law forbids to be done, or omitting to do what it commands. In this sense, it is nearly synonymous with crime. In a more confined sense, it may be considered as having the same meaning with misdemeanor; but it differs from it in this, that it is not indictable, but punishable summarily by the forfeiture of a penalty; 1 Chitty, Pr. 14.

**OFFER.** A proposal to do a thing.

An offer, as an element of a contract, is a proposal to make a contract. It must be made by the person who is to make the promise, and it must be made to the person to whom the promise is made. It may be made either by words or by signs, either orally or in writing, and either personally or by a messenger; but in whatever way it is made, it is not in law an offer until it

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comes to the knowledge of the person to whom it is made; Langd. Contr. § 151; 6 H. L. Cas. 112. While an offer remains in force, it confers upon the offeree the power to convert it into a promise by accepting it. The offerer may state how long it shall remain in force; and it will then remain in force during the time so stated, unless sooner revoked; 3 Cush. 224. In the absence of any specification by the offerer, an offer will remain in force a reasonable time unless sooner revoked; Leake, Contr. 33; 119 U. S. 151. As to what will be a reasonable time, no uniform positive rule can be laid down. When an offer is made personally, it will *prima facie* continue until the interview or negotiation terminates, and longer; 6 Wend. 103. In commercial transactions, when an offer is made by mail, the general rule is that the offerer is entitled to an answer by return mail; but this will not apply in all cases, *e.-g.* when there are several mails each day. In transactions which are not commercial, much less promptitude in answering is required; Langd. Contr. § 152.

Where the offer contemplates a unilateral contract, the length of time that the offer will continue in force depends upon different considerations. The question is no longer one of accepting the offer orally or by letter, but of performing the consideration. The duration of such an offer, therefore, in the absence of any express limitation, will be measured by the length of time which may be reasonably required for the performance of the consideration. When performance of the consideration has been begun in good faith, it seems that the offer will continue, in the absence of actual revocation, until the performance is either completed or abandoned, especially when the performance of the consideration is constantly within the knowledge of the offerer; Langd. Contr. § 155. An offer which contains no stipulation as to how long it shall continue is revocable at any moment. A stipulation that an offer shall remain open for a specified time must be supported by a sufficient consideration, or be contained in an instrument under seal, in order to be binding; Langd. Contr. § 178; 3 Term 653. When thus made binding, the offer is not irrevocable, but the only effect is to give the offerer a claim for damages if the stipulation be broken by revoking the offer. When an offer is made for a time limited in the offer itself, no acceptance afterwards will make it binding; an offer which in its terms limits the time of acceptance is withdrawn by the expiration of the time; 144 U. S. 394.

As an offer can only be made by communication from the offerer to the offeree, so it can only be revoked in the same manner. But the death or insanity of the offerer during the pendency of the offer, revokes it; Langd. Contr. § 180.

An offer can only be accepted in the terms in which it is made; an acceptance, therefore, which modifies the offer in any particular, goes for nothing; L. R. 7 Ch. App. 587; 119 U. S. 151. The other party having once rejected the offer, cannot afterwards revive it by tendering an acceptance of it; 4 Wheat. 225; 14 Pet. 77; 101 U. S. 50; 119 *id.* 151.

A mere proposal to sell may be revoked at any time before acceptance; 45 La. Ann. 214. Where an offer of sale of land stands for twenty years, and until after the death of the party to whom it is made, without compliance with its terms, the widow and sole devisee of such party cannot accept the proposition, and offer to perform it, and thereby make a contract binding on the proposer; 51 Fed. Rep. 860.

A man may change his mind at any time, if it is not to the injury of another; he may, therefore, revoke or recall his offers at any time before they have been accepted; and, in order to deprive him of this right, the offer must have been accepted on the terms in which it was made; 10 Ves. 438; 2 C. & P. 553. See Ans. Contr. 31.

Any qualification of, or departure from, those terms invalidates the offer, unless the same be agreed to by the party who made it; 4 Wheat. 225; 3 Johns.534; 7 *id.* 470; 6 Wend. 103; Poll. Contr. 38; *i. e.* there is no contract entered into.

When the offer has been made, the party is presumed to be willing to enter into the contract for the time limited, and, if the time be not fixed by the offer, then until it be expressly revoked or rendered nugatory by a contrary presumption; 6 Wend. 103. See 8 S. & R. 243; 1 Pick. 278; 10 *id.* 326; 12 Johns. 190; 9 Port. Ala. 605; 33 Neb. 460; 35 W. Va. 463; 1 Bell, Com. 326; Pothier, *Vente*, n. 32. And see ASSENT; BID; LETTER.

An offer must be communicated, but in many classes of contracts it need not be made to an ascertained person: as, auction sales; an offer of a reward (whether the service must have been rendered after knowledge of the offer of a reward is unsettled; see Ans. Contr. *24); an advertisement in railroad time-tables; letters of credit; offers to receive subscriptions for stocks or bonds. An offer of a stock of goods for sale on bids is not such an offer that a person who makes the highest bid is entitled to them (L. R. 5 C. P. 561). An offer may be determined:—by lapse of a specified time; by lapse of a reasonable time for accepting; by failure to comply with the terms of the offer as to the mode of acceptance; by the death of either party before acceptance; by revocation before acceptance; Hollingsworth, Contr. 11.

**OFFERINGS.** See OBVENTIO.

**OFFICE.** A right to exercise a public function or employment, and to take the fees and emoluments belonging to it. Shelf. Mortm. 797; Cruise, Dig. Index; 3 S. & R. 149. An office is a public charge or employment; 2 Brock. 102, per Marshall, C. J. An office may exist without an incumbent; 28 Cal. 382.

*Judicial* offices are those which relate to

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the administration of justice, and which should be exercised by persons of sufficient skill and experience in the duties which appertain to them.

*Military* offices are such as are held by soldiers and sailors for military purposes.

*Ministerial* offices are those which give the officer no discretion as to the matter to be done, and require him to obey the mandates of a superior. 7 Mass. 280. See 5 Wend. 170; 10 *id.* 514; 8 Vt. 512; 1 Ill. 280; 12 Ind. 569. It is a general rule that a judicial office cannot be exercised by deputy, while a ministerial may.

*Political* offices are such as are not connected immediately with the administration of justice or the execution of the mandates of a superior officer: the offices of the president of the United States, of the heads of departments, of the members of the legislature, are of this number.

In the United States, all offices, according to the above definition, are public; but in another sense employments of a private nature are also called offices: for example, the office of president of a bank, the office of director of a corporation. For the incompatibility of office, see INCOMPATIBILITY; OFFICER.

See, generally, 3 Kent 362; MANDAMUS; QUO WARRANTO.

For word "office" as used of a place for transacting public business, see 6 Cush. 181. See, as to tenure of office, R. S. §§ 1767–1775. See RANK.

**OFFICE-BOOK.** A book kept in a public office, not appertaining to a court, authorized by the law of any state.

An *exemplification* of any such office-book, when authenticated under the act of congress of 27th March, 1804, is to have such faith and credit given to it in every court and office within the United States as such exemplification has by law or usage in the courts or offices of the state from whence the same has been taken. See FOREIGN LAWS; FOREIGN JUDGMENT.

**OFFICE-COPY.** A transcript of a record or proceeding filed in an office established by law, certified under the seal of the proper officer.

A copy made by an officer of the court, bound by law to make it, is equivalent to an exemplification, though it is sometimes called an "office copy"; Steph. Dig. Ev. Art. 77. Copies of public records, whether judicial or otherwise, made by a public officer authorized by law to make them, are often termed "office copies," *e. g.* copies of recorded deeds; 74 Me. 127.

A copy made by an officer of the court, who is authorized to make it by a rule of court, but not required by law to make it, is equivalent to an exemplification in the same cause and court, but in other causes or courts is not admissible unless it can be proved as an examined copy; Steph. Dig. Ev. Art. 78. These are called "office copies"; 6 Barb. 130. Office copies are said to be secondary evidence; Steph. Dig. Ev.

**OFFICE FOUND. In English Law.** When an inquisition is made to the king's use of anything, by virtue of office of him who inquires, and the inquisition is found, it is said to be office found. See 100 U. S. 212, 484; INQUEST OF OFFICE.

**OFFICE GRANT.** See GRANT.

**OFFICE OF A JUDGE. In English Law.** A criminal suit in an ecclesiastical court, not being directed to the reparation of a private injury, is regarded as a proceeding emanating from the *office of the judge*, and may be instituted by the mere motion of the judge. But in practice these suits are instituted by private individuals, with the permission of the judge or his surrogate; and the private prosecutor in any such case is, accordingly, said to *promote the office of the judge*. Coote's Eccl. Practice; Moz. & W.

**OFFICER.** One who is lawfully invested with an office.

An office is a public charge or employment; and one who performs the duties of an office is an officer. Marshall, C. J., in 2 Brock. 102.

*Executive officers* are those whose duties are mainly to cause the laws to be executed.

*Legislative officers* are those whose duties relate mainly to the enactment of laws, such as members of congress and of the several state legislatures. These officers are confined in their duties by the constitution generally to make laws, though sometimes, in cases of impeachment, one of the houses of the legislature exercises judicial functions somewhat similar to those of a grand jury, by presenting to the other articles of impeachment, and the other house acts as a court in trying such impeachment.

*Judicial officers* are those whose duties are to decide controversies between individuals, and accusations made in the name of the public against persons charged with violations of the law.

*Ministerial officers* are those whose duty it is to execute the mandates, lawfully issued, of their superiors.

*Military* officers are those who have command in the army. Non-commissioned officers are not officers in the sense in which that word is generally used; 16 Ct. Cls. 214.

*Naval* officers are those who are in command in the navy.

Officers are also divided into public officers and those who are not public. Some officers may bear both characters: for example, a clergyman is a public officer when he acts in the performance of such a public duty as the marriage of two individuals; 4 Conn. 209; and he is merely a private person when he acts in his more ordinary calling of teaching his congregation. See 4 Conn. 134; 18 Me. 155.

Officers are required to exercise the functions which belong to their respective offices. The neglect to do so may in some cases, subject the offender to an indictment; 1 Yeates 519; and in others he

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will be liable to the party injured; 1 Yeates 506.

Public office in the constitution means a permanent public trust or employment, not merely transient, occasional, or incidental; 71 N. Y. 238. The term embraces the ideas of tenure, duration, emoluments, and duties; 6 Wall. 385; but it has been held that duration and salary are not of the essence of public office, and that the duty of acting for and on behalf of the state constitutes an office; 68 N. C. 497; even though it expires as soon as a single act is done; 66 N. C. 59. The true test is that it is a parcel of the administration of government; 86 N. C. 241; though it is a clerkship in a department and the duties are confined within narrow limits; 8 Cal. 39; the term includes all persons in any public station or employment conferred by government; *id.* 39. It is said to depend upon the greater importance and dignity of the position; the requirement of an oath and perhaps of a bond, and usually upon the tenure; 40 Mich. 673. Officers of the United States are those nominated by the president and confirmed by the senate or those who are appointed under an act of congress, by the president alone, a court of law, or a head of a department; 99 U. S. 508; see 124 U. S. 303. The notification of the secretary of the navy is a valid appointment as a passed assistant surgeon; 95 U. S. 762. It is generally true that a relation arising out of a contract and dependent for its duration and extent upon the terms thereof is never considered an office; 36 Miss. 273; 2 Brock. 102. Not every employment under the government is an office; 2 Brock. 96. The distinction between officer and placeman is that the former must take an oath of office, the latter not; 63 N. C. 199.

*Who are officers.* The following have been held to be officers: All persons entrusted with the receipt of public money; 74 Pa. 124; the receiver of a national bank; 2 Ben. 303; clerks in an executive department of the federal government; 10 Ct. Cl. 426; a collector of city taxes, within the bankruptcy act of 1841; 7 Metc. 152; a representative in a state legislature; 2 N. H. 246 (see *infra*); members of the boards of public safety and public works; secretaries of such boards; assistant bailiff of the police court; and the stenographer of the said court, within the meaning of a constitutional provision that the salaries of public officers shall be neither increased nor diminished during their term of office; 36 S. W. Rep. (Kan.) 944; a notary public, within the meaning of a constitutional provision that any public officer who shall travel on a free pass shall forfeit his office; 32 N. Y. Supp. 108, affirmed in 145 N. Y. 434; a representative in congress; 77 N. Y. 503; a selectman; 53 N. H. 610; the president of a city council; 45 Ohio St. 196; a city superintendent of streets; 106 Mo. 488; an assistant of the board of aldermen; 3 Hun 680; a deputy county clerk; 39 N. J. Eq. 126; a county solicitor duly elected; 126 Pa. 48; a notary public; 15 Ala. 72; a passed assistant surgeon in the navy; 95 U. S. 760; a cadet engineer, a graduate of the naval academy; 116 U. S. 483; a clerk appointed by an assistant treasurer; 6 Wall. 385; a postmaster; 22 Cal. 336; judges and members of a state senate and house and state directors in corporations; 66 N. C. 59; justices of the peace; 73 Cal. 487; attendants of courts; 83 N. Y. 372; a marshal of the United States; 4 Woods 592; a deputy marshal; 17 Fed. Rep. 150; a sheriff; 63 N. C. 199; 33 Conn. 109; a deputy state treasurer; 41 Ia. 593; an additional paymaster in the army; 6 Wall. 244; trustees of the state university and directors of a state institution for the deaf and dumb, penitentiary, etc.; 68 N. C. 457; the superintendent of a county penitentiary; 11 How. Pr. 240; the medical superintendent of a hospital for the insane; 29 Ohio St. 347; trustees of a state library; 30 Cal. 160; a deputy constable; 90 Mo. 369. As to a policeman, see 45 Conn. 191; 30 Hun 396; 113 Pa. 395; a fire marshal; 49 N. Y. S. 1096. See 63 N. C. 9, where a long list of public officers is given.

It has been said that members of the bar are "public officers and ministers of justice;" Barn. Ch. 478; see also 22 N. Y. 67 (which gives a very learned argument by Prof. Dwight); 2 Cow. 13; *contra*, 20 Johns. 492; 7 Porter (Ala.) 293; 24 Cal. 241. An attorney-at-law is not, indeed, in the strictest sense a public officer, but he comes very near it; 131 Mass. 376, citing 6 Md. 18; 7 Wall. 364.

The following have been held *not* to be officers:—A special deputy sheriff; 41 Ala. 399; a civil surgeon appointed by the commissioner of pensions to examine applicants for pensions; 99 U. S 508; a lamp inspector; 130 N. Y. 394; a paymaster's clerk in the navy; 124 U. S. 303; a United States agent of fortifications; 2 Brock. 102; the keeper of a county jail; 39 Fed. Rep. 599; the chief clerk in a city assessor's office; 40 Mich. 673; a mail carrier; 17 Gratt. 243 (*contra*, 13 Ohio 523); an agent appointed by a state to receive an extradited person; 111 U. S. 624; patrolmen on the police force of a city; 30 Hun 396 (*semble*); firemen of cities and villages; 32 N. Y. 377; 57 Ohio St. 15; a pilot; 66 Ga. 503; a night watchman of a post-office building; 89 N. C. 133; members of the legislature; 63 N. C. 199. Nine-tenths of the employes of the United States government are said not to be officers; 99 U. S. 509. County commissioners are not officers for the purpose of impeachment; 167 Mass. 559.

See on this subject, 17 L. R. A. 243.

Public officers are public agents or trustees and have no proprietary interest or property in their office beyond the lawful term and salary (if any) prescribed. Their official rights and duties may be changed at the discretion of the legislature during their term of office; R. M. Charlt. 397; but it has been held that a clerk's office, to be held during good behavior, and many

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other public offices are, under certain limitations, the subject of property; 4 Dev. (N. C.) 18; the emoluments are private property; *id.*

The profits of a public office cannot be assigned for the benefit of creditors; 8 Cl. & F. 295.

The buying and selling of offices was forbidden by 5 & 6 Edw. VI. c. 15, under which it has been held that an officer having a certain salary or certain annual profits may make a deputation of it, reserving a sum not exceeding the amount of his profits, or the deputy may lawfully agree to pay so much out of the uncertain fees of an office; but if the office have uncertain fees or profits, an agreement by the deputy to pay a fixed sum annually is a sale within the statute; and so is an agreement to give the deputy all the profits; 3 Kent 456; see 9 Wend. 175.

An agreement by an applicant for an office to divide the fees with another applicant if the latter withdraw his application for it, is void; 4 Comst. 449; so is a contract for the sale of an office; 51 Mich. 524; whether made by the appointing power or the incumbent; 18 Ind. 390. An agreement for compensation for procuring the appointment or resignation of a public officer is void; 20 S. E. Rep. (N. C.) 733. So is the sale by the owners of a vessel of the position of master; 2 B. & C. 661; and the promises of a stockholder that he will secure to the buyer of his stock the office of treasurer; 120 Mass. 501.

The tenure of office is never more permanent than during good behavior; 3 Kent 454; if not protected by the constitution, it may be changed by the legislature; 165 Pa. 284; but its term cannot be extended when fixed by the constitution; 44 Ohio St. 589. In England, servants of the crown, civil as well as military, except in special cases otherwise provided by law, hold their office only during the pleasure of the crown; [1896] 1 Q. B. 116, 121.

When an officer is protected in his office from removal, except for cause to be ascertained and adjudged upon a hearing of a judicial nature, his removal without such hearing is contrary to law, although at such hearing as was held he made no objection; 18 N. Y. L. J. 1241 (Ct. of App. N. Y.).

The right to appoint to a public office, when no term of office is fixed by law, carries with it as an incident the absolute power of removal at any time, without notice or charges or hearing; 66 N. W. Rep. (N. D.) 234.

The suspension of an officer by the governor does not deny him the equal protection of the laws because the governor refuses to produce to him the evidence against him, or to confront him with his accusers. He is not entitled to a jury trial; 169 U. S. 586.

An officer cannot be removed from office during his second term for a violation of duty committed during his first term; 40 Pac. Rep. (Cal.) 435.

The power to remove a corporate officer for reasonable and just cause is one of the common-law incidents of all corporations; Dill. Mun. Corp. § 179; 89 N. C. 187; but not for pre-existing cause affecting his capacity to hold the office; *id.*

The act of a *de facto* officer is binding on the public: 159 U. S. 596. Persons coming into a public office to transact business, who find a person in charge of it, are not bound to ascertain his authority so to act. To them he is an officer *de facto*, and so far as they are concerned, *de jure;* 164 U. S. 657; though there was no power to appoint him; 37 Atl. Rep. (N. J.) 732. A municipal corporation who has paid a salary to a *de facto* officer who has performed the duties of an office while the right to it was in litigation, cannot be held liable therefor again to one who may thereafter establish his title to the office: 68 N. W. Rep. (S. D.) 308: the remedy is against the *de facto* officer; *id.*: 20 Kan. 298. See 68 N. Y. 279; but see 12 Heisk. 499; 53 Ill. 428; 28 Cal. 21. It is no defence to a prosecution for bribery that the act under which the officer was bribed was unconstitutional; 42 N. E. Rep. (Ohio) 999. See DE FACTO.

Where the settlement of a question involves the exercise of discretion and judgment, the duty is not ministerial and is beyond the review of the judicial department; 37 U. S. App. 71.

A town collector is responsible as a debtor and not merely as a bailee; 1 Den. 233. It is the policy of public laws to hold all receivers of public money to a very strict accountability; 15 Wall. 346. The obligation to keep safely the public money was said to be absolute, without any condition express or implied; 3 How. 587; but this was considered in 15 Wall. 347, as being too generally expressed, the court intimating there that loss of funds under special circumstances, as by an earthquake, would probably exonerate the official. In the same case it was said that it appears from all the cases (except that in 1 Den. 233) that the official bond of an officer is regarded as laying the foundation of a more stringent responsibility; but the court held that the forcible seizure by the rebel authorities in 1861 of public moneys in the hands of a loyal government agent, against his will and without fault on his part, was a discharge from his obligation in reference to such moneys, three judges dissented.

The responsibility of a public officer is determined, not by the law of bailment, but by the condition of his bond; 3 Pa. 372.

Where public money is lost by the failure of a bank; 34 S. W. Rep. (Tenn.) 427; (*contra*, 151 N. Y. 135;) or a city treasurer is robbed; 113 Cal. 205; (*contra*, 44 Minn. 427;) the official being free from fault is not liable; but in 44 Pac. Rep. (Wash.) 125, an officer was held liable for the safety of public moneys, lost in an insolvent bank, even though he was not negligent; and in New York the liability is very strictly

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maintained; 151 N. Y. 135. The weight of authority seems to be in favor of a strict accountability; 48 Neb. 1; 14 Wash. 117.

Where a subordinate officer takes the place of his superior in the case of death or disability, he is entitled to the same salary; 45 Pac. Rep. (Nev.) 243.

There is no federal statute expressly bearing upon removals from office, except § 13 of the act of January 16, 1883—the Civil Service Act, relating to removal, etc., by reason of giving or refusing political contributions. The civil service rules of the executive are but regulations imposed by him upon his own actions or those of heads of departments, and do not confer upon an employe any property right in his office; 84 Fed. Rep. 551. Equity has no jurisdiction over the appointment and removal of public officers, whether the power is vested in executive or administrative boards or officers, or in a judicial tribunal; jurisdiction belongs exclusively to courts of law; 171 U. S. 366.

Equity has no jurisdiction over the appointment or removal of public officers; the jurisdiction belongs exclusively to courts of law; 124 U. S. 200; 54 Ala. 320; 151 Ill. 41; 119 Ind. 481. But equity will prevent a breach of trust affecting public franchises, or some illegal act, under color or claim of right, affecting injuriously the property rights of individuals, and falling under one of the acknowledged heads of equity jurisprudence; 55 N. Y. 390; 84 Fed. Rep. 554; and it is said that equity will protect the position of officers *de facto* against the interference of adverse claimants; High, Inj. § 1315; as by enjoining the dispossession of an officer, by force and unlawfully, and compelling the defendant to resort to a remedy at law; 84 Fed. Rep. 555.

The president may remove a district attorney within four years of his appointment; 167 U. S. 324; where the history of the question is reviewed. By the repeal (act of 1887) of the Tenure of Office Act, congress intended to concede to the president the power of removal, if it ever took it from him; *id.*

In the absence of constitutional or statutory regulation, the power of appointment carries with it, as an incident, the power of removal; 13 Pet. 230; 167 U. S. 324; 84 Fed. Rep. 552.

The Civil Service Act of 1891 is constitutional; 83 Fed. Rep. 578.

Department regulations cannot enlarge or restrict the liability of an officer on his bond; 81 Fed. Rep. 684.

The postmaster-general, when in the discharge of his duties, is not liable for damages on account of official communications made by him within those duties, by reason of any personal motive that might be alleged to have prompted his action; 161 U. S. 483.

The United States is not liable for the non-feasance or misfeasance or neglect of its officers; 141 U. S. 573.

A person holding two different federal offices cannot draw pay for both for the same period; 10 Ct. Cl. 426.

Congress cannot exercise the power of appointment to office; 147 U. S. 282. It may vest in the president the power to appoint a vice-consul; 169 U. S. 331.

The act, however tortious, of an executive officer of a court, done under color of its process, is to be regarded as a proceeding of the court, with which courts of concurrent jurisdiction will not interfere; 16 U. S. App. 325.

An act directing the employment of veterans in the labor service of the commonwealth, etc., in preference to other persons, if such veterans are qualified for the work, is constitutional; 166 Mass. 589, three judges dissenting.

One who accepts an office incompatible with one already held, *ipso facto* vacates the first office; 69 N. W. Rep. 82; 76 Hun 146. Where the mayor of Detroit was elected governor of Michigan, it was held that he thereby vacated the former office; 70 N. W. Rep. 450. In Louisiana a constitutional officer may also hold a municipal office; 25 La. Ann. 188. See OFFICE.

A woman is eligible to the office of court clerk where there is no provision expressly requiring such clerk to be a man, though the word "he" is used in the constitution of the state in declaring who is eligible to office; 39 S. W. Rep. (Mo.) 270.

The officers of a corporation are not, as regards their criminal liability, a single person in respect to corporate acts, and therefore they may be guilty of conspiracy; 44 N. Y. Supp. 336. A college professor is not an officer but an employee; 21 Pa. 525.

The word "vacant" has no technical nor peculiar meaning; it means empty, unoccupied; as applied to an office—without an incumbent. An existing office without an incumbent is vacant, whether it be an old or a new one; 7 Ind. 320. Where a new office has been created and has not been filled, a vacancy exists; 5 Nev. 111; 7 Ind. 326; but see 51 Miss. 28. Where a newly appointed officer fails to qualify as required by law, there is usually not a vacancy, if, by law, the last incumbent holds over; 44 Ohio St. 589; but it has been held that in such case there is a vacancy; 34 La. Ann. 273; and so where the last incumbent has no authority to hold over; 1 *id.* N. S. 753.

Statutory provisions requiring a bond and oath of office are usually only directory; it will suffice if the oath be taken and the bond given before a vacancy has been declared; 33 Ala. 674; 95 Ill. 249, 593; but see 52 N. Y. 374; 77 Va. 265; 14 Fla. 277. See 16 L. R. A. 140.

At common law, the refusal of a public officer to accept office was indictable; 4 Term 778; such is still the rule; 145 Ill. 573. Mandamus will lie to compel a person to enter upon the discharge of the duties of an office; 103 U. S. 471; 145 Ill. 573.

A public officer may resign, but not till he has qualified; 25 Cal. 94. A resignation, in the absence of any statute, should

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be tendered to the officer or body authorized to act in filling the vacancy; 103 U. S. 471. The resignation of a public officer is not complete till acceptance; 103 U. S. 471; 87 Va. 689; 31 N. J. L. 107; *contra*, 49 Ala. 402; 3 Nev. 566; 12 Ia. 405; 77 N. Y. 378.

An unaccepted offer to resign may be withdrawn; 10 Ind. 62; 32 Kan. 191; and even without the consent of the person accepting; 10 Ind. 62; but not after acceptance; 45 Ind. 105; 14 Q. B. Div. 908; 49 Ala. 402. See 36 Am. St. Rep. 523; 25 L. R. A. 613.

Term of office means "a fixed and definite period of time;" 30 Am. & E. Corp. Cas. 351. When no time is mentioned in the law from which the term of office begins, it runs from the date of election; 7 Ohio 7.

Officers who are compelled to rely upon and act through subordinate officers and employers are not ordinarily responsible to the government for their misfeasance or non-feasance; 52 N. Y. Supp. 197.

As to officers of corporations, see Wood, Ry.; Thomp. Corp. As to officers of a corporation as parties in patent cases, see INFRINGEMENT. As to service on corporation officers, see FOREIGN CORPORATIONS.

See MANDAMUS; QUO WARRANTO.

See 72 Am. Dec. 179; Mechem, Publ. Off.; SERVICE; TENURE OF OFFICE; OFFICE; LONGEVITY PAY; LOAN; NATIONAL BANKS, and the titles of various public and corporation officials.

**OFFICER DE FACTO.** One who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law; 6 East 368. See OFFICER.

**OFFICIAL. In Old Civil Law.** The person who was the minister of, or attendant upon, a magistrate.

**In Canon Law.** The person to whom the bishop generally commits the charge of his spiritual jurisdiction bears this name. Wood, Inst. 30, 505; Merlin, *Répert.*

**OFFICIAL SOLICITOR TO THE COURT OF CHANCERY.** An officer in England whose function is to protect the suitors' fund, and to administer under the direction of the court, so much of it as comes under the spending power of the court.

**OFFICIAL TRUSTEES OF CHARITIES.** Charity commissioners in England, created by 16 & 17 Vict. c. 137, and amended by 18 & 19 Vict. c. 24.

**OFFICIAL USE.** An active use before the statute of uses, which imposed some duty on the legal owner or feoffee to uses, as a conveyance to A with directions for him to sell the estate and distribute the proceeds amongst B, C, and D. To enable A to perform this duty he had the legal possession of the estate to be sold. Wharton.

**OFFICIARIIS NON FACIENDIS VEL AMOVENDIS.** A writ addressed to the magistrates of a corporation, requiring them not to make such a man an officer, or to put one out of the office he has, until inquiry is made of his manners, etc. Reg. Orig. 126.

**OFFICINA JUSTITIÆ.** The workshop or office of justice. **In English Law.** The chancery was formerly so called, because all writs issued from it, under the great seal, returnable into the courts of common law. See CHANCERY.

**OFFICIO, EX, OATH OF.** An oath whereby a person might be obliged to make any presentment of any crime or offence, or to confess or accuse himself of any criminal matter whereby he might be liable to any censure, penalty, or punishment. 3 Bla. Com. 447.

**OFFICIOUS WILL.** A testament by which a testator leaves his property to his family. Sand. Just. Inst. 207.

**OFFSET.** See SET-OFF.

**OFFSPRING.** The word offspring in its proper and natural sense extends to any degree of lineal descendants and has the same meaning as *issue*. 32 L. J. Ch. 373.

**OHIO.** One of the states of the American Union.

Massachusetts, Connecticut and Virginia claimed, under their respective charters, the territory lying northwest of the river Ohio. At the solicitation of the continental congress, these claims were, soon after the close of the war of independence, ceded to the United States. Virginia, however, reserved the ownership of the soil of three million seven hundred thousand acres between the Scioto and the Little Miami rivers, for military bounties to the soldiers of her line who had served in the revolutionary war; and Connecticut reserved three million six hundred and sixty-six thousand acres in northern Ohio, now usually called the "Western Reserve." The history of these reservations, and of the several "purchases" under which land-titles have been acquired in various parts of the state, will be found in Albachi's Annals of the West, in the Preliminary Sketch of the History of Ohio, in the first volume of Chase's Statutes of Ohio, and in Swan's Land Laws of Ohio. The conflicting titles of the states having been extinguished, congress, on July 13, 1787, passed the celebrated ordinance for the government of the territory northwest of the river Ohio. 1 Curw. Rev. Stat. of Ohio 86. It provided for the equal distribution of the estates of intestates among their children, gave the widow dower as at common law, regulated the execution of wills and deeds, secured perfect religious toleration, the right of trial by jury, judicial proceedings according to the course of the common law, the benefits of the writ of *habeas corpus*, security against cruel and unusual punishments, the right of reasonable bail, the inviolability of contracts and of private property, and declared that "there shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted."

These provisions have been, in substance, incorporated into the constitution and laws of Ohio, as well as of the other states which have since been formed within "the territory." The ordinance has been held to be a mere temporary statute, which was abrogated by the adoption of the constitution of the United States. 1 McLean 336; 3 *id.* 226; 3 How. 212, 589; 10 *id.* 82, 232. See ORDINANCE OF 1787.

On the 30th of October, 1802, congress passed an act making provision for the formation of a state constitution, under which, in 1803, Ohio was admitted into the Union, under the name of "the State of Ohio." This constitution was never submitted to a vote of the people. It continued to be the organic law of Ohio until September 1, 1851,

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when it was abrogated by the adoption of the present constitution.

The bill of rights which forms a part of this constitution contains the provisions common to such instruments in the constitutions of the different states. Such are the prohibitions against any laws impairing the right of peaceably assembling to consult for the common good, to bear arms, to have a trial by jury, to worship according to the dictates of one's own conscience, to have the benefit of the writ of *habeas corpus*, to be allowed reasonable bail, to be exempt from excessive fines and cruel and unusual punishment, not to be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury, to have a copy of the indictment, the aid of counsel, compulsory process for witnesses, a speedy and public trial, to be privileged from testifying against one's self, or from being twice put in jeopardy for the same offence. Provision is also made against the existence of slavery, against transporting offenders out of the state, against imprisonment for debt unless in cases of fraud, against granting hereditary honors, against quartering soldiers in private houses, for the security of persons from unreasonable arrest or searches, and for the freedom of speech and the press.

THE LEGISLATIVE POWER.—This is lodged in a general assembly, consisting of a senate and house of representatives.

The *Senate* is composed of thirty-five members, elected biennially, one in each of the senatorial districts into which the state is divided, for the term of two years. Senators must have resided in their respective districts one year next before election, unless absent on business of the state or the United States.

The *House of Representatives* is composed of one hundred members, elected biennially, one in each of the representative districts of the state, for the term of two years. A representative must have resided one year next preceding the election in the county or district for which he is elected. No person can be elected to either house who holds office under the United States or an office of profit under the state. Provision is made for re-districting the state every ten years from 1851.

THE EXECUTIVE DEPARTMENT.—The *Governor* is elected biennially, for the term of two years from the second Monday of January next following his election, and until his successor is qualified.

THE JUDICIAL POWER.—The *Supreme Court* consists of five judges, elected by the people for five years. The judges are so classified that one goes out of office each year. It has original jurisdiction over writs of *quo warranto*, *mandamus*, *habeas corpus*, and *procedendo*, and a large appellate jurisdiction by writs of error from inferior courts. It may issue writs of error and *certiorari* in any criminal case, and a *supersedeas* in any case, and all writs, not provided for, which are necessary to enforce the administration of justice. Writs of error, *certiorari*, *habeas corpus*, and *supersedeas* may be issued by the judge in vacation.

The *Circuit Court* consists of three judges in each circuit, who hold their office for a period of six years. The state is divided into eight judicial circuits. A majority of the judges is necessary for a quorum. It has like original jurisdiction with the Supreme Court, and on good cause shown, may issue writs of *supersedeas* in any case, and all other writs not specially provided for, nor prohibited by statute.

The *Court of Common Pleas*, under the constitution of 1851, was originally composed of three judges, elected by the people in each of the nine districts into which the state was divided, for the term of five years. Each of these nine districts was divided into three parts, following county lines, and as nearly equal as possible; and in each of these subdistricts one judge was elected. The general assembly may increase or diminish the number of judges in any district, and may alter the number of districts, and has in several districts increased the number of judges, and has increased the number of districts to ten. Courts of common pleas are to be held by one or more of these judges; and more than one common pleas court may be held in the district at the same time. This court has original jurisdiction of all civil causes where the matter in controversy exceeds one hundred dollars, and a service, personal or by attachment of property, can be made in the county or where the property in question is situated in the county. This court has also almost exclusively the criminal jurisdiction, with the exception of a petty jurisdiction exercised in some instances by local police courts. It has a supervisory jurisdiction in cases of distribution of decedent's property or the probate courts. It exercises appellate jurisdiction also of cases brought from justices of the peace and all other inferior judicial tribunals.

A *Probate Court* is held in each county by a probate judge, elected for three years by the people of the county. This court has jurisdiction in probate and testamentary matters.

*Superior Courts* have been established in Cincinnati, whose jurisdiction in civil causes is concurrent with the courts of common pleas within its territorial limits. The court consists of three judges. Its decisions are supervised by the supreme court, by writ of error allowed by that court, or by one of its judges in vacation.

*Justices of the Peace*, under certain restrictions, have exclusive jurisdiction of any sum not exceeding one hundred dollars, and concurrent jurisdiction with the court of common pleas in any sum over one hundred dollars, and not exceeding three hundred dollars.

*Jurisprudence.*—The common law of England is the basis of the civil law of this state, modified by the judicial rejection of that part which is "inapplicable to the condition of the people of Ohio."

The criminal law of the state is wholly statutory, and there are no offences recognized as common-law offences. The formal distinction between actions at law and in equity is abolished. Actions are brought by a petition stating the facts of the case.

**OIL.** Petroleum or rock oil is a mineral substance obtained from the earth by process of mining, and the land from which it is obtained is called mining land; 49 N. E. Rep. (Ohio) 399; 110 Pa. 313. It is a part of the realty; *id.*; 88 Pa. 198. But it is held that a reservation of "all timber suitable for sawing, also all minerals," will not include petroleum, the ordinary meaning of the word mineral overcoming the technical meaning; 101 Pa. 36.

A property owner has a right to drill for oil through a stratum of coal belonging to another; 152 Pa. 286. A contract giving the right to explore for oil, and if any be found, to sink wells, is a license only; 55 Pa. 164. A lease of land with the right to bore for oil is a lease and not a sale of the oil; 129 Pa. 94.

Oil produced from wells on lands leased for oil purposes during the owner's life is income; 138 Pa. 606. Where a life tenant united with a remainder-man in a leasing *new* oil territory, the court appointed a trustee to hold and invest the royalties and pay the income to the life tenant, and at her death, the principal to the remainderman; 174 Pa. 425. A life tenant cannot lease *new* oil territory, never operated before her title accrued; 179 Pa. 371.

When oil reaches a well and is produced at the surface, it becomes personal property; 49 N. E. Rep. (Ohio) 399. As to whether one holding oil on storage who converts it to his use is guilty of larceny as bailee, see 82 Pa. 472.

See Bryan, Petroleum and Natural Gas; as to oil leases, see 31 L. R. A. 673; as to liability for rent on oil leases, see 33 L. R. A. 847; as to assignment of an oil lease, see 34 L. R. A. 62. See NATURAL GAS; EMINENT DOMAIN; PIPE LINES; MINES AND MINING; WASTE.

**OKLAHOMA.** One of the territories of the United States.



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It includes all that portion of the United States known as the Indian Territory, except so much of the same as is actually occupied by the five civilized tribes, and the Indian tribes within the Quapaw Indian Agency, and except the unoccupied part of the Cherokee outlet, together with that portion of the United States known as the Public Land Strip. Whenever the interest of the Cherokee Indians in the land known as the Cherokee outlet shall have been extinguished, and the President shall make proclamation thereof, the outlet will become a part of the Territory of Oklahoma.

The *legislative* power is vested in the governor and legislative assembly. The legislative assembly consists of a council and house of representatives; the former has thirteen members, whose term of service is two years, while the latter is composed of twenty-six members, with a like term of service. The sessions of the legislative assembly are biennial. The legislative power extends to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States.

The *executive* power is vested in a governor, who holds his office for four years, or until his successor is appointed or qualified, unless sooner removed by the President of the United States.

The *judicial* power is vested in a supreme court, district courts, probate courts, and justices of the peace. The supreme court consists of a chief justice and two associate justices. The Territory is divided into three judicial districts, and a district court is held in each county in said district thereof by one of the justices of the supreme court.

The governor, secretary, chief justice and associate justices, attorney and marshal, are appointed by the President of the United States. See 1 Supp. Rev. Stat. U. S. 720 *et seq.*

**OLD NATURA BREVIUM.** The title of an English book, so called to distinguish it from Fitzherbert's work entitled Natura Brevium. It contains the writs most in use in the reign of Edward III., together with a short comment on the application and properties of each of them.

**OLD STYLE.** The mode of reckoning time in England until the year 1752, when the New Style, at present in use, and which had prevailed in the Roman Catholic countries of the continent since 1582, was introduced. According to the O. S., the year commenced on the 25th of March and every fourth year was a leap-year, instead of, as now, but 97 leap years in 400 years; Moz. & W.

**OLD TENURES.** The title of a small tract, which, as its title denotes, contains an account of the various tenures by which land was holden in the reign of Edward III. This tract was published in 1719, with notes and additions, with the eleventh edition of the First Institutes, and reprinted in 8vo in 1764, by Sergeant Hawkins, in a selection of Coke's Law Tracts.

**OLEOMARGARINE.** Artificial butter made out of animal fat, milk, and other substances; imitation butter. Anderson's L. Dict.

Oleomargarine is a recognized article of food and commerce, and being thus a lawful article of commerce it cannot be wholly excluded from importation into a state from another state where it was manufactured, though the former state may so regulate the introduction as to insure purity, without having the power totally to exclude it; 171 U. S. 1.

The New Hampshire Act prohibiting the sale of oleomargarine unless it is of a pink color is invalid as being, in necessary effect, prohibitory. The act is not an inspection law, it provides for no inspection, and apparently none was intended. It is an absolute prohibition of the sale of an article of commerce; 171 U. S. 30.

The Massachusetts Act of March 10th, 1891, "to prevent deception in the manufacture and sale of imitation butter," in its application to the sales of oleomargarine artificially colored and brought into Massachusetts, is in conflict with the commerce clause of the federal constitution; 155 U. S. 461.

The legislature of a state has the power to determine, as a matter of state policy, whether to permit the manufacture and sale of oleomargarine within the state or entirely to forbid the same, so long as the legislation is confined to the manufacture and sale within the state; 127 U. S. 678, explained in 171 U. S. 16.

Under its taxing power and in connection with the internal revenue system, congress has passed a law defining butter and oleomargarine and imposing a tax upon and regulating the sale, etc., of oleomargarine. See 144 U. S. 677.

In many of the states the manufacture and sale of this substance are prohibited by statute, unless made in a specified form and in such manner as will inform the buyer as to its real character.

In England, all packages must be marked, as must each parcel exposed for sale. See [1895] 2 Q. B. 657.

See ORIGINAL PACKAGE.

**OLERON, LAWS OF.** See CODE.

**OLIGARCHY** (Gr. ὀλίγος and ἀρχή. The government of a few). A name given to designate the power which a few citizens of a state have usurped, which ought by the constitution to reside in the people. Among the Romans, the government degenerated several times into an oligarchy,—for example, under the decemvirs, when they became the only magistrates in the commonwealth. See GOVERNMENT.

**OLOGRAPH.** A term which signifies that an instrument is wholly written by the party. See La. Civ. Code, art. 1581; Code Civ. 970; 5 Toullier, n. 357; 1 Stu. Low. C. 327. See TESTAMENT; WILL; Beach, Wills 16.

**OMISSION.** The neglect to perform what the law requires.

When a public law enjoins on certain officers duties to be performed by them for the public, and they omit to perform them, they may be indicted: for example, supervisors of the highways are required to repair the public roads: the neglect to do so will render them liable to be indicted.

When a nuisance arises in consequence of an omission, it cannot be abated, if it be a private nuisance, without giving notice, when such notice can be given. See COMMISSION; NUISANCE.

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**OMNIA PERFORMAVIT** (Lat. he has done all). **In Pleading.** A good plea in bar where all the covenants are in the affirmative. 1 Me. 189.

**OMNIBUS.** For all; containing two or more independent matters. Applied to a count in a declaration, and to a bill of legislation, and perhaps to a clause in a will, which comprises more than one general subject. 64 Pa. 428; 14 Md. 193. See IN OMNIBUS.

**OMNIUM** (Lat.). **In Mercantile Law.** A term used to express the aggregate value of the different stock in which a loan is usually funded. 2 Esp. 361; 7 Term 630.

**ON.** As denoting contiguity or neighborhood, it may denote near to as well as at; 45 Mo. 349; and has been held to be interchangeable with upon. 19 Wall. 264; 85 Va. 128. It is not equivalent to immediately on; 12 Kan. 25.

**ON ACCOUNT OF WHOM IT MAY CONCERN, FOR WHOM IT MAY CONCERN.** A clause in policies of insurance, under which all are insured who have an insurable interest at the time of effecting the insurance and who were then contemplated by the party effecting the insurance. 2 Pars. Marit. Law 30.

**ON ALL FOURS.** A phrase used to express the idea that a case at bar is in all points similar to another. The one is said to be on all fours with the other when the facts are similar and the same questions of law are involved. See IN OMNIBUS.

**ON BEHALF.** Where security is to be given on behalf of a person it cannot be given by the person himself. L. R. 4 C. P. 235.

**ON BOARD.** A devise of goods on board a ship may pass goods on board at the date of the will, but afterwards removed. 1 Ves. Sen. 271.

**ON CALL.** There is no legal difference between an obligation payable "on demand" and one payable "on call." 22 Gratt. 609.

**ON DEMAND.** A promissory note payable on demand is a present debt and is payable without demand. 39 Me. 494. It is payable the instant the note is signed; no demand is necessary prior to bringing an action; 2 M. & W. 461; 29 L. J. Ex. 377; 34 Ch. D. 566.

**ONE MAN COMPANY.** See PROMOTERS.

**ONERANDO PRO RATA PORTIONIS.** A writ that lay for a joint tenant, or tenant in common, who was distrained for more rent than his proportion of the land came to. Reg. Orig. 182.

**ONERARI NON** (Lat. ought not to be burdened). **In Pleading.** The name of a plea by which the defendant says that he ought not to be charged. It is used in an action of debt; 1 Saund. 290, n. *a*.

**ONERATIO.** A lading; a cargo.

**ONERIS FERENDI** (Lat. of bearing a burden). **In Civil Law.** The name of a servitude by which the wall or pillar of one house is bound to sustain the weight of the buildings of the neighbor.

The owner of the servient building is bound to repair and keep it sufficiently strong for the weight it has to bear. Dig. 8. 2. 23.

**ONEROUS CAUSE. In Civil Law.** A valuable consideration.

**ONEROUS CONTRACT. In Civil Law.** One made for a consideration given or promised, however small. La. Civ. Code, art. 1767.

**ONEROUS DEED. In Scotch Law.** A deed given for valuable consideration. Bell, Dict.; CONSIDERATION.

**ONEROUS GIFT.** The gift of a thing subject to certain charges imposed by the giver on the donee. Pothier, Obl.

**ONEROUS TITLE.** Under the Spanish and Mexican law that which was created by a valuable consideration, as the payment of money, the rendition of services, and the like, or by the performance of conditions or payment of charges to which the property was subject. See 13 Cal. 458; 8 La. 433; 20 *id.* 242.

**O. Ni.** In the exchequer, when the sheriff made up his account for issues, amerciaments, etc., he marked upon each head O. Ni., which denoted *oneratur, nisi habeat sufficientem exonerationem*, and presently he became the king's debtor, and a debet was set upon his head; whereupon the parties paravaile became debtors to the sheriff, and were discharged against the king etc., 4 Inst. 116. But sheriffs now account to the commissioners for auditing the public accounts; Whart. Lex.

**ONOMASTIC.** A term applied to a signature which is in a different handwriting from the body of the instrument. 2 Benth. Jud. Ev. 460.

**ON STAND.** A term used in the law of landlord and tenant. A tenant of a farm who cannot carry away manure but has the right to sell it to his successor, is said to have the right of *on stand* on the farm for it till he can sell it; he may maintain trespass for the taking of it by the incoming tenant before it is sold. See 16 East 116.

**ONTARIO.** A province in the Dominion of Canada. Its government is vested in a Lieutenant-Governor and an Executive Council of seven members. It has one Assembly of ninety members.

Toronto is the seat of government. It has a Supreme Court of Judicature composed of a Chief Justice of Ontario and three justices of appeal, and a high court, consisting of a queen's bench division, common pleas division, and chancery division;

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each of the first two divisions is presided over by a chief justice and two puisne judges, and the last by a chancellor and three judges.

**ONUS EPISCOPALE.** Ancient customary payments from the clergy to their diocesan bishop, of synods, pentacostals, etc.

**ONUS IMPORTANDI.** The charge of importing merchandise, mentioned in 12 Car. II. c. 28.

**ONUS PROBANDI** (Lat.). **In Evidence.** The burden of proof.

It is a general rule that the party who alleges the affirmative of any proposition shall prove it. It is also a general rule that the *onus probandi* lies upon the party who seeks to support his case by a particular fact: for example, when to a plea of infancy the plaintiff replies a promise after the defendant had attained his age, it is sufficient for the plaintiff to prove the promise, and it lies on the defendant to show that he was not of age at the time; 1 Term 648. But where the negative involves a criminal omission by the party, and, consequently, where the law, by virtue of the general principle, presumes his innocence, the affirmative of the fact is also presumed. See 11 Johns. 513; 19 *id.* 345; 9 Mart. La. 48; 3 Mart. La. N. S. 576. The burden of proof of the want of mental capacity of a person at the time of his marriage is on those asserting it, in the absence of proof of a confirmed condition of lunacy or idiocy prior to such marriage; 159 Pa. 634.

In general, wherever the law presumes the affirmative, it lies on the party who denies the fact to prove the negative; as when the law raises a presumption as to the continuance of life, the legitimacy of children born in wedlock, or the satisfaction of a debt. See, generally, 1 Phil. Ev. 156; 1 Stark. Ev. 376; Rosc. Civ. Ev., 16th ed. 94; Rosc. Cr. Ev., 8th ed. 17; Bull. N. P. 298; 2 Gall. 485; 1 M'Cord 573; 1 Houst. 44; 12 Viner, Abr. 201; Tayl. Ev. 343; 1 Greenl. Ev. 79; Whart. Ev. 353. As to shifting of burden of proof, see, generally, 44 La. Ann. 1043; 44 Mo. App. 141; 90 Tenn. 638.

The party on whom the *onus probandi* lies is entitled to begin, notwithstanding the technical form of the proceedings; 1 Stark. Ev. 584. See BURDEN OF PROOF; OPENING AND CLOSING; NEGATIVE.

**OPEN.** To begin. He begins or opens who has the affirmative of an issue. 1 Greenl. Ev. § 74.

To open a case is to make a statement of the pleadings in a case, which is called the opening. This should be concise, very distinct, and perspicuous. Its use is to enable the judge and jury to direct their attention to the real merits of the case and the points in issue; 1 Stark. 439; 2 *id.* 317.

To vacate; to relieve a party who has an equitable right to such relief against a proceeding which is to him a formal or legal bar; to allow a re-discussion on the merits.

For example, to open a rule of court. 2 Chitty, Bail 265; 5 Taunt. 628; 1 Mann. & G. 555; 7 Ad. & E. 519. To open a judgment or default; 4 R. I. 324; 1 Wisc. 631. See OPENING A JUDGMENT. To open an account: to make a judicial annouincement, that a party, *e. g.* an executor, shall not be absolutely bound by the account he has rendered, but may show that it contains errors to his prejudice. To open a marriage settlement or an estate-tail; *i. e.* to allow a new settlement of the estate. To open biddings; *i. e.* to allow a re-sale. See OPENING BIDDINGS. To open a contract; 44 Me. 206; a highway; 37 N. J. L. 14.

**OPEN A CREDIT.** To accept or pay the draft of a correspondent who has not furnished funds. Pardessus, n. 296.

**OPEN ACCOUNT.** A running or unsettled account; not completely settled, but subject to future adjustment. 1 Ala. 62; 6 *id.* 438; 21 La. Ann. 406; 1 Ga. 275; 18 Oregon 414.

**OPEN COMMISSION.** A commission without written interrogatories issued out of any one of certain courts of record, an issue of fact having been joined in that court, to take the testimony of witnesses, not within the state, but within the United States and Canada; N. Y. Code Civ. Proc. § 893, 894, 897. The application for an open commission will be denied where there is reason to believe that a commission with interrogatories will develop all the facts bearing upon the case. 17 Weekly Dig. (N. Y.) 17.

**OPEN COURT.** A court formally opened and engaged in the transaction of all judicial functions. 45 Ia. 501.

A court to which all persons have free access as spectators while they conduct themselves in an orderly manner.

The term is used in the first sense as distinguishing a court from a judge sitting in chambers or informally for the transaction of such matters as may be thus transacted. See CHAMBERS; COURT.

In the second sense, all courts in the United States are open; but in England, formerly, while the parties and probably their witnesses were admitted freely in the courts, all other persons were required to pay in order to obtain admittance. Stat. 13 Edw. I. cc. 42, 44; Barr. on the Stat. 126, 127. See Prin. of Pen. Law 165.

In a trial for criminal assault, the court, in the interest of public morality and to prevent undue publicity, ordered the exclusion of all persons not connected by ties of friendship or blood with the accused or complaining witnesses. Newspaper reporters were also permitted to remain. It was held that the constitutional requirements of a public trial must be interpreted in the broadest sense, and that any restriction of the public's right to be present rendered the trial illegal; Mich. Sup. Ct. 1897, 55 Alb. L. J. 429.

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In most of the states the constitution provides that persons accused shall have a speedy public trial; Stimson, Am. Stat. L. § 131. This has been construed to mean that "the doors of the court-room are expected to be kept open, the public are entitled to be admitted, and the trial is to be public in all respects . . . with due regard to the size of the court-room and the conveniences of the court, the right to exclude objectionable characters and youth of tender years, and to do other things which may facilitate the proper conduct of the trial;" 103 Cal. 242; in this case a conviction of assault with intent to commit rape was reversed because against defendant's objection all persons were excluded except the officers of the court and the defendant; *id.* See 65 Cal. 223. In a trial of a civil case of trespass for adultery the judgment was reversed because all but parties and witnesses were excluded; 86 Me. 80.

Judge Cooley says that the requirement of a public trial is for the benefit of the accused, but it is fairly met if a reasonable number are admitted; Const. Lim. 312.

In California the court may direct the trial of issues of fact in private; Cal. Code, C. P. § 125; but this act does not authorize the court to forbid the publication of the testimony, and when such an order was made judgment of guilty of contempt against a newspaper publisher was reversed; 99 Cal. 526. On a trial for assault with intent to kill, the court-room was cleared and all persons excluded except officers of the court, press reporters, and friends of defendant; the order was made on behalf of defendant, who was liable to be excited by a crowd, as well as to preserve order, and it was held that her right to a public trial was not violated; 14 Pac. Rep. (Cal.) 849.

See 15 Am. L. Rev. 427; 89 Mich. 276; s.c. 28 Am. St. R. 294, where the subject is fully discussed. See IN CAMERA.

**OPEN ENTRY.** See ENTRY.

**OPEN FOR BUSINESS.** A store is open for business when, according to custom, the door is locked after dark, but customers can get in by knocking. 15 S. W. Rep. (Ark.) 1034. See INSURANCE.

**OPEN INSOLVENCY.** The condition of a person having no property, within the reach of the law, applicable to the payment of any debt. 8 Blackf. 305.

**OPEN LAW.** The waging of law. Magna Charta, c. 21.

**OPEN POLICY.** An open policy is one in which the amount of the interest of the insured is not fixed by the policy, and is to be ascertained in case of loss. See POLICY.

**OPENING. In American Practice.** The beginning. The commencement. The first address of the counsel.

The opening is made immediately upon the impanelling of the jury: it embraces the reading of such of the pleadings as may be necessary, and a brief outline of the case as the party expects to prove it, where there is a trial, or of the argument, where it is addressed to the court.

**OPENING A RULE.** The act of restoring or recalling a rule which has been made absolute to its conditional state, as a rule *nisi*, so as to re-admit of cause being shown against the rule. Brown.

**OPENING A COMMISSION.** See COURTS OF ASSIZE AND NISI PRIUS.

**OPENING AND CLOSING.** After the evidence is all in, the plaintiff has the privilege of the opening and closing or summing up speeches to the jury; in the closing address he should confine himself to a reply to defendant's speech. It seems doubtful whether it is within the discretion of the court to interfere with this established mode of procedure; at least it should only be done with great caution; 36 Mich. 254; 32 Ohio 224; 8 Daly 61; 16 West. Jur. 18; 56 N. Y. 402; 87 Ky. 410. But in some courts it is the practice for the defendant's counsel to open to the jury, followed by the plaintiff's counsel. See Best's Right to Begin and Reply; TRIAL.

**In English Practice.** The address made immediately after the evidence is closed. Such address usually states—*first*, the full extent of the plaintiff's claims, and the circumstances under which they are made, to show that they are just and reasonable; *second*, at least an outline of the evidence by which those claims are to be established; *third*, the legal grounds and authorities in favor of the claim or of the proposed evidence; *fourth*, an anticipation of the expected defence, and statement of the grounds on which it is futile, either in law or justice, and the reasons why it ought to fail. But the court will sometimes restrict counsel from an anticipation of the defence; 3 Chitty, Pr. 881.

**OPENING BIDDINGS.** Ordering a re-sale. When estates are sold under decree of equity to the highest bidder, the court will, on notice of an offer of a sufficient advance on the price obtained, *open the biddings, i. e.* order a re-sale. But this will not generally be done after the confirmation of the certificate of the highest bidder. So, by analogy, a re-sale has been ordered of an estate sold under bankruptcy. Sugd. Vend. 90; 22 Barb. 167; 8 Md. 322; 13 Gratt. 639; 4 Wisc. 242; 31 Miss. 514.

In England, by stat. 30 & 31 Vict. c. 48, s. 7, the opening of biddings is now allowed only in cases of fraud or misconduct in the sale; Wms. R. P. The courts of this country also will not generally open the biddings merely to obtain a higher price, but require irregularity, fraud, or gross inadequacy of price to be shown.

**OPENING A JUDGMENT. In Practice.** An act of the court by which a judgment is so far annulled that it cannot be executed, although it still retains some

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qualities of a judgment: as, for example, its binding operation or lien upon the real estate of the defendant.

The opening of the judgment takes place when some person having an interest makes affidavit to facts which, if true, would render the execution of such judgment inequitable. The judgment is opened so as to be in effect an award of a collateral issue to try the facts alleged in the affidavit; 6 W. & S. 498.

The rule to open judgment and let defendant into a defence is peculiar to Pennsylvania practice, and is a clear example of the system of administering equity under common-law forms. By practice it is confined to judgments by default and those entered on warrants of attorney to confess, etc. It was, however, devised in the absence of a court of chancery, as a substitute for a bill in equity, to enjoin proceedings at law; Mitchell's Motions and Rules; 49 Pa. 365; 8 Phila. 553; 2 Watts 379; 6 W. N. C. 484.

**OPENING OF A POLICY OF INSURANCE.** The question has been made whether, and in what cases, if any, the valuation in a valued policy shall be opened. The valuation, being a part of the agreement of the parties, is not to be set aside as between them in any case. The question is, how shall it be treated where only a part of the subject insured and valued is put at a risk, and also in the settlement of a particular average? and the answer is the same in both cases: viz., when the proportion or rate per centum put at risk or lost is ascertained, the agreed valuation of the whole is to be applied to the part put at risk or the proportion lost, *pro rata*. 2 Phill. Ins. 1203.

**OPERA.** See COPYRIGHT.

**OPERARI.** Such tenants under feudal tenures, as held some portion of land by the duty of performing bodily labor and servile works for their lord.

**OPERATING EXPENSES.** They are, broadly speaking, those which it is reasonably necessary to incur for the purpose of keeping up a railroad (to which the term is commonly applied) as a going concern, or, as it is sometimes expressed, those which conduce to the conservation of the property. Short, Railw. Bonds § 653.

The term, when used in a reorganization plan, does not include money spent on steel rail betterments, or on steamers owned by the company to make them more efficient, or on the purchase of freight engines and coal cars; 34 Fed. Rep. 582. Under a Massachusetts statute, it was held that damage to property at a railroad crossing must be considered as operating expenses; 124 Mass. 154. See 138 Mass. 122; 124 Mass. 527. Judgments against a receiver for damages to persons by negligence are a part of the operating expenses; 73 Fed. Rep. 112. All outlays made by a receiver in the ordinary course, with a view to advance and promote the business of the road and render it profitable and successful, are fairly within the receiver's discretion; this will include not only keeping the road and rolling stock in repair, but also providing such additional accommodations, stock, and instrumentalities as the necessities of the business may require; 1 Woods 331. The court will authorize the purchase of new rails; 62 Fed. Rep. 771; and the payment of reasonable office rent; 1 Woods 331; and the payment of interest on money which a receiver has been obliged to borrow; *id.;* and of traffic balances on connecting roads; 64 Ala. 603; and rebates on freight; 1 Woods 331.

Damages paid to the owners of goods lost in transportation and for injury to property during a receivership will be allowed in the receiver's account of earnings; 93 U. S. 352; such claims stand upon the same footing as the other expenses of administration; Short, Railw. Bonds § 669; 62 Miss. 271; 80 N. Y. 458.

Earnings diverted to the payment of interest on receiver's certificates made payable out of the *corpus*, or to the costs or allowances in the foreclosure suit or any other matter not properly operating expenses, must be returned to the current earnings fund; 25 Fed. Rep. 232. See MORTGAGE; REORGANIZATION.

**OPERATION OF LAW.** The obligation of law; 1 Cra. C. C. 19; its practical working and effect. 5 Ia. 496. A term applied to indicate the manner in which a party acquires rights without any act of his own: as, the right to an estate of one who dies intestate is cast upon the heir at law, by operation of law; when a lessee for life enfeoffs him in reversion, or when the lessee and lessor join in a feoffment, or when a lessee for life or years accepts a new lease or demise from the lessor, there is a surrender of the first lease by operation of law; 5 B. & C. 269; 9 *id.* 298; 2 B. & Ad. 119; 5 Taunt. 518. See DESCENT; PURCHASE.

**OPERATIVE.** A workman; one employed to perform labor for another. See 1 Pa. L. J. 368; 3 C. Rob. 237; 2 Cra. 240, 270. See FACTORY ACTS; MASTER AND SERVANT.

**OPERATIVE PART.** That part of a conveyance, lease, mortgage or other instrument, which carries out its main object.

**OPERATIVE WORDS.** In a deed, or lease, the words which effect the transaction of which the instrument is the evidence; the terms generally used in a lease are "demise and lease," but any words clearly indicating an intention of making a present demise will suffice; Fawcett, L. & T. 74; Wms. R. P. 196; Bacon, Abr. (K) 161; see Martindale, Conv. 273.

**OPINION. In Evidence.** An inference or conclusion drawn by a witness as distinguished from facts known to him as facts.

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It is the province of the jury to draw inferences and conclusions; and if witnesses were in general allowed to testify what they judge as well as what they know, the verdict would sometimes prove not the decision of the jury, but that of the witnesses. Hence the rule that, in general, the witness cannot be asked his opinion upon a particular question; Tayl. Ev. 1206; 29 N. H. 94; 16 Ill. 513; 18 Ga. 194, 573; 7 Wend. 560; 2 N. Y. 514; 17 *id.* 340. But while it is incompetent for a witness to state his opinion upon a question of law, where the intent with which an act done by him is drawn in question he may testify as to such intent; 12 Reptr. 664.

Some confusion in the application of this rule arises from the delicacy of the line which divides that which is to be regarded as matter of observation from that which is matter of judgment founded upon observation. Thus, it is held that an unprofessional witness may testify to the fact that a person whom he saw was intoxicated, whether he is able to state all the constituent facts which amount to drunkenness or not; 14 N. Y. 562; 26 Ala. N. S. 26; 53 Minn. 532; he may also testify as to the apparent condition of a party as to sobriety, shortly before the commission of an offence; 73 Cal. 7. He is also competent to testify whether a person with whom he is familiarly associated is in good or bad health and hearing, is lame or has the natural use of his limbs, and also whether on certain occasions he was unconscious; 143 Ill. 480; also whether a certain person has African blood in his veins; 113 N. C. 9. But, on the other hand, insanity or mental incapacity cannot, in general, be proved by the mere assertion of an unprofessional witness; 17 N. Y. 340; 7 Barb. 314; 13 Tex. 568. And see 25 Ala. N. S. 21; 117 Ind. 277; but the opinion of non-expert witnesses may be given as to mental capacity where the facts upon which the opinions are based are disclosed; 116 Ind. 278; 126 Ill. 507; 100 N. C. 457; 77 Ga. 724; 7 Mont. 489; 64 N. H. 573; 84 Va. 87; 30 Fla. 170; 36 W. Va. 757.

So handwriting may be proved by being recognized by a witness who has seen other writings of the party in the usual course of business, or who has seen him write; Steph. Ev. § 51; Peake, N. P. 21; 2 Johns. Cas. 211; 19 Johns. 134; 84 Ala. 53. See 85 Va. 146. But, on the other hand, the authorship of an anonymous article in a newspaper cannot be proved by one professing to have a knowledge of the author's style; How. App. Cas. 187.

From necessity, an exception to the rule of excluding opinions is made in questions involving matters of science, art, or trade, where skill and knowledge possessed by a witness, peculiar to the subject, give a value to his opinion above that of any inference which the jury could draw from facts which he might state; 1 Denio 281; 3 Ill. 297; 2 N. H. 480; 2 Story 421. Such a witness is termed an expert; and he may give his opinion in evidence; Whart. Ev. 440. Experts alone can give an opinion based on facts shown by others, assuming them to be true; 100 N. C. 457.

The following reference to some of the matters in which the opinions of expert witnesses have been held admissible will illustrate this principle. The unwritten or common law of foreign countries may be proved by the opinion of witnesses possessing professional knowledge; 1 Cra. 12, 38; 6 Pet. 763; 2 Wash. C. C. 1, 175; 2 Wend. 411; 3 Pick. 293; 4 Conn. 517; 4 Bibb 73; 2 Marsh. 609; 5 Harr. & J. 186; 1 Johns. 385; 14 Mass. 455; 6 Conn. 508; 1 Vt. 336; 15 S. & R. 87; 1 La. 153; 6 Cra. 274; the degree of hazard of property insured against fire; 17 Barb. 111; 4 Zabr. 843; whether a picture is a good likeness or not; 89 Ala. 193; handwriting; 35 Me. 78; 2 R. I. 319; 25 N. H. 87; 1 Jones N. C. 94, 150; 13 B. Monr. 258; mechanical operations, the proper way of conducting a particular manufacture, and the effect of a certain method; 3 N. Y. 322; negligence of a navigator, and its effect in producing a collision; 24 Ala. N. S. 21; sanity; 41 Ala. 700; 12 N. Y. 358; impotency; 3 Phill. Eccl. 14; value of chattels; 22 Ala. N. S. 370; 11 Cush. 257; 22 Barb. 652; value of land; 11 Cush. 201; 9 N. Y. 183; compare 4 Ohio St. 583; value of services; 15 Barb. 550; speed of a railway train; 59 N. Y. 631; benefit to real property by laying out a street adjacent thereto; 2 Gray 107; survey marks identified as being those made by United States surveyors; 24 Ala. N. S. 390; as to the location of surveys; 121 Pa. 182; 71 Mich. 520; seaworthiness; 10 Bingh. 57; and see 9 Cush. 226; whether a person appeared sick or well; 53 N. Y. 603; of the effect of a personal injury; 116 Ind. 446; 56 Fed. Rep. 184; whether fright would produce heart trouble; 128 Ill. 163; whether a child would have been born alive if he had received medical assistance in time; 71 Tex. 507; as to the distance at which it is safe to stop before going upon a crossing; 116 Ind. 60. So an engineer may be called to say what, in his opinion, is the cause of a harbor having been blocked up; 3 Dougl. 158; 1 Phil. Ev. 276; 4 Term 498. Opinion evidence as to the age of a person, from his appearance, is not admissible; 6 Conn. 9; but see 25 Tex. App. 448; 98 Mo. 640; 48 Mo. App. 39; nor is it in cases involving adultery, on the question of guilt or guilty intent; see 18 Ala. 738; nor can an opinion be given as to the meaning of an instrument where the words or phrases are not technical; 79 Ga. 105; 8 Misc. Rep. 253.

It is to be observed, however, that the principle of admitting such opinions is taken with the qualifications necessary to make, as far as possible, the judgment of the jury, and not that of the witness, the final means of determining the issue. Thus opinions of experts are not admissible upon the question of damages; 23 Wend. 425; 60 Vt. 343; 84 Ala. 102; nor whether damages were occasioned by negligence; 76

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Ga. 532; 2 Tex. Civ. App. 210; 91 *id.* 422; 77 Hun 360; and experts are always confined to opinions within the scope of their professions, and are not allowed to give opinions on things of which the jury can as well judge; 4 Wend. 320; 14 Me. 398; 3 Dana 382; 1 Pa. 161; 2 Halst. 244; 7 Vt. 161; 6 Rand. 704; 9 Conn. 102; 3 N. H. 349; 5 Harr. & J. 438. A distinction is also to be observed between a feeble impression and a mere opinion or belief; 3 Ohio St. 406; 19 Wend. 477. See Mr. Lawson's article, in 25 Alb. L. J. 367. The testimony of experts is not admissible upon matters of judgment within the knowledge and experience of ordinary jurymen; 100 N. C. 310. See 37 W. Va. 524. The opinions of a witness are not admissible as to one's agency; 51 Minn. 141.

Upon an issue, in a suit upon a life policy, as to the insanity of the insured at the time he took his own life, the opinion of a non-professional witness as to his mental condition, in connection with a statement of the facts and circumstances, within his personal knowledge, upon which that opinion is based, is competent evidence; 111 U. S. 613.

Opinion evidence is not admissible as to whether the mode of coupling cars was careless and not the best way of performing the act; 39 Fed. Rep. 487. There are cases where the opinion of witnesses may be asked as to distance and other circumstances, but such questions are not permissible when it is practicable to draw out with exactness the data upon which a judgment must be founded; 109 Mass. 499. It must be left somewhat to the trial court; 58 Fed. Rep. 948. Whether a particular position on a wharf is a safe place for a wharfinger to stand while a steamboat is approaching is not matter for expert testimony; 139 U. S. 551.

**In Practice.** The statement of reasons delivered by a judge or court for giving the judgment which is pronounced upon a case. The judgment itself is sometimes called an opinion; and sometimes the opinion is spoken of as the judgment of the court.

A declaration, usually in writing, made by a counsel to the client of what the law is, according to his judgment, on a statement of facts admitted to him.

An opinion is in both the above cases a decision of what principles of law are to be applied in the particular case, with the difference that judicial opinions pronounced by the court are law and of authority, while the opinions of counsel, however eminent, are merely advice to his client or argument to the court.

Where there are several judges, and they do not all agree in the disposition of the cause, the opinion of the majority is termed the opinion of the court. The opinion of the minority is termed the dissenting opinion. The opinions of the courts, collected and provided with such preliminary statements of facts and of the arguments of counsel as may be necessary in each case to an understanding of the decision, make up the books of reports.

Opinions are said to be judicial or extra-judicial. A judicial opinion is one which is given on a question which is actually involved in the matter brought before the judge for his decision; an extra-judicial opinion is one which, although given by a judge in deciding a case, is not necessary to the judgment; Vaugh. 382; 1 Hale, Hist. 141; and, whether given in or out of court, is no more than the *prolatum* of him who gives it, and has no legal efficacy; 4 Pa. 28. Where a point is essential to the decision rendered, it will be presumed that it was duly considered, and that all that could be urged for or against it was presented to the court. But if it appears from the report of the case that such point was not taken or inquired into at all, there is no ground for this presumption, and the authority of the case is proportionably weakened; 8 Abb. Pr. 316.

Where two or more points are discussed in the opinions delivered on the decision of a cause, and the determination of either point in the manner indicated in such opinions would authorize the judgment pronounced by the court, the judges concurring in the judgment must be presumed to have concurred in such opinions upon all the points so discussed, unless some dissent is expressed or the circumstances necessarily lead to a different conclusion; 6 N. Y. 9. Where a judgment is reversed upon a part only of the grounds on which it went, it is still deemed an authority as to the other grounds not questioned. See 5 Johns. 125.

The opinion of the court assigning reasons for its conclusions cannot be treated as a special finding; 139 U. S. 222.

Counsel should, in giving an opinion, as far as practicable, give, *first*, a direct and positive opinion, meeting the point and effect of the question, and, if the question proposed is properly divisible into several, treating it accordingly. *Second*, his reasons, succinctly stated, in support of such opinion. *Third*, a reference to the statutes or decisions on the subject. *Fourth*, when the facts are susceptible of a material difference in statement, a suggestion of the probability of such variation. When an opinion is sought as a guide in respect to maintaining an action or defence, some other matters should be noticed:—as, *Fifth*, any necessary precautionary suggestions in reference to the possibility of a fatal defect in the evidence, arising from the nature of the case. Thus, where some important fact is stated as resting principally on the statement of the party interested, if by the law of the place such party is incompetent to testify respecting it, a suggestion ought to be made to inquire how that fact is to be proved. *Sixth*, a suggestion of the proper mode of proceeding, or the process or pleadings to be adopted.

In English and American law, the opinions of counsel, however eminent, are not

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entitled to any weight with the court, as *evidence* of the law. While the court will deem it their duty to receive such opinions as arguments, and as such entitled to whatever weight they may have, they will not yield to them any authority; 4 Pa. 28, per Gibson, C. J. In many cases, where a client acts in good faith under the advice of counsel, he may on that ground be protected from a liability which the law might otherwise have imposed upon him.

Expressions of opinion which are not statements of fact do not constitute fraud; 125 U. S. 247.

The attorney-general of the United States gives to the president his opinion and advice upon questions of law whenever required; and upon the request of the head of any of the executive departments of the government, he is required to give his opinion on questions of law arising in the administration of the department; R. S. §§ 354, 356. See JUDGE; EXPERT; OPINION OF JUDGES; PRECEDENT; LEGISLATIVE POWER.

**OPINION OF JUDGES.** Occasionally English judges have given opinions on legal matters to the crown, but the last instance appears to be in 1760. See 126 Mass. 562. The practice still obtains in the house of lords. See McNaghten's Case, 10 C. & F. 200. The federal judiciary can be called upon only to decide controversies brought before them in legal form. In Colorado, Florida, Maine, Massachusetts, New Hampshire, Rhode Island, and South Dakota, the constitution requires the supreme court to give opinions, at the request of the governor or legislature, or sometimes both. In Vermont the same practice obtains by statute, and in Nebraska without either constitutional or statutory sanction; 6 A. & E. Encyc. 1068. In Idaho, the constitution requires the supreme court judges to report annually to the governor as to defects and omissions in existing laws.

It has been held that the courts are the judges of whether the questions presented to them for their opinion fall within the scope of the law, and, generally, whether the exigency requires them to act. The court usually require that the questions shall be matters of public law and not those involving merely private rights; see Thayer on Advisory Opinions; Story, Const.; 6 A. & E. Encyc. 1065, where much law on the subject is collected. See LEGISLATIVE POWER.

**OPPOSITE.** Over against, standing in front or facing. 58 Me. 360. See 15 Atl. Rep. (Pa.) 706; 23 L. J. Ch. 45.

**OPPOSITION. In Practice.** The act of a creditor who declares his dissent to a debtor's being discharged under the insolvent laws. 14 Bankr. Reg. 449.

**OPPRESSION.** An act of cruelty, severity, unlawful exaction, domination, or excessive use of authority. 14 Fed. Rep. 597.

**OPPRESSOR.** One who having public authority uses it unlawfully to tyrannize over another: as, if he keep him in prison until he shall do something which he is not lawfully bound to do. To charge a magistrate with being an oppressor is actionable; 1 Stark. Sl. 185.

**OPPROBRIUM. In Civil Law.** Ignominy; shame; infamy.

**OPTION.** Choice; election. See those titles.

**In Contracts.** A contract by which A, in consideration of the payment of a certain sum to B, acquires the privilege of buying from or selling to B, specified securities or property at a fixed price within a certain time. 71 N. Y. 420; 83 *id.* 93.

Where notes are given to cover losses on deals in options in grain, a part of which is to be delivered, the illegality of a part taints the whole, the consideration being entire; 40 Ill. App. 155. See 40 *id.* 307; 49 Ohio St. 240; 75 Hun 174; [1892] 2 Q. B. 484; 54 Mo. App. 606. The sale of commodities to be delivered at a future day is not *per se* unlawful where the parties intend in good faith to comply with the terms of the contract; 47 Minn. 228; 64 Hun 636; 87 Neb. 766. See WAGER; CONTRACTS.

These options are of three kinds, viz.: "calls," "puts," and "straddles," or "spread eagles." A call gives A the option of calling or buying from B or not certain securities. A put gives A the option of selling or delivering to B or not. A straddle is a combination of a put and a call, and secures to A the right to buy of, or sell to, B or not. Where neither party, at the time of making the contract, intends to deliver or accept the shares, but merely to pay differences according to the rise or fall of the market, the contract is void either by virtue of statute or as contrary to public policy; 11 C. B. 538. In each transaction the law looks primarily at the intention of the parties; and the form of the transaction is not conclusive; 11 Hun 471; 71 N. Y. 420; 5 M. & W. 466; 89 Pa. 250; 10 W. N. C. 112. Option contracts are not *prima facie* gambling contracts; 11 Hun 471; 71 N. Y. 420. But see 78 Ill. 43; 83 *id.* 33. See in general Dos Passos, Stock-Brokers.

**OPTIONAL WRIT.** An original writ in the alternative, commanding either to do a thing or show cause why it has not been done. 3 Bla. Com. 274; Finch, Law 257.

**OPUS LOCATUM** (Lat.). **In Civil Law.** A work (*i. e.* the result of work) let to another to be used. A work (*i. e.* something to be completed by work) hired to be done by another. Vicat, Voc. Jur. *Opus*, *Locare*; L. 51, § 1, D. *Locat.*; L. 1, § 1, D. *ad leg. Rhod.*

**OPUS MAGNIFICIUM or MANIFICIUM** (from Lat. *opus*, work, *manus*, hand). Manual labor. Fleta, l. 2, c. 48, § 3.

**OR.** A disjunctive particle.

As a particle, *or* is often construed *and*,

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and *and* construed *or*, to further the intent of the parties, in legacies, devises, deeds, bonds, and writings; 3 Gill 492; 7 *id.* 197; 1 Call. 212; 2 Rop. Leg. 1400, 1405; 3 Greenl. Ev. §§ 18, 25; 1 Jarm. Wills, c. 17, 427, 2d ed.; 1 Wills. Exrs. 932; 5 Co. 112 *a*; Cro. Jac. 322; 4 Zabr. 686; 3 Term 470; 27 N. J. Eq. 305; 98 U. S. 143; 30 Ohio St. 407; 33 Minn. 419; but its more natural meaning, when used as a connective, is to mark an alternative and present a choice, implying an election to do one of two things; 60 Conn. 32. It sometimes has the same effect as the word "nor"; 64 Hun 635; 65 *id.* 145.

Where an indictment is in the alternative, as forged or caused to be forged, it is bad for uncertainty; 2 Stra. 900; 1 Y. & J. 22. But a description of a horse as of a brown or bay color, in an indictment for larceny of such horse, is good; 13 Vt. 687; and so an indictment describing a nuisance as in the highway or road; 1 Dall. 150. See 38 Vt. 583; 24 Conn. 286; 13 Ark. 397. So, "break or enter," in a statute defining burglary, means "break and enter"; 82 Pa. 306, 326; 105 Mass. 185.

When the word *or* in a statute is used in the sense of *to wit*, that is, in explanation of what precedes, and making it signify the same thing, a complaint or indictment which adopts the words of the statute is well framed. Thus, it was held that an indictment was sufficient which alleged that the defendant had in his custody and possession ten counterfeit bank-bills *or* promissory notes, payable to the bearer thereof, and purporting to be signed in behalf of the president and directors of the Union Bank, knowing them to be counterfeit, and with intent to utter and pass them, and thereby to injure and defraud the said president and directors; it being manifest from the statute on which the indictment was framed, that promissory note was used merely as explanatory of bank-bill, and meant the same thing; 8 Mass. 59; 2 Gray 502.

In general, see Cro. Eliz. 832; 2 Sandf. 369; 1 Jones N. C. 309; 3 Term 470; 1 Bingh. 500; 2 Dr. & War. 471; Whart. Cr. Pl. & Pr., 9th ed. §§ 161, 251.

**ORACULUM** (Lat.). **In Civil Law.** The name of a kind of decision given by the Roman emperors.

**ORAL.** Spoken, in contradistinction to written: as, oral evidence, which is evidence delivered verbally by a witness. Steph. Ev. 135. Formerly pleadings were put in *viva voce*, or orally; Kerr's Act. Law. When a pleading sets up a contract, and does not allege that it was in writing, it will be taken to have been oral; 84 Ind. 583.

**ORANDO PRO REGE ET REGNO.** An ancient writ which issued, while there was no regular collect for a sitting parliament, to pray for the peace and good government of the realm.

**ORATOR. In Chancery Practice.** The party who files a bill. *Oratrix*, is used of a female plaintiff. These words are disused in England, the customary phrases now being plaintiff and petitioner. Brown.

**In Roman Law.** An advocate. Code 1. 3. 33. 1.

**ORCINUS LIBERTUS. In Roman Law.** A freedman who obtained his liberty by the direct operation of the will or testament of his deceased master was so called, being the freedman of the deceased (*orcinus*), not of the *hæres*.

**ORDAIN.** To make an ordinance, to enact a law.

The preamble to the constitution of the United States declares that the people "do ordain and establish this constitution for the United States of America." The third article of the same constitution declares that "the judicial power shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish." See 1 Wheat. 304, 324; 4 *id.* 316, 402.

To confer on a person the holy orders of priest or deacon. 4 Conn. 134.

**ORDEAL.** An ancient superstitious mode of trial.

When in a criminal case the accused was arraigned, he might select the mode of trial either by God and his country, that is, by jury, or by God only, that is, by ordeal.

The trial by ordeal was either by fire or by water. Those who were tried by the former passed barefooted and blindfolded over nine hot glowing ploughshares, or were to carry burning irons in their hands, and accordingly as they escaped or not they were acquitted or condemned. The water ordeal was performed either in hot or cold water. In cold water, the parties suspected were adjudged innocent if their bodies were not borne up by the water contrary to the course of nature; and if after putting their bare arms or legs into scalding water they came out unhurt, they were taken to be innocent of the crime.

It was supposed that God would, by the mere contrivance of man, exercise his power in favor of the innocent. 4 Bla. Com. 342; 2 Am. Jur. 280. See 110 U. S. 529. For a detailed account of the trial by ordeal, see Herbert, Antiq. of the Inns of Court 146.

**ORDEFFE or ORDELFE.** A liberty whereby a man claims the ore found in his own land; also, the ore lying under land. Cowel.

**ORDELS.** The right of administering oaths and adjudging trials by ordeal within a precinct or liberty. Cowell.

**ORDENAMIENTO. In Spanish Law.** An order from the sovereign and differing from a *cedula* in form and in the mode of its promulgation. Schm. Civ. L. Introd. 93, n.

**ORDER.** Command; direction.

An informal bill of exchange or letter of

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request requiring the party to whom it is addressed to deliver property of the person making the order to some one therein described.

A designation of the person to whom a bill of exchange or negotiable promissory note is to be paid. See 14 Conn. 445; 48 N. H. 45; 39 N. Y. 98. This order, in the case of negotiable paper, is usually by indorsement, and may be either express, as, "Pay to C D," or implied merely, as by writing A B [the payee's name].

See INDORSEMENT; STORE ORDERS.

**In French Law.** The act by which the rank of preferences of claim, among creditors who have liens over the price which arises out of the sale of an immovable subject, is ascertained. Dalloz, Dict.

**In the Practice of Courts.** An order is any direction of a court or judge made or entered in writing, and not included in a judgment. N. Y. Code of Proc. § 400; 51 Ia. 127. But a decree is often called an order. See DECREE. For distinction between order and requisition, see 19 Johns. 7.

**In Governmental Law.** By this expression is understood the several bodies which compose the state. In ancient Rome, for example, there were three distinct orders: namely, that of the senators, that of the patricians, and that of the plebeians.

In the United States there are no orders of men; all men are equal in the eye of the law. See RANK.

**ORDER IN COUNCIL.** An order by the sovereign with the advice of the privy council. See PRIVY COUNCIL.

**ORDER OF DISCHARGE.** In England, an order made under the Bankruptcy Act of 1869, by a court of bankruptcy, the effect of which is to discharge a bankrupt from all debts, claims, or demands provable under the bankruptcy. Robson, Bkcy.; Whart. Lex.

**ORDER OF FILIATION.** The name of a judgment rendered by two justices, having jurisdiction in such case, in which a man therein named is adjudged to be the putative father of a bastard child, and it is further adjudged that he pay a certain sum for its support.

The order must bear upon its face—*first*, that it was made upon the complaint of the township, parish, or other place where the child was born and is chargeable; *second*, that it was made by justices of the peace having jurisdiction; 1 Salk. 122, pl. 6; 2 Ld. Raym. 1197; *third*, the birthplace of the child; *fourth*, the examination of the putative father and of the mother, but it is said the presence of the putative father is not requisite if he has been summoned; Cald. 308; *fifth*, the judgment that the defendant is the putative father of the child; Sid. 363; Style 154; Dougl. 662; *sixth*, that he shall maintain the child as long as he shall be chargeable to the township, parish, or other place, which must be named; 1 Salk. 121, pl. 2; but the order may be that the father shall pay a certain sum weekly as long as the child is chargeable to the public; Ventr. 210; *seventh*, it must be dated, signed, and sealed by the justices. Such order cannot be vacated by two other justices; 15 Johns. 208. See 4 Cow. 253; 2 Blackf. 42.

**ORDER OF REVIVOR. In English Practice.** An order as of course for the continuance of an abated suit. It superseded the bill of revivor. See 15 & 16 Vict. c. 86, s. 52. Whart. Lex.

**ORDER NISI.** A conditional order, which is to be confirmed *unless* something be done, which has been required, by a time specified. Eden, Inj. 122.

**ORDERS.** Rules made by a court or other competent jurisdiction. The formula is generally in these words: *It is ordered*, etc.

The instructions given by the owner to the captain or commander of a ship, which he is to follow in the course of the voyage.

**ORDERS OF THE DAY.** Matters which the house of commons may have agreed beforehand to consider on any particular day, are called the "orders of the day," as opposed to original motions. May's Parl. Prac. Orders of the day are also known to the parliamentary practice of this country; Cush. Pr. Leg. Assemblies 1512.

**ORDINANCE.** A law; a statute; a decree.

Municipal ordinances are laws passed by the governing body of a municipal corporation for the regulation of the affairs of the corporation. The term *ordinance* is now the usual denomination of such acts, although in England and in some states, the technically more correct term *by-law* is in common and approved use. The main feature of such enactments is that they are local, as distinguished from the general applicability of the state laws; hence, the word *law*, with the prefix *by*, should in strictness be preferred to the word *ordinance;* Horr. & Bemis, Mun. Pol. Ord. 1. See 117 Ind. 221; BY-LAWS.

They are not, in a constitutional sense, public laws, but mere local rules or by-laws, police or domestic regulations, devoid in many respects of the characteristics of public or general laws; 17 Colo. 302.

This word is more usually applied to the laws of a corporation than to the acts of the legislature. The following account of the difference between a statute and an ordinance is from Bacon's Abridgment, *Statute* (A). "Where the proceeding consisted only of a petition from parliament and an answer from the king, these were entered on the *parliament roll;* and if the matter was of a public nature, the whole was then styled an *ordinance:* if, however, the petition and answer were not only of a public but a novel nature, they were then formed into an *act* by the king, with the aid of his council and judges, and entered on the

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*statute roll.*" See Co. Litt. 159 *b*, Butler's note; 3 Reeve, Hist. Eng. Law 146.

According to Lord Coke, the difference between a statute and an ordinance is that the latter has not had the assent of the king, lords, and commons, but is made merely by two of these powers. Co. 4th Inst. 25. See Barrington, Stat. 41, note (x).

A *resolution* of a council is but another name for an *ordinance*, and if it is a legislative act it is immaterial whether it is called a resolution or an ordinance, so long as the requirements essential to the validity of an ordinance be observed; 99 Pa. 330; but if the action is merely declaratory of the will of the corporation, it is proper to act by *resolution*, which is more in the nature of a ministerial act; 19 U. S. App. 622.

A municipal ordinance not passed under legislative authority, is not a law of the state within the meaning of the constitutional prohibition against state laws impairing the obligation of contracts; 146 U. S. 258.

Equity will not restrain a city council from passing an ordinance allowing a gas company to lay pipes in its streets, although it has granted the exclusive privilege to do so to another company; 87 Ala. 245. See 92 Ky. 95. An illegal ordinance may be enjoined before passage; 92 Ky. 95; or the enforcement of an invalid ordinance; 132 Ind. 575; but not an ordinance restraining a certain act, unless it be a nuisance *per se*; 7 Mont. 173.

While it is not *per se* negligence for a railroad company to run its cars at a higher rate of speed than the limit specified in a city ordinance, yet the fact that it did so in the particular case may be taken into consideration by the jury, with other evidence, in ascertaining whether or not the defendant was negligent; 165 Pa. 118. In 34 Minn 29, it was held that running a railroad train at a speed exceeding the limit fixed by ordinance was evidence of negligence which should go to the jury. That it is negligence *per se* is held in 96 Mo. 509; 84 Ala. 141; 178 Ill. 197. (Also where the rate of speed is fixed by statute; 34 Ia. 276.) An ordinance as to the right of way between two street cars is not conclusive of the question of negligence; it is merely evidence of negligence on the part of the driver of a car whose duty under it was to give way; 173 Pa. 602.

An ordinance requiring an opening in a street to be guarded is admissible in evidence in an action against a city for injuries sustained by falling into such opening; 150 Pa. 611.

An ordinance which has the effect of denying to the owner of property the right to conduct a lawful business thereon is invalid, unless the business is of such a noxious or offensive character that the health, safety, or comfort of the community require its exclusion from the neighborhood; 98 Cal. 73; this does not extend to an asylum for the treatment of mild forms of insanity; *id.*; or to a laundry; 82 Fed. Rep. 623.

The burden of proving the unreasonableness of an ordinance is upon him who denies its validity; 58 N. J. L. 132; 19 L. R. A. 632.

A copy of an ordinance having the seal of the city attached is admissible in evidence without further proof; 113 Mo. 395.

See MUNICIPAL CORPORATIONS; NUISANCE; POLICE POWERS.

**ORDINANCE OF 1647.** A law passed by the Colony of Massachusetts, still in force, in a modified form, whereby the state owns the great ponds within its confines, which are held in trust for public uses. 147 Mass. 548. See LAKE.

**ORDINANCE OF 1648.** A law of England relating to admiralty jurisdiction. See Bened. Adm. § 99. It expired in 1660.

**ORDINANCE OF 1681.** An ordinance of France relating to maritime affairs. See Bened. Adm. § 173.

**ORDINANCE OF 1787.** A statute for the government of the Northwest Territory. See OHIO.

It has no force in Illinois except as incorporated in its statutes; 168 Ill. 179.

**ORDINANCES OF EDWARD I.** Two laws and ordinances published by Edward I. in the second year of his reign, at Hastings, relating to admiralty jurisdiction. These are said to have been the foundation of a consistent usage for a long time. See Bened. Adm. § 55.

**ORDINARY. In Ecclesiastical Law.** An officer who has original jurisdiction in his own right, and not by deputation.

In England, the ordinary is an officer who has immediate jurisdiction in ecclesiastical causes. Co. Litt. 344. A bishop is an ordinary, and archbishops are the ordinaries of the whole province. Also an archdeacon; and an officer of the royal household.

In the United States, the ordinary possesses, in those states where such officer exists, powers identical with those usually vested in the courts of probate. In South Carolina, the ordinary was a judicial officer; 1 Const. S. C. 267; 2 *id.* 384; but the office no longer exists in South Carolina, where they have now a probate court. Georgia retains courts of ordinary. See COURTS OF ORDINARY.

**ORDINARY CARE.** That degree of care which men of ordinary prudence exercise in taking care of their own persons or property. Story, Bailm. 11; 95 Cal. 279; 143 Ill. 127; 108 Mo. 387; 3 S. Dak. 93; 49 Kan. 260. It can only be determined by the circumstances of each particular case whether ordinary care was used. This degree of care is said to be required of bailees for the mutual benefit of bailor and bailee; 8 Metc. 91; 16 Ark. 308; 23 Conn. 437, 443; 40 Me. 64; 26 Ala. N. S. 203; 36 E. L. & E. 506. See 4 Misc. Rep. 104; 156 Pa. 353; BAILEE; NEGLIGENCE; CARE.

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**ORDINARY NEGLIGENCE.** The want of such care and diligence as reasonably prudent men, generally, in regard to the subject-matter of inquiry, would use to prevent or avoid an injury. 49 Kan. 460. See GROSS NEGLIGENCE.

**ORDINARY SKILL.** Such skill as a person conversant with the matter undertaken might be reasonably supposed to have. 11 M. & W. 113; 20 Mart. La. 68, 75; 8 B. Monr. 515; 13 Johns. 211; 7 C. & P. 289; 16 S. & R. 368; 15 Mass. 316; 108 N. C. 187. See Cooley, Torts 777; NEGLIGENCE.

One who undertakes to act in a professional or other clearly defined capacity is bound to exercise the skill appropriate to such capacity; Webb, Poll. Torts 26; though the undertaking be gratuitous; 20 Pa. 136; 31 N. H. 119.

**ORDINATION.** The act of conferring the orders of the church upon an individual. See ORDAIN.

**ORDINATIONE CONTRA SERVIENTES.** A writ that lay against a servant for leaving his master contrary to the ordinance of 23 & 24 Edw. III.

**ORDINIS BENEFICIUM.** See BENEFICIUM ORDINIS.

**ORDINUM FUGITIVI.** Those of the religious who deserted their houses, and, throwing off the habits, renounced their particular order in contempt of their oath and other obligations. Par. Antiq. 388.

**ORDNANCE DEBENTURES.** Bills which were issued by the Board of Ordnance on the treasurer of that office for the payment of stores, etc.

**ORDNANCE OFFICE, or BOARD OF ORDNANCE.** An office which was kept within the Tower of London, and which superintended and disposed of all the arms, instruments, and utensils of war, both by sea and land, in all the magazines, garrisons, and forts of Great Britain. It is divided into two distinct branches, the civil and the military. 4 & 5 Wm. IV. c. 24. But by 18 & 19 Vict. c. 117, the powers, duties, etc., of the board were transferred to the secretary of state for war. Wharton.

**ORDO JUDICIORUM.** The order of judgment: the rule by which the due course of hearing each cause was prescribed. 4 Reeves, Hist. Eng. L. 17.

**ORDONNANCE DE LA MARINE.** See CODE.

**ORE LEAVE.** A right to dig and take ore from land. 84 Pa. 340.

**ORE TENUS** (Lat.). Verbally; orally. Formerly the pleadings of the parties were *ore tenus;* and the practice is said to have been retained till the reign of Edward III. 3 Reeve, Hist. Eng. Law 95; Steph. Pl., Andr. ed. § 59. And see Bracton 372 *b.* In chancery practice, a defendant may demur at the bar *ore tenus;* 3 P. Wms. 370; if he has not sustained the demurrer on the record; 1 Swanst. 288; Mitf. Pl., Tyler's ed. 310; 6 Ves. 779; 8 *id.* 405; 17 *id.* 215.

**OREGON.** One of the Pacific coast states of the American Union, and the thirty-third state admitted therein.

The territory called Oregon from the early name of its principal river—now called the Columbia—originally included all the country on the Pacific coast west of the Rocky mountains, and north of the 42d and south of the 49th parallel of north latitude. From 1818 to 1846, this country was subject to the joint occupancy of the subjects and citizens of Great Britain and the United States, under a disputed claim of title, which was settled by the treaty of June 15, of the latter year, in favor of the United States.

As early as 1841 the American and British occupants west of the Cascade mountains commenced to organize a government for their protection. These efforts resulted in the establishment of the "Provisional Government of Oregon" by a popular vote on July 5, 1845, consisting of an executive, legislative (one house), and judicial department, the officers of which were chosen and supported by the voluntary action of the citizens and subjects of both nations. On March 3, 1849, this government was superseded by the territorial government provided by congress in the act of August 14, 1848. On September 27, 1850, congress passed the "donation act," giving the settlers the land held by them under the provisional government—640 acres to a married man and his wife, and 320 to a single man.

In 1857 a state constitution was formed and ratified by the people, under which a portion of the territory was admitted into the Union on February 14, 1859, on an equal footing with the other states.

THE LEGISLATIVE POWER.—The legislative authority is vested in a *legislative assembly*, consisting of a Senate and House of Representatives.

The *Senate* is to consist of sixteen members, which number may be increased to thirty, elected for the term of four years by the electors of the districts into which the state is divided for the purpose. The senate is divided into two classes, so that one-half the number may be changed every two years.

The *House of Representatives* is to consist of thirty-four members, which number may be increased to sixty, chosen by the electors from the respective districts into which the state is divided for the purpose, for the term of two years.

Senators and representatives must be twenty-one years old, citizens of the United States, and for a year at least preceding the election inhabitants of the county or district from which they were chosen. Sessions of the assembly are holden every second year.

THE EXECUTIVE POWER.—The *Governor* is elected for the term of four years, by the qualified electors, at the time and places of choosing members of the assembly.

THE JUDICIAL POWER.—The judicial power of the state is vested in a supreme court, circuit and county courts, and justices of the peace; and municipal courts may be created to administer the regulations of incorporated towns.

The *Supreme Court* originally consisted of four justices, which number was increased to five, chosen in districts, within which they held the circuit courts. But in 1878 the legislative assembly, in pursuance of § 10 of art. vii. of the constitution, provided for the election of justices of the supreme and circuit courts in separate classes; and now the supreme court is held by three justices elected by the electors of the whole state. A judge of the supreme court is elected for six years, and in addition to the usual oath of office is required to swear that he will not accept any other office, except a judicial one, during the term for which he is elected. The court has jurisdiction only to revise the decisions of the circuit court. It holds two terms a year, at the seat of government, and the judges are required to file with the secretary of state concise written statements of their decisions.

The *Circuit Courts* have all jurisdiction not vested in any other court, including appellate jurisdiction and supervisory control of all inferior tribunals

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and officers. There are eight circuit judges who are elected by the electors of the districts in which they hold court, for the term of six years. There are but seven judicial circuits; in the fourth circuit, however, there are two judges. Their qualifications are the same as the judges of the supreme court, including the oath not to accept a political office.

*County Courts* are held in each county, by a judge elected for the term of four years. They have jurisdiction pertaining to courts of probate and county commissioners, and may have, by act of assembly, civil jurisdiction to the extent of five hundred dollars, and "criminal jurisdiction not extending to death or imprisonment in the penitentiary." The civil jurisdiction has been conferred but no criminal jurisdiction.

*Justices Courts* have concurrent jurisdiction with the circuit and county courts of civil actions, where the sum in controversy does not exceed $250, except only actions in which the title to real property shall come in question, and actions for false imprisonment, libel, slander, malicious prosecution, crim. con., seduction, or promise to marry. They have also certain criminal jurisdiction.

**ORFGILD** (Sax. *orf*, cattle, *gild*, payment. Also called *cheapgild*). A payment for cattle, or the restoring them. Cowel.

A restitution made by the hundred or county of any wrong done by one that was in pledge. Lambard, Archaion 125, 126.

A penalty for taking away cattle. Blount.

**ORGANIC LAW.** The fundamental law or constitution of a state or nation. See LAW.

**ORIGINAL.** An authentic instrument which is to serve as a model or example to be copied or imitated.

Originals are single or duplicate: single when there is but one; duplicate, when there are two. In the case of printed documents, all the impressions are *originals*, or in the nature of *duplicate originals*, and any copy will be primary evidence; 2 Stark. 130. But see 14 S. & R. 200. See TELEGRAPH; PHOTOGRAPH; PRESS COPY.

When an original document is not evidence at common law, and a copy of such original is made evidence by an act of the legislature, the original is not therefore made admissible evidence by implication; 2 Campb. 121, n.

Not deriving authority from any other source: as, original jurisdiction, original writ, original bill, and the like.

**ORIGINAL BILL. In Chancery Practice.** A bill relating to a matter not before brought before the court by the same parties, standing in the same interests. Mitf. Eq. Pl. 33.

Proceedings in a court of chancery are either commenced by way of information, when the matter concerns the state or those under its protection, or by original petition or bill when the matter does not concern the state or those under its protection. The original bill states simply the cause of complaint, and asks for relief. It is composed of nine parts; Story, Eq. Pl. 7; and is the foundation of all subsequent proceedings before the court. See 1 Dan. Ch. Pr., 6th Am. ed. *314; BILL.

**ORIGINAL CHARTER. In Scotch Law.** That one by which the first grant of land is made. Bell, Dict.

**ORIGINAL CONSTRUCTION.** This term, as distinguished from repairs, has a technical meaning in relation to railroads, and is that construction of bridges, etc., that is necessary to be done before the railroad can be opened, not such structures as are intended to replace worn-out counterparts. 86 Fed. Rep. 73.

**ORIGINAL CONVEYANCES** (sometimes called primary conveyances). Those conveyances by means whereof the benefit or estate is created or first arises: viz. feoffment, gift, grant, lease, exchange, partition. 2 Bla. Com. 309; 1 Steph. Com., 11th ed. 464.

**ORIGINAL ENTRY.** The first entry made by a merchant, tradesman, or other person in his account-books, charging another with merchandise, materials, work, or labor, or cash, on a contract made between them.

Such an entry, to be admissible as evidence, must be made in a proper book. In general, the books in which the first entries are made, belonging to a merchant, tradesman, or mechanic, in which are charged goods sold and delivered or work and labor done, are received in evidence. There are many books which are not evidence, a few of which will be here enumerated. A book made up by transcribing entries made on a slate by a journeyman, the transcript being made on the same evening, or sometimes not until nearly two weeks after the work was done, was considered as not being a book of original entries; 1 Rawle 435; 4 *id.* 408; 2 Watts 451; 6 Whart. 189. A book purporting to be a book of original entries, containing an entry of the sale of goods when they were ordered, but before delivery, is not a book of original entries; 4 Rawle 404; 3 Dev. 449. And unconnected scraps of paper, containing, as alleged, original entries of sales by an agent, on account of his principal, and appearing on their face to be irregularly kept, are not to be considered as a book of original entries; 13 S. & R. 126; *contra*, 4 Harring. 532. See 2 Whart. 33; 4 M'Cord 76; 20 Wend. 72; 1 Yeates 198. A notched stick kept as a tally was admitted to prove items of different amount indicated by different cuts and notches: 2 Harring. 288.

The entry must be made in the course of business, and with the intention of making a charge for goods sold or work done; it ought not to be made after the lapse of one day; Tayl. Ev. 620; 1 N. & McC. 130; 4 S. & R. 5. Memoranda of sales found in an account-book are competent, when made contemporaneously with orders, by a witness knowing them to state correctly the facts; 35 Fed. Rep. 314.

The entry must be made in an intelligible manner and not in figures or hieroglyphics which are understood by the seller only; 4 Rawle 404. A charge made in the gross as "190 days work;" 1 N. & McC. 130; or "for medicine and attendance," or "thirteen dollars for medicine and attendance

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on one of the General's daughters in curing the hooping-cough;" 2 Const. So. C. 476, were rejected. An entry of goods without carrying out any prices proves, at most, only a sale; and the jury cannot, without other evidence, fix any price; 1 South. 370. The charges should be specific, and denote the particular work or service charged as it arises daily, and the quantity, number, weight, or other distinct designation of the materials or articles sold or furnished, and attach the price and value to each item; 2 Const. So. C. 745; 1 N. & M'C. 130.

The entry must, of course, have been made by a person having authority to make it; 4 Rawle 404; and with a view to charge the party; 8 Watts 545.

The proof of the entry must be made by the person who made it. If made by the seller, he is competent to prove it from the necessity of the case, although he has an interest in the matter in dispute; 5 Conn. 496; 12 Johns. 461; 1 Dall. 239. When made by a clerk, it must be proved by him. But in either case, when the person who made the entry is out of the reach of the process of the court, as in the case of death, or absence from the state, the handwriting may be proved by a person acquainted, with the handwriting of the person who made the entry; 2 W. & S. 137; if he is absent, proof must first be made that he cannot be found; 57 Ark. 402. But the plaintiff was not competent to prove the handwriting of a deceased clerk who made the entries; 1 Bro. App. liii. A book containing entries in defendant's handwriting of payments by him to payee in her lifetime, on the note in action, is not admissible as evidence in defendant's favor; 84 Va. 341.

The books and original entries, when proved by the supplementary oath of the party, are *prima facie* evidence of the sale and delivery of goods, or of work and labor done; 1 Yeates 347; 3 Vt. 463; 1 M'Cord 481; 2 Root 59. See 30 Fla. 419; 97 Ala. 619. But they are not evidence of money lent or cash paid; 1 Day 104; Kirb. 289; or of the time a vessel lay at the plaintiff's wharf; 1 Browne 257; or of the delivery of goods to be sold on commission; 2 Whart. 33. See, generally, Greenl. Ev. § 118.

These entries are sometimes evidence in suits between third parties; 8 Wheat. 326; 3 Campb. 305, 377; 2 P. & D. 573; 15 Mass. 380; 20 Johns. 168; 15 Conn. 206; 7 S. & R. 116; 2 Harr. & J. 77; 2 Rand. 87; 1 Y. & C. 53; and also in favor of the party himself; 2 Mart. La. N. S. 508; 2 Mass. 217; 1 Dall. 239; 2 Bay 173, 362; 5 Vt. 313; 108 Mo. 277. See 26 Tex. App. 404; 68 Hun 190; 160 Mass. 328.

**ORIGINAL AND DERIVATIVE ESTATES.** An original estate is the first of several estates, bearing to each other the relation of a particular estate and a reversion. It is contrasted with a derivative estate, which is a particular interest carved out of an another estate of larger extent. 1 Pres. Est. *123.

**ORIGINAL JURISDICTION.** See JURISDICTION.

**ORIGINAL PACKAGE.** The casing in which imported merchandise is kept and handled in course of transportation, whether hogsheads, bales, bottles, or boxes.

The package delivered by the importer to the carrier at the initial point of shipment in the exact condition in which it was shipped. In the case of liquors in bottles, if the bottles are shipped singly, each is an original package, but if a number are fastened together and marked, or are together in a box, etc., such box, etc., constitutes the original package; 81 Fed. Rep. 997.

An original package is a bundle put up for transportation and usually consists of a number of things bound together and convenient for handling; 15 So. Rep. (La.) 10.

An original package, trade in which is protected by the federal constitution, is such form and size of package as is used by purchasers or shippers for the purpose of securing both convenience in handling and security in transportation of merchandise between dealers in the ordinary course of commerce; 156 Pa. 201.

The power to regulate or forbid the sale of a commodity after it has been brought into a state does not carry with it the right and power to prevent its introduction by transportation from another state; 125 U. S. 465. This was followed by Leisy *v.* Hardin, 135 U. S. 100, where it was held (three judges dissenting), that a state statute prohibiting the sale of intoxicating liquors, except for medicinal, etc., purposes, and under a license, is, as applied to a sale by an importer and in the original packages or kegs unbroken and unopened, of such liquor brought from another state, unconstitutional and void as repugnant to the commerce clause of the constitution. See 4 Harv. L. Rev. 221, for a criticism of this case. The rule established in Leisy *v.* Hardin, does not justify the contention that a state is powerless to prevent the sale of foods made in or brought from another state, if their sale may cheat the people into buying something they do not intend to buy, and which is wholly different from what its condition and appearance import; 155 U. S. 461, upholding the Massachusetts Oleomargarine Act.

The act of congress of August 8, 1890 (Wilson Act), provided that upon the arrival in any state of liquors they should be subject to the laws of the state the same as if produced there, and should not be exempt therefrom whether in original packages or not. This was held constitutional in 140 U. S. 545. It does not confer upon any state the power of prohibiting the importation of articles by any one except certain officers appointed by the state. The South Carolina Dispensary Act of 1895 is therefore contrary to the commerce clause, and so far as it is so is invalid; 165 U. S. 58.

A consignment of liquor has *arrived* in the state, within the meaning of the Wilson Bill, as soon as it crosses the state

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boundary, although the contract of carriage is not then completed; 24 L. R. A. 245.

A state may regulate or prohibit the sale of liquor even in the original package; 18 Sup. Ct. Rep. 674; but it cannot impose a penalty on a carrier for transporting such goods within the state and before their delivery; *id.* 664.

Opening a barrel of intoxicating liquor to obtain a small quantity for testing does not destroy the nature of the original package; 27 L. R. A. (Ia.) 219.

The peddling of separate articles after a package has been broken is subject to regulation by the state police power; 166 Pa. 89.

An act prohibiting the manufacture and sale of cigarettes interferes with interstate commerce as applied to sales in small boxes containing ten each imported in that form from other states; 76 Fed. Rep. 156; 82 *id.* 615.

A sale of ten-pound packages of oleomargarine, manufactured and packed in one state and imported into another, is a valid sale, though made to a person who was himself a consumer. The importer has not only a right to sell personally but to employ an agent to sell for him. The right of the importer to sell does not depend upon whether the original package was suitable for retail trade or not, but is the same even if the consumers are wholesale dealers, provided he sells in original packages. The Pennsylvania act of May 21st, 1885, forbidding the manufacture of any imitation of butter or cheese, and providing that no one should sell or have such imitation in his possession with intent to sell as an article of food, is invalid to the extent that it prohibits the introduction of oleomargarine into another state and its sale in the original packages; 171 U. S. 1, two judges dissenting, reversing 170 Pa. 284. Whether the right to sell extended beyond the first sale by the importer was not decided. The right to import a lawful article of commerce from one state to another continues until a sale in the original package; 171 U. S. 23; when the package is broken it becomes a part of the general mass of property; 124 Mo. 436.

Retail trade as well as wholesale is included in the idea of commerce; 81 Fed. Rep. 1000.

The form or size of the package the importer determines for himself; 25 Pac. Rep. (Kan.) 235; however small it may be, if it is an original package, it is protected; 42 Fed. Rep. 545.

Bottles, if sealed without the state, are the original packages and not the boxes or barrels in which they come; 138 Pa. 642; 82 Ia. 401; 86 *id.* 639; but where bottles were shipped separately in tissue paper, each labelled original package, and packed in an open box with hay, it was held that the boxes were the original packages; 91 Ala. 2. See 47 N. W. Rep. (S. D.) 411; 60 N. W. Rep. (Neb.) 462; 53 *id.* (Ia.) 330; 43 Fed. Rep. 372.

Where cigarettes are put up in small boxes, ten to a box, and these boxes are placed in larger boxes for shipping, the small boxes constitute original packages; but when they reach their place of destination for sale they become a part of the mass of property of the state; 81 Fed. Rep. 997; 82 *id.* 422.

Merely labelling each bottle "original package" does not make it one; 91 Ala. 2.

See 34 Am. L. Reg. 784; 29 *id.* 721; COMMERCE; LIQUOR LAWS; OLEOMARGARINE.

**ORIGINAL PROCESS.** Process to compel an appearance by the defendant.

**ORIGINAL WRIT. In English Practice.** A mandatory letter issued in the king's name, sealed with his great seal, and directed to the sheriff of the county wherein the injury was committed or supposed to have been done, requiring him to command the wrongdoer, or party accused, either to do justice to the complainant, or else to appear in court and answer the accusation against him. This writ is deemed necessary to give the courts of law jurisdiction. Andr. Steph. Pl. 62; Gould, Pl. 14.

This writ is now disused, the writ of summons being the process prescribed by the Uniformity of Process Act for commencing personal actions; and under the Judicature Act, 1873, all suits, even in the court of chancery, are to be commenced by such writs of summons; Brown. But before this, in modern English practice, the original writ was often dispensed with, by recourse to a fiction and a proceeding *by bill* substituted. In this country, our courts derive their jurisdiction from the constitution, and require no original writ to confer it. Improperly speaking, the first writ which is issued in a case is sometimes called an original writ; but it is not so in the English sense of the word. See 3 Bla. Com. 273; Walker, Am. Law, *passim.*

**ORIGINALIA** (Lat.). **In English Law.** The transcripts and other documents sent to the office of the treasurer-remembrancer in exchequer are called by this name to distinguish them from *recorda*, which contain the judgments of the barons. The treasurer-remembrancer's office was abolished in 1833.

**ORIGINALITY. In Patent Law.** The finding out, the contriving, the creating of something which did not exist and was not known before, and which can be made useful and advantageous in the pursuits of life, or which can add to the enjoyment of mankind. 4 Fish. Pat. Cas. 16.

**ORNAMENT.** An embellishment. In questions arising as to which of two things is to be considered as principal or accessory, it is the rule that an ornament shall be considered as accessory.

**ORPHAN.** A minor or infant who has lost both of his or her parents. Sometimes the term is applied to a person who has lost only one of his or her parents. 2 S. & S. 93; Aso & M. Inst. b. 1, t. 2, c. 1; 40 Wisc.

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276. See 14 Hazzard, Penn. Reg. 188, 189, for a correspondence between Joseph Hopkinson and ex-president J. Q. Adams as to the meaning of the word *orphan;* see, also, Hob. 247; 147 Mass. 300.

**ORPHANAGE. In English Law.** The share reserved to an orphan by the custom of London. See LEGITIME; DEAD'S PART.

**ORPHANS' COURT. In American Law.** Courts of more or less extended jurisdiction, relating to probate, estates of decedents, etc., in Delaware, Maryland, New Jersey, and Pennsylvania. See the titles of the respective states.

**ORPHANOTROPHI. In Civil Law.** Persons who have the charge of administering the affairs of houses destined for the use of orphans. *Clef des Lois Rom. Administrateurs.*

**OSTENSIBLE PARTNER.** One whose name appears in a firm as a partner, and who is really such. Pars. Part. 27. See PARTNERS.

**OSWALD'S LAW.** The law by which was effected the ejection of married priests, and the introduction of monks into churches. Named from Oswald, Bishop of Worcester, about 964. Whart. Lex.

**OTHER CASUALTY.** In a lease providing that rent shall cease if the premises become untenantable by fire or other casualty, it refers to some fortuitous interruption of the use. 6 U. S. App. 42.

**OTHER WRONGS.** See ALIA ENORMIA.

**OTHESWORTHE** (Sax. *eoth*, oath). Worthy to make oath. Bract. 185, 192.

**OUGHT.** The word is generally directory, but may be taken as mandatory if the context requires it. Bract. fol. 185, 292 *b*.

**OUNCE.** The name of a weight. See WEIGHTS.

**OUSTER** (L. Fr. *outre, oultre;* Lat. *ultra*, beyond). Out; beyond; besides; farther; also; over and more. *Le ouster*, the uppermost. Over: *respondeat ouster*, let him answer over. Britton, c. 29. *Ouster le mer*, over the sea. Jacob, L. Dict. *Ouster eit*, he went away. 6 Co. 41 *b*; 9 *id.* 120.

To put out; to oust. *Il oust*, he put out or ousted. *Oustes*, ousted. 6 Co. 41 *b*.

**In Torts.** The actual turning out or keeping excluded the party entitled to possession of any real property corporeal.

It is the wrongful dispossession or exclusion from real property of a party entitled to the possession thereof; ouster of one cotenant by another is produced by the same acts as any other ouster; 91 Cal. 170.

An ouster can properly be only from real property corporeal, and cannot be committed of anything movable; 1 C. & P. 123; 1 Chitty, Pr. 148; nor is a mere temporary trespass considered as an ouster. Any continuing act of exclusion from the enjoyment constitutes an ouster, even by one tenant in common of his co-tenant; Co. Litt. 199 *b*, 200 *a*. See 3 Bla. Com. 167; Webb, Poll. Torts 447; 1 Chitty, Pr. 374, where the remedies for an ouster are pointed out. See 33 Cent. L. J. 297. A demand of possession by a tenant in common from his co-tenant, and refusal by the latter, constitutes an ouster from the joint possession; 107 Mo. 520. In an action of *quo warranto*, the judgment rendered, if against an officer or individuals, is called *judgment of ouster;* if against a corporation by its corporate name, it is *ouster* and seizure. See JUDGMENT; RESPONDEAT OUSTER; Rosc. Real Actions 502, 552, 574, 582; 2 Crabb, R. P. § 2454 *a*; 1 Woodd. Lect. 501; Washb. R. P.

**OUSTER LE MAIN** (L. Fr. to take out of the hand). **In Old English Law.** A delivery of lands out of the hands of the lord after the tenant came of age. If the lord refused to deliver such lands, the tenant was entitled to a writ to recover the same from the lord: this recovery out of the hands of the lord was called *ouster le main.* Abolished by 12 Car. II. c. 24. Also, a livery of land out of the king's hands by judgment given in favor of the petitioner in a *monstrans de droit;* 3 Steph. Com. 657.

**OUSTRE LE MER.** Beyond the sea. A cause of excuse, if a person, being summoned, did not appear in court. Cowell.

**OUT OF COURT.** A plaintiff in an action at common law must have declared within one year after the service of the summons, otherwise he was *out of court* unless the court had, by special order, enlarged the time for declaring. See Jud. Act, 1875, Ord. xxi. r. 1. Whart. Lex.

Also used as a colloquial phrase applied to a litigant party when his case breaks down, equivalent to saying, "he has not a leg to stand on;" Moz. & W.

**OUT OF THE STATE.** Beyond sea, which title see.

**OUT OF TIME. In Marine Insurance.** Missing. Generally speaking, a ship may be said to be missing or out of time when she has not been heard of after the longest ordinary time in which the voyage is safely performed. 1 Arn. Ins., 6th ed. 536; 2 Duer, Ins. 469, n.

**OUTER BAR.** See UTTER BARRISTER.

**OUTER HOUSE.** A department of the court of session in Scotland, consisting of five lords ordinary, sitting each separately, to decide causes in the first instance. Paterson; Moz. & W.

**OUTFANGTHEF.** A liberty in the ancient common law, whereby a lord was enabled to call any man dwelling in his manor and taken for felony in another place out of his fee to judgment in his own court. Du Cange. See INFANGTHEF.



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**OUTFIT.** An allowance made by the government of the United States to an ambassador, a minister plenipotentiary, or *chargé d'affaires*, on going from the United States to any foreign country.

The outfit can in no case exceed one year's full salary. No outfit is allowed to a consul. See MINISTER.

As to the meaning of "outfit" in the whaling business, see 9 Metc. 354.

**OUTBUILDING.** Something used in connection with a main building. 140 Mass. 287. While a stable may be a necessary outbuilding, yet when erected for use in connection with a tent placed temporarily on land, it is not so, within a restriction against the erection of a building other than dwellings of a specified value with necessary outbuildings; 159 Mass. 6. See OUTHOUSES.

**OUTHOUSES.** Buildings adjoining or belonging to dwelling-houses.

Buildings subservient to, yet distinct from, the principal mansion-house, located either within or without the curtilage. 4 Conn. 446; 4 Gill & J. 402; 2 Cr. & D. 479.

It is not easy to say what comes within and what is excluded from the meaning of outhouse. It has been decided that a *schoolroom*, separated from the dwelling-house by a narrow passage about a yard wide, the roof of which was partly upheld by that of the dwelling-house (the two buildings, together with some other, and the court which inclosed them, being rented by the same person), was properly described as an outhouse; Russ. & R. Cr. Cas. 295. See, for other cases, Co. 3d Inst. 67; 1 Leach 49; 2 East Pl. Cr. 1020; 5 C. & P. 555; 8 B. & C. 461; 1 Mood. Cr. Cas. 323, 336; 4 Conn. 446; 11 Ala. N. S. 594; 20 *id.* 30; 87 Ky. 454; 25 S. W. Rep. (Ky.) 1062.

**OUTLAND.** Land lying beyond the desmesnes and granted out to tenants at the will of the lord, like copyholds. Spelman.

**OUTLAW. In English Law.** One who is put out of the protection or aid of the law. 22 Viner, Abr. 316; 1 Phill. Ev. Index; Bacon Abr. *Outlawry;* 2 Sell. Pr. 277; Doctr. Plac. 331; 3 Bla. Com. 283, 284.

As used in the Alabama act of December 28, 1868, § 1, declaring counties liable for persons killed by an "outlaw," it is not used in the strict common-law sense of the term, but merely refers in a loose sense to the disorderly persons then roving through the state, committing acts of violence; 46 Ala. 118, 137. See 37 Me. 389.

When used with reference to a claim, as, a debt due on a promissory note, "outlawed" means barred by the statute of limitations; 37 Me. 392.

**OUTLAWRY. In English Law.** The act of being put out of the protection of the law, by process regularly sued out against a person who is in contempt in refusing to become amenable to the court having jurisdiction. The proceedings themselves are also called the outlawry.

At four successive county courts held month by month, a proclamation was made calling on the person "to come in to the king's peace," and at the fifth court he would be declared an outlaw. If, after this, he were caught he would be condemned to death without investigation. To slay him wherever he was found was not only the right but the duty of every true man, and even in the middle of the thirteenth century this was still the customary law of the Welsh marches; 1 Social England 296.

Outlawry may take place in criminal or in civil cases; 3 Bla. Com. 283; Co. Litt. 128.

In the United States, outlawry in civil cases is unknown, and if there are any cases of outlawry in criminal cases they are very rare; Dane, Abr. ch. 193 *a*, 34.

See Bac. Abr. *Abatement* (B), *Outlawry;* Gilbert, Hist. 196, 197; 2 Va. Cas. 244; 2 Dall. 92; 37 Me. 389.

**OUTPARTERS.** Stealers of cattle. Cowell.

**OUTPUTERS.** Such as set watches for the robbing any manor house. Cowell.

**OUTRAGE.** A grave injury; a serious wrong. This is a generic word which is applied to everything which is injurious in a great degree to the honor or rights of another. 44 Ia. 314.

**OUTRIDERS. In English Practice.** Bailiffs employed by the sheriffs and their deputies to ride to the farthest places of their counties or hundreds, to summon such as they thought good to attend their county or hundred court.

**OUTROPER.** A person to whom the business of selling by auction was confined by statute. 2 H. Bla. 557.

**OUTSTANDING.** Unpaid; uncollected; remaining undischarged.

**OUTSTANDING CROP.** One not harvested or gathered. It is outstanding from the day it commences to grow until gathered and taken away. 53 Ala. 474.

**OUTSTANDING DEBT.** Due but not paid; overdue; uncollected, as an outstanding draft, bond, premium, or other demand or indebtedness.

**OUTSTANDING TERM.** A term in gross at law, which, in equity, may be made attendant upon the inheritance, either by express declaration or by implication.

**OUTSUCKEN MULTURES.** Quantities of corn paid by persons voluntarily grinding corn at any mill to which they are not thirled or bound by tenure.

**OUVERTURE DES SUCCESSIONS. In French Law.** The right of succession which arises to one upon the

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death, whether natural or civil, of another. Brown.

**OVERCYTED ; OVERCHYSED.** Proved guilty or convicted. Blount.

**OVERDRAFT.** See OVERDRAW.

**OVERDRAW.** To draw bills or checks upon an individual, bank, or other corporation, for a greater amount of funds than the party who draws is entitled to.

When a person has overdrawn his account without any intention to do so, and afterwards gives a check on a bank, the holder is required to present it, and on refusal of payment to give notice to the maker, in order to hold him bound for it; but when the maker has overdrawn the bank knowingly, having no funds there between the time the check is given and its presentment, the notice is not requisite; 2 N. & M'C. 433; 16 Me. 36. A bank may properly refuse to pay a check which will overdraw the depositor's account, though on the bank books his balance seems to be larger than the amount of the check, because a check of his, paid by the bank two days before, had not yet been charged to such depositor; 138 Ill. 596. The president of a bank who directs the payment of checks of a customer who has no money in the bank, drawn in payment of property purchased by the customer, has no such interest in the property as will support an action by him for its conversion; 43 Mo. App. 566.

An overdraft on a bank is in the nature of a loan; it is considered a fraud on the part of the depositor; 52 Pa. 206. See 10 Wall. 647. *Indebitatus assumpsit* will lie against the depositor to recover the overdraft; 9 Pa. 475; 46 Ill. App. 461. See, generally, 24 N. J. L. 484.

A cashier who knowingly permits an overdraft is guilty of a breach of trust, and liable to an action to make good the amount, even though the directors had been wont to countenance him in a custom of allowing good depositors to overdraw; Morse, Bank., 3d ed. § 357.

If an overdraft on a national bank is properly made and allowed, or even if improperly allowed, the entry of the transaction on the books of the bank just as it occurred is not a false entry, under R. S. § 5209; 82 Fed. Rep. 904. The mere payment of a check which creates an overdraft is not a fraudulent misapplication of the funds; *id.*; and where a national bank officer arranges with a depositor in good faith to give him credit beyond his deposit and makes proper entries of his overdrafts, it is not a false entry under R. S. § 5209: 165 U. S. 323. But where the president of a bank, not acting in good faith, permitted overdrafts which he did not believe and had no reasonable ground to believe would be repaid, and it appeared that he intended by the transaction to injure and defraud the bank, the act becomes a crime; 162 U. S. 664.

**OVERDUE.** A bill, note, bond, or other contract for the payment of money at a particular day, when not paid upon the day, is overdue.

The indorsement of a note or bill overdue is equivalent to drawing a new bill payable at sight; 2 Conn. 419; 18 Pick. 260; 9 Ala. N. S. 153.

A note when passed or assigned after it is overdue, is subject to all the equities between the original contracting parties; 6 Conn. 5; 10 *id.* 30, 55; 18 N. J. L. 222; Byles, Bills 190.

**OVER-INSURANCE.** See DOUBLE INSURANCE.

**OVERHAUL.** To inquire into. The merits of a judgment can never be overhauled by an original suit. 2 H. Bla. 414.

**OVERISSUE.** *Bonds.* Where there is an agreement that a railroad company shall issue only a fixed number of bonds per mile, bonds issued in excess of the limit will be postponed in lien and payment to those within the limit; 134 U. S. 159; and one who buys bonds within the limit upon the faith of this agreement is fully entitled to the benefit of it; *id.*; where bonds are issued, secured by a mortgage which recites the amount of the bonds and that part of them were to be used to take up bonds of a prior issue, the lien of the mortgage will be confined to an amount of bonds which, added to the specified incumbrances, shall not exceed the limit fixed; 8 Fed. Rep. 118, where the question was raised by subsequent bondholders.

Where an issue of railroad bonds was limited in amount, and the governor of a state indorsed on them a recital that they were issued in pursuance of law, it was held that a *bona fide* purchaser was not bound to look beyond his certificate and that the bonds so certified in excess of the authorized issue were entitled to share *pro rata* with the other bonds; 2 Woods 523. Bonds are numbered for mere convenience, and holders of those of a higher number stand on the same footing, in a distribution of a fund, as those of lower numbers; *id.*

Where a mortgage was given to secure a specified issue of bonds and by mistake a larger number were issued and the excess came into the hands of a *bona fide* holder, there being nothing to put him on inquiry, the company was held estopped to set up that they were not secured by the mortgage, and it was held that the excess bonds had a prior lien as against income bonds not secured by a recorded mortgage, but not against a subsequent recorded mortgage; 1 Duv. 112. Where a statute limited the issue of bonds to the amount of the capital stock actually paid in, it was held that bonds issued in excess of this amount were illegal, and that a second mortgage bondholder could take advantage of their illegality, though the company itself did not seek to repudiate them; 10 Allen 448; but see 69 N. W. Rep. (Ia.) 541, where bonds issued in excess were held to be valid to the extent of the consideration received for

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them. Where a railroad company was authorized to issue bonds to a certain amount in relation to the amount of the capital stock, and a mortgage was executed for a larger amount than was authorized, it was held that between *bona fide* holders of the mortgage bonds and the company, the bonds were entitled to the lien of the mortgage, and that subsequent creditors with notice of the bonds occupied no better position than the company; 138 Pa. 494. A constitutional provision forbidding the fictitious increase of corporate indebtedness will not be enforced where mortgage bonds are sold at par to innocent purchasers, for construction and equipment; *id.*

*Stock.* Any issue of stock of a corporation in excess of that authorized by statute or charter is void; 34 N. Y. 30; even in the hands of a *bona fide* purchaser; 99 Pa. 344, 513. A *bona fide* holder of overissued stock, purporting to be signed by an authorized corporate officer, and actually issued by the corporation, may sue the corporation in tort and recover damages; 34 N. Y. 30 (the leading case); 99 Pa. 513; Pars. Sel. Cas. 180, 216; the doctrine of estoppel applying; 18 Atl. Rep. (Pa.) 383; and the same rule applies where the overissued stock is held as collateral for notes; 99 Pa. 513; not so, as to a purchaser not in good faith for full value; 134 N. Y. 83; although the signature of one corporate officer had been forged by another; 33 N. E. Rep. (N. Y.) 378.

If statutory or charter provisions authorize an increase of the capital stock, but the formalities prescribed for making the increase are not complied with, it is termed an irregular issue, and is voidable; 105 U. S. 143.

The authorized corporate officers and the corporation are jointly and severally liable to immediate or subsequent purchasers (buying upon the faith of certificates) of an overissue or irregular issue of stock, who have sustained damage thereby; 36 N. Y. 200.

Equity will enjoin the transfer of spurious stock, the payment of dividends thereon, or the voting thereof by the pretended owners; 78 N. Y. 159. Such stock is a cloud upon the title of the genuine stock, which a court of equity will remove at the suit of the corporation or the stockholders; 96 U. S. 198; and the holder thereof who knew it to be overissued, at the time of the subscription, can defeat an action at law on his subscription therefor; 105 U. S. 143; or an action upon a promissory note given therefor; 50 Ia. 404.

See Cook, St. & Stockh.; MORTGAGE; BOND; STOCK.

**OVERPLUS.** What is left beyond a certain amount; the residue; the remainder of a thing. The same as surplus.

The overplus may be certain or uncertain. It is certain, for example, when an estate is worth three thousand dollars, and the owner asserts it to be so in his will, and devises of the proceeds one thousand dollars to A, one thousand dollars to B, and the overplus to C, and in consequence of the deterioration of the estate, or from some other cause, it sells for less than three thousand dollars, each of the legatees, A, B, and C, shall take one-third. The overplus is uncertain where, for example, a testator does not know the value of his estate and gives various legacies, and the *overplus* to another legatee: the latter will be entitled only to what may be left; 18 Ves. 466. See RESIDUE; SURPLUS.

**OVERRATE.** In its strictest signification, a rating by way of excess and not one which ought not to have been made at all. 2 Ex. 352.

**OVERREACHING CLAUSE.** In a resettlement, a clause which saves the powers of sale and leasing annexed to the estate for life created by the original settlement, when it is desired to give the tenant for life the same estate and powers under the resettlement.

**OVERRULE.** To annul; to make void.

This word is frequently used to signify that a case has been decided directly opposite to a former case; when this takes place, the first-decided case is said to be overruled as a precedent, and cannot any longer be considered as of binding authority.

It also signifies that a majority of the judges of a court having decided against the opinion of the minority, in which case the latter are said to be overruled.

See PRECEDENTS.

**OVERSAMESSA.** A forfeiture for contempt or neglect in not pursuing a malefactor. 8 Inst. 116.

**OVERSEERS OF HIGHWAYS.** Officers having supervision of highways in some of the states. See COMMISSIONERS OF HIGHWAYS.

**OVERSEERS OF THE POOR.** Persons appointed or elected to take care of the poor with moneys furnished to them by the public authority.

The duties of these officers are regulated by local statutes. In general, the overseers are bound to perform those duties, and the neglect of them will subject them to an indictment. See 1 Bla. Com. 360; 16 Viner, Abr. 150; 1 Mass. 459; 3 *id.* 436; 2 N. J. L. 6, 136; 77 N. C. 494; Com. Dig. *Justice of the Peace* (B 63).

**OVERSMAN. In Scotch Law.** A person commonly named in a submission, to whom power is given to determine in case the arbiters cannot agree in the sentence. Sometimes the nomination of the oversman is left to the arbiters. In either case the oversman has no power to decide unless the arbiters differ in opinion; Erskine, Inst. 4. 3. 16. The office of an oversman very much resembles that of an umpire.

**OVERT.** Open.

An overt act in treason is proof of the intention of the traitor, because it opens his designs: without an overt act, treason can-

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not be committed; 2 Chitty, Cr. Law 40. An **overt act**, then, is one which manifests the intention of the traitor to commit treason; Archb. Cr. Pl. 379; 4 Bla. Com. 79; Co. 3d Inst. 12; 1 Dall. 33; 2 *id.* 346; 4 Cra. 75; 3 Wash. C. C. 234. In order to sustain a conviction for treason under the United States constitution, there must be the testimony of two witnesses to the same overt act or a confession in open court. A conspirator can be tried in any place where his co-conspirators perform an overt act; Rev. Stat. § 440. The phrase is used in relation to the Fugitive Slave Act in 5 How. 215.

In conspiracy, no overt act is needed to complete the offence; 11 Cl. & F. 155; 48 Md. 381; 49 Ind. 186. See 7 Biss. 175.

The mere contemplation or intention to commit a crime, although a sin in the sight of Heaven, is not an act amenable to human laws. The mere speculative wantonness of a licentious imagination, however dangerous or even sanguinary in its object, can in no case amount to a crime. But the moment that any overt act is manifest, the offender becomes amenable to the laws. See Cro. Car. 577; ATTEMPT; CONSPIRACY; SOLICITATION.

**OWELTY.** The difference which is paid or secured by one coparcener or cotenant to another for the purpose of equalizing a partition. 1 Story, Eq. Jur. § 612. Littleton § 251; Co. Litt, 169 *a*; 1 Watts 265; 16 Viner, Abr. 223, pl. 3. See 158 Pa. 396; 113 *id.* 578.

A charge on land for owelty of partition follows the land into the hands of a purchaser from the person to whom it was allotted; and the statute of limitation does not run against it, as the possession is not adverse; 106 N. C. 444.

**OWING.** Something unpaid. A debt, for example, is owing while it is unpaid, and whether it be due or not. See 40 La. Ann. 671.

In affidavits to hold to bail it is usual to state that the debt on which the action is founded is due, owing, and unpaid; 1 Pa. L. J. 210.

**OWLER. In English Law.** One guilty of the offence of owling (*q. v.*).

**OWLING. In English Law.** The offence of transporting wool or sheep out of the kingdom.

The name is said to owe its origin to the fact that this offence was carried on in the night, when the owl was abroad.

**OWNER.** He who has dominion of a thing, real or personal, corporeal or incorporeal, which he has a right to enjoy and do with as he pleases,—even to spoil or destroy it, as far as the law permits, unless he be prevented by some agreement or covenant which restrains his right. See 18 S. W. Rep. (Tex.) 578; 21 Or. 339.

Although there can be but one absolute **owner of a thing**, there may be a qualified ownership of the same thing by many. Thus, a bailor has the general ownership of the thing bailed, the bailee the special ownership. See 2 Cra. C. C. 83. The right of the absolute owner is more extended than that of him who has only a qualified ownership: as, for example, the use of the thing. Thus, the absolute owner of an estate, that is, an owner in fee, may cut the wood, demolish the buildings, build new ones, and dig wherever he may deem proper for minerals, stone, plaster, and similar things, which would be considered waste and would not be allowed in a qualified owner of the estate, as a lessee or a tenant for life. The word owner, when used alone, imports an absolute owner; but it has been held in Ohio that the word owner, in the mechanic's lien law of that state, includes the owner of the leasehold as well as of the reversion, on the ground that any other construction would be subversive of the policy and intent of the statute. 2 Ohio 123.

The owner continues to have the same right although he perform no acts of ownership or be disabled from performing them, and although another perform such acts without the knowledge or against the will of the owner. But the owner may lose his right in a thing if he permit it to remain in the possession of a third person for a sufficient time to enable the latter to acquire a title to it by prescription or under the statute of limitations. See La. Civ. Code, b. 2, tit. 2, c. 1; *Encyclopédie d'Alembert, Proprietaire.*

When there are several joint owners of a thing,—as, for example, of a ship,—the majority of them have the right to make contracts in respect of such thing in the usual course of business or repair, and the like, and the minority will be bound by such contracts; Holt 586; 5 Whart. 366; 105 Pa. 222. See PART-OWNER.

**OWNERSHIP.** The right by which a thing belongs to some one in particular, to the exclusion of all others. La. Civ. Code, art. 480.

**OXGANG** (fr. Sax. *gang*, going, and ox; Law Lat. *bovata*). **In Old English Law.** So much land as an ox could till. In the north of England a division of a carucate. According to some, fifteen acres. Co. Litt. 69 *a*; Crompton, Jurisd. 220. According to Balfour, the Scotch *oxengang*, or *oxgate*, contained twelve acres: but this does not correspond with ancient charters. See Bell, Dict. *Ploughgate*. Skene says thirteen acres. Cowell. See 1 Poll. & Maitl. 347.

**OYER** (Lat. *audire*; through L. French *oyer*, to hear).

**In Pleading.** A prayer or petition to the court that the party may hear read to him the deed, etc., stated in the pleadings of the opposite party, and which deed is by intendment of law in court when it is pleaded with a profert. The same end is now generally attained by giving a copy of

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the deed of which oyer is asked, or, in other instances, by setting forth the instrument in full in the plaintiff's statement of his case. Oyer as it existed at common law seems to be abolished in England; 1 B. & P. 646; 3 *id.* 398; 25 E. L. & E. 304. Oyer may be demanded of any specialty or other written instrument, as, bonds of all sorts, deeds-poll, indentures, letters testamentary and of administration, and the like, which the adverse party is obliged to plead with a *profert in curia;* Gould, Pl. 408. But pleading with a profert unnecessarily does not give a right to demand oyer; 1 Salk. 497; and it may not be had except when profert is made; Hempst. 265. Denial of oyer when it should be granted is ground for error; Andr. Steph. Pl. 59; 1 Blackf. 126. In such cases the party making the claim should move the court to have it entered on record, which is in the nature of a plea, and the plaintiff may counterplead the right of oyer, or strike out the rest of the pleading following the oyer, and demur; 1 Saund. 9 *b*, n. 1; Bac. Abr. *Pleas* 1; upon which the judgment of the court is either that the defendant have oyer, or that he answer without it; *id.;* 2 Lev. 142; 6 Mod. 28. See PROFERT IN CURIA.

After craving oyer, the defendant may set forth the deed or a part thereof, or not, at his election; 1 Chitty, Pl. 872; and may afterwards plead *non est factum*, or any other plea, without stating the oyer; 2 Stra. 1241; 1 Wils. 97; and may demur if a material variance appear between the oyer and declaration; 2 Saund. 366, n.

See, generally, Com. Dig. *Pleader* (P), *Abatement* (I 22); 3 Bouvier, Inst. n. 2890.

**OYER AND TERMINER.** See ASSIZE; COURT OF OYER AND TERMINER.

**OYEZ** (Fr. hear ye). The introduction to any proclamation or advertisement by public crier. Used also by court officers in opening court. It is wrongly and usually pronounced oh yes. 4 Bla. Com. 340, n.

**OYSTER.** The right to take shell fish below high water mark from natural beds in tide waters is common to all citizens of the state, except as restrained by positive law or grants from the state; 50 N. J. L. 409; 32 Atl. Rep. (R. I.) 166; 33 *id.* (Conn.) 1006. "A natural oyster-bed" is one not planted by man. 104 N. C. 764. There is a right of property in artificial oyster beds planted in public or navigable waters, in spots designated by stakes or otherwise; 27 N. J. L. 117; 22 Hun 53; the owner must clearly mark out and define his beds; 11 Barb. 248; this right is in the nature of a license from the state, which the state may revoke; 14 Wend. 41; 65 Md. 586.

The state, subject to the paramount right of navigation, is the owner of the oyster-beds in its waters and can prohibit their taking by any but its own citizens, and prescribe the times, instruments, and conditions of taking them; 36 Fed. Rep. 652; 94 U. S. 391; 76 Va. 989.

One who plants oysters on a natural bed cannot recover against one who removes them with the natural growth; 66 Conn. 285.

One who plants a bed of oysters in a bay on an arm of the sea, designating the bed, does not interfere with the common right of fishing, and may maintain trespass for an invasion of his property; 91 N. Y. 98; 7 Q. B. D. 106. Oysters deposited artificially may obstruct navigation and be a nuisance; 7 Q. B. 339.

A riparian owner has not the right to bed oysters along his entire water front; 65 Md. 586.

In Maryland by statute any citizen of any county bordering on the waters of the state may appropriate any area not exceeding an acre for bedding oysters.

An act (Maryland) exacting a license fee of three dollars per ton on oyster boats is not a tonnage tax, but a lawful compensation to the state for the privilege of taking oysters; 36 Fed. Rep. 651.

Statutes in several states, especially Delaware, Maryland, and Virginia, regulate the matter.

# P.

**PAAGE.** A toll for passage through another's land.

**PACARE.** To pay.

**PACE.** A measure of length, containing two feet and a half. The geometrical pace is five feet long. The common pace is the length of a step; the geometrical is the length of two steps, or the whole space passed over by the same foot from one step to another.

**PACIFIC BLOCKADE.** A means of coercion short of war, usually adopted by the joint action of several nations. An instance of it occurred when Great Britain and Germany united to prevent the slave traffic and stop the importation of arms on the east coast of Africa; Snow, Int. Law 79. In 1827 Greece was blockaded by France, Russia, and Great Britain; in 1850 the Greek ports were blockaded by Great Britain, and again in 1855 by the combined fleets of the five Great Powers.

In the blockade of Mexico by France in

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1838, neutral vessels as well as Mexican were both seized and condemned. In other cases both classes of ships were seized, but were restored without compensation at the termination of conflict. In the blockades of Greece in 1850 and 1886, only Greek vessels were sequestrated.

In 1887 the Institute of International Law unanimously declared in favor of the legality of pacific blockade, subject to these conditions:—"(1) That the neutral flag can enter freely; (2) that there must, of course, be formal notice and a sufficient force; and (3) that ships of the blockaded country may be sequestrated, but should be restored with their cargoes at the end of the blockade, but without compensation." See 21 L. Mag. & Rev. 285; BLOCKADE.

**PACIFICATION** (Lat. *pax*, peace, *facere*, to make). The act of making peace between two countries which have been at war; the restoration of public tranquillity.

**PACK.** To deceive by false appearances; to counterfeit; to delude.

**PACK OF WOOL.** A horse load consisting of seventeen stone and two pounds. Cowell.

**PACKAGE.** A bundle put up for transportation or commercial handling. A parcel is a small package; 1 Hugh. 529; 44 Ala. 468, where a bale of cotton was held not a package; *contra*, 2 Daly 434. See L. R. 9 Ex. 67. Certain duties charged in the port of London on the goods imported and exported by aliens. Now abolished. Whart. Lex. See ORIGINAL PACKAGE.

**PACKED PARCELS.** The name for a consignment of goods consisting of one large parcel made up of several small ones, collected from different persons by the immediate consignor, who united them into one for his own profit, at the expense of the carrier. Whart.

**PACKER.** A person employed by merchants to receive and (in some instances) to select goods from manufacturers, dyers, calenders, etc., and pack the same for exportation. Arch. Bankr., 11th ed. 37.

**PACKING A JURY.** Improperly and corruptly selecting a jury to be sworn and impanelled for the trial of a cause. 12 Conn. 289.

**PACT. In Civil Law.** An agreement made by two or more persons on the same subject, in order to form some engagement, or to dissolve or modify one already made: *Conventio est duorum in idem placitum consensus de re solvenda, id est facienda vel præstanda.* Dig. 2. 14; *Clef des Lois Rom.;* Ayliffe, Pand. 558; Merlin, *Rép. Pacte.*

**PACT DE NON ALIENANDO.** A clause inserted in mortgages in Louisiana which secures to the mortgage creditor the right to foreclose his mortgage by executory process, directed solely against the mortgagor, and gives him the right to seize and sell the mortgaged property, regardless of any subsequent alienations. 35 La. Ann. 585; 36 *id.* 645; 124 U. S. 355. This rule applies to an alienation by condemnation in proceedings for confiscation, and as against the heirs-at-law of the person whose property is confiscated; 113 U. S. 293. If a mortgage debtor in Louisiana, in a suit to foreclose a mortgage containing this clause, waives the benefit of prescription, those who take through him are estopped from pressing it, as effectually as he is estopped; 124 U. S. 351.

**PACTIONS. In International Law.** Contracts between nations which are to be performed by a single act, and of which execution is at an end at once. 1 Bouvier, Inst. n. 100.

**PACTUM CONSTITUTÆ PECUNIÆ** (Lat.). **In Civil Law.** An agreement by which a person appointed to his creditor a certain day, or a certain time, at which he promised to pay; or it may be defined simply an agreement by which a person promises a creditor to pay him.

When a person by this pact promises his own creditor to pay him, there arises a new obligation, which does not destroy the former by which he was already bound, but which is accessory to it; and by this multiplicity of obligations the right of the creditor is strengthened. Pothier, Obl. pt. 2, c. 6, s. 9.

There is a striking conformity between the *pactum constitutæ pecuniæ*, as above defined, and our *indebitatus assumpsit*. The *pactum constitutæ pecuniæ* was a promise to pay a subsisting debt, whether natural or civil, made in such a manner as not to extinguish the preceding debt, and introduced by the prætor to obviate some formal difficulties. The action of *indebitatus assumpsit* was brought upon a promise for the payment of a debt; it is not subject to the wager of law and other technical difficulties of the regular action of debt; but by such promise the right to the action of debt was not extinguished nor varied; 4 Co. 91, 95. See 1 H. Bla. 550, 850; Brooke, Abr. *Action sur le Case* (pl. 7, 69, 72); 4 B. & B. 295; 1 Chitty, Pl. 89.

**PACTUM DE NON PETENDO** (Lat.). **In Civil Law.** An agreement made between a creditor and his debtor that the former will not demand from the latter the debt due. By this agreement the debtor is freed from his obligation. This is not unlike the *covenant not to sue*, of the common law. Wolff, *Dr. de la Nat.* § 755; Leake, Contr., 3d ed. 798.

**PACTUM DE QUOTA LITIS** (Lat.). **In Civil Law.** An agreement by which a creditor of a sum difficult to recover promises a portion—for example, one-third—to the person who will undertake to recover it. In general attorneys should abstain from making such a contract: yet it is not unlawful at common law. See CHAMPERTY.

**PAIN FORTE ET DURE.** See PEINE FORTE ET DURE.

**PAINS AND PENALTIES.** See BILL OF PAINS AND PENALTIES.

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**PAINTING.** A likeness, image, or scene depicted with paints. Cent. Dict. The term does not necessarily mean anything upon which painting has been done by a workman, but rather something of value as a painting and something on which skill has been bestowed in producing it; 3 Exch. Div. 121. Whether certain articles fall within the description of paintings as used in a statute is a question of fact for a jury; *id.*

Paintings on porcelain, the value of which depends on the skill of the artist, are dutiable as porcelain and not as china porcelain and parian ware gilded, decorated, or ornamented in any manner; 103 U. S. 677. As to copyright in paintings, see COPYRIGHT.

**PAIRING-OFF.** A system in vogue both in parliament and in legislative bodies in this country, whereby a member agrees with a member on the opposite side, that they shall both be absent from voting during a given time, or upon a particular question. It is said to have originated in the house of commons in Cromwell's time. See May, Parl. Prac.

**PAIS, PAYS.** A French word, signifying country. In law, matter *in pais* is matter of fact, in opposition to matter of record; a trial *per pais* is a trial by the country,—that is, by a jury. See IN PAIS.

**PALACE CAR.** See SLEEPING CAR.

**PALACE COURT. In English Law.** A court which had jurisdiction of all personal actions arising between any parties within twelve miles of Whitehall, not including the city of London.

It was erected in the time of Charles I., and was held by the steward of the household, the knight-marshal and steward of the court, or his deputy. It had its sessions once a week, in the borough of Southwark. It was abolished by 12 & 13 Vict. c. 101, § 13. See COURT OF MARSHALSEA.

**PALAGIUM.** A duty to lords of manors for exporting and importing vessels of wine at any of their ports. Jacob.

**PALATINE.** Possessing royal privileges. See COUNTY PALATINE; COURTS OF COUNTY PALATINE.

**PALFRIDUS** (L. Lat.). A palfrey; a horse to travel on. Fitzherbert, Nat. Brev. 93.

**PALLIO COOPERIRE.** (To cover with a cloak.) An ancient custom, where the parents of children born out of wedlock afterwards intermarried, of the parents and children standing together under a cloth extended, while the marriage was solemnized, the act being in the nature of adoption. Toml. See LEGITIMATION.

**PALMER'S ACT.** Statutes 19 & 20 Vict. c. 16, which enable a person accused of crime committed out of the jurisdiction of the central criminal court to be tried in that court.

**PALMISTRY.** The art or practice of telling fortunes by a feigned interpretation of the lines and marks on the hand. The word is used by good writers in the sense of a trick with the hand. 2 Exch. Div. 268.

**PAMPHLET.** A small book usually printed in octavo form and stitched.

*Pamphlet laws.* The name given in some states to the publication of the acts of the legislature. In Pennsylvania and Delaware they are originally published from session to session, unbound, with continuous paging, and indexed and bound after a number of sessions.

**PANDECTS. In Civil Law.** The name of an abridgment or compilation of the civil law, made by Tribonian and others, by order of the emperor Justinian, and to which he gave the force of law, A. D. 533.

It is also known by the name of the Digest, because in his compilation the writings of the jurists were reduced to order and condensed *quasi digestiæ*. The emperor, in 530, published an ordinance entitled *De Conceptione Digestorum*, which was addressed to Tribonian, and by which he was required to select some of the most distinguished lawyers to assist him in composing a collection of the best decisions of the ancient lawyers, and compile them in fifty books, without confusion or contradiction. The instructions of the emperor were to select what was useful, to omit what was antiquated or superfluous, to avoid contradictions, and by the necessary changes, to produce a complete body of law. This work was a companion to the Code of Justinian, and was to be governed in its arrangement of topics by the method of the Code. Justinian allowed the commissioners, who were sixteen in number, ten years to compile it; but the work was completed in three years, and promulgated in 533. A list of the writers from whose works the collection was made, and an account of the method pursued by the commissioners, will be found in Smith's Dict. of Gr. & Rom. Antiq. About a third of the collection is taken from Ulpian; Julius Paulus, a contemporary of Ulpian, stands next: these two contributed one-half of the Digest. Papinian comes next. The Digest, although compiled in Constantinople, was originally written in Latin, and afterwards translated into Greek.

The Digest is divided in two different ways: the first into fifty books, each book in several titles, and each title into several extracts or *leges*, and at the head of each series of extracts is the name of the lawyer from whose work they were taken. The fifty books are allotted in seven parts.

The division into *digestum vetus* (book first to and including title second of book twenty-fourth), *digestum infortiatum* (title third of book twenty-fourth, to and including book thirty-eighth), and *digestum novum* (from book thirty-ninth to the end), has reference to the order in which these three parts appeared. As to the methods of citing them, see CITATION OF AUTHORITIES.

The Pandects—as well indeed as all Justinian's laws, except some fragments of the Code and Novels—were lost to all Europe for a considerable period. During the pillage of Amalfi, in the war between the two soi-disant popes Innocent II. and Anaclet II., a soldier discovered an old manuscript, which attracted his attention by its envelope of many colors. It was carried to the Emperor Clothaire, and proved to be the Pandects of Justinian. The work was arranged in its present order by Warner, a German, whose Latin name is Irnerius, who was appointed by that emperor Professor of Roman Law at Bologna. 1 Fournel, *Hist. des Avocats* 44. The style of the work is very grave and pure, and contrasts in this respect with that of the Code, which is very far from classical. On the other hand, the learning of the Digest stands rather in the discussing of subtle questions of law, and enumerations of the variety of opinions of ancient lawyers thereupon, than in practical matters of daily use, of which the Code so simply and directly treats. See Kidley, View, pt. i. ch. 1, 2.

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While the Pandects form much the largest fraction of the *Corpus Juris* their relative value and importance are far more than proportional to their extent. They are, in fact, the soul of the *Corpus Juris*. Hadley, Rom. L. 11.

**PANEL** (diminutive from either *pane*, apart, or *page*, *pagella*. Cowell). **In Practice.** A schedule or roll, containing the names of jurors summoned by virtue of a writ of *venire facias*, and annexed to the writ. It is returned into court whence the *venire* issued. Co. Litt. 158 *b*; 3 Bla. Com. 353; 40 Cal. 586. See 89 Ill. 575. The word may be used to designate either the whole number of jurors summoned or those selected by the clerk by lot according to the connection in which it is used. 76 Ia. 141.

**In Scotch Law.** The prisoner at the bar, or person who takes his trial before the court of justiciary for some crime. So called from the time of his appearance. Bell, Dict. Spelled, also, *pannel*.

**PANTOMIME.** A dramatic performance in which gestures take the place of words. 3 C. B. 871.

**PAPACY.** See PAPIST.

**PAPER.** A manufactured substance composed of fibres (whether vegetable or animal) adhering together in forms consisting of sheets of various sizes and of different thicknesses, used for writing or printing or other purposes to which flexible sheets are applicable. 4 H. & N. 470. Books are not paper within the meaning of the tariff act; 104 U. S. 735.

**PAPER BLOCKADE.** An ineffective blockade. See BLOCKADE.

**PAPER-BOOK. In Practice.** A book or paper containing an abstract of all the facts and pleadings necessary to the full understanding of a case.

The issues in actions, etc., upon special pleadings, made up by the clerk of the papers, who is an officer for that purpose. Upon an issue in law, it is termed the demurrer-book. The clerks of the papers of the court of K. B., in all copies of pleas and paper-books by them made up, shall subscribe to such paper-books the names of the counsel who have signed such pleas, as well on behalf of the plaintiff as defendant; and in all paper-books delivered to the judges of the court, the names of the counsel who did sign those pleas are to be subscribed to the books by the clerks or attorneys who deliver the same. Jac. L. Dict.; 2 Hill, Abr. 268.

The courts of error, and other courts, on arguments, require that the judges shall each be furnished with such a paper-book; Tr. & H. Pr. 867. In Pennsylvania the printed copy of the record, the argument, etc., used in the supreme and superior courts is so called.

In the court of king's bench, in England, the transcript containing the whole of the proceedings filed or delivered between the parties, when the issue joined is an issue in fact, is called the *paper-book*. Steph. Pl. 95; 3 Bla. Com. 317; 3 Chitt. Pr. 521; 2 Stra. 1131, 1266; 2 Wils. 248.

In modern English practice under the Jud. Act of 1875, printed copies of every special case must now be delivered by the plaintiff (Ord. xxxiv. r. 3). And any party who enters an action for trial must deliver to the officer of the court a copy of the whole of the pleadings in the action for the use of the judge at the trial. Ord. xxxvi. r. 17.

**PAPER CREDIT.** Credit given on the security of any written obligation purporting to represent property.

**PAPER-DAYS. In English Law.** Days on which special arguments are to take place. Tuesdays and Fridays in term-time are paper-days appointed by the court. Lee, Dict. of Pr.; Archb. Pr. 101.

**PAPER MONEY.** The engagements to pay money which are issued by governments and banks, and which pass as money. Pardessus, Droit. Com. n. 9. Bank-notes are generally considered as cash, and will answer all the purposes of currency; but paper money is not a legal tender if objected to. But see LEGAL TENDER.

See NATIONAL BANKS; MONEY; GOLD.

**PAPER OFFICE.** An ancient office in the palace of Whitehall, wherein state papers are kept. Also an ancient office for the court records in the court of queen's bench, sometimes called the paper-mill, Moz. & W. See Jac. L. Dict.

**PAPER TITLE.** A title to land evidenced by one or more conveyances, the term generally implying that such title, while it has color or plausibility, is without substantial validity. Black, L. Dict.

**PAPERS.** The term does not mean newspapers or perhaps even include them within the meaning of a statute, the object of which is to prevent a jury from receiving any evidence, papers, or documents not authorized by the court. 42 Pac. Rep. (Mont.) 216. In a will, "all my books and papers" include a promissory note; 49 N. H. 107.

The constitution of the United States provides that the rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated. See SEARCH WARRANT.

**PAPIST.** A term applied by Protestants to Roman Catholics.

By the act of 10 Geo. IV. c. 7, known as the Catholic Emancipation Act, Roman Catholics were restored in general to the full enjoyment of all civil rights, except that of holding ecclesiastical offices and certain high appointments in the state. Before that act their condition had been much ameliorated by various statutes, beginning with 18 Geo. III. c. 60. As to the right of holding property for religious purposes, the 2 & 3 Wm. IV. c. 115, placed them on a level with Protestant dissenters, and the 7 & 8 Vict. c. 102, and 9 & 10 Vict. c. 49, repealed all enactments oppressive to Roman Catholics. See Whart. Lex.

See 2 Phill. Int. L. for a history of the political status of the Papacy.

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**PAR.** Equal. It is used to denote a state of equality or equal value. Bills of exchange, stocks, and the like, are at par when they sell for their nominal value; *above* par, or *below* par, when they sell for more or less; 57 Ga. 324; 8 Paige 527; 22 Pa. 479.

**PAR DELICTUM.** Equal guilt. See IN PARI DELICTO; PARI DELICTO.

**PAR OF EXCHANGE.** The par of the currencies of any two countries means the equivalence of a certain amount of the currency of the one in the currency of the other, supposing the currency of both to be of the precise weight and purity fixed by their respective mints. 26 Wend. 224. The exchange between the two countries is said to be at par when bills are negotiated on this footing. Bowen, Pol. Econ. 321. See 11 East 267.

**PAR ONERI.** Equal to the burden or charge, or to the detriment or damage.

**PAR VALUE.** A current phrase having no other meaning than the value of the pound sterling formerly fixed by law for the purposes of revenue. 10 Allen 44. It is commonly used to indicate the face value of bonds or stock.

**PARAGE.** Equality of blood, name, or dignity, but more especially of land in the partition of an inheritance between co-heirs. Co. Litt. 166 *b*. See TENURE.

**In Feudal Law.** Where heirs took of the same stock and by same title, but, from right of primogeniture, or some other cause, the shares were unequal, the younger was said to hold of the elder, *jure et titulo paragii*, by right and title of parage being equal in everything but the quantity, and owing no homage or fealty. Calv. Lex. See 2 Poll. & Maitl. 261, 274, 289.

**PARAGIUM** (from the Latin adjective *par*, equal; made a substantive by the addition of *agium*; 1 Thomas Co. Litt. 681). Equality.

**In Ecclesiastical Law.** The portion which a woman gets on her marriage. Ayl. Par. 336.

**PARAGRAPH.** A distinct part of a discourse or writing relating to a particular point.

An entire or integral statement of a cause of action equivalent to a count at common law. 63 Fed. Rep. 488. Where a complaint contains several causes of action, each must be distinctly paragraphed and numbered; 19 U. S. App. 157.

**PARAGUAY.** A republic of South America. The president is elected for four years and is assisted by responsible ministers. The legislation is in the senate and house of deputies, both representative. The civil and criminal courts are administered in Asuncion.

**PARALLEL.** Extending in the same direction, and in all parts equidistant; having the same direction or tendency. 14 S. E. Rep. (Va.) 803. See 144 Mass. 254.

In the specification of a patent the word was construed in its popular sense of going side by side and not in its purely mathematical sense; 2 App. Cas. 423; and so in 32 Cal. 231; 2 Cal. Cas. 363; 5 Johns. 489; 3 Me. 1031, where it was held that parallel lines were not necessarily straight lines. As to parallel and competing railroads, see MERGER.

**PARAMOUNT** (*par*, by, *mounter*, to ascend). Above; upwards. Kelh. Norm. Dict. *Paramount especifié*, above specified. Plowd. 209 *a*.

That which is superior: usually applied to the highest lord of the fee of lands, tenements, or hereditaments. Fitzh. N. B. 135. Where A lets land to B, and he underlets them to C, in this case A is the paramount and B is the mesne landlord. See 2 Bla. Com. 90; 1 Thomas, Co. Litt. 484, n. 79, 485, n. 81; MESNE.

**PARANOIA.** A form of insanity which comes under the class of degenerative diseases. The main fundamental characteristic of this disease is a delusion which has become a part of the belief of the individual, and which he believes himself able to explain and defend. 3 Witth. & Beck. Med. Jur. 288.

It is sometimes characterized as logical perversion, and is said to have "misplaced the antiquated term monomania, which not only implied that the delusion was restricted to one subject, but was otherwise insufficient and misleading;" 2 Clevenger, Med. Jur. 860. The memory, emotions, judgment, and conceptions are in most cases unimpaired, though each of these mental divisions may be involved; *id.* The intellect is rarely much involved. In all other relations the individual may be able to carry on his business in life. There is little doubt but that they are thoroughly responsible for their own actions. But if the act be the result of their delusion it is not so much a question of their ability to control their actions, as that they do not attempt to do so. 3 Witth. & Beck. 289.

**PARAPHERNA** (Lat.). **In Civil Law.** Goods brought by wife to husband over and above her dower (*dos*). Voc. Jur. Utr.; Fleta, lib. 5, c. 23, § 6; Mack. C. L. § 529.

**PARAPHERNALIA.** Apparel and ornaments of a wife, suitable to her rank and degree. 2 Bla. Com. 435.

Those goods which a wife could bequeath by her testament. 2 Poll. & Maitl. 427.

These are subject to the control of the husband during his lifetime; 3 Atk. 394; but go to the wife upon his death, in preference to all other representatives; Cro. Car. 343; and cannot be devised away by the husband; Noy, Max. They are liable to be sold to pay debts on a failure of assets; 1 P. Wms. 730. See, also, 2 Atk. 642; 11 Vin. Abr. 176. The judge of probate may, in the practice of most states, make an allowance to the widow of a deceased person which more than takes the place of the paraphernalia.

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While a married woman may acquire title to articles of apparel by gift from her husband, yet her mere use and enjoyment of such articles purchased by her husband does not give title thereto as her separate property; 12 S. C. 180; s. c. 32 Am. Rep. 508. See, also, 35 Ohio St. 514. The wearing apparel purchased by a married woman after her marriage, with her husband's money, or upon his credit, belongs to him as against her creditors; 87 Mich. 62. In New York, by statute, a married woman may sue in her own name for injury to her paraphernalia; 48 N. Y. 212; s. c. 8 Am. Rep. 548; but in the absence of proof of a gift to her, the husband can sue; 74 N. Y. 116; s. c. 30 Am. Rep. 271.

In some states, the paraphernalia of a wife is protected by statute (in Georgia by name, and in Rhode Island and Colorado by description). The articles covered by one or more of the statutes are: wearing apparel of the wife and such ornaments, jewelry, silver, table ware, plate, and such articles of property as have been given to her for her own use and comfort. In Louisiana the property not declared to be brought in marriage by the wife, or given to her in consideration of the marriage, is paraphernalia, and she has a right to administer it without the assistance of her husband; but as to any which is administered by her husband without her opposition, he is accountable for it. See MARRIED WOMAN.

**PARAPHERNAUX BIENS. In French Law.** All the property of the wife which is not subject to the *régime dotal*. Brown.

**PARASYNEXIS. In Civil Law.** A conventicle or unlawful meeting. Whart.

**PARATITLA** (Lat.). **In Civil Law.** An abbreviated explanation of some titles or books of the Code or Digest.

**PARATUM HABEO** (Lat. I have ready). **In Practice.** A return made by the sheriff to a *capias ad respondendum*, which signified that he had the defendant ready to bring into court. This was a fiction, where the defendant was at large. Afterwards he was required, by statute, to take bail from the defendant, and he returned *cepi corpus* and bail-bond. But still he might be ruled to bring in the body; 7 Pa. 535.

**PARAVAIL.** Tenant paravail is the lowest tenant of the fee, or he who is the immediate tenant to one who holds of another. He is called tenant paravail because it is presumed he has the avails or profits of the land. Fitzh. N. B. 135; Co. 2d Inst. 296.

**PARCEL.** A part of the estate. 38 Ia. 141; 1 Comyns, Dig. *Abatement* (H 51), *Grant* (E 10). Under a statute providing for an assessment of unplatted lands, synonymous with lot. 38 N. E. Rep. (Ind.) 468. To parcel is to divide an estate. Bac. Abr. *Conditions* (O).

A small bundle or package.

The word "parcel" is not a sufficient description of the property alleged in an indictment to have been stolen. The prisoner was indicted for stealing "one parcel, of the value of one shilling, of the goods," etc. The parcel in question was taken from the hold of a vessel, out of a box broken open by the prisoner. Held an insufficient description; 7 Cox, C. C. 13. See PACKAGE.

**PARCEL MAKERS.** Two officers in the exchequer who formerly made the parcels of the escheator's accounts, wherein they charged them for everything they had levied for the sovereign's use within the time of their being in office, and delivered the same to the auditors to make up their accounts therewith. Whart. Law Lex.

**PARCELS, BILL OF.** See BILL OF PARCELS.

**PARCENARY.** The state or condition of holding title to lands jointly by parceners, before the common inheritance has been divided.

**PARCENERS.** The daughters of a man or woman seised of lands and tenements in fee-simple or fee-tail, on whom, after the death of such ancestor, such lands and tenements descend, and they enter. See ESTATE IN COPARCENARY.

**PARCHMENT.** Skeepskins dressed for writing, so called from *Pergamus*, Asia Minor, where they were invented. Used for deeds, and was used for writs of summons in England previous to the Judicature Act, 1875. Whart. Lex.

**PARCO FRACTO** (Lat.). **In English Law.** The name of a writ against one who violently breaks a pound and takes from thence beasts which, for some trespass done, or some other just cause, were lawfully impounded.

**PARDON.** An act of grace, usually proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment which the law inflicts for a crime he has committed. 7 Pet. 160; 19 N. Y. S. 508.

Every pardon granted to the guilty is in derogation of the law; if the pardon be equitable, the law is bad; for where legislation and the administration of the law are perfect, pardons must be a violation of the law. But, as human actions are necessarily imperfect, the pardoning power must be vested somewhere, in order to prevent injustice when it is ascertained that an error has been committed.

An *absolute* pardon is one which frees the criminal without any condition whatever.

A *conditional* pardon is one to which a condition is annexed, performance of which is necessary to the validity of the pardon. 1 Bail. 283; 10 Ark. 284; 1 M'Cord 176; 1 Park. Cr. Cas. 47. See 27 N. J. L. 637.

A *general* pardon is one which extends

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to all offenders of the same kind. It may be express, as when a general declaration is made that all offenders of a certain class shall be pardoned, or implied, as in case of the repeal of a penal statute. 2 Over. 423.

The pardoning power is lodged in the executive of the United States and of the various states, and extends to all offences except in cases of impeachment. In some states a concurrence of one of the legislative bodies is required; in other states, boards of pardon have been provided, whose recommendation of a pardon to the executive is a prerequisite to the exercise of the power. See the titles of the several states. The constitutional power of pardon vested in the executive is not subject to legislative control, either to limit the effect of a pardon, or to exclude from its operation any class of offenders; 4 Wall. 333; 169 Pa. 316. In Pennsylvania, the act of March 31, 1860, provides that when any person convicted of a felony, etc., has endured his punishment, it shall have the same effect as a pardon, and he becomes a competent witness; this is a legislative pardon and has the same effect as an executive pardon; 53 Fed. Rep. 352. The pardoning power is by no means confined to the executive; it was possessed by parliament (4 Bla. Com. 401; 7 Pet. 162); and from the very nature of government, in Pennsylvania it is vested in the legislative branch by the inherent supreme law-making power, and in the executive by constitutional provision; 53 Fed. Rep. 352.

The power of pardon conferred by the constitution upon the president is unlimited, except in cases of impeachment. It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. A pardon reaches the punishment prescribed for an offence, and the guilt of the offender. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching: if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights. It gives him a new credit and capacity. It blots out his guilt and makes him, in the eye of the law, as innocent as if he had never committed the offence. There is only this limitation to its operation; it does not restore offices forfeited, or property or interests vested in others, in consequence of the conviction and judgment; 4 Wall. 333. See 93 Ky. 156; 26 N. J. L. 326; 27 *id.* 637. It may be granted after conviction and before sentence while exceptions are pending; 109 Mass. 323, where there is an extended discussion of the pardoning power by Gray, J.

The granting of a full and unconditional pardon by the president to a person convicted of a felony restores his competency as a witness, and this result is not affected by a recital in a pardon that it was granted for the reason, among others, that his testimony was desired by the government in a cause then pending in a federal court; 142 U. S. 450; and a pardon granted after the person has served his term of imprisonment has the same effect; 30 S. W. Rep. (Ky.) 98.

There are several ways (as given by Judge Cooley) in which the pardoning power of the president may be exercised: 1. A pardon may be given to a person under conviction by name, and this will take effect from its delivery, unless otherwise provided therein. 2. It may be given to one or more persons named, or to a class of persons, before conviction, and even before prosecution begun. Such a pardon is rather in the nature of an amnesty. 3. It may be given by proclamation, forgiving all persons who may have been guilty of the specified offence, or offences; 4 Wall. 330, 380; 18 *id.* 128; and in this case the pardon takes effect from the time the proclamation is signed; 17 Wall. 191. See *infra*. 4. It may in any of these ways be made a pardon on conditions to be first performed, in which case it has effect only on performance; or on conditions to be thereafter performed, in which case a breach of the condition will place the offender in the position occupied by him before the pardon was issued; 7 Pet. 150; 2 Caines 57; 1 McCord 176; 64 Cal. 29.

In Michigan it has been held that a pardoned convict charged with having violated the conditions of his release must be arrested and tried in the same manner as other offenders against the law; 62 Mich. 496; but in South Carolina a convict who has broken the conditions of his pardon may be remanded to the penitentiary to serve out the remainder of his sentence, though the time in which he was to serve has expired; 32 S. C. 14. A power to grant pardons on condition that the person pardoned shall leave the state and not return to it, is not in conflict with a constitutional provision which provides that no one shall be exiled from the state; 33 S. W. Rep. (Ark.) 106.

It is to be exercised in the discretion of the power with whom it is lodged.

As to promises of pardon to accomplices, see 1 Chitty, Cr. L. 83; 1 Leach 115.

In order to render a pardon valid, it must express with accuracy the crime intended to be forgiven; 4 Bla. Com. 400; 3 Wash. C. C. 335; 7 Ind. 359; 1 Jones N. C. 1.

The effect of a pardon is to protect the criminal from punishment for the offence pardoned; 6 Wall. 766; 16 *id.* 147; 91 U. S. 474; but for no other; 10 Ala. 475; 1 Bay 34. It seems that the pardon of an assault and battery, which afterwards becomes murder by the death of the person beaten, would not operate as a pardon of the murder; 12 Pick. 496. See Plowd. 401; 1 Hill N. Y. 426. In general, the effect of a full pardon is to restore the convict to all his rights; 169 Pa. 319; even though granted after he has served out his sentence, it restores his competency to testify; 23 U. S. App. 344; 142 U. S. 450; but to

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this there are some exceptions. *First*, it does not restore civil capacity; 2 Leigh 724. See 1 Strobh. 150; 2 Wheel. Cr. Cas. 451; 33 N. H. 388. *Second*, it does not affect a *status* of other persons which has been altered or a right which has accrued in consequence of the commission of the crime or its punishment; 10 Johns. 232; 2 Bay 565; 5 Gilm. 214; or third persons who, by the prosecution of judicial proceedings, may have acquired rights to a share in penalties or to property forfeited and actually sold; 4 Wash. C. C. 64; 9 Fed. Rep. 645; but see 4 Biss. 336; 6 Wall. 766 (as to forfeiture to U. S.).

In England a pardon removes not only the punishment but the legal disabilities consequent on the crime, wherever the latter are the consequence of the judgment, but where it is declared by act of parliament to be a part of the punishment, as in case of perjury under the 5 Eliz. c. 9, pardon will not make the person competent; 2 Russ. Cr. 975, followed in 1 Park. Cr. Rep. 241; 24 Ill. 298. See 11 Am. Jur. 356. But this distinction does not obtain here; 169 Pa. 316; 4 Wall. 333. It has been held in Ohio that a prisoner could not be tried on the charge of being a habitual criminal after having been pardoned by the governor for the previous offence; 56 Alb. L. J. 5.

When the pardon is general, either by an act of amnesty, or by the repeal of a penal law, it is not necessary to plead it; because the court is bound, *ex officio*, to take notice of it; Baldw. 91; 145 U. S. 546. A criminal cannot even waive such pardon, because by his admittance no one can give the court power to punish him when it judicially appears there is no law to do it. But when the pardon is special, to avail the criminal it must judicially appear that it has been accepted; and for this reason it must be specially pleaded; 4 Bla. Com. 401; 7 Pet. 150, 162; and if he has obtained a pardon before arraignment, and, instead of pleading it in bar, he pleads the general issue, he shall be deemed to have waived the benefit of it, and cannot afterwards avail himself of it in arrest of judgment; 1 Rolle 297. See 1 Dy. 34 *a*; T. Raym. 13; 3 Metc. Mass. 458.

The power to pardon extends to punishments for contempt; 7 Blatch. 23.

All contracts made for the buying or procuring a pardon for a convict are void; and such contracts will be declared null by a court of equity, on the ground that they are opposed to public policy; 4 Bouvier, Inst. 3857.

A mayor of a city may be vested with power to pardon one convicted of the violation of an ordinance. See 46 Fed. Rep. 52.

See AMNESTY.

**PARDONERS.** Persons who carried about the pope's indulgences and sold them. Whart. Law Lex.

**PARENS PATRIÆ** (Lat.). Father of his country. In England, the king; 3 Bla. Com. 427; 2 Steph. Com. 528; in the United States the state, as sovereign, has power of guardianship over persons under disabilities. See 17 How. 398.

**PARENTAGE.** Kindred in the direct ascending line. See 2 Bouv. Inst. n. 1955. For a discussion of the subject in connection with citizenship, see 2 Kent 49; Morse, Citizenship; CITIZEN; NATURALIZATION.

**PARENTELA.** The sum of those persons who trace descent from one ancestor. 2 Poll. & Maitl. 294. See LINE.

**PARENTS.** The lawful father and mother of the party spoken of. 1 Murph. N. C. 336; 11 S. & R. 93.

The term parent differs from that of ancestor, the latter embracing not only the father and mother, but every person in an ascending line. It differs also from predecessor, which is applied to corporators. 7 Ves. Ch. 522; 1 Murph. N. C. 336; 6 Binn. 255. See FATHER; MOTHER.

By the civil law, grandfathers and grandmothers, and other ascendants, were, in certain cases, considered parents. *Dict. de Jur. Parents.* See 1 Ashm. 55; 2 Kent 159; 5 East 223.

**PARES** (Lat.). A man's equals; his peers. 3 Bla. Com. 349.

**PARES CURIÆ** (Lat.). **In Feudal Law.** Those vassals who were bound to attend the lord's court. Erskine, Inst. b. 2, tit. 3, s. 17; 1 Washb. R. P., 5th ed. 1. See MAGNA CHARTA.

**PARI DELICTO** (Lat.). In a similar offence or crime; equal in guilt or in legal fault.

A person who is *in pari delicto* with another differs from a *particeps criminis* in this, that the former term always includes the latter, but the latter does not always include the former. 8 East 381.

Ordinarily where two persons are *in pari delicto* the law will not relieve them; see CONTRIBUTION. But this doctrine does not apply where a president of a national bank has borrowed an amount exceeding twenty per cent. of its capital stock and suit is brought to recover the amount; 49 N. Y. Supp. 270.

The rule that both parties to an *ultra vires* contract are *in pari delicto*, and therefore a court of equity will not interpose to restore to one of them rights which it has thus parted with, is inapplicable to a municipal corporation whose trustees attempt to make an invalid grant; 56 Fed. Rep. 867.

**PARI MATERIA** (Lat.). Of the same matter; on the same subject: as laws *pari materia* must be construed with reference to each other. Bacon, Abr. *Statute* (I 3).

**PARI PASSU** (Lat.). By the same gradation. Used especially of creditors who, in marshalling assets, are entitled to receive out of the same fund without any precedence over each other.

**PARI PASSU BONDS.** A name

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given in Scotland to certain bonds secured upon lands which share an equal benefit of the security. Where several securities are created over the same lands by separate bonds and dispositions in security, they would ordinarily have priority according to the date of registration of the sasine or bond, as the case may be. If it is intended to have them rank as *pari passu*, it is usual to insert a clause in each bond declaring that they shall be so ranked without regard to their priority of registration. 9 Jurid. Rev. 74.

**PARIS, DECLARATION OF.** See DECLARATION OF PARIS; BLOCKADE; NEUTRALITY.

**PARISH.** A district of country, of different extents. As used in the revised statutes, the word is synonymous with county; 28 Fed. Rep. 840; as also in the state of Louisiana.

**In Ecclesiastical Law.** The territory committed to the charge of a parson, or vicar, or other minister. Ayl. Par. 404; 2 Bla. Com. 112; Hoffm. Eccl. Law.

Although, in the absence of a state church in this country, the status of parishes is comparatively unimportant, yet in the Protestant Episcopal Church, at least, their boundaries and the rights of the clergy therein are quite clearly defined by canon. In the leading case of Stubbs and Boggs *v.* Tyng, decided in New York, in March, 1868, the defendant was found guilty of violating a canon of the church, in having officiated, without the permission of plaintiffs within the corporate bounds of the city of New Brunswick, N. J., which then constituted the plaintiffs' parochial cure. Baum 103. As to their origin, see 2 Hallam, Mid. Ages, c. 7, p. 144. See, also, 1 Poll. & Maitl. 548, 602.

**In New England.** Divisions of a town, originally territorial, but which now constitute *quasi*-corporations, consisting of those connected with a certain church. See 2 Mass. 501; 16 *id.* 457, 488; 1 Pick. 91. Synonymous with church and used in the same sense as society. 16 Conn. 299.

**PARISH APPRENTICES.** The children of parents unable to maintain them, who are apprenticed by the overseers of the poor of their parish, to such persons as may be willing to receive them. 2 Steph. Com. 230.

**PARISH CLERK. In English Law.** An officer, in former times often in holy orders, and appointed to officiate at the altar; now his duty consists chiefly in making responses in church to the minister. By common law he has a freehold in his office, but it seems now to be falling into desuetude. 2 Steph. Com, 11th ed. 713; Moz. & W.

**PARISH CONSTABLE.** See CONSTABLE.

**PARISH COURT.** In Louisiana the local courts in each parish, corresponding generally to county and probate courts, and, in some respects, justices' courts, in other states were formerly so called.

**PARISH OFFICERS.** Churchwardens, overseers, and constables.

**PARISH PRIEST.** The parson; a minister who holds a parish as a benefice.

**PARISHIONERS.** Members of a parish. In England, for many purposes they form a body politic. See PARISH.

**PARITOR.** A beadle; a summoner to the courts of civil law.

**PARIUM JUDICIUM** (Lat. the decision of equals). The right of trial by one's peers: *i. e.* by jury in the case of a commoner, by the house of peers in the case of a peer.

**PARK** (L. Lat. *parcus*). An inclosure. 2 Bla. Com. 38. A pound. Reg. Orig. 166; Cowell. An inclosed chase extending only over a man's own grounds. 13 Car. II. c. 10; Manw. For. Laws; Crompton, Jur. fol. 148; 2 Bla. Com. 38.

A pleasure-ground in or near a city, set apart for the recreation of the public; a piece of ground enclosed for purposes of pleasure, exercise, amusement, or ornament. 36 N. Y. 120. A place for the resort of the public for recreation, air, and light; a place open for everyone. 40 N. J. L. 613. See 93 Cal. 43.

Public parks may be dedicated to the public like highways; 143 Mass. 521; 23 Ore. 176; and at common law, upon such dedication, the fee remains in the owners; 154 Mass. 323. Non-user by the public, however long continued, will not affect the public right or revest the title in the donor; 81 Wis. 313. The title is usually vested in municipalities by the legislature; 106 N. Y. 496; 27 Mich. 262; 148 Mass. 580; and held by them in trust for the use of the public. The municipality cannot lease them; 60 Ga. 221; nor can the legislature; 7 Ohio 218; but see 3 West. L. Bul. 551, where a right of way was granted through a public park in consideration of an agreed rental.

A public park may be crossed by a street railway where such use will not materially interfere with its enjoyment by the public; 76 Cal. 176; and compensation may not be demanded for the taking; 44 N. E. Rep. (Mass). 446; but it is also held that parks dedicated to the public use are not subject to a right of way for a street railway, and that neither the municipality nor the legislature can divert them for that purpose; 67 Ill. 540; Booth, St. Ry. L. § 11.

A park or public square may be enclosed, notwithstanding it has remained open many years; 58 Tex. 183; 2 Ohio St. 107; *contra*, 3 Pa. 206, where it was held that a public square was as much a highway as though it were a street, and that neither the county nor the public could block it up, to the prejudice of the public or an individual. See, also, 3 Ore. 226; 85 Mo. 674.

A city is not bound to keep parks in safe condition; 148 Mass. 580; 128 id. 584; and is not liable for injuries caused by a horse frightened by the firing of a cannon therein; 148 Mass. 580; but it must contribute to an assessment for the improvement of streets by which a park is bounded in

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common with private owners benefited thereby; 42 Ill. 192.

As to the right of the municipality to make regulations for the preservation of order in a park or public square, see POLICE POWER; LIBERTY OF SPEECH.

See, generally, DEDICATION; EMINENT DOMAIN; RAILROAD.

**PARLE HILL** (also called Parling Hill). A hill where courts were held in olden times. Cowell.

**PARLIAMENT** (said to be derived from *parler la ment*, to speak the mind, or *parum lamentum*).

**In English Law.** The legislative branch of the government of Great Britain, consisting of the house of lords and the house of commons.

The parliament is usually considered to consist of the kings, lords, and commons. See 1 Bla. Com. 147*, 157*, Chitty's note; 2 Steph. Com., 11th ed. 341. In 1 Woodd. Lect. 30, the lords temporal, the lords spiritual, and the commons are called the three estates of the realm: yet the king is called a part of the parliament, in right of his prerogative of veto and the necessity of his approval to the passage of a bill. That the connection between the king and the lords temporal, the lords spiritual, and the commons, who when assembled in parliament form the three estates of the realm, is the same as that which subsists between the king and those estates—the people at large—out of parliament, the king not being in either case a member, branch, or co-estate, but standing solely in the relation of sovereign or head. See Colton, Record 710; Rot. Parl. vol. iii. 623 *a*; 2 M. & G. 457, n.

The House of Lords was the supreme court of judicature in the kingdom. It had no original jurisdiction (except to a certain extent before the reign of Charles II.), but was the court of appeal in the last resort, with a few exceptions and under some limitations as to the right, from the inferior courts upon appeal or writ of error for mistakes of law. Appeals lay to this tribunal from Scotch and Irish courts, in some cases. See stat. 4 Geo. IV. c. 85, as to Scotch, and stat. 39 & 40 Geo. III. c. 67, art. 8, as to Irish, appeals.

This body, when sitting as a court of law, was presided over by the lord chancellor, whose attendance alone was in any respect compulsory, and was composed of as many of its members who had filled judicial stations as chose to attend. Three laymen also attended in rotation, but did not vote upon judicial matters; 11 Cl. & F. 421. In the absence of the chancellor, deputy speakers, who were members of the profession but not of the house, have been appointed; 3 Bla. Com. 56.

By statute 39 & 40 Vict. ch. 59, an appeal, by petition, lies to the House of Lords from the Court of Appeal in England and from Scotch and Irish courts from which an appeal or writ of error formerly lay to the House of Lords. The appeal is heard by the Lord Chancellor, two Lords of Appeal in Ordinary (whose appointment is provided for by the act), and such peers as are holders of or have held certain high judicial offices. The House of Lords sits also to try impeachments.

Records of writs summoning knights, burgesses, and citizens to parliament are first found towards the end of the reign of Henry III., such writs having issued in the thirty-eighth and forty-ninth years of his reign. 4 Bla. Com. 425; Prynne, 4th Inst. 2. The earliest parliamentary roll is said to be 1290. 1 Poll. & Maitl. 178. In the reign of Edward III. it assumed its present form. Since the reign of Edward III. the history of England shows an almost constant increase in the power of parliament. Anne was the last sovereign who exercised the royal prerogative of *veto*; and, as this prerogative no longer practically exists, the authority of parliament is absolutely unrestrained. The parliament can only meet when convened by the sovereign, except on the demise of the sovereign with no parliament in being, in which case the last parliament is to assemble; 6 Anne, c. 7. The sovereign has also power to prorogue and dissolve the parliament. The origin of the English parliament seems traceable to the *witena-gemote* of the Saxon kings. Encyc. Brit. A recent writer traces the origin back to the local institutions of the Germanic tribes, but considers that the final stages of its growth are to be sought in the period between the accession of Henry II. and the close of the reign of Edward I.; 1 Social Eng. 396. See May, Law, Priv. and Proc. of Parliament; St. Armand, Legislative Power; Bagehot, English Constitution; Pike, History of the House of Lords; HIGH COURT OF PARLIAMENT; FOLC-GEMOTE; WITENA-GEMOTE; LEGISLATIVE POWER; PEERS; HOUSE OF LORDS.

**PARLIAMENTARY AGENTS.** Persons professionally employed in the promotion of or opposition to private bills, and otherwise in relation to private business in parliament. Whart. Law Lex. Business in relation to private bills must be transacted through them, and counsel may be instructed by them. 2 Brett, Com. 775.

**PARLIAMENTARY COMMITTEE.** A committee of members of the house of peers, or of the house of commons, appointed by either house for the purpose of making inquiries, by the examination of witnesses or otherwise, into matters which could not be conveniently inquired into by the whole house. Whart. Law Lex.

**PARLIAMENTARY LAW.** That body of the recognized usages of parliamentary and legislative assemblies by which their procedure is regulated, which takes its name from the British parliament and on the practice of which it is mainly founded, with such changes and modifications in American deliberative bodies as have been necessary to adapt it to the usages of that country. See MEETINGS; QUORUM.

**PARLIAMENTUM DIABOLICUM.** A parliament held at Coventry, 38 Henry VI., wherein Edward, Earl of March (afterwards Edward IV.), and many of the chief nobility were attainted, was so called; but the acts then passed were annulled by the succeeding parliament. Jacob.

**PARLIAMENTUM INDOCTUM** (Lat. unlearned parliament). A name applied to a parliament assembled at Coventry, under a law that no lawyer should be a member of it. 6 Hen. IV.; 1 Bla. Com. 177; Walsingham 412, n. 30; Rot. Parl. 6 Hen. IV.

**PARLIAMENTUM INSANUM.** A parliament assembled at Oxford, 41 Hen. III., so styled from the madness of their proceedings, and because the lords came to it with armed men. Jacob.

**PARLOR CAR.** See SLEEPING CAR.

**PAROCHE.** A parish.

**PAROCHIAL BOARD.** In Scotch Law. A body of men in a parish who manage the relief of the poor. Ersk. Prin. 612.

**PAROL** (more properly, *parole*. A French word, which means, literally, word,

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or speech). A term used to distinguish contracts which are made verbally, or in writing not under seal, which are called parol contracts, from those which are under seal, which bear the name of deeds or specialties. 1 Chitty, Contr., 12th ed. 7; 7 Term 350; 3 Johns. Cas. 60; 1 Chitty, Pl. 88. When a contract is made under seal, and afterwards it is modified verbally, it becomes wholly a parol contract; 2 Watts 451; 9 Pick. 298. See CONTRACT.

Pleadings are frequently denominated the *parol*. In some instances the term parol is used to denote the entire pleadings in a cause: as, when in an action brought against an infant heir, on an obligation of his ancestors, he prays that the parol may demur, *i. e.* that the pleadings may be stayed till he shall attain full age; 3 Bla. Com. 300; 4 East 485; 1 Hoffm. 178. See a form of a plea in abatement, praying that the parol may demur, in 1 Wentw. Pl. 43, and 2 Chitty, Pl. 520. But a devisee cannot pray the parol to demur; 4 East 485.

**PAROL DEMURRER.** See PAROL.

**PAROL EVIDENCE.** Evidence verbally delivered by a witness. See 56 Am. St. Rep. 659; 6 Harv. L. Rev. 417; Browne, Parol Evidence; EVIDENCE; RECEIPT; CONTRACT.

**PAROL LEASE.** An agreement made orally between parties, by which one of them leases to the other a certain estate. See LEASE.

**PAROLE. In International Law.** The agreement of persons who have been taken prisoner by an enemy that they will not again take up arms against those who captured them, either for a limited time or during the continuance of the war. Vattel, liv. 3, c. 8, § 151.

It is a sacred obligation to the fulfilment of which the national faith is pledged. 5 Phila. 299; Fed. Cas. No. 16777.

A parole can be given only by a commissioned officer for himself or the troops under him. And an inferior officer, if his superior is within reach, cannot give his parole without the consent of the latter. If the prisoner's government refuse to confirm his parole, he is bound in honor to return into captivity. A captor is not bound to offer, nor a prisoner to accept, parole; it is voluntary on both sides. Giving a parole precludes only active service in the field. It is ended by the prisoner's exchange or by peace. A prisoner who violates his parole and is again captured may be shot as a bandit; Risley, Law of War 131.

**In Criminal Law.** In some states acts have been passed providing for the release on parole of prisoners committed to prison upon conviction of crime. Such acts were passed in 1897 in Connecticut, Illinois, Idaho, Indiana, Minnesota, and Missouri. See PRISONER.

**PARQUET. In French Law.** The magistrates who are charged with the conduct of proceedings in criminal cases and misdemeanors.

**PARRICIDE** (from Lat. *pater*, father, *caedere* to slay). **In the Civil Law.** One who murders his father. One who murders his mother, his brother, his sister, or his children. Merlin, *Rep. Parricide*; Dig. 48. 9. 1. 3, 4.

This offence is defined almost in the same words in the penal code of China. Penal Laws of China, b. 1, s. 2, § 4.

The criminal was punished by being scourged, and afterwards sewed in a sort of sack, with a dog, a cock, a viper, and an ape, and then thrown into the sea or into a river; or, if there were no water, he was thrown in this manner to wild beasts. Dig. 48. 9. 9; Code 9, 17. 1. 1. 4, 18, 6; Brown, Civ. Law 428.

By the laws of France, parricide is the crime of him who murders his father or mother, whether they be the legitimate, natural, or adopted parents of the individual, or the murder of any other legitimate ascendant. Code Penal, art. 297. This crime was there punished by the criminal's being taken to the place of execution without any other garment than his shirt, barefooted, and with his head covered with a black veil. He was then exposed on the scaffold, while an officer of the court read his sentence to the spectators; his right hand was then cut off, and he was immediately put to death. *Id.* art. 13.

The common law does not define this crime, and makes no difference between its punishment and the punishment of murder; 1 Hale, Pl. Cr. 380; Prin. Penal Law, c. 18, § 8, p. 243; Dalloz, Dict. *Homicide*, § 3.

**PARS ENITIA** (Lat.). **In Old English Law.** The share of the eldest daughter where lands were parted between daughters by lot, she having her first choice after the division of the inheritance. Co. Litt. 166 *b*; Glanv. lib. 7, c. 3; Fleta, lib. 5, c. 10, § *In divisionem*.

**PARS RATIONABILIS** (Lat. reasonable part). That part of a man's goods which the law gave to his wife and children. 2 Bla. Com. 492; Magn. Chart.; 9 Hen. III. c. 18; 2 Steph. Com., 11th ed. 194. See DEAD MAN'S PART.

**PARSON. In Ecclesiastical Law.** One that hath full possession of all the rights of a parochial church.

So called because the church, which is an invisible body, is represented by his *person*. In England he is himself a body corporate, in order to protect and defend the church (which he personates) by a perpetual succession; Co. Litt. 300. He is sometimes called the rector (*q. v.*), or governor, of the church: but the appellation of parson, however it may be depreciated by familiar, clownish, and indiscriminate use, is the most legal, most beneficial, and most honorable title that a parish priest can enjoy; because "such a one," Sir Edward Coke observes, "and he only, is said *vicem seu personam Ecclesiæ gerere*"; 1 Bla. Com. 384.

The parson has, during life, the freehold in himself of the parsonage-house, the glebe, the tithes, and other dues, unless these are appropriated, *i. e.* given away, to some spiritual corporation, sole or aggregate, which the law esteems as capable of providing for the service of the church as any single private clergyman; *id.*; 1 Hagg. Cons. 162; 3 Steph. Com., 11th ed. 5.

The ecclesiastical or spiritual rector of a rectory. 1 Woodd. Lect. 311; Fleta, lib. 7, c. 18; Co. Litt. 300. Also, any clergyman having a spiritual preferment. Co. Litt. 17. Holy orders, presentation, institution, and induction are necessary for a parson; and a parson may cease to be such by death, resignation, cession, or deprivation, which last may be for simony, non-

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conformity to canons, adultery, etc.; Co. Litt. 120; 4 Co. 75, 76.

**PARSON IMPERSONEE** (Lat.). A *persona*, or parson, may be termed *impersonata*, or impersonee, only in regard to the possession he hath of the rectory by the act of another. Co. Litt. 300. One that is inducted and in possession of a benefice; *e. g.* a dean and chapter. Dy. 40, 221. He that is in possession of a church, be it presentative or appropriate, and with whom the church is full,—*persona* in this case meaning the patron who gives the title, and *persona impersonata* the parson to whom the benefice is given in the patron's right. Reg. Jud. 24; 1 Barb. 330; 1 Busb. Eq. 55.

**PARSONAGE.** The house set apart for the minister's residence. A portion of lands and tithes established by law for the maintenance of a minister. Toml.

**PART.** A share; a purpart. This word is also used in contradistinction to counterpart: covenants were formerly made in a script and rescript, or *part* and *counterpart*.

**PART AND PERTINENT. In Scotch Law.** A term in a conveyance including lands or servitudes held for forty years as part of, or pertinent to, lands conveyed, natural fruits before they are separated, woods and parks, etc.; but not steelbow stock, unless the lands have been sold on a rental. Bell, Dict.; Erskine, Inst. 2. 5. 3. *et seq.*

**PART-OWNERS.** Those who own a thing together, or in common.

**In Maritime Law.** A term applied to two or more persons who own a vessel together, and not as partners.

In general, when a majority of the part-owners are desirous of employing such a ship upon a particular voyage or adventure they have a right to do so upon giving security in the admiralty by stipulation to the minority, if required to bring her back and restore the ship, or in case of her loss, to pay them the value of their respective shares; Abb. Ship., 13th ed. 84; 3 Kent 151; Story, Partnership § 489; 11 Pet. 175. When the majority do not choose to employ the ship, the minority have the same right, upon giving similar security; 11 Pet. 175; 1 Hagg. Adm. 306; Jacobsen, Sea-Laws 442.

Where part-owners are equally divided as to the employment upon any particular voyage, the courts of admiralty have manifested a disposition to support the right of the court to order a sale of the ship; Story, Partn. § 439; Bee 2; Gilp. 10; 18 Am. Jur. 486. See VESSEL.

**PARTES FINIS NIL HABUERUNT** (Lat. the parties to the fine had nothing; *i. e.* nothing which they could convey). **In Old English Pleading.** The plea to a fine levied by a stranger, which only bound parties and privies. 2 Bla. Com. *356; Hob. 334; 1 P. Wms. 520; 1 Woodd. Lect. 315.

**PARTIAL LOSS.** See LOSS.

**PARTIBLE LANDS.** Lands which might be divided; lands held in gavelkind. See 2 Poll. & Maitl. 268, 271; GAVELKIND.

**PARTICEPS CRIMINIS.** A partner in crime.

**PARTICIPATE.** To take equal shares and proportions; to share or divide. 6 Ch. 696. *Participate in an estate.* To take as tenants in common. 28 Beav. 266.

**PARTICULAR AVERAGE.** Every kind of expense or damage, short of total loss, which regards a particular concern, and which is to be wholly borne by the proprietor of that concern or interest alone. See 3 Bosw. N. Y. 385; 14 Allen 320; 2 Phill. Ins. § 354; 1 Pars. Marit. Law 284; Gourlie, Gen. Average; AVERAGE.

**PARTICULAR AVERMENT.** See AVERMENT.

**PARTICULAR CUSTOM.** A custom which only affects the inhabitants of some particular district.

To be good, a particular custom must have been used so long that the memory of man runneth not to the contrary; must have been continued; must have been peaceable; must be reasonable; must be certain; must be consistent with itself; must be consistent with other customs. 1 Bla. Com. 74, 79.

**PARTICULAR ESTATE.** An estate which is carved out of a larger, and which precedes a remainder, as, an estate for years to A, remainder to B for life; or, an estate for life to A, remainder to B in tail: this precedent estate is called the particular estate, and the tenant of such estate is called the particular tenant. 2 Bla. Com. 165; 4 Kent 226; 16 Vin. Abr. 216; 4 Com. Dig. 32; 5 *id.* 346; Will. Real P. 281. See REMAINDER.

**PARTICULAR LIEN.** The right which a person has to retain property in respect of money or labor expended on such particular property. See LIEN.

**PARTICULAR MALICE.** Ill will; grudge; a desire to be revenged on a particular person. 11 Ind. 261. See MALICE.

**PARTICULAR SERVICES.** In this phrase is included the professional services of an expert; 59 Ind. 13; but not of a witness; 14 Ore. 20.

**PARTICULAR STATEMENT. In Pennsylvania Pleading and Practice.** A statement particularly specifying the date of a promise, book-account, note, bond (penal or single), bill, or all of them, on which an action is founded and the amount believed by the plaintiff to be due from the defendant. 6 S. & R. 21. It is founded on the provisions of a statute passed March 21, 1806. See 4 Sm. Pa. Laws 328. It is an unmethodical declaration, not restricted to any particular form; 2 S. & R. 537; 3 *id.* 405; 8 *id.* 316.



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**PARTICULAR TENANT.** See PARTICULAR ESTATE.

**PARTICULARS.** See BILL OF PARTICULARS.

**PARTIDAS.** See LAS PARTIDAS.

**PARTIES** (Lat. *pars*, a part). Those who take part in the performance of an act, as, making a contract, carrying on an action. Parties in law may be said to be those united in interest in the performance of an act; it may then be composed of one or more persons. The term includes every party to an act. It is also used to denote all the individual, separate persons engaged in the act,—in which sense, however, a corporation may be a party.

**In Contracts.** Those persons who engage themselves to do or not to do the matters and things contained in an agreement.

In general, all persons may be parties to contracts. But no person can contract with himself in a different capacity, as there must be an agreement of minds; 2 Bro. C. C. 400; 13 S. & R. 210; 2 Johns. Ch. 252; 4 How. 503; 63 Vt. 231. See 5 Misc. Rep. 309.

*Aliens* were under greater disabilities at common law with reference to real than to personal property; 7 Co. 25 *a*; 6 Pet. 102; 11 Paige, Ch. 292; 1 Cush. 531. The disability is now removed, in a greater or less degree, by statutes in the various states, and alien friends stand on a very different footing from alien enemies; 2 Sandf. Ch. 586; 2 Woodb. & M. 1; 2 How. 65. See ALIEN; WAR.

*Bankrupts* and *insolvents* are disabled to contract, by various statutes, in England, as well as by insolvent laws in the states of the United States.

*Duress* renders a contract voidable at the option of him on whom it was practised. See DURESS.

*Infants* are generally incapable of contracting before the age of twenty-one years. This provision is intended for their benefit; and therefore most of their contracts are voidable, and not void. It is the infant's privilege at majority to elect whether to avoid or ratify the contract he has made during minority; 39 Kan. 495. Though the infant is not bound, the adult with whom he may contract is. The infant may always sue, but cannot be sued; Stra. 937. The infant cannot avoid his contract for necessaries; 11 N. H. 51; 12 Metc. 559; 6 M. & W. 42; 65 Hun 57. See [1891] 1 Q. B. 413. If he avoids an executed contract when he comes of age, on the ground of infancy, he must restore the consideration which he has received; the privilege of infancy is to be used as a shield, not as a sword; 7 Mont. 171; 1 App. D. C. 359. See INFANT; NECESSARIES.

*Married women*, at common law, were almost entirely disabled to contract, their personal existence being almost entirely merged in that of their husbands; 2 J. J. Marsh. 82; 23 Me. 305; 5 Exch. 388; so that contracts made by them before marriage could be taken advantage of and enforced by their husbands, but not by themselves; 13 Mass. 384; 17 Me. 29; 2 Dev. 360; 9 Cow. 230; 14 Conn. 99; 6 T. B. Monr. 257. The contract of a *feme covert* was, then, generally void, unless she was the agent of her husband, in which case it was the husband's contract, and not hers; 6 Mod. 171; 6 N. H. 124; 16 Vt. 390; 5 Binn. 285; 15 Conn. 347. See MARRIED WOMAN.

*Non compotes mentis.* At common law, formerly, in this class were included *lunatics*, *insane persons*, and *idiots*. It is understood now to include *drunkards*; 4 Conn. 203; 2 N. H. 435; 15 Johns. 503; 11 Pick. 304; 1 Rice 56; 3 Blackf. 51; 13 M. & W. 623; 56 Minn. 216. See 89 Va. 56; 63 Hun 629. *Spendthrifts* under guardianship are not competent to make a valid contract for the payment of money; 13 Pick. 206. *Seamen* "are the wards of the admiralty, and though not technically incapable of entering into a valid contract, they are treated in the same manner as courts of equity are accustomed to treat young heirs dealing with their expectancies, wards with their guardians, and *cestuis que trust* with their trustees." 2 Mas. 541. See 3 Kent 193; 2 Dods. 504.

*As to the character* in which parties contract. They may act independently or severally, jointly, or jointly and severally. The decision of the question of the kind of liability incurred depends on the terms of the contract, if they are express, or, if not express, upon the intention of the parties as gathered from the circumstances of the case. Whenever, however, the obligation is undertaken by two or more, or a right given to two or more, it is a general presumption of law that it is a joint obligation or right; words of joinder are not necessary for this purpose; but, on the other hand, there should be words of severance in order to produce a several responsibility or a several right; 13 M. & W. 499; 6 Wend. 629; 7 Mass. 58; 1 B. & C. 407; 12 Gill & J. 265; 37 W. Va. 834. See 53 N. J. L. 638. It may be doubted, however, whether anything less than express words can raise at once a joint and several liability. No joint liability exists upon separate individual contracts, though for the same subject-matter; 43 Ill. App. 378. Parties may act as the representatives of others, as *agents*, *factors*, or *brokers*, *attorneys*, *executors*, or *administrators*, and *guardians*. See these titles; JOINT PROMISE. They may also act in a collective capacity, as *corporations*, *joint-stock companies*, or as *partnerships*. See these titles.

New parties may be made to contracts already in existence, by *novation*, *assignment*, and *indorsement*, which titles see.

**To Suits in Equity.** The person who seeks a remedy in chancery by suit, commonly called the plaintiff, or complainant, and the person against whom the remedy is sought, usually denominated the defendant, or respondent, are the parties to a suit in equity.

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In equity all persons materially interested, either legally or beneficially, in the subject-matter of a suit, are to be made parties to it, either as plaintiffs or defendants, so that there may be a complete decree which shall bind them all; 133 U. S. 233, 579; it is not indispensable that all the parties should have an interest in all the matters contained in the suit, but it is sufficient if each party has an interest in some material matter in the suit, and it is connected with the others; 128 U. S. 403. In the absence of parties, and without their having an opportunity to be heard, a court is without jurisdiction to make an adjudication affecting them; 164 U. S. 471.

*Active parties* are those who are so involved in the subject-matter in controversy that no decree can be made without their being in court. *Passive* parties are those whose interests are involved in granting complete relief to those who ask it. 1 Wash. C. C. 517. See 3 Ala. 361.

PLAINTIFFS. In general, all persons, whether natural or artificial, may sue in equity; and an equitable title only is sufficient; 10 Ill. 332. Incapacities which prevent suit are *absolute*, which disable during their continuance, or *partial* which disable the party to sue alone.

Persons representing antagonistic interests cannot be joined as complainants; 14 So. Rep. (Ala.) 765.

*Alien enemies* are under an absolute incapacity to sue. Alien friends may sue; Mitf. Eq. Pl. 129; if the subject-matter be not such as to disable them; Co. Litt. 129 *b*; although a sovereign; 1 Sim. 94; 8 Wheat. 464; 4 Johns. Ch. 370; Ad. Eq. 314. In such case he must have been first recognized by the executive of the forum; Story, Eq. Pl. § 55; 3 Wheat. 324.

In such case the sovereign submits to the jurisdiction, as to the subject-matter, and must answer on oath; Mitf. Eq. Pl. 30; Ad. Eq. 313; 6 Beav. 1. See SOVEREIGN.

*Attorney-general.* Government (in England, the *crown*) may sue both in its own behalf, for its own political rights and interests, and in behalf of the rights and interests of those partaking of its prerogatives or claiming its peculiar protection; Mitf. Eq. Pl. 421; Coop. Eq. Pl. 21, 101; usually by the agency of the attorney-general or solicitor-general; Mitf. Eq. Pl. 7; Ad. Eq. 312. See INJUNCTION; QUO WARRANTO; MANDAMUS; TRUSTS.

*Corporations*, like natural persons, may sue; Moraw. Pr. Corp. § 357; Grant, Corp. 198; although foreign; *id.* 200; but in such case the incorporation must be set forth; 1 Cr. M. & R. 296; 4 Johns. Ch. 327; as it must if they are domestic and created by a private act; 3 Conn. 199; 15 Viner, Abr. 198. All the members of a voluntary association must be joined; 15 Ill. 251; unless too numerous; 2 Pet. 566; 3 Barb. Ch. 362. See JURISDICTION; EXPRESS COMPANIES.

As to the right of a *stockholder* to sue, see 104 U. S. 460; 106 *id.* 537; 18 How. 331.

*Idiots* and *lunatics* may sue by their committees; Mitf. Eq. Pl. 29. As to when a mere petition is sufficient, see 7 Johns. Ch. 24; 2 Ired. Eq. 294. See NEXT FRIEND.

*Infants* may sue; Mitf. Eq. Pl. 25; and, if they be on the wrong side of the suit, may be transferred at any time, on suggestion; 3 Edw. Ch. 32. The bill must be filed by the next friend (*q. v.*); Coop. Eq. Pl. 27; 2 Ala. 406; who must not have an adverse interest; 2 Ired. Eq. 478; and who may be compelled to give bail; 1 Paige, Ch. 178. If the infant have a guardian, the court may decide in whose name the suit shall continue; 12 Ill. 424.

A *married woman*, at common law, was under partial incapacity to sue; 7 Vt. 369. Otherwise, when in such condition as to be considered in law a *feme sole*; 2 Hayw. 406. She could sue on a separate claim by aid of a next friend of her own choice; Story, Eq. Pl. § 61; 1 Freem. 215; but see 2 Paige, Ch. 454; and the defendant might insist that she should sue in this manner; 2 Paige, Ch. 255; 4 Rand. 397.

Though at common law an action could not be maintained by a partnership against another *partnership* having a common member with the former, upon an agreement made between the two firms, equity will take jurisdiction, and afford an adequate remedy; 50 Minn. 171.

*Societies.* A certain number of persons belonging to a voluntary society may sue on behalf of themselves and their associates for purposes common to them all; 2 Pet. 366; such as bondholders and stockholders.

The objection for want of proper parties may be taken advantage of either by demurrer, plea, answer, or at the hearing; 24 U. S. App. 601.

Where a defendant insists upon the joinder of a certain party, as a necessary party, there is, upon joining such party, no ground for demurrer for improperly uniting causes of action; 18 N. Y. L. J. 1797, Supreme Ct. of N. Y., App. Div.

DEFENDANTS. Generally, all who are able to sue may be sued in equity. To constitute a person defendant, process must be prayed against him; 2 Bland, Ch. 106; 4 Ired. Eq. 175; 5 Ga. 251; 1 A. K. Marsh. 594. Those who are under incapacity may be made defendants, but must appear in a peculiar manner. One, or more, interested with the plaintiff, who refuse to join may be made defendants; 2 Bland, Ch. 264; 3 Des. 31; 10 Ill. 534; 15 *id.* 251; 156 Mass. 203. A court of equity even after a final hearing on the merits, and on appeal to the court of last resort, will compel the joinder of necessary parties defendant; 89 Mo. 284. One cannot be made a defendant on his own application, against the objection of the complainant; 15 So. Rep. (Miss.) 33; 2 Tenn. Ch. 140. See INTERVENTION.

*Corporations* must be sued by their corporate names, unless authorized to come into court in the name of some other person, as president, etc.; Story, Eq. Pl. § 70. Governments cannot, generally, be sued in their own courts; Story, Eq. Pl. § 69;

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yet the attorney-general may be made a party to protect its rights when involved; 1 Barb. Ch. 157; and the rule does not prevent suits against officers in their official capacity; 1 Dougl. Mich. 225. The directors of a corporation may be included as parties defendant in a bill against a corporation for infringement of a trade-mark; 53 Fed. Rep. 124; or of a patent; 45 *id.* 482; or where discovery is sought from the officers; 48 *id.* 849; but not on a bill for an accounting in which no discovery is sought against the officers; 44 *id.* 219. See INFRINGEMENT; PATENT.

*Foreclosure.* For the mere purpose of extinguishing an equity of redemption, the mortgagor is strictly the only necessary party; 23 Fed. Rep. 513; but if it be intended to divest other liens, other parties must be brought in; *id.*

In a suit to foreclose a junior mortgage, a prior mortgagee need not be joined; 112 U. S. 8; and more particularly if the prior mortgage is not yet due; 94 U. S. 734; but it is otherwise where the bill prays a receiver for the property covered by such prior mortgage; 106 U. S. 286; or where the junior mortgagee seeks a sale of the property free of incumbrance; 94 U. S. 734; or where there is a doubt as to the amount of the debt due under the prior incumbrance; 43 Hun 521; 94 U. S. 734. Senior mortgagees cannot become parties to an action to foreclose a junior mortgage; 9 Abb. N. C. 256. But where joined he may enforce his lien by a cross-bill; 30 Fed. Rep. 805. Even junior incumbrancers are not indispensable parties, but if not joined, their rights will not be affected; 62 Ill. App. 418; 23 Fed. Rep. 849.

A receiver is a proper, though not a necessary party to foreclosure proceedings begun after his appointment; 105 N. Y. 340; 38 N. J. Eq. 234; he may be permitted to intervene; 4 N. J. Eq. 377.

Bondholders cannot bring proceedings to foreclose a mortgage without showing that they have requested their trustee to proceed and he has refused; 79 Fed. Rep. 25.

Mortgage bondholders may proceed for the protection of their interests where the trustee has refused to sue; 130 Mass. 303; 35 Fed. Rep. 3; 106 U. S. 47; or has acquired interests adverse to those of the bondholders; 52 Fed. Rep. 826; and, in such case, one or more bondholders may sue for themselves and other like bondholders; 59 Fed. Rep. 957; such others may come in at any stage; 2 Woods 447.

A mortgage trustee is the only necessary party to a bill to foreclose the mortgage; he represents the bondholders; see 93 U. S. 156; 4 Dill. 533; 117 U. S. 434; and he is the proper person to bring foreclosure proceedings; 122 U. S. 1; 15 Fed. Rep. 52. A non-resident mortgage trustee may be brought in as defendant by publication in the federal courts; 13 Fed. Rep. 857. In a railroad foreclosure brought by a non-resident bondholder, the fact that the trustee is a resident of the same state as the plaintiff does not affect the jurisdiction of a federal court; 27 Fed. Rep. 1.

A trustee may intervene in a bondholder's suit to foreclose and carry on the suit in his own name; 3 Ill. 487. A buyer at a foreclosure sale makes himself a party to the record; 136 U. S. 89. See INTERVENTION; MORTGAGE.

Corporations are indispensable parties to a bill which affects corporate rights or liabilities; 148 U. S. 604; 110 Mass. 115.

*Idiots and lunatics* may be defendants and defend by committees, usually appointed guardians *ad litem* as of course; Mitf. Eq. Pl. 103; Story, Eq. Pl. § 70; 6 Paige, Ch. 237.

A guardian *de facto* may not have a bill against a lunatic for a balance due him, but must proceed by petition; 2 D. & B. Eq. 385; 2 Johns. Ch. 242; 2 Paige, Ch. 422.

*Infants* defend by guardians appointed by the court; Mitf. Eq. Pl. 103; 8 Pet. 128; 12 Mass. 16. On becoming of age, an infant is allowed, as of course, to put in a new plea, or to demur, on showing that it is necessary to protect his rights; 6 Paige, Ch. 353.

*Married women* might be made defendants, and might answer as if *femes sole*, if the husband was plaintiff, an exile, or an alien enemy, has abjured the realm or been transported under criminal sentence; Mitf. Eq. Pl. 104.

She should be made defendant where her husband sought to recover an estate held in trust for her separate use; 9 Paige, Ch. 225; and, generally, where the interests of her husband conflicted with hers in the suit, and he was a plaintiff; 3 Barb. Ch. 397. See MARRIED WOMEN.

See, generally, as to who may be defendants, JOINDER OF PARTIES.

A failure to join the husband of a married woman in an equitable action against her, is cured by his death pending suit; 84 Ala. 332.

Where proceedings are against an association having numerous members, all need not be made parties defendant; they are good as to all the members named; 11 C. C. R. 525; Story, Eq. Pl. § 94.

In 175 Pa. 13, the same trust company as trustee for two different estates was both plaintiff and defendant in a cause. The court in its opinion adverted to the fact without comment.

**At Law.** *In Actions Ex Contractu.*

There are two necessary parties to an action, viz. the person who seeks to establish a right in himself, commonly called the plaintiff, and the person upon whom he seeks to impose a corresponding duty or liability, commonly called the defendant. In attachment proceedings there is still a third party, commonly called the garnishee.

PLAINTIFFS. In general, all persons who have a just cause of action may sue, unless some disability be shown; Dicey, Part. 1. An action on a contract, of whatever description, must be brought in the name of the party in whom the legal interest is

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vested; 3 B. & P. 147; 5 S. & R. 27; 10 Mass. 230, 287; 1 Pet. C. C. 109; 2 Root 119; 21 Wend. 110. See 51 N. H. 71.

On simple contracts, by the party from whom (in part, at least) the consideration moved; 1 Stra. 592; 2 W. & S. 287; although the promise was made to another, if for his benefit; 3 Pick. 83; 10 Wend. 87, 156; 5 Dana 45; and not by a stranger to the consideration, even though the contract be for his sole benefit; Browne, Act. 101. On contracts under seal, by parties to the instrument only; 10 Wend. 87; Co. Litt. 231.

*Agents* contracting in their own name, without disclosing their principals, may, in general, sue in their own names; 3 B. & Ald. 280; 5 M. & W. 650; 5 Pa. 41; or the principals may sue; 6 Cow. 181; 3 Hill N. Y. 72; 2 Ashm. 485; Broom, Part. 44. See, generally, Ans. Contr. 352.

So they may sue on contracts made for an unknown principal; 3 E. L. & E. 391; and also when acting under a *del credere* commission; 4 Maule & S. 566; 10 Barb. 202; but not an ordinary merchandise broker. An auctioneer may sue for the price of goods sold; 1 H. Bla. 81; 16 Johns. 1; but a mere attorney having no beneficial interest may not sue in his own name; 10 Johns. 383.

*Alien enemies*, unless resident under a license, or contracting under specific license, cannot sue, nor can suit be brought for their benefit; 1 Campb. 482; 1 Kent 67; 11 Johns. 418. License is presumed if they are not ordered away; 10 Johns. 69; 6 Binn. 241. See, also, Co. Litt. 129 *b*; 15 East 260; 1 Kent 68.

Alien friends may bring actions concerning personal property; Bac. Abr. *Aliens;* for libel published here; 8 Scott 182; and now, in regard to real estate generally, by statute; 12 Wend. 342; see 15 Tex. 495; and, by common law, till office found, against an intruder; 1 Johns. Cas. 399. But see 5 Cal. 373. See WAR. As a general rule, an alien may maintain a personal action in the federal courts; 3 Story 458; 4 McLean 516.

*Assignees* of choses in action cannot, at common law, maintain actions in their own names; Broom, Part. 10; 42 Me. 221. Promissory notes, bills of exchange, bail-bonds, and replevin bonds, etc., are exceptions to this rule; Hamm. Part. 108. Assignees of a note and mortgage can maintain an action thereon, whether they paid any consideration for the assignment, or not; 74 Wis. 289.

An assignee of real estate may have an action in his own name for breaches of a covenant running with the land, occurring after assignment; 14 Johns. 89; and he need not be named in an express covenant of this character; Broom, Part. 8.

An assignee in insolvency or bankruptcy should sue in his own name on a contract made before the act of bankruptcy or the assignment in insolvency; 1 Chitty, Pl. 14; Com. Dig. *Abatement* (E 17); 5 S. & R. 394. See 3 Term 779. Otherwise of a suit by a foreign assignee; 11 Johns. 488. The discharge of the insolvent pending suit does not abate it; 11 Johns. 488. But see 1 Johns. 118.

An assignee who is to execute trusts may sue in his own name; 4 Abb. 106. *Cestuis que trustent* cannot sue at law; 3 Bouvier, Inst. 135.

*Civil death* occurring in case of an outlaw, an attainted felon, or one sentenced to imprisonment for life, incapacitates the person for suing as plaintiff during the continuance of the condition; Broom, Part. 85. Sentence as above, during suit, abates it; 1 Du. N. Y. 664; but the right to sue is suspended only; Broom, Part. 85.

*Corporations* may sue in their true corporate name, on contracts made in their behalf by officers or agents; 2 Blatchf. 343; 6 Cal. 258; 5 Vt. 500; 20 Me. 45; 3 N. J. 321; 9 Ind. 359; Dicey, Part. 276; 39 W. Va. 294; as a bank, on a note given to a cashier; 5 Mo. 26; 4 How. Pr. 68; 21 Pick. 486. A suit against a director for his secret profits on a sale to the company is properly brought by the company and not by its stockholders; 64 Conn. 101.

The name must be that at the time of suit; 3 Ind. 285; 4 Rand. 359; with an averment of the change, if any, since the making of the contract; 6 Ala. 327, 494; even though a wrong name were used in making the contract; 6 S. & R. 16; 10 Mass. 360; 5 Ark. 234; 10 N. H. 123; 5 Halst. 323. See NAME.

If the corporation be a foreign one, proof of its existence must be given; 1 C. & P. 569; 13 Pet. 519; 2 Gall. 105; 5 Wend. 478; 10 Mass. 91; 2 Tex. 531; 1 T. B. Monr. 170; 2 Rand. 465; 2 Green N. J. 439; 1 Mo. 184. See 144 U. S. 451.

*Executors and administrators*, in whom is vested the legal interest, are to sue on all personal contracts; 5 Term 393; Will. Exec. Index; see 15 S. & R. 183; or covenants affecting the realty but not running with the land; 2 H. Bla. 310; and on such covenants running with the land, for breach during the decedent's lifetime occasioning special damage; 2 Johns. Cas. 17. They must sue, as such, on causes accruing prior to the death of the decedent; 1 Saund. 112; Com. Dig. *Pleader* (2 D 1); 2 Swan 170; and as such, or in their own names, at their election, for those accruing subsequently; 16 Ark. 36; 3 Dougl. 36; Will. Exec. 1590; and upon contracts made by them in their official capacity; 30 Ala. 482; 32 Miss. 319; 15 Tex. 44; in their own names only, in some states; 4 Jones 159.

On the death of an executor, his executor, or administrator, if he die intestate, is the legal representative of the original decedent; 7 M. & W. 306; 2 Swan 127; 2 Bla. Com. 506; unless altered by statute.

*Foreign governments*, whether monarchical or republican; 5 Du. 634; if recognized by the executive of the forum; 8 Wheat. 324; Story, Eq. Pl. § 55; see 4 Cra. 272; 2 Wash. C. C. 43; 9 Ves. 347; 11 *id.* 283; may sue; 26 Wend. 212.

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*Husband must* sue alone for wages accruing to the wife, for the profits of business carried on by her, or money lent by her during coverture; 2 W. Bl. 1239; 4 E. D. Sm. 384; and see 1 Salk. 114; 1 Maule & S. 180; 4 Term 516; for slanderous words spoken of the wife which are actionable only by reason of special damage; 2 Du. 633; on a fresh promise, for which the consideration was in part some matter moving from him renewing a contract made with the wife, *dum sola;* 1 Maule & S. 180; and see 2 Pa. 827; for a legacy accruing to the wife during coverture; 22 Pick. 480; and as administrator of the wife to recover chattels real and personal not previously reduced into possession; Broom, Part. 74. See MARRIED WOMAN.

He may sue alone for property that belonged to the wife before coverture; 1 Murph. 41; 5 T. B Monr. 264; on a joint bond given for a debt due to the wife *dum sola;* 1 Maule & S. 180; 1 Chitty, Pl. 20; on a covenant running to both; Cro. Jac. 399; 1 B. & C. 443; to reduce choses in action into possession; 2 Maule & S. 396, n. (b); 2 Ad. & E. 30; for damages to his wife's separate real estate; 71 Tex. 264; and, after her death, for anything he became entitled to during coverture; Co. Litt. 351 *a*, n. 1. And see 4 B. & C. 529.

*Infants* may sue only by guardian or *prochein ami;* 13 M. & W. 640; 11 How. Pr. 188; 13 *id.* 413; 13 B. Monr. 193. In a suit by an infant against his guardian, the infant and not his next friend must be made the plaintiff; 157 U. S. 195. Infants who, by their next friend, have procured a judgment from a court with jurisdiction, for the sale of their lands, are bound thereby; 102 N. C. 112.

*Joint tenants.* See JOINDER.

*Lunatic*, or *non compos mentis*, may maintain an action, which should be in his own name; Broom, Part. 84; Hob. 215; 8 Barb. 552. His wife may appear, if he have no committee; 7 Dowl. 22. An idiot may, by a next friend, who petitions for that purpose; 2 Chitty, Archb. Pr. 909.

*Married women* cannot, in general, sue alone at common law; Broom, Part. 74; but a married woman may sue alone where her husband is civilly dead; see 4 Term 361; Cro. Eliz. 519; 2 B. & P. 165; or, in England, where he is an alien out of the country, on her separate contracts; 1 B. & P. 357; 2 *id.* 226; 3 Camp. 123; while he is in such condition; Broom, Part. § 114.

So she may sue alone after a sentence of nullity or divorce *a vinculo;* 9 B. & C. 698; but not after a divorce *a mensa et thoro*, or voluntary separation merely; 3 B. & C. 297.

She may, where he is legally presumed to be dead; 5 B. & Ad. 94; 2 M. & W. 894; or where he has been absent from the country for a very long time; 12 Mo. 30; 23 E. L. & E. 127. See 11 East 301; 2 B. & P. 226.

When the wife survives the husband, she may sue on all contracts entered into by others with her before coverture, and she may recover all arrears of rent of her real estate which became due during the coverture, on their joint demise; 8 Taunt. 181; 1 Rolle, Abr. 350 *d*. She is also entitled to all her real property, and her chattels real and choses in action not reduced into possession by the husband; Broom, Part. 76.

*Partners.* One partner cannot, in general, sue another for goods sold; 9 B. & C. 356; for work done; 7 B. & C. 419; for money had and received in connection with a partnership transaction; 6 B. & C. 194; or for contribution towards a payment made under compulsion of law; 5 B. & Ad. 936; 1 M. & W. 504. See *id.* 168; 2 Term 476. But one may sue the other for a final balance struck; Broom, Part. 57; 5 M. & W. 21; 2 Cr. & M. 361; see JOINDER; and they may sue the administrator of a deceased partner; 4 Wisc. 102. One making a contract for himself and his partner cannot sue therein in his own name alone; 72 Wis. 120. An action on an account due a firm is properly brought in the names of its members, though the firm has been dissolved; 160 Mass. 559. The fact that after suit brought by partners, one of them sells his interest in the firm to the others, does not necessitate a change of parties; 6 Tex. Civ. App. 254.

Partners cannot sue or be sued in their copartnership name, but the individual names of the members must be stated; 5 So. Rep. (Miss.) 112. A dormant partner is not a necessary party plaintiff in an action brought by the firm; 8 Tex. Civ. App. 1.

*Survivors.* The survivor or survivors of two or more jointly interested in a contract not running with the land must sue as such; Broom, Part. 21; Archb. Pl. 54; 1 East 497; 1 Dall. 65, 248; 2 Johns. Cas. 374; 7 Ala. 89.

The survivor of a partnership must sue alone as such; 9 B. & C. 538; 4 B. & Ald. 374; 2 Maule & S. 225. See 118 Ind. 313.

The survivor of several parties to a simple contract should describe himself as such; 3 Conn. 203.

*Tenants in common* may sue each other singly for actual ouster; Woodf. Landl. & T. 789. See JOINDER; Webb's Poll. Torts 447.

*Trustees* must sue, and not the *cestuis que trustent;* 1 Lev. 235; 15 Mass. 286; 12 Pick. 554; 4 Dana 474. See JOINDER.

DEFENDANTS. All persons having a direct and immediate legal interest in the subject-matter of the suit are to be made parties. The proper defendants to a suit on a specialty are pointed out by the instrument.

In case of simple contracts, the person made liable expressly by its terms; 3 Bingh. N. C. 732; or by implication of law, is to be made defendant; 2 Bla. Com. 443. See 6 Mass. 253; 1 Chitty, Pl. 24. Where there are several persons parties, if the liability be joint, all must be joined as defendants, either on specialties; 1 Wms. Saund. 154; or simple contracts; Chitty, Contr. 99. If it be joint and several, all may be joined;

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1 Wms. Saund. 154, n. 4; or each sued separately; 1 Wms. Saund. 191, c.; Com. Dig. *Obligations* (G); 3 Term 782; 1 Ad. & E. 207; if it be several, each must be sued separately; 1 East 226. The presumption is, in such case, that a written agreement is joint; 2 Campb. 640; 3 *id.* 49, 51, n.; otherwise of verbal contracts; 1 Ad. & E. 691; 3 B. & Ald. 89.

*Alien enemies* may be sued; Broom, Part. 18; 1 W. Bla. 30; Cro. Eliz. 516; 4 Bingh. 421; Com. Dig. *Abatement* (E 3); see 18 Wall. 99; 66 Ill. 288; 30 Md. 512; and, of course, alien friends.

*Assignees* of a mere personal contract cannot, in general, be sued; of covenants running with the realty may be, for breach after assignment; 2 Saund. 304, n. 12; Woodf. Landl. & T., 1st Am. ed. 260; 7 Term 312; 1 Dall. 210; but not after an assignment by him; Bac. Abr. *Covenant* (E 4).

Assignees of bankrupts cannot be sued as such at law; Cowp. 134; Chitty, Pl. 11, n. (f).

*Bankrupts* after discharge cannot be sued. An insolvent after discharge may be sued on his contracts, but his person is not liable to arrest in a suit on a debt which was due at the date of his discharge; Dougl. 93; 8 East 311; 1 Saund. 241, n. 5.

See CONFLICT OF LAWS; BANKRUPTCY; INSOLVENCY.

*Corporations* must be sued by their true names; Moraw. Pr. Corp. § 355; 7 Mass. 441; 2 Cow. 778; 15 Ill. 185; 4 Rand. 359; 2 Blatchf. 343. See NAME. Assumpsit lies against a corporation aggregate on an express or implied promise, in the same manner as against an individual; 3 Halst. 182; 3 S. & R. 117; 12 Johns. 231; 7 Cra. 297; 2 Bay 109; 10 Mass. 397; 9 Pet. 541; 2 Conn. 260; 5 Q. B. 547.

*Executors* and *administrators* of a deceased contractor or the survivor of several joint contractors may be sued; Hamm. Part. 156; but not if any of the original contractors survive; 6 S. & R. 272; 2 Wheat. 844.

The liability does not commence till probate of the will; 2 Sneed 58. The executor or administrator *de bonis non* of a deceased person is the proper defendant; Broom, Part. 197.

The liability is limited by the amount of assets, and does not arise on subsequent breach of a covenant which could be performed only by the covenantor; Broom, Part. 118. They, or real representatives, may be parties, at the election of the plaintiff, where both are equally liable; 1 Lev. 189, 303.

The personal representative must be made a party before debts can be decreed against a decedent's estate; 32 W. Va. 14; 71 Tex. 103.

*Foreign governments* cannot be sued to enforce a remedy, but may be made defendants to give an opportunity to appear; 14 How. Pr. 517. A foreign sovereign cannot be sued for any act done by him in the character of a sovereign prince; 2 H. L. C. 1; 17 Q. B. 171; it would appear most probably that he can in no case be made defendant in an action; Dicey, Part. *5; but see 10 Q. B. 656. See JURISDICTION.

*Heirs* may be liable to suit under the ancestor's covenant, if expressly named, to the extent of the assets received; Broom, Part. 118; Platt, Cov. 449.

*Husband* may be sued alone at common law for breach of joint covenant of himself and wife; 15 Johns. 483; 17 How. 609; and *must* be on a mere personal contract of the wife made during coverture; Com. Dig. *Pleader* (2 A 2); 8 Term 545; 2 B. & P. 105; 16 Johns. 281; even if made to procure necessaries when living apart; 6 W. & S. 346; *may* be on a new promise for which the consideration is a debt due by the wife before marriage; 7 Term 348; but such promise must be express; Broom, Part. 174; and have some additional consideration, as forbearance, etc.; 1 Show. 183; 11 Ad. & E. 438, 451; on lease to both made during coverture; Com. Dig. *Baron & F.* (2 B); on lease to wife *dum sola*, for rent accruing during coverture, or to wife as executrix; Broom, Part. 178; Com. Dig. *Baron & F.* (T); 1 Rolle, Abr. 149; not on wife's contracts *dum sola* after her death; 3 Mod. 186; 3 P. Wms. 410; except as administrator; 7 Term 350; Cro. Jac. 257; 1 Campb. 189, n.

He is liable, after the death of the wife, in cases where he might have been sued alone during her lifetime. See MARRIED WOMEN.

*Idiots*, *lunatics*, and *non compotes mentis*, generally, may be sued on contracts for necessaries; 2 M. & W. 2.

*Infants* may be sued on their contracts for necessaries; 10 M. & W. 195; Macph. Inf. 447. Ratification in due form; 11 Ad. & E. 934; after arriving at full age, renders them liable to action on contracts made before.

*Partner* is not liable to action by his copartners. A sole ostensible partner, the others being dormant, may be sued alone by one contracting with him; Broom, Part. 172.

A partnership cannot be sued as such, but the names of its members must be set out; 17 Or. 256. Garnishment to secure a claim against a partnership cannot be maintained against a partner individually; 19 Colo. 206.

*Survivor* of two or more joint contractors must be sued alone; 1 Saund. 291, n. 2; 2 Burr. 1196. A sole surviving partner may be sued alone; Chitty, Pl. 152; 1 B. & Ald. 29.

*In Actions Ex Delicto.* PLAINTIFFS. The plaintiff must have a legal right in the property affected, whether real; 2 Term 684; Broom, Part. 202; Co. Litt. 240 *b*; 2 Bla. Com. 185; or personal; 11 Cush. 55; though a mere possession is sufficient for trespass, and trespass *quare clausum*; Cro. Jac. 122; 4 B. & C. 591; 1 Ad. & E. 44; and the possession may be constructive in case of trespass for injury to *personal* property; 6 Q. B. 606; 5 B. & Ald. 603; 1 Hill N. Y. 311. The property of the plaintiff may be

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absolute; 5 Bingh. 305; 1 C. B. 672; or special. See 7 Term 9; 4 B. & C. 941.

*Agents* who have a qualified property in goods may maintain an action of tort in their own names for injury to the goods.

A principal may sue in the name of his agent for a false representation to the agent; 12 Wend. 176.

*Assignees* of property may sue in their own names for tortious injuries committed after the assignment; 3 Maule & S. 7; 1 Ad. & E. 580; although it has never been in their possession; 9 Wend. 80; 8 B. & C. 270; Wms. Saund. 252 *a*, n. (7). Otherwise of the assignee of a mere right of action; 12 N. Y. 322; 18 Barb. 500; 7 How. 492. See 15 N. Y. 432. Assignees in insolvency may sue for torts to the property; 8 S. & R. 124; but not to the person of the assignee; W. Jones 215.

*Executors* and *administrators* cannot, in general, sue in actions *ex delicto*, as such actions are said to die with the plaintiff; Broom, Part. 212; 13 N. Y. 322. See ACTIO PERSONALIS. They may sue in their own names for torts subsequent to the death of the deceased; 11 Rich. 363.

*Heirs* and *devisors* have no claim for torts committed during the lifetime of the ancestor or devisor; 2 Inst. 305.

*Husband* must, at common law, sue alone for all injuries to his own property and person; 3 Bla. Com. 143; Cro. Jac. 473; 1 Lev. 3; including personalty of the wife which becomes his upon marriage; 6 Call 55; 13 N. H. 283; Cro. Eliz. 133; 6 Ad. & E. 259; 27 Vt. 17; Hempst. 64; and including the continuance of injuries to such property commenced before marriage; 1 Salk. 141; 6 Call 55; in replevin for timber cut on land belonging to both; 8 Watts 412; for personal injuries to the wife for the damages which he sustains; 3 Bla. Com. 140; Chitty, Pl. 718, n.; 4 B. & Ald. 523; 4 Ia. 420; as in battery; 8 Mod. 342; 2 Brev. 170; 11 So. Rep. (La.) 541; slander, where words are not actionable *per se*; 4 B. & Ad. 514; 22 Barb. 396; or for special damages; 4 B. & Ad. 514; 112 N. C. 293.

He *may* sue alone, also, for injuries to personalty commenced before marriage and consummated afterwards; 2 B. & P. 407; and the right survives to him after death of the wife in all cases where he can sue alone; 1 Chitty, Pl. 75; Viner, Abr. *Baron & F.* (G); for cutting trees on land held by both in right of the wife; 16 Pick. 235; 1 Rop. Husb. & W. 215; and generally, for injury to real estate of the wife during coverture; 18 Pick. 110; 20 Conn. 296; 2 Wils. 414; although her interests be reversionary only; 5 M. & W. 142; he may also sue alone for damages for the negligent failure of a telegraph company to transmit and deliver a message to his wife; 70 Tex. 689.

*Infants* may sue by guardian for torts; Broom, Part. 238.

*Lessors* and *reversioners*, generally, may have an action for injury to their reversions; Broom, Part. 214. Damage necessarily to the reversion must be alleged and shown; 1 Maule & S. 284; 11 Ad. & E. 40; 10 B. & C. 145.

*Lessees* and *tenants*, generally, may sue for injuries to their possession; 4 Burr. 2141; Woodf. Landl. & T. 661.

*Married woman* must sue alone for injury to her separate property; 29 Barb. 512; see 129 Ind. 472; she may bring an action of detinue to recover her separate personal property and join her husband as co-plaintiff; 37 W. Va. 877.

The restrictions on her power to sue are the same as in actions *ex contractu*; Broom, Part. 233. Actions in which she might or must have joined her husband survive to her; Rolle, Abr. 349 (A). A married woman though living with her husband may maintain an action for slander in her own name, and without joining him; 89 Ga. 829.

The dissolution of marriage by divorce does not enable the wife to sue her husband for a tort committed on her during coverture; 46 Ill. App. 106. She may maintain in her own name an action for the alienation of her husband's affections; 29 N. E. Rep. (Ill.) 389; 32 *id.* 932. See 31 Cent. L. J. 29.

*Master* has an action in tort for enticing away an apprentice; 3 Bla. Com. 342; 3 Maule & S. 191; and, upon the same principle, a parent for a child; 1 Halst. 322; 4 B. & C. 660; 4 Litt. 25; and for personal injury to his servant, for loss of time, expenses, etc.; 3 Bla. Com. 342; Sm. M. & S. 171.

For seduction or debauchery, a master; Broom, Part. 227; 4 Cow. 422; and if any service be shown, a parent; 2 M. & W. 542; 6 *id.* 56; has his action.

*Survivor*, whether sole or several, must sue for a tortious injury, the rule being that the remedy, and not the right, survives; Broom, Part. 212; 1 Show. 188; 2 Maule & S. 225.

*Tenants in common* must sue strangers separately in distress and avowry for rent; 15 Johns. 479.

A tenant in common may sue his co-tenant, where there has been actual ouster, in ejectment; Littleton § 322; 1 Campb. 173; 11 East 49; or trespass *quare clausum*; 7 Pa. 397; and trespass for mesne profits after recovery; 3 Wils. Ch. 118. Where there is a total destruction or conversion of the property, one tenant in common may sue his co-tenant in trespass; Co. Litt. 200 *a*, *b*; Cro. Eliz. 157; 8 B. & C. 257; or in trover; 1 Term 658; 2 Ga. 73; 2 Johns. 468; 6 Ired. 388. For a misfeasance, waste, or case in the nature of waste, may be brought.

DEFENDANTS. He who commits the tortious act or asserts the adverse title is to be made defendant: as the wrongful occupant of land, in ejectment: 1 B. & P. 573; the party converting, in trover; Broom, Part. 246; making fraudulent representations; 3 Term 56; 3 M. & W. 532. The act may, however, have been done by the defendant's agent; 2 M. & W. 650; his mischievous animal; 12 Q. B. 29; or by the plaintiff himself if acting with due care and suffering from the defendant's negligence; 1 Q. B. 29; 10 Ill. 425.

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*Agents* and *principals;* Story, Ag. § 625; Paley, Ag. 294; are both liable for tortious act or negligence of the agent under the direction; 1 Sharsw. Bla. Com. 431, n.; or in the regular course of employment, of the principal; 10 Ill. 425; 1 Metc. Mass. 550. See 2 Den. 115. As to the agent of a corporation acting erroneously without malice, see 1 East 555.

Subsequent ratification is equivalent to prior authority; Broom, Part. 259.

Agents are liable to their principals for conversion; 14 Johns. 128; 8 Pa. 442.

*Assignees* are liable only for torts committed by them: as, where one takes property from another who has possession unlawfully; Bac. Abr. *Actions* (B); or continues a nuisance; 2 Salk. 460; 1 B. & P. 409.

*Bankrupts;* 3 B. & Ald. 408; 2 Den. 73; and *insolvents;* Broom, Part. 284; 2 B. & Ald. 407; 9 Johns. 161; are liable even after a discharge, for torts committed previously.

*Corporations* are liable for torts committed by their agents; Moraw. Pr. Corp. § 725; 2 Wend. 452; 17 Mass. 503; 4 S. & R. 16; 2 Ark. 255; 4 Ohio 500; 4 Wash. C. C. 106; 5 Ind. 252; but not, it seems, at common law, in replevin; Kyd, Corp. 205; or trespass *quare clausum;* 9 Ohio 31. In an action against a corporation for a tort, the corporation and its servant by whose act the injury was done may be joined as defendants; 98 N. C. 34.

Death of a tort-feasor, at common law, takes away all cause of action for torts disconnected with contract; 5 Term 651; 1 Saund. 291 *e*. But actions against the personal representatives are provided for by statute in most of the states, and in England by stat. 3 & 4 Will. IV. c. 42, § 2.

*Executors* and *administrators*, at common law, are liable for the continuance of torts first committed by the deceased; W. Jones 173; 5 Dana 34; see 28 Ala. N. S. 360; but such continuance must be laid to be, as it really is, the act of the executor; 1 Cowp. 373; Will. Exec., 7th Am. ed. *1602; 13 Pa. 54; 1 Harring. Mich. 7.

*Husband* must be sued alone for his torts, and in detinue for goods delivered to himself and wife; 2 Bulstr. 308; 1 Leon. 312.

He may be sued alone for a conversion by the wife during coverture; 2 Rop. Husb. & W. 127. In an action for a wife's personal tort the husband is properly joined as defendant; 61 Hun 164; 44 Mo. App. 583.

*Idiots* and *lunatics* are liable, civilly, for torts committed; Bac. Abr. *Trespass* (G); Webb, Poll. Torts 59, n.; though they may be incapable of design; Broom, Part. 281. But if the lunatic is under control of chancery, proceedings must be in that court, or it will constitute a contempt; 3 Paige 199.

*Infants* may be sued in actions *ex delicto*, whether founded on positive wrongs or constructive torts; Broom, Part. 280; Co. Litt. 180 *b*, n. 4: as, in detinue for goods delivered for a specific purpose; 4 B. & P. 140; for tortiously converting or fraudulently obtaining goods; 3 Pick. 492; 5 Hill N. Y. 391; 4 M'Cord 387; for uttering slander; 8 Term 337; but only if the act be wholly tortious and disconnected from contract; 8 Term 35; 6 Watts 1; 6 Cra. 226.

*Lessor* and *lessee* are respectively liable for their part of the tort in case of a wrong commenced by one and continued by the other; as, for example, a nuisance; 2 Salk. 460; Broom, Part. 253; Woodf. Landl. & T. 671.

*Master* is liable for a negligent tortious act or default of his servant while acting within the scope of his employment; 6 Cow. 189; 2 Gray 181; 23 N. H. 157; 16 Me. 241; 5 Rich. 44; 18 Mo. 362; 75 Hun 68; 160 Pa. 300; 37 W. Va. 606; for the direct effect of such negligence; 17 Mass. 132; but not to one servant for the neglect of another engaged in the same general business; 36 Eng. L. & Eq. 486; 3 Cush. 270; 15 Barb. 574; 6 Ind. 205; 22 Ala. N. S. 294; 23 Me. 269; 4 Sneed 36; 161 Pa. 270; 160 Mass. 45; 98 Mich. 135; 7 Wash. 178; 154 U. S. 349; if the servant injured be not unnecessarily exposed; 28 Vt. 59; 6 Cal. 209; 4 Sneed 36.

And the servant is also liable; 1 Sharsw. Bla. Com. 431, n. For wilful acts; 9 C. & P. 607; 3 Barb. 42; for those not committed while in the master's service; 26 Pa. 482; or not within the scope of his employment, he alone is liable.

*Partners* may be sued separately for acts of the firm, its agents or servants; 4 Gill 406; 1 C. & M. 93; 17 Mass. 182; 11 Wend. 571.

In an action to recover damages for a tort committed by a corporation prior to the appointment of a receiver, the latter is not a proper party; 83 Fed. Rep. 93. See INTERVENTION; MORTGAGE; UNITED STATES COURTS; REMOVAL; JOINDER; MISJOINDER; MISNOMER; NAME; RECEIVER; PATENT.

**PARTITION.** The division which is made between several persons of lands, tenements, or hereditaments, or of goods and chattels which belong to them as co-proprietors. The term is more technically applied to the division of real estate made between co-parceners, tenants in common, or joint tenants.

*Voluntary partition* is that made by the owners by mutual consent. It is effected by mutual conveyances or releases to each person of the share which he is to hold, executed by the other owners. Cruise, Dig. tit. 32, c. 6, § 14.

*Compulsory partition* is that which takes place without regard to the wishes of one or more of the owners.

At common law the right of compulsory partition existed only in cases of co-parcenary; Litt. § 264. By statutes of 31 Henry VIII. c. 1, and 32 *id.* c. 2, the right was extended to joint tenants and tenants in common. These statutes have been generally re-enacted or adopted in the United States, and usually with increased facilities for partition; 4 Kent 362; Co. Litt. 175 *a*;

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2 Bla. Com. 185; 16 Vin. Abr. 217. Partition at common law is effected by a judgment of the court and delivering up possession in pursuance of it, which concludes all the parties to it. In England the writ of partition has been abolished by stat. 3 & 4 Wm. IV. c. 27, § 36.

Courts of equity also exercise jurisdiction in cases of partition where no adequate remedy could be had at law, as where the titles to the estates in question are such as are cognizable only in equity or where it is necessary to award owelty of partition. This jurisdiction was first settled in Elizabeth's time, and has increased largely on account of the peculiar advantages of the chancery proceeding; 1 Spence, Eq. 654. Nor have the increased facilities grafted by statute upon the common-law proceedings ousted the jurisdiction; 1 Story, Eq. § 646.

Partition in equity is effected by first ascertaining the rights of the several parties interested; and then issuing a commission to make the partition required; and finally on return of the commissioners and confirmation thereof, by decreeing mutual conveyances between the parties; Mitf. Eq. Pl. 120; 2 Sc. & L. 371. Where the titles of the parties are legal titles, the decree in the partition has been held to vest the titles in the purparts without conveyances.

A suit in the nature of partition cannot be maintained where there has been an ouster of the complainants by the defendant tenant in common, by acts so overt and notorious as to imply notice to his co-tenants; 37 Fed. Rep. 273; 80 Ala. 70. An adverse holding by any one of the parties for a period of time, however short, before the institution of proceedings in partition, is effectual to defeat the proceedings; 126 Pa. 297.

A voluntary partition of land by persons under legal disabilities is binding when fairly and equally made and free from fraud; 49 N. E. Rep. (Ind.) 373.

Where there is a parol partition, a party acquiescing in it and accepting exclusive possession under it is estopped from asserting title or right to possession in violation of its terms; 65 Fed. Rep. 742.

**PARTNERS.** Members of a partnership.

*General partners* are those whose liability for partnership debts is unlimited.

*Ostensible partners* are those whose names appear to the world as partners, and who in reality are such.

*Nominal partners* are those who are held out as partners but who have no interest in the firm or business. They may be liable as partners by reason of their own acts, without being actually partners.

*Secret partners* are partners whose connection with the firm is not publicly made known.

*Silent partners* are those who, though having a share in the firm profits, have no voice in the firm business.

*Dormant partners* are those whose names and transactions as partners are professedly concealed from the world. They combine the characters of both secret and silent partners.

A dormant partner is one whose name is not mentioned in the title of the firm, or embraced in some general term, as company, son, etc.; 4 Phill. 1. It is not necessary that his membership be universally unknown; it is enough if he is not an ostensible partner; 2 Fed. Rep. 640.

*Special partners* are those whose liabilities are limited by statute to the amount of their respective contributions. Ordinarily a special partner is associated with at least one general partner by whom the business is managed, but in the "partnerships limited" organized under recent statutes, all the parties have a limited liability.

WHO MAY BE. *General rule.* Persons who have the legal capacity to make other contracts may enter into that of partnership; Lind. Part. *77; 1 Col. Part. § 11; Pars, Part. § 14.

*Aliens.* An alien friend may be a partner; Lind. Part. *78; Co. Litt. 129 *b*. An alien enemy cannot enter into any commercial contract; 1 Kent *66; 16 Johns. 438; 7 Pet. 586; 9 Bush 15; 11 Exch. 135; and the breaking out of a war between two countries in which partners reside dissolves the partnership; 91 U. S. 70. See WAR.

*Clergymen* were disqualified to enter into a partnership in England by 57 Geo. III.

*Corporations.* There is no general principle of law which prevents a corporation from being a partner with another corporation, or with ordinary individuals, except the principle that a corporation cannot lawfully employ its funds for purposes not authorized by its charter; Lind. Part., 2d Am. ed. *78; 46 Conn. 136; Grant, Corp. 5; 5 Gray 58; they are said to be *prima facie* ineligible as partners; George, Partn. 15; 121 N. Y. 582; 68 Pa. 173; 86 Tenn. 598; Beach, Corp. § 842. The purchase of an interest in a firm by a corporation does not make it a partner; 62 Mo. App. 390; but see 46 Conn. 136, where the charter authorized the corporation to enter into a partnership. See also 7 Wend. 412, where it was held that two corporations cannot form a partnership. A corporation which shares profits may be held to make good losses; 14 Barb. 479. While a contract of partnership between a corporation and an individual is *ultra vires* as to this corporation, yet if the corporation has received the benefit of the contract, it must account to the other party for what is due him under the contract; 182 Pa. 206.

*Firms.* Two firms may be partners in one joint firm; 1 Abb. Pr. 243; 1 Fed. Rep. 800. Where a partnership and an individual form a second partnership, all the members of the first partnership are members of the new firm; 114 Ill. 574.

*Felons.* Felons probably are not disqualified, in the absence of any statutory

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restriction, to enter into a contract of partnership in this country; George, Partn. 11.

*Infants.* An infant may contract the relation of partner, as he may make any trading contract which is likely to prove for his advantage; 17 Gratt. 503; 5 B. & Ald. 147. Such a contract made by a person during infancy is voidable and may be affirmed or disaffirmed by him at majority; Story, Part. § 7; 42 Mich. 184; but whether he may disaffirm before majority is doubtful; 31 Mich 182; Lind. Part., 2d Am. ed. *74, n.; though it is said that he may; Pars. (Jas.) Partn. § 136. He may reclaim his contribution before majority; 83 N. Y. 245. Unless he gives notice of disaffirmance, or in some manner repudiates the contract within a reasonable time after becoming of age, he will be presumed to have ratified it; Story, Part. § 7; 9 Vt. 368; but it is held that there must be positive acts of ratification after majority; neglect to disaffirm is not ratification; 8 Cush. 372; see 8 Exch. 181; 8 N. Y. 228; and his liability then relates back to firm contracts made during his minority; 33 S. C. 285; 21 Mich. 304. The person with whom the minor contracts will be bound; 2 M. and S. 205; 1 Watts 412; 3 Green N. J. 343. In England and in Maine ratification, after majority, must be in writing.

*Lunatics.* A lunatic is probably not absolutely incapable of being a partner; Lind. Part. *84; since the insanity of a partner does not *per se* dissolve the firm, but simply amounts to a sufficient cause for a court of equity to decree a dissolution; 1 Cox, Ch. 107; 2 Myl. & K. 125; 15 Johns. 57; *contra*, 6 Humphr. 85. Whether a contract by a lunatic to become a partner can in all cases be avoided by him, is, perhaps, unsettled; Story, Part. § 7, n. 1.

*Married women.* Married women, at common law, are incapable of becoming partners, since they are generally unable to contract or engage in trade; 30 Md. 402; Story, Part. § 10; 3 De G., M. & G. 18; see 36 S. C. 424; and cannot be made partners by estoppel; 27 S. C. 525; 31 Ind. 113. But where a married woman is authorized by custom, statute, or otherwise to trade as a *feme sole*, she may probably be a partner; 52 Miss. 402; 43 Ark. 212; 57 Ia. 361; *contra*, 91 Ind. 384; Story, Part. § 10; Pars. Part. § 19. The mere consent of her husband to her trading as a *feme sole* does not necessarily permit her to become a partner; Story, Part. § 12. In some states she may be a partner as to her separate estate; 74 Pa. 448; 94 Mich. 230; *contra*, 20 W. Va. 571. A married woman, by acting as partner and continuing the business after her husband's death, creates a partnership from the beginning; 10 Paige 82.

Except as above stated, a married woman cannot become a partner without statutory authority; 23 Fla. 83; 27 S. C. 525; 20 W. Va. 571; in any case, however, the capital she puts in is liable for the firm debts; 66 Mo. 617. It has been held that where the wife cannot be a partner, the husband will be considered as such; 65 Tex. 131.

Under modern married women statutes, a wife is not, according to most of the cases, permitted to enter into partnership with her husband; 140 Mass. 521; 4 Wash. St. 263; 16 L. R. A. (Ark.) 526; 73 Mich. 146; *contra*, 122 N. Y. 308. See 3 Biss. 405.

*Number of persons.* Generally speaking, the common law imposes no restriction as to the number of persons who may carry on trade as partners; 1 Col. Part. § 10: 27 Ind. 399; unless by statute, as in England, where the limit is twenty. But a partnership cannot consist of but one person; 46 Mich. 449.

*As to who are partners*, see PARTNERSHIP.

POWERS OF PARTNERS. *General rule.* It has been customary to derive the authority of a partner from an assumed relation of mutual agency between the members of the firm, and it is true that the firm is responsible for whatever is done by any of the partners while acting for it within the limits of the authority conferred by the nature of the business carried on; 8 H. L. Cas. 268; Lind. Part., 2d Am. ed. *124; 36 Pa. 498; 58 Mo. 532; 45 Miss. 499; 59 Ala. 386. The principle of agency applies to copartners; but it is only when one is acting as their agent that he binds them; 18 N. Y. L. J. 1315. It is perhaps more accurate to trace a partner's power to his standing as a co-principal, and to consider his agency an incident of this relation; 5 Ch. Div. 458; L. R. 7 Ex. 218. The relation is a peculiar sort of agency, where the partner is agent for the firm and not merely for the other partners; 5 Ch. Div. 458. Whatever the source of a partner's power, it is, as a rule, limited to acts incident to carrying on, in the usual way, the particular business in which the firm is engaged, and each partner has the power to manage the ordinary business of the firm, and, consequently, to bind his co-partners, whether they be ostensible, dormant, actual, or nominal; 2 B. & Ald. 673; 1 Cr. & J. 316; by whatever he may do, in the course of such management, as entirely as to bind himself. But the acts of a partner wholly unconnected with the business of the partnership do not bind the firm; 2 B. & Ald. 678; 8 Me. 320; 15 Pick. 290; 3 Johns. Ch. 23; nor will an act beyond the scope of the partnership; 79 Ga. 268.

The partner's authority is incident to, and co-extensive with, the business; Pars. (Jas.) Partn. § 133. A partner's authority to act cannot be restricted by notice from another partner to a third party; 5 Den. 541; 41 N. Y. 376. An insolvent partner has the same authority, even after dissolution; 1 Duer 662. Partners may, by agreement, restrict the authority of a partner, as between themselves, but not as to third parties, without notice; Pars. (Jas.) Part. § 134.

One of two partners in the practice of the law has no authority to accept for the

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firm an agency for the mere sale of real estate; 152 U. S. 673.

*Accounts.* One partner can bind his firm by rendering an account relating to a partnership transaction; 8 Cl. & F. 121; 47 Mo. 346; Lind. Part., 2d Am. ed. *28

*Actions.* One partner can bring an action on firm account in his own and his co-partners' names without their consent, but they are entitled to indemnity if he sues against their will; Lind. Part., 2d Am. ed. *271; 2 Cr. & M. 318; 67 Mo. 568. This power of a partner survives the dissolution of the firm; 1 E. D. Sm. 423. One partner cannot, as a rule, sue in his own name for a firm debt; the suit must be in the names of all; Penn. N. J. 711.

*Admissions.* After the relation of partnership has been established, a partner may bind his co-partner by an admission; Pars. (Jas.) Partn. § 121; 143 Mass. 473; 65 Wis. 247; but the existence of the partnership must be shown by other evidence; 102 N. Y. 336. See *infra.*

*Appearance.* In an action against partners, one may enter or authorize an appearance for the rest; 7 Term 207; 17 Vt. 531; 1 Binn. 214; 6 Johns. 296; 32 N. Y. Supp. 840; 4 Kan. 240; *contra*, L. R. 8 Q. B. 398; 3 Ohio 519; see Pars. (Jas.) Partn. § 119; 10 App. Cas. 680; but not after dissolution of the firm; 2 McCord 311. Nor can one partner bind his co-partners personally and individually by entering an appearance for them when they are not within the jurisdiction, nor served with process; 9 Cush. 390; 11 How. 165. A partner cannot authorize an appearance for a co-partner, not subject to the jurisdiction of the court, or if the firm has been dissolved; 91 U. S. 160; but a solicitor instructed by a managing partner may enter an appearance for all partners; [1896] 1 Q. B. 386.

*Arbitration.* As a general rule, one partner cannot bind the firm by submitting any of its affairs to arbitration, whether by deed or parol; 3 Kent 49; 3 C. & B. 742; 35 Mich. 5; 2 So. Rep. (Ala.) 268; 40 Vt. 460; 19 Johns. 137; 1 Pet. 221. The reason given being that such a power is unnecessary for carrying on the business in the ordinary way; Lind. Part., 2d Am. ed. *129, *272. But the acting partner may be bound; 19 Johns. 137; 5 G. & J. 412. And the general rule is perhaps somewhat relaxed; Pars. Partn. § 121. It is held that one partner may bind the firm by submission to arbitration, by an agreement not under seal; 89 Pa. 453; 3 T. B. Monr. 435; 25 Ill. 48; but apparently only so as to bind firm assets; 12 S. & R. 243; 89 Pa. 453.

*Assignments.* The right of a partner to dispose of the property of the firm extends to the assignment of at least a portion of it as security for antecedent debts, as well as for debts thereafter to be contracted; Story, Part. § 101; 5 Cra. 289; 58 Mo. 532; 17 Vt. 394. Although the authorities differ, the better opinion seems to be that one partner cannot, without the knowledge or consent of his co-partners, assign all the property of the firm to a trustee for the benefit of creditors; 13 Minn. 43; 84 Mo. 329; 50 Ala. 251; 29 Ohio St. 441; 32 Wis. 444; 17 Vt. 390; 69 Miss. 17; 2 Tex. App. 226; 134 U. S. 206; unless the co-partner is absent, or is incapable of giving his assent or dissent; 90 Va. 200; 27 Minn. 255; but not against the assent, or without the consent, of the co-partner, if the latter is present and capable of acting; 176 Pa. 52. A surviving partner has power to make an assignment for the benefit of the firm's creditors; 76 Md. 581.

*Bills of exchange and promissory notes.* A partner may draw, accept, and indorse bills and notes in the name and for the use of the firm, for purposes within the scope of its business; 7 Term 210; 20 Miss. 226; 119 Mass. 215; 78 Ill. 234. A restriction of this power by agreement between the partners does not affect third persons unless they have notice; 27 La. Ann. 352; 44 Miss. 283. This power cannot be exercised after dissolution of the firm; 42 Mich. 110; 51 Cal. 531; but its exercise may bind the firm if such dissolution be without proper notice; 130 Mass. 591; or when the other party subsequently assents thereto; 98 Ga. 468.

The doctrine is generally limited to partnerships in trade and commerce, and does not apply to other partnerships, unless it is the common usage of such business so to bind the firm, or it is necessary for the due transaction thereof; 145 U. S. 512. Non-trading partners, such as farmers; 57 Ill. 531; lawyers; 37 Wis. 285; physicians; 1 Humph. 23; cannot usually bind the firm by such instruments. Parties dealing with non-trading partnerships are put on inquiry; 10 Heisk. 629; 33 La. Ann. 196; the doctrine of general agency does not apply; 53 Conn. 53.

A bill or note made by one partner in the name of the firm is *prima facie* for partnership purposes; 31 Mich. 373; 34 Pa. 344; 16 Wend. 504; 44 Miss. 283.

A partner has no implied authority to indorse a note made payable to a co-partner, although for firm account; 64 Ga. 221; nor to bind the firm as a party to a note for the accommodation of or as surety for another; 19 Johns. 154; 5 Conn. 574; 21 Miss. 122; 31 Me. 452; 49 Minn. 557; 1 App. D. C. 171; unless by special authority implied from the nature of the business or previous course of dealing; 3 Kent 46; 3 Humph. 597; 4 Hill N. Y. 261; and the burden is on the holder of the instrument to show such authority; 19 Johns. 154; 86 Mich. 632; 69 Miss. 17. Direct proof is not necessary; the authority or ratification may be inferred from circumstances; 2 Cush. 309; 22 Me. 188; 14 Wend. 133; 10 Vt. 268. Indorsement of a note for a third person by a partner in the firm name without the knowledge of the other member of the firm and having no connection with its business, does not bind the firm; 129 U. S. 372.

*Borrowing money.* One partner may borrow money on the credit of the firm,

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when it is necessary for the transaction of the business in the ordinary way; 115 Mass. 388; 62 Pa. 393; 75 Ill. 629; 61 Ala. 143; but the amount must be within the usual business of the firm; Pars. (Jas.) Partn. § 125; but a partner in a cash business, as a firm of solicitors, cannot borrow; 87 Wis. 285; or physicians; Humph. 28. It is said that a partner cannot borrow to increase the firm's capital; 2 Hare 318. A contract to borrow money in violation of a partnership agreement is not valid, though made in furtherance of the interests of the firm; 13 So. Rep. (Miss.) 282.

*Checks.* One partner has the implied power to bind the firm by firm checks drawn on its bankers; 3 C. B. N. S. 442. See 159 Pa. 287. Such checks must not be post-dated; L. R. 6 Q. B. 209.

*Compromise.* A partner may compromise with debtors or creditors of the firm; Story, Part. § 115; 30 Conn. 1; 7 Gill 49.

*Confession of judgment.* One partner cannot, by confessing a voluntary judgment against the firm, bind his co-partners; 172 Pa. 70; see 51 Mo. App. 470; 43 *id.* 121. But a judgment so confessed will bind the partner who confessed it; 91 U. S. 160; 3 C. B. 742; 154 Pa. 152; 13 Ia. 496; 32 Vt. 709; 30 La. Ann. 692; but see 22 How. 209; and will bind the firm assets; see 8 Kulp Pa. 264; 32 La. Ann. 607, where it was held that a "commercial partner" has a right to confess judgment on behalf of the firm. Only the other partner can object to it; 42 Ill. App. 291. Where a judgment note has been signed in the firm name only, the plaintiff may name the individual members, and judgment may be entered in this form; 172 Pa. 70.

*Contracts.* A partner has the power to bind the firm by simple contracts within the scope of the partnership business; 15 Mass. 75; 5 Pet. 529; and make a contract which will bind them as partners and also as individuals; 78 Ga. 797; but not a contract to convey firm real estate; 5 Hill N. Y. 107.

*Debts.* One partner may receive debts due the firm, and payment to him by the debtor extinguishes the claim; 12 Mod. 446; 1 Wash. Va. 77; 2 Blackf. 371; 14 La. Ann. 681; 4 Binn. 375; even after dissolution; 15 Ves. 198; although the debtor knew there was an agreement that one party alone was to collect and pay the debts; 44 Ill. App. 500. A partner may also bind the firm by assenting to the transfer of a debt due to it, as the transfer of the firm's account from one banker to another; 2 H. & N. 826. A partner cannot employ partnership funds to pay his own pre-existing debt, without the consent of his co-partners; 18 Conn. 294; 12 Pet. 231; 31 Ala. 532; 28 Ohio St. 55; 94 Pa. 31; 87 Ga. 651; 121 U. S. 310. But in 57 Fed. Rep. 257, it was held that one of two co-partners could pledge the partnership property to secure his private debts, to the extent of his interest therein.

*Deeds.* One partner has no implied authority to bind his co-partners by a deed, even for a debt or obligation contracted in the ordinary course of commercial dealings within the scope of the partnership business; 3 Kent 47; 11 Ohio St. 223; 26 Vt. 154. Such an instrument binds the maker only; 62 Pa. 393; 7 Ohio St. 463. But such a deed may be ratified; 12 Ill. App. 517; and this consent or adoption may be by parol; 26 Vt. 154; 11 Pick. 400. It binds the firm if they were present at the execution; 3 Ves. 578. The fact that the partnership articles are under seal does not give such authority; 7 Term 297; unless they contain a particular power to that effect; *id.* One partner may convey by deed property of the firm which he might have conveyed without deed. The seal in such a case would be surplusage; 2 Ohio St. 478; 5 Hill N. Y. 107; 7 Metc. 244; he may assign a mortgage in payment of a firm debt, or release a mortgage; 4 Gill & J. 310; 4 Mas. 206. See *infra* under *Release.* One partner may acknowledge a deed for the firm; 70 Mo. 206.

*Distress.* Where a lease has been granted by the firm, any partner may distrain or appoint a bailiff to do so; 4 Bing. 562, and cases there cited.

*Firm property.* Each partner has the power to dispose of the entire right of his co-partners in the partnership effects, for the purposes of the partnership business and in the name of the firm; Story, Part. § 9. This power is held not to extend to real estate, which a single partner cannot transfer without special authority; Story, Part. § 101; 1 Brock. 456; 8 McLean 27. Since the power to transfer the firm property must be exercised for the ordinary purposes of the partnership business, it is held that a partner's employment of firm capital in a new partnership, which he forms for his firm with third persons charges him for a conversion of the fund to his own use; 25 Ohio St. 180.

*Guarantees.* A partner derives no authority from the mere relation of partnership to bind the firm as guarantor of the debt of another; 4 Exch. 623; 31 Me. 454; 21 Miss. 122; 35 Pa. 517. If the contract of guaranty is strictly within the scope of the firm business, one partner may bind the firm by it; 41 Ia. 518; or if guaranty is usual in that kind of business or is such as the firm has frequently recognized; Pars. Partn. § 144; and where a partner sold notes and applied the proceeds to firm use; 24 Barb. 549.

*Insurance.* One partner may effect an insurance of the partnership goods; 1 M. & G. 130; 54 Mich. 531; 141 Mass. 298. The assignment of a partner's interest in the firm stock without the insurer's consent, does not violate a policy of insurance upon it; 27 Ohio St. 1.

*Leases.* The rule is that a partner has no power to contract on behalf of the firm for a lease of a building for partnership purposes; 22 Beav. 606. But it is held that a partner may bind the firm for the rent of premises necessary for partnership pur-

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poses, and so used; 47 Conn. 26; 21 La. Ann. 21; 51 Wis. 547; but see 22 Beav. 606. A partner can give a valid notice to quit; 1 B. & Ad. 135.

*Statute of limitations.* Before dissolution an acknowledgment by one partner of a debt barred by the statute will bind the firm; Pars. Part. § 127; as to whether it will do so, if made after dissolution, the authorities are conflicting; the better view appears to be that it will not; *id.*; 15 Fed. Rep. 888; 76 Ala. 501; 5 Neb. 368; some cases distinguish between acknowledgments made before and after the statutory period has run; if made after, it does not bind; 43 Md. 70; if made before, it does; 36 Conn. 270; 45 Mo. 365. Some cases hold that it binds though made after dissolution and after the statutory period has run; 50 Vt. 421; 6 Call. 51. If made after dissolution by a liquidating partner, it is binding; 3 W. & S. 345; but not otherwise; 101 Pa. 233. In England and in many states statutes have rendered the acknowledgment of one partner insufficient to toll the statute.

*Majority, power of.* The weight of authority seems to be in favor of the power of a majority of the firm, acting in good faith, to bind the minority in the ordinary transactions of the partnership business; 3 Kent 45; 33 Beav. 595; 4 Johns. Ch. 473; 46 Pa. 434; 27 Ala. 245; 49 Ga. 417. But see 6 Ves. 773; 1 Yo. & Jer. 227; 57 Pa. 365. It is said that, in the absence of an express stipulation, a majority may decide as to the disposal of the partnership property; 3 Chitty, Com. L. 234; but the power of the majority must be confined to the ordinary business of the partnership; 14 Beav. 367; 2 De G. M. & G. 49; it does not extend to the right to change any of the provisions therein; 4 Johns. Ch. 573; 32 N. H. 9; nor to engage the partnership in transactions for which it was never intended; 3 Maule & S. 488; and all must be consulted; 2 Ia. 504. Where a majority is authorized to act, it must be fairly constituted and must proceed with the most entire good faith; 10 Hare 493; 5 De G. & S. 310. A majority cannot change the place of business after a lease has expired; 8 Ch. Div. 129. The American cases are said to have enlarged the power of the majority; Pars. Partn. § 147; but the question is not clearly settled; *id.*

*Mortgages.* A partner has no implied power to make a mortgage of partnership real estate; Lind. Part., 2d Am. ed. *139; 2 Humph. 534. See 37 Neb. 666. But one partner may execute a valid chattel mortgage of firm property, without the consent of his co-partners; 47 Wis. 261; 18 Minn. 232; 16 Or. 153; 30 W. Va. 586; 96 Mich. 233; 130 Ind. 63; 83 Ia. 449. A deed of trust of partnership property to secure certain creditors to the exclusion of others will bind the partnership, though executed by only two out of three partners; 136 U. S. 223. Two or three members of a firm have authority to mortgage partnership stock for the security of the debts of the firm; 73 Ia. 399. A mortgage by one partner of the whole stock in trade to secure a firm debt has been held valid; 1 Metc. 515.

*Pledges of firm property.* A partner may pledge its personal property to raise money for the firm; 3 Kent 46; 10 Hare 453; 7 M. & G. 607; 3 Bradw. 261. It is thought that a partner's equitable mortgage of firm real estate, by depositing deeds of partnership property as a pledge, would be valid; Lind. Part., 2d Am. ed. *140.

*Purchases.* A partner may bind the firm by purchasing on credit such goods as are necessary for carrying on the business in the usual way; 1 Camp. 185; 5 W. & S. 564; 19 Ga. 520; 76 N. C. 139; even land; 14 Nev. 265; but see 13 Bush 67.

*Ratification.* If a contract on behalf of the co-partnership, executed under seal by one partner, be, after its execution, ratified by the other partners, it becomes the deed of the firm as fully as if executed under seal by all the partners; even if the contract did not pertain to the ordinary business of the firm; 45 Minn. 11; see 70 Tex. 517.

*Receipts.* The power of a partner to receipt for the firm is incident to his power to receive money for it; see *Debts;* Story, Part. § 115.

*Relative extent of each partner's power.* In all ordinary matters relating to the partnership, the powers of the partners are co-extensive, and neither has a right to exclude another from an equal share in the management of the concern or from the possession of the partnership effects; 2 Paige, Ch. 310; 2 J. & W. 558.

*Release.* The rule that one partner cannot bind his co-partners by deed does not extend to releases; 75 Ill. 583; 2 Co. 68; 3 Johns. 68; 4 Gill & J. 310; 3 Kent 48; but see 40 Ia. 76. As a release by one partner is a release by all; 21 Ill. 604; 37 Vt. 573; so a release to one partner is a release to all; 5 Gill & J. 314; 23 Pick. 444.

*Sales.* A partner has power to sell any of the partnership goods; Cowp. 445; 3 Kent 44; or its negotiable notes; 102 U. S. 564; even the entire stock, if the sale be free from fraud on the part of the purchaser; and such sale dissolves the firm, although the term for which it was formed has not expired; 24 Pick. 89; 5 Watts 22; 59 Ala. 338; see, *contra*, 8 Bosw. 495; and this rule is doubted; George, Partn. 234; the implied power of a partner to sell applies only to property which is held for the purposes of sale; 37 Pa. 217; 12 Misc. Rep. 620; a partner has no power to sell all the partnership property without his co-partners' assent. A partner cannot transfer the whole of the partnership assets to a third person who is not a creditor; 32 N. Y. S. App. 423. A partner has power to sell after dissolution; 4 De G. M. & G. 542; and may then sell partnership realty to pay debts; 104 U. S. 18. A sale by one partner of his share of the stock dissolves the firm and gives the purchaser the right to an account; 50 Cal. 615. A *bona fide* sale of all the partnership effects by one partner to another is valid, although the firm and

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both partners are at the time insolvent; 9 Cush. 553; 21 Conn. 130; 21 N. H. 462.

*Servants.* One partner has the implied power to hire servants for partnership purposes; 9 M. & W. 79; 74 Pa. 166; and probably to discharge them, though not against the will of his co-partner; Lind. Part., 2d Am. ed. *147.

*Specialties.* As a rule, the relation of partnership gives a partner no authority to bind his co-partners by specialty; Story, Part. § 117; and see *Deeds* and *Mortgages*, *supra*. The reason is that a seal belongs to the common law and partnership to the law merchant; Pars. Part. § 123. But it has been held that a partner may bind his firm by an executed contract under seal, because the firm is really bound by the act, and the seal is merely evidence; 38 Pa. 231; and, as stated above, a partner may bind his firm by a release under seal. If the seal was not necessary, it will be regarded as surplusage; as in an assignment for creditors; 5 Cra. 289; a mortgage of firm chattels; 7 Metc. 244; an assignment of a chose in action due the firm; 5 Hill 163. The general rule is now of less importance than formerly; Pars. Part. § 123. A lender may disregard a specialty executed by one partner, for a loan, and recover from the firm in assumpsit; 98 Ill. 27.

*Warranties.* It is laid down as a general rule that a power to sell does not carry with it the implied authority to bind the firm by a warranty; Pars. Part. 4th ed. § 144. See 46 Ill. App. 213. But if the partner has power to sell, his warranty would probably bind the firm; Pars. Partn. § 144; 24 Barb. 549.

LIABILITIES. *General Rule.* If an act is done by one partner on behalf of the firm, and it can be said to have been necessary for the carrying on of the partnership business in the ordinary way, the firm will *prima facie* be liable, although in point of fact the act was not authorized by the other partners; but if the act cannot be said to have been necessary for the carrying on of the partnership business in the ordinary way, the firm will *prima facie* not be liable; 10 B. & C. 128; 14 M. & W. 11. As to reason for such liability, see *Powers*, *supra*.

*Admissions.* It is laid down as a general rule that partners are bound by the admissions, representations, and acknowledgments of one of their number, concerning partnership transactions; Story, Part. § 107; 1 Harr. N. J. 41. A better rule seems to be that the admissions of one partner with reference to a partnership transaction are evidence against the firm: 2 C. & P. 232; but not necessarily conclusive evidence; 2 K. & J. 491; 5 Stew. N. J. 828. It is held that the admission of one partner in *legal* proceedings is the admission of all; 1 Maule & S. 259; 40 Md. 499; 68 Ind. 110; 47 Mo. 346; 4 Conn. 326; 15 Mass. 44; 2 Wash. C. C. 388. See *supra*.

*Agreements inter se.* No arrangement between the partners themselves can limit or prevent their ordinary responsibilities to third persons, unless the latter assent to such arrangement; 2 B. & Ald. 679; 3 Kent 41; 5 Pet. 129; 3 B. & C. 427. But where the creditor has express notice of a private arrangement between the partners, by which either the power of one to bind the firm or his liability on partnership contracts is qualified or defeated, such creditor will be bound by the arrangement: 4 Ired. 129; 38 N. H. 287; 6 Pick. 372; 4 Johns. 251; 5 Conn. 597; 5 Bro. P. C. 489.

*Attachment.* A partner's interest in a firm is liable to attachment by his creditors; 7 C. B. 229; 2 Johns. Ch. 548; 8 N. H. 252; but one partner cannot maintain an attachment against the firm of which he is a member; 98 Ala. 526.

*Contracts.* See *Powers*, *supra*.

*Contribution.* A partner's contribution to the capital of his firm is a partnership debt for the repayment of which each partner is liable on an accounting and after payment of debts; 119 Mass. 38. Failure of a partner to pay his contribution in full does not entitle his co-partner to exclude him from the business without a dissolution; 3 C. E. Green 385.

*Debts.* Each partner is liable to pay the whole partnership debts. In what proportion the partners shall contribute is a matter merely among themselves; 5 Burr. 2613. Universally, whatever agreement may exist among the partners themselves, stipulating for a restricted responsibility, and however limited may be the extent of his own separate beneficial interest in, and however numerous the members of, the partnership, each individual member is liable for the joint debt; 5 Burr. 2611; 1 V. & B. 157; 2 Des. 148; 6 S. & R. 333; 34 Ohio St. 187. See 45 N. J. Eq. 738. In Louisiana, ordinary partners are not bound *in solido* for the debts of the partnership; La. Civ. Code, art. 28: though commercial partners who deal in personal property are bound *in solido;* a partner is bound for his share of the partnership debts, calculating such share in proportion to the number of partners, without attention to the proportion of the stock or profits each is entitled to; *id.* art. 2873. In equity, partnership debts are regarded as both joint and several; 45 N. J. Eq. 738.

An incoming partner is not liable for the debts of the firm incurred before he became a member, unless he assumes them by agreement; 58 Pa. 179; 27 La. Ann. 352; 73 Ill. 381; 6 Wash. 514; 53 Kan. 251; 49 Ark. 457; 77 Cal. 440. But a retiring partner remains liable for the outstanding debts of the firm; 4 Russ. 430.

*Dormant partners.* Dormant partners are, when discovered, equally liable with those who are held out to the world as partners, upon contracts made during the time they participate in the profits of the business; 1 Cr. & J. 316; 5 Mas. 176; 9 Pick. 272; 5 Pet. 529; 2 Harr. & G. 159; 5 Watts 454; 1 Dougl. 371; 21 Miss. 656; 25 Ill. 359; 46 La. Ann. 894. This liability is said to be founded on their participation in the profits; 5 Pet. 574; 10 Vt. 170; 16 Johns.

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40; 1 H. Bla. 81. Another reason given for holding them liable is that they might otherwise receive usurious interest without any risk; 4 B. & Ald. 663; 10 Johns. 226. But inasmuch as a dormant partner differs from an ostensible partner only in being unknown as such, the liability of each must be owing to the same cause, viz.: that they are principals in the business, the dormant partner being undisclosed; L. R. 7 Ex. 218. Sharing profits is simply evidence of this relation; 5 Ch. Div. 458; and the usurious interest theory is so palpably illogical that it has never been accepted to any extent; 2 W. Bla. 997.

*Dower.* It has been held that a partner's widow is entitled to dower in firm lands subject to the equities of the parties; 3 Stew. N. J. 415. Firm debts are a lien on partnership lands paramount to a widow's right of dower; 8 Ohio St. 328; 86 Ill. 286; where partnership land is sold to pay debts, the widow of a partner has no dower; 65 Mo. 138; but *contra*, 20 S. C. 550; 7 How. (Miss.) 437. See 34 Fed. Rep. 375. Where the firm debts are all paid the dower revives; 68 Ala. 210.

*Firm funds.* A partner who withdraws firm funds from the business, thereby diminishing the stock, and applies them to his own use, is liable to the others for the injury; 1 J. J. Marsh. 507; 3 Stor. 101; and funds so used by a partner may be followed into his investments; 1 Stew. N. J. 595.

*Fraud.* One partner will be bound by the fraud of his co-partner in contracts relating to the affairs of the partnership, made with innocent third persons; 6 Cow. 497; 2 Cl. & F. 250; 7 T. B. Monr. 617; 15 Mass. 75, 331; 56 Ind. 406; 73 Ill. 381. This doctrine proceeds upon the ground that where one of two innocent persons must suffer by the act of a third person, he shall suffer who has been the cause or the occasion of the confidence and credit reposed in such third person; 1 Metc. 562, 563. The liability, therefore, does not arise when there is collusion between the fraudulent partner and the party with whom he deals; 1 East 48; or the latter has reason to suppose that the partner is acting on his own account; 2 C. B. 821; 10 B. & C. 298. See *infra*.

Not only gross frauds, but intrigues for private benefit, are clearly offences against the partnership at large, and, as such, are relievable in a court of equity; 3 Kent 51, 52; 1 Sim. 52, 89.

A fraud committed by a partner (in a law firm) while acting on his own separate account is not imputable to the firm, although, had he not been a member of the firm, he would not have been in a position to commit the fraud; 18 N. Y. L. J. (Dec. 17, 1897).

*Insolvency.* It has been held that the discharge of the partners in insolvency, as individuals, does not relieve them from liability for the firm debts; 56 Cal. 631.

*Judgments.* The rule is that a judgment obtained against one partner on a firm liability is a bar to an action against his co-partners on the same obligation; Lind. Part., 2d Am. ed. *253, *703; 3 De G. & J. 33; 4 McLean 51; 11 Gill & J. 11; see *contra*, 14 Bush 777; except when they are abroad and cannot be sued with effect; Lind. Part., 2d Am. ed. *255; 42 Ohio St. 11; 71 Ga. 466; 4 De G. & S. 199; and this is so even if the other partners were not known to him. But in Pennsylvania and other states this rule is changed by statute. Where one partner is sued and judgment is given *for him*, the creditor may still have recourse to the others; 2 H. & C. 717.

*Mismanagement.* As a rule, a partner is not liable to the firm for the mismanagement of its business; Penn. N. J. 717; 1 Gray 376. See 41 Pa. 505; see *infra*, *Torts*. Because it is unreasonable to hold a partner, who acts fairly and for the best interests of the firm according to his judgment, liable for a loss thus unwittingly occasioned; 3 Wash. C. C. 224.

*Notice.* A retiring ostensible partner remains liable to persons who have had dealings with the firm and who have no notice of his retirement; 51 Ala. 126; 57 Ind. 284; 83 Pa. 148. Actual notice is not necessary to escape liability to new customers; Wade, Notice 226; Pars. Part. § 317; even though the business is continued in the same firm name; 36 Ohio St. 135. As a general rule, notice to one partner of any matters relating to the business of the firm is notice to all; 40 Mich. 546; 40 N. H. 267; 6 La. Ann. 684; 20 Johns. 176; 79 Pa. 251; even if two firms have a common partner; 3 Pa. 399.

*Surviving partner.* The surviving partner stands chargeable with the partnership debts, and takes the partnership property by survivorship, for all purposes of holding and administering the estate, until the effects are reduced to money and the debts paid; 3 Kent 37; 5 Metc. 576; 10 Gill & J. 404; 30 Me. 386; 3 Paige, Ch. 527; 13 Miss. 44; 18 Conn. 294. See 1 Exch. 164. The debts of the partnership must be collected in his name; 6 Cow. 441; Story, Part. § 346; 3 Kent 37; 4 Metc. 540. He has full power to control and dispose of the firm assets for the purpose of winding up its affairs and may secure a firm creditor by the execution of a mortgage, which is not invalid by reason of the fact that it also secures money borrowed by him after the death of his partner, if used for the partnership debts; 46 Pac. Rep. (Colo.) 932. He has power to make an assignment for the benefit of firm creditors with preferences; 118 U. S. 3.

*Torts.* The firm is not liable for the torts of a partner committed outside of the usual course of the business, unless they are assented to or adopted by its members; 42 N. H. 25; 87 Ill. 508; 2 Ia. 580; 4 Blatch. 129; 32 Miss. 17; otherwise, in regard to torts committed in conducting the affairs of the partnership or those assented to by the firm; Lind. Part., 2d Am. ed. *198, *702; as for the negligent driving of a coach by a member of a firm of coach proprietors; 4 B. & C. 223; or for

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the negligence of a servant employed by the firm while transacting its business; 14 Gray 191; or for the conversion of property by a partner, to be appropriated to the use of the firm; 87 Ill. 508; or for obtaining goods by false pretences and fraudulently disposing of them; 67 N. W. Rep. (Mich.) 116. Demand of, and a refusal by, one partner to deliver up property is evidence of a conversion by the firm; 24 Wend. 169; 4 Rawle 120. A partnership may be liable for the publication of a libel; 83 Ala. 404. See 73 Mich. 203. If the firm is liable for the tort of a partner, each partner is liable *in solido;* Pars. Partn. § 100; and all or one or more may be sued; 142 Ill. 9.

It has been held that the fraud of one partner does not charge the firm; 6 Mass. 245; without participation by the firm; 5 Greenl. 295 (but see as to these cases 1 Metc. 564); and that it is not liable for malicious prosecution instituted by one partner for the larceny of firm property, unless the others participated in the prosecution; 101 Ala. 165.

RIGHTS AND DUTIES. *General rules.* Good faith, reasonable diligence and skill, and the exercise of a sound judgment and discretion, lie at the very foundation of the relation of partnership. In this respect the same general rules apply to partners which are applicable to the other fiduciary relations; Story, Part. § 169; 14 Beav. 250; 1 Johns. Ch. 470; 53 Mo. 122; 81 Ill. 221; 80 Pa. 234. It becomes, therefore, the implied duty of each partner to devote himself to the interests of the business, and to exercise due diligence and skill for the promotion of the common benefit of the partnership. No partner has, ordinarily, a right to engage in any business or speculation which must necessarily deprive the partnership of a portion of his skill, industry, or capital; 3 Kent 51; 1 Johns. Ch. 305; 1 S. & S. 133; nor to place himself in a position which gives him a bias against the discharge of his duty; Story, Part. § 175; 1 S. & S. 124; 11 S. & R. 41, 48; 3 Kent 61; see 129 U. S. 512; nor to make use of the partnership property for his own private benefit; 6 Madd. 367; 4 Beav. 534; 1 Sim. 52; 3 Stew. N. J. 254; nor to make a personal profit out of any transaction connected with firm interests; 61 N. Y. 123. He cannot make a profit out of any transaction between himself and the firm; 18 Beav. 75; L. R. 18 Eq. 524; a partner cannot engage in any other business in which he competes with his firm; 1 S. & S. 124. But a partner may traffic outside of the scope of the firm's business for his own benefit and advantage; 150 U. S. 524.

*Account in equity.* Every partner has a right to an account from his co-partner, which may be enforced in equity, whereby a partner is enabled to secure the application of partnership assets to firm debts and the distribution of the surplus among the members of the firm; 8 Beav. 106; 24 Conn. 279. A silent partner may have a bill for an account; 98 Mass. 118. It has been held that a partner's bill for an account will be barred by the statute of limitations; 3 C. E. Green 457. See 66 Hun 469. But not for secret profits made by one partner in transacting firm business; 3 Stew. N. J. 254. A partner cannot maintain account against a co-partner for the profits of an illegal traffic; 120 Mass. 285.

*Accounts to be kept.* In order to give the partners information that the business is being carried on for their mutual advantage, it is the duty of each to keep an accurate account ready for inspection; 2 J. & W. 556; Story, Part. § 181; and see 104 Mass. 436; 16 Fla. 99; 3 Y. & C. 655; 20 Beav. 219.

*Actions.* As a general rule an action at law does not lie by one partner against his co-partners for money paid or liabilities incurred on account of the partnership, because without an account it is impossible to tell whether a partner is a debtor or creditor of the firm; 33 Mo. 557; 54 Barb. 353. See, *contra*, Gow, Part. c. 2, § 3. There are, however, many circumstances under which partners may sue each other; see Story, Part. § 219, note (2).

*Articles of co-partnership.* Partners may enter into any agreements between themselves, which are not void as against statutory provisions or general principles of law, even though they do conflict with the ordinary rules of the law of partnership, and such engagements will be enforced between the parties; Pars. Part., 4th ed. § 160; 28 E. L. & Eq. 7.

One partner may obtain an injunction to restrain his co-partner from violating his rights under the contract of partnership, even when the dissolution of the partnership is not asked; 12 U. S. App. 193. But it is held that equity will not interfere with the suit of a partner to prevent a dissolution made in contravention of the partnership articles, or to compel specific performance of them, the contract being of an essentially personal character; 4 Del. Ch. 337; 118 Mass. 279; 168 U. S. 336.

But the partnership articles do not affect third persons, unless they have notice of them; 2 B. & Ald. 697; 8 M. & W. 703; 1 Dall. 269; 14 Ohio St. 592; 16 Wend. 505.

*Claims against the firm.* A partner may be a firm creditor and is entitled to payment of his claim before judgment creditors of the individual partners; 5 C. E. Green 288.

*Compensation.* As it is the duty of partners to devote themselves to the interests of the business, it follows that they are not entitled to any special compensation for so doing, although the services performed by them are very unequal in amount and value, unless there is an express stipulation for remuneration; 7 Paige, Ch. 483; 4 Gill 338; 2 D. & B. Eq. 123; 44 Ia. 428; 69 Pa. 30; 11 So. Rep. (Ala.) 754; 89 Mich. 233; 99 U. S. 355; nor for services performed prior to the partnership, although they enure to its benefit; 124 Mass. 305. A surviving partner has been held entitled to compensation for continuing the busi-



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ness, in order to save the good-will; 26 Ohio St. 190. A surviving partner is ordinarily entitled to compensation after dissolution; 25 Beav. 382; but it is held that a liquidating partner is not entitled to compensation for winding up the concern; 82 Hun 488; 89 Pa. 139; 99 U. S. 355; 124 Mass. 305; so of a surviving or liquidating partner; 31 N. Y. Supp. 614; but he is entitled to be paid his expenses; 2 Super. Ct. Pa. 306. But where it was agreed that a partner should not give personal services, he may recover for services rendered the firm at their request; 11 Ill. 392. See *Liquidating partner, infra.*

*Contribution.* Since partners are co-principals and all liable for the firm debts, any partner who pays its liabilities is, in the absence of agreement to the contrary, entitled to contribution from his co-partners; Lind. Part., 2d Am. ed. *367; 6 De G. M. & G. 572; 3 Ill. 464; 18 Pa. 351.

*Dissolution.* A member of an ordinary partnership, the duration of which is indefinite, may dissolve it at any time; Pars. Part. § 306; Lind. Part. *220; 51 Ind. 478; 76 N. Y. 373; 168 U. S. 336; 4 Col. 567. It will then continue only for purposes of winding up; 17 Ves. 298; 5 Leigh 583; 55 N. J. L. 427. But a court of equity would perhaps interfere to prevent irreparable injury by an untimely dissolution; 1 Swanst. 512. Where there is an agreement to continue the business for a certain time, one partner has no right to have a dissolution except for special cause; 50 Barb. 169; 9 Utah 236. But it is held that a partner can dissolve a partnership formed for a definite period, before the end of that period, but that he is liable in damages for the value of the profits which the other partner would otherwise have received; 10 N. Y. 489; 168 U. S. 337. In general, any circumstance which renders the continuance of the partnership, or the attainment of the end for which it was created, practically impossible, would seem sufficient to warrant a dissolution; Lind. Part., 2d Am. ed. *576; 22 Beav. 471. A sale by one partner of his interest in the firm's property to the others has been held not necessarily to work a dissolution of the firm; 93 Mich. 569; but see 28 Fla. 680; PARTNERSHIP.

*Exemption.* The right of partners to statutory exemption out of firm property is a disputed point, and depends somewhat on the statutes of the several states. It has been held that they are not so entitled; 77 Cal. 403; 7 Neb. 134; 61 Wis. 335; 26 Ohio St. 317; 44 Pa. 442; *contra*, 57 Ga. 229; 44 Mich. 86; 37 N. Y. 350. See Thomps. Hom. & Ex. § 197.

*Firm name, use of.* It has been held that one partner has no right to use the firm name after dissolution; 7 South. 749; 7 Abb. Pr. 202; 7 Phila. 257; the reason given being that such a continued use of the firm name would impair the value of the good-will (*q. v.*), and might also subject the retired partners to additional liabilities; Lind. Part., 2d Am. ed. *444; 43 Ch. D. 208 (C. A). For cases *contra* see 3 Swanst. 490; 7 Sim. 421; 28 Beav. 536; 34 *id.* 566; 121 N. Y. 484; 4 Denio 559. It is said to be the better opinion that the firm name is an asset of the firm; Pars. Partn. § 182, n. Where there is a sale of the business to a partner, the latter does not, without express agreement, acquire a right to the firm name; 43 Ch. D. 208 (C. A.); 88 Mich. 473; but see 10 Ch. D. 436 (C. A.); 37 Conn. 278; even so as to advertise himself as "successor;" *id.;* but he may advertise that he is "late of" the former firm; *id.* A continuing partner who has acquired the right to a retiring partner's name, cannot transfer it to a corporation; Bagby, etc., Co. *v.* Rivers, Ct. of App. Md., 57 Alb. L. J. 261.

*Firm property.* Each partner has a claim, not to any specific share or interest in the property *in specie*, as a tenant in common has, but to the proportion of the residue which shall be found to be due to him upon the final settlements of their accounts, after the conversion of the assets and the liquidation of all claims upon the partnership; and therefore each partner has a right to have the same applied to the payment of all such claims, before any one of the partners, or his personal representatives, or his individual creditors, can claim any right or title thereto; Story, Part. § 97; 4 Ves. 396; 6 *id.* 119; 17 *id.* 193.

Each partner has also a specific lien on the present and future property of the partnership, the stock brought in, and everything coming in during the continuance and after the determination of the partnership, not only for the payment of debts due to third persons, but also for the amount of his own share of the partnership stock, and for all moneys advanced by him beyond that amount, as also for moneys withdrawn by his co-partners beyond the amount of his share; 3 Kent 65; 8 Dana 278; 10 Gill & J. 253; 20 Vt. 479; 9 Cush. 558; 25 Beav. 280; 52 N. J. Eq. 628. This lien attaches to real estate held for partnership purposes, as well as to the personal estate; 5 Metc. Mass. 562, 577; and is co-extensive with the transactions on joint account; 1 Dana 58; 11 Ala. N. S. 412.

Upon a settlement of a partnership by an account, the assets are divided among the partners in proportion to their contributions; and each partner is liable for a deficit in proportion to his share of the profits; 120 Mass. 324.

*Fraud.* A partner has an equity to rescind the partnership and be indemnified for his co-partner's fraud in inducing him to enter the business; 126 Mass. 304; 3 De G. & J. 304; 1 Giff. 355. Where the partnership suffers from the fraud or wanton misconduct of any partner in transacting firm business, he will be responsible to his co-partners for it; Story, Part. § 169. See *supra.*

*Interest.* As a general rule partners are not entitled to interest on their respective contributions to capital unless by special agreement, or unless it has been the custom of the firm to have such interest

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charged in its accounts ; 3 De G. J. & S. 1 ; 6 Beav. 433 ; 89 Pa. 139 ; 119 Mass. 38 ; 20 Ala. 747 ; 92 Ill. 92. See 52 Minn. 342 ; 56 Mich. 276. But a partner is entitled to interest on advances made by him to the firm ; 6 Mad. 145 ; 129 Mass. 517 ; 35 Atl. Rep. (Md.) 60 ; 14 N. J. Eq. 44 ; 17 Vt. 242 ; 79 N. Y. 366 ; and no express agreement is necessary ; 1 McCart. Ch. 44. See, however, 8 Dana 214 ; 24 Conn. 185. But it is held that interest will not be allowed on advances and profits not drawn out ; 25 N. E. Rep. (Mass.) 728. Where profits are left in the business, a partner is not entitled to interest thereon ; L. R. 5 Ch. 519 ; 89 Pa. 139 ; 53 Mich. 421 ; a partner who has not paid in his contribution to capital will be charged with interest ; 42 Kan. 247 ; 109 Ill. 94 ; a partner will not be charged with interest on overdrafts ; 72 Ga. 154. A partner has been held entitled to interest on a sum contributed to capital in excess of the agreed share ; 17 Ala. 32.

*Liquidating partner.* It is the duty of those upon whom, by appointment or otherwise, it devolves, after the dissolution of a firm, to wind up the affairs of the partnership, to act for the best advantage of the concern, to make no inconsistent use of the property, and to seek no private advantage in the composition of debts or in any other transaction in the performance of this business ; 1 Swanst. 507 ; 2 *id.* 627 ; 11 Ill. 392 ; 54 Kan. 793. Nor, in this case, can any partner claim any commission for getting in the debts, or, in any other particular, reward or compensation for his trouble ; *id.* ; 14 Misc. Rep. 18 ; 99 U. S. 355 ; 1 Knapp, P. C. 312 ; 3 Kent 64, note ; Story, Part. § 331 ; 17 Pick. 519 ; 4 Gratt. 138 ; but in 16 Vt. 613, a partner who performed services in settling up the affairs of a firm after dissolution was allowed compensation for them, and where one partner contributed all the capital and exercised complete management of the business, he was allowed compensation ; 35 S. W. Rep. (Ky.) 921 ; and where there is a great difference between the services of the partners, there may be compensation ; 19 Pa. 516 ; see 124 Mass. 305 ; it is held that no compensation will be allowed for an excess of services without a special agreement : 57 Ill. App. 20. But it is held that a partner will be allowed compensation for extra and outside services in winding up ; 118 Mass. 236. See *Compensation, supra.*

*Litigation.* A partner may recover the costs of carrying on litigation for the firm —but not compensation for conducting it, unless by express agreement ; 2 Stew. N. J. 504.

*Profits and losses, how distributed.* As between the partners, they may by agreement stipulate for equal or unequal shares in the profit and loss of the partnership ; 132 U. S. 539 ; Story, Part. § 23 ; but in the absence of any express agreement or stipulation between them, and of all controlling evidence and circumstances, the presumption has been held to be that they are interested in equal shares ; 183 Pa. 186 ; 6 Wend. 263 ; 9 Ala. N. S. 372 ; 2 Murph. 70 ; 5 Dana 211 ; 1 Ired. Eq. 332 ; 1 J. J. Marsh. 506 ; 20 Beav. 98 ; 54 Fed. Rep. 237 ; 132 U. S. 539 ; 70 Md. 523. And the circumstance that each partner has brought an unequal amount of capital into the common stock, or that one or more have brought in the whole capital and the others have only brought industry, skill, and experience, would not seem to furnish any substantial ground of difference as to the distribution ; Story, Part. § 24 ; 3 Kent 28, 29 ; 21 Me. 117.

It has sometimes been asserted, however, that it is a matter of fact, to be settled according to all the circumstances, what would be a reasonable apportionment, uncontrolled by any natural presumption of equality in the distribution ; Story, Partn. § 24 ; 2 Camp. 45. The opinion in England seems divided ; but in America the authorities seem decidedly to favor the doctrine of a presumed equality of interest. See American cases cited above ; Story, Part. § 24. "The better view is that although all or a large part of the capital is furnished by one partner, the entire loss is to be borne by all. Hence, after payment of the debts, the contributions of partners to capital are all to be repaid before there can be any division of profits (L. R. 7 Eq. 538 ; 119 Mass. 38 ; 113 N. Y. 39). And if the assets are not sufficient, after paying the debts, to repay the capital, the deficit must be shared by all the partners ; and the partner who has contributed more than his share of capital is therefore entitled to contribution from the rest (37 Fed. Rep. 294 ; 124 Pa. 498)." Pars. Part., Beale's ed. § 173.

*Receiver, appointment of.* To authorize a partner to demand the appointment of a receiver of a subsisting partnership, he must show such a case of gross abuse and misconduct on the part of his co-partner, that a dissolution ought to be decreed and the business wound up ; Story, Part. §§ 228, 231 ; 2 Mer. 405 : 8 C. E. Green 208, 388. Where it appears that the surviving members of a firm are conducting the business for the purpose of enlarging and continuing it, and not to close it up, a receiver may be appointed for that purpose, on application of the legal representatives of the deceased member ; 20 N. Y. S. 65. After dissolution a court of equity will appoint a receiver almost as a matter of course ; Lind. Part. *1008 ; 1 Ch. Div. 600 ; 65 N. C. 162 ; 2 C. E. Green 343 ; 20 Md. 30. But see 18 Ves. 281 ; and [1892] Ch. 633, where it was held that the mere fact of dissolution of a partnership does not give one partner an absolute right, as against his co-partners, to have a receiver appointed of the partnership business.

*Set-off.* It may be stated as a general rule in law and equity that there can be no set-off of joint debts against separate debts unless under a special agreement ; Story, Part. § 396. Thus, a debt due by one of the members of a firm cannot be set off against a debt due the firm ; 2 C. B. 821 ; 16 R. I. 288 ; 2 Bay 146 ; 4 Wend. 583 ; 88 Ala. 356 ;

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unless the partners assent; 89 Pa. 392. Nor can a debt owing to a partner be set off against a debt due by the firm; 119 Ill. 407; 6 C. & P. 60; Lind. Part., 2d Am. ed. *269; 1 South. 220; but see 67 Miss. 60. But otherwise where the partnership's debt is reduced to judgment; Pars., Part., Beale's ed. § 262; 69 Wis. 410.

*Torts.* If the partnership suffers loss from the gross negligence, unskilfulness, fraud, or other wanton misconduct of a partner in the partnership business, or from a known deviation from the partnership articles, he must bear the loss; 6 W. & S. 529; 1 Sim. 89; Pothier, Part. n. 133; 3 Kent 52, note; Story, Part. § 173. But not if it be the result of an honest mistake in judgment, not caused by gross negligence or ignorance; 1 McCart. 44; 76 Ia. 288.

**PARTNERSHIP.** A relation founded upon a contract between two or more persons to do business as individuals on joint, undivided account.

A contract of two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions. 3 Kent 23; 94 Ala. 116.

This definition was criticised by Jessel, M. R., in 5 Ch. D. 472, on the ground that there may be partners who do not contribute any property, labor, or skill, as where a share is given to the widow of a former partner. Pollock (Partnership 3) considers it the most businesslike and substantially accurate definition, and one which might be eccepted, with more or less verbal condensation and amendment.

A voluntary contract between two or more persons for joining together their money, goods, labor, and skill, or any or all of them, in some lawful commerce or business, under an understanding, express, or implied from the nature of the enterprise, that there shall be a communion of profit and loss between them, will constitute a partnership. Colly. Part. § 2; 10 Me. 489; 3 Harr. N. J. 485; 5 Ark. 278.

A legal entity formed by the association of two or more persons for the purpose of carrying on business together and dividing its profits between them. Parsons, Part., Beale's ed. § 1. See 5 Ch. D. 458.

The relation which subsists between persons who have agreed to share the profits of a business carried on by all or any of them on behalf of all of them. Colly. Part., 5th ed. 4.

Sir F. Pollock says: "The nearest approach to a definition which has been given by judicial authority in England is the statement that 'to constitute a partnership the parties must have agreed to carry on business and to share profits in some way in common;'" but he adds that this principle "excludes several kinds of transactions which, at first sight, have some appearance of partnership." Poll. Part. 4.

A contract of partnership is one by which two or more persons agree to carry on a business for their own benefit, each contributing property or services and having a community of interest in the profits. It is, in effect, a contract of mutual agency, each partner acting as a principal in his own behalf and as agent for his co-partner. Gray, J., in 168 U. S. 334.

An agreement that something shall be attempted with a view to gain, and that the gain shall be shared by the parties to the agreement, is the grand characteristic of every partnership, and is the leading feature in every definition of the term. Ewell's Lind. Part., 2d Am. ed. *2, where many definitions are collected.

The relation which subsists between persons carrying on a business in common with a view of profit. English Partnership Act, 1890.

It has been said that "the various definitions have been approximate rather than exhaustive;" 145 U. S. 611.

Partnership, though often called a contract, is in truth the result of a contract; the relation which subsists between persons who have so agreed that the profits of a business inure to them as co-owners. George, Part. 30.

That a partnership is an entity, distinct from the partners, is the view of the business world everywhere. And such is the state of the law where the civil law is in force. In our law, the partnership has not been clearly recognized as an entity. In an action at law, at least, the partners alone are recognized as parties in interest, yet even at law certain doctrines are explained only by recognizing the firm as an entity. The courts of equity show more recognition of the true character of a partnership; but even in equity this has not been made clear until recently. There is now, however, a strong disposition on the part of the courts to recognize the mercantile doctrine. Pars. Part., Beale's ed. 2.

"The firm is the contracting party, not the individuals composing the firm; the credit is given to the firm; the partnership, the ideal person, formed by the union of interest, is the legal debtor. A partnership is considered in law as an artificial person, or being, distinct from the individuals composing it." 2 Green, L. 410.

"Everybody knows that partnership is a sort of agency, but a very peculiar one. You cannot grasp the notion of agency, properly speaking, unless you grasp the notion of the existence of the firm as a separate entity from the existence of the partners: a notion which was well grasped by the old Roman lawyers, and which was partly understood in the courts of equity before it was part of the whole law of the land, as it is now. But when you get that idea clearly, you will see at once what sort of agency it is. It is the one person acting on behalf of the firm." 5 Ch. D. 476, per Jessel, M. R.

"When one joins a partnership, he makes himself a part of an entity already existing, which has acquired certain property and business, and in acquiring it has incurred certain indebtedness. The firm

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owns the property, holds the business, and owes the debts." 17 Kan. 340, per Brewer, J.

A partnership is a distinct entity, having its own property, debts, and credits; for the purpose for which it was created, it is a person, and as such is recognized by the law. 22 Neb. 744. See 82 Ga. 129.

"The partnership for most legal purposes is a distinct entity." 39 Mich. 784, per Cooley, J.

"A partnership, or joint stock company, is just as distinct and palpable an entity in the idea of the law, as distinguished from the individuals composing it, as is a corporation. . . . The obligation and the liability, *inter partes*, are the same in the one case as the other. The only practical difference is a technical one, having reference to the *forum* and form of remedy." 50 Vt. 676.

There are statutes in some states providing that a partnership may sue and be sued by its name.

The relation between the partners and the firm is that of agent to principal; and the firm property, the legal title to which is held by the partners, is in trust for the firm. Each partner, in doing an act which is within the scope of his agency, is acting therefor for the firm, and not for himself nor for his co-partners. Pars. Part., Beale's ed. 4.

The law of partnership, as administered in England and in the United States, rests on foundations derived from three sources, —the common law, the law merchant, and the Roman law; Colly. Part. § 1.

Partnership in the Roman law (*societas*) included every associated interest in property which resulted from contract; *e. g.* where two bought a farm together. Every other associated interest was styled *communitas*, *e. g.* where a legacy was left to two; Pothier, *Droit Franc.* III. 444; Ewell's Lind. Part. *58, note 2; 11 La. Ann. 277.

Partnership at the common law is an *active* notion. The relation implies a business and a turning of capital. It is to be contrasted with ownership, which is, whatever the tenancy, a *passive* notion; 1 Johns. 106; 54 Cal. 429. But there may be at the common law a joint purchase and an individual liability for the whole price without a partnership. In a purchase expressly by two the contract is *prima facie* joint with a consequent liability of each for the whole price. But this inference may be contradicted by circumstances known to the seller which indicate a division of title: 1 Wms. Saund. 291 *c*; 4 Cow. 163, 282; 27 Ia. 131; 9 Johns. 475; 15 Me. 17.

Partnership, in the Roman law, was in buying or selling. True partnership, at common law, is only in buying and selling. This peculiarity of the common law is due to the commercial origin of the relation and of the rules by which the relation is governed. The Roman *societas* was an outgrowth of the ancient tribal constitution. The common-law partnership is an expedient of trade; 15 Wend. 187; 42 Ala. 179; 41 Me. 9; 1 Pa. 140; Camp. 793; 1 Johns. 106. Buying to sell again fixes the transaction as a joint one. The transaction is joint because the sale excludes the idea of division of title in the purchase. The property dealt in becomes the instrument of both parties in obtaining a totally distinct subject of distribution, *i. e.* the profit; 14 Wend. 187; 3 Kent *25. There must be an agreement, not a mere intention, to sell jointly; 47 N. Y. 199.

In a partnership, the members do business in their unqualified capacity as men, without special privilege or exemption; they are treated in law as a number of individuals, occupying no different relation to the rest of the world than if each were acting singly; 7 Ves. 773. On the other hand, a corporation, though in fact but an association of individuals with special privileges and exemptions, is in contemplation of law a fictitious person distinct from the members who compose it; Ewell's Lind. Part. *4. Every unincorporated association for purposes of gain is a partnership; unless it can claim corporate privilege on the ground of a *de facto* standing; 27 Ind. 399; 66 N. Y. 425; 7 Pa. 165; 65 Ill. 532. A club or association not for gain is not a partnership: it is not a commercial relation; 6 Mo. App. 465; 22 Ohio St. 159; 97 Pa. 493; 2 M. & W. 172. In this country there is a far wider extent in the variety of purposes for which partnerships are established than anywhere else; Pars. Part. § 37; including farming, manufacturing, mining, lumbering, the business of lawyers, physicians, etc.; *id.*

Whether a partnership exists or not in a particular case is not a mere question of fact, but one mixed of law and fact; 111 U. S. 529. It is, nevertheless, generally to be decided by a jury. See 3 Harr. N. J. 358; 1 N. & M'C. 20; 1 Cai. 184; 2 Fla. 541; 3 C. B. N. S. 562, 563: 42 Ala. 179; 61 Mich. 216. If the facts are admitted or the evidence consists of a written instrument, it is for the court to say whether a partnership exists; 58 Conn. 413; 13 R. I. 27.

*Elements of partnership.* The elements of partnership are the contribution and a sharing in the profits. These two elements must be combined. Without contribution the alleged partner cannot be said to do business; unless he shares the profits, the business is not carried on for his account. Contribution without a share in the profits is a simple gift to the firm, by which firm creditors are enriched, not damaged. Sharing profits without contribution is a gift by the firm to the beneficiary, with which creditors may of course interfere by seizing the property and closing out the concern. In neither case does the alleged partner enter into business relations with the customers and creditors of the firm; 8 H. L. Cas. 286; 5 Ch. Div. 458; 8 Hun 189; L. R. 7 Exch. 218.

Contribution need not be made to the firm stock; any co-operation in the business will be enough; 4 East 144; 16 Johns.

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34; Story, Partn. §§ 27, 40. A contribution must be kept in the concern, and take the risk of the business; a loan, on the other hand, is made upon the personal credit of the partners merely, and may be used by them as they please; it is to be repaid at all events. Because of this difference, sharing profits in lieu of interest upon a loan does not create a partnership. The English statute to this effect has been decided to be merely declaratory; 5 Ch. Div. 458; 7 Ch. Div. 511; 62 N. Y. 508; 6 Pick. 372. Mere loaning of money to a partnership for a definite period, the creditor to receive interest in proportion to the profits, does not make the lender liable as a partner; 145 U. S. 611. It is not necessary, however, that each partner should bring into the concern both labor and property; Parsons, Partn. Beale's ed. § 63. The contribution of money or property by an incoming partner is not essential to the creation of a partnership; it is competent for the prior partners, in consideration of the new partner undertaking the entire charge and control of the business of the company, to give him an interest as partner in the property which is to constitute, at the outset, the whole capital of the partnership; 132 U. S. 539.

It was formerly held that sharing profits constituted the parties partners, though no such relationship was intended between them; 2 W. Bla. 998; 2 H. Bla. 235; 1 Story 371; 58 N. Y. 272; but not sharing gross profits; 1 Camp. 329. Again, it is called *prima facie* evidence of partnership, but a contribution will have the same effect. Each is an element in a relation not complete without both.

It has been held that a partnership subsists between merchants who divide the commissions received by each other on the sale of goods recommended or "influenced" by the one to the other; 4 B. & Ald. 663. See 95 Ky. 387. So between persons who agree to share the profits of a single adventure; 9 C. B. 431; 1 Rose 297; and between persons one of whom is in the position of a servant to the others, but is paid a share of the profits instead of a salary; 1 Deac. 341; 1 Rose 92; (*contra*, 182 Pa. 624); and between persons one of whom is paid an annuity out of the profits made by the others; 17 Ves. 412; 8 Bingh. 469; or an annuity in lieu of any share in those profits; 2 W. Bla. 999. So between the vendor and purchaser of a business, if the former guarantee a clear profit of so much a year, and was to have all profits beyond the amount guaranteed; 3 C. B. 641. The character in which a portion of the profits was received did not affect the result; see 1 Maule & S. 412; 21 Beav. 164. Persons who share profits were *quasi*-partners, although their community of interest was confined to the profits; 2 B. & C. 401. But it is held that a contract for the sale of goods, which provides that they shall be charged for at reasonable prices, and that the purchaser shall have a credit of one-half the profits, does not establish a partnership between the seller and purchaser; 16 Colo. 447.

An agreement to share losses is not essential; that follows as an incident to the relation. Indeed all liability *inter se* may be provided against by contract and a partnership may nevertheless subsist; 3 M. & W. 357; 3 C. B. 32, 39; Ewell's Lind. Part. *22; 7 Ala. 761; 5 La. An. 44. Partnership is a question of intention, and the intention which makes a partnership is ordinarily to contribute to the business and share the profits. In this way, the parties become co-principals in a business carried on for their account. The question of intention is to be decided by a consideration of the whole agreement into which the parties have entered, and ought not to be made to turn upon a consideration of only a part of its provisions; 15 M. & W. 292; 3 Kent 27; Ewell's Lind. Part. *10.

An agreement to share profits, nothing being said about the losses, amounts *prima facie* to an agreement to share losses also; so that an agreement to share profits is *prima facie* an agreement for a partnership; and, accordingly, it is held that, unless an agreement to the contrary is shown, persons engaged in any business or adventure, and sharing the profits derived from it, are partners as regards that business or adventure. It is strong presumptive evidence of partnership; 37 Conn. 250. Still, it cannot be said that persons who share profits are necessarily partners in the proper sense of the word; Ewell's Lind. Part *7, *12; 28 Ohio St. 319; 54 Mo. 325; 5 Gray 59, 60; 12 Conn. 69; 12 N. H. 185; 15 Me. 294; 8 H. L. Cas. 268; see 18 Johns. 34; 18 Wend. 175; 6 Conn. 347; 132 U. S. 539; unless the business is carried on by them personally or by their agents; 8 H. L. Cas. 268. Although a presumption of partnership would seem to arise in such a case; Colly. Part. § 85; 101 Cal. 500; 127 Pa. 442; still, the particular circumstances of the case may be such as to repel this presumption. It may appear that the share of the profits taken was merely a compensation to one party for labor and service, or for furnishing the raw materials, or a mill privilege, or a factory, or the like, from which the other is to earn profits; 5 Gray 60; 3 Kent 33; 6 Halst. 181; 2 McCord 421; but see 38 N. H. 289. Originally it was immaterial whether the profits were shared as gross or net; but the later cases have established a distinction. A division of gross returns is thought to be identical with a purchase for the purpose of division; the price represents the thing. There is no unity of interest; 1 Camp. 329; 3 Kent *25; 4 Maule & S. 240; 5 N. Y. 186. But the distinction is not absolutely decisive on the question of partnership. See 1 Camp. 330; 6 Vt. 119; 6 Pick. 335; 4 Me. 264; 12 Conn. 69; 38 N. H. 287, 304; 4 B. & Ald. 663. The officers and crews of whaling and other fishing vessels, who are to receive certain proportions of the produce of the

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voyage in lieu of wages; 4 Esp. 182; 17 Mass. 206; 2 Y. & C. 61; captains of merchant-ships who, instead of wages, receive shares in the profits of the adventure; 4 Maule & S. 240; or who take vessels under an agreement to pay certain charges and receive a share of the earnings; 16 Mass. 336; 7 Me. 261; persons making shipments on half-profits; 14 Pick. 195; have generally been held not to be partners with the owners, and the like. Running a steamboat on shares does not make the owners partners in respect of the vessel; 35 Fed. Rep. 785; so of an agreement between two parties to farm on shares; 42 Ga. 226; 67 Mo. 170; 30 Atl. Rep. (Md.) 637; and a purchase of land on joint account for the purpose of sale and profit; 142 U. S. 682; and a hotel lease where the rental depends in part on the profit of the hotel; 28 N. Y. Supp. 134; or running a saw mill where one erects it and another furnishes logs and they divide profits; 58 Ala. 618. But a partnership can be created in a single business transaction, as upon the sale of horses, sharing the profits and loss; 2 Super. Ct. Pa. 104; or in the purchase and sale of lands; 149 U. S. 248. A seamen who is to receive pay in proportion to the amount of fish caught, is not a partner; 68 Me. 241. Sharing profits in lieu of wages is not a partnership. There is no true contribution; 182 Pa. 624; 69 Ill. 237; 118 Mass. 443; 34 Md. 49; 29 N. J. L. 270; 14 Cal. 73; 43 Mo. 538; 44 Ga. 228; 15 So. Rep. (Ala.) 444; 41 Kan. 503; 112 N. Y. 419. Where a person enters into a contract with another by which the latter is to receive a certain salary and a percentage of the profits, while the former is to own the entire capital, no partnership exists; 104 Mo. 425; nor where one receives a share of the profits by way of compensation; 76 N. Y. 55; 4 Nev. 420. A factor, simple or *del credere*, may receive a portion of the profits in lieu of commissions, without becoming a partner; 62 Pa. 374; 24 L. J. Ch. 58. A mere participation in profits and losses of a business does not necessarily constitute a partnership; 89 Mo. 192.

Where a business is assigned to trustees who are to manage it and pay creditors out of the profits, the creditors are not partners; the distribution of so-called profit is really the payment of a debt; 8 H. L. C. 268; but creditors who set up their insolvent debtor in business and share the profits with him, forbearing meanwhile to press their claims, have been held to be partners; 8 Hun 189.

The case of Cox *v.* Hickman, 8 H. L. C. 268. which held that persons who share profits do not thereby incur the liability of partners, is said to have put an end to two doctrines formerly held to be fundamental: that persons may be held to the liability of partners who are not partners in fact, merely because some other relation exists between them; and that profit-sharing is conclusive of the existence of a partnership; Pars. Part. § 43. The true question of partnership is said in L. R. 1 C. P. 86, to be as stated by Lord Cranworth in 8 H. L. C. 268: "Whether the trade is carried on, on behalf of the person sought to be charged as a partner, the participation in the profits being a most important element in determining that question, but not being in itself decisive; the test being whether it is such a participation of profits as to constitute the relation of principal and agent between the person taking the profits and those actually carrying on the business."

The doctrine of Cox *v.* Hickman has been generally followed in this country; 145 U. S. 611; George, Partn. 43, where cases in nearly all the states are collected; but in Pennsylvania the rule in Waugh *v.* Carver, 2 H. Bla. 235, *supra*, has been held to be firmly established, though overruled in England; 62 Pa. 374. There is a distinction in Pennsylvania between participation in profits as such and a compensation or consideration merely measured by a proportion of profits; while this distinction is of a very refined and shadowy character, it is said to be too late to question the rule or the exception; 62 Pa. 374; 176 Pa. 361. In New York, Cox *v.* Hickman was considered, but not followed, in 58 N. Y. 272; and in 115 N. Y. 625, the rule in Waugh *v.* Carver was held to be still in force in that state. The rule was fully discussed in 53 N. H. 276 and 45 Mich. 188. The result of the English doctrine is said to be that there can be no partnership between parties unless by contract among themselves, but parties may be charged as partners by way of estoppel. It is the present law of England that no person who does not hold himself out as a partner is liable to third persons for the acts of persons whose profits he shares, unless he and they are really partners *inter se*; 1 Lind. Part. *42; L. R. 1 C. P. 86.

Mutual agency as a final test of partnership has been approved in some cases; 53 N. H. 276; 64 L. J. Q. B. 170; and rejected in others; 5 Ch. Div. 458; 145 U. S. 611.

The ultimate test is said to be the co-ownership of the profits, which the owner receives as owner and not by way of compensation for something, such as services, etc.; George, Partn. 50. To constitute partnership each person must have an interest in the profits as a principal in the joint business: 54 Mo. 325.

A distinction is made between a share in the profits and a commission equal to a certain per cent. on the profits. In the latter case there is no partnership, because no sharing in the profits as such. The rule is based upon authority, but is acknowledged to have no foundation in common sense. It is said to be an attempt to escape from the rigidity of the proposition that a share in the profits must in all cases make a man a partner; L. R. 4 P. C. App. 419; 62 Pa. 374; 18 Ves. 300; 12 Conn. 69; 6 Metc. 82.

In other cases, it is held that in order to render a man liable as partner he must have a specific interest in the profits as a *principal trader*; 1 Den. 337; 15 Conn. 73;

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10 Metc. 303; 28 Ohio St. 319. But in reference to these positions the questions arise: When may a party be said to have a specific interest in the profits, *as profits?* when, as a principal trader?—questions in themselves very nice, and difficult to determine. See 6 Metc. 82; 12 Conn. 77.

Sometimes the partnership relation has been made dependent on the power to control the business. In strictness the only control necessary is the power to control the application of the contribution. A partner may have no power, as between him and his partners, to manage the business; 4 Sandf. 311.

Again, partnership has been said to require that a partner have an initiative in the conduct of the business; but the proposition seems to lose sight of dormant partners; L. R. 4 P. C. 419.

Again, partnership has been made to depend on what is termed the legal title to the business: A was held not a partner, though he shared in the profits of a business created solely by his contribution but assigned to B for A's protection; L. R. 1 C. P. 86. There are other cases in which considerable stress is laid on the right to an account of profits, as furnishing a rule of liability; 3 Kent 25; 18 Wend. 184; 3 C. B. N. S. 544, 561. But, although it is true that every partner must have a right to an account, it seems not to be equally true that every party who has a right to an account is a partner; 5 Gray 58.

Partnership has sometimes been styled a branch of the law and relation of principal and agent. But mutual agency is not the basis, it is the incident of partnership. Partners are co-principals, and the right and power of representation springs from this circumstance. A dormant partner is not at all the agent of the firm; L. R. 7 Ex. 227. The principal distinction between a partnership and a mere agency is that a partner has a community of interest with the other partners in the business and responsibilities of the partnership,—sometimes both in the stock and profits, and sometimes only in the profits,—whereas an agent, as such, has no interest in either; 4 B. & C. 67. The authority of a partner is very much more extensive than that of a mere agent; 10 N. H. 16. See PARTNERS. The reference to agency as a test of partnership is unfortunate and inconclusive, inasmuch as agency results from partnership, rather than partnership from agency; 145 U. S. 611.

The *formation* of a contract of partnership does not require any particular formality. It is, in general, sufficient that it is formed by the voluntary consent of the parties, whether that be express or implied, whether it be by written articles, tacit approbation, or by parol contract, or even by mere acts; 3 Kent 27; Daveis 320; 4 Conn. 568; Pars. Part. § 627. As a general rule a writing is unnecessary; 2 Barb. Ch. 336; Ewell's Lind. Part. *80. Under the statute of frauds, where there is an agreement that a partnership shall commence at some time more than a year from the making of the agreement, a writing is necessary; 5 B. & C. 108. As to partnership in lands, see *infra*.

Where there is no written agreement, the evidence generally relied upon to prove a partnership is the conduct of the parties, the mode in which they have dealt with each other, and the mode in which each has, with the knowledge of the others, dealt with other persons. This can be shown by the books of account, by the testimony of clerks, agents, and other persons, by letters and admissions, and, in short, by any of the modes by which facts can be established. As to the presumption arising from the joint retainer of solicitors, see 20 Beav. 98; 7 Hare 159. For cases in which partnership has been inferred from various circumstances, see 4 Russ. 247; 2 Camp. 45. Though formed by deed, partnership may be dissolved by parol; Ewell's Lind. Part. *572. See ARTICLES OF PARTNERSHIP.

A contract for the creation of a partnership is enforcible at law; 3 Super. Ct. Pa. 527. The practical construction of partnership articles given for several years by the partners to its language will usually be accepted by the courts as conclusive; 152 Mass. 316.

*Kinds.* The Roman law recognized five sorts of partnership. First: *societas universorum bonorum*, a community of goods: probably a survival of the old tribal relation. Second: *societas universorum quæ ex quæstu veniunt*, or partnership in everything which comes from gain,—the usual form; Pothier, Part. nn. 29, 43. Such contracts are said to be within the scope of the common law; but they are of very rare existence; Story, Part. § 72; 5 Mas. 183. Third: *societas vectigalium*, a partnership in the collection of taxes. It was not dissolved by the death of a member; and if it was so agreed in the beginning, the heir immediately succeeded to the place of the ancestor. Fourth: *societas negotiationis alicujus, i. e.* in a given business venture. Fifth: *societas certarum rerum vel unius rei, i. e.* in the acquisition or sale of one or more specific things; Pothier, Part. *24.

In the French law there are four principal classes of partnership; First: *en nom collectif*, the ordinary general partnership. Second: *en commandite*, an association corresponding to our limited partnership, composed of general and special partners in which the liability of the latter is limited to the fund invested by them. Third: *anonyme*, a joint stock company with limited liability. Fourth: *en participation*, simply a partnership with a dormant partner; Merlin, *Rèpert. de Jur.* tit. *Société*; Mackenzie, Rom. Law 217; Pothier, Part. *39. See Goiraud, Code, etc.

In the common law all partnership is for gain. *General* partnership is for a general line of business; 3 Kent *25; Cowp. 814. But where the parties are engaged in one branch of trade or business only, they would be usually spoken of as engaged in a general partnership; Story, Part. § 74.

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*Special* or *particular* partnership is one confined to a particular transaction. The extent or scope of the agreement is different in the two cases, but the character of the relation is the same. A partnership may exist in a single transaction as well as in a series; Daveis 323; 2 Ga. 18; 3 C. B. 641; 49 Pa. 83. Special or limited partnership differs from the ordinary relation. It is composed of general partners to whom all the ordinary rules of partnership apply, and of limited partners with circumscribed power and liability limited to the amount of their contribution. The privilege is imparted by charter in England. In America it exists by statute; and unless the provisions of the act are strictly complied with, the association will be treated as a general partnership; 3 Kent *35; 62 N. Y. 513; 91 Ill. 96; 127 Pa. 161, 255; 151 *id.* 79; 35 Ill. App. 336. The special exemption of a limited partner will be recognized in other jurisdictions than the one in which the association is formed, though the firm has made the contract in the foreign jurisdiction; 69 N. Y. 24.

Another sort of association is styled *limited partnership* (*q. v.*). It is of recent, statutory origin and strongly resembles a corporation. The members incur no liability beyond the amount of their subscription; unless they violate in some manner the requirements of the statute under which they organize. It is a general requirement, that the word "limited" be in all cases added to the firm name. Limited partnerships in Pennsylvania, which can be sued in the partnership name, are nevertheless not corporations entitled to sue as artificial citizens of the states, within the constitution and laws of the United States; 38 Fed. Rep. 574.

There is still another class of partnerships, called *joint-stock companies* (*q. v.*).

*Sub-partnerships.* The *delectus personæ*, *q. v.*, which is inherent in the nature of partnership (excepting mining partnerships; see 102 U. S. 641; 28 Cal. 569; and joint-stock companies, and certain partnership associations in Massachusetts; see 137 Mass. 510; 47 N. E. Rep. (Mass.) 502) precludes the introduction of a stranger into the firm without the concurrence of all the partners; 7 Pick. 235; 11 Me. 488; 1 Hill, N. Y. 234; 8 W. & S. 63; 16 Ohio 166; 2 Rose 254; Pars. Part. § 106. Yet no partner is precluded from entering into a *sub-partnership* with a stranger: *nam socii mei socius meus socius non est.* In such case the stranger may share the profits of the particular partner with whom he contracts; and although it has been decided that it is not true as a general proposition that such stranger will not be liable for the debts of the general partnership; 13 Gray 468; still, it is quite evident that a *mere* participation in profits renders one responsible only for the debts and liabilities of those with whom he participates; and, inasmuch as such stranger shares the profits only of and with *one* of the partners, he can be held only as the partner of that partner; he cannot be held as a partner in the general partnership, because he does not share or participate with the other persons who compose it. See 2 Rose 255; 3 Kent 52; 1 B. & P. 546; 19 Ind. 113; 3 Ired. Eq. 226; 114 Ill. 574. Besides, a subpartner does not receive a certain share of the whole profits of the firm, but only a part of a share thereof; and he does not receive this part of a share, nor is he entitled to interfere with it at all, to say whether it shall be more or less in amount, until it has actually been set out and the time has come for a division between himself and the partner with whom he contracted. He does not draw out of the general concern any of its profits; he only draws from the profits of one who has previously drawn them from the general partnership. See 6 Madd. 5; 4 Russ. 285. If this stranger has caused damage to the partnership by his default, the party who has taken him into the partnership will be liable to the other partners the same as if he had done the damage himself; Pothier, Part. n. 93.

Any number of partners less than the whole may form an independent co-partnership, which, though not strictly a subpartnership, is entitled to a separate standing in equity. In case of insolvency the subordinate co-partnership is treated as a distinct concern, and the assets are marshalled accordingly. Consequently, although the creditors of the smaller firm are strictly separate creditors when compared with the creditors of the larger firm; yet debts owing by one firm to the other are collected on insolvency for the benefit of the creditors of the creditor firm; 1 B. & P. 539; 1 Cox 140. See 176 Pa. 354. Indeed, one partner may have this independent standing if the trade is distinct; Lind. Part. 2d Am. ed. *725. But the debts must arise in the ordinary course of trade; Lind. Part. 2d Am. ed. *527.

*Quasi-partnership.* This is simply the case of a man who without being actually a partner, holds himself out or suffers himself to be held out as such; he is estopped to deny his liability as a partner; Pars. Part. § 93; 27 N. H. 252; 2 Campb. 802; 2 McLean 347; 17 Vt. 449; 6 Ad. & E. 469; 122 U. S. 583. This rule of law rests, not upon the ground of the real transaction between the partners, but upon principles of general policy, to prevent the frauds to which creditors would be liable if they lent their money upon the apparent credit of three or four persons, when in fact they lent it only to two of them, to whom, without others they would not have been willing to lend anything; 3 Kent 32; 6 S. & R. 259, 333; 16 Johns. 40; 2 Des. 148; 2 N. & M'C. 427; 39 Minn. 404; 70 Md. 205.

The term "holding one's self out as partner" imports, at least, the voluntary act of the party holding himself out; 3 Conn. 324; 2 Camp. 617; but no particular mode of holding himself out is requisite to charge a party. It occurs most frequently where a partner retires from a firm and his retire-

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ment is not made known. It may be express and either by direct assertion or by authority to a partner to use the party's name. It may result from negligence, as a failure to forbid the use of one's name by the firm; 2 Zab. 372; 61 N. Y. 456; 41 Pa. 30; 64 Ind. 545; 53 Ga. 98; 30 Md. 1; 32 Ark. 733. It must appear that the "holding out" was done by him or by his consent; 51 N. J. L. 103.

Holding out is a question of fact; 10 Ind. 475; 47 Mo. App. 31; 70 Md. 205. The usual evidence to charge a party in such cases is that he has suffered the use of his name over the shop-door, etc., or that he has done other acts, or suffered his agents to do acts; 37 N. H. 9; no matter of what kind, sufficient to induce others to believe him to be a partner; 3 McLean 364, 549; 3 Camp. 310; 20 N. H. 453; 39 Me. 157; 55 Ga. 116; 139 Mass. 275; 43 La. Ann. 258. A person is not relieved from liability though he was induced by the fraud of others to hold himself out as a partner with them. See 5 Bingh. 521; 1 Rose 69. The holding out must have been before the contract with the third person was entered into, and must have been the inducement to it; 7 B. & C. 409; 8 Ala. 560; 67 Ill. 161; 37 Me. 252; 30 Atl. Rep. (N. H.) 351. A third party will be held liable as a partner only to one who knew of the holding out at the time he acted and who acted in reliance upon it; 1 B. & Ald. 11; 111 U. S. 529; 82 Ala. 322; 130 Mass. 476; 81 N. Y. 550. The cases *contra* in 61 N. Y. 456 and 2 H. Bla. 242, cannot be considered as good law; Pars. Partn. Beale's ed. § 93. If the plaintiff knew at the time he made the contract that the party he seeks to charge was not a partner, he cannot hold him as such; 50 Fed. Rep. 684; or if the plaintiff had notice of any kind; 85 Ala. 19; 1 Camp. 404; and a representation made after the contract was entered into will not charge the defendant; 1 C. M. & R. 415. The doctrine is based upon estoppel. But it has been held that even where there was no evidence that the plaintiff was misled, the reputed partner will be held liable; 26 Kan. 221.

A person who is not actually a partner cannot, by reason of having held himself out to the world as a partner, be held liable on a contract made by the partnership with one who had no knowledge that he was so held out; 111 U. S. 529.

Where the new firm had the same name as the old, one who sold goods to the former may recover of the members of the old firm, though notice of dissolution was published in a newspaper, and though the old firm, owed him nothing at the dissolution, and though he did not know the names of the members of the old firm; 143 Mass. 479.

A person does not become liable as partner because he represents that he is willing or intends to become one; 9 B. & C. 632; 15 M. & W. 517.

Where persons hold themselves out as a corporation, without having even a *de facto* corporate existence, persons dealing with them, if not estopped to deny their corporate existence, may hold them liable as partners; Clark, Corp. 108; 76 Mich. 579; 108 Pa. 569; 64 Fed. Rep. 90. Other cases hold that the remedy is against the agent who professed to act for a non-existent corporation; 1 Thomps. Corp. § 418; 7 Cush. 188. Where there is a *de facto* corporation, the members cannot be held as partners; 91 Ala. 224; 80 Tex. 344; 48 N. J. L. 599; 69 Ga. 159. If the organization is defective and the parties act in good faith, they are not liable as partners; 22 Fed. Rep. 197; 80 Tex. 344; 48 N. J. L. 599; *contra*, 72 Mo. 446; 29 Mich. 369; 56 Ia. 104; 43 N. H. 636. Text writers differ widely. That stockholders in a defective or illegal corporation are liable as partners, see Cook, Stockh. § 233; Beach, Priv. Corp. § 162; Spell. Priv. Corp. § 838; *contra*, whether the corporation is *de facto* or not; Moraw. Priv. Corp. § 748; Tayl. Priv. Corp, § 148; Bates, Partn. § 4. Incorporators who transact business upon the strength of an organization which is materially defective, are individually liable, as partners, to those with whom they have dealt. Failure to record the charter as required by law, renders the incorporators personally liable to persons who deal with them without knowledge of the attempted incorporation or without knowledge of facts which ought to put them on inquiry; 159 Pa. 303.

Where persons enter into articles of association for banking purposes, and go through the usual steps for forming a corporation, such as subscribing for shares, etc., but without a charter, they are liable as partners; 60 Ill. 454. Where persons associate together to form a corporation, but none is formed, by reason of a failure to comply with the statute, they become a *quasi*-partnership; 85 Ill. 164; but not as against a creditor who is also a stockholder; 161 Ill. 417; or is a director; 48 N. E. Rep. (Ill.) 399; or when it appears that third parties dealt with the concern as a corporation; 38 Mich. 779.

If the charter is obtained by fraud, the members will be held liable as partners; 45 Pa. 410; or if it be obtained for gambling purposes; 85 Tenn. 572. Where parties go to another state to get a charter to carry on business in their own state, with powers which they could not obtain at home, they will be held liable as partners, the transaction being substantially forbidden by statute; 12 L. R. A. (Tex. App.) 366; 148 Mass. 249; *contra*, 128 N. Y. 205. It is held that when parties incorporate in one state to do business in another, they are partners; 12 N. J. Eq. 31; *contra*, 34 N. Y. 207; 35 Ohio St. 158; Cook, St. & Stockh. § 237; 35 Kan. 242. The intent to form a corporation will not prevent parties being held as partners; 79 Mo. 401.

After dissolution of a corporation, stockholders are not liable as partners for corporate debts; 66 N. Y. 424; unless they agree to continue the business as partners; 45 N. Y. 410.

The fact that a special partner fails to

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comply with the stipulated requirements, does not change his special partnership into a general one, but simply makes him liable to creditors as a general partner; 131 U. S. 66.

*The Domain.* A partnership is primarily a commercial relation. The notion has, however, been gradually extended to include other associations than those for trade merely: *e. g.* partnerships between two attorneys at law; 6 Pa. 360; 8 Wend. 665; 13 Ark. 173. It is said by Collyer that "perhaps it may be laid down generally that a partnership may exist in any business or transaction which is not a mere personal office, and for the performance of which payment may be enforced." Colly. Part. 5th ed. § 56.

The early law did not recognize partnerships for trading in land, because the land was all held by the barons who did not engage in trade. But in modern times, and especially in America, where the social conditions are different, land is largely held by speculators whose operations as partners the law must recognize; 21 Me. 421, 422; 7 Pa. 165; 10 Cush. 458; 4 Conn. 568; 4 Ohio St. 1; 54 N. Y. 1. In transferring title to and from the firm the ordinary rules of conveyancing must be observed. When the title is in all the partners, all must join in the deed; if in the name of one, he alone need execute; Story, Part. § 92, note; 15 Johns. 158; 15 Gratt. 11; 16 B. Monr. 631; 2 Nev. 234.

Building operations are now upon the same footing as land speculations; 4 Cow. 282. But the tradition has been too strong to be impaired as yet in landlord and tenant cases. Farming on shares is not partnership. The owner of land may either receive a share in the produce as rent, or give such a portion to a laborer in lieu of wages; Lind. Part. Am. ed. *651; 58 Ind. 379. But there may be a partnership in the development of land owned by one; 59 Ala. 587. See *supra*, as to mining partnerships; also MINES AND MINING.

*Firm Property.* Partners have, presumptively, the same interest in the stock that they have in the profits; 16 Hun 163. Their shares are presumed to be equal both in capital and profits; Ewell's Lind. Part. *348; 23 Cal. 427; 16 Hun 163; 23 Cal. 427. Where no definite arrangement is made between partners as to a division of profits, the presumption of law is that they are to be equally divided; 182 Pa. 186. But a joint stock is not essential to a partnership. The partner without capital is then interested, not in the fund, but in the adventure; 2 Bingh. 170; 7 Hun 425; Ewell's Lind. Part. *13.

Sometimes a partnership exists between parties merely as the managers and disposers of the goods of others; 4 B. & Ald. 663; 15 Johns. 409, 422. So, it seems, two persons may be owners in common of property, and also partners in the working and management of it for their common benefit; 2 C. B. N. S. 357, 363; 16 M. & W. 503.

Whether a partnership includes the capital stock, or is limited to the profit and loss, must be determined from the agreement and intention of the parties; 21 Me. 120. See 5 Taunt. 74; 4 B. & C. 867; Story, Part. § 26.

A partner may contribute only the use of his capital, retaining full control of the principal; and he may charge interest for the use whether profits are earned or not; Ewell's Lind. Part. *328. If, however, the firm funds are expended in repairing and improving the property thus placed at their disposal, it becomes partnership stock; Ewell's Lind. Part. *330; 49 Me. 252; 23 N. J. Eq. 247; 72 Pa. 142.

The partnership property consists of the original stock and the additions made to it in the course of trade. All real estate purchased for the partnership, paid for out of the funds thereof, and devoted to partnership uses and trusts, whether the legal title is in one or all of the partners, is treated in equity in the same manner as other partnership property until the partnership account is settled and the partnership debts are paid; Story, Part. § 98; 5 Ves. 189; 10 Cush. 458; 4 Metc. Mass. 527; 3 Kent 37; 27 N. H. 37; Ewell's Lind. Part. *324. See 111 N. Y. 423. Leases or real estate taken by one partner for partnership purposes, mines, and trade-marks are held to be partnership property; 17 Ves. 298; 1 Taunt. 250; Story, Part. § 98. See 83 Ia. 571. The good-will of a business is an asset of the firm. It does not always have a salable value, however; Ewell's Lind. Part. *327, *443; 9 Neb. 258; 4 Sandf. Ch. 405; 1 Hoff. Ch. 68; 5 Ves. 539. But Chancellor Kent says, "The good-will of a trade is not partnership stock;" 3 Kent 64. The good-will of a professional partnership belongs, in the absence of express stipulations, exclusively to the survivors; 3 Madd. 64; a surviving partner has the right to carry on the business under the firm name; 7 Sim. 421; 4 Den. 559; *contra*, 7 Abb. Pr. 202. The firm name is a part of the good-will; 8 Daly 1. Upon dissolution, it passes with the assets and good-will to one who buys the business and continues it; 7 Abb. N. C. 292; L. R. 10 Ch. Div. 436. On dissolution and a division of firm assets, each partner may use the firm name in a similar business; 34 Beav. 566; 47 How. Pr. 532 (but see 53 Hun 501); see 79 N. Y. 490; but he must not do it in such a way as to mislead the public; L. R. 9 Ch. Div. 196; 22 Ohio St. 370. The name of a withdrawing partner cannot be used by the remaining partners without an agreement; L. R. 43 Ch. Div. 208; nor can a partner who buys the firm stock in trade, but not the good-will, keep the name of the retiring partner in the firm name; 26 L. J. N. S. 391. There are statutes which partially govern the subject in New York and Massachusetts. See 15 L. R. A. 462; GOOD-WILL.

A ship, as well as any other chattel, may be held in strict partnership; 3 Kent 154; 12 Mass. 54; 15 Me. 427. But ships are generally owned by parties as tenants in common; and they are not in consequence

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of such ownership to be considered as partners; 6 Me. 77; 24 Pick. 19; 14 Conn. 404; 14 Pa. 34, 38; 47 N. Y. 462. The same is true of any other species of property in which the parties have only a community of interest; Ewell's Lind. Part. 51; 8 Exch. 825; 21 Beav. 536. As against an assignment of partnership property for the benefit of creditors, property in the possession of and used by the firm, cannot be claimed to have been the individual property of a member of the firm, by one to whom such member subsequently assigned it; 70 Hun 598.

Partners hold land by a peculiar title. In one respect it most resembles an ancient joint tenancy. Neither partner can convey title to a moiety of the goods; his assignee takes subject to the right of the other partner to have firm debts paid out of that fund; he therefore can assign only a moiety of what is left after firm debts paid. Upon this principle depends also the special right of survivorship for the purposes of liquidation. With these qualifications the partner's title at law differs but slightly from a tenancy in common; Story, Part. §§ 90, 97; 9 Me. 28; 5 Johns. Ch. 417. See 85 Tex. 22. They hold the land in common and must grant it as other tenants in common; 11 Gray 179. The legal title to the land, with all the characteristics of realty, attaches to it until applied to partnership purposes; 76 Ala. 501; equity interferes for partnership purposes only; 13 Allen 252. Co-partners may withdraw realty from the partnership for the purpose of holding it in severalty; and in this event they become simply co-tenants in such land; 7 Mont. 206.

A partner has the same title to the stationary capital of the firm that he has to its product in his hands for sale, but his power over it is less extensive. He cannot sell the permanent capital stock. The power of a partner to sell results not from the title, but from the general partnership relation; 37 Pa. 217.

It has been held that in order to make the land really firm assets the title should be in the partners as a firm, otherwise, the partners would be mere tenants in common, and the land, as to purchasers and creditors, would be the individual estate of the partners, regardless of the funds by which it was purchased and the uses to which it was put; 81 Pa. 377; but as to the partners and their representatives, the land would belong to the firm, in such case: 5 Metc. 582; 89 Pa. 203 (even if the title is in one partner's name; 31 N. Y. Supp. 78, 543). The rule is applied to cases of equitable, as well as legal, estates; 70 Pa. 79. In other cases it has been held that where land has been bought with firm money and is used for firm purposes, or been dedicated to the firm, it must be regarded as partnership property without considering the record title: 64 N. Y. 479; 55 Ill. 416; 14 Fla. 565; 17 Cal. 262. It has been thought necessary to resort to an equitable conversion of firm land into personalty in order to subject it to the rules governing partnership property; 7 J. Baxt. 212; 15 Gratt. 11; 74 Pa. 391; 135 U. S. 621. But this fiction seems unnecessary. See 25 Ala. 625; 3 Stew. N. J. 415; 11 Barb. 43.

Partnership lands are liable for firm debts prior to the claim of the widow or heirs of a deceased partner; 118 U. S. 97. After liquidation, the lands or their surplus proceeds pass as real estate; 3 Stew. N. J. 415; 7 J. Baxt. 212; 11 Barb. 43; 74 Pa. 391; upon a dissolution the equitable title to land passes to the surviving partner; 34 Fed. Rep. 375; 86 Wis. 552; 109 N. Y. 333.

If one partner buys land with firm money and takes title in his own name, a resulting trust arises to the firm; 39 Pa. 535; 135 U. S. 621; 81 Me. 207; 73 Cal. 394; 85 Ky. 539. No length of possession by one partner of real estate paid for with partnership funds and conveyed to him, bars the other partners; 135 U. S. 621. A deed made to a partnership as grantee in the firm name, vests in the individual partners the power to convey; 8 C. C. App. 600; 15 Oreg. 476; but it has been held that such a conveyance vests title only in the partner whose name appears in the firm name; 22 Mo. 378. See 36 Ark. 476. In Pennsylvania, so far as third parties without notice are concerned, the title of the firm must appear of record; 128 Pa. 153. As to partnership realty, see 28 L. R. A. 86, 129, 161; 27 *id.* 449.

Profits made by a member of a firm through individual outside transactions do not belong to the firm, though he employs therein the skill and information acquired by him as a member thereof; 150 U. S. 524. Nor do they when made with the consent of the firm which receives a commission on them; 30 N. Y. Supp. 321; but if a partner avails himself of information obtained by him in the firm business, and uses it for any purposes within the scope of the firm business, or in competition with the firm in its business, he is liable to account to it for the profits made by him; [1891] 2 Ch. 244.

*Marshalling Assets.* A firm is not a corporation, and hence firm creditors are in theory separate creditors as well. But in administering insolvent estates equity has established the "rule of convenience" that firm and separate creditors shall have priority upon, and be confined to, the firm and separate funds respectively; 116 Ind. 317; 84 Ky. 85; 31 W. Va. 688; 22 Neb. 526; 98 N. C. 1; 133 U. S. 670. A *surplus* of a separate fund is divided among firm creditors *pro rata*; and a *surplus* of a firm fund is divided among the separate creditors of the various partners in proportion to the shares of the partners therein; Pars. Part. § 382; 67 Ind. 485; 50 Miss. 300; 44 Pa. 503; 13 N. J. Eq. 126; 41 N. H. 12; 35 Vt. 44; 94 Ill. 271; 28 Ga. 371; 29 Ala. 172. If there is no firm fund and no solvent partner, the firm creditors come in on an equal footing with separate creditors against the separate estates of partners *pari passu* with individual creditors; 39 Fed. Rep. 203; 78 Mo.

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491; 58 Wis. 499; *contra*, 46 N. H. 188; 100 Ind. 593; 9 Cush. 553. A very slight firm fund over and above costs will suffice to exclude firm creditors from the separate estate; five shillings has been said to be enough; 7 Am. L. Reg. 499; and five pounds is enough, and so is a joint estate of less than two pounds; 2 Rose 54; one dollar and a quarter was considered too little; Pars. Part. 4th ed. § 384. A solvent partner, if living, is equivalent to a firm fund; 8 Conn. 584; Lind. Part. *731.

But though there is no separate estate, separate creditors cannot come against the joint estate until the firm debts are paid, after which they may resort to the partners' interest in any surplus remaining; Pars. Part. § 382; 3 B. & P. 288, 289; 12 Ohio 647; 43 N. H. 144.

As a general rule partnership creditors, after they have exhausted firm assets, cannot share equally with individual creditors in the individual assets; 89 Ala. 503; 133 U. S. 670; 103 Mo. 78; some cases hold that they can; 33 La. Ann. 1279; 21 Conn. 41; 86 Va. 478. In Kentucky they share the separate assets equally with the separate creditors after the latter have received the same dividend from the separate estate that the firm creditors have received from the firm estate; 79 Ky. 133. It has been said not to be settled that, at law, the partnership creditors may not look to the several funds at once, in common with several creditors, but that the law is now tending towards the adoption of the rule to that effect which prevails in equity; Pars. Part. § 383.

If two firms having one or more common members, are both bankrupt, there can be no proof by one against the other; Pars. Part. § 381. Various explanations have been offered for this rule. Sometimes it is called a "rule of convenience"; sometimes a fundamental principle of equity; Ewell's Lind. Part. *692; 22 Pick. 450; 5 Johns. Ch. 60; Story, Part. § 377; 44 Pa. 503. Sometimes it is said to depend on the principle of destination; the partners by gathering together a firm fund have dedicated it to the firm creditors. Upon this theory, the partnership stock becomes a trust fund. The firm creditors occupy a commanding position and restrain even the partners in dealing with the property; 3 Biss. 122; 41 Barb. 307; 52 N. Y. 146. Usually it is declared to be the outgrowth of the partner's equity, *i. e.* his right to have firm funds applied first to the payment of firm debts; 7 Md. 398; 32 Gratt. 431; 4 Bush 25; 4 R. I. 173; 7 B. Monr. 210. Consequently, where the partner gives up this right, the firm creditor loses his priority; 3 Ired. L. 213; 59 Tenn. 167; 2 Disn. 286; 1 Woods 127; 32 Gratt. 481. The rule does not apply where a partnership creditor has acquired a lien by contract; 84 Ky. 85. If insolvent partners divide the firm fund among their separate creditors in proportion to the interest of each in the partnership, firm creditors cannot object; 39 Pa. 369; 77 N. Y. 195.

As a general rule, insolvency fixes the position of the different funds. A debt to a partner by the firm cannot be collected for the benefit of separate creditors; a debt of a partner to the firm cannot be collected for the benefit of firm creditors; because a man cannot prove against his own creditors; 4 H. & McH. 167. What one partner owes his co-partner independently of the firm can be collected from the separate estate of the debtor for the benefit of the separate estate of the creditor: but this will not be allowed unless the situation is such that the firm creditors can derive no benefit even indirectly from the enforcement of the claim, *i. e.* there must be no surplus to go to them; 4 De G. J. & S. 551; *contra*, where both partners owe the firm one-half of the excess of one debt over the other, it is payable to the firm creditors out of the estate of the greater debtor; 55 Pa. 252. Partners, before insolvency, may, by an executed agreement, change firm into separate property. Firm creditors have no lien to prevent the alteration; *e. g.* where one partner sells out to the others, the fund becomes primarily liable for the claims of the creditors of the new firm; 20 N. J. Eq. 13; 6 Bosw. 533; 19 Ga. 190; 9 Cush. 553; 35 Ia. 323; 21 Pa. 77; 6 Ves. 119.

Equity will not interfere to embarrass a vested legal right. Therefore if a firm creditor levies on a separate estate, he has priority over the subsequent execution of a separate creditor; 24 Ga. 625; 22 Pick. 450; 9 N. J. Eq. 353; 17 N. Y. 300. A separate creditor can sell nothing but his debtor's interest. An execution against the firm, though subsequent, has priority, because it attaches this paramount right of the co-partner. But a firm creditor, without a legal lien, has no standing; 22 Cal. 194; 17 N. J. Eq. 259; 5 Johns. Ch. 417; 9 Me. 28. But where there is an execution against each partner and a subsequent execution against the firm, and the sheriff seizes and sells firm goods under the three, the proceeds are given first to the joint creditor, and the remainder to the separate creditors in proportion to each partner's interest; 29 Pa. 90. So in the case of judgments against real estate. A judgment on a separate claim has no lien on the firm real estate, but only on the partner's interest. But a firm judgment is a lien on a partner's separate real estate, and takes priority over a subsequent separate judgment; Ewell's Lind. Part. *299; 17 N. Y. 300; 46 Ia. 461. Partnership creditors who have a levy on partnership goods are entitled to be paid before a creditor of one of the partners, who had a prior attachment on the individual interest of one partner; 97 Mo. 145.

When an assignment for creditors has been made by a firm, and also by the partners individually, the holder of a note executed by the firm and by the individual members is entitled to have the estates of the partnership and of each partner kept separate, and to receive a dividend from

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each, though the note was given for a firm liability; 67 N. W. Rep. (Ia.) 239.

*Duration.* *Prima facie* every partnership is determinable at will. But it may be entered into for a definite term by agreement express or implied: Ewell's Lind. Part. *121, 413.

A partnership at will is presumed to continue so long as the parties are in life and of capacity to continue it; 1 Greenl. Ev. § 42; 9 Humphr. 750. See PARTNERS. A partnership for a term in presumed to continue during the term, provided the parties are in life and of legal capacity to continue it. See 7 Mo. 29. If a partnership be continued by express or tacit consent after the expiration of the prescribed period, it will be presumed to continue upon the old terms, but as a partnership at will; 17 S. & R. 165. But in no case will the law presume a partnership to exist beyond the life of the parties; 1 Wils. Ch. 181. When a partnership has been entered into for a definite term, it is nevertheless dissolved by death within the term; Story, Part. § 195. The *delectus personæ* is so essentially necessary to the constitution of a partnership that even the executors or other representatives of partners themselves do not, in their capacity of executors or representatives, succeed to the state and condition of partners; 7 Pick. 237, 238; 3 Kent 55; 42 Ill. 342; 46 Mo. 197. The civilians carried this doctrine so far as not to permit it to be *stipulated* that the heirs or executors of partners should themselves be partners; Domat, lib. 1, tit. 8, s. 2; Pothier, Part. n. 145; though Pothier thinks it binding.

At common law, the representatives of a deceased partner may be made partners in his stead either by original agreement or by testamentary direction; Ewell's Lind. Part. *590; 47 Tex. 481. Clauses providing for the admission into the firm of a deceased partner's representatives will, in general, be construed as giving them an option to become partners, and not as constituting them partners absolutely; 7 Jarm. Conv. 120; 1 McCl. & Y. 569; 2 Russ. 62. The executor of a deceased partner is not compelled in such case to become a partner, so as to charge the estate with debts incurred after the partner's death; 168 Pa. 331. In any event it must be a new partnership; Pars. Part. 4th ed. § 343; 5 Allen 290; 32 Barb. 425; 79 Ala. 540; 31 Minn. 186; *contra*, 46 Conn. 136; 66 Mo. 468; 81 Me. 207; 51 Tex. 578; and such is said to be the tendency of modern decisions; Pars. Part. Beale's ed. § 343, n.

Only the fund already invested or directed to be invested by the testator is subject to the claims of new creditors; 15 Gratt. 11; 10 Ves. 110; 47 Tex. 481; 135 N. Y. 430; any direction, in order to charge the general assets, must be clear and unambiguous; 2 How. 577; 48 Pa. 275.

The rule in England is clear that when an executor undertakes to participate in the business, whether in consequence of a testamentary direction or otherwise, he becomes personally liable to creditors as a partner, in addition to the liability of the estate. The common-law relation of partnership will not admit of a qualified liability; Ewell's Lind. Part. *593, *604; 11 Moo. P. C. 198. See 113 N. Y. 586; 59 Miss. 305. But simply taking the profits will not charge the executor; L. R. 7 Ex. 218. In America, some authorities have declared that the executor is not personally liable when the testator has directed him to continue the business, but only when he does so of his own motion; 4 Ala. 588; 33 Md. 382; 39 How. Pr. 82; 48 Pa. 275; *contra*, for personal liability of executor; 8 Conn. 584. A simple direction to allow a fund to remain in a partnership may be construed as a loan to the survivors; 9 Hare 141. An executor is not liable personally if he merely leaves the estate of his testator in the business and takes no part in it; 60 Miss. 367; 48 N. J. L. 129.

*Dissolution.* A partnership may be dissolved: 1. *By the act of the parties:* as by their mutual consent; Pars. Part. § 284; 98. Ill. 109; 3 Kent 54; and where no specified period is limited for the continuance of the partnership, either party may dissolve it at any time; 4 Russ. 260; 131 Mass. 312; 76 N. Y. 373; 168 U. S. 334; 3 Kent 53; Story, Part. §§ 84, 272. Whether a partnership for a certain time can be dissolved by one partner at his mere will before the term has expired, seems not to be absolutely and definitively settled; Story, Part. § 275. In favor of the right of one partner in such cases, see 3 Kent 55; 17 Johns. 525; 3 Bland, Ch. 674; 55 Mich. 256, per Cooley, J.; 58 Pa. 155; 168 U. S. 337. Against it, see Story, Part. § 275; 5 Ark. 281; 4 Wash. C. C. 234; Pothier, Part. 152; Ewell's Lind. Part. *571, note; 20 N. J. Eq. 172; 9 Utah 236.

A partner exercising such right would be liable for his breach of the partnership articles: 55 Mich. 256; 168 U. S. 337, 256. As against third persons, a partner may certainly withdraw from a partnership at his pleasure; 3 C. B. N. S. 561. Partners may terminate the partnership at any time by mutual agreement; 126 Ill. 166; and this may be inferred from an abandonment of the undertaking; 109 Ill. 94; 54 Cal. 463; but see 16 Pick. 412. The incorporation of the partners for a similar business may perhaps work a dissolution as by consent. See Pars. Part. § 285. Dissolution need not be under seal, even though the partnership articles were under seal; Pars. Part. § 284. See PARTNERS.

A partner, who, within the time stipulated in the articles of partnership for its continuance, undertakes to dissolve the partnership and takes exclusive possession of its property and business, is liable to account to his co-partner for profits according to the partnership agreement; 168 U. S. 328.

2. *By the act of God:* as, by the *death* of one of the partners: and this operates from the time of the death: 3 Mer. 610; 6 Cow. 441; 6 Conn. 184; 2 How. 560; 7 Ala. N. S. 19; 7 Pet. 594; 17 Pick. 519; 5 Gill 1; 40

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Mich. 343. As to the effect of a provision in the partnership articles to the contrary, see *supra*.

A partnership dissolved by the death of one of the partners is dissolved as *to the whole firm;* 7 Pet. 586, 594; 31 Minn. 186; and the reason given for this rule is applicable not only to dissolution by death, but to every species of dissolution; Story, Part. § 317.

3. *By the act of law:* as by the bankruptcy of one of the partners; Cowp. 448; 6 Ves. 126; 5 Maule & S. 340; 45 Miss. 703; 59 Ala. 597; or by the bankruptcy of the firm; *id.;* such dissolution takes place when bankruptcy is legally declared, and then relates back to the act of bankruptcy; 11 Ves. 78.

4. *By a valid assignment* of all the partnership effects for the benefit of creditors, either under insolvent acts; Colly. Part. 6th ed. § 102; or otherwise; 41 Me. 373; but this is only *prima facie* evidence of dissolution which other circumstances may rebut; 1 Dall. 380; by a sale of the partnership effects under a separate execution against one partner; 2 V. & B. 300; 3 Kent 59. It is said that this does not constitute a dissolution but inevitably leads to it; 24 Pick. 89; 53 Tex. 540. The mere insolvency of one or all of the members of a partnership, without a suspension or judicial process, etc., does not of itself operate a dissolution; 24 Pick. 89.

5. *By the civil death* of one of the partners; Pothier, Part. n. 147. But the absconding of a party from the state does not of itself operate a dissolution; 24 Pick. 89. See Story, Part. § 298.

6. *By the breaking out of war* between two states in which the partners are domiciled and carrying on trade; 16 Johns. 438; 3 Bland, Ch. 674; 50 N. Y. 166; 91 U. S. 7. See WAR.

7. *By the marriage of a feme sole* partner; 4 Russ. 260; 3 Kent 55. This would now, in view of the recent married women acts, depend upon the laws of the state; 61 Tex. 437. The marriage of a male and female partner would work a dissolution; 52 Mich. 3.

8. *By the extinction of the subject-matter* of the joint business or undertaking; 16 Johns. 401; and by the completion of the business or adventure for which the partnership was formed; Story, Part. § 280.

9. *By the termination of the period* for which a partnership for a certain time was formed; Colly. Part. § 105.

10. *By the assignment of the whole of one partner's interest* either to his co-partner or to a stranger; 4 B. & Ad. 175; 17 Johns. 525; 1 Freem. Ch. 231; 8 W. & S. 262; 45 Ill. App. 469; 28 Fla. 680; where it does not appear that the assignee acts in the concern after the assignment; 17 Johns. 525; 8 Wend. 442; 5 Dana 213; 1 Whart. 381; 2 Dev. Eq. 481. But in England this can occur only in partnerships at will. See 135 U. S. 632. It has been held that a sale by one partner of his interest in the firm's property to the other does not necessarily work a dissolution of the firm; 93 Mich. 569. In partnerships for a term, assignment is a ground for dissolution by remaining co-partners, but probably not by the transferee. In America, the transferee always has a right to an account; Ewell's Lind. Part. *363; 60 Ala. 226; 50 Cal. 615. But see 14 Pick. 322, where it was held that such an assignment would not *ipso facto* work a dissolution. See 55 N. J. L. 427. "If a member of an ordinary partnership assigns where the partnership is at will, the assignment dissolves it, and if the partnership is not at will, the assignment may be treated by the other members of the concern as a cause of dissolution. The assignee of one partner cannot be made a member of the partnership against the will of the other partners, but the absolute right to have the affairs of the firm at once wound up, when the specified duration of the partnership has not yet expired, may be subject to modification according to circumstances." 135 U. S. 632.

11. *By the award of arbitrators* appointed under a clause in the partnership articles to that effect. See 1 W. Bla. 475; 4 B. & Ad. 172; 5 Wend. 268.

The addition of a member to a firm creates a new firm and operates as a dissolution of the old one, even though the business be continued under the old firm name, and so does the retirement of a member; 96 Mo. 591.

A partnership for a term may be *dissolved* before the expiration of the term, by the decree of a court of equity founded on the wilful fraud or other gross misconduct of one of the partners; Pars. Part. § 270, § 357; 4 Beav. 502; 2 V. & B. 299; 5 Ark. 270; 145 U. S. 578; so on his gross carelessness and waste in the administration of the partnership, and his exclusion of the other partners from their just share of the management; 1 J. & W. 592; 5 Ark. 278; 79 Mich. 290; or persistent violation of partnership articles; 41 Fed. Rep. 841; or the loss of health by a partner; Pars. Part. § 360; or the pecuniary inability of a partner to fulfil his engagement with the others; *id.;* so on the existence of violent and lasting dissension between the partners; 1 Ia. 537; where these are of such a character as to prevent the business from being conducted upon the stipulated terms; 3 Kent 60, 61; and to destroy the mutual confidence of the partners in each other; 21 Beav. 482; 20 N. J. Eq. 172. Equity will not act on slight grounds; 58 Pa. 168. A partner cannot, by misconducting himself and rendering it impossible for his co-partners to act in harmony with him, obtain a dissolution on the ground of the impossibility so created by himself; 21 Beav. 493; 3 Hare 387; 84 Ill. 121. A partnership may be dissolved by decree when its business is in a hopeless state, its continuance impracticable, and its property liable to be wasted and lost; 3 Kent 60; 16 Johns. 491; 3 K. & J. 78; 13 Sim. 495; 8 Oreg. 84; 41 Fed. Rep. 841; or

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where there was fraud in inducing a partner to enter into the partnership; *id.*

The confirmed *lunacy* of an active partner is sufficient to induce a court of equity to decree a dissolution, not only for the purpose of protecting the lunatic, but also to relieve his co-partners from the difficult position in which the lunacy places them. See 1 Cox, Ch. 107; 1 Swanst. 514; 2 My. & K. 125; 6 Beav. 324; 2 Kay & J. 441; 3 Y. & C. 184; 128 Ill. 256. The same may be said of every other inveterate infirmity, which has seized upon one of the partners and rendered him incompetent to act where his personal labor and skill were contracted for; 3 Kent 62. But lunacy does not itself dissolve the firm, nor do other infirmities; 3 Kent 58; Story, Part. § 295; this is said to be supported by the current of authorities; Pars. Part. § 362. It is, however, contended by Mr. Justice Story and by Parker, C. J., that a clear case of insanity ought to effect that result; Story, Part. § 295; 10 N. H. 101. An inquisition of lunacy found against a member dissolves the firm; 6 Humph. 85. The court does not decree a dissolution on the ground of lunacy except upon clear evidence that the malady exists and is incurable; 3 Y. & C. 184; 2 K. & J. 441. A temporary illness is not sufficient; 2 Ves. Sen. 84; 1 Cox 107. A dissolution by the court on the ground of insanity dates from the decree and not from a prior day; 1 Phill. 172; 1 K. & J. 765.

Actual *notice of dissolution* must be brought home to persons who have been in the habit of dealing with the firm; but as to all persons who have had no previous dealings with the firm, notice fairly given in the public newspapers is deemed sufficient; Colly. Part. 6th ed. 163, n. See 159 Pa. 165; 99 Ala. 47; 148 Mass. 498. This notice is necessary to terminate the agency of each partner, and, consequently, his powers and liabilities as a member; 68 N. Y. 314; 25 Gratt. 321; 47 Wisc. 361; 67 Ill. 106; 83 Pa. 148; 7 Price 193; 1 Camp. 402. If there is no notice of the dissolution and the retiring partner permits the use of his name, he is liable for the acts of the continuing partner; 48 Mo. App. 518. It is said that notice of dissolution need not be given to one who has sold goods to the firm for cash; 17 Kan. 287; 12 N. Y. 283; or to one who, without the knowledge of the firm, has discounted its commercial paper; 20 N. Y. 241.

It is not necessary to give notice of the retirement of a dormant partner from the firm, if the fact of his being a partner be unknown to all the creditors of the firm; if it be known to some, notice to those must be given, but that will be sufficient; 1 Metc. Mass. 19; 1 B. & Ad. 11; 5 B. Monr. 170; 36 Pa. 325; 37 Ill. 76. See 35 Ala. 242; 87 Ill. 281; 3 N. Y. 108; 87 Ky. 525. But where there were an active and two dormant partners, and the firm retained a solicitor in pending litigation, and the dormant partners retired, the solicitor never having known that they were partners and having no notice of dissolution, the dormant partners were held liable for the solicitor's costs incurred after dissolution; [1897] 2 Q. B. 397.

Notice of the dissolution is not necessary, in case of the death of one of the partners, to free the estate of the deceased partner from further liability; 3 Kent 63; 3 Mer. 614; 17 Pick. 519; 25 Gratt. 321; nor is notice, in fact, necessary in any case where the dissolution takes place by operation of law; 3 Kent 63, 67; 15 Johns. 57; Cowp. 445; 9 Exch. 145. Bankruptcy of a member, after dissolution, is notice of dissolution; 146 Mass. 413.

One partner may obtain an injunction to restrain his co-partner from violating his rights under the partnership articles, even when the dissolution of the partnership articles is not asked; 54 Fed. Rep. 439.

If a retiring partner leaves a firm and the remaining partners agree to pay the debts and indemnify the outgoing partner, the creditors who know these facts and raise no objections are bound to treat the outgoing partner merely as surety for the debts; [1894] A. C. 586.

*Effect of dissolution.* The effect of dissolution, as between the partners, is to terminate all transactions between them as partners, except for the purpose of taking a general account and winding up the concern; 1 Pa. 274; 3 Kent 62. As to third persons, the effect of a dissolution, with notice as stated *supra*, is to absolve the partners from all liability for future transactions, but not for past transactions of the firm; 53 Miss. 280; 51 Cal. 530; 61 Ind. 225; 57 Ill. 215; 2 Cush. 175; 3 M'Cord 378; 4 Munf. 215; 5 Mas. 56; Harp. 470; 4 Johns. 224; 41 Me. 376.

It is said that a firm, notwithstanding its dissolution, continues to exist so far as may be necessary for the winding up of its business; 11 Ves. 5; 16 *id.* 57; 2 Russ. 242; Ewell's Lind. Part. *217. See 55 N. J. L. 427. The power of the partners subsists for many purposes after dissolution: among these are—*first*, the completion of all the unfinished engagements of the partnership; *second*, the conversion of all the property, means, and assets of the partnership existing at the time of the dissolution, for the benefit of those who were partners, according to their respective shares; *third*, the application of the partnership funds to the payment of the partnership debts; Story, Part. § 326; 3 Kent 57; 17 Pick. 519. See 135 U. S. 621. But although, for the purposes of winding up the concern and fulfilling engagements that could not be fulfilled during its existence, the power of the partners certainly subsists even after dissolution, yet, legally and strictly speaking, it subsists for those purposes only; 5 M. & G. 504; 4 M. & W. 461; 10 Hare 453; 61 N. Y. 222; 49 Ia. 177; 45 Pa. 49. The surviving members of a co-partnership have the legal title to the firm property, and the right to dispose of its assets, only for the purpose of closing the business, not to continue it; 66 Hun 628.

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Whether a dissolution of a partnership is *per se* a breach of a contract by the firm to employ a person in their service is questionable; 8 H. & N. 931. A contract of employment for a year by a firm terminates on the dissolution of the firm during the year by the death of a partner; 4 Misc. Rep. 99.

**PARTURITION.** The act of giving birth to a child. See BIRTH.

**PARTUS** (Lat.). The child just before it is born, or immediately after its birth.

Offspring. See MAXIMS, *Partus sequitur*, etc.

**PARTY.** See PARTIES.

**PARTY AGGRIEVED.** The phrase is not technical. They are ordinary English words and are to be construed in the ordinary meaning put upon them. 7 Q. B. D. 470.

**PARTY-JURY.** A jury *de medietate linguæ*. See JURY.

**PARTY TO BE CHARGED.** A phrase used in the seventeenth section of the Statute of Frauds, under which, in the case of certain sales, a note or memorandum of the contract must be in writing, "signed by the parties to be charged by such contract." In the fourth section the language is "by the party to be charged." It is held to be sufficient if the signature is only by the party against whom the contract is sought to be enforced; 6 Gray 31; 90 Cal. 307; 42 N. Y. 493; and if a written offer be made though accepted by parol; L. R. 1 Exch. 342; *contra*, 58 Mich. 574. The signature may be by mark, or by initials, or printed, if the printed name be shown to have been adopted: Tiff. Sales 75. If the name be shown to have been signed to the writing to authenticate it, it is immaterial in what part of the writing it is placed; L. R. 2 H. L. 127. An agent may be authorized to sign by parol and a subsequent ratification proved; 24 W. Va. 643; 114 Ind. 311. An auctioneer at a public sale may sign for either party; 7 East 558; 35 N. J. L. 338; and so, ordinarily may a broker; 16 Gray 436; and his memorandum need not be signed: *id.*

See FRAUDS, STATUTE OF; NOTE OR MEMORANDUM.

**PARTY-WALL.** A wall erected on the line between two adjoining pieces of land belonging to different persons, for the use of both properties. 2 Washb. R. P. 385.

A structure for the common benefit and convenience of both the tenements which it separates. 118 Ill. 17.

The phrase ordinarily means a wall of which the two adjoining owners are tenants in common. Emden, Building Leases 285. But it does not as a matter of law necessarily imply a solid structure; 129 N. Y. 61.

It is a wall built by one owner partly on the land of another for the common benefit of both. The adjoining owners are not joint tenants or tenants in common of the party wall. Each is possessed in severalty of his own soil up to the dividing line, and of that portion of the wall which rests upon it; but the soil of each, with the wall belonging to him, is burdened with an easement or servitude in favor of the other, to the end that it may afford a support to the wall and buildings of such other; 57 Miss. 746; 32 Pac. Rep. (Or.) 681.

"The words *party wall* appear to me to express a meaning rather popular than legal, and they may, I think, be used in four different senses. They may mean, first, a wall of which the two adjoining owners are tenants in common, which is the most common and the primary meaning of the term. In the next place the term may be used to signify a wall divided longitudinally into two strips, one belonging to each of the neighboring owners. Then, thirdly, the term may mean a wall which belongs entirely to one of the adjoining owners, but is subject to an easement or right in the other to have it maintained as a dividing wall between the two tenements. The term is so used in some of the building acts. Lastly, the term may designate a wall divided longitudinally into two moieties, each moiety being subject to a cross-easement in favor of the owner of the other moiety." 14 Ch. Div. 192.

A brick wall which is used in common, as the wall of two adjacent properties in a city, is a party-wall, if erected partly on the soil of each, and so used for many years without question or complaint by either; 43 La. Ann. 1157.

Party-walls are generally regulated by statute. The principles of these acts generally are that the wall shall be built equally on the lands of the adjoining owners, at their joint expense, but when only one owner wishes to use such wall, it is built at his expense, and when the other wishes to make use of it he pays one-half of its value. Each owner has a right to place his joists in it and use it for the support of his roof. See 4 Sandf. 480; 24 Mo. 69; 12 La. An. 785. When the party-wall has been built, and the adjoining owner is desirous of having a deeper foundation, he has a right to undermine such wall, using due care and diligence to prevent any injury to his neighbor; and, having done so, he is not answerable for any consequential damages which may ensue; 17 Johns. 92.; 12 Mass. 220; 2 N. H. 534. See 1 Dall. 346; 5 S. & R. 1. An adjoining owner of a party wall has a right to increase its height, but in doing so is liable for any injury to the adjoining building, even though the addition is being built by a contractor and the damages result from a windstorm which causes the wall to fall; 50 N. Y. 639; 68 Hun 293. See 14 Daly 450.

When such a wall exists between two buildings, belonging to different persons, and one of them takes it down with his buildings, he is required to erect another in its place in a reasonable time and with the least inconvenience; the other owner



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must contribute to the expense, if the wall required repairs, but such expense will be limited to the costs of the old wall; 3 Kent 436; 6 Den. 717. See 41 La. Ann. 194. When the wall is taken down, it must be done with care; but it is not the duty of the person taking it down to shore up or prop the house of his neighbor to prevent it from falling. If, however, the work be done with negligence, by which injury accrues to the neighboring house, an action will lie: 1 M. & M. 362; 15 N. Y. 601. If one tenant in common of a party-wall excludes the other from the use of it by placing obstacles in it, the only remedy is to remove the obstcales; 14 Ch. Div. 192.

Where the owner of two contiguous lots erects a brick messuage, with a division wall, and sells to different purchasers, the wall is not a party-wall; 2 Miles 247; *contra*, 6 Duer 17. The right to use a party-wall is not lost by lapse of time, even seventy-five years; 1 Phila. 366. It can be acquired by prescription after a sufficient period; 80 N. Y. 614. A party-wall must be built without openings; 61 Pa. 118; 51 Tex. 480; s. c. 32 Am. Rep. 627; 6 Mackey 580; 71 Hun 295; 159 Mass. 427. A party-wall can only be built for mutual support; painting a sign on it is unlawful; 2 W. N. C. Pa. 333. The principle of party-walls is based upon mutual benefit, and does not extend to the interior of lots where the adjoining owner cannot be expected to build; 2 Pears. 324. Where one built a party-wall, which was defective and fell over, injuring the adjoining premises, he was held liable to the owner of the premises; 125 Mass. 232; s. c. 28 Am. Rep. 224. Where a building having a party-wall is destroyed by fire, leaving the wall standing, the easement in the wall ceases; 57 Miss. 746; and so where the wall becomes unfit either from age or accident; 24 Or. 16.

An agreement between adjoining owners in relation to a party-wall erected on the division lines of their lots is binding on the parties and those who purchase subject to such agreement, and creates cross easements upon the lots; 33 Neb. 437; 135 N. Y. 312; but see 9 S. W. Rep. (Tex.) 205. It creates a covenant running with the land; 88 Mo. 524; s. c. 1 L. R. A. 3. But an agreement to pay half the cost is merely a personal covenant; 115 Ill. 199.

By statute in Iowa, Mississippi, Pennsylvania, and South Carolina, and in the District of Columbia, one adjacent owner may build over his neighbor's line, without compensating him, except that the latter may, when he pleases, use the wall so built, upon paying for it. The cases should be read with a view to the statutes. The regulation of party walls is a very ancient form of exercise of the police power, and came to Pennsylvania from the customs of London, like so many other parts of our early law. Those interested will find the subject discussed in a note in 7 Amer. L. Reg. N. S. 10. But such regulation, as it exists in Pennsylvania and some other states, is an interference with the rights and enjoyment of property, sustainable only on the police power, and therefore to be governed and measured by the strict extent of the statutory grant; 146 Pa. 636. The provincial act of 1692 in Massachusetts, similar to the Pennsylvania act, was held void as contrary to the bill of rights; 139 Mass. 29, a case cited by counsel, but not followed, in 16 W. N. C. Pa. 83. But it has also been said that there can be no available objection to the principle upon which the law of party-walls is based. It has constituted a part of the law of France for ages. The principle is no invasion of the absolute right of property. Per Lowrie, J., in 23 Pa. 36.

See LATERAL SUPPORT.

**PARVA SERJEANTIA.** Petty serjeanty. See SERJEANTY.

**PARVUM CAPE.** See PETIT CAPE.

**PASS.** A certificate given to a slave, by his master or mistress, in which it is stated that he is permitted to leave his home with their authority. The paper on which such certificate is written.

**In Practice.** To be given or entered: as, let the judgment pass for the plaintiff.

To become transferred: thus, the title to goods passes by the sale whenever the parties have agreed upon the sale and the price, and nothing remains to be done to complete the agreement; 1 Bouvier, Inst. n. 939.

To decide upon. When a jury decide upon the rights of the parties, which are in issue, they are said to pass upon them.

The constitution of various states forbid the issue of free passes on railroads, except in certain cases, as does the Interstate Commerce Act. See INTERSTATE COMMERCE COMMISSION.

**PASS AND REPASS.** The phrase has been held to mean going and returning over the road once only. 34 J. P. 823.

**PASS-BOOK. In Mercantile Law.** A book used by merchants with their customers, in which an entry of goods sold and delivered to a customer is made.

It is kept by the buyer, and sent to the merchant whenever he wishes to purchase any article. It ought to be a counterpart of the merchant's books, as far as regards the customer's account.

The term pass-book is given to a small book made up from time to time from the banker's ledger and forwarded to the customer: this is not considered as a statement of account between the parties: yet when the customer neglects for a long time to make any objection to the correctness of the entries, he will be bound by them; 2 Atk. 252; 2 D. & C. 534; 2 M. & W. 2.

A depositor in a bank, who sends his pass-book to be written up and receives it back with entries of credits and debits and his paid checks as vouchers for the latter, is bound to examine with due diligence the pass-book and vouchers, and to report

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to the bank without any unreasonable delay any errors which may be discovered in them; and if he fails to do so and the bank is thereby misled to its prejudice, he cannot afterwards discredit the balance as shown by the pass-book. If a depositor delegates the examination to a clerk without proper supervision he will not be protected from loss if it turns out that without his knowledge the clerk had committed forgery in raising the amounts of some of the checks, and thereby misled the bank to its prejudice, in spite of due care on the part of its officers; 117 U. S. 96.

**PASSAGE.** Properly a way over water. Where a seaman shipped for a voyage to foreign parts, and at the termination of the voyage was provided with a passage to a port within the United Kingdom, but not the one from which he originally shipped, he was held to have been provided with a passage home, within the meaning of the Merchant Shipping Act; [1897] 1 Q. B. 712.

**PASSAGE COURT.** An ancient court of record in Liverpool, once called the "mayor's court of *pays sage*," but now usually called the "court of the passage of the borough of Liverpool." M. & W.

**PASSAGE-MONEY.** The sum claimable for the conveyance of a person, with or without luggage, on the water.

The difference between *freight* and *passage-money* is this, that the former is claimable for the carriage of goods, and the latter for the carriage of the person. The same rules which govern the claim for freight affect that for passage-money; 8 Chitty, Com. Law 424; 1 Pet. Adm. 126; 8 Johns. 335. See COMMON CARRIERS OF PASSENGERS.

**PASSAGIO.** An ancient writ addressed to the keepers of the ports to permit a man who had the king's leave to pass over sea. Reg. Orig. 193.

**PASSAGIUM REGIS.** A voyage or expedition to the Holy Land made by the kings of England in person. Cowell.

**PASSATOR.** He who has the interest or command of the passage of a river; or a lord to whom a duty is paid for passage. Wharton.

**PASSENGER.** One who has taken a place in a public conveyance, by virtue of a contract, for the purpose of being transported from one place to another, on the payment of fare or its equivalent. 132 Pa. 1. See 96 *id.* 267.

The purchase of a ticket and the entry by a person on the premises or accommodations of the carrier creates the relation of passenger and carrier with all its rights, duties, and obligations; 104 Ill. 296; 9 Am. & Eng. R. R. Cas. 264; 37 Ia. 264; so does entry on the premises with the intention of buying a ticket; 40 Barb. 546; 89 Va. 639.

A carrier is not liable to one who rides by stealth; 83 Ill. 427; or who is a trespasser; 91 Mo. 332; although invited to ride by an employe of the carrier; 76 Tex. 174. Express messengers and mail clerks are passengers; 15 N. Y. 444; 96 Pa. 256; but not a voluntary assistant to an express messenger or mail clerk; 12 Am. Rep. 475; or a newsboy permitted to ride free; 69 Pa. 210; 60 Mo. 413; or an employe of the carrier who rides free between his home and place of employment; 30 Kan. 689.

One who travels free; 14 How. 468; on an annual pass; 17 So. Rep. (La.) 503; or on a drover's pass; 51 Pa. 316; is entitled to the same care as the holder of a regular ticket; even if he expressly assumes the risk of accident; 176 Pa. 45; but an employe travelling on a free pass containing a stipulation that the company will not be liable cannot recover for injuries; 34 N. J. L. 513.

A passenger voluntarily riding in a baggage car, or other dangerous place, even by permission of the conductor, cannot recover for injuries; 14 Allen 429; 92 Pa. 21; 55 Tex. 88; but it has been held that the permission of the conductor justifies such conduct in the passenger; 20 Minn. 125; 1 Duer 571; so of permitting a passenger to ride on a freight train; 115 Ind. 435.

A passenger is bound by the reasonable rules of a carrier; 55 Ill. 185; 11 Fed. Rep. 683; 41 Am. Dec. 472; which do not violate the obligation of the contract; 142 Mass. 40; 26 Am. & Eng. R. R. Cas. 54. Whether such rule is reasonable is a question for the court; 18 Am. & Eng. R. R. Cas. 356; 92 Mo. 359; 43 Ill. 420; 14 Lea 128; 20 N. Y. 127; but it has been held to be one for the jury; 4 Fed. Rep. 37; 41 Am. Dec. 472. A passenger who places his arm outside the car window and is injured cannot recover; 36 L. R. A. (Ky.) 123; see 56 Alb. L. J. 250; but it is not contributory negligence for a passenger on a crowded train to ride on the platform; Ky. L. Rep., July 15, 1897.

Provisions have been made by the United States laws for the health and safety of passengers by sea. See acts March 2, 1847; Jan. 31, 1848; May 17, 1848; 11 Stat. 127, 149, 210.

Seamen have no right, even in cases of extreme peril, to sacrifice the lives of passengers, for the sake of preserving their own; Fed. Cas. 15, 383.

See NEGLIGENCE; BAGGAGE; TICKET; COMMON CARRIERS OF PASSENGERS; SLEEPING CAR; RAILROAD.

**PASSENGER SHIP.** "Every description of sea-going vessel carrying one or more passenger or passengers on any voyage from any place in Her Majesty's Dominions to any place whatever." 52 & 53 Vict. c. 29.

**PASSENGER TRAIN.** "A train advertised to take passengers generally,—people travelling from place to place,—upon the terms and in the manner *ordina-*

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*rily* applicable to such passengers." 54 L. J. Q. B. 585.

**PASSIAGIARIUS.** A ferryman. Jacob.

**PASSIVE.** See DEBT; TRUST.

**PASSPORT** (Fr. *passer*, to pass, *port*, harbor or gate). **In Maritime Law.** A paper containing a permission from a neutral state to the captain or master of a ship or vessel to proceed on the voyage proposed. It usually contains his name and residence, the name, property, description, tonnage, and destination of the ship, the nature and quantity of the cargo, the place from whence it comes, and its destination, with such other matters as the practice of the place requires.

It is also called a *sea-brief*, or *sea-letter* (*q.v.*). But Marshall distinguishes sea-letter from passport, which latter, he says, is pretended to protect the ship, while the former relates to the cargo, destination, etc. See Jacobs, Sea-Laws 66, note.

This document is indispensably necessary in time of war for the safety of every neutral vessel; Marsh. Ins. 317, 406 *b*.

A Mediterranean pass (*q v.*), or protection against the Barbary powers.

A document granted in time of war to protect persons or property from the general operation of hostilities. Wheat. Int. Law, 3d Eng. ed. § 408; 1 Kent 161; 6 Wheat. 3.

In most countries of continental Europe passports are given to travellers. These are intended to protect them on their journey from all molestation while they are obedient to the laws. The secretary of state may issue, or cause to be issued in foreign countries by such diplomatic or consular officers of the United States, and under such rules as the president may prescribe, passports, but only to citizens of the United States; R. S. §§ 4075–4076. See SAFE CONDUCT.

**PASTURES.** Lands upon which beasts feed themselves. By a grant of pastures the land itself passes. 1 Thomas, Co. Litt. 202.

**PATENT.** A grant of some privilege, property, or authority, made by the government or sovereign of a country to one or more individuals. Phillips, Pat. 1.

As the term was originally used in England, it signified certain written instruments emanating from the king and sealed with the great seal. These instruments conferred grants of lands, honors, or franchises; they were called letters patent, from being delivered open, and by way of contradistinction from instruments like the French *lettres de cachet*, which went out sealed.

In the United States, the word patent is sometimes understood to mean the title-deed by which a government, either state or federal, conveys its lands. But in its more usual acceptation it is understood as referring to those instruments by which the United States secures to inventors for a limited time the exclusive right to their own inventions.

The granting of exclusive privileges by means of letters patent was a power which for a long time was greatly abused by the sovereigns of England. The sole right of dealing in certain commodities was in that manner conferred upon particular individuals, either as a matter of royal favor or as a means of replenishing the royal treasury. These exclusive privileges, which were termed monopolies, became extremely odious, and, at an early date, met with the most determined resistance. One of the provisions of Magna Charta was intended to prevent the granting of monopolies of this character; and subsequent prohibitions and restrictions were enacted by parliament even under the most energetic and absolute of their monarchs. See Hallam, Const. Hist. 153, 205.

Still, the unregulated and despotic power of the crown, which reached its height in Elizabeth's reign, proved, in many instances, superior to the law, until the reign of James I., 1623, when an act was passed, known as the Statute of Monopolies, 21 Jac. 1, ch. 3, which entirely prohibited all grants of that nature, and abolished existing monopolies. But the king was permitted to secure by letters patent to the inventor of any new manufacture, the sole right to make and vend the same for a term not exceeding fourteen years. Since that time the power of the monarch has been so far controlled by the law that the prohibition contained in the Statute of Monopolies has been fully observed, and under that statute has grown up the present system of British patent law, from which ours has to a great extent being derived. See Rob. Pat. §§ 1–8. See 12 Law Quart. Rev. 141, as to the earliest grants of privileges in England and the early history of patent law.

The constitution of the United States confers upon congress the power to pass laws "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;" U. S. Const. art. i. s. 6, cl. 8. This right can, accordingly, be conferred only upon the *authors* and *inventors* themselves; but it rests with congress to determine the length of time during which it shall continue. Congress at an early day availed itself of the power. The first act passed was that which established the patent office, on the 10th of April, 1790. There were several supplements and modifications to this law, namely, the acts passed February 7, 1793, June 7, 1794, April 17, 1800, July 3, 1832, July 13, 1832. These were all repealed, by an act passed July 4, 1836, and a new system was established. Subsequently other changes were made by the acts of March 3, 1837, March 3, 1839, August 29, 1842, May 27, 1848, March 3, 1849, February 18, 1861, March 2, 1861, July 16, 1862, March 3, 1863, June 25, 1864, and March 3, 1865. The act of July

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8, 1870, repealed all existing acts. See acts of March 3, 1883 (patents to United States officers); Feb'y 4, 1887 (pirating patented designs); Feb'y 9, 1893 (act establishing court of appeals in D. C.); March 3, 1897 (various amendments); March 3, 1897 (jurisdiction over infringers).

Letters patent for inventions are granted for a term of seventeen years.

The present law does not furnish any guarantee of the validity of the title conferred upon the patentee. The patent is, nevertheless, *prima facie* evidence of its own validity; 1 Stor. 336; 14 Pet. 458; 2 Blatchf. 239; as also for a defendant as tending to show non-infringement, in some cases. See 15 How. 252.

The exclusive right of the patentee did not exist at common law; it is created by acts of congress; and no rights can be acquired unless authorized by the statute and in the manner it prescribes; 10 How. 494; 19 *id.* 195; 137 U. S. 41. The power granted by the patent is domestic in its character, and confined within the limits of the United States; consequently it does not extend to a foreign vessel lawfully entering one of our ports, where the patented improvement was placed upon her in a foreign port and authorized by the laws of the country to which she belongs; 19 How. 183.

*Of the subject-matter of a patent.* The act of July 8, 1870, sec. 24, provides for the granting of a patent to the first inventor or discoverer of any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof, not known or used by others in this country, and not patented, or described in any printed publication in this or any foreign country before his invention or discovery thereof, and not in public use or on sale for more than two years prior to his application, unless the same is proved to have been abandoned. By act of March 3, 1897 (to go into effect January 1, 1898), amending this section, the patenting or publication of an invention in a foreign country, if more than two years before the application in this country bars a patent. There are four classes of inventions which may be the subjects of patents: *first*, an art; *second*, a machine; *third*, a manufacture; and, *fourth*, a composition of matter. In Great Britain, as we have seen, letters patent granting exclusive privileges can be issued only to the inventors of a "new manufacture." But the courts in defining the meaning of the term, have construed the word "manufacture" to be coextensive in signification with the whole of the four classes of inventions thus recognized by our law. An art or process, a machine, and a composition of matter are all regarded there as manufactures. The field of invention in Great Britain is, therefore, coincident with that provided by our law, and the legal subject-matter of patents is the same in each country; 2 B. & Ald. 349; 2 M. & W. 544. But, inasmuch as we have three other classes of inventions, the term "manufacture" has a more limited signification here than it receives in Great Britain. See *infra*.

A *process* is an art or method by which any particular result is produced. Where a result or effect is produced by chemical action, by the operation or application of some element or power of nature, or of one substance to another, such modes, methods, or operations are called processes. A new process is usually the result of discovery; a machine, of invention. The arts of tanning, dyeing, vulcanizing india-rubber, smelting ores, etc., are usually carried on by processes, as distinguished from machines. But the term process is often employed more vaguely in a secondary sense in which it cannot be the subject of a patent. Thus, we say that a board is undergoing the process of being planed, grain of being ground, iron of being hammered or rolled. Here the term is used subjectively or passively, as applied to the material operated on, and not to the method or mode of producing that operation, which is by mechanical means, or the use of a machine as distinguished from a process. In this use of the term it represents the function of a machine, or the effect produced by it on the material subjected to the action of the machine, and does not constitute a patentable subject-matter, because there cannot be a valid patent for the function or abstract effect of a machine, but only for the machine which produces it. 15 How. 267.

"A *process* is a mode of treatment of certain materials to produce a given result. It is an act, or series of acts, performed upon the subject-matter, to be transferred and reduced to a different state or thing. . . . In the language of the patent law, it is an 'art.' The machinery pointed out as suitable to perform the process may or may not be new or patentable; whilst the process itself may be entirely new, and produce an altogether new result. The process requires that certain things should be done with certain substances, and in a certain order; but the tools to be used in doing this may be of secondary consequence." 94 U. S. 788. The term *process* is not used in the patent statutes, but it has been uniformly held that there may be a patent for a process; 102 U. S. 727. A process may be new though the apparatus is old; 122 U. S. 413; 21 Fed. Rep. 811. The process by which an article is produced and the product are two different inventions; 7 Fed. Rep. 213. The new combination of old processes constitutes a new process; 13 Fed. Rep. 172; 7 E. & B. 725.

Letters patent for a process irrespective of the particular mode or form of apparatus for carrying it into effect are granted under the laws of the United States. Whoever discovers that a certain useful result will be produced in any art, machine, manufacture, or composition of matter, by the use of certain means, is entitled to a patent for it, provided he specifies the means he uses in a manner so full and exact that any one skilled in the science to which it apper-

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tains can, by using the means he specifies, without any addition to or subtraction from them, produce precisely the result he discovers; 102 U. S. 727.

Processes of manufacture which involve chemical or other similarly elementary action are patentable, though mechanism may be necessary in carrying out the process, while those which consist solely in the operation of a machine are not, and where such mechanism is subsidiary to the chemical action, the fact that the patentee may be entitled to a patent upon the mechanism, does not impair his right to the patent for the process. A valid patent cannot be obtained for a process which involves nothing more than the operation of a piece of mechanism, that is to say, for the function of a machine; 158 U. S. 68.

To procure a patent for a process the inventor must describe his invention with sufficient clearness to enable those skilled in the matter to understand what the process is, and must point out some practiable way of putting it into operation; but he need not bring the art to the highest degree of perfection; 126 U. S. 1. It must first be reduced to practice; Rob. Pat. §. 171; 30 Fed. Rep. 63.

Where a patent clearly shows and describes the functions of a certain process, no other person can afterwards patent that process; 21 Fed. Rep. 580. Where the process is described with the method of operation of a machine, the machine alone is patentable; 32 Fed. Rep. 221; the product, unless itself new, is not patentable; *id.*

A *machine* is any contrivance which is used to regulate or modify the relations between force, motion, and weight.

"The term machine includes every mechanical device or combination of mechanical powers and devices to perform some function and produce a certain effect or result;" 15 How. 267; but when the effect is produced by chemical action, or by the application of some element or power of nature, or of one substance to another, such methods or operations are called processes; 4 Fish. Pat. Cas. 175.

A machine is an instrument composed of one or more of the mechanical powers, and capable, when set in motion, of producing, by its own operation, certain predetermined physical effects. Rob. Pat. § 173. A machine differs from an art in that the act or series of acts which constitute the art become, in the machine, inseparably connected with a specific physical feature. The art is the primary conception, the machine the secondary. A machine differs from all other mechanical instruments in that its rule of action resides within itself. The structural law of a machine is its one enduring and essential characteristic. Rob. Pat. §. 175; 1 Fish. 44. See 23 O. G. 1827.

What are sometimes called the simple machines are six in number: the lever, the pulley, the wheel and axle, the wedge, the screw, and the inclined plane. These are sometimes known as the mechanical powers, though neither these nor any other machinery can ever constitute or create power; they can only control, direct, and render it useful.

Machines, as generally seen and understood, are compounded of these simple machines in some of their shapes and modification. Such a combination as, when in operation, will produce some specific final result, is regarded as an entire machine. It is so treated in the patent law; for although a new machine, or a new improvement of a machine, is an invention, and although only one invention can be included in a single patent, still several different contrivances, each of which is in one sense a machine, may all be separately claimed in a single patent, provided they all contribute to improve or to constitute one machine, and are intended to produce a single ultimate result; and a new combination of machines is patentable whether the machines themselves be new or old; 3 Wash. C. C. 69; 1 Sto. 273, 568; 3 Wheat. 454; 2 Fish. Pat. Cas. 600.

Inventions pertaining to machines may be divided into four classes: 1. Where the invention embraces the entire machine; 2. Where it embraces one or more of the elements of the machine only, as the coulter of a plough; 3. Where the invention embraces both a new element and a new combination of elements previously used and well known; 4. Where all the elements of the machine are old and the invention consists in a new combination. Almost all of the modern machines are of the fourth class; 3 Cliff. 639.

The combination of two existing machines is patentable; 18 Pa. 465.

It has been said that a machine becomes entitled to protection by a patent only when embodied in an operative instrument. The expression of the idea in language, drawings, or a model, does not fulfil the legal requirements. It must be constructed of sufficient size, etc., to accomplish its purpose; Rob. Pat. § 180. But this is probably not a correct statement.

*A manufacture* is a term which is used to denote whatever is made directly by the hand of man, or indirectly through the instrumentality of any machinery which is controlled by human power. A commodity may be regarded as being in itself a manufacture, or as being produced by manufacture.

The term is used in its widest sense in the patent law of Great Britain. See *supra*. It has been defined there to be "anything made by the hand of man." 8 Term 99.

A manufacture is an instrument created by the exercise of mechanical forces and designed for the production of mechanical effects, but not capable, when set in motion, of attaining, by its own operation, to any predetermined results. It receives its rule of action from the external source which furnishes its motive power. A manufacture requires the constant guidance and control of some separate intel-

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ligent agent; a machine operates under the direction of that intelligence with which it was endowed by its inventor when he imposed on it its structural law. The parts of a machine, considered separately from the machine itself, all kinds of tools and fabrics, and every other vendible substance, which is neither a complete machine nor produced by the mere union of ingredients, is included under the title "manufacture"; Rob. Pat. § 182. An article of ornament may be a manufacture; 20 Blatch. 413; and a bond and coupon register in the form of a book; 3 Fed. Rep. 338; and a wooden pavement; 2 Webst. 126. The parts of a machine are not patentable upon the ground that it makes a known article more perfectly than it has been made before; 11 Blatch. 215. A manufacture, if new in itself, may be patentable whether the process or apparatus by which it is produced be new or not; 6 Holmes 208. A manufacture may be an invention distinct from the mode of producing it; 21 Blatch. 226. Making an article by a new process or apparatus is not making a new manufacture; 8 Fed. Rep. 710; a new process producing a new manufacture may involve two separate inventive acts; 7 Fed. Rep. 213. A new form of an old article may be a new manufacture; 25 O. G. 601; but to perceive a hitherto unknown quality in an existing substance is not the invention of a new substance; 32 Fed. Rep. 81. Although a new process for producing an article is patentable, the product itself cannot be patented, if it is old; 111 U. S. 293.

*Invention, what constitutes.* The general rule is that, wherever *invention* has been exercised, there will be found the subject-matter of a patent; 1 McAll. 48; 5 Blatch. 46.

An invention differs from a discovery, inasmuch as this latter term is used to signify the finding out of something that existed before. Thus, we speak of the *discovery* of the properties of steam, or of electricity; but the first contrivance of any machinery by which those discoveries were applied to practical use was an *invention:* the former always existed, though not before known; the latter did not previously exist.

Although the word "discovery" is used in our statute as entitling the discoverer to a patent, still, every discovery is not a patentable invention. The discoverer of a mere philosophical principle, or abstract theory, or elementary truth of science, cannot obtain a patent for the same, unless he applies it to some directly useful purpose. The patent can only be for such a principle, theory, or truth reduced to practice and embodied in a particular structure or combination of parts; 1 Sto. 285; 1 Mas. 187; 140 U. S. 481; nor can there be a patent for a function or for an effect only, but for an effect produced in a given manner or by given means; 1 Holmes 20; 2 Fish. 229; or by a particular operation; 1 Mas. 476; 1 Sto. 270; 1 Pet. C. C. 394; 15 How. 62; 4 Fish. 468; but a patent covers the means employed to effect results; 151 U. S. 186. While the end or purpose sought to be accomplished by the device is not the subject of a patent, the device or mechanical means by which the desired result is to be secured, is; 150 U. S. 221. An idea is not patentable; a patent is valid only for the practical application of an idea; 3 Blatch. 535; 20 Wall. 498. A principle denotes the physical force employed by an invention. It is some natural power or energy which operates with uniformity under given circumstances, and may thus be contemplated as obedient to law. It is a necessary factor in every means which produce physical effects, whether such means be natural or artificial; Rob. Pat. § 135.

To be entitled to a patent, a person must have invented and discovered some new and useful art, machine, manufacture, or composition of matter, or some new and useful improvement thereof; and it is not enough that a thing is new, in the sense that in the shape or form in which it is produced, it has not been known, and that it is useful, but it must amount to an invention or discovery; 133 U. S. 349; 132 *id.* 693.

An invention, to be patentable, must not only be *new*, but must also be *useful.* But by this it is not meant that it must be more useful than anything of the kind previously known, but that it is capable of use for a beneficial purpose. The word "useful" is also to be understood in contradistinction to "pernicious," or "frivolous." A contrivance directly and mainly calculated to aid the counterfeiter, the pickpocket, or the assassin, or which would in any way be directly calculated to be injurious to the morals, the health, or the good order of society, would not be patentable. Neither would a new contrivance which was of too trivial a character to be worthy of serious consideration; 1 Paine 203; 1 Blatch. 372, 488; 13 N. H. 311; 5 Fish. 396; 1 Biss. 362; 3 Fish. 218, 536.

The patent itself is *prima facie* evidence of utility; 9 Blatch. 77; s. c. 5 Fish. 48; 1 Bond 212; and its use by the defendant and others is evidence of utility; 1 Holmes 340.

In the trial of an action for infringement, evidence of the comparative utility of the plaintiff's machine and the defendant's is inadmissible, except for the purpose of showing a substantial difference between the two machines; 1 Stor. 336.

A mere application of an old device or process to the manufacture of an article is held to constitute only a "double use," and not to be patentable. There must be some new process or machinery used to produce the effect; 2 Sto. 190, 408; 2 Curt. 340; 12 Blatch. 101; 91 U. S. 37, 150. See 134 U. S. 388; 135 *id.* 227; 138 *id.* 124; 147 *id.* 623; 148 *id.* 547. A combination of old elements does not constitute a patentable invention, where they are all found, some in one and some in another of earlier devices for the same purpose, in which each element performs the same function

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that it has in the new combination; 137 U. S. 423; 150 *id.* 221; 138 *id.* 349.

A mere carrying forward of the original thought, a change only in form, proportions, or degree, doing the same thing in the same way, by substantially the same means, with better results, is not such an invention as will sustain a patent; 152 U. S, 100; 148 *id.* 547; 144 *id.* 11; 138 *id.* 124; 137 *id.* 423; 133 *id.* 349; and something more is required to support one than a slight advance over what has preceded it, or mere superiority in workmanship or finish; 140 U. S. 55.

Inventive skill has been defined as "that intuitive faculty of the mind put forth in the search for new results, or new methods, creating what had not before existed, or bringing to light what lay hidden from vision; it differs from a "suggestion of that common experience which arose spontaneously and by a necessity of human reasoning in the minds of those who had become acquainted with the circumstances with which they had to deal." 113 U. S. 72.

"Not every improvement is invention; but to entitle a thing to protection it must be the product of some exercise of the inventive faculties, and it must involve something more than what is obvious to persons skilled in the art to which it relates." 23 Fed. Rep. 841.

"An invention, in the sense of the patent law, means the finding out—the contriving, the creating of something which did not exist, and was not known before, and which can be made useful and advantageous in the pursuits of life, or which can add to the enjoyment of mankind." 4 Fish. 12.

"It was never the object of those [patent] laws to grant a monopoly for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures." 107 U. S. 200, Bradley, J.

"The law gives no monopoly to industry, to wise judgment, or to mere mechanical skill in the use of known means, nor to the product of either if it be not new. . . . It is invention of what is new, and not comparative superiority or greater excellence in what was before known, which the law protects as exclusive property, and it is that alone which is secured by patent." 1 O. G. 331.

"Originality is the test of invention. If that is successfully exercised, its product is protected; and it is immaterial whether it is displayed in a greater or less degree, or whether the new idea revealed itself to the inventor by a sudden flash of thought or dawned on his mind after groping his way through many and dubious experiments." 6 Blatch. 195. Whenever a change or device is new, and accomplishes beneficial results, courts look with favor upon it. The law, in such cases, has no nice standard by which to gauge the degree of mental power or inventive genius brought into play in originating the new device. A lucky casual thought, involving a comparatively trifling change, often produces decided and useful results, and, though the result of a small amount of inventive skill, the law extends to it the same protection as if it were the product of a lifetime of profound thought and most ingenious experiment; 3 Fish. 141. The patentee must be an inventor and he must have made a discovery. It is not enough that a thing shall be new and that it shall be useful, but it must amount to an invention or discovery; 114 U. S. 11.

The unsuccessful effort of others in the same art, to accomplish the same result, indicates that the means by which the patentee has produced it are the result of inventive skill; 28 Fed. Rep. 195; 29 *id.* 248. In The Barbed Wire Patent, 143 U. S. 275, it appeared that the sales of the earlier article had been but tentative and slight, and those of the patented article enormous. In sustaining the patent in suit, Brown, J., said: "Under such circumstances courts have not been reluctant to sustain a patent to the man who has taken the final step which has turned a failure into a success. In the law of patents it is the last step that wins. . . . It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produces a new and beneficial result, never attained before, it is evidence of invention."

The degree of invention is not prescribed by the statute; 69 Fed. Rep. 958; nor is it material; 4 Fed. Rep. 900; each case must stand on its own facts, but if the patented structure is at the head of the evolution in its particular art and is a marked improvement on what preceded it, the court should surely be predisposed in its favor; 70 Fed. Rep. 1006. Courts give a liberal construction to the law, so as to protect every contrivance which can be called new, and which proves at all useful. The inventor, therefore, has the benefit of the doubt. But it is obvious that there is a limit beyond which mere changes cannot and ought not to receive this protection; 3 Fish. 265.

Where the question of patentable novelty in a device was by no means free from doubt, the court, in view of the extensive use to which the patent had been put by manufacturers of wagons, resolved the doubt in favor of the patentee and sustained the patent; 145 U. S. 156. While the utility of a contrivance, as shown by the general public demand for it when made known, is not conclusive evidence of novelty and invention, it is nevertheless highly persuasive in that direction, and in the absence of pretty conclusive evidence to the contrary, will generally exercise controlling influence; 27 Fed. Rep. 560; see 4 *id.* 900; 36 *id.* 183; in case of doubt it will turn the scale; 148 U. S. 556; it is better evidence of invention than the opinion of an expert or the intuition of a judge; 34 Fed. Rep. 336; but not where public acceptance is the plain result of successful business methods

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in creating a market for the article. And not when the popularity is not due to any patentable feature. The fact that a patented device went into immediate use, and supplanted all others, cannot be attributed to artful advertising, in the case of an article such as an electric heater for railway cars, which is sold, not to the public, but to mechanicians of skill in their art; 82 Fed. Rep. 993. But extensive use has been said to be an unsafe criterion of patentability; 141 U. S. 419. When, in a class of machines widely used, it appears that at last, after repeated and futile attempts, a machine has been contrived which accomplishes the result desired, and when a patent has been granted to the successful inventor, the courts should not be ready to adopt a narrow or astute construction, fatal to the grant; 151 U. S. 139.

Simplicity in the device is itself a merit; 2 Webst. Pat. Cas. 113. Mere suggestions from others do not negative the existence of patentable invention, unless they cover the entire invention; 5 Ct. of Cl. 1. The suggestion by others of a part of a device does not show the absence of inventive skill as to the whole; 11 Fed. Rep. 505. Where inventive skill was necessary in addition to suggestions of others, the inventor is entitled to a patent; 15 Blatch. 160; 1 Sto. 336; 15 How. 62. To suggest that a certain result may be obtained, but without indicating how, is not an invention; 7 Biss. 490. Mere experiment is not invention; 1 Fish. 17.

The simplicity of a device and its apparent obviousness after the event, ought not to detract from its meritoriousness. That it had never been suggested or thought of before, and effectually supplied the one thing necessary to bring success, when before there had been nothing but failure, is sufficient within the meaning of the patent law; 61 Fed. Rep. 102. "The apparent simplicity of a new device often leads an inexperienced person to think that it would have occurred to any one familiar with the subject; but the decisive answer is that with dozens and perhaps hundreds of others laboring in the same field, it had never occurred to any one before. The practised eye of an ordinary mechanic may be safely trusted to see what ought to be apparent to every one." 155 U. S. 597.

A "double use" may involve invention if the second use is an art remote from the former use; otherwise, if the new use is such that it would occur to a person of ordinary mechanical skill; much depends upon the nature of the changes required to adapt the device to its new use; *id.*

Study, effort, and experiment are not alone enough to constitute inventive skill; 27 Fed. Rep. 219. Nor is the exercise of good judgment; 109 U. S. 633. Nor the exercise of the reasoning process; 23 Fed. Rep. 443. Inventive skill requires thought, while mechanical skill does not; 24 Blatch. 163. Small discoveries may involve inventive skill; 27 Fed. Rep. 656.

The exercise of mechanical skill must be considered as it existed at the date of the invention; 31 Fed. Rep. 224.

It is said by an able writer: These two requirements of novelty and utility are clearly susceptible of proof by evidence; and it is deducible from the earlier decisions and those which have followed in the same line, that a change which involves those requirements *is* an invention within the meaning of the patent law with certain well defined exceptions. The exceptions are that a change, even when new and useful, does not amount to invention when it is a mere change of form, or in size, or degree, or in proportions, or of material, or of location, or of arrangement. A mere application of an old thing to a new purpose or a double use of an old thing is an exception. Also a mere application of an old thing to perform its usual functions with its usual mode of operation, or movement. A mere substitution of one old device for another, or a duplication of old devices, or a change of direction of movement of a moving device, or discovery of a new property of matter are exceptions. But there are changes in each of the above respects which are not *mere* changes, but are substanstial, and amount to invention when the changes are new and useful; Renwick, Pat. Inv. 4.

The doctrine of *equivalents* is treated under novelty as a part of Patentable Invention; Rob. Pat. § 245. It is there said that *equivalent* "signifies the interchangeability of agencies which are known in the arts to be capable of serving the same purpose as integral parts of some particular invention. It must be capable of performing the same office in the invention as the act or substance whose place it supplies; it must relate to the form of embodiment alone and not affect in any degree the idea of means; and it must have been known in the arts at the date of the patent, as endowed with this capability, or have subsequently become so known without the further exercise of inventive skill." *Id.* § 246. See 27 Fed. Rep. 691; 15 Wall. 187; 3 Bann. & Ard. 598.

A mechanical equivalent exists where one device may be adopted instead of another by a person skilled in the art, from his knowledge of the art; 1 Fish. 351. Equivalents have been said to be "obvious and customary" interchanges; 1 Fish. 64. It is a question of fact depending on the opinion of experts and on an inspection of the machine; 2 Fish. 31. It is a question of use, not of name; 5 Fish. 1. Equivalents may differ in shape; 11 Fed. Rep. 148; a substitute in a combination does not cease to be an equivalent because, in addition, it does something more and better; 3 B. & Ard. 161. Only those things can be considered equivalents for the elements of a manufacture which perform the same function in substantially the same way; 102 U. S. 222. Where no inventive skill is shown in the substitute, it is an equivalent; 103 U. S. 797; 96 *id.* 549.

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*Successive patents.* "No patent can issue for an invention actually covered by a former patent, especially to the same patentee, although the terms of the claims may differ. The second patent, in such case, although containing a claim broader and more generic in its character than the specific claims contained in the prior patent, is also void. But where the second patent covers matters described in the prior patent, essentially distinct and separable, and distinct from the invention covered thereby, and claims made thereunder, its validity may be sustained." 151 U. S. 186. See also 69 Fed. Rep. 257; 83 *id.* 1014.

An *improvement* is an addition to or alteration in some existing means, which increases its efficiency without destroying its identity. It includes two necessary ideas: the idea of a complete and practical operative art or instrument and the idea of some change in such art or instrument not affecting its essential character but enabling it to produce its appropriate results in a more perfect or economical manner; Rob. Pat. § 210.

No patent can be granted in the United States for the mere importation of an invention brought from abroad; although it is otherwise in England. The constitution, as we have seen, only authorizes congress to grant these exclusive privileges to the inventors themselves. The mere fact of an inventor having obtained a patent for a device in a foreign country will not prevent his obtaining a patent for the same thing here, provided he applies for a patent here within seven months from the date of the foreign patent (Act of March 3, 1897). When the foreign patent issues before the United States patent issues, the latter expires at the same time as the former, or, if there be more than one, with the former patent having the shortest term; but in no case will the term exceed seventeen years; 157 U. S. 1.

*Of caveats.* See CAVEAT.

The caveator can prevent the grant of any interfering patent, on any application filed within one year from the day when the caveat was lodged in the patent office, without his being notified of the application and having an opportunity of contesting the priority of invention of the applicant, by means of an "interference," which will be treated of hereafter. In this way an inventor can obtain a year to perfect his invention, without the risk of having the patent to which he believes he is entitled granted to another in the mean time.

Upon application within one year by any other person for a patent covering the same invention, it is the duty of the commissioner of patents to give notice of such application to the person filing the caveat, who shall within three months file his description, etc. The caveat is filed in the secret archives of the office. See 1 Bond 212; 4 Blatch. 362. A caveat is evidence of the date of the invention, but it does not necessarily show that the invention was then completed. It is not assignable. The caveator is not concluded by his description of the invention, but may proceed with his experiments; Rob. Pat. § 438 *et seq.*

*Of the application for a patent.* When the invention is complete, and the inventor desires to apply for a patent, he causes a specification to be prepared, setting forth in clear and intelligible terms the exact nature of his invention, describing its different parts and the principle and mode in which they operate, and stating precisely what he claims as new, in contradistinction from those parts and combinations which were previously in use. This should be accompanied by a petition to the commissioner of patents, stating the general nature of his invention and the object of his application. One copy of drawings should be attached to the specification, where the nature of the case admits of drawings; and, where the invention is for a composition of matter, specimens of the ingredients and of the composition of matter should be furnished. The specification, as well as the drawings, must be signed by the applicant and attested by two witnesses; the drawings may be signed by an attorney in fact; and appended to the specification must be an affidavit of the applicant (or in case of his death, of his personal representatives), stating that he verily believes himself to be the original and first inventor of that for which he asks a patent, and that he does not know and does not believe that the same was ever before known or used, and, also, of what country he is a citizen. It may be sworn to before any person in the United States authorized to administer oaths, and, in foreign countries, before certain officials designated in the act. The whole is then filed in the patent office.

A substituted specification covering a different invention fixes the date of the application; 27 Fed. Rep. 450.

*Of the examination.* As has been already observed, the act provides for an examination whenever an application is completed in the prescribed manner. And if on such examination it appears that the claim of the applicant is invalid and would not be sustained by the courts, the application is rejected.

As a general rule, an invention is considered patentable whenever the applicant is shown to be the original and first inventor; and his own affidavit appended to the application is sufficient to raise a presumption that he is the first inventor, until the contrary is shown. But if it is ascertained by the office that the same thing had been invented by any other person in this country, or that it had been patented or described in any printed publication in this or any foreign country, prior to its invention by the applicant, a patent will be denied him. But a mere prior invention of the same thing in a foreign country, if not patented or de-

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scribed in some printed publication, will not affect his right to a patent here. Under the act of March 3, 1897 (taking effect Jan. 1, 1898), the patenting or publication of an invention in any foreign country, for more than two years before the application in this country, or its patenting in a foreign country by the applicant for more than seven months before his application, bars a patent here.

The rule that the applicant is entitled to a patent whenever he is shown to be the original and first inventor is subject to one important exception. If he has, either actually or constructively, *abandoned* his invention to the public, he can never afterwards recall it and resume his right of ownership.

Abandonment may be by conduct from which an intention to abandon will be inferred, or by public use or sale. In the former class, it may be *before* the application; *by* the application; or *after* application. Abandonment before application may be shown by any conduct from which can be inferred an intention to give the invention to the public; as, by throwing it aside and not using it; disclaiming any right in it, or giving it expressly to the public; and by public use of the device for even less than two years, taken in connection with circumstances tending to show that the inventor did not intend to secure a monopoly; Rob. Pat. § 349. It is a question of intention; 2 Blatch. 240; and of fact; 10 *id.* 140.

An applicant, either by express words in his specification, or by a failure to claim all of his invention or by unreasonable delay in applying for a revision, may abandon the whole or a part of his invention; and after application he can abandon his invention by withdrawing his application.

Public use or sale of the invention for more than two years before the application works an abandonment; 123 U. S. 267; 26 Fed. Rep. 262; this is a conclusive presumption; 9 Blatch. 185; and a single use is enough; 104 U. S. 333. But this rule does not apply to a strictly experimental use; 22 Fed. Rep. 780; 19 Fed. Rep. 735; 12 *id.* 721; no matter how long it had continued; 97 U. S. 126. A mere temporary use by a few persons as an act of kindness, for a limited period, or a use where the party using it is bound to secrecy, or is actually under the control of the inventor, or a use by the inventor in private is not within the rule; 1 Sto. 273. See 1 Fish. 1. Such public use, with or without the consent of the subsequent patentee, renders the patent invalid; 123 U. S. 267.

The sale which works an abandonment in this connection must be a sale in the usual course of business; 2 Fed. Rep. 78; and of the completed invention; *id.*; and merely placing the device on sale is not sufficient; 14 Fed. Rep. 919. A sale on trial, to test the invention, is not an abandonment, even though warranted; 11 Fed. Rep. 859.

Use by the inventor for the purpose of testing the machine, in order to devise means for perfecting its operation, is admissible where, as incident to such use, the product of its operation is disposed of by sale; such use does not change its character; but where the use is mainly for the purposes of trade and profit and the experiment is merely incidental to that, the principle, and not the incident, must give character to the use. The thing implied as excepted out of the prohibition may be characterized as substantially the purpose of experiment; 123 U. S. 249.

Where an invention was complete and capable of producing the result sought to be accomplished, and the construction and mode of operation and use of the mechanism were necessarily known to the workmen who put it into safes, which were the articles in question, where it was hidden from view after the safes were completed and no attempt was made to expose the mechanism and thus prove whether or not it was efficient, it was held that it was not an experimental use; 107 U. S. 90. If an inventor, after having made his device, gives or sells it to another to be used by the donee or vendee without limitation or restriction or injunction of secrecy, and it is so used, such use is public even though confined to one person; 104 U. S. 333. Where the inventor of a connecting tie for rails used the device in constructing a cable road and reserved no future control over it, and had no expectation of making any material changes in it, and never examined it to see whether it was defective or could be improved, it was held that it was a public use so as to defeat the patent; 146 U. S. 210. But where the inventor of a wooden pavement himself constructed an experimental pavement which was used for six years before the patent was applied for, and it appeared that he built it at his own expense and went to see the effect of traffic upon it and its durability, and examined it almost daily, it was held that this was an experimental use; 97 U. S. 126. Where the invention is a machine, such as a grist mill, its experimental use does not cease to be so because its products have been sold. But if the inventor allows his machine to be used by other persons generally, with or without compensation, or if it by his consent put on sale for such use, then it will be in public use and on public sale, within the act; 146 U. S. 223. Where there is no evidence of use or sale of the invention, which was a method of driven wells, by the applicant before his application, or by others with his consent, except putting down a single well, it was held that the use was merely experimental; 122 U. S. 71.

The abandonment extends only to the exact invention publicly used or sold; 2 Fed. Rep. 78.

An inventor whose application for a patent has been rejected by the patent office and withdrawn by him, and who, without substantial reason or excuse, omits for eight years to reinstate or renew it,

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during which time many patents embodying the substance of the invention are granted to other persons, must be held to have abandoned the invention; 118 U. S. 22.

A delay of 13 years in the patent office, was held, under the circumstances, not to invalidate a patent; 167 U. S. 225.

By the act of March 3, 1897, it is provided that the failure to apply for a patent in this country for more than seven months after the inventor's application in a foreign country, bars the patent. And, by the same act, a failure to complete an application and prepare it for examination within one year after its filing, and a failure to prosecute the same within one year after action in the office, of which notice shall have been given, works an abandonment, unless the commissioner be satisfied that the delay was unavoidable; but these provisions do not apply to patents granted or applications filed prior to January 1, 1898.

If the application or any claim is rejected, the specification or the claim may be amended and a second examination requested. If again rejected, an appeal may be taken to the examiners-in-chief. If rejected by them, an appeal lies to the commissioner; and if rejected by him, an appeal may be taken to the court of appeals of the District of Columbia, upon notice to the commissioner, and filing the reasons of appeal in writing. If all this proves ineffectual, the applicant may still file a bill in equity in the circuit court to compel the allowance of his patent.

All the proceedings before the patent office connected with the application for a patent are *ex parte*, and are kept secret, except in cases of conflicting claims, which will be referred to below.

*Of the date of the patent.* The patent usually takes date on the day it issues; every patent shall bear date as of a day not later than six months from its allowance and notice to the applicant.

The date of the application and not the date of the patent, controls in determining the legal effect to be given to two patents issued at different dates to the same inventor, and the order in which they are to be considered; 143 U. S. 275.

The *conception* of an invention consists in the complete performance of the mental part of the inventive act. While this in theory necessarily precedes the physical reduction to practice, it in fact also embraces whatever of thought and skill the inventor may have exercised in bringing the invention to that point where reduction to practice can begin; Rob. Pat. § 376; and the date of the conception is the date when the idea of means, including all the essential attributes of the invention, becomes so clearly defined in the mind of the inventor as to be capable of exterior expression; Rob. Pat. § 80. The true *date* of invention is at the point where the work of the inventor ceases and the work of the mechanic begins; 18 O. G. 520.

Whoever first perfects a machine and makes it capable of useful operation is entitled to a patent; an imperfect and incomplete invention resting in theory or intellectual motion and uncertain experiments, not actually reduced to practice and embodied in some machine, etc., is not patentable; 2 Cliff. 224.

The one who first conceives the invention, and is diligent to reduce it to practice is entitled to a patent in preference to one who conceives it subsequently, although the latter may have been the first to render the invention available for public use; Rob. Pat. § 383. See 1 Sto. 590.

*Of interferences.* When an application is filed which interferes with another pending application or with an unexpired patent, an investigation is ordered for the purpose of determining who was the prior inventor, and a patent is directed to be issued or not accordingly. When the controversy is between two applications a patent will be finally granted to him who is shown to be the first inventor, and will be denied to the other applicant so far as the point thus controverted is concerned. But if the interference is between an application and an actual patent, as there is no power in the patent office to cancel the existing patent, all that can be done is to grant or withhold from the applicant the patent he asks. If the patent is granted to him there will be two patents for the same thing. The two parties will stand upon a footing of equality, and must settle their rights by a resort to the courts.

The parties to an interference are required to put their claims into proper shape, and the question of the patentability of the device for which the application is filed is then determined by the examiner. The issues are then defined by the examiner and the parties notified. Each party is then required to file a concise written statement under oath of the date of the conception of his invention, its reduction to practice, etc. If a party to an interference fail to file such a statement, he cannot show an earlier date for his invention than the date of his application. The averments of fact in the preliminary statement are conclusive upon the party who files it. If, in an interference between two applications, the date fixed in the preliminary statement is not earlier than the date of filing the previous application, the priority is awarded to the earliest application. Testimony is taken in contested cases and the question of priority passed upon. An appeal lies to the Examiners-in-Chief and from them to the Commissioner. Priority of inventive act consists in the prior conception of the idea of means and the prior embodiment of this idea in some practically operative art or instrument, or reasonable diligence in perfecting such embodiment, and must be established by a clear preponderance of evidence; Rob. Pat. § 600. Conception of the invention may be shown by verbal descriptions, sketches, models, etc., but these have little weight in proving a reduction to practice. The

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testimony cannot carry the date of conception back of the statement filed. An applicant can terminate interference proceedings by disclaiming the matter in contest, whereupon judgment goes against him on the interference. A judgment in an interference has been held to be binding only on the parties to the record, and only in respect of further proceedings on the same question in the patent office, and not on the courts on the question of novelty or priority; 1 Bann. & A. 394; though the courts will consider it on a motion for a preliminary injunction against the defeated party; 24 Fed. Rep. 275; but the supreme court has recently held that where the question decided in the patent office is one between contesting parties as to priority of invention, the decision there must be accepted as controlling upon that question of fact in any subsequent suit between the same parties, unless the contrary is established by testimony, which in character and amount carries thorough conviction; 153 U. S. 125. The opinion of the patent office on claims or earlier patents do not affect the applicant, except so far as they lead him to abandon or modify some of his claims; 84 Fed. Rep. 659.

The question of interference is determined by the claims and not by the general appearance and functions of the machine shown, but not claimed; 56 Fed. Rep. 714.

An appeal lies from the Commissioner of Patents in an interference case to the court of appeals of the District of Columbia; Act of Feb. 9, 1893.

Whenever there are interfering patents, any person interested in any one of such patents may have relief against the interfering patent by suit in equity against its owners; the court may thereupon adjudge either patent void in whole or in part, etc., but such judgment shall affect none but parties to the suit and those deriving title under them subsequently to the judgment.

*Of the specification.* The specification is required to describe the invention in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which it relates, to make, construct, or use it. In the trial of an action for infringement, it is a question of fact for the jury whether this requirement has been complied with. See 2 Brock. 298; 1 Mas. 182; 2 Sto. 432; 1 W. & M. 53. At the same time, the interpretation of the specification, and the ascertainment of the subject-matter of the invention from the language of the specification and claims and from the drawings are a matter of law exclusively for the court; 5 How. 1; 3 McLean 250, 432; 2 Fish. 62; 4 Blatch. 61; 1 Fish. 44, 289, 351. The specification will be liberally construed by the court, in order to sustain the invention; 1 Sumn. 482; 1 Sto. 270; 5 Fish. 153; 2 Bond 189; 15 How. 341; 4 Blatch. 238; 1 Wall. 491; but it must, nevertheless, identify with reasonable clearness and accuracy the invention claimed, and describe the manner of its construction and use so that the public from the specification alone may be enabled to practise it; and if the court cannot satisfactorily ascertain the meaning of the patent from its face, it will be void for ambiguity; 2 Blatch. 1; 2 Brock. 303; 1 Sumn. 482; 1 Mas. 182, 447. It will be construed in view of the state of the art; 2 Fish. 477; 14 Blatch. 79; 1 Biss. 87; 124 U. S. 1; 133 *id.* 349. A specification in letters patent is sufficiently clear and descriptive, when expressed in terms intelligible to a person skilled in the art to which it relates; 152 *id.* 561.

It is required to distinguish between what is new and what is old, and not mix them together without disclosing distinctly that for which the patent is granted; 1 Sto. 273, 475; 1 Sumn. 482; 3 Wheat. 534. If the invention consists of an improvement, the patent should be confined thereto, and should clearly distinguish the improvement from the prior device, so as to show that the former only is claimed; 1 Gall. 438, 478; 1 Mas. 447; 3 McLean 250. Ambiguous terms should be avoided; nothing material to the use of the invention should be omitted; and the necessity of trials and experiments should not be thrown upon the public.

*Of the claim.* The claim is the statutory requirement prescribed for the purpose of making a patentee define what the invention is. It is to be read in the light of the description contained in the specification, and its literal terms may be enlarged or narrowed accordingly, but not to an extent inconsistent with their meaning; 38 U. S. App. 55. If an invention is not covered by the claim, it will not be protected by the patent; 148 U. S. 54. A mere reference in a claim to a letter on the drawing does not in itself limit the claim to the precise geometrical shape shown in the drawing; 20 U. S. App. 14.

The *claim* is the measure of a patentee's right to relief; and while the specification may be referred to, to limit the claim, it can never be made available to expand it; 141 U. S. 419.

The inventor need not describe all the functions to be performed by his machine if they are evident in its practical operation; 37 U. S. Ap. 239.

The terms of the claims are carefully scrutinized in the patent office. It defines and determines what the applicant is entitled to. The scope of the patent should be limited to the invention covered by the claim; although the claim may be illustrated, it cannot be enlarged by the language used in other parts of the specification; 104 U. S. 112. The whole patent, including specifications and drawings, is to be taken into consideration, though the court looks to them only for the purpose of placing a proper construction upon the claims; 2 Fish. 10. The scope of the patent is given by the claims: 117 U. S. 555: though it be less than the real invention; 9 Blatch. 77; parts which may be indispensable to the invention are not covered by the patent

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unless mentioned in the claims; 1 Fed. Rep. 722; and where a feature is inserted in the claims which is not essential, its materiality cannot be afterwards denied; 13 Fed. Rep. 86. The patentee, in a suit brought on his patent, is bound by his claims; 95 U. S. 274; 9 Blatch. 363; the court will not enlarge the claims by the specification; 117 U. S. 554. Words in a claim such as "substantially as described" refer back to the descriptive parts of the specification and are implied in a claim whether inserted or not; 19 Wall. 287; they relate only to the material features of the invention; 9 Blatch. 77. See 86 Fed. Rep. 315. "Substantially as set forth" are technical words and are equivalent to saying "by the means described in the text of the inventor's application for letters patent as illustrated by the drawings, diagrams, and model which accompany the application;" 25 U. S. App. 475.

A patentee cannot hold under his patent anything excluded therefrom by him or with his acquiescence during the stages of his application therefor; 28 U. S. App. 525.

Where one originates a generic invention and also several specific inventions and presents the same for patent contemporaneously, he cannot enlarge each invention by use of general terms so as to obtain overlapping patents; 1 U. S. App. 320. An inventor is required to explain the principle of his machine and the best mode of applying the principle, so as to distinguish it from other inventions; but he is not necessarily limited to the one mode shown. A pioneer inventor is entitled to a generic claim, which will include every species within the genus, and may also insert in the same application specific claims for one or more of the species; 80 Fed. Rep. 121.

A claim must be interpreted with reference to the rejected claims and to the prior state of the art, and cannot be so construed as to cover either what was rejected by the patent office or disclosed by prior devices; 150 U. S. 221.

A claim for a function is bad; 4 Fed. Rep. 635; though it will, if possible, be construed as a claim for means of performing the function; 28 Fed. Rep. 850; thus a claim for doing an act is treated as a claim for the means of doing it; 94 U. S. 288.

While the law does not limit the number of claims, their multiplication is disapproved; 21 Fed. Rep. 316.

A *drawing* must be filed whenever the nature of the invention permits; 16 O. G. 809; a *model* is not required until called for by the patent office.

*Of re-issues.* It often happens that errors, defects, and mistakes occur in the specification of a patent, by which it is rendered wholly or partially inoperative, or perhaps invalid. Sec. 53 of the act of 1870 provides that when such errors or defects are the result of inadvertence, accident, or mistake, without any fraudulent or deceptive intention, the patent may be surrendered by the patentee, his executors, administrators, or assigns, and a new patent issued in proper shape to secure the real invention intended to have been patented originally. Rob. Pat. § 658. The identity between the invention described in the re-issue and that in the original patent is a question of fact for the jury; 4 How. 380; 27 Pa. 517; 1 Wall. 531. A patentee cannot secure in a re-issue claims covering what has been previously rejected upon his original application; 150 U. S. 38.

A re-issued patent has the same effect and operation in law, on the trial of all actions *for causes subsequently arising*, as though the patent had been originally issued in such corrected form. From this it appears that after a re-issue no action can be brought for a past infringement of the patent. But, as the bare use of a patented machine is (if unauthorized) an infringement of the rights of the patentee, a machine constructed and lawfully used prior to the re-issue may be an infringement of the patent if used afterwards. The re-issued patent will expire when the original patent would have expired.

All matters of fact relating to a re-issue are finally settled by the decision of the commissioner, granting the re-issue; but it may be shown that the commissioner has exceeded his authority in granting a re-issue for an invention different from the one embraced in the original patent; 11 Wall. 516; 9 *id.* 796; 8 Blatch. 513. See 123 U. S. 87. Where a re-issue is sought on the ground of inadvertent errors, rendering the patent inoperative, the decision of the commissioner upon the questions of fact relating to inoperativeness and inadvertence will not be re-examined by the courts; 82 Fed. Rep. 916.

Where the only mistake suggested is that the claim is not so broad as it might have been, the mistake was apparent on the first inspection of the patent, and any correction desired should have been applied for immediately; the right to a correction may be lost by unreasonable delay. The claim of a specific device, and the omission to claim other devices apparent on the face of the patent, are in law a dedication to the public of that which was not claimed, and the legal effect of the patent cannot be revoked unless the patentee surrenders it and proves that the specification was so framed by real inadvertence, accident, or mistake, and this should be done with due diligence and before adverse rights have accrued. It was not the special purpose of the legislation to authorize re-issues with broader claims, though such a re-issue may be made when it clearly appears that there has been a *bona fide* mistake, such as chancery in cases within its ordinary jurisdiction would correct. The specifications cannot be substantially changed, either by the addition of new matter or the omission of important particulars, so as to enlarge the invention as intended to be originally claimed; 129 U. S. 294; 119 *id.* 664. The re-issue is an amendment and cannot be allowed unless the imperfections in the original patent arose without fraud, and from inadvert-

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ence, accident, or mistake; 137 U. S. 258. The re-issued patent is not a new patent; and an existing contract concerning the patent before its surrender applies equally to it after the surrender and re-issue; 11 Cush. 569.

A re-issue can cover only what an examination of the original shows the original was intended to embrace; 127 U. S. 563; 123 *id.* 87; and not that which the original did not describe or claim; 40 Fed. Rep. 667. It can enlarge a claim by omitting an element previously claimed as essential; 124 U. S. 347. Claims cannot be enlarged so as to cover matter already in public use after unreasonable delay; 127 U. S. 563. If not for the same invention, the re-issue is void; 145 U. S. 226.

A claim restricted by the patent office in the first re-issue cannot be enlarged by subsequent re-issues; 125 U. S. 427. A re-issue which brings in a claim originally rejected by the patent office with the acquiesence of the applicant, is void; 35 Fed. Rep. 329; but a re-issue may correct errors occasioned by the mistaken ideas raised in the patent office; 33 Fed. Rep. 502. Both the specification and the claims may be corrected by a re-issue; 16 Fed. Rep. 240.

Laches in applying for a re-issue is fatal to the re-issue and may be taken advantage of by a demurrer; 39 Fed. Rep. 273; 33 *id.* 840. What is reasonable delay is a question for the court and the decision of the patent office on that point is not conclusive; 125 U. S. 217. The plaintiff must explain the delay in applying for a re-issue; 125 U. S. 217. The inadvertence must be in reference to the application and not to the invention. See a review of the cases in 123 U. S. 89. A delay of three years is held to invalidate a re-issue; 76 Fed. Rep. 816; but where a patent, dated in 1882, was held void in 1894 and a re-issue was granted five months later, it was held valid; 86 Fed. Rep. 124; where, on an application for a re-issue, the primary examiner rejects certain claims, and the applicant abandons his application, the claims disallowed are not invalidated; 169 U. S. 606.

No action lies on the orginal patent after its surrender for re-issue; 35 Fed. Rep. 833. A patentee, imposing words of limitation upon himself in his claim in taking out a re-issue, is bound thereby in subsequent suits on the re-issued patent; 123 U. S. 589.

A patent cannot be re-issued to enlarge a claim unless there has been a clear mistake in the wording of the claim, and an application is made within a reasonably short period after the original patent was granted; 123 U. S. 87; 125 *id.* 217; 148 *id.* 270.

The application for a re-issue must be sworn to by the inventor, if living, and not by the assignee, if any.

A re-issue of a patent for an invention, after the expiration of foreign patents for the same invention is invalid; 135 U. S. 176.

Until an amended patent issues, the original stands as if the re-issue had never been applied for; 171 U. S.—Not reported.

*Of patents for designs.* The act of 1870 permits any person to obtain a patent for a design, which shall continue in force for three and a-half, seven, or fourteen years, at the option of the applicant, upon the payment of a fee of ten, fifteen, or thirty dollars, according to the duration of the patent obtained. These patents are granted wherever the applicant, by his own industry, genius, efforts, and expense, has invented or produced any new and original design for a manufacture, alto-relievo, or bas-relief, or any new and original design for the printing of woollen, silk, cotton, or other fabrics; any new and original impression, ornament, pattern, print, or picture, to be printed, painted, cast, or otherwise placed on or worked into any article of manufacture, or any new and original shape or configuration of any article of manufacture, not known or used by others before his invention or production thereof, or patented or described in any printed publication.

A design is an instrument created by the imposition upon a physical substance of some peculiar shape or ornamentation which produces a particular impression upon the human eye, and through the eye, upon the mind. Its creation involves a change in the substance itself and not merely in the mode of presenting it for sale; and affects, not its abstract qualities, nor those on which its practical utility depends, but those only which determine its appearance to the sight; Rob. Pat. § 200. The acts of congress were plainly intended to give encouragement to the decorative arts; they contemplate not so much utility as appearance; 14 Wall. 511. A design is patentable though not more beautiful than former ones; 105 U. S. 94. Design patents require as high a degree or exercise of the inventive or originative faculty as utility patents; 18 Fed. Rep. 321. Where scroll-work is used there must be something peculiar to sustain a patent; 84 Fed. Rep. 182.

A design patent cannot be enlarged in its scope from the specifications; 84 Fed. Rep. 170.

The general method of making the application is the same as has been hereinbefore described, and the patent issues in a similar form.

The use of a design or colorable imitation thereof on any article of manufacture or the sale of any article to which the same shall have been applied, knowing that it has been so applied, renders the party liable to pay $250 or the profits in excess of that amount, and this may be recovered at law or in equity.

*Of disclaimers.* R. S. § 4922 provides that the plaintiff in a suit for infringement may *disclaim* so much of his patent as is in excess of his real invention and thus recover damages for the injury he has really sustained. Sec. 4917 provides for

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the filing in the patent office of a disclaimer of either a separate claim or some distinct and separate matter which can be exscinded without mutilating or changing what is left. These two sections are part of one law having one general purpose and both relate to a case in which a patentee, through inadvertence, accident, or mistake, and without any fraudulent intention, has included in his claim and in his patent, inventions to which he is not entitled, and which are clearly distinguishable from those to which he is entitled. The purpose of § 4917 is to authorize him to file a disclaimer to the part to which he is not entitled and of § 4922 is to legalize the suit on the patent mentioned in the section, and to the extent to which the patentee can rightfully claim the patented invention; 123 U. S. 582.

Delay in a disclaimer under § 4917 goes only to the question of costs; 145 U. S. 29.

No person can avail himself of the benefits of this provision who has unreasonably neglected or delayed to enter his disclaimer. The act of 1870 follows substantially the act of 1837 in this respect.

A disclaimer by one owner will not affect the interest of any other owner.

A disclaimer cannot be used to change the character of the invention; 123 U. S. 582; 130 *id.* 56.

After an action in equity for the infringement of letters patent has been heard and decided upon its merits, the plaintiff cannot file a disclaimer in court, or introduce new evidence upon that or any other subject, except at a rehearing granted by the court upon such terms as it thinks fit to impose; 132 U. S. 103.

*Of the extension of a patent.* See EXTENSION OF PATENTS.

Of the *repeal* of letters patent. The United States may sue in equity for the repeal of a patent obtained by fraud; 128 U. S. 315; and a bill in equity to repeal two patents for the same subject-matter and to the same party is not multifarious; 128 U. S. 315.

R. S. § 4918 provides that any person interested in one or more interfering patents may bring his bill in equity against the owner of the adverse patent, upon which the court may declare either of the patents void in whole or part, or inoperative, or invalid in any particular part of the United States. The judgment rendered affects only the parties or those taking under them.

Suits may be maintained by the government in its own courts to set aside one of its own patents, not only when it has a proprietary and pecuniary interest in the result, but also when it is necessary in order to enable it to discharge its obligations to the public, and sometimes when the purpose and effect are merely to enforce the rights of an individual. In a suit between individuals to set aside an instrument for a fraud, the testimony must be clear, unequivocal, and convincing and more than a bare preponderance of evidence is required. This is much more so when the government attempts to set aside its solemn patent. In establishing the patent office, congress created a tribunal to pass upon all questions of novelty and utility, giving it exclusive jurisdiction in the first instance, with provisions for review. Its determination of facts should therefore be held conclusive upon the government subject to the same limitations as apply in suits between individuals; 167 U. S. 224.

*Of the assignment of patents.* Every patent or an interest therein is assignable in law, by an instrument in writing; such assignments, etc., are void as against any purchaser or mortgagee for a valuable consideration, without notice, unless recorded in the patent office within three months. But an unrecorded assignment is valid as against a subsequent party who has had actual notice; Holmes 152; 2 Sto. 609.

The right may be successively assigned without limit; 9 Fed. Rep. 390. Any person may take under an assignment, a married woman, an infant, etc.; 17 Fed. Rep 841. An invention may be assigned before it is perfected; 26 Fed. Rep. 249; 92 U. S. 724; but an agreement for the future assignment of a patent not yet granted is not a recordable instrument; 32 Fed. Rep. 783.

A deed conveying "all the inventor's property and estate whatsoever" carries rights in unpatented inventions; 10 Wall. 367.

An assignment is the transfer of the entire interest in a patented invention or of an undivided portion of such entire interest as to every section of the United States; Rob. Pat. § 762; it differs from grant in relation to the territorial area to which they relate. A grant is the transfer of the exclusive right in a specific part of the United States. It is an exclusive sectional right. A license is a transfer of a less or different interest than either the interest in a whole patent or an undivided part of such whole interest or an exclusive sectional interest; 4 Blatch. 206. See 3 Fed. Rep. 143; 21 Wall. 205. Any transfer of an interest in a patented invention, which cannot operate as an assignment or grant, is a license; Rob. Pat. § 806. See 4 Blatch. 206. A license is distinguished from an assignment and a grant in that the latter transfers the monopoly as well as the invention, while a license transfers only the invention and does not affect the monopoly otherwise than by estopping the licensor from exercising his prohibitory powers in derogation of the privileges conferred by him upon the licensee; Rob. Pat. § 806. See 5 Fish. 411; 138 U. S. 252; 144 *id.* 248. A license is said to be merely the right not to be sued; 7 Hun 146. It need not be recorded; 2 Sto. 69. It may be by parol; 153 U. S. 332. The right of a patent owner to license the use of his patent is not a creature of statute, but of the common law; 29 Fed. Rep. 17.

No particular form is required for an as-

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signment; 32 Fed. Rep. 790; to comply with the act it must be in writing; 104 U. S. 531; Holmes 152; 5 Fish. 528. It may be made either before or after the patent issues; 94 U. S. 225.

A grant of the exclusive right to make, use, and sell a patented article throughout the United States for the full term of the patent, is an assignment; 41 Fed. Rep. 792; where the intention of a writing is to transfer all rights under the patent, it is an assignment; 32 Fed. Rep. 790.

One owning a patent with several claims cannot assign a single claim so as to pass the legal title; such a transfer is a mere license; 144 U. S. 238. A joint owner may give a license; 61 Fed. Rep. 401.

A *licensee* cannot dispute the validity of the patent; 41 Fed. Rep. 48; but where a license does not recite the validity of the patent, a licensee who abandons the patent may set up the defence of invalidity in an action for royalties alleged to be payable by him after his repudiation; 55 Fed. Rep. 645; and a licensee is not estopped to question the validity of a patent in vindication of acts done after his license expired; 37 Fed. Rep. 686. A patentee cannot question the validity of his own patent as against his assignee; 31 Fed. Rep. 918; 60 *id.* 283.

An oral agreement for the sale and assignment of the right to obtain a patent, is not within the statute of frauds, nor within R. S. § 4898, requiring assignments of patents to be in writing, and may be specifically enforced in equity, upon sufficient proof thereof; 149 U. S. 315.

The right to damages for past infringements does not pass by a mere assignment; 18 Fed. Rep. 638; 30 *id.* 241, 444; but see 30 *id.* 250; 32 *id.* 629, 790; 34 *id.* 327.

Acts *in pais* will sometimes justify the presumption of a license; 1 How. 202; 17 Pet. 228; 3 Sto. 402. As to a verbal license, see 1 Bond 194; s. c. 1 Fish. 380. A license to use an invention implied from circumstances is not transferable; 119 U. S. 226; and a licensee cannot divide the territory in which he is licensed among third parties although the license is to him and his assigns; 52 Fed. Rep. 945. A verbal assignment of an interest in a patent has no force against a subsequent assignee under a written transfer, without notice; 153 U. S. 332; but it has been held that a license to use a patent, not exclusive of others, need not be recorded and may be by parol; and a subsequent assignee of the patent takes title subject to such license, of which he must inform himself as best he may; but the verbal license will be strictly construed, and must show the consideration and alleged payment of royalties; 58 Fed. Rep. 1006.

An assignment may be made prior to the granting of a patent. And when duly made and recorded, the patent may be issued to the assignee. This, however, only applies to cases of assignments proper, as contradistinguished from grants or licenses. The application must, however, in such cases be made and the specification sworn to by the inventor. See 5 McLean 131; 4 Wash. C. C. 71; 1 Blatch. 506. The assignment transfers the right to the assignee, although the patent should be afterwards issued to the assignor; 10 How. 477. The assignee of the entire right in a patent has the exclusive right to sue either at law or in equity for its subsequent infringement; 138 U. S. 252; and may sue in his own name, and so may the assignee of the entire interest for some particular territory; 2 Blatch. 20; but see 14 Fed. Rep. 297.

A license to use includes the right to make for use; 43 Fed. Rep. 847.

The title to a patent passes to the assignee in bankruptcy of the patentee, subject to the assignee's election not to accept it if in his opinion it is worthless or would prove to be burdensome and unprofitable; and he is entitled to a reasonable time to elect whether he will accept it or not; 145 U. S. 29. Upon the death of the owner of a patent, intestate, it passes to his administrator; 19 Fed. Rep. 913; who can sue thereon in another state without taking out ancilliary letters of administration therein; 1 Dill. 104. See LETTERS TESTAMENTARY.

It has been held that any breach of the condition of a license by the licensee works a forfeiture; 1 Blatch. 165.

Licenses containing express stipulations for their forfeiture are not *ipso facto* forfeited upon condition broken, but remain inoperative and pleadable until rescinded by a court of equity; Rob. Pat. § 822; 3 Fed. Rep. 222. The question of forfeiture depends upon the ordinary principles of equity; therefore a court will not rescind a license for non-payment of money at the time fixed therein, if payment has been subsequently tendered or justice can be done by a judgment for the amount already due; Rob. Pat. § 822; 5 Bann. & A. 572. A refusal to pay royalties coupled with an abandonment of the license and a defence on other grounds, are sufficient for annulment; 1 Fish. 380. If the contract contain no power of revocation, the licensor can only proceed at law for any breach; 41 Fed. Rep. 475; 32 *id.* 544; 28 *id.* 814.

Where an assignment, grant, or conveyance of a patent has been acknowledged before a notary public or United States commissioner, or any secretary of legation or consular officer authorized to administer oaths under R. S. § 1750, the certificate of such acknowledgment under the hand and seal of such officer is *prima facie* evidence of the execution of the instrument; Act of March 3, 1897.

A certified copy of an assignment of a patent has been held sufficient, *prima facie*, to show title in the assignee; 56 Fed. Rep. 149; but see 26 *id.* 763; 60 *id.* 1016.

*Of joint inventors.* The patent must in all cases issue to the inventor, if alive and if he has not assigned his interest. And if the invention is made jointly by two inventors, the patent must issue to them both. This is equally the case where one makes a



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portion of the invention at one time and another at another time.

It is not necessary that exactly the same idea should have occurred to each at the same time. If an idea is suggested to one and he even goes so far as to construct a machine embodying this invention, but it is not a completed working machine and another person takes hold of it and by their joint labor a perfect machine is made, a joint patent may be properly issued to them. But if each person invented a distinct part of a machine, each should obtain a patent for his invention; 11 Fed. Rep. 505.

A joint patent is invalid as to a feature previously invented by one of the patentees, which is not a necessary part of the device jointly invented; 58 Fed. Rep. 868.

*Of executors and administrators.* Where an inventor dies before obtaining a patent, his executor or administrator may apply for and obtain such patent, holding it in trust for the heirs at law or devisees, accordingly as the inventor died intestate or testate. Nothing is said as to its being appropriated to the payment of debts; but, having once gone into the hands of the executors or administrators, it would perhaps become assets, and be used like other personal property. In England, a patent will pass as assets to assignees in bankruptcy; 3 B. & P. 565.

The right to make a surrender and receive a re-issue of a patent also vests by law in the executor or administrator. The law further provides that the executor or administrator may make the oath necessary to obtain the patent,—differing in this respect from the case of an assignment, where, although the patent issues to the assignee, the inventor must make the oath.

*The liability of a patent to be levied upon for debt.* The better opinion is that letters patent cannot be levied upon and sold by a common-law execution. The grant of privilege to the patentee would, from its incorporeal nature, seem to be incapable of manual seizure and of sale. Even if such a sale were made, there does not appear to be any provision in the acts of congress which contemplates the recording of a sheriff's deed: and without a valid record, the patentee might nevertheless make a subsequent transfer to a *bona fide* purchaser without notice, which would be valid.

But this peculiar species of property may be subjected to the payment of debts through the instrumentality of a bill in equity. The chancellor can act upon the person. He can direct the patent to be sold, and by attachment can compel the patentee to execute a conveyance to the purchaser; 105 U. S. 126; see where it was further held that the court might compel the holder of the patent to assign it, or appoint a trustee for that purpose. The right of a patentee will pass to his assignees in bankruptcy; 3 B. & P. 777; 145 U. S. 29; but not to a trustee in insolvency, in Massachusetts; 1 Holmes 152. The legal title to a patent does not pass to a receiver of an insolvent owner; but the receiver may maintain a bill to compel the owner to transfer it to him; 45 Fed. Rep. 479.

*How far a patent is retroactive.* By the earlier law on this subject in the United States, a patent, when granted, operated retroactively; so that a machine covered by the terms of the patent, though constructed with the inventor's knowledge, or consent, or purchased from him, previously to the date of that instrument, could not be used after the issuing of the patent without subjecting the party so using it to an action for infringement. The use of the machine previously to the date of the patent has been held not an infringement; 128 U. S. 605. See, also, 163 U. S. 49.

The 37th section of the act of 1870, following substantially the act of 1837, provides "that every person who may have purchased of the inventor, or with his knowledge and consent may have constructed any newly-invented or discovered machine, or other patentable article, prior to the application by the inventor or discoverer for a patent, or sold or used one so constructed, shall have the right to use, and vend to others, to be used, the specific thing so made or purchased, without liability therefor."

At present, therefore, property rightfully acquired in a specific machine, etc., cannot be affected by a patent subsequently obtained by the patentee. It has been held, however, that, under the general grant contained in the constitution, congress has power to pass a special act which shall operate retrospectively so as to give a patent for an invention already in public use; 3 Wheat. 454; 2 Stor. 164; 3 Sumn. 535.

On the question of anticipation by a prior device, the patentee's invention will be considered as relating back to the original conception; 4 Wash. C. C. 68, 703.

*Marking patented articles.* Sec. 38 of the act of 1870 declares that in all cases where an article is made or vended by any person under the protection of letters patent, it shall be the duty of such person to give sufficient notice to the public that said article is so patented, either by fixing thereon the word "patented," together with the day and year the patent was granted, or when, from the character of the article patented, that may be impracticable, by enveloping one or more of the said articles, and affixing a label to the package, or otherwise attaching thereto a label containing a like notice; on failure of which, in any suit for the infringement of letters patent by the party failing so to mark, no damage shall be recovered by the plaintiff, except on proof that the defendant was duly notified of the infringement, and continued after such notice, to make, use, or vend the article patented. The burden of proof is on the plaintiff, in a suit for infringement, to allege and prove actual or constructive notice of the patent: 155 U. S. 584; 152 *id.* 244.

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*Penalties provided in certain cases.* The act of 1870 provides a penalty of not less than $100 and costs for every person who shall mark, etc., any article for which he has not obtained a patent, with the name or imitation of the name of any person who has a patent thereupon, without his consent, etc., or who shall so mark the word "patent" or any word of similar import with intent to counterfeit the mark or device of the patentee, without consent; or who shall in any manner mark upon an unpatented article the word "patent," etc., for the purpose of deceiving the people. This penalty may be recovered in the district court where the offence was committed; one half goes to the person who sues for the penalty and the other to the United States.

A similar statute—that of 5 & 6 Will. IV. c. 83—exists in England, for observations upon which see Hindm. Pat. 366. It has been decided under that statute that where there has been an unauthorized use of the word "patent," it must be proved that the word was used with a view of imitating or counterfeiting the stamp of the patentee, and that it is no defence that the patented article imitated was not a new manufacture, the grant of the patent being conclusive on the defendant; 3 H. & N. 802. See 1 Fish. 647; 3 Fish. 72, 374; 5 *id.* 384; 5 Blatch. 494; 6 *id.* 33.

*Defences.* In any action for infringement the defendant may plead the general issue and having given thirty days notice previous to trial, may prove: 1. That for the purpose of deceiving the public the specification contained less than the whole truth relative to the invention or more than necessary to produce the desired effect; 2. That the patentee had surreptitiously or unjustly obtained the patent for that which was in fact invented by another, who was using reasonable diligence in adapting and perfecting the same; 3. That it had been patented or described in some printed publication prior to his supposed invention thereof [or more than two years prior to the application]; 4. That the patentee was not the original and first inventor of any material and substantial part of the thing patented; 5. That it had been in public use or on sale in this country more than two years before the application or had been abandoned to the public. R. S. § 4920, as amended.

The portions above in [ ] were inserted in § 4920 by the act of March 3, 1897, and do not apply to patents previously granted.

Special notice must be given at law or must be set up in the answer in equity; notice of previous invention, knowledge, or use must state the names of the patentees and when granted and the names and residences of the persons alleged to have invented or to have had a prior knowledge of the thing patented and where and by whom it had been used.

Numerous other defences can be set up at law or in equity, such as the want of invention, novelty, or utility; absence of title in the plaintiff; non-infringement; estoppel; title in the defendant; a release, etc. See Rob. Pat. All of these, and also the above statutory defences, can be proved at law under a general issue plea; those not statutory do not require notice of special matter, unless under special practice in the particular court. The statute of limitations must be pleaded specially.

Prior use must be proved beyond reasonable doubt; 36 Fed. Rep. 183; it must antedate the patentee's invention and not merely his application; 80 Fed. Rep. 121.

A prior use of a device, in order to defeat a patent, must be something which was identical with the patented invention; 4 Blatch. 307. It is not enough to show older devices having part of the elements in one machine, part in a second, and part in a third, and then say that the patented device is anticipated; 17 Fed. Rep. 520. A prior use of all the elements of a device does not anticipate their combination; 4 Cliff. 424; a prior invention must have been complete and operative; 14 Fed. Rep. 457. A mere written description or drawing does not constitute a prior use; 9 Fed. Rep. 293; nor does the construction of a model; 16 Blatch. 76. But there may be circumstances under which a complete model will suffice; 19 Blatch. 473; 18 Wall. 120. A patent, though a mere paper one, may constitute anticipation if it discloses the principle of a subsequent invention; 82 Fed. Rep. 228.

If the prior use was embryotic or inchoate it is not enough. If the device was a machine, it must have been clothed in a substantial form, sufficient to demonstrate at once its practical efficacy and utility; 18 Wall. 120.

Trade magazines, copyrighted, and found in public and scientific libraries are "publications"; 87 Fed. Rep. 470.

Abandoned experiments do not constitute a prior use; 23 Fed. Rep. 327; 23 Wall. 181; 26 Fed. Rep. 329. But throwing aside an invention does not necessarily show that it was an unsuccessful experiment; 20 Fed. Rep. 826. It has been said that where an invention once in use has become a lost art, one who has reinvented it may obtain a patent therefor; Webst. Pat. 720.

Evidence as to the state of the art before the date of the conception of the invention is always admissible to show what was then known, to distinguish the new features from the old and to enable the court to perceive the precise limits of the inventive act; Rob. Pat. § 1020. No previous notice of this evidence is necessary; 91 U. S. 337.

If letters patent be manifestly invalid upon their face, the question of their validity may be raised on demurrer; 158 U. S. 299; 83 Fed. Rep. 170; but only in an unusual case; 84 *id.* 189.

The doctrine of laches has been said to apply to a case where a patentee has slept on his rights for sixteen years while infringement was open and notorious; 82

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Fed. Rep. 96; but on the other hand it is held that mere delay will not bar a right unless it act as an estoppel; 69 *id.* 838.

The failure of a patentee for some years to manufacture his device does not defeat his right to his patented invention; 59 Fed. Rep. 613.

Utility is said to be absence of frivolity and mischievousness, and utility for some beneficial purpose; Rob. Pat. § 339; and the degree of utility is not material; 19 Fed. Rep. 323. But there is no utility if the invention can be used only to commit a fraud with; 19 Wall. 433; or for some immoral purpose; 1 Mas. 182; or can be used only for gambling purposes in saloons; 82 Fed. Rep. 448; or if the invention is dangerous in its use; 19 Wall. 287.

*Of infringements.* The criterion of infringement is substantial identity of construction or operation. Mere changes of form, proportion, or position, or substitution of mechanical equivalents, will still be infringements, unless they involve a substantial difference of construction, operation, or effect; 3 McLean 250, 432; 1 Wash. C. C. 108; 15 How. 62; 1 Curt. 279; 1 McAll. 48. As a general rule, whenever the defendant has incorporated in his structure the substance of what the plaintiff has invented and properly claimed, he is responsible to the latter; 1 Wall. 531.

Where the patent is for a new combination of machines to produce certain effects, it is no infringement to use any of the machines separately, if the whole combination is not used; 1 Mas. 447; 2 *id.* 112; 1 Pet. C. C. 322; 1 Sto. 568; 16 Pet. 336; 3 McLean 427; 14 How. 219; 1 Black 427; 1 Wall. 78. But it is an infringement to use one of several improvements claimed, or to use a substantial part of the invention, although with some modification or even improvement of form or apparatus; 2 Mas. 112; 1 Sto. 273. Where the patent describes and claims a machine, it cannot be construed to be for a process or function, so as to make all other machines infringements which perform the same function; and no infringement will in such case take place where the practical manner of giving effect to the principle is by a different mechanical structure and mechanical action; 15 How. 252. If the patentee is the inventor of a device, he may treat as infringers all who make a similar device operating on the same principle and performing the same functions by analogous means or equivalent combinations, although the infringing machine may be an improvement of the original and patentable as such. But if the invention claimed is itself but an improvement on a known machine, by a mere change of form or combination of parts, it will not be an infringement to improve the original machine by the use of a different form or combination of parts performing the same functions. The doctrine of equivalents does not in such case apply, unless the subsequent improvements are mere colorable invasions of the first; 20 How. 405. A pioneer in the art of making a practical device, who has invented a principle which has gone into almost universal use in this country, is entitled to a liberal construction of his claim; and another device containing all the elements of his combination should be held an infringement, though there are superficial dissimilarities in their construction; 145 U. S. 29. A pioneer means one covering a function never before performed; a wholly novel device marking a distinct step in the progress of the art; 18 Sup. Ct. Rep. 707. The new application of a patented device to another use, which does not involve the exercise of the inventive faculty, is an infringement as much as though the new machine were an exact copy of the old; 139 U. S. 601. The mere fact that one who uses a patented process finds it applicable to more extended use than has been perceived by the patentee is not a defence to a charge of infringement; 147 U. S. 623.

A sale of the thing patented to an agent of the patentee, employed by him to make the purchase on account of the patentee, is not *per se* an infringement, although, accompanied by other circumstances, it may be evidence of infringement; 1 Curt. 260.

The making of a patented machine for philosophical experiment only, and not for use or sale, has been held to be no infringement; 1 Gall. 429, 485; but a use with a view to an experiment to test its value is an infringement; 4 Wash. 580. The sale of the articles produced by a patented machine or process is not an infringement; 3 McLean 295; 4 How. 709; 94 U. S. 568; nor is the *bona fide* purchase of patented articles from an infringing manufacturer; 10 Wheat. 359; nor a sale of materials by a sheriff; 1 Gall. 485; 1 Robb 47. Selling the parts of a patented machine may be an infringement; 1 Holmes 88. As to infringement by a railroad corporation, where its road was worked and its stock owned by a connecting road, see 17 How. 30. Ignorance by the infringer of the existence of the patent infringed is no defence, but may mitigate damages; 11 How. 587. See INFRINGEMENT.

The purchaser of a car load of beds covered by a patent from the owner of the territorial rights of Michigan, for the express purpose of selling them in Massachusetts, had the right to sell them anywhere within the United States, even within the territory already assigned to another person; 157 U. S. 659 (Brown J., dissenting); 149 *id.* 355; but one cannot buy a patented article in a foreign country from a person authorized to sell it there and then sell it in the United States; 84 Fed. Rep. 192.

The owners of letters patent cannot sue the United States in the court of claims for infringement of his patent; 155 U. S. 163.

The United States has no right to use a patented invention without a license from the patentee or making compensation to him. No suit can be maintained, or

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injunction granted, against the United States, unless expressly permitted by act of congress. Officers or agents of the United States, although acting under order of the United States, are personally liable to be sued for their own infringement of a patent. Upon a suit in equity by the patentee of an improvement in caisson gates against officers of the United States, using in their official capacity a caisson gate made and used by the United States, in infringement of his patent, the plaintiff is not entitled to an injunction. Nor can he recover profits, if the only profit proved is a saving to the United States in the cost of the gate; 161 U. S. 10.

*Of damages for infringement.* Damages may be recovered in any circuit court of the United States, in the name of the party interested either as patentee, assignee, or grantee, and in case of a verdict for the plaintiff the court may enter judgment thereon for any sum above the amount found by the verdict as the actual damages sustained, according to the circumstances of the case, not exceeding three times the amount of such verdict, together with costs. A court of equity may award damages for infringement and increase the same in a similar manner. R. S. § 4921, as amended March 3, 1897, provides that upon a decree in equity for infringement the complainant shall be entitled to recover, in addition to profits, the damages he has sustained, which shall be assessed by the court, and the court has the same power to increase the damages as is given to the court to increase the damages found by verdict, even though the infringer made no profit; 97 U. S. 348. See 13 Am. L. Rev. 1. At law a plaintiff is entitled to recover what he has lost although it exceed defendant's profits; in equity only the profits the defendant has actually made; 151 U. S. 139; 155 *id.* 565; 161 *id.* 10.

The actual damage is all that can be allowed by a jury, as contradistinguished from exemplary, vindictive, or punitive damages. The amount of defendant's profits from the unlawful user is, in general, the measure of the plaintiff's damages; and this may be determined by the plaintiff's price for a license; 11 How. 607; 16 *id.* 480; 20 *id.* 198; 1 Blatch. 244, 405; 2 *id.* 132, 194, 229, 476; but no interest is allowed on the profits until their amount is judicially ascertained: 125 U. S. 136. The rule of damages is different where a patent is only for an improvement on a machine and where it is for an entire machine; 16 How. 480. If there be a mere making and no user proved, the damages should be nominal; 1 Gall. 476; and where there is in the evidence no basis for a computation of the damages, only nominal damages can be given; 131 U. S. 159. Where a royalty was proved on a device covering two claims and one only was sustained, only nominal damages were allowed; 4 Fed. Rep. 415; but it has been held that in an action at law, if there is no established royalty, the jury may consider what would be a reasonable royalty; and, in so doing, may consider the utility and advantage of the invention, and take into account defendant's profits; 81 Fed. Rep. 1012.

In equity, a plaintiff, though he has an established license fee, is not limited to the amount thereof as damages; but may instead of damages recover the profits the defendants have made; 125 U. S. 136.

The plaintiff may recover in equity as profits the advantages which the defendants have gained by using the invention, and a definite saving shown to have been made in the cost of manufacture; 125 U. S. 136. The expense of using the new process is to be ascertained from the manner in which the defendants have used it and not in the manner in which they might have used it; *id.*

A plaintiff cannot recover a defendant's entire profits unless the whole market value of defendant's article is shown to be due to the invention; 24 Blatch. 275. But if the entire saleability of the article is the result of the introduction of the patented feature, the plaintiff is entitled to all the profits made; 39 Fed. Rep. 466; 130 U. S. 456. Where the invention apparently gave the device its value, the defendant must show the extent to which his own improvements were the cause of the profits which he had made; 39 Fed. Rep. 468. The profits are what the defendant made or saved; 36 Fed. Rep. 378. Nominal damages only are allowed where it is not shown what definite profits were due to the invention; 24 Blatch. 396, 463; 39 Fed. Rep. 613; or where plaintiff shows no established license fee, no market price, and no other use of the invention than by the defendant; 81 Fed. Rep. 863.

Where the owner of a patent has a fixed license fee, this is the measure of damages for an invention; 2 Fed. Rep. 677; 27 Fed. Rep. 691; this must be the license fee existing at the date of infringement; 25 Fed. Rep. 274; one established afterwards may be considered, though it is not conclusive; 26 Fed. Rep. 274; it is immaterial whether in such case the use of the invention has been profitable to the defendant. A single instance is not sufficient to establish a license fee; 35 Fed. Rep. 597; but two instances may be; 37 Fed. Rep. 654; it is not enough to show foreign license fees; 14 Blatch. 265. And a license fee must be shown by actual payment and not merely by promises to pay; 28 Fed. Rep. 360; nor by amount paid in settlement of a claim; 43 Fed. Rep. 478.

In the absence of an established license fee, damages must be shown by general evidence; 3 Wall. 315; and there is a difference between infringement by sale and those by use. The measure of recovery in a suit in equity for infringement of patent is the gains and profits made by the infringer and such further damage as the proof shows that the complainant sustained in addition; but in an action at law the damages are measured only by the extent of the plaintiff's loss, as proved by the evidence, and when the evidence dis-

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closes the existence of no license fee, no impairment of the plaintiff's market, no damages of any kind, only nominal damages can be recovered; 155 U. S. 565.

Where the defendant's acts compelled the plaintiff to reduce his price, such loss is an item of damage; 43 Fed. Rep. 72.

It is said that any attempt to classify the reported cases on damages would be futile; Rob. Pat. § 1061.

The statute of limitation is six years prior to the filing of the bill of complaint or the issuing of a writ at law; Act of March 3, 1897 (in effect January 1, 1898).

It is the *province of the court* to define the patented invention, as indicated by the language of the claims; and of the jury to determine whether, as so defined, it covers the defendant's article; 155 U. S. 565.

If one is employed to devise or perfect an instrument or a means for accomplishing a prescribed result, he cannot, after successfully accomplishing the work for which he was employed, plead title thereto as against his employer. What he accomplishes becomes the property of the employer. He has sold it in advance to him. So when one is in the employ of another in a certain line of work and devises an improved instrument for that work and uses the property of his employer and the services of other employes to develop and put in practical form his invention, a jury or court is warranted in finding that the benefits resulting from his use of the property and the assistance of the co-employes of his employer have given to such employer an irrevocable license to use the invention; 130 U. S. 342; 150 *id.* 430; 1 How. 202; 160 U. S. 426. But a railroad company is not entitled to the use of an invention of its master mechanic, when none of the company's material or labor entered into the perfecting of the invention or was devoted to its construction until after the patent had issued; 33 N. E. Rep. (Ind.) 322.

Patents can be granted to United States officers, except those in the patent office, without any fee, when the invention is used or to be used in the public service, but the patentee must file a stipulation, which must be inserted in the patent, that the invention may be used by the government and its officers in public work or by any other person in the United States; Act of March 3, 1883.

In patent cases, costs will not be awarded to complainant, where some of the claims sued on are withdrawn at the argument, and others are adjudged not infringed, although the decree is in favor as to others still; 71 Fed. Rep. 886.

*Jurisdiction of cases under the patent laws.* The act of 1870, § 55, gives original jurisdiction to circuit courts of the United States and to the supreme court of the District of Columbia, or of any territory, in all cases arising under the laws of the United States granting exclusive privileges to inventors. This act was amended by giving this jurisdiction to the court of appeals of the District of Columbia and abolishing that of the supreme court of the District. This jurisdiction extends both to law and equity, and is irrespective of the citizenship of the parties or the amount in controversy. The jurisdiction of the federal courts is exclusive of that of the state courts; 3 N. Y. 9; 40 Me. 430. But this is to be understood of cases arising directly under the acts of congress, and not of those where the patent comes collaterally in question: as, for instance, where it is the subject-matter of a contract or the consideration of a promissory note; 3 McLean 525; 1 W. & M. 84; 16 Conn. 409. Hence a bill to enforce the specific performance of a contract for the sale of a patent-right is not such a case arising under the patent laws as gives jurisdiction to the federal courts; 10 How. 477; 140 U. S. 344. A contract relating to a patent does not necessarily involve a federal question; 125 U. S. 46, 54; 140 *id.* 344. For the requirements of a bill on a patent, see 121 U. S. 484. If a bill is filed so near the expiration of a patent that, under the rules, there could be no injunction, it will be dismissed; but if one could be obtained, though only three days before the expiration, the court may retain jurisdiction and proceed, with or without an injunction; 119 U. S. 322.

The expiration of a patent pending a suit for infringement does not defeat the jurisdiction of a court of equity, although it is a reason for denying an injunction which was the basis of equity jurisdiction; 122 U. S. 71; 119 *id.* 322. A bill is not maintainable when filed only a few days before the patent expired; 84 Fed. Rep. 344.

*Patent-right, note given for a.* In many of the states, laws have been passed making void all notes given in consideration of a patent-right unless the words "given for a patent-right" are prominently written on the face of the note. These laws have been decided to be unconstitutional in 37 Mich. 309; 70 Ill. 109; 23 Minn. 24; 25 Fed. Rep. 394; 2 Biss. 311; 2 Flipp. 33; 14 Neb. 134; *contra*, 109 N. Y. 127; 108 Ind. 365. The property in inventions exists by virtue of the laws of congress, and no state has a right to interfere with its enjoyment or annex conditions to the grant; 2 Biss. 314; 4 Bush 311. In Pennsylvania, however, a distinction has been made, the statute of April 12, 1872, requiring the insertion of the words "given for a patent-right," merely having the effect of making the note or instrument in the hands of a purchaser subject to the same defence as if in the hands of the original owner or holder. By necessary implication, notes without such words inserted in them remain on the same footing as before the act, and innocent holders, who take such notes without notice, take them clear of all equities existing between the original parties. And in several cases these acts have been sustained as constitutional; 36 Ohio St. 370; 116 Ind. 118, 502; 109 N. Y. 127; 93 Pa. 373.

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As between the original parties to a note given for a patent-right, it is well settled that it is a good defence to show that the alleged patent was void, and therefore there was no consideration; 18 Pa. 465. All who take with notice of the consideration, take subject to same defence; *id.*; 93 Pa. 373. Sharswood, J., held that there was nothing in this view which interfered with any just right of the holder of a valid patent under the acts of congress, nor in permitting the maker to show, against a holder with such notice, that the note was obtained by fraudulent misrepresentation; 86 Pa. 173. An innocent purchaser of a note is not affected by the act; 93 Pa. 373; 118 Ind. 586; 88 Tenn. 705. If the patent is void; 124 Mass. 523; or the patented article is useless; 42 Nev. 97; 40 Ind. 1; the note is void.

To secure the insertion of the words, some acts make it a misdemeanor punishable by fine or imprisonment, or both, for any person "knowing the consideration of a note" to be the sale of a patent-right, to sell or transfer it without the words "given for a patent-right" inserted, as provided by the act; 26 Am. Rep. 514; 23 Minn. 24; 53 Ind. 454; 54 *id.* 270.

On the *expiration* of patents on the "Singer" sewing-machine, under which name it came to indicate a type of machine made by that company, the right to make the patented article and use the generic name passed to the public, but one using the name in selling such type of machines may be compelled to indicate that the articles made by him are his product and not the product of the owners of the extinct patent; 163 U. S. 169.

See CAVEAT; EXPERT; EXTENSION OF PATENTS; INFRINGEMENT; LIBEL.

**PATENT AMBIGUITY.** An ambiguity which appears upon the face of an instrument. It is a settled rule that extrinsic evidence is not admissible to explain such an ambiguity. The general rule on the subject is thus stated in 2 Eng. Rul. Cas. 707: "Where a legal relation is sought to be established by means of a written instrument, if an uncertainty of intention appear by the expression of the instrument itself, the true intention cannot be ascertained by the aid of extrinsic evidence. For, as said by Lord Bacon (Maxims, Reg. 23), '*ambiguitas patens* cannot be holpen by averment.'" 5 Bing. N. C. 425; s. c. 8 L. J. C. P. 227. See AMBIGUITY; LATENT AMBIGUITY.

**PATENT OFFICE.** The office through which applications for letters patent for inventions, etc., are made, and from which those letters patent emanate.

Some provision for the purpose of issuing patents is, of course, found in every country where the system of granting patents for inventions prevails; but nowhere else is there an establishment which is organized in all respects on the same scale as the United States Patent Office.

By the act of 1790, the duty of transacting this business was devolved upon the secretary of state, the secretary of war, and the attorney-general. In the provision for a board for this purpose found in the act of 1793 the secretary of war is omitted. From that time during a period of more than forty years all the business connected with the granting of patents was transacted by a clerk in the office of the secretary of state, the duties of the secretary in this respect being little more than nominal, and the attorney-general acting only as a legal adviser.

The act of July 14, 1836, reorganized the office and gave it a new and higher position. A commissioner of patents was constituted. Provision was made for a library, which has since become one of the finest of the kind in the country.

The act of 1870 provides for the appointment by the President of one commissioner, one assistant commissioner and three examiners-in-chief. Other officers are appointed by the secretary of the interior, in whose department the patent office is, upon the nomination of the commissioner.

The patent office is an office of record, in which assignments of patents are recordable, and the record is notice to all the world of the facts to be found on record. Under section 4 of the act of 1793, an assignment was not valid unless recorded in the office of the secretary of state; 4 Blackf. 183. See PATENT.

**PATENT OFFICE, EXAMINERS IN.** Officials in the United States Patent Office, whose duty it is to determine whether the subject-matter of applications for letters patent is such as to entitle the applicant to the grant of such letters. See PATENT OFFICE.

**PATENT RIGHT.** See PATENT.

**PATENT ROLLS.** Registers in which are recorded all letters patent granted since 1516. 2 Sharsw. Bla. Com. 346; Whart. L. Lex.

**PATENT WRIT.** A writ not closed or sealed up. Jacob, Law Dict.; Co. Litt. 289; 7 Co. 20.

**PATENTEE.** He to whom a patent has been granted. The term is usually applied to one who has obtained letters patent for an invention. See PATENT.

**PATER** (Lat.). Father. The term is frequently used in genealogical tables.

**PATER-FAMILIAS** (Lat.). **In Civil Law.** One who was *sui juris*, and not subject to the paternal power.

In order to give a correct idea of what was understood in the Roman law by this term, it is proper to refer briefly to the artificial organization of the Roman family,—the greatest moral phenomenon in the history of the human race. The comprehensive term *familia* embraced both persons and property: money, lands, houses, slaves, children, all constituted part of this artificial family, this juridical entity, this legal patrimony, the title to which was exclusively vested in the chief or *pater-familias*, who alone was *capax dominii*, and who belonged to himself, *sui juris*.

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The word *pater-familias* is by no means equivalent to the modern expression father of a family, but means proprietor in the strongest sense of that term; it is he *qui in domo dominium habet*, in whom were centred all property, all power, all authority: he was, in a word, the lord and master, whose authority was unlimited. No one but he who was *sui juris*, who was *pater-familias*, was capable of exercising any right of property, or wielding any superiority or power over anything; for nothing could belong to him who was himself *alieni juris*. Hence the children of the *filii familias*, as well as those of slaves, belonged to the *pater-familias*. In the same manner, everything that was acquired by the sons or slaves formed a part of the *familia*, and, consequently, belonged to its chief. This absolute property and power of the *pater-familias*, only ceased with his life, unless he voluntarily parted with them by a sale; for the alienation by sale is invariably the symbol resorted to for the purpose of dissolving the stern dominion of the *pater-familias* over those belonging to the *familia*. Thus, both emancipation and adoption are the results of imaginary sales,—*per imaginarias venditiones*. As the daughter remained in the family of her father, grandfather, or great-grandfather, as the case might be, notwithstanding her marriage, it followed as a necessary consequence that the child never belonged to the same family as its mother: there is no civil relationship between them; they are natural relations,—*cognati*,—but they are not legally related to each other,—*agnati*; and therefore the child never inherits from its mother, nor the mother from her child. There was, however, a means by which the wife might enter into the family and subject herself to the power of her husband, *in manu mariti*, and thereby establish a legal relationship between herself and her husband. This marital power of the husband over the wife was generally acquired either *coemptione*, by the purchase of the wife by the husband from the *pater-familias*, or *usu*, by the prescription based on the possession of one year,—the same by which the title to movable property was acquired according to the principles governing the *usucapio* (*usu capere*, to obtain by use). Another mode of obtaining the same end was the *confarreatio*, a sacred ceremony performed by the breaking and eating of a small cake, *farreum*, by the married couple. It was supposed that by an observance of this ceremony the marital power was produced by the intervention of the gods. This solemn mode of celebrating marriages was peculiar to the patrician families. By means of these fictions and ceremonies the wife became in the eye of the law the daughter of her husband, and the sister of the children to whom she gave birth, who would otherwise have been strangers to her. Well might Gaius say, *Fere nulli alii sunt homines qui talem in liberos habeant potestatem qualem nos habemus*.

There is some similarity between the *agnatio*, or civil relationship, of the Romans, and the transmission of the name of the father, under the modern law, to all his descendants in the male line. The Roman law says of the children, *patris, non matris, familiam sequuntur*; we say, *patris, non matris, nomen sequuntur*. All the members of the family who, with us, bear the same name, were under that law *agnates*, or constituted the *agnatio*, or civil family. Those children only belonged to the family, and were subject to the paternal power, who had been conceived in *justis nuptiis*, or been adopted. *Nuptiæ*, or *matrimonium*, was a marriage celebrated in conformity with the peculiar rules of the civil law. There existed a second kind of marriage, call *concubinatus*,—a valid union and a real marriage,—which has been often improperly confounded, even by high authority, with concubinage. This confusion of ideas is attributable to a superficial examination of the subject; for the illicit intercourse between a man and a woman which we call concubinage was stigmatized by the opprobrious term *stuprum* by the Romans, and is spoken of in the strongest terms of reprobation. The *concubinatus* was the natural marriage, and the only one which those who did not enjoy the *jus connubii* were permitted to contract. The Roman law recognized two species of marriage, the one civil, and the other natural, in the same manner as there were two kinds of relationship, the *agnatio* and *cognatio*. The *justæ nuptiæ* or *justum matrimonium*, or civil marriage, could only be contracted by Roman citizens and by those to whom the *jus connubii* had been conceded: this kind of marriage alone produced the paternal power, the right of inheritance, etc.

But the rapid rise and extraordinary greatness of the city attracted immense crowds of strangers, who, not possessing the *jus connubii*, could form no other union than that of the *concubinatus*, which, though authorized by law, did not give rise to those legal effects which flowed from the *justæ nuptiæ*. By adoption, the person adopted was transferred from one family to another; he passed from the paternal power of one *pater-familias* to that of another: consequently, no one who was *sui juris* could be adopted in the strict sense of that word. But there was another species of adoption, called *adrogatio*, by which a person *sui juris* entered into another family, and subjected himself to the paternal power of its chief. The effect of the adrogation was not confined to the person adrogated alone, but extended over his family and property. 1 Marcade 7b.

This extraordinary organization of the Roman family, and the unlimited powers and authority vested in the *pater-familias*, continued until the reign of Justinian, who by his 118th Novel, enacted on the 9th of August, 544, abolished the distinction between the *agnatio* and *cognatio*, and established the order of inheritance which, with some modifications, continues to exist at the present day in all countries whose jurisprudence is based on the civil law. See Maine, Anc. L. Ch. 5; GENS; PATRIA POTESTAS.

**PATERNA PATERNIS** (Lat. the father's to the father's). **In French Law.** An expression used to signify that, in a succession, the property coming from the father of the deceased descends to his paternal relations.

**PATERNAL.** That which belongs to the father or comes from him: as paternal power, paternal relation, paternal estate, paternal line. See LINE.

**PATERNAL POWER.** The authority lawfully exercised by parents over their children. See FATHER.

**PATERNAL PROPERTY.** That which descends or comes from the father and other ascendants or collaterals of the paternal stock. Domat, Liv. Prél. tit. 3, s. 2, n. 11.

**PATERNITY.** The state or condition of a father.

The husband is *prima facie* presumed to be the father of his wife's children born during coverture or within a competent time afterwards: *pater is est quem nuptiæ demonstrant*; 7 Mart. La. N. S. 553. So if the child is *en ventre sa mere* at time of marriage; Co. Litt. 123; 8 East 192. In civil law the presumption holds in case of a child born before marriage as well as after; 1 Bla. Com. 446, 454; Fleta, lib. 1, c. 6. In cases of marriage of a widow within ten months after decease of husband, the paternity is to be decided by circumstances; Hargrave, note to Co. Litt. § 188. Marriage within ten months after decease of husband was forbidden by Roman, Danish, and Saxon law, and English law before the Conquest; 1 Beck, Med. Jur. 481; Brooke, Abr. *Bastardy*, pl. 18; Palm. 10; 1 Bla. Com. 456.

The presumption of paternity may always be rebutted by showing circumstances which render it impossible that the husband can be the father; 6 Binn. 283; 8 East 193; Stra. 51, 940; 2 Myl. & K. 349; 3 Paige, Ch. 139; 1 S. & S. 150; T. & R. 138.

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The declarations of one or both of the spouses, however, cannot affect the condition of a child born during the marriage; 7 Mart. La. N. s. 553; 3 Paige, Ch. 139. See ACCESS; BASTARD; BASTARDY; LEGITIMACY; PREGNANCY.

**PATHOLOGY. In Medical Jurisprudence.** The science or doctrine of diseases. In cases of homicides, abortions, and the like, it is of great consequence to the legal practitioner to be acquainted in some degree with pathology. 2 Chitty, Pr. 42, n.

**PATIBULUM.** A gallows or gibbet. Fleta, l. 2, c. 3, § 9.

**PATRIA** (Lat.). The country; the men of the neighborhood competent to serve on a jury; a jury. This word is nearly synonymous with *pais*, which see.

**PATRIA POTESTAS** (Lat.). **In Civil Law.** The paternal power; the authority which the law vests in the father over the persons and property of his legitimate children.

One of the effects of marriage is the paternal authority over the children born in wedlock. In the early period of the Roman history, the paternal authority was unlimited: the father had the absolute control over his children, and might even, as the domestic magistrate of his family, condemn them to death. They could acquire nothing except for the benefit of the *pater-familias*; and they were even liable to be sold and reduced to slavery by the author of their existence. But in the progress of civilization this stern rule was gradually relaxed.

There are several instances given in which the emperors interfered to moderate the severity of fathers, and the power to kill the child was restricted and finally abolished during the empire. The father could originally abandon his male child to relieve himself of responsibility for it, but this was forbidden by the institutes. Inst. 4, 8, 7. Over the property of the child the rights of the father were as absolute as over that of the slave; but this power was also moderated under the emperors until in the time of Justinian it was practically destroyed. The power of the *pater familias* extended to all descendants in the male line, and it was not lost even over those who held the highest offices in the state or became victorious generals.

The children of a daughter were not subject to the paternal authority of her own father but entered into the family of her husband. The paternal power was never exercised by a woman, even if she were herself *sui juris*. It is for this reason, Ulpian observes, that the family of which a woman, *sui juris*, was the head, *mater familias*, commenced and ended with her: *mulier autem familiæ suæ et caput et finis est*. 1 Ortolan 191.

See PATER FAMILIAS.

The modern civil law has hardly preserved any features of the old Roman jurisprudence concerning the paternal power.

The Louisiana code provides that a child owes honor, respect, and obedience to the parents, but even the power of correction ceases with the age of puberty, and boys at fourteen and girls at twelve years of age may leave the paternal roof in opposition to the will of their parents. By modern law the paternal authority is vested in both parents, but usually exercised by the father alone. During the marriage the parents are entitled to the property of their minor children, subject to the obligation of support and education, paying taxes, repairs, etc. The paternal power ceases with the death of one spouse and is succeeded by tutorship, which, however, usually devolves upon the surviving parent, who can also at death appoint a testamentary tutor.

**PATRICIDE.** One guilty of killing his father. See PARRICIDE.

**PATRIMONIAL.** A thing which comes from the father, and, by extension, from the mother or other ancestor.

**PATRIMONIUM. In Civil Law.** That which is capable of being inherited.

Things capable of being possessed by a single person exclusively of all others are, in the Roman or civil law, said to be *in patrimonio*; when incapable of being so possessed, they are *extra patrimonium*.

Most things may be inherited; but there are some which are said to be *extra patrimonium*, or which are not in commerce. These are such as are *common*, as the light of heaven, the air, the sea, and the like; things *public*, as rivers, harbors, roads, creeks, ports, arms of the sea, the sea-shore, highways, bridges, and the like; things *which belong to cities and municipal corporations*, as public squares, streets, market-houses, and the like. See 1 Bouvier, Inst. n. 421.

**PATRIMONY.** Any kind of property. Such estate as has descended in the same family; estates which have descended or been devised in a direct line from the father, and, by extension, from the mother or other ancestor. It has been held that the word is not necessarily restricted to property inherited directly from the father. 5 Ir. Ch. Rep. 525.

**PATRINUS** (Lat.). A godfather.

**PATRON. In Ecclesiastical Law.** He who has the disposition and gift of an ecclesiastical benefice.

**In Roman Law.** The former master of a freedman. Dig. 2. 4. 8. 1.

**PATRONAGE.** The right of appointing to office; as, the patronage of the President of the United States, if abused, may endanger the liberties of the people.

**In Ecclesiastical Law.** The right of presentation to a church or ecclesiastical benefice. 2 Bla. Com. 21.

**PATRONIZE.** To act as patron towards. The occupants of a house cannot be said to patronize it; 9 Bradw. 344. See 48 N. Y. 472.

**PATRONUS** (Lat.). **In Roman Law.** A modification of the Latin word *pater*, father. A denomination applied by Romulus to the first senators of Rome, and which they always afterwards bore.

Romulus at first appointed a hundred of them. Seven years afterward, in consequence of the association of Tatius to the Romans, a hundred more were appointed, chosen from the Sabines. Tarquinius Priscus increased the number to three hundred. Those appointed by Romulus and Tatius were called *patres majorum gentium*, and the others were called *patres minorum gentium*. These and their descendants constituted the nobility of Rome. The rest of the people were called plebeians, every one of whom was obliged to choose one of these fathers as his *patron*. The relation thus constituted involved important consequences. The plebeian, who was called *cliens* (a client), was obliged to furnish the means of maintenance to his chosen patron, to furnish a portion for his patron's daughters, to ransom him and his sons if captured by an enemy, and pay all sums recovered against him by judgment of the courts. The patron, on the other hand, was obliged to watch over the interests of his client, whether present or absent, to protect his person and property, and especially to defend him in all actions brought against him for any cause. Neither could accuse or bear testimony against the other, or give contrary votes, etc. The contract was of a sacred nature: the violation of it was a sort of treason, and punishable as such. Ac-

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cording to Cicero (De Repub. ii. 9), this relation formed an integral part of the governmental system, *Et habuit plebem in clientelas principum descriptum*, which he affirms was eminently useful. Blackstone traces the system of vassalage to this ancient relation of patron and client. It was, in fact, of the same nature as the feudal institutions of the middle ages, designed to maintain order in a rising state by a combination of the opposing interests of the aristocracy and of the common people, upon the principle of reciprocal bonds for mutual interests. Ultimately, by force of radical changes in the institution, the word *patronus* came to signify nothing more than an advocate.

**PATROON. In New York.** The lord of a manor. See MANOR.

**PATRUELIS** (Lat.). **In Civil Law.** A cousin-german by the father's side; the son or daughter of a father's brother. Dig. 38. 10. 1.

**PATRUUS** (Lat.). **In Civil Law.** An uncle by the father's side; a father's brother. Dig. 38. 10. 10. *Patruus magnus* is a grandfather's brother, grand-uncle. *Patruus major* is a great-grandfather's brother. *Patruus maximus* is a great-grandfather's father's brother.

**PAUPER** (Lat. poor). One so poor that he must be supported at the public expense.

A laboring man, who has always been able to make a living, and who, until his last sickness, has never had occasion to ask or receive charity, is not a pauper, although without money or property with which to pay the expense of that sickness; 21 Nev. 415. See 16 Viner, Abr. 259; Botts' Poor-Laws; Woodf. Landl. & T. 201.

Before a person can be admitted to sue or defend as a pauper, proof must be given that he is not worth £25, his wearing apparel and the subject-matter of the cause or matter only excepted. He is exempt from court fees. Counsel may be assigned to him, and no fees can be taken from him. Brett, Comm. 681. See POOR.

**PAUPERIES** (Lat.). **In Civil Law.** Poverty. In a technical sense, *Damnum absque injuria: i. e.* a damage done without wrong on the part of the doer: *e. g.* damage done by an irrational being, as an animal. L. 1, § 3, D. *si quod paup. fec.*; Calvinus, Lex.

**PAVE.** To cover with stone, brick, concrete, or any other substantial matter, making a smooth and level surface. 60 N. Y. 22.

To lay or cover with stone, brick, or other material, so as to make a firm, level, or convenient surface for horses, carriages, or persons on foot to travel on. It means as well to cover with asphalt or concrete, as to lay or cover with stone; 110 Mo. 502.

The laying of a cross walk comes within the general designation of paving; 62 N. Y. 224; paving includes flagging, as well as other modes of making a smooth surface for streets and sidewalks; 76 N. Y. 181; 66 Hun 179. A footway made up with gravel, but not paved with stone or flags is a pavement; 15 Q. B. D. 652; 54 L. J. M. C. 147. To pave a street has been held not to include curbing and sidewalks; 9 Wash. 272.

**PAVIAGE.** A contribution or tax for paving streets or highways.

**PAWN.** A pledge. A pledge includes, in Louisiana, a *pawn* and an *antichresis*; but sometimes pawn is used as the general word, including pledge and antichresis. La. Civ. Code, art. 3101; Hennen, Dig. *Pledge*. See PLEDGE.

**PAWNBROKER.** One whose business it is to lend money, usually in small sums, upon pawn or pledge. An ordinance requiring pawnbrokers to keep a book in which shall be entered a description of all property left in pawn, with the name and description of the pledgor and to submit such book to the inspection of the mayor or any police officer on demand, is a valid police regulation; 31 S. W. Rep. (Mo.) 101; 111 Ill. 291. And one forbidding them to purchase certain specified articles is not unreasonable as imposing upon pawnbrokers a penalty for doing that which is lawful for other persons to do, as a city may not only regulate their business, but suppress and prohibit it; 30 Ill. App. 203.

An ordinance requiring pawnbrokers to take out a license is not authorized by a statute empowering city councils to make by-laws and ordinances not inconsistent with the laws of the state and necessary to carry out the object of the corporation; 127 Ind. 109. See 78 Ga. 773; 24 S. E. Rep. (N. C.) 526; LICENSE; ORDINANCE; POLICE POWER.

**PAWNEE.** He who receives a pawn or pledge. See PLEDGE.

**PAWNOR.** One who, being liable to an engagement, gives to the person to whom he is liable a thing to be held as a security for the payment of his debt or the fulfilment of his liability. 2 Kent 577. See PLEDGE.

**PAX REGIS** (Lat.). That peace or security for life and goods which the king promises to all persons under his protection. Bract. lib. 3, c. 11. See PEACE.

In ancient times there were certain limits which were known by this name. The *pax regis*, or verge of the court, as it was afterwards called, extended from the palace-gate to the distance of three miles, three furlongs, three acres, nine feet, nine palms, and nine barleycorns; Crabb, C. L. 41; or from the four sides of the king's residence, four miles, three furlongs, nine acres in breadth, nine feet, nine barleycorns, etc.; LL. Edw. Conf. c. 12, et LL. Hen. I.

**PAY.** To discharge a debt, to deliver a creditor the value of a debt, either in money or in goods, to his acceptance, by which the debt is discharged. 36 N. Y. 527. See 1 Cush. 76.

**PAY.** A fixed and definite amount given by law to persons in military service in consideration of and as compensation for their personal services. 16 Ct. Cl. 496. See LONGEVITY PAY.

*Payable in trade.* Payable in such ar-

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ticle as the promissor deals in. 114 Mass. 34.

*Payable as convenient.* A phrase which can be construed only as an extension of credit. 120 Mass. 171.

**PAYEE.** The person in whose favor a bill of exchange is made payable. See BILLS OF EXCHANGE.

**PAYMENT.** The fulfilment of a promise, or the performance of an agreement.

The discharge in money of a sum due.

It implies the existence of a debt, of a party to whom it is owed, and of a satisfaction of the debt to that party; 53 Conn. 175.

The word payment is not a technical term: it has been imported into legal proceedings from the exchange, and not from law treatises. When payment is pleaded as a defence, the defendant must prove the payment of money, or something accepted in its stead, made to the plaintiff or to some person authorized in his behalf to receive it; 2 Greenl. Ev. 509.

Payment, in its most general acceptation, is the accomplishment of every obligation, whether it consists in giving or in doing: *solutio est præstatio ejus quod in obligatione est.*

It follows, therefore, that every act which, while it extinguishes the obligation, has also for its object the release of the debtor and his exemption from liability, is not payment. Payment is doing precisely what the payer has agreed to do. *Solvere dicitur cum qui fecit quod facere promisit.*

However, practically, the name of payment is often given to methods of release which are not accompanied by the performance of the thing promised. *Restrinximus solutiones ad compensationem, ad novationem, ad delegationem, et ad numerationem.*

In a more restricted sense, payment is the discharge in money of a sum due. *Numeratio est nummariæ solutio.* 5 Massé, *Droit commerciel* 229. That a payment may extinguish a debt, it must be made by a person who has a right to make it, to a person who is entitled to receive it, in something proper to be received both as to kind and quality, and at the appointed place and time.

In the civil law, it is said, where payment is something to be done, it must be done by the debtor himself. If I hire a mechanic to build a steam-engine for me, he cannot against my will substitute in his stead another workman. Where it is something to be given, the general rule is that it can be paid by any one, whether a co-obliger, or surety, or even a third person who has no interest; except that in this last case subrogation will prevent the extinction of the debt as to the debtor, unless the payer at the time of payment act in the name of the debtor, or in his own name to release the debtor. See SUBROGATION.

*What constitutes payment.* According to Comyns, payment by merchants must be made in money or by bill; Com. Dig. *Merchant* (F).

It is now the law that payment must be made in money, unless the obligation is, by the terms of the instrument creating it, to be discharged by other means. In the United States, congress has, by the constitution, power to decide what shall be a legal tender; that is, in what form the creditor may demand his payment or must receive it if offered: and congress has determined this by statutes. The same power is exercised by the government of all civilized countries. As to the medium of payment in the United States, see LEGAL TENDER.

In England, Bank of England notes are legal tender. But the creditors may waive this right, and anything which he has accepted as satisfaction for the debt will be considered as payment. What the parties agree shall constitute payment, the law will adjudge to be payment; 115 Ind. 525.

A debt contracted in a foreign country is payable in the currency of that country, and therefore, where the creditor sues in the United States, he is entitled to recover such sum in the money of the United States as equals the debt in the foreign country where it was payable; 34 Pac. Rep. (Cal.) 73. Where rent is payable in coin, its value is to be estimated at the market price of the coin at the time and place of payment; 152 Ill. 207. See GOLD.

Upon a plea of payment, the defendant may prove a discharge in bank-notes, negotiable notes of individuals, or a debt already due from the payee, delivered and accepted or discounted as payment; Phil. Ev. Cowen & H. ed. n. 387. Bank-notes, in conformity to usage and common understanding, are regarded as cash; 1 Burr. 452; 9 Johns. 120; 6 Md. 37; unless objected to; 1 Metc. Mass. 356; 8 Ohio 169; 10 Me. 475; 2 Cr. & J. 16, n.; 5 Yerg. 199; 3 Humphr. 162; 6 Ala. N. S. 226. Treasury notes are not cash; 3 Conn. 534. Giving a check is not considered as payment; the holder may treat it as a nullity if he derives no benefit from it, provided he has not been guilty of negligence so as to cause injury to the drawer; 2 B. & P. 518; 4 Ad. & E. 952; 4 Johns. 296; 30 N. H. 256; 78 Cal. 15. See 17 R. I. 746; 8 Misc. Rep. 535; 4 Tex. Civ. App. 535; 39 Minn. 340; 101 N. C. 589; 59 Mo. App. 610. But see 14 How. 240. Giving a check is a conditional payment, and the debt is discharged only when the check is paid, unless it was agreed that the check should be received in satisfaction of the debt; 76 Hun 194.

Payment in forged bills is generally a nullity, both in England and this country; 10 Wheat. 333; 2 Johns. 455; 6 Hill, N. Y. 340; 7 Leigh 617; 3 Hawks 568; 4 Gill & J. 463; 11 Ill. 137; 3 Pa. 330; 5 Conn. 71. So also of counterfeit coin; but an agreement to sell goods and accept specific money is good, and payment in these coins is valid even though they be counterfeit; 1 Term 225; 14 S. & R. 51. The forged notes must be returned in a reasonable time, to throw the loss upon the debtor; 7 Leigh 617; 11 Ill. 137. Payment to a bank in its own notes which are received and afterwards discovered to be forged is a good payment; 2 Parsons, Contr. *622, n. A forged check received as cash and passed to the credit of the customer is good payment; 4 Dall. 234; 10 Vt. 141. Payment in bills of an insolvent bank, where both parties were innocent, has been held no payment; 7 Term 64; 13 Wend. 101; 11 Vt. 576; 9 N. H. 365; 22 Me. 85. On the other hand, it has been held good payment in 1 W. & S. 92; 6 Mass. 185; 12 Ala. 280; 8 Yerg. 175. See 121 U. S. 27. The point is still unsettled, and it is said to be a question of intention rather than of law; Story, Pr. Notes 125*, 477*, 641. The payment of bonds, secured by a

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mortgage, made in Confederate money during the Civil War is held to have been received in good faith, and if accepted and acquiesced in for a long time, a court of equity will not interfere; 145 U. S. 214.

If a bill of exchange or promissory note be given to a creditor and accepted as payment, it shall be a good payment; Benj. Sales 726; Com. Dig. *Merchant* (F); 30 N. H. 540; 27 Ala. N. S. 254; 16 Ill. 161; 2 Du. 133; 14 Ark. 267; 4 Rich. 600; 34 Me. 324. But regularly a bill of exchange or note given to a creditor shall not be a discharge of the debt till payment of the bill, unless so accepted; 1 Salk. 124.

If the debtor gives his own promissory note, it is held in England and the United States generally not to be payment, unless it be shown that it was so intended; 10 Pet. 567; 4 Mas. 336; 27 N. H. 244; 15 Johns. 247; 9 Conn. 23; 26 E. L. & E. 56.

And if payment be made in the note of a factor or agent employed to purchase goods, or intrusted with the money to be paid for them, if the note be received as payment it will be good in favor of the principal; 1 B. & Ald. 14; 7 B. & C. 17; but not if received conditionally; and this is a question of fact for the jury; 6 Cow. 181; 10 Wend. 271.

It is said that an agreement to receive the debtor's own note in payment must be expressed; 1 Cow. 359; 1 Wash. C. C. 328; 47 Minn. 207; 7 Ind. App. 1; and when so expressed it extinguishes the debt; 5 Wend. 85; 49 Ark. 508; 77 Ga. 463; but if such be not the express agreement of the parties, it only operates to extend the period of the payment of the debt; 131 U. S. 287. Whether there was such an agreement is a question for the jury; 9 Johns. 310; 131 U. S. 287. Acceptance of an indorsed note of a debtor in payment for goods sold, merges and extinguishes the original debt; 6 Misc. Rep. 77. See 115 Ind. 512. But the giving of a void note for an indebtedness does not pay it; 29 Atl. Rep. (N. H.) 406.

A bill of exchange drawn on a third person and accepted discharges the debt as to the drawer; 10 Mod. 37; and in an action to recover the price of goods, in England, payment by a bill not dishonored has been held a good defence; 4 Esp. Cas. 46; 1 M. & M. 28; 4 Bingh. 454; 5 Maule & S. 62.

Retaining a draft on a third party an unreasonable length of time will operate as payment if loss be occasioned thereby; 13 S. & R. 318; 2 Wash. C. C. 191; Ans. Contr. 359. The receipt of a draft, in the absence of an express agreement, does not constitute a payment of the debt for which the draft is drawn; 92 Ga. 511. See 62 Hun 376.

In the sale of a chattel, if the note of a third person be accepted for the price, it is good payment; 3 Cow. 272; 1 D. & B. 291. Not so, however, if the note be the promise of one of the partners in payment of a partnership debt; 4 Dev. 91, 460.

In Maine and Massachusetts, the presumption where a negotiable note is taken, whether it be the debtor's promise or that of a third person, is that it is intended as payment; 6 Mass. 143; 8 Me. 298; 37 *id.* 419. The fact that a note was usurious and void was allowed to overcome this presumption; 11 Mass. 361. Generally, the question will depend upon the fact whether the payment was to have been made in notes or the receiving them was a mere accommodation to the purchaser; 17 Mass. 1. And the presumption never attaches where non-negotiable notes are given; 15 Me. 340.

Payment may be made through the intervention of a third party who acts as the agent of both parties: as, for example, a stakeholder. If the money be deposited with him to abide the event of a legal wager, neither party can claim it until the wager is determined, and then he is bound to pay it to the winner; 4 Campb. 37. If the wager is illegal, the depositor may reclaim the money at any time before it is paid over; 8 B. & C. 221; 29 E. L. & E. 424. And at any time after notice given in such case he may hold the stakeholder responsible, even though he may have paid it over; see 2 Pars. Contr. 138.

An auctioneer is often a stake-holder, as in case of money deposited to be made over to the vender if a good title is made out. In such case the purchaser cannot reclaim except on default in receiving a clear title. But if the contract has been rescinded by the parties there need be no notice to the stake-holder in case of a failure to perform the condition; 2 M. & W. 244; 1 M. & R. 614.

A payment of a debt by a stranger without the debtor's request, if accepted as such by the creditor, discharges the debt so far as the creditor is concerned, and also as to the debtor, if he ratify it; 38 W. Va. 390.

A transfer of funds, called by the civil-law phrase a payment by delegation, is payment only when completely effected; 2 Pars. Contr. 137; and an actual transfer of claim or credit assented to by all the parties is a good payment; 2 *id.*; 5 B. & Ald. 228; 7 N. H. 345, 397; 17 Mass. 400. This seems to be very similar to payment by drawing and acceptance of a bill of exchange.

Where a purchaser contracts to pay a certain amount in printing, the seller cannot enforce the collection of such amount in cash, as a profit presumably attaches to the printing; 7 Wash. 316: unless, of course, the party declines to pay in printing.

*Foreclosure of a mortgage* given to secure a debt operates as payment made when the foreclosure is complete; but if the property mortgaged does not produce a sum equal in value to the amount of the debt then due, it is payment *pro tanto* only; 2 Greenl. Ev. § 324; 3 Mass. 562; 2 Gall. 152; 3 Mass. 474; 10 Pick. 396; 11 Wend. 106. A transfer of a worthless mortgage in payment of a debt, does not discharge the debt where neither party at the time of the transfer knew that the mortgage was

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worthless; 75 Hun 445. A *legacy* also is payment, if the intention of the testator that it should be so considered can be shown, and if the debt was liquidated at the death of the testator; 1 Esp. 187; 12 Mass. 391; 5 Cow. 368; 61 Vt. 110. See LEGACY.

When money is sent by letter, even though the money is lost, it is good payment, and the debtor is discharged, if he was expressly authorized or directed by the creditor so to send it, or if such authority can be presumed from the course of trade; Benj. Sales 727; 11 M. & W. 233; and in the case of an insurance premium, such premium is paid when the letter containing it is deposited in the postoffice, addressed to the company; 77 Hun 556. But, even if the authority be given or inferred, at least ordinary diligence must be used by the debtor to have the money safely conveyed. See 3 Mass. 249; Ry. & M. 149; 1 Exch. 477.

Payment must be of the whole sum; and even where a receipt in full has been given for a payment of part of an ascertained sum, it has been held not to be an extinction of the debt; 5 Co. 117; 2 B. & C. 477; 3 N. H. 518; 11 Vt. 60; 37 Me. 361; 10 Ad. & E. 121; 4 Gill & J. 305; 9 Johns. 333; 11 How. 100.

But payment of part may be left to the jury as evidence that the whole has been paid; 5 Cra. 11; 3 N. H. 518; and payment of a part at a different time; 2 Metc. Mass. 283; or place; 3 Hawks 580; or in any way more beneficial to the creditor than that prescribed by the contract, is good; 15 M. & W. 23. Giving a chattel, though of less value than the debt, is a discharge; Dy. 75 *a*; 2 Litt. 49; 3 Barb. Ch. 621; or rendering certain services, with the consent of the creditor; 5 Day 359; or assigning certain property; 5 Johns. 386; 13 Mass. 424. So if a stranger pay a part, or give his note for a part, and this is accepted, it is a good payment of the debt; 4 B. & C. 500; 13 Ala. N. S. 353; 14 Wend. 116; 2 Metc. Mass. 283; 53 Minn. 88. And where a creditor by process of law compels the payment of a part of his claim, by a suit for that part only, this is generally a discharge of the whole: 11 S. & R. 78; 16 Johns. 121. See ACCORD.

The payment must have been accepted knowingly. Many instances are given in the older writers to illustrate acceptance; thus if the money is counted out, and the payee takes a part and puts it in a bag, this is a good payment, and if any be lost it is the payee's loss; 5 Mod. 398. Where A paid B £100 in redemption of a mortgage, and B bade C put it in his closet, and C did so, and A demanded his papers, which B refused to deliver, and A demanded back his money, and B directed C to give it to him, and C did, it was held to be a payment of the mortgage; Viner, Abr. *Payment* (E). When interest coupons on railroad bonds have been presented and paid at the usual place of payment, with money furnished by a third party, a private arrangement between such third party and the mortgagor that the transaction shall constitute a purchase of the coupons and not payment, will not be enforced against the bondholders; 138 Pa. 494. One who lends money to a company to take up its coupons, is not entitled to be paid out of funds in the hands of the receiver; 12 Bush 673.

Generally, there can be but little doubt as to acceptance or non-acceptance, and the question is one of fact for the jury to determine under the circumstances of each particular case. Of course where notes or bank-bills are given in payment of a debt, the evidence that they were so given is to be the same as evidence of any other fact relating to payment.

*Evidence of payment.* Evidence that any thing has been done and accepted as payment is evidence of payment.

A *receipt* is *prima facie* evidence of payment; but a receipt acknowledging the payment of ten dollars and acquitting and releasing from all obligations would be a receipt for ten dollars only; 5 B. & Ald. 696; 18 Pick. 325; 1 Edw. Ch. 341. And a receipt is only *prima facie* evidence of payment; 2 Taunt. 241; 7 Cow. 334; 4 Ohio 346; 18 Colo. 538. For cases explaining this rule, see, also, 2 Mas. 141; 11 Mass. 27; 9 Johns. 310; 4 H. & M'H. 219; 96 Ala. 496; 46 Ill. App. 121. And it may be shown that the particular sum stated in the receipt was not paid, and, also, that no payment has been made; 2 Term 366; 26 N. H. 12; 9 Conn. 401; 10 Humphr. 188; 13 Pa. 46. As against strangers thereto, a receipt is incompetent evidence of the payment thereby acknowledged; 41 Neb. 93. See RECEIPT.

Payment may be presumed by the jury in the absence of direct evidence; thus, possession by the debtor of a security after the day of payment, which security is usually given up upon payment of the debt, is *prima facie* evidence of payment by the debtor; 1 Stark. 374; 9 S. & R. 385; 83 Tex. 385; 36 Neb. 741. See 37 Ill. App. 564.

If an acceptor produce a bill of exchange, this is said to afford in England no presumption of payment unless it is shown to have been in circulation after he accepted it; 2 Campb. 439. See, also, 14 M. & W. 379. But in the United States such possession is *prima facie* evidence of payment; 7 S. & R. 116; 4 Johns. 296; 2 Pick. 204. Payment is conclusively presumed from lapse of time. After twenty years' non-demand, unexplained, the court will presume a payment without the aid of a jury; 1 Campb. 27; 14 S. & R. 15; 6 Cow. 401; 2 Cra. 180; 112 Mo. 300; 152 Pa. 102; 65 Fed. Rep. 910. Facts which destroy the reason of this rule may rebut the presumption; 1 Pick. 60; 2 La. 481; 84 Me. 107; 23 Or. 313. See 34 S. C. 289; 50 Ark. 485; 73 Hun 177. And a jury may infer payment from a shorter lapse of time, especially if there be attendant circumstances favoring the presumption; 7 S. & R. 410. As to presumptions against the existence of the

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debt, see 5 Barb. 63. The statute of limitations does not apply to an action by a legatee to collect a legacy which is a charge on land, and no presumption of payment arises from the lapse of twenty years; 82 Wis. 393. Where an indebtedness is shown, it is presumed to remain unpaid until the contrary is shown; 56 Mo. App. 535.

In a suit to enforce a vendor's lien the acknowledgment of payment contained in the deed is only *prima facie* evidence of payment; 150 Ill.212.

A presumption may rise from the course of dealing between the parties, or the regular course of trade; Tayl. Ev. 194. Thus, after two years it was presumed that a workman had been paid, as it was shown that the employer paid his workmen every Saturday night, and this man had been seen waiting among others; 1 Esp. 296. See, also, 3 Camp. 10.

A receipt for the last year's or quarter's rent is *prima facie* evidence of the payment of all the rents previously due; 2 Pick. 204. If the last instalment on a bond is paid in due form, it is evidence that the others have been paid; if paid in a different form, that the parties are acting under a new agreement.

Where receipts had been regularly given for the same amount, but for a sum smaller than was due by the agreement, it was held evidence of full payment; 4 Mart. La. 698.

*Who may make payment.* Payment may be made by the primary debtor, and by other persons from whom the creditor has a right to demand it.

An agent may make payment for his principal. An attorney may discharge the debt against his client; 5 Bingh. 506. One of any number of joint and several obligors, or one of several joint obligors, may discharge the debt; Viner, Abr. *Payment* (B). Payment may be made by a third person, a stranger to the contract.

It may be stated, generally, that any act done by any person in discharge of the debt, if accepted by the creditor, will operate as payment. In the civil law there are many exceptions to this rule, introduced by the operation of the principle of subrogation. Most of these have no application in the common law, but have been adopted, in some instances, as a part of the law merchant. See SUBROGATION; CONTRIBUTION.

*To whom payment may be made.* Payment is to be made to the creditor. But it may be made to an authorized agent. And if made in the ordinary course of business, without notice requiring the payment to be made to himself, it is binding upon the principal; 6 M. & G. 166; 4 B. & Ald. 395; 41 La. Ann. 1. Payment to a third person by appointment of the principal will be substantially payment to the principal; 1 Phill. Ev. 200. Payment to an agent who made the contract with the payee (without prohibition) is payment to the principal; 16 Johns. 86; 2 Gall. 565; 10 B. & C. 755. But payment may be made to the principal after authority given to an agent to receive; 6 Maule & S. 156. Payments made to an agent after the death of the principal do not discharge the debtor's obligation, even if made in ignorance of the principal's death; 150 U. S. 520. Payment to a broker or factor who sells for a principal not named is good; 11 East 36. Payment to an agent, when he is known to be such, will be good, if made upon the terms authorized; 11 East 36; if there be no notice not to pay to him; 3 B. & P. 485; 15 East 65; and even after notice, if the factor had a lien on the money when paid; 5 B. & Ald. 27. If the broker sells goods as his own, payment is good though the mode varies from that agreed on; 1 Maule & S. 147; 2 C. & P. 49. Bankers are not agents of the owner to receive payment of the notes by reason simply of the fact that the notes were made payable at their bank; and moneys left with them to be used as payment are not thereby the moneys of the owner of the notes; 134 U. S. 68.

Payment to an attorney is as effectual as payment to the principal himself; 2 Pars. Contr. 727; 102 Mich. 483. So, also, to a solicitor in chancery after a decree: 2 Ch. Cas. 38. The attorney of record may give a receipt and discharge the judgment; 1 Call 147; 1 Coxe 214; 1 Pick. 347; 10 Johns. 220; 2 Bibb 382; if made within one year; 1 Me. 257. Not so of an agent appointed by the attorney to collect the debt; 2 Dougl. 623. Payment by an officer to an attorney whose power has been revoked before the officer received the execution did not discharge the officer; 13 Mass. 465 See, also, 1 Des. Ch. 461. Payment to one of two co-partners discharges the debt; 8 Wend. 542; 2 Blackf. 371; 1 Ill. 107; 6 Maule & S. 156; 1 Wash. C. C. 77; even after dissolution: 4 C. & P. 108. And see 7 N. H. 568. So payment to one of two joint creditors is good, though they are not partners; 4 J. J. Marsh. 367. But payment by a banker to one of several joint depositors without the assent of the others was held a void payment; 1 M. & R. 145; 4 E. L. & E. 342.

Payment to the wife of the creditor is not a discharge of the debt, unless she is expressly or impliedly his agent; 2 Scott N. R. 372; 2 Freem. 178; 22 Me. 335; as to payment to the husband, see 66 Hun 633. One who purchases the property of a married woman through the agency of her husband, must pay for it precisely as if he had purchased through an agent who sustained no such relation; 116 Ind. 164. An auctioneer employed to sell real estate has no authority to receive the purchase-money by virtue of that appointment merely; 1 M. & R. 326. Usually, the terms of sale authorize him to receive the purchase-money; 5 M. & W. 645. Payment was made to a person sitting in the creditor's counting-room and apparently doing his business, and it was held good; 1 M. & M. 200; 5 Taunt. 307; but payment to an apprentice so situated was held not to be good;

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2 Cr. & M. 304. Payment to a person other than the legal owner of the claim must be shown to have been made to one entitled to receive the money; 114 N. Y. 481. Generally, payment to the agent must be made in money, to bind the principal; 10 B. & C. 760; 61 Vt. 534; 40 Kan. 395. Power to receive money does not authorize an agent to commute; 1 Wash. C. C. 454; 1 Pick. 347; nor to submit to arbitration; 5 How. 891. See, also, Story, Ag. § 99.

An agent authorized to receive money cannot bind his principal by receiving goods; 4 C. & P. 501; or a note; 5 M. & W. 645; but a subsequent ratification would remedy any such departure from authority; and it is said that slight acts of acquiescence will be deemed ratification. Payment to one of several joint creditors of his part will not alter the nature of the debt so as to enable the others to sue separately; 4 Tyrwh. 488. Payment to one of several executors has been held sufficient; 3 Atk. 695. Payment to a trustee generally concludes the *cestui que trust* in law; 5 B. & Ad. 96. Payment of a debt to a marshal or sheriff having custody of the person of the debtor does not satisfy the plaintiff; 4 B. & C. 32. Interest may be paid to a scrivener holding the mortgage deed or bond, and also the principal, if he deliver up the bond; otherwise of a mortgage-deed as to the principal, for there must be a re-conveyance; 1 Salk. 157. It would seem, then, that in those states where no re-conveyance is needed, a payment of the principal to a person holding the security would be good, at least *prima facie*.

Subsequent ratification of the agent's acts is equivalent to precedent authority to receive money; Pothier, Obl. n. 528.

*When to be made.* Payment must be made at the exact time agreed upon. This rule is held very strictly in law; but in equity payment will be allowed at a time subsequent, generally when damages can be estimated and allowed by way of interest; 8 East 208; 3 Pick. 414; 5 *id.* 106, 187. Where payment is to be made at a future day, of course nothing can be demanded till the time of payment, and, if there be a condition precedent to the liability, not until the condition has been performed. And where goods had been sold "at six or nine months' credit," the debtor was allowed the option; 5 Taunt. 338.

Where no time of payment is specified, the money is to be paid immediately on demand; 1 Pet. 455; 4 Rand. 346. When payment is to be made at a certain time, it may be made at a different time if the plaintiff will accept; Viner, Abr. *Payment* (H); and it seems that the debtor cannot compel the creditor to receive payment before the debt is due. The time of payment of a pecuniary obligation is a material provision in the contract, and a creditor cannot be compelled by statute to accept payment in advance; 111 N. Y. 1.

*Where to be made.* Payment must be made at the place agreed upon, unless both the parties consent to a change. If no place of payment is mentioned, the payer must seek out the payee; 2 Pars. Part. 751; Moore, P. C. 274; Shepp. Touchst. 378; 2 M. & W. 223; 20 E. L. & E. 498. Refusal to receive payment offered at a place other than the stipulated place of payment, except upon certain conditions, is an implied waiver of the right to have the payment made in the place agreed on; 37 Fed. Rep. 286. Where there is a covenant for the payment of rent, the tenant must seek the landlord; 8 Exch. 689. A lessor must demand the rent upon the land on the day when it becomes due at a convenient time before sunset, in order to re-enter for breach of condition upon non-payment; 47 Conn. 366; 63 Ind. 415. It has been held that a licensor of a patent must apply to the licensee for an account and payment; 6 Fed. Rep. 493.

So, too, the creditor is entitled to call for payment of the whole of his claim at one time, unless the parties have stipulated for payment otherwise.

Questions often arise in regard to the payment of debts and legacies by executors and administrators. These questions are generally settled by statute regulations.

As a general rule, debts are to be paid first, then specific legacies. The personal property is made liable for the testator's debts, and, after that is exhausted, the real estate, under restrictions varying in the different states.

See DESCENT AND DISTRIBUTION; EXECUTOR; ADMINISTRATOR; LEGACY.

In the payment of mortgages, if the mortgage was made by the deceased, the personal estate is liable to discharge the mortgage debts; 2 Cruise, Dig. 147. But where the deceased acquired the land subject to the mortgage, the mortgaged estate must pay the debt; 3 Johns. Ch. 252; 2 Bro. C. C. 57; 24 Pa. 203. See MORTGAGE.

*Effect of Payment.* The effect of payment is—*first*, to discharge the obligation; and it may happen that one payment will discharge several obligations by means of a transfer of the evidence of obligations; Pothier, Obl. 554, n. Payment by one who is primarily liable to one entitled to collect the debt is an extinguishment of the debt and all liability thereunder, and however held, transferred, or assigned, it is ever afterwards a mere nullity; 84 Va. 806. *Second*, payment does not prevent a recovery back when made under mistake of fact. The general rule is that a mistake or ignorance of law furnishes no ground to reclaim money paid voluntarily under a claim of right; 2 Kent 491; 2 Greenl. Ev. § 123; 44 Mo. App. 249; 27 Ct. Cls. 547; 29 *id.* 115; 99 Cal. 607. But acts done under a mistake or ignorance of an essential fact are voidable and relievable both in law and equity; Poll. Cont. 439; 34 Fla. 471. Laws of a foreign country are matters of fact; Story, Const. 5th ed. § 1304; 9 Pick. 112; and the several United States are foreign to each other in this respect. See CONFLICT OF LAWS; FOREIGN LAWS. In Kentucky and

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Connecticut there is a power of recovery equally in cases of mistake of law and of fact; 19 Conn. 548; 3 B. Monr. 510. In Ohio it may be remedied in equity; 11 Ohio 223. In New York a distinction is taken between ignorance of the law and mistakes of law, giving relief in the latter case; 18 Wend. 422; 2 Barb. Ch. 508. In England, money paid under a mistake of law cannot be recovered back; 4 Ad. & E. 858. The payment of a note for the purchase price of land, after the discovery of a mistake in computing the price, is no bar to an action to recover an overpayment resulting from such mistake; 158 Mass. 352. See IGNORANCE; MISTAKE. A payment under protest is nevertheless voluntary, unless there was duress or coercion; 3 N. Dak. 160; 136 N. Y. 363. *Third*, part payment of a note will have the effect of waiver of notice of protest. *Fourth*, payment of part of the debt will bar the application of the Statute of Limitations as to the residue; 22 N. H. 219; 6 Md. 201; 8 Mass. 134; 28 E. L. & E. 454; even though made in goods and chattels; 4 Ad. & E. 71. But it must be shown conclusively that the payment was made as part of a larger debt; 6 M. & W. 824; 20 Miss. 663; 9 Ark. 455; 11 Barb. 554; 24 Vt. 216. See, also, 3 Pars. Contr. 8th ed., 74; EARNEST; PROTEST, PAYMENT UNDER.

*The Burden of Proof*, on a plea of payment, is on the party pleading it; 7 Misc. Rep. 668; 91 Ga. 791; 33 Neb. 519; 1 Mo. App. Rep. 295. As to *appropriation of payments*, see that title. One English and one American case reported since its publication may be here cited as stating the general principles. When a debtor pays money on account and makes no appropriation, the creditor has the right to make it and may exercise it up to the last moment by action or otherwise; [1897] A. C. 286, reversing the court of appeal. The right of appropriation of payments belongs exclusively to the debtor and creditor and no third party can demand a change in appropriations assented to by them; 10 U. S. App. 415.

See NOVATION.

**In Pleading.** The name of a plea by which the defendant alleges that he has paid the debt claimed in the declaration; this plea must conclude to the country. See Chitty, Plead. In Pennsylvania a plea of payment, with leave, etc., is in common use; under it a defendant may give in evidence anything tending to show that, of right, the plaintiff cannot recover.

**PAYMENT INTO COURT. In Practice.** Depositing a sum of money with the proper officer of the court by the defendant in a suit, for the benefit of the plaintiff and in answer to his claim.

It may be made in some states under statutory provisions; 18 Ala. 293; 7 Ill. 671; 1 Barb. 21; 5 Harring. 17; 24 Ga. 211; 16 Tex. 461; 11 Ind. 532; and see 3 E. L. & E. 185; and in most by a rule of court made for the purpose; 2 Bail. 28; 7 Ired. 100; 1 Swan 92; in which case notice of an intention to apply must, in general, have been previously given.

The *effect* is to divest the defendant of all right to withdraw the money; 1 Wend. 191; 3 Watts 248; except by leave of court; 1 Coxe 298; and to admit conclusively every fact which the plaintiff would be obliged to prove in order to recover it; 1 B. & C. 3; 6 M. & W. 9; 1 Dougl. Mich. 330; 24 Vt. 140; 66 Pa. 27; as, that the amount tendered is *due;* 1 Campb. 558; 5 Mass. 365; 2 Wend. 431; for the cause laid in the declaration; 5 Bingh. 28, 32; 2 B. & P. 550; 5 Pick. 285; to the plaintiff in the character in which he sues; 2 Campb. 441; the jurisdiction of the court; 5 Esp. 19; that the *contract* was made; 3 Campb. 52; and broken as alleged; 1 B. & C. 3; but only in reference to the amount paid in; 7 Johns. 315; 3 E. L. & E. 548; and nothing beyond such facts; 1 Greenl. Ev. § 206.

Generally, it relieves the defendant from the payment of further costs unless judgment is recovered for a sum larger than that paid in; 1 Wash. 10; 3 Wend. 326; 2 Miles 65; 2 Rich. 64; 24 Vt. 140; 32 Fed. Rep. 816. As to the capacity in which the officer receiving the money acts, see 1 Coxe 298; 2 Bail. 28; 17 Ala. 293.

Payment of money into court, when the declaration is on a special contract, is an acknowledgment of the right of action to the amount of the sum brought in, and no more; 1 Tidd's Pr. 624. It does not waive the benefit of a defence, though that be to the whole claim; 66 Pa. 27; 100 U. S. 673. But no defence can deprive the plaintiff of the right to the money in court. See TENDER.

**PAYS.** Country. Trial *per pays*, trial by jury (the country). See IN PAIS; PAIS.

**PEACE.** The concord or final agreement in a fine of land. 18 Edw. I. *modus levandi finis.*

The tranquillity enjoyed by a political society, internally by the good order which reigns among its members, and externally by the good understanding it has with all other nations. Applied to the internal regulations of a nation, peace imports, in a technical sense, not merely a state of repose and security as opposed to one of violence or warfare, but likewise a state of public order and decorum; Hamm. N. P. 139; 12 Mod. 566; 86 Mich. 175.

The term peace in English and American law is used in a general way to express that condition which is violated by the commission of crime. In modern times it is expressed in England by the phrase *king's peace*, and in this country *peace of the state* or *commonwealth*. But originally the phrase king's peace had no such broad meaning, but was used only in connection with crimes committed against persons, or in places, or at times and seasons, which were under the special protection of the king. See PAX REGIS. "Breach of the king's peace was an act of personal disobedience, and a much graver matter than an ordinary breach of public order; it made the wrong-doer the king's enemy. The notion of the king's peace appears to have had two distinct origins. These were, first, the special sanctity of the king's house, which may be regarded as differing only in degree from that which

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Germanic usage attached everywhere to the homestead of a free man; and, secondly, the special protection of the king's attendants and servants, and other persons whom he thought fit to place on the same footing. . . . The rapid extension of the king's peace till it becomes, after the Norman Conquest, the normal and general safeguard of public order, seems peculiarly English. On the continent the king appears to have been recognized as protector of the general peace, besides having power to grant special protection or peace of a higher order, from a much earlier time." 1 Poll. & Maitl. 22.

There was the peace of the church, both that of the parish and the minster; so there was the peace of the sheriff, and of each lord, and indeed of every householder, for the breach of which atonement could be exacted. In writing of the criminal law of England in the twelfth century it is said, "The time has not yet come when the king's peace will be eternal and cover the whole land. Still we have here an elastic notion; if the king can bestow his peace on a privileged person by a writ of protection, can he not put all men under his peace by proclamation." See 2 Poll. & Maitl. 451-2. The phrase peace of the king was in that period used to express the idea that the crime which was alleged to be in breach of the "peace of God and of our lord the king," was one of those reserved as specially punishable in behalf of the king himself. These crimes were the original pleas of the crown but the king's peace by an easy process extended itself "until it had become an all-embracing atmosphere;" *id.* 462. That general peace which is now denominated the peace of the king or of the state, as the case may be, was in the early days protected only by the hundred court and the ealdorman. It is possible that mediæval usage which applied to an inferior court the phrase the peace of the lord who held it, dates from the earliest period of the administration of justice. There is said to be some evidence that in the tenth century the phrase *peace of the witan*, was used, but no authority for the use of the term *folk-peace*; 1 Poll. & Maitl. 23. See also Pollock, The King's Peace, Oxford Lectures; Inderwick, The King's Peace.

The Lord Chancellor and the judges of the Queen's Bench Divison of the High Court are conservators of the peace at common law; they have all the common-law powers for the preservation of the peace which are possessed by other conservators, such as sheriffs and justices of the peace; they may command all men, whether private citizens, soldiers, or constables, to assist in the suppression of unlawful assemblies, and may arrest peace-breakers, by command, on view of the breach, or by their warrants.

See, generally, Bacon, Abr. *Prerogative* (D 4); Hale, Hist. Comm. Pleas 160; 3 Taunt. 14; 1 B. & Ald. 227; Peake 89; 1 Esp. 294; Harrison, Dig. *Officer* (V 4); 2 Benth. Ev. 319, note; 10 Ore. 139. GOOD BEHAVIOR; SURETY OF THE PEACE; ARTICLES OF THE PEACE; BREACH OF THE PEACE; CONSERVATOR OF THE PEACE; TREATY OF PEACE.

**PEACE OF GOD.** The words, "in the peace of God and the said commonwealth, then and there being," as used in indictments for homicide and in the definition of murder, mean merely that it is not murder to kill an alien enemy in time of war, provided such killing occur in the actual exercise of war; Whart. Cr. Law § 310; 13 Minn. 341.

**PEACE OF GOD AND THE CHURCH.** The freedom from suits at law between the terms. Spelman, Gloss.; Jacob, Law Dict. See PEACE.

**PEACEABLE ASSEMBLY.** See ASSEMBLY; LIBERTY OF SPEECH.

**PECK.** A measure of capacity, equal to two gallons. See MEASURE.

**PECULATION.** The unlawful appropriation by a depository of public funds, of the property of the government intrusted to his care, to his own use or that of others. Domat, *Suppl. au Droit Public*, l. 3, tit. 5. See EMBEZZLEMENT.

**PECULIARS. In Ecclesiastical Law.** A parish in England which has jurisdiction of ecclesiastical matters within itself and independent of the ordinary.

They may be either—

*Royal*, which includes the sovereign's free chapels;

*Of the archbishops*, excluding the jurisdiction of the bishops and archdeacons;

*Of the bishops*, excluding the jurisdiction of the bishop of the diocese in which they are situated;

*Of the bishops* in their own diocese, excluding archdeaconal jurisdiction;

*Of deans, deans and chapters, prebendaries*, and the like, excluding the bishop's jurisdiction in consequence of ancient compositions.

See 1 Phill. Eccl. 202, n. 245; Skinn. 589; 3 Bla. Com. 65; COURT OF PECULIARS.

**PECULIUM** (Lat.). **In Civil Law.** Private property.

The most ancient kind of *peculium* was the *peculium profectitium* of the Roman law, which signified that portion of the property acquired by a son or slave which the father or master allowed him, to be managed as he saw fit. In modern civil law there are other kinds of *peculium*, viz.: *peculium castrense*, which includes all movables given to a son by relatives and friends on his going on a campaign, all the presents of comrades, and his military pay and the things bought with it: *peculium quasi-castrense*, which includes all acquired by a son by performing the duties of a public or spiritual office or of an advocate, and also gifts from the reigning prince; *peculium adventitium*, which includes the property of a son's mother and relatives on that side of the house, and all which comes to him on a second marriage of his parents, and, in general, all his acquisitions which do not come from his father's property and do not come under *castrense* or *quasi-castrense peculium*.

The *peculium profectitium* remains the property of the father. The *peculium castrense* and *quasi-castrense* are entirely the property of the son. The *peculium adventitium* belongs to the son; but he cannot alien it nor dispose of it by will; nor can the father, unless under peculiar circumstances, alien it without consent of the son. Mackeldey, Civ. Law, § 557; Inst 2. 9. 1; Dig. 15. 1. 5. 3; Pothier, ad Pand. lib. 50, tit. 17, c. 2, art. 3.

A master is not entitled to the extraordinary earnings of his apprentices which do not interfere with his services so as to affect the master's profits. An apprentice was therefore decreed to be entitled to salvage, in opposition to his master's claim for it. 2 Cra. 270.

**PECUNIA** (Lat.). **In Civil Law.** Property, real or personal, corporeal or incorporeal. Things in general (*omnes res*).

The law of the Twelve Tables said, *uti quisque pater familias legasset super pecunia tutelave rei suæ ita jus esto:* in whatever manner a father of a family may have disposed of his *property* or of the tutorship of his things, let this disposition be law. 1 *Lecons Elém. du Dr. Civ. Rom.* 288. But Paulus, in l. 5, D. *de verb. signif.*, gives it a narrower sense than *res*, which he says means what is not included within patrimony, *pecunia* what is. Vicat, Voc. Jur. In a still narrower sense, it means those things only which have measure, weight, and number, and most usually strictly money. *Id.* The general sense of



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property occurs, also, in the old English law. Leg. Edw. Confess. c. 10.

Flocks were the first riches of the ancients; and it is from *pecus* that the words *pecunia*, *peculium*, *peculatus*, are derived. In old English law *pecunia* often retains the force of *pecus*. So often in Domesday: *pastura ibidem pecuniæ villæ*, *i. e.* pasture for *cattle* of the village. So *vivæ pecuniæ*, live stock. Leg. Edw. Confess. c. 10; Emendat. Willielmi Primi ad Leges Edw. Confess.; Cowell.

**PECUNIA NUMERATA** (Lat.). Money given in payment of a debt.

Properly used of the creditor, who is properly said to *number*, *i. e.* count out, the money to the debtor which he must pay, and improperly of the debtor, who is said to number or count out the money to the creditor, *i. e.* to pay it. Vicat, Voc. Jur.; Calvinus, Lex.

**PECUNIA NON-NUMERATA** (Lat.). Money not paid or numbered.

The *exceptio non-numeratæ pecuniæ* (plea of money not paid) is allowed to the principal or surety by the creditor. Calvinus, Lex.

**PECUNIA TRAJECTITIA** (Lat.). A loan of money which, either itself or in the shape of goods bought with it, is to be carried over the sea, the lender to take the risk from the commencement of the voyage till arrival at the port of destination, and on that account to have higher interest; which interest is not essential to the contract, but, if reserved, is called *fœnus nauticum*. Mackeldey, Civ. Law § 398 *b*. The term *fœnus nauticum* is sometimes applied to the transaction as well as the interest, making it coextensive with *pecunia trajectitia*.

**PECUNIARY.** That which relates to money. A *pecuniary provision* does not apply to a provision in an agreement for alimony specifically dividing personal property of the parties; 61 Me. 395. The exemption from registration of annuities without regard to *pecuniary consideration* was held to include the case of a grantee's giving up his business to the grantor; 4 Term 790; 5 *id.* 639. Bank notes; 3 *id.* 554; 1 B. & P. 208; checks; 8 Term 328; and a verbal promise to pay a debt in full; 6 Gray 327; are pecuniary considerations. But the assignment of a leasehold interest is not; 2 B. & B. 702; or a transfer of stock; 3 B. & A. 602; or a surrender of a life interest in a sum of money and of a contingent interest in the corpus; 2 El. & Bl. 374; 2 B. & C. 875.

**PECUNIARY CAUSES.** Causes in ecclesiastical courts where satisfaction is sought for withholding ecclesiastical dues or the doing or neglecting some act connected with the church. 3 Bla. Com. 88. As to what causes are ecclesiastical, see 2 Burn, Eccl. Law 39.

**PECUNIARY LEGACY.** See LEGACY.

**PECUNIARY LOSS.** A loss of money, or of something by which money or something of money value may be acquired. 32 Barb. 33.

**PECUNIARY PROFIT.** An academy is not a corporation for pecuniary profit. 116 Ill. 376.

**PEDAGIUM** (Lat. *pes*, foot). Money paid for passing by foot or horse through any forest or country. Cassan de Coutum. Burgund. p. 118; Rot. Vasc. 22 Edw. III. m. 34.

**PEDAULUS** (Lat. *pes*. foot). **In Civil Law.** A judge who sat at the foot of the tribunal, *i. e.* on the lowest seats, ready to try matters of little moment at command of the prætor. Calvinus, Lex.; Vicat, Voc. Jur.

**PEDDLER.** Persons who travel about the country with merchandise for the purpose of selling it.

An itinerant trader, who carries goods about in order to sell them, and who actually sells them, to purchasers, in contradistinction to a trader who has goods for sale, and sells them, at a fixed place of business. A petty chapman, or other trading person going from town to town, or to other men's houses, and travelling either on foot or with horses, or otherwise, carrying to sell or expose to sale, any goods, wares, or merchandise. 107 Ind. 502; 12 Cush. 493; 63 Hun 123. Any person carrying a wagon, cart, or buggy for the purpose of exhibiting or delivering any wares or merchandise. N. C. Act 1895, c. 116.

An itinerant individual, ordinarily without local habitation or place of business, who travels about the country carrying commodities for sale. 75 Ia. 74.

The distinctive feature has been held not to consist in the *mode* of transportation, though one of the statutory modes is essential to constitute a peddler, but in the fact that the peddler goes from house to house or place to place carrying his merchandise with him and concurrently sells and delivers it; 87 Ala. 144; 140 N. Y. 187. One who, having a place of business in another town, goes about delivering goods at the houses of his customers, in pursuance of orders previously taken, and takes orders for future delivery, is not a peddler; 140 N. Y. 187; 140 Pa. 158; 113 N. C. 681; but one who manufactures and deals in proprietary medicines who, although having a permanent manufactory and residence, yet attends county fairs and publicly recommends his medicines as a cure for certain ailments, is held a peddler; 85 Ia. 21.

The driver of a delivery wagon who takes orders for goods and subsequently delivers them is not a peddler; 55 N. J. L. 522; nor is one who merely delivers goods previously sold by another; 88 Ia. 191; or a canvasser; 135 Ill. 36; or one who exhibits samples of cloth and takes orders for clothing to be made therefrom; 28 Wkly. L. Bul. 107.

But one who goes from house to house with merchandise, selling the same on the instalment plan is held a peddler; 64 N.

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W. Rep. (Mich.) 333; 41 N. E. Rep. (Ind.) 315.

A state may impose a tax upon itinerant peddlers and require them to take out a license to practice their trade; 156 U. S. 296; but it may not discriminate between its own citizens and non-residents; 12 Wall. 418; 103 U. S. 344; 64 N. H. 48; 84 Ga. 754; nor charge a higher price to the latter for a license than it imposes on the former; 64 N. H. 508. See COMMERCE; LICENSE.

**PEDIGREE.** A succession of degrees from the origin: it is the state of the family as far as regards the relationship of the different members, their births, marriages, and deaths. This term is applied to persons or families who trace their origin or descent.

On account of the difficulty of proving in the ordinary manner, by living witnesses, facts which occurred in remote times, *hearsay evidence* has been admitted to prove a pedigree: As declarations of deceased persons who were related by blood or marriage may be given in evidence in matters of pedigree; 117 U. S. 397. See Rawle, Covenants § 17 N. 1; Warv. Abs. of Title 33, 313. See DECLARATION; HEARSAY.

**PEDIS POSITIO** (Lat. a planting or placing of the foot). A term used to denote an actual corporal possession. *Possessio est quasi pedis positio:* possession is as it were a planting of the foot. 3 Co. 42; 8 Johns. per Kent, C. J.; 5 Pa. 303; 2 N. & McC. 343. See PEDIS POSSESSIO.

**PEDIS POSSESSIO** (Lat.). A foothold; an actual possession. To constitute adverse possession, there must be *pedis possessio*, or a substantial inclosure. 2 N. & M'C. 343.

**PEERS** (Lat. *pares*). The vassals of a lord; the freeholders of a neighborhood, before whom livery of seisin was to be made, and before whom, as the jury of the county, trials were had. 2 Bla. Com. 316. These vassals were called *pares curiæ*, which title see. 1 Washb. R. P. 5th ed. *23.

Trial by a man's peers or equals is one of the rights reserved by Magna Charta. 4 Bla. Com. 349.

The nobility of England, though of different ranks, viz., dukes, marquesses, earls, viscounts, and barons, are equal in their privileges of sitting and voting in the house of lords; hence they are called peers of the realm.

They are created by writ summoning them to attend the house of lords by the title intended to be given, or by letters patent directly conferring the dignity. The former is the more ancient way; but the grant by patent is more certain. See Sullivan, Lect. 19 *a*; 1 Wood. Lect. 37.

Peers are tried by other peers in cases of treason, felony, and misprision of the same. In cases of treason, felony, and breach of the peace, they have no privilege from arrest; 1 Sharsw. Bla. Com. 401*, n. 11.

Bishops who sit in parliament are peers; but the word spiritual is generally added; *e. g.* "lords temporal and spiritual." 1 Sharsw. Bla. Com. 401*, n. 12.

The titles of all temporal peers are now hereditary; May, Law of Parl. 14; except certain peers holding judicial office, whose peerage is a life peerage only.

Scotch and Irish peers are not entitled to sit in the lords, but sixteen representative Scotch peers are elected to each parliament, and twenty-eight Irish peers are elected to sit in the lords for life.

A peerage is not transferable, except with consent of parliament; *id.* Succession to the title is destroyed by attainder; see 1 Bla. Com. 412*. When an English peer has been adjudicated a bankrupt, he cannot sit in the house of lords; he loses no other privilege thereby. When the bankruptcy is determined he may resume his seat. If he obtains his discharge with a certificate that bankruptcy was the result of misfortune, the disqualification may be removed. But in the case of Scotch or Irish representative peers in the house of lords, the bankruptcy not determined within a year vacates their seat.

A member of the House of Commons, when he becomes a member of the English peerage, ceases thereby to have a right to sit in the Commons.

As to the trial of peers, see tit. *Lord High Steward*, in 8 Encyc. Laws of Eng.

**PEINE FORTE ET DURE** (L. Fr.). **In English Law.** A punishment formerly inflicted in England on a person who, being arraigned of felony, refused to plead and put himself on his trial, and stubbornly stood mute.

A jury was empanelled to try whether he stood "mute of malice," or "mute by the visitation of God," and if the latter the trial proceeded; but if the former the prisoner was solemnly warned by the judges of the terrible consequences described by Lord Coke, in the trial of Sir Richard Weston in 1615 for the murder of Sir Thomas Overbury, by the words—*overe, frigore, et fame.* Time was given for reflection and often the unfortunate was subjected to entreaties of friends and others, but if he remained obdurate he was adjudged to suffer *peine forte et dure.* The judgment was that he return from whence he came, to a low dungeon into which no light could enter; he was to be laid down, naked, on his back, on the ground, his feet and head and loins covered, his arms and legs drawn apart by cords tied to posts, a sharp stone under his back, and as much weight of iron or stone as he could bear, or more than he could bear, placed on his chest. He was to have the next day three morsels of barley bread, without drink; the next, three draughts, as much each time as he could drink, of the nearest stagnant water to the prison, without bread; and such was to be his diet on alternate days, till he died. This punishment was vulgarly called *pressing*

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*to death;* 2 Reeve, Hist. Eng. Law 134; 4 Bla. Com. 324; Cowell; Britton c. 4. fol. 11*. This punishment as above described dates back to a period between 31 Edw. III. and 8 Hen. IV.; 4 Bla. Com. 324; Year B. 8 Hen. IV. 1. It did not at first include the *pressing*. Originally when asked how he would be tried the accused must choose between a trial "by God" (by ordeal) and "by my country" (by jury). After the former method of trial was abolished about 1215 the other method remained a privilege to be claimed and in those days the idea did not occur to any one of trying a prisoner by jury without his consent. By standing mute a prisoner put the court in difficulty, and at first he was put to death for not consenting to be tried "according to the law and custom of the realm." This was thought too severe and in the Parliament of Westminster under Edward I. there was provided for notorious felons confinement in *prison torte et dure;* which included all possible harsh features except death. Then to conquer obduracy starvation was resorted to; but this being too slow, under Henry IV. the *peine* was substituted for the *prison*. It continued until 1772 although occasionally something stronger than exhortation was resorted to, as tying up by the thumbs in the presence of the court, at the Old Bailey in 1734. It only ended when standing mute, by statute, in England, became equivalent to a confession or verdict of guilty; 12 Geo. III. c. 20; but in 1827 it was enacted by 7 and 8 Geo. IV., c. 28 "that in such cases a plea of not guilty should be entered for the accused."

The obvious effect of standing mute was to avoid the forfeiture of goods consequent upon conviction of felony and the results of corruption of blood, by an attainder, in case of capital felony. Often, indeed usually, in treason cases certainly, conviction was sure and the fortitude required to endure this death by torture would save his children or other heirs from disinheritance. Great numbers did in fact undergo the punishment which was recorded by the clerk's entry or record, "mortuus en pen' fort' et dur'." The number in rural Middlesex alone in 1609-1618 was thirty-two, of whom three were women, and peers were not protected from it by their privilege. A case is recorded in the last year of George I. and one at least in the reign of George II.

The only instance in which this punishment has ever been inflicted in this country is that of Giles Cory, of Salem, who refused to plead when arraigned for witchcraft; Washb. Jud. Hist. 142; 1 Chandl. Cr. Tr. 122.

**PENAL ACTION.** An action for recovery of statute penalty. 3 Steph. Com. 535. See Hawk. Pl. Cr. *Informatio.* It is distinguished from a popular or *qui tam* action, in which the action is brought by the informer, to whom part of the penalty goes. A penal action or information is brought by an officer, and the penalty goes to the king; 1 Chitty, Gen. Pr. 25; 2 Archb. Pr. 188.

**PENAL BILL.** The old name for a bond with condition by which a person is bound to pay a certain sum of money or do a certain act, or, in default thereof, pay a certain sum of money by way of penalty. Jacob, Law Dict. *Bill.*

**PENAL CLAUSE.** That particular clause or subdivision of a statute which fixes the penalty for a violation of previous provisions. See STATUTE; PENAL STATUTES.

A secondary obligation entered into for the purpose of enforcing the performance of a primary obligation. La. Civ. Code, art. 2117.

**PENAL SERVITUDE.** A punishment which consists in keeping an offender in confinement and compelling him to labor.

**PENAL STATUTES.** Those which inflict a penalty for the violation of some of their provisions. Strictly and properly, they are those laws imposing punishment for an offence committed against the state, which the executive has power to pardon, and the expression does not include statutes which give a private action against a wrong-doer. 146 U. S. 657.

It is a rule of law that such statutes must be construed strictly; 1 Bla. Com. 88; Cro. Jac. 415; 1 Com. Dig. 444; 5 *id.* 360; 1 Kent 467; Whart. Cr. L. 28. They cannot, therefore, be extended by their spirit or equity to other offences than those clearly described and provided for; 1 Paine 32; 6 Cra. 171. But they are not to be so strictly construed as to defeat the obvious intention of the legislature; 134 U. S. 624. See 120 *id.* 678; CONSTRUCTION; INTERPRETATION.

**PENALTY.** A clause in an agreement, by which the obligor agrees to pay a certain sum of money if he shall fail to fulfil the contract contained in another clause of the same agreement.

A penal obligation differs from an alternative obligation, for the latter is but one in its essence; while a penalty always includes two distinct engagements, and when the first is fulfilled the second is void. When a breach has taken place, the obligor has his option to require the fulfilment of the first obligation, or the payment of the penalty, in those cases which cannot be relieved in equity, when the penalty is considered as liquidated damages. Dalloz, Dict. *Obligation avec Clause penale.*

A distinction is made in courts of equity between penalties and forfeitures. In cases of forfeiture for the breach of any covenant other than a covenant to pay rent, relief will not be granted in equity, unless upon the ground of accident, fraud, mistake, or surprise, when the breach is capable of compensation; Eden, Inj. 22; 3 Ves. 692; 16 *id.* 403; 18 *id.* 58.

For the distinction between a penalty

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and liquidated damages, see LIQUIDATED DAMAGES.

The penalty remains unaffected, although the condition may have been partially performed: as, in a case where the penalty was one thousand dollars, and the condition was to pay an annuity of one hundred dollars, which had been paid for ten years, the penalty was still valid; 5 Vt. 355.

The punishment inflicted by a law for its violation. The term is mostly applied to a pecuniary punishment; see 6 Pet. 404; 7 Wheat. 13; 1 Wash. C. C. 1; 1 Paine 661; 1 Gall. 26; 1 Mas. 243; 7 Johns. 72; 1 Pick. 451; 1 Saund. 58, n.; 16 Viner, Abr. 301; 62 Hun 407; 28 Fed. Rep. 74; 124 U. S. 571; although not restricted to it; 16 Ind. App. 357.

The words penal and penalty in their strict and primary sense, denote a punishment, whether corporal or pecuniary, imposed and enforced by the state for a crime or offence against its laws; 146 U. S. 657.

**PENAL LAWS.** See PENAL STATUTES.

**PENANCE. In Ecclesiastical Law.** An ecclesiastical punishment inflicted by an ecclesiastical court for some spiritual offence. Ayliffe, Parerg. 420.

**PENCIL.** An instrument made of plumbago, red chalk, or other suitable substance, for writing without ink.

It has been holden that a will written with a pencil is valid; 1 Phill. Eccl. 1: 2 *id.* 173; Beach, Wills § 23. See WILL.

**PENDENTE LITE** (Lat.). Pending the continuance of an action; while litigation continues.

An administrator is appointed *pendente lite*, when a will is contested. See ADMINISTRATOR; LIS PENDENS.

**PENDENTES** (Lat.). **In Civil Law.** The fruits of the earth not yet separated from the ground; the fruits hanging by the roots. Erskine, Inst. b. 2, tit. 2, s. 4.

**PENDING.** See LIS PENDENS.

**PENDING SUIT.** See AUTER ACTION PENDANT; UNITED STATES COURTS.

**PENETRATION.** See RAPE.

**PENITENTIARY.** A prison for the punishment of convicts.

A prison or place of punishment. The place of punishment in which convicts, sentenced to confinement and hard labor, are confined by the authority of the law. 2 Kan. 174; 48 Kan. 723.

There are two systems of penitentiaries in the United States, each of which is claimed to be the best by its partisans,—the Pennsylvania system and the New York system. By the former, convicts are lodged in separate, well-lighted, and well-ventilated cells, where they are required to work during stated hours. During the whole time of their confinement they are never permitted to see or speak with each other. Their usual employments are shoemaking, weaving, winding yarn, picking wool, and such like business. The only punishments to which convicts are subject are the privation of food for short periods, and confinement *without labor* in dark but well-aired cells: this discipline has been found sufficient to keep perfect order; the whip and all other corporal punishments are prohibited. The advantages of the plan are numerous. Men cannot long remain in solitude without labor; convicts, when deprived of it, ask it as a favor, and, in order to retain it, use, generally, their best exertions to do their work well; being entirely secluded, they are of course unknown to their fellow-prisoners, and can form no combination to escape while in prison, or associations to prey upon society when they are out; being treated with kindness, and afforded books for their instruction and amusement, they become satisfied that society does not make war upon them, and more disposed to return to it, which they are not prevented from doing by the exposure of their fellow-prisoners when in a strange place; the labor of the convicts tends greatly to defray the expenses of the prison. The disadvantages which were anticipated have been found to be groundless. Among these were that the prisoners would be unhealthy; experience has proved the contrary: that they would become insane; this has also been found to be otherwise: that solitude is incompatible with the performance of business: that obedience to the discipline of the prison could not be enforced. These, and all other objections to this system, are by its friends believed to be without force.

The New York system, adopted at Auburn, which was probably copied from the penitentiary at Ghent, in the Netherlands, called La Maison de Force, is founded on the system of isolation and separation, as well as that of Pennsylvania, but with this difference, that in the former the prisoners are confined to their separate cells during the night only; during the working-hours in the daytime they labor together in workshops appropriated to their use. They eat their meals together, but in such a manner as not to be able to speak with each other. Silence is also imposed upon them at their labor. They perform the labor of carpenters, blacksmiths, weavers, shoemakers, tailors, coopers, gardeners, woodsawyers, etc. The discipline of the prison is enforced by stripes inflicted by the assistant keepers, on the backs of the prisoners; though this punishment is rarely exercised. The advantages of this plan are that the convicts are in solitary confinement during the night: that their labor, by being joint, is more productive; that, inasmuch as a clergyman is employed to preach to the prisoners, the system affords an opportunity for mental and moral improvements. Among the objections made to it are that the prisoners have opportunities of communicating with each other and of forming

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plans of escape, and, when they are out of prison, of associating together in consequence of their previous acquaintance, to the detriment of those who wish to return to virtue, and to the danger of the public; that the discipline is degrading, and that it engenders bitter resentment in the mind of the convict.

**PENNED AND CORRALLED.** Confined in a small enclosure or narrow space, either by means of an artificial structure or through some other agency without such structure. 105 Cal. 636.

**PENNSYLVANIA.** One of the thirteen original states of the United States of America.

It received its name from a royal charter granted March 4, 1681, by Charles II. to William Penn. By that charter, Penn was constituted the proprietary and governor of the province, and vested with power to enact laws, with the consent of the freemen, to execute the laws, to appoint judges and other officers, incorporate towns, establish ports, levy customs, import and export goods, sell lands creating a tenure, levy troops, make war, and exercise other attributes of sovereign power. Appeals in judicial matters lay to the crown, and all laws could be annulled by the Crown within five years after their passage.

The first frame of government was adopted and promulgated on April 25, 1682. The government was to be by the governor and freemen in a provincial council and general assembly. Both of the latter were chosen annually by the people. All laws were to originate with the council. A governor, judges, and other officers were to be appointed, during good behavior, by the governor from a double list presented by the council or assembly.

On April 2, 1683, a new frame was adopted, reducing the numbers both of the council and assembly. In 1693 the proprietary was deprived of his government and the province placed under the government of New York. But in 1694 Penn was duly reinstated.

A new frame of government adopted on October 28, 1696, made some material alterations in the existing order of things. The power of originating laws was thereby first conferred on the assembly.

The charter of privileges granted by the proprietary and accepted by the assembly on October 28, 1701, confirming the foregoing provisions and making numerous others, continued the supreme law of the province during the residue of the proprietary government.

In 1776, after the declaration of American independence, a constitution was formed adapted to the altered circumstances of the country, which continued in force until 1790, when a new one was substituted. This was amended in 1837 by the introduction of some very radical changes. Other amendments were made in 1850, in 1857, and in 1864. In 1874 a new constitution was adopted, which remains still in force.

The LEGISLATIVE power is vested in a general assembly, consisting of a senate and house of representatives, who sit in regular session every two years, beginning the first Tuesday of January, and at such other times as they are convened by the governor.

Members of the senate must be at least twenty-five years old, and representatives twenty-one. They must have been citizens and inhabitants of the state four years, and inhabitants of their respective districts one year next before their election (unless absent on public business of the United States or of the state), and must reside in their respective districts during continuance in office. They are paid a fixed salary which can neither be increased nor diminished during their term of office.

The constitution imposes numerous restrictions upon the general power to legislate, notably prohibiting special legislation in many instances and putting bounds to the power of appropriating the public moneys to charitable objects. All laws relating to taxation and courts of justice are general and uniform in their operation throughout the state. Restrictions are laid upon the right of the state or of any municipality therein to contract debts. Most of the essential provisions of Magna Charta are embodied in the Declaration of Rights.

The supreme EXECUTIVE power of the state is vested in a governor, who is chosen by the electors qualified to elect members of the legislature. His term of office is four years from the third Tuesday of January next ensuing his election, and he is incapable of re-election to office for the next succeeding term. He has power to remit fines and forfeitures, and grant reprieves, commutations of sentence, and pardons, on recommendation of three or more of a board of pardons consisting of the lieutenant-governor, secretary of the commonwealth, attorney-general, and secretary of internal affairs. He has a veto power over every bill passed by the legislature; but if, notwithstanding his objection, two-thirds of both houses agree to the bill after reconsideration, it becomes a law.

In case of the death or resignation of the governor, his removal from office, or other disability, the office devolves upon the lieutenant-governor, and in case of a vacancy in that office, on the president pro tem. of the senate.

The supreme court is the highest JUDICIAL tribunal of the state. It is composed of seven judges elected by the qualified electors of the state at large. They hold their offices for the term of twenty-one years if they so long behave themselves well, but are not again eligible. They must during their term of office reside within the commonwealth. The jurisdiction of the court extends over the state, and the judges are, *ex officio*, justices of oyer and terminer and general jail delivery in the several counties. The court is principally a court of errors and appeals, and its writs run to all other courts in the state. It has original jurisdiction only in cases of injunction where a party corporation is defendant, of habeas corpus, of mandamus to courts of inferior jurisdiction, and of *quo warranto* to officers whose jurisdiction extends over the whole state. In all cases of felonious homicide, and in such other criminal cases as are provided by law, the accused is entitled of right to remove the proceedings to this court for review. It holds its sessions once in each year at least, in Philadelphia, Pittsburg, and Harrisburg.

The superior court is composed of seven judges, elected by the people, for a term of ten years. Its jurisdiction extends throughout the commonwealth: it has no original jurisdiction except that it may issue writs of *habeas corpus*, but it has the exclusive and final appellate jurisdiction which are now allowed to the supreme court in the following classes of cases: proceedings in quarter sessions court, except cases involving a right to an office; proceedings in oyer and terminer court, except in cases of felonious homicide; proceedings in common pleas court or in equity or other actions, where the amount in controversy is not greater than one thousand dollars; and proceedings in orphans' court. Appeals from this court lie to the supreme court in certain classes of cases.

For the courts of common pleas, the state is divided into fifty-four districts. Most civil issues are tried by the courts of common pleas, but their decisions are reviewable. All judges of these and every other court (except those of the supreme court) required to be learned in the law, are elected by the qualified electors of the district in which they are to preside, and hold office for ten years if they so long behave themselves well. They must reside within their respective districts during their terms of office, and are liable on sufficient cause to be removed by the governor on address of two-thirds of each house of the assembly. Every district is entitled to one court of common pleas, and one president judge learned in the law, and such additional judges as the general assembly may provide. In every county constituting a separate judicial district such associate judges must be learned in the law.

In Philadelphia there are four, and in Allegheny county three courts of common pleas of co-ordinate powers. In each county the judges of the courts of common pleas are *ex officio* justices of oyer and terminer, quarter sessions of the peace and general jail delivery, and within their respective districts are justices of the peace as to criminal matters.

In counties exceeding in population one hundred and fifty thousand, separate orphans' courts may be established, to consist of one or more judges. The orphans' courts have general jurisdiction over the settlement of decedents' estates, and the accounts of executors, administrators, and guardians,

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subject, however, to an appellate jurisdiction in the superior or supreme court. No new courts can be created to exercise the powers now vested in the courts of common pleas, and orphans' courts.

Aldermen, justices of the peace, and magistrates are elected in the various counties for terms of five years. A register's office for the probate of wills and granting letters of administration, is maintained in each county.

**PENNY.** The name of an English coin, of the value of one-twelfth part of a shilling.

The weight of a penny is approximately, 1-3 oz. avoird.; of a half penny, 1-5 oz.; of a farthing, 1-10 oz. A half penny is one inch in diameter. Whittaker's Alm.

While the United States were colonies, each adopted a monetary system composed of pounds, shillings, and pence. The penny varied in value in the different colonies.

**PENNYWEIGHT.** A troy weight of twenty-four grains, or one-twentieth part of an ounce. See WEIGHTS.

**PENSION.** A stated and certain allowance granted by the government to an individual, or those who represent him, for valuable services performed by him for the country.

The act of August 26, 1776, of the old congress promised pensions to soldiers and seamen who might be disabled in the war; and the act of May 15, 1778, promised half pay for seven years after the end of the war to all commissioned officers who should serve until the end of the war. The earliest act of the United States congress was that of September 29, 1789, which directed that pensions that had been paid by the states should be paid by the United States. The act of July 4, 1836, was the foundation of pensions to widows and orphans. In 1866 and 1868 "old war" pensioners were put upon the same footing with widows and orphans of the War of the Rebellion. Originally the secretary of war was directed to make out the list of pensioners. The law of May 15, 1828, was executed at the treasury department, but by resolution of June 28, 1832, all duties devolved on that department were transferred to the war department. On March 2, 1833, an independent pension bureau was established in the war department. For a time navy pension laws were executed in the navy department, but on March 4, 1840, this was transferred to the pension bureau. The act of March 3, 1849, created the interior department and transferred the pension business to that department, where it has since been.

Pensions have been divided into "invalid pension," "gratuitous or service pensions" and "land bounties."

"No pensioner has a vested legal right to his pension. Pensions are the bounties of the government, which congress has the right to give, distribute, or recall at its discretion." 107 U. S. 68. But by an act of December 21, 1893, payment of a pension cannot be withheld or suspended without notice to the grantee of not less than thirty days.

Invalid pensions were granted to volunteers and the militia in suppressing Indian depredations in Florida; and pensions were granted to the widows and children under sixteen years of age of those engaged in various Indian wars since 1790 who remained in the service at the date of their death, or who had received an honorable discharge and died, or should thereafter die of injuries received or disease contracted in the service. In 1892, service pensions were granted to survivors who had served for thirty days in certain Indian wars from 1832 to 1842, and were honorably discharged and to those personally named in any resolution of congress though they may have served less than thirty days, and to their surviving widows, if not remarried. This act does not apply to persons who are not citizens of the United States.

Invalid pensions were granted to regulars and volunteers, disabled by injury received or disease contracted in the Mexican war if they received an honorable discharge; R. S. § 4730; and in case of their death, to their widows, or if the latter die or remarry, to the children under sixteen. By act of January 29, 1887, service pensions were granted to survivors of the Mexican war who served sixty days or were actually engaged in a battle or were personally named in any resolution of congress for specific service in the war.

By R. S. § 4728, invalid navy pensions are granted to any person in the navy or marine service disabled in the service prior to March 4, 1861; and in case of death from injury received or disease contracted in the service, a pension is granted to the widow, and, in case of her death or remarriage, to the children under sixteen years; R. S. §§ 4728, 4729. By R. S. § 4741, officers and men on revenue cutters co-operating with the navy are placed on the navy pension list. Special acts provide for a navy pension fund and a privateer pension fund and the pensioners thereon.

No person can draw a pension as an invalid and the pay of his rank for any period, unless his disability caused his employment in a lower grade or in the civil branch of the service; R. S. § 4724; and no person can draw two pensions; R. S. § 4715. No pension shall be paid to any person or to the widow or children or heirs of any deceased person who voluntarily engaged in or aided or abetted the rebellion; R. S. § 4716; unless such person afterwards voluntarily enlisted in the army or navy and incurred disability therein; act of March 3, 1877, amended August 1, 1892.

Pensions are not liable to attachment in any way; R. S. § 4747.

If any one entitled under R. S. § 4693, *supra*, has died since March 4, 1861, or dies after this act, by reason of any wound, etc., which under said section would have entitled him to an invalid pension, had he been disabled, his widow, or if none, or in case of her death without the payment to her of any part of the pension mentioned in the act, his child or children under sixteen years, shall receive the same pension as the husband or father would have been

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entitled to, to continue from the death of the husband or father, to continue to the widow during widowhood and to the children until they attain sixteen years (longer if permanently helpless); in case of the widow's marriage the children draw the pension from her marriage, etc., R. S. § 4702, as amended August 7, 1882. Pensions of widows are increased by two dollars a month for each child under sixteen years; R. S. § 4703.

By act of March 19, 1886, widows' pensions are raised to twelve dollars a month (with allowance of two dollars a month for each child under sixteen years); but the act applies only to widows married prior to that date, and those who may marry prior to and during the husband's service.

If a widow entitled to a pension abandon a child under sixteen or is an unsuitable person, by reason of immoral conduct, to have the custody of it, no pension is allowed the widow till the child attains sixteen years, but the child shall be pensioned as if no widow had survived, the pension being payable to the guardian; R. S. § 4706. Children born before marriage, if acknowledged by the father before or after marriage, are deemed legitimate; R. S. § 4704. On remarriage of a widow entitled to a pension, her pension ceases; R. S. § 4708; and no pension shall be granted to a widow for the same period that her husband received one; R. S. § 4735.

Dependent relations of one entitled under R. S. § 4793, *supra*, in case of his death since March 4, 1861, or after the act, leaving neither widow nor legitimate children, are entitled to the same pension as such person would have been entitled to, in the following order of precedence: — the mother; the father; orphan brothers and sisters under sixteen (jointly); R. S. § 4707. See act of March 19, 1886. They take in substance, successively; but are entitled only so long as the pension shall be necessary as a means of adequate subsistence; R. S. § 4707; and the rate is raised to twelve dollars a month; act of March 19, 1886. The marriage of a dependent mother or sister terminates the pension.

Arrears of pensions granted in consequence of death which originated from a cause occurring in the service since March 4, 1861, or in consequence of wounds or injuries received or disease contracted since that date, commence on the death or discharge of the person, if the disability occurred prior to discharge; if after discharge, then from disability, or from the termination of the right of the person having the prior right to such pension; provided the application was filed prior to July 1, 1880, otherwise the pension begins at the filing of the application; but this limitation does not apply to widows, insane persons, or children under sixteen; acts of January 25, 1879; March 3, 1879; June 7, 1888. Where death or disability occurred prior to March 4, 1861, and an application was not filed in three years from discharge or death or from the termination of a previously granted pension, the pension commences from the date of filing the application; but no claim allowed prior to June 6, 1886, is affected by this section; R. S. § 4713. In pensions payable to dependent parents, it is enough to show that the parents have no means of support except their own manual labor or the contributions of others, not legally bound to support them; the pension continues only so long as the dependence; act June 27, 1890.

All persons who served ninety days or more in the rebellion, and were honorably discharged, and are or may be suffering from a mental or physical disability of a permanent character, not the result of their own vicious habits, which incapacitates them from support by manual labor, shall receive not more than twelve nor less than six dollars a month, proportioned to the degree of inability, beginning with the date of filing the application after June 27, 1890; and the widow, if without means of support other than her daily labor, or the children under sixteen are placed on the pension list from the date of the application, on proof of the husband's death, but without proving his death to have been the result of army service.

An offence against the act of June 27, 1890, is committed when a sum greater than ten dollars has been taken, regardless of the fact whether the pension has or has not been received, and it is not necessary to aver a demand for the return of the money wrongfully taken; 157 U. S. 160. Where one fraudulently obtained pension money from a client he is not guilty of wrongfully withholding money from the pensioner under R. S. § 4786; it applies to money before it reaches the hands of the pensioner; 160 U. S. 187. See MILITARY BOUNTY LANDS.

A reasonable appropriation of municipal funds for a police pension is for a strictly municipal use and is valid; 182 Pa. 373.

**PENSIONER.** One who is supported by an allowance at the will of another. It is more usually applied to him who receives an annuity or pension from the government.

**PENT ROAD.** A road shut up or closed at its terminal points. 40 Vt. 41.

**PEONIA. In Spanish Law.** A portion of land which was formerly given to a simple soldier on the conquest of a country. It is now a quantity of land of different size in different provinces. In the Spanish possessions in America it measured fifty feet front and one hundred feet deep. 2 White, N. Rec. 49; 12 Pet. 444, notes.

**PEOPLE.** A state: as, the people of the state of New York. A nation in its collective and political capacity. 4 Term 783. See 6 Pet. 467.

When the term *the people* is made use of in constitutional law or discussions, it is often the case that those only are intended who have a share in the gov-

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ernment through being clothed with the elective franchise. Thus, the people elect delegates to a constitutional convention; the people choose the officers under the constitution, and so on. For these and similar purposes, the electors, though constituting but a small minority of the whole body of the community, nevertheless act for all, and, as being for the time the representatives of sovereignty, they are considered and spoken of as the sovereign people. But in all the enumerations and guaranties of rights the whole people are intended, because the rights of all are equal, and are meant to be equally protected; Cooley, Const. 2d ed. 40, 267; Cooley, Const. L. 278.

In a policy of insurance, "detainments of all kings, princes, and people," the word does not include insurance against any promiscuous or lawless rabble which may be guilty of attacking or detaining a ship; 2 Marsh. Ins. 508. See INSURGENTS; NATION.

The term people of the United States is synonymous with citizens; both describe the political body, who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government through their representatives.

Sovereign people. Every citizen is one of this people, and a constituent member of the sovereignty; 19 How. 393; 143 U. S. 135; it includes registered voters as well as tax payers. 19 R. I. 610.

**PER.** By. When a writ of entry is sued out against the alienee, or descendant of the original disseisor, it is then said to be brought in the *per*, because the writ states that the tenant had not the entry but *by* the original wrong-doer. 3 Bla. Com. 181. See ENTRY, WRIT OF; POST.

**PER ÆS ET LIBRAM** (Lat. *æs*, brass, *libra*, scale). **In Civil Law.** A sale was said to be made *per æs et libram* when one called *libripens* held a scale (*libra*), which the one buying struck with a brazen coin (*æs*), and said, "I say, by the right of a Roman, this thing is mine," and gave the coin to the vendor, in presence of at least three witnesses. This kind of sale was used in the emancipation of a son or slave, and in making a will. Calvinus, Lex. *Mancipatio.*

**PER AGREEMENT.** The addition of these words in a bill of particulars for services does not preclude from recovering the value of the services specified, although no agreement for the payment of a specified sum is proven. 45 N. Y. 810.

**PER ALLUVIONEM** (Lat.). **In Civil Law.** By alluvion, or the gradual and imperceptible increase arising from deposit by water. Vocab. Jur. Utr. *Alluvio;* Ang. & A. Waterc. 53.

**PER AND CUI.** When a writ of entry is brought against a second alienee or descendant from the disseisor, it is said to be in the *per* and *cui*, because the form of the writ is that the tenant had not entry but *by* and *under* a prior alienee, *to* whom the intruder himself demised it. 3 Bla. Com. 181. See ENTRY, WRIT OF.

**PER ANNULUM ET BACULUM** (Lat.). **In Ecclesiastical Law.** The symbolical investiture of an ecclesiastical dignity was *per annulum et baculum, i. e.* by the ring and staff. 1 Bla. Com. 378; 1 Burn, Eccl. Law 209.

**PER ANNUM.** Strictly speaking, by the year or through the year. 50 Kan. 440.

**PER AUTRE VIE.** See ESTATE PER AUTRE VIE.

**PER AVERSIONEM** (Lat.). **In Civil Law.** By turning away. Applied to a sale not by measure or weight, but for a single price for the whole in gross; *e. g.* a sale of all the wine of a vineyard for a certain price. Vocab. Jur. Utr. *Aversio.* Some derive the meaning of the phrase from a *turning away* of the risk of a deficiency in the quantity from the seller to the buyer; others, from *turning away* the head, *i. e.* negligence in the sale; others think *aversio* is for *adversio.* Calvinus, Lex.; 2 Kent 640; 4 *id.* 517.

**PER CAPITA** (Lat. by the head or polls). When descendants take as individuals, and not by right of representation (*per stirpes*), they are said to take *per capita.* For example, if a legacy be given to the issue of A B, and A B at the time of his death shall have two children and two grandchildren, his estate shall be divided into four parts, and the children and grandchildren shall each have one of them. 3 Ves. 257; 2 Bla. Com. 218; 6 Cush. 158; 2 Jarm. Wills 6th Am. ed. 945; 3 Beav. 451; 4 *id.* 239.

**PER CURIAM** (Lat. by the court). A phrase which occurs constantly in the reports. It distinguishes the opinion or decision of the court from that of a single judge. Abb. Law Dict. 353. It designates, in Pennsylvania, opinions written by the chief justice of the supreme court.

**PER FORMAM DONI** (Lat. by the form of the gift). According to the line of descent prescribed in the conveyance of the ancestor or donor of estate-tail. 2 Bla. Com. 113; 3 Harr. & J. 323; 1 Washb. R. P. 74, 81.

**PER FRAUDEM** (Lat.). A replication to a plea where something has been pleaded which would be a discharge if it had been honestly pleaded that such a thing has been obtained by fraud; for example, where, on debt on a statute, the defendant pleads a prior action depending, if such action has been commenced by fraud, the plaintiff may reply *per fraudem.* 2 Chitty, Pl. *675.

**PER INCURIAM.** Through want of care; through inadvertence. 35 E. L. & Eq. 302.

**PER INFORTUNIUM** (Lat. by misadventure). **In Criminal Law.** Homi-

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cide *per infortunium*, or by misadventure, is said to take place when a man in doing a lawful act, without any intent to hurt, unfortunately kills another. Hawk. Pl. Cr. b. 1, c. 11; Fost. Cr. Law 258; Co. 3d Inst. 56.

**PER LEGEM TERRÆ.** By the law of the land.

**PER MINAS** (Lat. by threats). When a man is compelled to enter into a contract by threats or menaces, either for fear of loss of life or mayhem, he may avoid it afterwards. 1 Bla. Com. 131; Bac. Abr. *Duress, Murder* (A). See DURESS.

**PER MY ET PER TOUT** (Law Fr. by the moiety, or half, and by the whole). The mode in which joint tenants hold the joint estate, the effect of which, technically considered, is that for purposes of tenure and survivorship each is the holder of the whole, but for purposes of alienation each has only his own share, which is presumed in law to be equal. 1 Washb. R. P. 406; 2 Bla. Com. 182; Chal. R. P. 335.

**PER PAIS TRIAL.** Trial by the country, *i. e.* by jury.

**PER PROC.** By procuration; by letter of attorney. It does not necessarily mean that the act is done under procuration. 27 L. J. Ex. 468; 3 H. & W. 554. A signature of a promissory note or bill of exchange by procuration operates as notice that the agent has but limited authority to sign, and the principle is only bound by such signature if the agent was acting within the actual limits of his authority. 12 C. B. N. S. 373.

**PER QUOD CONSORTIUM AMISIT** (Lat. by which he lost her company). If a man's wife is so badly beaten or ill used that thereby he loses her company and assistance for any time, he has a separate remedy by an action of trespass (in the nature of an action on the case) *per quod consortium amisit*, in which he shall recover satisfaction in damages. 3 Bla. Com. 140; Cro. Jac. 501.

**PER QUOD SERVITIUM AMISIT** (Lat. by which he lost her or his service). Where a servant has been so beaten or injured that his or her services are lost to the master, the master has an action of trespass *vi et armis, per quod servitium amisit*, in which he must allege and prove the special damage he has sustained. 3 Bla. Com. 142. This action is commonly brought by the father for the seduction of his daughter, in which case very slight evidence of the relation of master and servant is necessary; but still some loss of service, or some expense, must be shown; 5 East 45; 5 B. & P. 466; 5 Price 641; 11 Ga. 603; 15 Barb. 279; 8 N. Y. 191; 14 *id.* 413; 20 Pa. 354; 5 Md. 211; 1 Wisc. 209; 3 Sneed 29. See SEDUCTION.

**PER SALTUM.** By sudden movement, passing over certain proceedings. 8 East 511.

**PER SAMPLE.** By sample. A purchase so made is a collateral engagement that the goods shall be of a particular quality. 4 B. & Ald. 387.

**PER SE.** Taken alone; in itself; by itself.

**PER STIRPES** (Lat. *stirps*, trunk or root of a tree or race). By or according to stock or root; by right of representation. 6 Cush. 158; 2 Bla. Com. 217; 2 Steph. 253; 2 Woodd. Lect. 114; 2 Kent 425.

When descendants take by representation of their parent, they are said to take *per stirpes;* that is, children take among them the share which their parent would have taken, if living. See DESCENT AND DISTRIBUTION.

**PER TOUT ET NON PER MY** (Law Fr. by the whole and not by the moiety). Where an estate in fee is given to a man and his wife, they cannot take the estate by moieties, but both are seised of the entirety, *per tout et non per my.* 2 Bla. Com. 182. The late married woman's acts have been held to abolish estates by entireties; 76 Ill. 57; 56 N. H. 105; 76 N. Y. 262; *contra*, 57 Ind. 412; s. c. 26 Am. Rep. 64; 25 Mich. 350; 56 Pa. 106. See 20 Alb. L. J. 346; ENTIRETY.

**PER UNIVERSITATEM** (Lat. by the whole). Used of the acquisition of any property as a whole, in opposition to an acquisition by parts: *e. g.* the acquisition of an inheritance, or of the separate property of the son (*peculium*), etc. Calvinus, Lex. *Universitas.*

**PER YEAR.** Equivalent to the word "annually." 39 N. Y. 213.

**PERAMBULATIONE FACIENDA, WRIT DE. In English Law.** The name of a writ which is sued by consent of *both* parties when they are in doubt as to the bounds of their respective estates; it is directed to the sheriff to make perambulation, and to set the bounds and limits between them in certainty. Fitzh. N. B. 309.

"The writ *de perambulatione facienda* is not known to have been adopted in practice in the United States, but in several of the states remedies somewhat similar in principle have been provided by statutes." Greenl. Ev. § 146.

**PERCEPTION** (From *per* and *capere*). The taking possession of. For example, a lessee or tenant before perception of the crops, *i. e.* before harvesting them, has a right to offset any loss which may happen to them, against the rent; but after the perception they are entirely at his risk. Mackeldey, Civil Law § 378. Used of money, it means the counting out and payment of a debt. Also used for food due to soldiers. Vicat, Voc. Jur.

**PERCH.** The length of sixteen feet and a half: a pole or rod of that length. Forty perches in length and four in breadth make an acre of land.

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**PERCOLATION.** See SUBTERRANEAN WATERS.

**PERDONATIO UTLAGARIÆ** (Lat.). **In English Law.** A pardon for a man who, for contempt in not yielding obedience to the process of the king's courts, is outlawed, and afterwards, of his own accord, surrenders.

**PERDUELLIO** (Lat.). **In Civil Law.** At first, an honorable enmity to the republic; afterwards, a traitorous enmity of a citizen; consisting in being of a hostile disposition towards the republic, *e. g.* treason aiming at the supreme power, violating the privileges of a Roman citizen by beating him, etc., attempting anything against the person of the emperor, and, in general, any open hostility to the republic. Sometimes used for the enemy or traitor himself. *Perduellio* was distinguished from *crimen imminutæ majestatis*, as being an attempt against the whole republic, punishable in *comitia centuriata*, by crucifixion and by infamy after death. Calvinus, Lex.; Vicat, Voc. Jur.

**PEREGRINI** (Lat.). **In Civil Law.** Under the denomination of *peregrini* were comprehended all who did not enjoy any capacity of the law, namely, slaves, alien enemies, and such foreigners as belonged to nations with which the Romans had not established relations. Savigny, Dr. Rom. § 66.

**PEREMPT.** To waive or bar an appeal by one's own act so as partially to comply with or acquiesce in a sentence of a court. Phill. Eccl. L. 1275; Rog. Eccl. L. 47.

**PEREMPTORIUS** (Lat. from *perimere*, to destroy). **In Civil Law.** That which takes away or destroys forever: hence, *exceptio peremptoria*, a plea which is a perpetual bar. See PEREMPTORY. Bract. lib. 4, c. 20; Fleta, lib. 6, c. 36, § 3; Calvinus, Lex.

**PEREMPTORY.** Absolute; positive. A final determination to act, without hope of renewing or altering. Joined to a substantive, this word is frequently used in law; as, peremptory action; Fitzh. N. B. 35, 38, 104, 108; peremptory nonsuit; *id.* 5, 11; peremptory exception; Bract. lib. 4, c. 20; peremptory undertaking; 3 Chitty, Pr. 112, 793; peremptory challenge of jurors; Inst. 4. 13. 9; Code 7. 50. 2; 8. 36. 8; Dig. 5. 1. 70. 73.

**PEREMPTORY CHALLENGE.** See CHALLENGE.

**PEREMPTORY DAY.** A precise time when certain business by rule of court ought to be spoken to.

**PEREMPTORY DEFENCE.** A defence which insists that the plaintiff never had the right to institute the suit, or that, if he had, the original right is extinguished or determined. 4 Bouvier, Inst. n. 4206.

**PEREMPTORY EXCEPTION.** Any defence which denies entirely the ground of action. 1 White, Rec. 283. So of a demurrer; 1 Tex. 364.

**PEREMPTORY MANDAMUS.** A mandamus requiring a thing to be done absolutely. It is usually granted after failure to show satisfactory cause on an alternative mandamus. No other return will be permitted but absolute obedience; 3 Bla. Com. *110; Tapp. Mand. 400. See MANDAMUS.

**PEREMPTORY PAPER.** A court paper containing a list of all motions.

**PEREMPTORY PLEA.** A plea which goes to destroy the right of action itself; a plea in bar or to the action. 3 Steph. Com. 11th ed. 541; 3 Woodd. Lect. 57; 2 Saund. Pl. & Ev. 645.

**PERFECT.** Complete. The word implies either physical, moral, or mechanical perfection. 17 C. B. N. S. 601. A guaranty that goods are perfect is construed to mean that they are perfect for the use intended; 41 Wis. 360.

The term is applied to obligations in order to distinguish those which may be enforced by law, which are called *perfect*, 37 Ga. 128, from those which cannot be so enforced, which are said to be *imperfect*.

A *perfect title* is one which is good both at law and in equity. 21 Conn. 449.

**PERFIDY.** The act of one who has engaged his faith to do a thing, and does not do it, but does the contrary. Wolff § 390.

**PERFORMANCE.** The act of doing something. It is synonymous with fulfilling. 81 Ind. 97.

The thing done: as, Paul is exonerated from the obligation of his contract by its performance.

When a contract has been made by parol, which under the statute of frauds could not be enforced, because it was not in writing, and the party seeking to avoid it has received the whole or a part performance of such agreement, he cannot afterwards avoid it; 1 Johns. Ch. 273; L. R. 1 Ch. 35; 40 U. S. App. 579; and such part performance will enable the other party to prove it *aliunde*; 1 Pet. C. C. 380; 1 Rand. 165; 1 Blackf. 58; 2 Day 255; 1 Des. 350; 1 Binn. 218; 3 Paige, Ch. 545.

The statute of frauds does not apply to a contract which has been fully performed by one party and partially, at least, by the other; 35 Atl. Rep. (R. I.) 579. An agreement for constructing a party wall is so performed as to take it out of the statute when built by one owner and used by the other; 7 Ohio Dec. 426. Part performance of a verbal contract for the sale of land is not sufficient to avoid the statute; 73 Miss. 665; though in some cases it is; 89 Me. 506; as where the land was selected and a conveyance made; 15 Ind. App. 432; and where there has been an entry into possession under a parol promise and a deed has

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been tendered, it is sufficient part performance to sustain an action for the purchase money, though it would not have been for compelling specific performance; 48 Neb. 659.

The question what is sufficient delivery to operate as part performance to avoid the statute is one of frequent occurrence, and must usually be determined upon the circumstances of each case and is not a subject upon which it is easy to generalize. For cases in which the question has arisen see 59 Minn. 295; 64 Vt. 147; 114 N. C. 530; 84 Md. 426; 88 Neb. 339; 15 Ind. App. 34; 10 Utah 31.

The question of performance becomes important where it is necessary to determine whether the non-performance of one party according to the exact terms of the contract will prevent a recovery upon it, or in case that is not permitted, upon a *quantum meruit*. As to the effect of a contract for services, where the employe is discharged for good cause before the termination of his contract, the authorities conflict. See 24 L. R. A. 231, where the authorities are collected. See also MASTER AND SERVANT. Where there is a contract for permanent employment, a substantial performance by the employer would have the effect of releasing him from liability upon his contract to an employe who refused to comply with the terms of the contract; 42 Neb. 531.

The non-performance of a building contract is not excused by inevitable accident; 88 Mo. 285; 25 Conn. 530; 2 Wall. 1; 25 N. Y. 272; nor by the acceptance of the buildings when not finished in due time; 23 How. 220; but it may be by acts of the other party which delay completion, even if acquiesced in by the contractor; 11 *id.* 461; 102 N. Y. 205. The prevention of performance by the destruction of a building before completion, if the contract is entire, will prevent recovery for any part; L. R. 2 C. P. 651; but where there is a provision for payment from time to time, it is otherwise; 4 M. & W. 699. There may be waiver of strict performance as to time; 102 N. Y. 228; and a recovery for work actually done; 91 U. S. 640; a vendor who has waived performance at the time specified cannot rescind without reasonable notice to the vendee; 8 Paige 423; 36 Minn. 317; 4 Mich. 573. Nothing can be recovered for part performance of a contract unless full performance was waived or prevented; 26 N. Y. 217; 39 Wis. 553; 67 Me. 449; but see 81 N. Y. 341. See 2 Benj. Sales § 1032. It is said that substantial performance of a building contract is all that is required; 88 N. Y. 648; but one who invokes that doctrine must himself have faithfully endeavored to perform; 123 Pa. 119. See 5 L. R. A. 270; 9 *id.* 52.

Whether a contract is entire or severable with respect to its performance depends generally upon the consideration, and not the subject matter; 110 Pa. 236; if the latter is apportioned, either expressly or impliedly, the contract is severable; 77 *id.* 228; so also where it provides for the performance of different things at different times; 143 Mass. 11; or where the price is apportioned to different items to be separately performed; 11 N. Y. 35; 5 B. & Ald. 942. See 1 L. R. A. 826.

Where no time is fixed for performance, a reasonable time will be presumed to have been intended; 45 Ill. App. 624; 79 Mich. 47; 10 Vt. 274; 4 Q. B. D. 133; 39 N. Y. 481; 27 Fla. 482; 11 L. R. A. 526. What is a reasonable time will depend upon the circumstances of the case; 24 Me. 131; L. R. 1 C. P. 385; 30 Vt. 633; 14 W. Va. 1; and is a question for the jury; 18 N. Y. L. J. 1809. Where no time has been fixed, or where performance at an appointed time has been waived, either party may limit a reasonable period within which it must be performed, giving notice thereof to the other party; Hoffm. Ch. 125; 16 Beav. 59, 239; L. R. 10 Eq. 281.

A contract for the delivery of a number of personal chattels of the same kind is severable in its nature, and if a part is accepted and appropriated to the use of the vendee, he must pay the stipulated price for such part, less damages sustained by reason of the failure to make complete delivery: 86 Fed. Rep. 225.

Where the contract is silent as to the mode of performance, it should be according to the usage of the place where it is made; 11 Ex. 645; but it must be substantial and *bona fide*, conforming to the true intent and meaning, and not merely the letter, of the agreement; 4 *id.* 128. Conditions precedent must be performed; 3 Addison, Contr. 8th ed. [1189]. See CONDITION.

The question of performance also becomes important with respect to the effect of non-performance as a rescission, so as to give a right of action to the other party. The refusal or inability of one party to a contract to perform his part of it, discharges the other, who is ready and willing to perform his part, from further responsibility, and entitles him to sue at once for a breach. If before the time of the performance, one party announces to the other that he does not intend to perform his promise, the latter may treat the contract as broken and bring suit at once; 158 Pa. 107.

The leading case for this rule is Hochster *v.* De La Tour, 22 L. J. Q. B. 455, which was followed in Frost *v.* Knight, L. R. 7 Ex. 111; but in Johnston *v.* Milling, 16 Q. B. D. 460, it was doubted whether the doctrine extended to a contract containing various stipulations, where the whole cannot be treated as put an end to upon the wrongful repudiation of one of the stipulations. The rule has generally been followed in England and in this country; 11 C. B. N. S. 152; 13 *id.* 825; 102 N. Y. 10; 108 Ill. 170; 36 Md. 567; *contra*, 114 Mass. 530.

The principle has been applied to sustain an action for breach of promise of marriage where the defendant, before the time

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fixed for fulfilling his promise, has married another person; L. R. 7 Ex. 111; 32 Ia. 409; 42 N. Y. 246.

The refusal of performance must be treated as a breach; the plaintiff cannot maintain his action if he persists in seeking performance; 6 El. & Bl. 953; 2 C. B. N. S. 563.

The refusal to perform must be distinct, unequivocal, and absolute; 15 Wall. 36; and acted on by the other party; Benj. Sales § 568. In 117 U. S. 502, the court considered the cases, but declined to decide whether or not the rule should be maintained as applicable to the class of cases to which the one then before it belonged; and said it has been called in England a "novel doctrine" and has never been applied in that court.

The cases in 8 C. C. A. 14 (59 Fed. Rep. 87) and 19 C. C. A. 599 (73 Fed. Rep. 603) followed Hochster *v.* De la Tour. In 84 Fed. Rep. 569, Dallas, J., was of opinion that the question was an open one, so far as the supreme court was concerned, and followed the ruling of Judge Lowell in 11 Fed. Rep. 372, supported by the two federal cases last above mentioned. He considered that Judge Lowell had answered the argument of the court in 114 Mass. 530, and concurred with him in thinking that the cases which follow the English rule are "founded in good sense, and rest on strong grounds of convenience, however difficult it may be to reconcile them with the strictest logic."

Wallace, C. J., in 85 Fed. Rep. 853, considered that Dingley *v.* Oler, 117 U. S. 490, was a *dictum*, and that there was an overwhelming preponderance of adjudication in favor of the doctrine of Hochster *v.* De la Tour. He cited also 137 N. Y. 471; 60 Minn. 284; 41 W. Va. 717. See 6 Eng. Rul. Cas. 576; ELECTION OF RIGHTS OR REMEDIES.

See, generally, Add. Contr.; 2 Sto. Contr.; 2 Pars. Contr.; 7 Wait, Act. & Def. Ch. 53.

**PERIL.** The risk, contingency, or cause of loss insured against, in a policy of insurance. See RISK; INSURANCE.

**PERIL OF DEATH.** A term used to denote that condition of apprehension of death in which it is necessary that the donor should be, in order to make a valid gift *causa mortis*.

In the cases on this subject there is found a great lack of precision of definition. The result of a critical examination of the authorities is thus stated by Bates, Ch., in Robson *v.* Robson's Adm., 3 Del. Ch. 51, 63: "I have labored to obtain from the authorities a clear view of what is implied in these terms, peril of death, in other words, what is that precise condition of disability in consideration of which it is that the law gives effect to a gift *causa mortis*. Thus much is certain, that the gift, to be valid, in the first instance must be made under apprehension of death, as likely to result from some present peril, usually that of sickness. It is further certain that to render the gift finally effectual death must in fact ensue from the sickness or other peril under which it was made. But on another question I am unable to derive from the text books and decisions any settled conclusion: That question is, whether the apprehension of death must be an apprehension of death as *presently imminent*, the donor being, as it is said, *in extremis;* or, whether it is sufficient for the validity of the gift if death be contemplated as the probable result of the sickness, a result likely or even certain to occur but after an indefinite interval, it may be of weeks or months; as in the case of chronic diseases generally." After adverting to the difference of view to be found in the leading English cases, the chancellor continues: "The question is uncontrolled by any decisions known to me in our own courts; and as between the English cases I confess a strong preference for the narrower construction of these terms 'peril of death,' the one which seems to have been at first held. It is consistent with the original object of admitting these gifts into the English law; it guards the policy of the statute of wills; and prevents frauds and uncertainties of title." This view of the proper construction of the phrase "peril of death," was founded upon the theory that gifts *causa mortis* were testamentary in their nature. But Gibson, C. J., in Nicholas *v.* Adams, 2 Whart. 17, held to the contrary, "that these gifts are not testamentary, but, as he describes them, are gifts executed in the first instance by delivery of the thing, though defeasible by reclamation, the contingency of survivorship or deliverance from the peril." By way of comment on the last cited case it has been suggested that, "that able judge (and this is said with great deference) seems to have been misled by a consideration of gifts *causa mortis* under the civil law. Under that law these gifts formed quite an expanded system. They embraced all cases of gifts made in consideration of mortality, *whether made in present danger or not.*" 3 Del. Ch. 66. See also Prec. in Ch. 269; 2 Ves. Sr. 437; 1 Bligh 533; DONATIO CAUSA MORTIS.

**PERILS OF THE SEA.** All marine casualities resulting from the violent action of the elements, as distinguished from their natural, silent influence upon the fabric of the vessel. 74 Fed. Rep. 413.

A phrase contained in bills of lading, and a class of dangers to goods carried, the effects of which the carriers do not undertake to insure against in virtue of their general undertaking.

Bills of lading generally contain an exception that the carrier shall not be liable for "perils of the sea." What is the precise import of this phrase is not, perhaps, very exactly settled. In a strict sense, the words perils of the sea denote the natural accidents peculiar to the sea; but in more

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than one instance they have been held to extend to events not attributable to natural causes.

Perils of the sea denote natural accidents peculiar to that element, which do not happen by the intervention of man, nor are to be prevented by human prudence. It is a loss happening in spite of all human effort and sagacity; 2 Kent 597, approved in 166 U. S. 386. It is said to have a broader signification than the act of God and includes calamities not caused by violence or a convulsion of nature, such as lightning, flood, or tempest; 20 U. S. App. 503, on appeal in 166 U. S. 386, where Fuller, C. J., said that this might be the case, but did not decide the exact point.

The damage must be due to an accident, of a kind peculiar to the sea, directly and exclusively, without any negligence on the part of the ship-owner or his servants, and must not be due to unseaworthiness of the ship when she started on the voyage; Pollock, Bill of Lading Excep. 40. "There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure;" 12 App. Cas. 509.

Perils of the sea *include* a capture by pirates; 9 Allan 310; loss by fire; 26 Conn. 128; 10 N. Y. 431; hidden obstructions in a river, recently brought there by the current; 52 Barb. 489; but see 6 Gratt. 189; loss due to motion of the sea; 41 Fed. Rep. 62; but not by the natural and inevitable action of winds and waves; 12 App. Cas. 509; by a tidal wave and flood of unusual violence; 41 Fed. Rep. 106. Also the following, if the immediate damage is caused by salt water; rolling and pitching of the ship in rough weather; 32 L. T. 847; running ashore in a fog; L. R. 9 Ex. 339; foundering in a collision; 12 App. Cas. 509; rats eating a hole in a ship and letting water in; 12 App. Cas. 527; the destruction of goods at sea by rats has been held a peril of the sea, the carrier not being in default; 1 Binn. 592.

It *includes* striking on a sunken rock not on the chart, or a rock from which the light has been removed, or an iceberg, or a vessel without lights; 12 App. 514; or a sword fish making a hole in the ship; *id.* 525.

Where the vessel's main shaft was broken by a cause coming within perils of the sea and by the necessary delays for repairs the cargo was destroyed, and the plaintiff lost the entire freight, it was held that this was a claim consequent on the disabling of the vessel by peril of the sea; 75 L. T. Rep. 155. Where a cargo was damaged by sea water, which, during the voyage, was caused by the giving way of a bolt used to fasten a stanchion, and it appeared that the ship had encountered very heavy weather, but the evidence showed that the stanchion had withstood with much heavier cargo on a former voyage, and there was no fault in the original construction shown, it was held that the loss came within the exemption clause; 14 U. S. App. 626.

The stranding of a steamer by reason of the negligence of a local pilot, by which the anchor dragged and a portion of her cargo was damaged, is a sea peril and the steamer is not responsible for the negligence of the pilot; 38 U. S. App. 50.

It *does not include:* Restraint of princes and rulers; 100 Mass. 301; 10 Q. B. 517; 22 How. 502; loss by rats; 5 Blatch. 335; 17 Q. B. Div. 670; destruction by vermin in certain seas, where such injury is to be expected; 2 Mass. 429; 12 App. Cas. 524; by worms; 48 Fed. Rep. 463; confiscation of cargo as contraband by a foreign court; 10 Q. B. 517; damage caused by an accident to machinery that would equally have occurred on land under similar condition; 12 App. Cas. 592; retardation of the voyage by which meats are spoiled; L. R. 4 C. P. 206; encountering heavy seas; 42 Fed. Rep. 861.

Where a cargo was damaged by water which reached it through a pipe which had been gnawed by rats, it was held that the ship was responsible for the whole damage to the cargo, less such portion as could be shown affirmatively to have been done by sea peril; 38 U. S. App. 1.

Where the loss might not have occurred but for the unseaworthiness of the ship or the negligence or breach of contract of the owner or master, it would seem that the owner is not exonerated by the fact that the proximate cause of the loss was a peril of the sea; 9 Wall. 684; 14 C. B. N. S. 59.

The mere fact of a collision at sea is not proof that it occurred in such a way as to be a peril of the sea; 11 P. D. 170. The burden of proof is on the shipowner; 56 Fed. Rep. 243; 1 U. S. App. 251; if goods are lost, the presumption is that it was the fault of the carrier; 41 Fed. Rep. 62.

The exception in a charter-party as to dangers of the seas and navigation, is not applicable to the perils which arise from a breach of the ship-owner's obligation; 11 U. S. App. 648. Where the ship-owner, *prima facie*, appears to have been negligent, it is not enough for him to prove that his ship was seaworthy at the commencement of the voyage; 78 Fed. Rep. 155.

The mere fact that goods are damaged by sea water entering the ship does not create a presumption of damage by peril of the sea even when aided by the presumption of seaworthiness, for the water may still have got in through negligence; 75 Fed. Rep. 74. But where sea perils have been encountered adequate to cause damage to a seaworthy ship and there is general proof of seaworthiness, the damage is presumptively due to such perils; 79 Fed. Rep. 371.

See ACT OF GOD; FORTUITOUS EVENT; PILOT; RESTRAINT OF RULERS; SEAWORTHY.

**PERINDE VALERE.** A writ of dispensation granted by the pope to a clerk

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admitted to a benefice, although incapable. Gibs. 87; 3 Burn, Eccl. L. 111.

**PERIOD.** A stated and recurring interval of time, a round or series of years, by which time is measured. 67 N. Y. 528.

When used to designate an act to be done or to be begun, though its completion may take an uncertain time, as for instance, the act of exportation, it must mean the day on which the exportation commences. 20 How. 579. See TIME.

**PERIODICAL PAYMENTS.** Payments occurring periodically, that is, at fixed times from some antecedent obligation and not at variable periods at the discretion of individuals. 42 L. J. Ch. 337.

**PERIODICAL WORK.** Within the copyright act, 5 & 6 Vict., one that comes out from time to time and is miscellaneous in its articles; 16 L. J. Ch. 142; but a newspaper has been held not a periodical within that act; 39 L. J. Ch. 132; L. R. 9 Eq. 324; *contra*, 50 L. J. Ch. 621; 17 Ch. D. 708.

**PERIPHRASIS.** Circumlocution; the use of other words to express the sense of one.

Some words are so technical in their meaning that in charging offences in indictments they must be used or the indictment will not be sustained; for example, an indictment for treason must contain the word *traitorously;* an indictment for burglary, *burglariously;* and *feloniously* must be introduced into every indictment for felony; 1 Chitty, Cr. Law 242; Co. 3d Inst. 15; 2 Hale, Pl. Cr. 172; 4 Bla. Com. 307; Bac. Abr. *Indictment* (G 1); Com. Dig. *Indictment* (G 6); Cro. Car. c. 37.

**PERISH.** To come to an end; to cease to be; to die.

What has never existed cannot be said to have perished.

When two or more persons die by the same accident, as a shipwreck, no presumption arises that one perished before the other.

**PERISHABLE.** Subject to speedy decay. 31 Conn. 498.

**PERISHABLE GOODS.** Goods which are lessened in value and become worse by being kept.

Losses due to the natural decay, deterioration, and waste of perishable goods in the hands of a carrier are excusable. Reference must always be had, however, to the nature and inherent qualities of the articles in question, their unavoidable exposure at the time and place, and under the general circumstances, while in the charge of a carrier of ordinary prudence, and their condition when entrusted to him; Schoul. Bail. 397; 31 Am. Rep. 567.

In admiralty practice, property in its nature perishable, or liable to deterioration, injury, or decay, may be sold pending suit and the proceeds brought into court to abide the event of the suit; or the court may order it appraised and deliver it to the claimant, upon his paying into court such sum of money, or giving such bond as the court may direct; Bened. Adm. § 444; Adm. Rule 10; 1 Gall. 148, 476.

There is a similar practice in equity and in most of the states such property when taken in execution or under attachment, on petition may be ordered sold, pending suit; in which case the proceeds of sale are held in place of the property. See COMMON CARRIERS.

In order to authorize the court to order property levied upon under a warrant of attachment, to be sold as being perishable, it must appear that such property is inherently liable to deterioration and decay and it is not sufficient to show that it will depreciate in value because of changes in fashion; 25 Hun 367. Fattened cattle are perishable property; 3 Munf. 288; also potatoes; 16 Me. 208; skins and furs; 7 Cow. 202; kid gloves; 25 Hun 367; but not merchantable corn; 54 Ill. 67. The doctrine applies to real estate in litigation and liable to deteriorate; 26 N. J. Eq. 269.

**PERJURY. In Criminal Law.** The wilful assertion as to a matter of fact, opinion, belief, or knowledge, made by a witness in a judicial proceeding as part of his evidence, either upon oath or in any form allowed by law to be substituted for an oath, whether such evidence is given in open court, or in an affidavit, or otherwise, such assertion being known to such witness to be false, and being intended by him to mislead the court, jury, or person holding the proceeding. 2 Whart. C. L. § 1244.

The wilful giving, under oath, in a judicial proceeding or course of justice, of false testimony material to the issue or point of inquiry. 2 Bish. N. Cr. Law § 1015.

It consists in swearing wilfully and corruptly to some matter which is untrue. 63 Vt. 201.

*The intention must be wilful.* The oath must be taken and the falsehood asserted with deliberation and a consciousness of the nature of the statement made; for if it has arisen in consequence of inadvertency, surprise, or mistake of the import of the question, there was no corrupt motive; Hawk. Pl. Cr. b. 1, c. 69, s. 2; Cro. Eliz. 492; 4 McLean 113; 3 Dev. 114; 7 C. & P. 17; 11 Q. B. 1028; 1 Rob. Va. 729; 3 Ala. N. S. 602; 74 Cal. 306. But one who swears wilfully and deliberately to a matter which he really believes, and which is false, and which he had no probable cause for believing, is guilty of perjury; 6 Binn. 249. See Baldw. 370; 1 Bail. 50; 4 McLean 113. And so is one who swears falsely, though he testifies against his will; 98 Ky. 526. Where a bankrupt, having submitted the facts fairly to his counsel, swore to a schedule wrongly made out on his advice, it was not perjury; 3 McLean 573.

*The oath must be false.* The party must believe that what he is swearing to is fictitious; and if, intending to deceive, he as-

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serts that which may happen to be done without any knowledge of the fact, he is equally criminal, and the accidental truth of his evidence will not excuse him; Co. 3d Inst. 166; Hawk. Pl. Cr. b. 1, c. 69, s. 6; 1 Bish. N. Cr. L. § 437. See 4 Mo. 47; 4 Zabr. 455; 9 Barb. 567; 1 C. & K. 519; 15 S. W. Rep. (Tex.) 118. As, if a man swears that C D revoked his will in his presence, if he really had revoked it, but it was unknown to the witness that he had done so, it is perjury; Hetl. 97. Knowledge by a witness that his testimony is false, is tested, like intention generally, by sound mind and discretion, and by all the circumstances; soundness of mind, where nothing to the contrary appears, being assumed; 83 Ga. 521.

*The party must be lawfully sworn.* The person by whom the oath is administered must have competent authority to receive it; an oath, therefore, taken before a private person, or before an officer having no jurisdiction, will not amount to perjury, "For where the court hath no authority to hold plea of the cause, but it is *coram non judice*, there perjury cannot be committed;" 1 Ind. 232; 1 Johns. 498; 3 M'Cord 308; 3 C. & P. 419; 4 Hawks 182; 1 N. & M'C. 546; 2 Hayw. 56; 8 Pick. 453; 12 Q. B. 1026; 2 Russ. Cr. 520; Co. 3d Inst. 166; 40 La. Ann. 460; 131 U. S. 50; 20 D. C. 424. See 79 Ga. 162; 24 Tex. App. 715; 36 Tex. Cr. Rep. 483; 107 N. C. 832; 87 Tenn. 693; 9 Mackey 424. Where a defect in the proceedings is waived, perjury may be committed; 135 Ill. 416. A false affidavit will be perjury where the officer who administered the oath was a minor, in the absence of a statutory disqualification of minors from holding office; 35 Tex. Cr. Rep. 243.

*The proceedings must be judicial;* 5 Mo. 21; 1 Bail. 595; 11 Metc. 406; 5 Humphr. 83; 1 Johns. 49; Wright, Ohio 173; R. & R. 459. Proceedings before those who are in any way intrusted with the administration of justice, in respect of any matter regularly before them, are considered as judicial for this purpose; 2 Russ. Cr. 518; Hawk. Pl. Cr. b. 1, c. 69, s. 3. See 9 Pet. 238; 11 Conn. 408; 4 M'Cord 165. Perjury cannot be committed where the matter is not regularly before the court: 4 Hawks 182; 2 Hayw. 56; 8 Pick. 453; 1 N. & M'C. 546; 9 Mo. 824; 18 Barb. 407; 26 Me. 33; 7 Blackf. 25; 5 B. & Ald. 634. An oath not administered pursuant to, or required or authorized by, any law, cannot be made the basis of a charge of perjury; 41 Minn. 59.

*The assertion must be absolute.* If a man, however, swears that he *believes* that to be true which he knows to be false, it will be perjury; 10 Q. B. 670; 2 W. Bla. 881; 1 Leach 232; 6 Binn. 249. It is immaterial whether the testimony is given in answer to a question or voluntarily; 3 Zabr. 49; 12 Metc. 225. Perjury cannot be assigned upon the valuation, under oath, of a jewel or other thing the value of which consists in estimation; Sid. 146; 1 Kebl. 510. But in some cases a false statement of opinion may become perjury; 10 Q. B. 670; 15 Ill. 357; 3 Ala. N. s. 602; 3 Strobh. 147; 1 Leach, C. C. 325; 9 S. W. Rep. (Ky.) 161.

*The oath must be material to the question depending;* 1 Term 63; 12 Mass. 274; 3 Murph. 123; 4 Mo. 47; 2 Ill. 80; 9 Miss. 149; 6 Pa. 170; 2 Cush. 212; 40 Kan. 631; 98 N. C. 759; 64 Cal. 106. See 23 Neb. 436; 111 Mo. 464; 14 Fed. Rep. 447. Where the facts sworn to are wholly foreign from the purpose and altogether immaterial to the matter in question, the oath does not amount to perjury; 2 Russ. Cr. 521; Co. 3d Inst. 167; 8 Ves. 35; Bac. Abr. *Perjury* (A); 2 N. & M'C. 18; 2 Mo. 158; 95 Cal. 657. But all false statements wilfully and corruptly made by a witness as to matters which affect his credit are material; [1895] 1 Q. B. 797; and so is every question in cross-examination which goes to the credit of a witness, as, whether he has been before convicted of felony; 3 C. & K. 26; 1 C. & M. 655. And see 10 Mod. 195; 8 Rich. 456; 9 Mo. 824; 12 Metc. 225; 28 Tex. Ap. 301. False evidence, whereby, on the trial of a cause, the judge is induced to admit other material evidence, even though the latter evidence is afterwards withdrawn by counsel, or though it was not legally receivable, is indictable as perjury; 2 Den. C. C. 302; 3 C. & K. 302.

It is perjury where the witness swears falsely in giving evidence legally inadmissible, but which becomes material by being introduced in evidence; 5 Okl. 173.

The materialty of the false oath is for the court and not for the jury; 54 Fed. Rep. 488; 97 Cal. 224; 1 Okl. 336.

A *defendant in a criminal prosecution*, who testifies in his own behalf and of his own accord, is guilty of perjury if he testifies falsely. He is to be treated the same as any other witness; 115 N. C. 712; 33 Tex. Cr. Rep. 314; *id.* 67; 57 Kan. 431.

Where one person arranges with another to commit perjury, both are *in pari delicto;* 135 U. S. 483. An attempt to induce a person to commit perjury on the contemplated trial of an indictment not yet returned, has been held not to be subornation of perjury; 137 Mo. 289.

Punishment of perjury is provided for by statutes in all the states, and also by the United States when it is committed in any proceeding by or under federal laws; U. S. R. S. §§ 5392–5396. For a form of indictment approved as correct in every substantial part, see 159 U. S. 682.

The power of punishing witnesses for testifying falsely in a judicial proceeding belongs peculiarly to the government in whose tribunals that proceeding is had; 134 U. S. 372. In general, it may be observed that a perjury is committed as well by making a false affirmation as a false oath. See OATH.

R. S. § 5392, provides that every person taking an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any

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written testimony, etc., by him subscribed is true, who wilfully, and contrary to such oath, states or subscribes any material matter which he does not believe to be true, is guilty of perjury, punishable by a fine of not more than $2,000 and imprisonment at hard labor for not more than five years, and is rendered incapable of testifying in any court of the United States until the judgment against him is reversed.

It is unnecessary in an indictment for perjury under R. S. § 5396 to set out the affidavit at length; 50 Fed. Rep. 915.

**PERMANENT.** This word does not always embrace the idea of absolute perpetuity; 8 Barb. 185; or forever or lasting forever, or existing forever; 136 U. S. 393; 2 N. J. Eq. 155; but where the citizens of a locality are induced to give large sums of money for the establishment of an educational institution, it means that the place agreed on shall be the site of the institution so long as it shall endure; 8 Barb. 186.

**PERMANENT ABODE.** A domicil, a home, which a party is at liberty to leave, as interest or whim may dictate, but without any present intention of changing it. 78 Ill. 181. See NON-RESIDENT; DOMICIL; HOME.

**PERMANENT EMPLOYMENT.** Employment for an indefinite time which may be severed by either party. 81 Cal. 596; 12 Bush 541; 4 C. B. 479.

**PERMANENT TRESPASS.** A trespass consisting of trespasses of one and the same kind, committed on several days, which are, in their nature, capable of renewal or continuation, and are actually renewed or continued from day to day, so that the particular injury done on each particular day cannot be distinguished from what was done on another day. In declaring for such trespasses, they may be laid with a continuando; 3 Bla. Com. 212; Bac. Abr. *Trespass* (B 2, I 2); 1 Saund. 24, n. 1; Poll. Torts 482. See CONTINUANDO; TRESPASS.

**PERMISSION.** A license to do a thing; an authority to do an act which without such authority would have been unlawful. A permission differs from a law: it is a check upon the operations of the law.

A negation of law, arising either from the law's silence, or its express declaration. Ruth. Nat. L. b. 1, c. 1.

*Express permissions* derogate from something which before was forbidden, and may operate in favor of one or more persons, or for the performance of one or more acts, or for a longer or shorter time.

*Implied permissions* are those which arise from the fact that the law has not forbidden the act to be done.

**PERMISSIVE.** Allowed; that which may be done: as, permissive waste, which is the permitting real estate to go to waste. When a tenant is bound to repair, he is punishable for permissive waste. See WASTE.

**PERMISSIVE LETTERS.** In a note by the secretary of the navy, October 1, 1861, this term was used as indicating an authority something less than a grant of letters of marque. See 2 Hall. Int. L. Baker's ed. 120.

**PERMIT.** A license or warrant to do something not forbidden by law: as to land goods imported into the United States, after the duties have been paid or secured to be paid. Act of Congr. March 2, 1799, s. 49, cl. 2. See form of such a permit, Gordon Dig. App. II. 46.

It denotes a decided assent; 105 Ill. 558. It may mean suffer; 7 Ch. Div. 145; although it is more positive than allow or suffer; 105 Ill. 558. It implies consent given or leave granted; 4 Bosw. 391. It has been defined to mean allow by not prohibiting. 9 Allen 266. Every definition of suffer or permit includes knowledge of what is to be done under the sufferance or permission and intention that what is done was what was to be done; 17 Blatch. 325.

**PERMUTATION. In Civil Law.** Exchange; barter.

This contract is formed by the consent of the parties; but delivery is indispensable, for without it it is a mere agreement. Dig. 31. 77. 4; Code 4. 64. 3.

Permutation differs from sale in this, that in the former a delivery of the articles sold must be made, while in the latter it is unnecessary. It agrees with the contract of sale, however, in the following particulars: that he to whom the delivery is made acquires the right or faculty of prescribing; Dig. 41. 3. 4. 17; that the contracting parties are bound to guarantee to each other the title of the things delivered; Code 4. 64. 1; and that they are bound to take back the things delivered when they have latent defects which they have concealed; Dig. 21. 1. 63. See Aso & M. Inst. b. 2, t. 16, c. 1; MUTATION; TRANSFER.

**PERMUTATIONE.** A writ to an ordinary commanding him to admit a clerk to a benefice upon exchange made with another. Cow.; Moz. & W.

**PERNANCY** (from Fr. *prendre*, to take). A taking or receiving.

**PERNOR OF PROFITS.** He who receives the profits of lands, etc. A *cestui qui use*, who is legally entitled and actually does receive the profits, is the pernor of profits. *Termes de la Ley.*

**PERPARS.** A part of the inheritance. Fleta.

**PERPETRATOR.** Within the meaning of a statute giving an action against the perpetrator of an act, where a servant of a railroad company is killed through the negligence of a fellow-servant, the



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company itself may be regarded as the perpetrator. 33 Ia. 47.

**PERPETUAL.** That which is to last without limitation as to time: as, a perpetual statute, which is one without limit as to time, although not expressed to be so.

**PERPETUAL EDICT. In Roman Law.** An edict issued by the prætor on taking office. It was intended to be valid for the whole term of his year of office. Sohm, Rom. L. 51.

**PERPETUAL CURACY.** The office of a curate in a parish where there is no spiritual rector or vicar, but where the curate is appointed to officiate by the impropriator. 2 Burn, Eccl. Law 55.

The church of which the curate is perpetual. 2 Ves. Sen. 425. See 2 Steph. Com. 11th ed. 695; 2 Burn, Eccl. Law 55; 9 Ad. & E. 556. As to whether such curate may be removed, see 2 Burn, Eccl. Law 55.

**PERPETUAL INJUNCTION.** Opposed to an injunction *ad interim;* an injunction which finally disposes of the suit, and is indefinite in point of time. See INJUNCTION.

**PERPETUAL SUCCESSION.** The continuous existence which enables a corporation to manage its affairs and hold property without the necessity of conveyances for the purpose of transmitting it. By reason of this quality, this ideal and artificial person remains, in its legal entity and personality, the same, though frequent changes may be made of its members; and although all of its members may be changed, and new ones substituted for the old, it still legally remains the same. Field, Corp. § 50; 5 Mo. App. 340.

**PERPETUATING TESTIMONY.** The act by which testimony is reduced to writing as prescribed by law, so that the same shall be read in evidence in some suit or legal proceedings to be thereafter instituted.

The origin of this practice may be traced to the canon law, cap. 5, X *ut lite non contestata*, etc. Bockmer, n. 4; 8 Toullier, n. 22. Statutes exist in most of the states for this purpose. Equity also furnishes means, to a limited extent, for the same purpose.

**PERPETUITY.** Any limitation tending to take the subject of it out of commerce for a longer period than a life or lives in being, and twenty-one years beyond, and, in case of a posthumous child, a few months more, allowing for the term of gestation. Randall, Perp. 48.

Such a limitation of property as renders it inalienable beyond the period allowed by law. Gilbert, Uses, Sugd. ed. 260, n.

"A future limitation, whether executory or by way of remainder, and of real or personal property, which is not to vest till after the expiration of or which will not necessarily vest within, the period prescribed by law for the creation of future estates, and which is not destructible by the person for the time being entitled to the property subject to the future limitation, except with the concurrence of the person interested in the contingent event." Lewis, Perpetuities ch. 12. This was said by Gibson, C. J., to be the nearest approach to a perfect definition of a perpetuity; 10 Pa. 334.

It is suggested that some confusion has arisen in connection with the law of perpetuities because of a certain ambiguity in the legal definition of the term itself. "The original meaning of a perpetuity is an inalienable, indestructible interest. The second artificial meaning is, an interest which will not vest to a remote period. This latter is the meaning which is attached to the term when the rule against perpetuities is spoken of;" Gray, Perp. § 140. The author last cited considers it a matter of regret that the rule should not have been known as the rule against remoteness, rather than the rule as against perpetuities.

The comment was made upon this statement that notwithstanding the declaration quoted from this author, "yet in all his illustrations he shows that interests which were destructible were not perpetuities"; 121 Pa. 205; where it is held that indestructibility of the estate of the person, for the time being entitled to the property, is essential to constitute a perpetuity.

The following is suggested as the true form of the rule: "No interest subject to a condition precedent is good, unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest;" Gray, Perp. 201. A later work adheres more closely to the familiar phraseology (a course which has great advantages in the discussion of common-law rules of decision), in defining it as a rule which "forbids the postponement of the vesting of real or personal property for an estate in fee-simple, in tail or absolute interest, during a longer period than lives in being and twenty-one years after, an extension being allowed for gestation if gestation exists;" Brett, L. Cas. Mod. Eq. 47. See, also, 7 Cra. 456; 118 U. S. 340; L. R. 44 Ch. D. 85. The rule against perpetuities as distinguished from that against making estates indefinitely inalienable, concerns itself only with the vesting or assignment of estates and not with their termination; 90 Me. 318; and when properly so limited, it is applicable to a gift in trust for charity; *id.* An interesting case in Colorado holds that notwithstanding statutory adoption, in that state, of the common law prior to 4 James I., English decisions after that year are to be regarded as authority in determining what the common law as to perpetuities was at that time; 23 Colo. 40; s. c. 35 L. R. A. 41.

The rule against perpetuities is one of decision only, and in England is affected only by statute under what is known as the Thelluson Act, the passage of which

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was occasioned by litigation arising under the will of Peter Thelluson who died in 1797. See Thelluson *v.* Woodford, 4 Ves. Jr. 227; 11 Ves. 112. For the text of the act see Gray, Perp. Appx. B. note; and for the history of the litigation which led to it, see Hargrave, Thelluson Case ch. 1.

The act was directed against trusts for accumulation. Such a trust which violates the rule against perpetuities is wholly void, but one which is good within the rule might violate the Thelluson Act and be void for the excess; Gray, Perp. § 687. The act prohibits accumulations other than during four distinct periods, the language being: "For any longer term than the life or lives of any such grantor or grantors, settler or settlers; or the term of twenty-one years from the death of any such grantor, settler, devisor, or testator; or during the minority or respective minorities of any person or persons who shall be living, or *en ventre sa mere* at the time of the death of such grantor, devisor, or testator; or during the minority or respective minorities only of any person or persons who, under the uses or trusts of the deed, surrender, will, or other assurances directing such accumulations, would, for the time being, if of full age, be entitled unto the rents, issues and profits, or the interest, dividends, or annual produce so directed to be accumulated." And only one of these periods can be taken; 16 Sim. 391; 25 Ch. D. 729. In Pennsylvania there is a statute of the same kind, Act 1853, Apr. 18, § 9, the text of which will be found in Gray, Perp. Appx. B. In Alabama accumulations are prohibited for more than ten years, or to the termination of minority in case of a minor in being at the date of conveyance or death of the testator.

The legislation in the United States on the subject of perpetuities has been classified as of three kinds: 1. A general provision that perpetuities shall not be allowed. 2. A short and simple statute declaring or modifying the law. 3. An elaborate scheme to be substituted for the common law.

The first class consists mainly of constitutional provisions in Arkansas, North Carolina, Tennessee, Texas, and Vermont. A similar provision existed formerly in Florida, being omitted in the last constitution. The second class includes Georgia, Iowa, and Kentucky, with statutes properly declaratory of the common law; and Alabama, Connecticut, Indiana, Mississippi, Ohio, Pennsylvania, where the common-law rule is somewhat modified. The third class embraces the states which have followed, in the main, the New York statute, providing against, (1) remoteness of interests in land; (2) accumulation of land and profits therefrom; (3) the same as to personal property. Michigan and Minnesota have followed the first and second parts of the New York system, and Indiana substantially the whole of it. The prohibition of this legislation is against a restraint upon the power of alienation for more than two lives in being at the creation of the estate. But in Indiana, California, and Dakota, where the New York system to a large extent was followed, the restraint was not confined to two existing lives. In Wisconsin, where the New York statute was first followed exactly, in 1887, the period was extended to two lives in being and twenty-one years thereafter. See Gray, Perp. Appx. B. & C.; 1 Stims. Am. Stat. L. § 1440. The rule affects both legal and equitable interests and real and personal estate; it is not of feudal origin, but the outgrowth of necessities of modern times; and while strictly applied, regard is had rather to substance than form; Gray, Perp. §§ 202, 203.

Under the common-law rule there is no limit to the number of lives that can be taken; 11 Ves. 146.

In the application of the rule, a child *en ventre sa mere* is to be considered as born when necessary for its own benefit; 2 H. Bla. 399; but not for that of third persons; 2 De G. J. & S. 665. The principle controlling the allowance of the period of gestation under the rule is, that life begins from conception and it is sufficient if the person entitled to a future interest at majority is begotten though not born within a life in being at its creation; Gray, Perp. § 220. This principle has been extended to allow two periods of gestation; 7 Term 100; and it has been a subject of discussion whether three might be allowed; 3 Yo. & Coll. 328; Lewis, Perp. 726; Gray, Perp. § 222. The time runs only from testator's death; *id.* § 231; Lewis, Perp. Suppl. 27. Where a future interest is void as against the rule, prior limitations will be treated precisely as if the void limitation had been omitted; 3 Gray 142; 4 Ves. Jr. 427; 83 Wis. 617. See an extended note classifying and analyzing the cases, 20 L. R. A. 509. Subsequent limitations following an interest too remote were held by Sugden, L. C., to fail. The authorities relied upon for this view are, his argument as counsel in Beard *v.* Westcott, 5 B. & Ald. 801; and his decision as chancellor in Monypenny *v.* Dering, 2 De G. M. & G. 145. In Beard *v.* Westcott, the limitation was held good in the common pleas; 5 Taunt. 393; and bad in the king's bench; 5 B. & Ald. 801. The latter view is seriously controverted as not supported by the authorities cited in Sudgen's argument; Gray, Perp. §§ 251–257; Lewis, Perp. 421, 661.

A vested interest is not subject to the rule, and therefore it does not affect reversions and vested remainders and analogous equitable interests and interests in personalty; Gray, Perp. § 205. Whether contingent remainders are so has been the subject of much discussion involving the mooted question of limiting a possibility upon a possibility. That they are within the rule is contended by many authorities; Gray, Perp. §§ 284–298, where it is earnestly contended that contingent remainders and all future interests should fall within the rule, which conclusion is also supported by Lewis, Perp. c. 16, Suppl. 97. See, also, 20

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Ch. D. 562; 1 Jarm. Wills 255, 260; 2 *id.* 845; Theobald, Wills 424; 46 N. H. 230; 60 L. T. 247; 69 *id.* 360; 1 Hayes, Conv. 494; *contra*, Wms. R. P. 6th Am. ed. 274; Challis, R. P. 90, 159; 8 Jurist, pt. 2, p. 20, 283; 4 D. & W. 1; s. c. 2 H. L. Cas. 186. See L. R. 43 Ch. D. 246.

The rule applies to personal property; Lewis, Perp. 613; Gray, Perp. § 315; and equitable interests are affected by analogy to legal estates; those vested are subject, and those not vested are not subject to the rule; *id.* §§ 322, 323. The rule against perpetuities does not affect contracts unless they are such as create rights of property; *id.* § 329; L. R. 43 Ch. D. 265. The rule is not applicable to a resulting trust which arises on the failure of an estate granted for a particular use which has ceased; 165 U. S. 342; nor to a power to sell, upon the expiration of an estate tail, and divide the proceeds among persons then ascertainable; 166 U. S. 83.

The statutes against perpetuities were directed at private trusts and accumulations and not at public, charitable, or eleemosynary trusts or uses; 107 U. S. 174; 95 *id.* 303; 3 Pet. 99; 15 How. 367; 6 Paige 639. The rule cannot be invoked to defeat a charitable use; 68 Fed. Rep. 796; but a gift for the encouragement of yacht-racing is not such a use and may therefore be void as a perpetuity; [1895] 2 Ch. 657.

If a gift by will to a class is void as to one of the class because against the rule as to perpetuities, it is void as to all; 124 Pa. 10.

Mr. Justice Powell, in Scattergood *v.* Edge, 12 Mod. 278, distinguished perpetuities into two sorts, absolute and qualified; meaning thereby, as it is apprehended, a distinction between a plain, direct, and palpable perpetuity, and the case where an estate is limited on a contingency, which might happen within a reasonable compass of time, but where the estate, nevertheless, from the nature of the limitation, might be kept out of commerce longer than was thought agreeable to the policy of the common law. But this distinction would not now lead to a better understanding or explanation of the subject, for whether an estate be so limited that it cannot take effect until a period too much protracted, or whether on a contingency which may happen within a moderate compass of time, it equally falls within the line of perpetuity, and the limitation is therefore void; for it is not sufficient that an estate *may* vest within the time allowed, but the rule requires that it *must*: Randall, Perp. 49; 48 Conn. 293; 7 Sim. 173; 10 Allen 1; Schoul. Wills § 21; 124 Pa. 10. See Cruise, Dig. tit. 32, c. 23; 1 Belt, Suppl. to Ves. Jr. 406; 2 Ves. 357; 3 Saund. 388; Com. Dig. *Chancery* (4 G 1); 3 Ch. Cas. 1; 85 Tenn. 646.

Under statutes of the New York class, a devise which suspends the power of alienation for a specific time, not measured by two lives, but by a term of years, is void; 5 App. Div. 318; 74 Hun 297. That a contingency may arise which will make the estate alienable is immaterial, but the validity of the provision must be determined independently of any possible agreement of parties; 157 Mass. 362; but a power is not rendered void because by its terms an appointment might possibly be made which would not take effect within the required period; 136 Pa. 354.

**PERQUISITES.** In its most extensive sense, perquisites signifies anything gotten by industry or purchased with money, different from that which descends from a father or ancestor. Bract. l. 2, c. 30, n. 3; l. 4, c. 22. In a more limited sense, it means something gained by a place or office beyond the regular salary or fee.

**PERSIA.** An absolute monarchy of Asia. The executive functions are deputed to a ministry. The laws are based on the Koran and justice is administered according to the Divine law as therein set forth.

**PERSON.** A man considered according to the rank he holds in society, with all the right to which the place he holds entitles him, and the duties which it imposes. 1 Bouv. Inst. n. 137; 134 N. Y. 506.

The term is, however, more extensive than *man*. It may include artificial beings, as corporations; 2 Ill. 178; 1 Bla. Com. 123; 4 Bingh. 669; 1 Mod. 164; 23 N. Y. 242; 48 Ga. 321; *quasi*-corporations; Sedgw. Stat. & Const. L. 372; L. R. 5 App. Cas. 857; territorial corporations; 53 Conn. 507; and foreign corporations; 80 N. Y. 259; under statutes, forbidding the taking of property without due process of law and giving to all persons the equal protection of the laws; 169 U. S. 466, citing 118 *id.* 394; 142 *id.* 386; 165 *id.* 150; concerning claims arising from Indian depredations: 164 U. S. 686; relating to taxation and the revenue laws; 1 Bush 250; 80 N. Y. 254; to attachments; 20 Conn. 416; usurious contracts; 7 How. (Miss.) 508; 13 Conn. 249; applying to limitation of actions: 20 N. Y. 210; 4 Kan. 453; and concerning the admissibility as a witness of a party in his own behalf when the opposite party is a living person; 22 N. Y. 352; 31 Barb. 267. A corporation is also a person under a penal statute; 11 Wheat. 392. See RAILROAD.

It has been held that when the word person is used in a legislative act, *natural* persons will be intended unless something appear in the context to show that it applies to artificial persons; 2 Ill. 178; 112 Pa. 337; but as a rule corporations will be considered persons within the statutes unless the intention of the legislature is manifestly to exclude them; 5 Rand. (Va.) 132.

A county is a person in a legal sense; 52 N. W. Rep. (Neb.) 711; but a sovereignty is not: 52 N. Y. 535; 44 Fed. Rep. 17; 94 U. S. 315; but *contra* within the meaning of a statute, providing a penalty for the fraudulent alteration of a public record

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with intent that any "person" be defrauded; 24 Tex. 61; and within the meaning of a covenant for quiet and peaceful possession against all and every person or persons; 19 Mont. 268. An Indian is a person; 5 Dill. 459; 2 Sawy. 264; and a slave was so considered, in so far as to be capable of committing a riot in conjunction with white men; 1 Bay 358. The estate of a decedent is a person; 107 Ind. 54; and where the statute makes the owner of a dog liable for injuries to any person, it includes the property of such person; 11 Gray 29; but where the statute provided damages for the bite of a dog which had previously bitten a person, it was held insufficient to show that the dog had previously bitten a goat; [1896] 2 Q. B. 109; a dog will not be included in the word in an act which authorizes a *person* to kill dogs running at large; 34 Mich. 283.

It includes women; 136 Mass. 580; 50 Conn. 131; 16 Col. 441; 25 Ohio St. 21; 76 Mich. 1; 74 Ga. 795; but see 39 Wis. 232; 55 Ill. 535, where the statute was in reference to admission to the bar, and it was held that, while the term was broad enough to include them, such a construction could not be presumed to be the legislative intent.

Where the statute prohibited any person from pursuing his usual vocation on the Lord's Day, it was held to apply to a judge holding court; 49 Ga. 436.

A child *en ventre sa mere* is not a person; 138 Mass. 14; but an infant is so considered; 131 *id.* 441.

In the United States Bankruptcy Act of 1898, it is provided that the word "persons" shall include corporations, except where otherwise specified, and officers, partnerships, and women, and, when used with reference to the commission of acts which are therein forbidden, shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or their controlling bodies, of corporations.

**PERSONA** (Lat.) **In Civil Law.** Character, in virtue of which certain rights belong to a man and certain duties are imposed upon him. Thus, one man may unite many characters (*personæ*); as, for example, the characters of father and son, of master and servant; Mackeldey, Civ. Law § 117.

In its original signification, a mask; afterwards, a man in reference to his condition or character (*status*). Vicat, Voc. Jur. It is used metaphorically of things, among which are counted slaves. It is often opposed to *res*: as, *actio in personam* and *actio in rem*.

Power and right belonging to a person in a certain character (*pro jure et potestate personæ competente*). Vicat, Voc. Jur. Its use is not confined to the living, but is extended to the dead and to angels. *Id.* A statue in a fountain whence water gushes.

**PERSONAL.** Belonging to the person.

**PERSONAL ACTION. In Practice. In the Civil Law.** An action in which one person (the *actor*) sues another (the *reus*) in respect of some obligation which he is under to the actor either *ex contractu* or *ex delicto*. It will be seen that this includes all actions against a person, without reference to the nature of the property involved. In a limited sense of the word action in the civil law, it includes only personal action, all others being called petitions. See REAL ACTION.

**In the Common Law.** An action brought for the recovery of personal property, for the enforcement of some contract or to recover damages for its breach, or for the recovery of damages for the commission of an injury to the person or property. Such arise either upon contracts as, account, assumpsit, covenant, debt, and detinue (see these words), or for wrongs, injuries, or torts, as trespass, trespass on the case, replevin, trover (see these words). Other divisions of personal actions are made in the various states; in Vermont and Connecticut an action is in use called the action of book debt. See PERSONAL PROPERTY.

**PERSONAL ASSETS.** See ASSETS.

**PERSONAL CHATTELS.** See CHATTELS.

**PERSONAL CONTRACT.** A contract as to personal property. A covenant (or contract) personal relates only to matters personal as distinguished from real, and is binding on the covenantor (contractor) during his life, and on his personal representatives after his decease, in respect of assets. 3 Co. 22 *a*.

**PERSONAL COVENANT.** A covenant which binds only the covenantor and his personal representatives in respect to assets, and can be taken advantage of only by the covenantee.

A covenant which must be performed by the covenantor in person. Fitzh. N. B. 340.

All covenants are either personal or real; but some confusion exists in regard to the division between them. Thus, a covenant may be personal as regards the covenantor, and real as regards the covenantee; and different definitions have been given, according to whether the rights and liabilities of the covenantor or the covenantee have been in consideration. It is apprehended, however, that the prevalent modern usage is to hold a covenant real, if it is real,—that is, runs with the land so as to apply to an assignee, either as regards the covenantor or the covenantee. See Platt, Cov. 61; 4 Bla. Com. 304; 3 N. J. 260; 7 Gray 83. See COVENANT.

**PERSONAL EFFECTS.** In a will, the words are held not to include personal property in the testator's house, such as furniture and pictures. 173 Pa. 368. See WILL.

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**PERSONAL ESTATE.** The term is sometimes used as synonymous with personal property, but its use should not lead to the supposition that there can be any such thing as an estate in personalty, properly so called. Will. Pers. Prop. 8.

But Dicey (Confl. Laws, Moore's ed. 811) considers *personal estate* and *personal property* synonymous. They are so used in Acts of Parliament.

**PERSONAL GOODS.** That property which passes by hand and property which marriage passed from the wife to the husband. Co. Litt. 185 *b*. See PERSONAL PROPERTY.

**PERSONAL INJURY.** Bodily injury. 45 Pac. Rep. (Wash.) 808.

**PERSONAL LIABILITY.** The statutory liability of stockholders of corporations by which they are held individually liable for the debts of the corporation. See STOCKHOLDERS; JOINT STOCK COMPANY.

**PERSONAL LIBERTY.** Freedom from physical and personal restraint; the right to the pursuit of happiness; freedom to go where one chooses and to pursue such lawful occupations as may seem suitable.

In its broad sense personal liberty would include freedom from unlawful arrest and restraint, from unlawful seizures and searches, from assault and battery, from libel and slander, from general warrants of arrest, from unfair monopolies in trade, and from quartering soldiers in time of peace; and it would include also the right of trial by jury, liberty of conscience, freedom of the press, the right to travel and emigrate, to bear arms and to petition the government for redress of grievances. But in its stricter sense it includes only freedom to move about as one pleases and to pursue any lawful calling. 94 U. S. 142; 4 Am. St. Rep. 468; 16 Wall. 106; 111 U. S. 757; 99 N. Y. 377; 50 Am. Rep. 636. See CONSTITUTIONAL; POLICE POWER; ASSAULT; CORRECTION; IMPRISONMENT; HABEAS CORPUS; EXPATRIATION; PHYSICAL EXAMINATION; SEARCH; PRELIMINARY EXAMINATIONS; LIBERTY OF CONTRACT; LIBERTY.

**PERSONAL PROPERTY.** The right or interest which a man has in things personal.

The right or interest less than a freehold which a man has in realty, or any right or interest which he has in things movable.

Personal property is to be distinguished from things personal. There may be, for example, a personal estate in realty, as chattels real; but the only property which a man can have in things personal must be a personal property. The essential idea of personal property is that of property in a thing movable or separable from the realty, or of perishability or possibility of brief duration of interest as compared with the owner's life, in a thing real, without any action on the part of the owner. See 2 Bla. Com. 14 and notes, 384 and notes.

It includes money, chattels, things in action and evidence of debt; 62 Hun 298; 2 S. Dak. 226; 129 Md. 595; and the right which a vendor has to enforce a contract for the sale of real property; 133 N. Y. 383. It does not include dogs untaxed; 79 Ind. 9.

A crop growing in the ground is personal property so far as not to be considered an interest in land, under the statute of frauds; 12 Me. 337; 5 B. & C. 829; 9 *id.* 561; 10 Ad. & E. 753; 117 Ind. 56, 58.

It is a general principle of American law that stock in corporations is to be considered as personal property; Walker, Am. Law, 9th ed. Sec. 3; 4 Dane, Abr. 670; 1 Hill, R. P. 18; 76 Cal. 536; though it was held that such stock was real estate; 2 Conn. 567; but the rule was then changed by the legislature.

Title to personal property is acquired—*first*, by original acquisition by occupancy; as, by capture in war, by finding a lost thing; *second*, by original acquisition by accession; *third*, by original acquisition by intellectual labor: as, copyrights and patents for inventions; *fourth*, by transfer, which is by act of law, by forfeiture, by judgment, by insolvency, by intestacy; *fifth*, by transfer by act of the party, by gift, by sale. See Graves, Title to Pers. Prop; PEW; PROPERTY; REAL PROPERTY; POSSESSION.

Possession of personal property is *prima facie* title thereto; 76 Ga. 299. See 113 N. Y. 52.

**PERSONAL REPRESENTATIVES.** The executors or administrators of the person deceased. 6 Mod. 155; 5 Ves. 402; 1 Madd. 108; 118 Mass. 198. The personal representative of a lessee for years is his assignee. 1 Ld. Raym. 553; 12 Eng. Rul. Cas. 59.

In wills, these words are sometimes construed to mean *next of kin;* 3 Bro. C. C. 224; 2 Jarm. Wills 112; 1 Beav. 46; 1 R. & M. 587; that is, those who would take the personal estate under the statute of distributions. They have been held to mean *descendants;* 19 Beav. 448. See LEGAL PERSONAL REPRESENTATIVES.

**PERSONAL SECURITY.** The legal and uninterrupted enjoyment by a man of his life, his body, his health, and his reputation. 1 Bouvier, Inst. n. 202.

**PERSONAL SERVICE.** The delivery of a writ to the person therein named in person. Leaving a copy at his place of abode is not personal service; 12 Wis. 336.

**PERSONAL STATUTE.** A law whose principal, direct, and immediate object is to regulate the condition of persons.

The term is not properly in use in the common law, although Lord Mansfield, in 2 W. Bla. 154, applied it to those legislative acts which respect personal transitory

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contracts, but it is occasionally used in the sense given to it in civil law and which is adopted as its definition. It is a law, ordinance, regulation, or custom, the disposition of which affects the person and clothes him with a capacity or incapacity which he does not change with his abode. See 2 Kent 613.

**PERSONALTY.** That which is movable; that which is the subject of personal property and not of a real property.

**PERSONALITY.** A term used to designate that quality of a law which concerns the condition, state, or capacity of persons.

An *action in personality* is one brought against the right person, or the person against whom it lies. Fitzh. N. B. 92.

The *personality of laws* is a phrase used by foreign jurists to designate all laws concerning the condition, state, or capacity of persons, as distinguished from the reality of laws, which means all laws concerning property or things. To express the idea that the operation of a law is universal it is termed a *personal statute*, and, on the other hand, to express the idea that its operation is confined to the country of its origin it is designated a *real statute*. Sto. Confl. L. § 16.

Livermore used the words *personality* and *reality*, and Henry the words *personalty* and *realty*; Story preferred the former, as less likely to lead to mistakes, as, in our law, *personalty* and *realty* are used exclusively to designate personal and real property. *Id.*

**PERSONATE. In Criminal Law.** To assume the character of another without lawful authority, and, in such character, do something to his prejudice, or to the prejudice of another, without his will or consent.

The bare fact of personating another for the purpose of fraud is no more than a cheat or misdemeanor at common law, and punishable as such; 2 East, Pl. Cr. 1010; 2 Russ. Cr. 479.

By statute punishment is inflicted in the United States courts for false personation of any person under the naturalization laws, and of any person holding a claim or debt against the government; R. S. §§ 5424, 5436. See, generally, 2 Johns. Cas. 293; 16 Viner, Abr. 336; Comyns, Dig. *Action on the Case for a Deceit* (A 3).

**PERSUADE, PERSUADING.** To persuade is to induce to act. Persuading is inducing others to act. Inst. 4. 6. 23; Dig. 11. 3. 1. 5.

In the act of the legislature which declared that "if any person or persons knowingly and willingly shall aid or assist any enemies at open war with this state, etc., by *persuading* others to enlist for that purpose, etc., he shall be adjudged guilty of high treason," the word persuading thus used means to succeed; and there must be an actual enlistment of the person persuaded in order to bring the defendant within the intention of the clause; 1 Dall. 39; 4 C. & P. 369; 9 *id.* 79. The attempt to persuade a servant to steal his master's goods, or other person to undertake a larceny or other crime, is an indictable misdemeanor, although the person approached declines the persuasion; 1 Bish. Cr. L. § 767.

If one counsels another to suicide, and it is done in his presence, the adviser is as guilty as the principal. Accordingly, where two persons, agreeing to commit suicide together, employ means which take effect on one only, the survivor is a principal in the murder of the other; 8 C. & P. 418; 1 Bish. Cr. L. § 652; Whart. Cr. L. § 448.

**PERSUASION.** The act of influencing by expostulation or request. While the persuasion is confined within those limits which leave the mind free, it may be used to induce another to make his will, or even to make it in his own favor. But if such persuasion should so far operate on the mind of the testator that he would be deprived of a perfectly free will, it would vitiate the instrument; 3 S. & R. 269; 5 *id.* 207; 13 *id.* 323.

**PERTINENT.** (from Lat. *pertineo*, belong to). That which tends to prove or disprove the allegations of the parties. Willes 319. Matters which have no such tendency are called impertinent; 8 Toullier, n. 22.

**PERTINENTS. In Scotch Law.** Appurtenances. Ersk. Inst. 2. 6. 6.

**PERTURBATION.** This is a technical word which signifies disturbance or infringement of a right. It is usually applied to the disturbance of pews or seats in a church. In the ecclesiastical courts, actions for these disturbances are technically called "suits for perturbation of seat." 1 Phill. Eccl. 323. See PEW.

**PERU.** A republic of South America. The executive is vested in a president and cabinet of ministers responsible to him. The Senate and House of Representatives are representative bodies. The constitution is modelled on that of the United States; it was adopted in 1856, and revised in 1860. It guarantees political but not religious freedom. The Roman Catholic is declared the religion of the State.

**PERVERSE VERDICT.** A verdict rendered by a jury which choose not to take the law from the judge, but will act on their own erroneous view of the law. In such cases, however honest the intentions of the jury may be, their verdict is perverse. A. & E. Encyc.; 14 Eng. L. & Eq. 532.

**PERVISE, PARVISE.** The palace yard at Westminster.

A place where counsel used to advise with their clients.

An afternoon exercise or moot for the instruction of students. Cowell; Blount.

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**PESAGE.** In England, a toll charged for weighing avoirdupois goods other than wool. 2 Chitty, Com. Law 16.

**PESQUIDOR. In Spanish Law.** A coroner. White, New Recop. b. 1, tit. 1, § 3.

**PETENS.** A demandant; the plaintiff in a real action. Bract. fol. 102, 106 *b*.

**PETER-PENCE.** An ancient levy or tax of a penny on each house throughout England paid to the pope. It was called *Peter-pence* because collected on the day of St. Peter, *ad vincula*; by the Saxons it was called *Rome-feoh*, *Rome-scot*, and *Rome-pennying*, because collected and sent to Rome; and lastly, it was called *hearth money*, because every dwelling-house was liable to it, and every religious house, the abbey of St. Albans alone excepted.

It was not intended as a tribute to the pope, but chiefly for the support of the English school or college at Rome; the popes, however, shared it with the college, and at length found means to appropriate it to themselves.

**PETIT** (sometimes corrupted into *petty*). A French word signifying little, small. It is frequently used: as, *petit larceny*, *petit jury*, *petit treason* (*q. v.*).

**PETIT ASSIZE.** A jury to decide on questions of possession. Britton c. 42; Glanv. lib. 2, c. 6, 7. Used in contradistinction to the *grand assize*, which was a jury to decide on questions of property. See GRAND ASSIZE.

**PETIT CAPE.** See CAPE; GRAND CAPE.

**PETIT JURY or PETTY JURY.** The "little" jury, so called to distinguish it from the "grand" (or "large") jury. Brett, Comm. 1162, n.

**PETTY LARCENY.** See LARCENY.

**PETIT SERJEANTY.** See SERJEANTY.

**PETIT TREASON. In English Law.** The killing of a master by his servant, a husband by his wife, a superior by a secular or religious man. In the United States, this is like any other murder. See HIGH TREASON; TREASON.

**PETITIO.** A count or declaration. Glanv.

**PETITION.** An instrument of writing or printing, containing a prayer from the person presenting it, called the petitioner, to the body or person to whom it is presented, for the redress of some wrong or the grant of some favor which the latter has the right to give.

By the constitution of the United States, the right "to petition the government for a redress of grievances" is secured to the people. Amend. art. 1.

Petitions are frequently presented to the courts in order to bring some matters before them. It is a general rule in such cases that an affidavit should be made that the facts therein contained are true as far as known to the petitioner, and that those facts which he states as knowing from others he believes to be true. The sufficiency of a petition must be determined by its face, and can neither be aided nor destroyed by the accompanying exhibits, the exhibits being no part of it; 46 Mo. App. 236.

**PETITION OF RIGHT. In English Law.** A proceeding in chancery by which a subject may recover property in the possession of the king.

This is in the nature of an action against a subject, in which the petitioner sets out his right to that which is demanded by him, and prays the king to do him right and justice; and, upon a due and lawful trial of the right, to make him restitution. It is called a petition of right because the king is bound of right to answer it and let the matter therein contained be determined in a legal way, in like manner as causes between subject and subject. The petition is presented to the king, who subscribes it with these words, *soit droit fait al partie*, and thereupon it is delivered to the chancellor to be executed according to law. Co. 4th Inst. 419, 422 *b*; Mitf. Eq. Pl. 30, 31; Cooper, Eq. Pl. 22, 23.

The modern practice is regulated by statute 23 and 24 Vict. c. 34, which provides that the petition shall be left with the home secretary for Her Majesty's consideration, who, if she shall think fit, may grant her fiat that right be done, whereupon the fiat having been served on the solicitor of the treasury, an answer, plea, or demurrer shall be made in behalf of the crown, and the subsequent pleadings be assimilated as far as practicable to the course of an ordinary action; Mozl. & W.

The stat. 3 Car. I. was a parliamentary declaration of the liberties of the people. 1 Bla. Com. 128.

**PETITORY.** That which demands or petitions; that which has the quality of a prayer or petition; a right to demand.

A petitory suit or action is understood to be one in which the mere title to property is to be enforced by means of a demand, petition, or other legal proceeding, as distinguished from a suit where only the right of possession and not the mere right of property is in controversy. 1 Kent 371; 7 How. 846; 10 *id.* 257. Admiralty suits touching property in ships are either *petitory*, in which the mere title to the property is litigated, or *possessory*, to restore the possession to the party entitled thereto.

The American courts of admiralty exercise unquestioned jurisdiction in petitory as well as possessory actions; 23 Fed. Rep. 403, 406; 26 *id.* 708; 46 *id.* 204; but admiralty will not enforce a merely equitable title; 135 U. S. 599. In England the courts of law, some time after the restoration in 1660, claimed exclusive cognizance of mere questions of title, until the statute of 3 & 4 Vict. c. 65. By that statute the court of

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admiralty was authorized to decide all questions as to the title to or ownership of any ship or vessel, or the proceeds thereof remaining in the registry in any cause of possession, salvage, damage, wages, or bottomry, instituted in such court after the passing of that act; Ware 232; 18 How. 267; 2 Curt. C. C. 426.

**In Scotch Law.** Actions in which damages are sought.

This class embraces such actions as assumpsit, debt, covenant, and detinue, at common law. See Patterson, Comp. 1058, n.

**PETROLEUM.** See OIL.

**PETTY AVERAGE** (called, also, customary average). Several petty charges which are borne partly by the ship and partly by the cargo, such as the expense of tonnage, beaconage, etc. Abb. Sh. 13th ed. 658; 2 Pars. Mar. Law 312; 1 Bell, Com. 567; 2 Magens 277. See AVERAGE.

**PETTY BAG OFFICE. In English Law.** An office in the court of chancery, appropriated for suits against attorneys and officers of the court, and for process and proceedings by extent on statutes, recognizances *ad quod damnum*, and the like. *Termes de la Ley.*

**PETTY CONSTABLE.** The ordinary constable, as distinguished from the high constable of the hundred. 1 Bla. Com. 355; Bac. Law Tr. 181, *Office of Constable;* Willc. Cons. c. 1, § 1. See CONSTABLE.

**PETTY SESSIONS.** See SESSION.

**PETTIFOGGER.** One who pretends to be a lawyer, but possesses neither knowledge of the law nor conscience.

An unprincipled practitioner of law, whose business is confined to petty cases.

**PEW.** A seat in a church, separate from all others, with a convenient place to stand therein.

It is an incorporeal interest in the real property. The pewholder does not own the soil; 32 Barb. 234. And although a man has the exclusive right to it, yet it seems he cannot maintain trespass against a person entering it; 1 Term 430; but case is the proper remedy; 3 B. & Ald. 361; 8 B. & C. 294. See 47 Vt. 262. In 3 Paige, Ch. 296, it was held that the owner of a pew can, if disturbed in its use, maintain trespass, case, or ejectment, according to the circumstances.

The right to pews is limited and usufructuary, and does not interfere with the right of the parish or congregation to pull down and rebuild the church; 4 Ohio 541; Mitch. R. E. & Conv. 60; 5 Cow. 496; 109 Mass. 21; 6 S. & R. 508; 9 Wheat. 445; 9 Cra. 52; 6 Johns. 41; 6 Term 396; 3 How. 74; indemnifying those whose pews are destroyed; 17 Mass. 435. See 2 Bla. Com. 429; 1 Pow. Mortg. 17; 19 Am. L. Reg. N. S. 1; 9 Am. Dec. 161; 24 *id.* 230. The pewholder's right is only to occupy his pew during public worship; 47 Vt. 262. His right is subject to the paramount rights of the parish; 59 Me. 250; but it is held that a rule of the Roman Catholic Church forbidding a layman to control his pew will not be regarded by the courts, unless it was part of the contract; 33 Vt. 602 (criticised in 15 Am. L. Reg. 280).

When pews are removed from a church merely as a matter of expediency, the owners are entitled to payment; 160 Mass. 118. See PERTURBATION.

A pew may be used only for divine service and for meetings of the congregation held for temporal purposes. The pew-owner must preserve order, while enjoying his pew; 34 N. Y. 149. The owner of a pew does not own the soil under it, nor the space above it; 17 Mass. 435.

Where not otherwise provided by statute the interest is considered as real estate, subject to the incidents of that kind of property; 1 Washb. R. P. 9; 33 Vt. 602; 34 Barb. 104 (see also 2 Edw. Ch. 608); 14 Conn. 279; 23 La. Ann. 9; 21 N. J. L. 325. In Massachusetts and New Hampshire pews are personal property by statute. In Pennsylvania they are held personal property as to devolution, although, strictly speaking, an interest in real estate; 24 Pa. 251. See, generally, 45 N. J. L. 320; 27 Wkly. L. Bul. 25; Best, Pres. 111; Crabb, R. P. § 481; Baum, Church Law.

**PHARMACY.** See DRUGGIST.

**PHAROS.** A watch-tower, at sea mark, which cannot be erected without lawful warrant and authority. 3 Inst. 204.

**PHOTOGRAPH.** The mechanical process of photography is judicially recognized as a means of producing true likenesses which are admissible in evidence in the trial of civil and criminal cases. The difference between the images produced upon a photographic plate and upon the human eye does not render a photograph inadmissible in evidence, but bears only upon the effect of such evidence; 1 Greenl. Ev. 92; 2 Rice, Ev. 1169; Tayl. Ev. 1613; 75 Fed. Rep. 373; 52 Mich. 214. A photograph of the subject-matter in controversy is admissible in evidence, when proved to have been fairly taken; 83 N. Y. 464; 31 Wis. 512; 162 Mass. 90; 69 Ga. 42; 47 Am. Rep. 748; 90 Ala. 25; 41 U. S. App. 498; 76 Pa. 340; 81 Cal. 408; 67 Ia. 146; 50 N. H. 159. While the reported cases do not always show that the photograph offered in evidence was first authenticated, yet there is no case which holds that such proof is unnecessary. The following cases show that such proof was assumed to be necessary or was given; 57 Conn. 9; 30 Fla. 256; 52 Ia. 210; 160 Mass. 288; 95 Mich. 586; 54 Minn. 379; 134 Mo. 85; 57 Am. Rep. 766; 125 N. Y. 136; 46 S. C. 55; 77 Tex. 438; 91 Ala. 112; 128 Ind. 97; 31 Wis. 512. It has been said that photographs are merely secondary evidence; 107 Ill. 113; 2 Woods 680; and where the jury has viewed the premises in question a photograph of them is generally inadmissible; 7 D. R. Pa. 321; 118 Mass. 420; 31

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Wis. 512; but where the photographs themselves are the subject of the controversy, or the original subject of the photograph cannot for any reason be produced, it is otherwise; 39 Ala. 193; 49 Ill. App. 398; 5 Wash. 479; 52 Mich. 214; 26 Am. Rep. 319; 2 Woods 680; 32 S. W. Rep. (Tex.) 240; 36 Neb. 361; 31 Wis. 512; 46 Hun 32; 81 Cal. 408; 6 L. R. A. 594; 6 Blatch. 137. The discretion of the court in the admission of photographs does not differ from the exercise of that power with reference to other kinds of evidence; 30 Fla. 256; 162 Mass. 414; 26 L. R. A. 430; 106 N. Y. 598; 37 Am. Rep. 538.

Photographs are admissible to show the physical condition, characteristics, and identity of persons and property, in civil and criminal cases; 65 Mich. 306; 88 Tex. 642; 139 N. Y. 73; 38 Am. Rep. 464; 160 Mass. 403; 89 Ala. 134; 42 Minn. 350; 59 Fed. Rep. 684; 85 Ga. 751; 156 Pa. 147; 4 Fost. & F. 103; 162 U. S. 613; 58 Ind. 530; 36 Neb. 361; 64 N. W. Rep. (Ia). 420; 17 R. I. 763; 108 Cal. 597; also of places; 3 Fost. & F. 73; 36 Neb. 361; 31 Wis. 512; 76 Cal. 597; 95 Mich. 586; 57 Conn. 9; 15 S. W. Rep. (Tex.) 714; 140 Ill. 474; 83 Ga. 92; 126 Mo. 597; 46 S. C. 55; 122 Ind. 527; 162 Mass. 90; 125 N. Y. 136; 30 Fla. 256; 76 Fed. Rep. 373; 55 Miss. 533; 41 U. S. App. 498; 91 Ala. 112; to show the condition of a highway; 62 Hun 137; and a change of grade in a street; 31 Wis. 512; to show resemblance of parent and child; 56 Kan. 43; 81 Cal. 408; 6 L. R. A. 594; 160 Mass. 288; and the physical condition of a plaintiff who was too ill to be present at a trial; 54 Minn. 379; also the appearance of a person at some time in the past; 17 R. I. 763; 159 Mass. 375; to show the identity of a person who passed under different names; 59 Fed. Rep. 684; of documents in general; 134 Mo. 85; 77 Tex. 438; 52 Mich. 214; 60 Barb. 580; 107 Ill. 113; 6 Blatch. 137; 23 Abb. N. C. 83; and public records that cannot be brought into court, but the handwriting must be proved; 2 Woods 680; for comparison of handwriting; 5 Wash. 479; 57 Mich. 69; 10 Abb. Pr. N. S. 300; 39 Md. 36; 75 Tex. 176; 23 How. 515; 16 Gray 161; 77 Am. Dec. 405; 59 Vt. 688; 124 Ind. 495; to show certain premises where inspection is impossible; 36 Neb. 361; and eye-witnesses may verify their accuracy; 75 Hun 255; to show things in general; 49 Ill. App. 398; 62 Mo. App. 634; 56 Md. 84; 11 Blatch. 552.

It is doubtful if they ought to be admitted to show the health, strength, or agility of a person; 160 Mass. 403.

Upon a criminal trial, photographic likenesses taken after death, of persons whom it is material to identify, may be exhibited to witnesses acquainted with such persons in life as aids in the identification; 45 N. Y. 215. Where a mutilated body was found, the witness was allowed to testify that the face resembled a photograph of a person alleged to be the one found, though he had not known the man before death; 76 Pa. 340. The healthy condition of the deceased may be proved by a colored photograph taken a short time before death; 1 W. N. C. Pa. 369; and in an indictment for bigamy a photograph of the first husband may be shown to a witness to the first marriage to prove his identity with the person mentioned in the marriage certificate; 4 F. & F. 103.

See an extended note on the use of photographs as evidence, where the cases are collected and classified; 35 L. R. A. 802.

A photograph made by the cathode or X-ray process will be admitted as secondary evidence; its competency depends upon the science, skill, experience, and intelligence of the person who took the picture and testified with regard to it. Lacking these important qualifications, it should not be admitted, and it is to be weighed like other competent evidence. In an action for personal injuries it was held competent to submit to the jury an X-ray photograph taken by a surgeon, showing the overlapping bones of one of the plaintiff's legs, where it was broken at the time of the accident, and where the surgeon was familiar with the process by which the impression was secured, as well as with fractures, and the surgeon testified that the photograph accurately represented the condition of the leg at the point of the fracture, and that by the aid of the X-rays he was enabled to see the fracture and overlapping bones as if they were uncovered to the sight; 41 S. W. Rep. (Tenn). 445. So in an action for negligence by which the plaintiff's foot was injured, an X-ray photograph was admitted to prove the condition of the injured foot; Hawkins, J., in 22 Law Mag. & Rev. 62.

In a criminal case in New York the prosecution claimed that a bullet struck the victim in the jaw, and split, one piece being deflected into the jaw and the other piece into the back of his head. The defence claimed that the piece lodged in the back of the victim's head was not a fragment but a bullet. To prove this, the defence introduced an X-ray photograph of the head and neck showing the lodgment of the bullet, and the testimony of the physician who took the photograph; 56 Alb. L. J. 309; 15 Med. Leg. J. 246. This question was also recently presented to the District Court of Colorado, wherein Lefevre, J., said:

"During the last decade, at least, no science has made such mighty strides forward as surgery. It is eminently a scientific profession, alike interesting to the learned and the unlearned. It makes use of all science and learning. It has been of inestimable value to mankind. It must not be said of the law that it is wedded to precedent; that it will not lend a helping hand. Rather let the courts throw open the door to all well considered scientific discoveries. Modern science has made it possible to look beneath the tissues of the human body and has aided surgery in telling of the hidden mysteries. We believe it

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to be our duty in this case to be the first, if you please, to so consider it, in admitting in evidence a process known and acknowledged as a determinate science." 29 Chi. Leg. News 145.

It is a breach of contract and violation of confidence for a photographer to make unauthorized copies of his customer's photograph. A private individual may enjoin the publication of his photograph, but a public character may not, in the absence of a breach of contract or violation of confidence in procuring the likeness from which the publication is made. A statesman, author, artist, or inventor who seeks public recognition, may be said to have surrendered this right to the public; 64 Fed. Rep. 280; 40 Ch. D. 845. See PRIVACY; INJUNCTION.

One who reproduces a copyrighted photograph cannot escape liability as an infringer by merely showing that the copy which he reproduced did not bear the notice of copyright when he purchased it, but he must also show that it bore no notice when it left the custody of the owner of the copyright; 54 Fed. Rep. 890; s. c. 4 C. C. A. 548. Violation of the right in a copyrighted photograph is subject by statute to a penalty. See 77 Fed. Rep. 966.

See COPYRIGHT.

**PHOTOGRAPHER.** An artist who takes impressions or likenesses of things and persons on prepared plates or surfaces. 11 Lea 517.

**PHRENASTHENIA.** A morbid condition, also known as the insanity of the degenerates, used to indicate the general mental infirmity of degenerates, or individuals with vices of organization who are insane, but whose insanity presents special characteristics growing out of mental infirmity. It is usually hereditary and congenital. The insanity is a secondary phenomenon, vice of organization being the primary one; 2 Clevenger, Med. Jur. 856.

**PHYSICAL EXAMINATION.** The question as to whether, and under what circumstances, courts will permit the physical examination of litigants and of persons accused of crime, and also of property in litigation, has been much mooted. A physical examination of a woman under the writ of *de ventre inspiciendo* was known to the common law under special circumstances. See JURY OF WOMEN. This early practice has been urged as a precedent for permitting a physical examination in certain civil and criminal cases.

In Union Pacific R. Co. *v.* Bottsford, 141 U. S. 250, the question was the right of a court of the United States to order a surgical examination of the plaintiff, in an action of tort. Mr. Justice Gray referred to the common-law writ of *de ventre inspiciendo* in capital cases, and also in civil cases involving the rightful succession to property of a decedent against fraudulent claims of bastards, and said that the learning and research of counsel for the plaintiff in error (John F. Dillon) had "failed to produce an instance of its even having been considered in any part of the United States as suited to the habits and conditions of the people." He added that "so far as the books within our reach show, no order to inspect the body in a personal action appears to have been made or even moved for, in any of the English courts of common law, at any period of their history." The ruling of the court below, refusing such an examination, was sustained. See, also, 129 Ind. 401; 129 N. Y. 50; 80 Fed. Rep. 278; 25 C. C. A. 413; 102 Ill. 272.

It appears however that such an order was moved for and made by a judge at chambers, not purporting to be by consent, though in fact unopposed, and of which Cockburn, C. J., said, "the order for such examination was clearly *ultra vires*;" 46 L. J. 696.

"The right to one's person may be said to be a right of complete immunity,—to be let alone." Cooley, Torts 29.

But while it has been held that the defendant has no *absolute* right to have a personal physical examination of the plaintiff made, in an action for personal injuries, yet in the discretion of the court such examination *may* be made, if essential for the ascertainment of truth or to subserve the ends of justice; 3 Am. St. Rep. 549; 95 Mo. 169; 49 Leg. Int. (Pa.) 434; 13 Med. Leg. J. 23; 72 Tex. 95; 90 Ala. 71; 2 Dist. R. (Pa.) 825; 34 L. R. A. 207; 96 Mich. 625; 39 W. Va. 86; 82 Ga. 719; 61 Wis. 536; 46 Ark. 275; 29 Kan. 466.

In 1865, in New York, it was said that in an action for personal injuries the defendant could examine the actual physical condition of the plaintiff before trial, and if the plaintiff refused, the defendant might prove the refusal at the trial; 64 Barb. 299. In 1868, in an action in the same state against a physician for personal injuries resulting from malpractice, it was said that no case involving the right to a physical examination was to be found on the books; but the court permitted the examination, citing as authority proceedings in divorce for impotency, mayhem, and the writ *de ventre inspiciendo*; 52 How. Pr. 334. The supreme court of that state, in an action against a carrier for injury to a passenger, overruled this view of the law, holding that in such divorce cases a physical examination was necessary to arrive at the truth, and that the other proceedings were obsolete; 29 Hun 154; 129 N. Y. 50. In a note by the reporter in 52 How. Pr. 334, it is said that there were few cases decisive of the right of physical examination, and he cites: Andrew's Trials 41; 45 How. 216; 1 Brews. (Pa.) 561; 71 N. C. 85; 5 Jones (N. C.) 259.

A plaintiff, in an action for personal injuries alleged to have caused the secretion of albumen and sugar, may be required to produce in court, for analysis, specimens of his urine, accompanied by an affidavit that it was voided by him; the privacy of

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his person not being thereby invaded; 46 N. E. Rep. (Ind.) 678; 36 L. R. A. 681.

It is within the discretion of the court to refuse to require the plaintiff to submit to a physical examination which necessitates the administration of anæsthetics; 65 N. W. Rep. (Mich.) 616.

In some courts plaintiffs are allowed to exhibit to the jury their injuries, and to perform physical acts showing the nature and extent of their injuries; 47 Ia. 375; 33 Minn. 130; but other courts hold this to be improper, because such evidence cannot be preserved in a bill of exceptions for use in an appellate court; 19 Cent. L. J. 144.

In a trial of an action of trespass for assault and battery, it is not error to permit the jury to examine with their fingers scars on the plaintiff's head caused by a blow from defendant's pistol; 35 S. W. Rep. (Tex.) 528.

A court of equity will not, in a patent case, even if it had the power, require the respondent, claiming under an alleged anticipating patent, to perform experiments in the presence of plaintiff's witnesses, except where so extraordinary a course is necessary; 83 Fed. Rep. 490.

In an action for breach of warranty on a sale of a horse, the court has no power to order that the defendant have the privilege of sending a veterinary surgeon into the plaintiff's stable to examine the horse; 63 N. W. Rep. (Mich.) 998; 95 Mich. 266.

In a suit for divorce on the ground of impotence a court has power to compel the parties to submit to a surgical examination when facts essential to a correct decision may thereby be ascertained; 5 Paige 554; 89 Ala. 291; 32 L. J. Mat. 12; in divorce proceeding because of malformation of the wife the court made an order for her inspection, but did not require the husband to submit to inspection; 16 Week. Rep. 943.

The measurement in the presence of the jury of a woman's foot and her leg six inches above the ankle, in a suit for injuries to the foot and ankle, must be permitted by the court when there is a direct conflict as to such measurement by the medical men called by the respective parties,—at least if the witness herself does not object; 99 Ia. 698; s. c. 34 L. R. A. 208.

The better practice seems to be to apply to the party to be examined, before trial, for permission to make the examination, and upon his refusal, to present a motion for leave, by affidavit, showing the refusal, and also the probability that the examination will result in some material disclosure. The party applying for the order for examination should also offer to pay the expense of such examination; 82 Ga. 719. In practice, some courts order a private physical examination of a party to be made by a physician, who may then testify in regard thereto at the trial of the cause.

A physical examination, if made, must be made by physicians agreed upon by the parties or selected by the court, care being taken to prevent danger to life, pains of body, or any indignity to the person; 47 Ia. 375; 33 Minn. 137; 37 Ohio St. 104.

Where an order for physical examination is made, the court will enforce it by refusing to try the cause until it is complied with; 7 Co. Ct. Rep. (Pa.) 565; by dismissing the action, or refusing to allow the plaintiff to give evidence to establish his injury; 37 Ohio St. 104; or by striking out and withdrawing from the consideration of the jury the allegations relative to his inquiry, or punishing him for contempt; 47 Ia. 375; 33 Minn. 130. A refusal to submit to a physical examination, if the court permit him to prosecute his claim will be very strong evidence against the person refusing; 35 Mo. App. 97; and may be considered by the jury as reflecting on his good faith; 141 U. S. 250.

Upon an appeal of mayhem where the issue joined is whether it is mayhem or no mayhem, it will be decided by the court upon inspection with the assistance of surgeons, if desired; 3 Bla. Com. 332.

The Stat. 31 & 32 Vict. c. 119, § 26, expressly authorizes any judge of a court in which an action is pending to recover compensation for a railway accident or any person having power to fix such compensation, to order an examination of the person injured by a duly qualified medical practitioner named in the order, and not being a witness on either side, the costs to be at the discretion of the judge or court making the order. When an examination has been procured by a railway company under this statute the report is privileged and the plaintiff is not entitled to an order for its production; 43 L. J. Rep. Exch. 150.

The act of 1894 in New York provides that, in all actions for personal injuries, the court may, before trial, order the plaintiff to submit to a physical examination "by one or more physicians or surgeons" under such restrictions as the order may impose; the order must require the person to appeal before the judge or a referee, for the purpose of taking the examination, at a time and place named therein. A woman is entitled to have the examination made by "surgeons of her own sex."

*In criminal proceedings* there is no power to undress and medically examine the person of a prisoner, without his consent, although such examination might further the ends of justice; 13 Cox, C. C. 625. It is error for a court to require a person on trial for murder to exhibit his leg at the place where it was amputated, although a certain material fact may be established thereby; 3 Cr. Law Mag. (Ga.) 393; 71 N. C. 85. Where a prisoner refused to make a print of his foot in a pan of soft earth in order that the witnesses for the prosecution might testify as to similarity of such tracks with those found at the scene of the crime, the court said it was optional with the accused, who refused, and upon conviction a new trial was granted; 5 Baxt. 619; *contra*, 7 Tex. Civ. App. 245. A woman indicted for the murder of her illegitimate child refused to allow physicians

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selected by the coroner to examine whether she had recently been delivered of a child, and upon being threatened, yielded. The court ruled out the testimony of the physicians, saying that such proceedings violated the spirit of the constitution which declares that no person shall, in any criminal case, be compelled to be a witness against himself; 45 How. Pr. 216.

On the other hand, it has been held not to be error to compel the defendant to exhibit tattoo marks on his body, to the existence of which a witness had testified; 14 Nev. 79; 33 Am. Rep. (S. C.) 530; or to compel the accused to make his footprints in an ash heap, and to allow the prosecution to show that they corresponded with those found at the scene of the crime; 7 Tex. Civ. App. 245; or for an officer to compel the accused to put his foot in print found at the place where the crime was committed and at the trial testify to the result of the comparison; 74 N. C. 646; 67 Ga. 76; 26 N. E. (Ind.) 138.

See JURY OF WOMEN; PRIVACY; VIEW.

**PHYSICAL FACT.** A fact, the existence of which is perceptible by the senses.

"A fact considered to have its seat in some inanimate being, or, by virtue, not of the qualities by which it is constituted animate, but of those which it has in common with the class of inanimate beings." 1 Benth. Jud. Ev. 45.

**PHYSICIAN.** A person, who has received the degree of doctor of medicine from an incorporated institution.

One lawfully engaged in the practice of medicine.

As used in a policy of life insurance, the term "family physician" has been held to mean the physician who usually attends, and is consulted by, the members of a family, in the capacity of a physician, whether or not he usually attended on or was consulted by the insured himself; 17 Minn. 497; s. c. 10 Am. Rep. 166. See 58 Mo. 421.

Although the physician is civilly and criminally responsible for his conduct while discharging the duties of his profession, he is in no sense a warrantor or insurer of a favorable result, without an express contract to that effect; Elwell, Malp. 20; 7 C. & P. 81.

Every person who offers his services to the public generally, impliedly contracts with the employer that he is in possession of the necessary ordinary skill and experience which are possessed by those who practise or profess to understand the art or science, and which are generally regarded by those most conversant with the profession as necessary to qualify one to engage in such business successfully. This ordinary skill may differ according to locality and the means of information; Elw. Malp. 22, 201; Story, Bailm. 433; 3 C. & P. 629; 34 Ia. 286; s. c. 11 Am. Rep. 141, n.; 82 Ill. 379; s. c. 25 Am. Rep. 328; 70 Md. 162; 36 Neb. 794; 27 Abb. N. C. 45; 108 N. C. 187. If the treatment of the patient has been honest and intelligent only ordinary care and skill is required of defendant and errors of judgment will be overlooked; 60 Barb. 485; 75 N. Y. 21. Experimenting with a patient outside of the rules of practice renders the practitioner liable in damages; 4 Ill. 209. Any one who treats patients as a clairvoyant must be held to the same degree of care as a regular practitioner; 59 Me. 181; 72 Wis. 391.

The physician's responsibility is the same when he is negligent as when he lacks ordinary skill, although the measure of indemnity and punishment may be different; Elw. Malp. 27; 3 Maule & S. 14, 15; 5 *id.* 198; 1 Lew. C. C. 169; Broom, Leg. Max. 168, 169; 4 Denio 464; 19 Wend. 345; 62 How. 621. See 69 Hun 826; 84 Me. 497. Where a physician is charged with manslaughter, resulting from a surgical operation performed by him, it is error to charge that if deceased consented to the performance of the operation, defendant must be acquitted; 8 Wash. 12.

One who holds himself out as a healer of diseases, and accepts employment as such, must be held to the duty of reasonable skill in the exercise of his vocation; failing in this he must be held liable for any damages proximately caused by unskilful treatment of his patient; 72 Wis. 591. Gross negligence may constitute criminal liability; 138 Mass. 165; 38 Ark. 605; and an unlicensed practitioner may be guilty of manslaughter; 1 Witth. & Beck. Med. Jur. 79. See 4 F. & F. 519; 29 Ohio St. 577.

Bad or unskilful practice in a physician or other professional person, whereby the health of the patient is injured, is usually called Malpractice (*Mala praxis*).

*Wilful malpractice* takes place when the physician purposely administers medicines or performs an operation which he knows and expects will result in damage or death to the individual under his care; as in the case of criminal abortion; Elw. Malp. 243; 2 Barb. 216.

*Negligent malpractice* comprehends those cases where there is no criminal or dishonest object, but gross negligence of that attention which the situation of the patient requires; as if a physician should administer medicines while in a state of intoxication, from which injury would arise to his patient.

*Ignorant malpractice* is the administration of medicines calculated to do injury, which do harm, which a well-educated and scientific medical man would know were not proper in the case; Elw. Malpr. 198; 7 B. & C. 493; 6 Mass. 134; 5 C. & P. 333; 1 Mood. & R. 405; 5 Cox, C. C. 587; Whart. & St. Med. Jur. 755.

This offence is a misdemeanor (whether it be occasioned by curiosity and experiment or neglect), because it breaks the trust which the patient has put in the physician, and tends directly to his destruction. See 3 Chitty, Cr. Law 863; 4 Wentw. Pl. 360; 2 Russ. Cr. 277; 6 Mass. 134; 138

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*id.* 165; 88 Ark. 605; 10 Cox, C. C. 525; 8 Mo. 561; 8 C. & P. 629; 4 *id.* 428.

Besides the public remedy for malpractice, in many cases the party injured may bring a civil action; 9 Conn. 209; 3 Watts 355; 7 N. Y. 397; 39 Vt. 447.

Civil cases of malpractice are of very frequent occurrence on those occasions where surgical operations are rendered necessary, or supposed to be so, by disease or injury, and are so performed as either to shorten a limb or render it stiff, or otherwise prevent the free, natural use of it, by which the party ever after suffers damage. This may embrace almost every kind of surgical operation; but nine-tenths of all such cases arise from amputations, fractures, or dislocations; Elw. Malpr. 55.

To the performance of all surgical operations the surgeon is bound to bring at least ordinary skill and knowledge. He must apply without mistake what is settled in his profession. He must possess and practically exercise that degree and amount of knowledge and science which the leading authorities have pronounced as the result of their researches and experience up to the time, or within a reasonable time, before the issue or question to be determined is made; Elwell, Malpract. 55; 6 Am. L. Reg. N. S. 774; 36 Neb. 764.

A physician in the treatment of a patient is bound only to use the reasonable degree of skill and care which is ordinarily possessed and exercised; 27 Abb. N. C. 45; the law imposes on a surgeon the duty of being reasonably skilled in his profession, and the exercise of care and prudence in the application of that skill, and if he be wanting in either, to the injury of his patient, he is liable for damages; 62 Hun 621; although there may be no contractual relation between the patient and the physician; 130 N. Y. 35. If one physician, being unable to attend, sends another in his stead, the former is not liable to one who is injured by the unskilfulness of the latter, since the latter, being engaged in a distinct and independent occupation of his own, is not the servant or agent of the former; 33 Atl. Rep. (N. J.) 388. See, also, 8 East 347; 2 Wils. 259; 1 H. Bla. 61; Wright, Ohio 466; 22 Pa. 261; 27 N. H. 460; 13 B. Monr. 219; 27 Abb. N. C. 45; 62 Hun 621.

In the Roman civil law and at common law until 1422 the practice of medicine and surgery was free to all. A statute in that year confined it to those who had studied the subject in a university and who were bachelors of science. In the United States statutes regulating the right to practice are constitutional; 129 U. S. 114; 10 N. W. Rep. 323; 11 Colo. 109; 52 Hun 65.

In *England*, at common law, a physician could not maintain an action for his fees for anything done as physician either while attending to or prescribing for a patient; but a distinction was taken when he acted as a surgeon or in any other capacity than that of physician, and in such cases an action for fees would be sustained; 1 C. & M. 227, 370; 3 Q. B. 928. But now by the act of 21 & 22 Vict. c. 90, a physician who is registered under the act may bring an action for his fees, if not precluded by any by-law of the college of physicians; 2 H. & C. 92. It has not been denied in this country; 26 Wend. 451.

In this country, the various states have statutory enactments regulating the collection of fees and the practice of medicine; they will be found in Witth. & Beck. Med. Jur.; an unlicensed physician can not maintain an action for medical attendance and medicines; 4 Den. 60; 91 Tenn. 16; 21 Ala. N. S. 680; *contra*, 1 Metc. 154.

In a suit for medical sevices the plaintiff is presumed to have been licensed; 24 Wend. 15. See, also, 24 Ill. App. 42. Sec. 153 of ch. 661 of the laws of New York (1895), as amended by ch. 398, laws of 1895, providing that no person shall practice medicine who has ever been convicted of felony, applies to persons who had been convicted of felony before the passage of the act. As to such persons the statute if not *ex post facto;* 55 Alb. L. J. 218. Such an act does not conflict with the federal constitution; 170 U. S. 189.

The business of massage does not violate a statute forbidding the practice of medicine without a license; 24 Hun 32; but prescribing patent medicine does; 15 Wend. 395; 4 Ohio 295. The law does not recognize any difference between schools of medicine; 4 E. D. Sm. 1. See 42 N. Y. 161. Contracts for contingent compensation are valid; 71 N. Y. 443; 19 Vt. 54. Where a physician called in a stranger, an unmarried man in a confinement case, it was held that this was a breach of duty, for which both were liable to the patient; 46 Mich. 160.

Where the wife of the defendant, being afflicted with a dangerous disease, was carried by him to a distance from his residence and left under the care of the plaintiff as a surgeon, and after the lapse of some weeks the plaintiff performed an operation, soon after which she died, it was held, in an action by the plaintiff against the defendant to recover compensation for his services, that the performance of the operation was within the scope of the plaintiff's authority, if, in his judgment, it was necessary or expedient, and that it was not incumbent on him to prove that it was necessary or proper under the circumstances, or that before he performed it he gave notice to the defendant, or that it would have been dangerous to the wife to wait until notice could be given to the defendant; 19 Pick. 333.

If physicians attending a woman deem it necessary for the preservation and prolongation of her life, to perform an operation they are justified in doing so if she consents, whether her husband consents or not; 70 Md. 162.

Where one who has received personal injury through the negligence of another uses reasonable and ordinary care in the

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selection of a physician, the damages awarded him will not be reduced because more skilful medical aid was not secured; 32 Ia. 324; s. c. 7 Am. Rep. 200. In assumpsit by a physician for his services, the defendant cannot prove the professional reputation of the plaintiff; 3 Hawks 105. Physicians can recover for the services of their students in attendance upon their patients; 4 Wend. 200. Partners in the practice of medicine are within the law merchant, which includes the *jus accrescendi* between traders; 9 Cow. 631. An agreement between physicians whereby, for a money consideration, one promises to use his influence with his patrons to obtain their patronage for the other, is lawful and not contrary to public policy; 39 Conn. 326; s. c. 12 Am. Rep. 390. If a physician carries contagious disease into a family, on a suit for services this may be shown to reduce his claim; 12 B. Monr. 465. A physician who has been guilty of negligence in the treatment of his patient, resulting in damages to the latter, does not necessarily lose his right to recover any compensation whatever for his services; but the amount of his recovery, if any, depends in the amount of damages suffered because of negligence; 66 N. W. Rep. 898.

A law providing that no person shall be licensed to practise medicine except after examinations by the state board, is not in conflict with the fourteenth amendment of the United States constitution; 4 Wash. St. 424; nor is a statute making it a misdemeanor punishable by fine or imprisonment to practise medicine without a certificate from the state board of health that the practitioner is a graduate of a reputable medical college, unconstitutional, as depriving him of life, liberty, or property without due process of law; 129 U. S. 114. See CONFIDENTIAL COMMUNICATIONS; EXPERT; OPINION; EVIDENCE.

**PIA FRAUS.** A pious fraud; a fraud considered morally justifiable on account of the ends sought to be promoted.

**PIACLE.** An enormous crime. Obsolete.

**PICAROON.** A robber; a plunderer.

**PICKERY. In Scotch Law.** Stealing of trifles, punishable arbitrarily. Bell, Dict.; Tait, Inst. *Theft.*

**PICKETING.** Picketing by members of a trade union or strikers, consists in posting members at all the approaches to the works struck against for the purpose of reporting the workman going to or coming from the works; and to use such influence as may be in their power to prevent the workman from accepting work there. Dav. Friend. Soc. 212. See LABOR UNION; STRIKE; BOYCOTT.

**PICKPOCKET.** A thief; one who in a crowd or in other places steals from the pockets or person of another without putting him in fear. This is generally punished as simple larceny.

**PICTURE.** A frame is part of a picture as used in a carrier's act. L. R. 5 Ex. 90; 39 L. J. Ex. 55; 37 L. J. C. P. 83. See PAINTING; COPYRIGHT; PHOTOGRAPH; FIXTURES.

**PIE-POUDRE, PIE POWDER.** See COURT OF PIE POWDER.

**PIER.** A wharf. A structure erected for ferry purposes which was simply a ferry rack and bridge was held not a pier. 5 Robt. N. Y. 285. See DOCK; HARBOR; PORT.

**PIERAGE.** The duty for maintaining piers and harbor.

**PIGNORATIO** (*Lat. from pignorare*, to pledge). **In Civil Law.** The obligation of a pledge. L. 9 D. *de pignor.* Sealing up (*obsignatio*). A shutting up of an animal caught in one's field and keeping it till the expenses and damage have been paid by its master. New Decis. 1. 34. 13.

**PIGNORATIVE CONTRACT. In Civil Law.** A contract by which the owner of an estate engages it to another for a sum of money and grants to him and his successors the right to enjoy it until he shall be reimbursed, voluntarily, that sum of money. Pothier, Obl.

**PIGNORIS CAPTIO** (Lat.). **In Roman Law.** The name given to one of the *legis actiones* of the Roman law. It consisted chiefly in the taking of a pledge, and was, in fact, a mode of execution. It was confined to special cases determined by positive law or by custom, such as taxes duties, rents, etc., and is comparable in some respects to distresses at common law. The proceeding took place in the presence of a prætor.

**PIGNUS** (Lat.). **In Civil Law.** Pledge, or pawn. The contract of pledge. The right in the thing pledged.

"It is derived," says Gaius, "from *pugnum*, the fist, because what is delivered in pledge is delivered in hand." Dig. 50. 16. 238. 2. This is one of several instances of the failure of the Roman jurists when they attempted etymological explanations of words. The elements of *pignus* (*pig*) are contained in the word *pan(g)-o* and its cognate forms. See Smith, Dict. Gr. & Rom. Antiq.

Though pledge is distinguished from mortgage (*hypotheca*), as being something delivered in hand, while mortgage is good without possession, yet a pledge (*pignus*) may also be good without possession. Domat, Civ. Law b. iii. tit. 1, § 5: Calvinus, Lex. *Pignus* is properly applied to movables, *hypotheca* to immovables; but the distinction is not always preserved. *Id.*

**PILA.** That side of money which was called *pile*, because it was the side on which there was an impression of a church built on piles. Fleta, lib. 1, c. 39.

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**PILFER.** To steal. To charge another with pilfering is to charge him with stealing and is slander; 4 Blackf. 499.

**PILFERER.** One who steals petty things.

**PILLAGE.** The taking by violence of private property by a victorious army from the citizens or subjects of the enemy. This in modern times is seldom allowed, and then only when authorized by the commanding or chief officer at the place where the pillage is committed. The property thus violently taken belongs, in general, to the common soldiers. It is expressly forbidden under the rules of the Brussel's Conference, 1874, which however have never been adopted by the European nations. See Dalloz, Dict. *Propriété*, art. 3, § 5; Wolff § 1201; BOOTY; PRIZE; WAR.

**PILLORY.** A wooden machine, in which the neck of the culprit is inserted.

This punishment has in most of the states been superseded by the adoption of the penitentiary system. See 1 Chitty, Cr. L. 797. The punishment of standing in the pillory, so far as the same was provided by the laws of the United States, was abolished by the act of congress of February 27, 1839, s. 5. See Barrington, Stat. 48.

**PILOT.** An officer serving on board of a ship during the course of a voyage, and having charge of the helm and of the ship's route. An officer authorized by law who is taken on board at a particular place for the purpose of conducting a ship through a river, road, or channel, or from or into port.

Pilots of the second description are established by legislative enactments at the principal seaports in this country, and have rights, and are bound to perform duties, agreeably to the provisions of the several laws establishing them.

Pilots have been established in all maritime countries. After due trial and experience of their qualifications, they are licensed to offer themselves as guides in difficult navigation; and they are usually, on the other hand, bound to obey the call of a ship-master to exercise their functions; Abb. Sh. 13th ed. 190; 1 Johns. 305; 4 Dall. 205; 5 B. & P. 82; 5 Rob. Adm. 308; 6 *id.* 316; Laws of Oleron, art. 23; Molloy, b. 2, c. 9, ss. 3, 7; Wesk. Ins. 395; Act of Congr. of August 7, 1789, s. 4; Pardessus, n. 637.

The master of a vessel may decline the services of a pilot, but in that event he must pay the legal fees; 1 Cliff. 492. A pilot who first offers his services, if rejected, is entitled to his fee; 2 Am. Law Rev. 458; Desty. Shipp. § 349; 102 U. S. 592.

The pilot is to conduct the navigation, regulate the course of the ship and the management of the sails; 7 Moore, P. C. 171, 134. He is not liable for damages to the vessel unless caused by his failure to use ordinary diligence, *i. e.*, the degree of skill commonly possessed by others in the same employment; 57 Fed. Rep. 227. A river pilot is bound to be familiar with the channel of the river, and with the various obstructions to navigation, and is liable for damages occasioned by the want of such knowledge, but not for damages occasioned by an error of judgment on his part; 48 Fed. Rep. 690. Shipowners are responsible to third parties for obedience to the pilot; his orders ordinarily, are to be implicitly obeyed; but the shipowner is not responsible for the acts of the pilot where pilotage is compulsory; 7 Moore, P. C. 171; 7 P. Div. 134; 63 Fed. Rep. 845; 73 L. T. 49; 2 W. Rob. 10; in such case the ship has been held liable; 7 Wall. 53. But the owner remains liable for the ship's management in all things that do not relate to mere navigation; 158 U. S. 186. The compulsory pilotage law applies within the three mile limit; 70 Fed. Rep. 331. See TERRITORIAL WATERS. Where a steamer in need of a pilot disregarded the speaking pilot and it appeared that the speaking pilot was within the three mile limit, the pilot was held entitled to recover his fee; 28 U. S. App. 593. See SEAWORTHINESS; PERILS OF THE SEA.

By acts of Aug. 7, 1789, March 2, 1837, each state has authority over pilotage on its navigable waters, though not exclusive; 9 Fed. Rep. 164. A Delaware pilot may recover for services upon the Delaware River and to Philadelphia, although a Pennsylvania act prohibits any one acting as such without a Pennsylvania license; 12 Fed. Rep. 346. The state of Delaware cannot exclude pilots of other states, on the Delaware River; 14 Fed. Rep. 972. A state law may permit or direct a pilot to tender his services beyond the three mile limit.

The usual signal by which a pilot tenders his services is the Union Jack set at the main truck, by day, and "flare-ups" by night; 19 Fed. Rep. 207.

**PILOTAGE.** The compensation given to a pilot for conducting a vessel in or out of port. Pothier, *Des Avaries*, n. 147.

Pilotage is a lien on the ship, when the contract has been made by the master or *quasi*-master of the ship or some other person lawfully authorized to make it; 1 Mas. 508; see 32 Fed. Rep. 486; 24 *id.* 397; and the admiralty court has jurisdiction when services have been performed at sea; 10 Wheat. 428; 6 Pet. 682; Bened. Adm. § 289; 10 Fed. Rep. 135. And see 1 Pet. Adm. Dec. 227; 42 Fed. Rep. 793. The statutes of the several states regulating the subject of pilotage are, in view of the numerous acts of congress recognizing and adopting them, to be regarded as constitutionally made, until congress by its own acts supersedes them; 12 How. 312; 13 Wall. 236.

**PIMP.** One who provides for others the means of gratifying lust; a procurer; a panderer. The word pimp is not a

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technical one, nor has it acquired any peculiar or appropriate meaning in the law; and is therefore to be construed and understood according to the common and approved usage of the language; 75 Mich. 127, where the court disapproved the action of the judge at *nisi prius* who defined the term to mean a man who has intercourse with a loose woman, who usually is taking care of him,—supporting him.

The Indiana statutes provide: "Whoever, being a male person, frequents houses of ill-fame or of assignation, or associates with females known or reputed as prostitutes, or frequents gambling-houses with prostitutes, or is engaged in or about a house of prostitution, is a pimp." R. S. (1881) § 2002. See 102 Ind. 156, which was an indictment for being a pimp under that statute.

**PIMP-TENURE.** A very singular and odious kind of tenure mentioned by old writers, "*Wilhelmus Hoppeshort tenet dimidiam virgatam terræ, per servitium custodiendi sex damisellas, scil. meretrices, ad usum domini regis.*" 12 Edw. 1.

**PIN-MONEY.** Money allowed by a man to his wife to spend for her own personal comforts.

It has been conjectured that the term *pin-money* has been applied to signify the provision for a married woman because anciently there was a tax laid for providing the English queen with pins; Barrington, Stat. 181.

When pin-money is given to but not spent by the wife, on the husband's death it belongs to his estate; 4 Viner, Abr. 133, *Baron & Feme* (E a. 8); 2 Eq. Cas. Abr. 156; 2 P. Will. 341; 1 Ves. 190, 267; 1 Madd. 489.

In England it was once adjudged that a promise to a wife, by the purchaser, that if she would not hinder the bargain for the sale of the husband's lands he would give her ten pounds, was valid, and might be enforced by an action of assumpsit instituted by husband and wife; Rolle, Abr. 21.

In the French law, the term *épingles*, pins, is used to designate the present which is sometimes given by the purchaser of an immovable to the wife or daughters of the seller to induce them to consent to the sale. This present is not considered as a part of the consideration, but a purely voluntary gift. *Dict. de Jur. Epingles.*

**PINT.** A liquid measure, containing half a quart or the eighth part of a gallon.

**PIOUS USES.** See CHARITABLE USES.

**PIPE ROLL. In English Law.** The name of a roll in the exchequer, otherwise called the *Great Roll*. A measure, containing two hogsheads: one hundred and twenty-six gallons is also called a pipe.

**PIPE LINES.** A connected series of pipes for the transportation of oil, gas, or water.

A line of pipes running upon or in the earth carrying with it the right to the use of the soil in which it is placed. 95 Cal. 92.

The right to construct a pipe line is a public use, as is also that of laying pipes for a proper purpose in the streets of a city. See EMINENT DOMAIN.

A pipe line company for conveying oil is a common carrier bound to receive and transport for all persons alike, all goods entrusted to its care, and is not in any sense, or at any time, an agent for the person committing oil to its care; 172 Pa. 580.

A pipe line for the transportation of oil is not rendered a nuisance by the mere fact that its presence enhances the rates of insurance in the neighborhood; 29 Atl. Rep. (N. J.) 683.

A pipe line is held to create an additional servitude on a country highway but not on city or borough streets; 111 Pa. 35; 160 *id.* 372. It may remove its pipes and abandon its easement; 184 *id.* 28.

See Bryan, Nat. Gas; GAS; OIL.

**PIRACY. In Criminal Law.** A robbery or forcible depredation on the high seas, without lawful authority, done *animo furandi*, in the spirit and intention of universal hostility. 3 Wheat. 610; 5 *id.* 153, 163; 3 Wash. C. C. 209. This is the definition of this offence by the law of nations; 1 Kent 183.

"Depredation upon the high seas, without authority from any sovereign." It is not necessary that the motive be plunder or that the depredations be directed against the vessels of all nations indiscriminately. As in robbery upon land, it is only necessary that the spoliation or intended spoliation be felonious, that is, with intent to injure, and without legal authority or lawful excuse; 25 Fed. Rep. 408.

All nations and individuals are warranted in seizing pirates. It has been held by many authorities that insurgents who have not been accorded belligerent rights are pirates, although it may be their intention to prey upon no ships except those of their mother country whom they are resisting. The American colonists in the American Revolution were declared to be pirates by Great Britain, and so were the cruisers of the confederate government by the federal government during the American Civil War; Snow, Lect. Int. Law 52.

Piracy has two aspects: As a violation of the common right of nations, punishable under the common law of nations by the seizure and condemnation of the vessel only, in prize courts. Its liability to punishment criminally by the municipal law of the place where the offenders are tried; Whart. Cr. L. § 2830; 2 Phil. Int. Law 414. Acts hostile in their nature, done for plunder, hatred, revenge, or mischief, or in the wanton exercise of power, are piratical; 2 How. 210, where the subject is elaborately discussed.

Property found on board a pirate ship goes to the Crown, of strict right; but the



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claim of the original owner is admitted, on application; 1 Hagg. Adm. 142. Vessels recaptured from pirates, after whatever length of time, are always restored to the owner on payment of salvage; 4 C. Rob. 3.

Congress may define and punish piracies and felonies on the high seas, and offences against the law of nations; Const. U. S. art. 1, s. 7, n. 10; 3 Wheat. 336; 5 *id.* 76, 153, 184. The following laws have been passed:

Every person who on the high seas commits the crime of piracy as defined by the Law of Nations, and is afterward brought into or found in the United States, shall suffer death; § 5368. Every seaman who lays violent hands upon his commander, thereby to hinder and prevent his fighting in the defence of his vessel or the goods entrusted to him, is a pirate and shall suffer death; § 5369. Robbery on the high seas or in any open roadstead, haven, or harbor where the sea ebbs and flows, committed upon any vessel or ship's company or its lading, is piracy punishable by death; § 5370. Robbery on shore committed by the crew of a piratical vessel is piracy punishable by death. Every person who commits upon the high seas or in any river, harbor, basin, or bay, out of the jurisdiction of any particular state, murder or robbery or any crime which by the laws of a county would be punishable by death, by the laws of the United States, is a pirate, punishable by death. Every citizen who aids in murder or robbery or act of hostility against the United States or any citizen thereof on the high seas under color of any commission from any foreign prince or state or on pretence of authority from any person, is a pirate punishable by death. Every subject of a foreign state found upon the sea making war upon the United States or cruising against its vessels or citizens contrary to the provisions of any treaty between the United States and the state of which he is a subject, when by such treaty such acts are declared to be piracy, is guilty of piracy, and shall suffer death; § 5374. Every person who knowingly aids, etc., another to commit murder, robbery, or other piracy upon the seas is an accessory before the fact, punishable by death; § 5323. Every person who knowingly receives any vessel or other property feloniously taken by any robber or pirate, against the laws of the United States, and any person who, knowing that said pirate has committed any act of piracy or robbery on the land or sea, receives or conceals him, is accessory after the fact; § 5324. Secs. 5375, 5376 refer to confining and detaining negroes on board vessels and landing or seizing negroes on foreign shores, and constitute piracy punishable by death.

See RECAPTURE.

**In Torts.** By piracy is understood the plagiarism of a book, engraving, or other work for which a copyright has been taken out; infringement of copyright may be by unfair quotation; by piratical copying; by piratical use other than copying.

Where the violation of the copyright consists of excerpts from plaintiff's book, the court is bound to consider the quantity and quality of the matter appropriated and the extent to which the plaintiff is injured by it and the damage to the defendant by an injunction. It seems that the complainant is not always bound to prove pecuniary damage to entitle him to an injunction. Where the parts of the complainant's book are scattered through the defendant's book and cannot be separated, the whole will be enjoined; 33 Fed. Rep. 494. See Drone, Copyr. 494.

Piratical copying was held to be established in the case of a society directory by proof that out of 2800 names, 39 common errors were found to exist; 30 Fed. Rep. 772; and by proof that out of 60,000 names there were 67 common errors; 66 Fed. Rep. 977. Two common errors in maps were held sufficient to establish the fact that one map had been copied from the other; 18 Fed. Rep. 539; in a mercantile agency book, the existence of 15 common errors was held sufficient to establish the use of the complainant's book by the defendant; 84 Hun 12. It is not necessary to point out many common errors to establish a presumption of piracy; 66 Hun 38. The court does not feel bound to go through the whole of the defendant's book to ascertain the extent of the piracy; 19 L. J. N. S. Ch. 90. In 2 Beav. 6, the court enjoined the defendant who had pirated parts of a topographical dictionary, without waiting until the whole of the pirated parts could be ascertained, and held that if the parts which had been copied could not be separated from those which were original without destroying the use and value of the original matter, the defendant must suffer the consequences.

The majority of copyright infringements that occur, which have been called "literary larcency" lie intermediately between open piracy and fair use; Chamier, Copyr. 108.

In 30 Fed. Rep. 772, it was intimated that the injunction would be modified at the final hearing, if the proofs of the defendant tended to segregate any part of the material which had been made subject to the injunction.

The rule is well settled that although the entire copyrighted work is not copied in the infringement, but only portions, if such portions are so intermingled with the rest of the piratical work that they cannot well be distinguished from it, the entire profits realized by the defendant will be given to the plaintiff; 144 U. S. 488, following 128 *id.* 617. See 2 Russ. 385; 97 U. S. 126.

It is the unfair appropriation of the compiler's labor in the case of the syllabus of a legal opinion that constitutes infringement. Identity of language will often prove that the offence was committed, but it is not the sole proof. If the subsequent digestor has made an unfair use of any part of a syllabus of his predecessor, the burden is on him to show that there were parts of it that he did not use. Where the defendant's editor, in compiling a digest of reports, digested some 13,300 cases from the complainant's pamphlet reports and a partial comparison of the copyrighted syllabi with the digest showed internal evidence of piracy in some 400 instances, it was held that this indicated a general, systematic, and unfair use of the copyrighted work, coupled with an attempt to disguise such use, and made out a *prima facie* case, which was not rebutted by the simple denial of the defendant's editors that they had made use of the complainant's syllabi. It was held that the whole work, so far as taken from the complainant's pamphlet reports, should be en-

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joined, with liberty to defendant to show by further proofs what paragraphs were digested by non-offending editors and to move to have them excluded from the injunction; 79 Fed. Rep. 756. See COPYRIGHT; MEMORIZATION.

**PIRATE.** A sea-robber, who, to enrich himself, by subtlety or open force, setteth upon merchants and others trading by sea, despoiling them of their loading, and sometimes bereaving them of life and sinking their ships. Ridley, View pt. 2, c. 1, s. 3. One guilty of the crime of piracy. Merlin, *Répert.* See, for the etymology of this word, Bac. Abr. *Piracy.* See PIRACY.

**PIRATICALLY. In Pleading.** This is a technical word, essential to charge the crime of piracy in an indictment, which cannot be supplied by another word or any circumlocution. Hawk. Pl. Cr. b. 1, c. 37, s. 15; Co. 3d Inst. 112; 1 Chitty, Cr. L. *244.

**PISCARY.** The right of fishing in the waters of another. Bac. Abr.; 5 Com. Dig. 366. See FISHERY.

**PISTAREEN.** A small Spanish coin. It is not made current by the laws of the United States. 10 Pet. 618.

**PIT.** A hole dug in the earth, which was filled with water, and in which women thieves were drowned, instead of being hung. The punishment of the pit was formerly common in Scotland.

**PIT AND GALLOWS** (Law Lat. *fossa et furca*). **In Scotch Law.** A privilege of inflicting capital punishment for theft, given by king Malcolm, by which a woman could be drowned in a pit (*fossa*) or a man hanged on a gallows (*furca*). Bell, Dict.; Stair, Inst. 277 § 62.

**PLACE.** The word is associated with objects which are, in their nature, fixed and territorial. 3 Wheat. 336. See VENUE.

It is applied to any locality, limited by boundaries however large or however small. It may be used to designate a country, state, county, town, or a very small portion of a town. The extent of the locality designated by it must, generally, be determined by the connection in which it is used; 46 Vt. 432.

Any piece of ground appropriated by its owner or occupier for the time being is a place within the English betting houses act; 51 L. J. M. C. 56; but the ground must be so appropriated and must be an ascertained place; 14 Q. B. D. 588. The habitual standing or using a table in Hyde Park does not make it a place for betting; 19 C. B. N. S. 765; as habitual user is not of the essence of place; 10 Q. B. 102; but a piece of ground bounded on one side by a boarding and on two other sides by stays which support the boarding is a *place* under 16 & 17 Vic. c. 119, relating to betting; [1896] 1 Q. B. 295. See [1897] 1 Q. B. 579.

A private residence may become a public place when it is used for the purpose of public amusement, recreation, business, or religious worship; 45 S. W. Rep. (Tex.) 702.

**PLACE OF AMUSEMENT.** A hall containing a stage whereon a nightly programme of music, vocal and instrumental, is rendered is a place of amusement; 4 D. R. Pa. 37; and a dance hall is a public amusement. 40 N. E. Rep. (Mass.) 1043.

**PLACE OF BUSINESS.** The place where a man usually transacts his affairs or business.

When a man keeps a store, shop, counting-room, or office, independently and distinctly from all other persons, that is deemed his place of business; and when he usually transacts his business at the counting-house, office, and the like, occupied and used by another, that will also be considered his place of business, if he has no independent place of his own. But when he has no particular right to use a place for such private purpose, as in an insurance-office, an exchange-room, a banking-room, a postoffice, and the like, where persons generally resort, these will not be considered as the party's place of business, although he may occasionally or transiently transact business there; 1 Pet 582; 2 *id.* 121; 10 Johns. 501; 11 *id.* 231; 16 Pick. 392.; Byles, Bills 296.

It is a general rule that a notice of the non-acceptance or non-payment of a bill, or of the non-payment of a note, may be sent either to the domicil or place of business of the person to be affected by such notice; and the fact that one is in one town and the other in the other will make no difference, and the holder has his election to send to either. A notice to partners may be left at the place of business of the firm or of any one of the partners; Story, Pr. Notes § 312; Dan. Neg. Instr. 4th ed. § 1016. See Notice.

**PLACE OF CONTRACT.** See LEX LOCI.

**PLACE OF DELIVERY.** The place where goods sold are to be delivered. If no place is specified in the contract they must, generally, be delivered at the place where they are at the time of the sale. 100 U. S. 134.

**PLACER.** See MINES AND MINING.

**PLACITA COMMUNIA** (Lat.). Common pleas. All civil actions between subject and subject. 3 Bla. Com. 38, *40; Cowell, *Plea.* See PLACITUM.

**PLACITA CORONÆ** (Lat.). Pleas of the crown. All trials for crimes and misdemeanors, wherein the king is plaintiff, on behalf of the people. 3 Bla. Com. 40*; Cowell, *Plea.*

**PLACITA JURIS** (Lat.). Arbitrary rules of law. Bac. Law Tr. 73; Bac. Max. Reg. 12.

**PLACITUM** (Lat. from *placere*). **In Civil Law.** Any agreement or bargain.

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A law; a constitution or rescript of the emperor; the decision of a judge or award of arbitrators. Vicat, Voc. Jur.; Calvinus, Lex; Dupin, *Notions sur le Droit*.

**In Old English Law** (Ger. *plats*, Lat. *platea*, *i. e.* fields or streets). An assembly of all degrees of men, where the king presided and they consulted about the great affairs of the kingdom: first held, as the name would show, in the fields or street. Cowell.

So on the continent. Hinc. *de Ordine Palatii*, c. 29; Bertinian, Annals of France in the year 767; Const. Car. Mag. cap. ix.; Hinc. *Epist.* 197, 227; Laws of the Longobards, *passim*.

A lord's court. Cowell.

An ordinary court. *Placita* is the style of the English courts at the beginning of the record at *nisi prius*; in this sense, *placita* are divided into pleas of the crown and common pleas, which see. Cowell.

A trial or suit in court. Cowell; Jacobs.

A fine. Black Book of Exchequer, lib. 2, tit. 13; 1 Hen. I. cc. 12, 13.

A plea. This word is *nomen generalissimum*, and refers to all the pleas in the case. 1 Saund. 388, n. 6; Skinn. 554; Carth. 334; Yelv. 65. By *placitum* is also understood the subdivisions in abridgments and other works, where the point decided in a case is set down separately, and, generally, numbered. In citing, it is abbreviated as follows; Viner, Abr. *Abatement* pl. 3.

*Placitum nominatum* is the day appointed for a criminal to appear and plead.

*Placitum fractum*. A day past or lost to the defendant. 1 Hen. I. c. 59.

**PLAGIARISM.** The act of appropriating the ideas and language of another and passing them for one's own.

When this amounts to piracy, the party who has been guilty of it will be enjoined when the original author has a copyright. See COPYRIGHT; PIRACY; QUOTATION; Pardessus, *Dr. Com.* n. 169.

**PLAGIARIUS** (Lat.). **In Civil Law.** He who fraudulently concealed a freeman or slave who belonged to another.

The offence itself was called *plagium*.

It differed from larceny or theft in this, that larceny always implies that the guilty party intended to make a profit, whereas the *plagiarius* did not intend to make any profit. Dig. 48. 15. 6; Code 9. 20. 9. 15.

**PLAGIUM** (Lat.). Man-stealing; kidnapping. This offence is the *crimen plagii* of the Romans. Alison, Cr. L. 280.

**PLAIN STATEMENT.** One that can be readily understood not merely by lawyers but by all who are sufficiently acquainted with the language in which it is written. 5 Sandf. 564. See 79 N. C. 574.

**PLAIN TYPE.** Large or ordinary sized type, not that of very small size. 57 Mo. 255.

**PLAINT. In English Law.** The exhibiting of any action, real or personal, in writing. The party making his plaint is called the plaintiff.

**PLAINTIFF** (Fr. *pleyntife*). He who complains. He who, in a personal action, seeks a remedy for an injury to his rights. 3 Bla. Com. 25; Hamm. Part.; 1 Chitty, Pl.; 1 Com. Dig. 36, 205, 308.

The legal plaintiff is he in whom the legal title or cause of action is vested.

The *equitable* plaintiff is he who, not having the legal title, yet is in equity entitled to the thing sued for. For example: when a suit is brought by B. for the use of A., B. the legal, and A. the equitable, plaintiff. This is the usual manner of bringing suits when the cause of action is not assignable at law but is so in equity.

The word plaintiff occurring alone means the plaintiff on record, not the real or equitable plaintiff. After once naming the plaintiff in pleading, he may be simply called the plaintiff. 1 Chitty, Pl. 266; 9 Paige, Ch. 226; 5 Hill, N. Y. 523, 548; 7 Term 50.

**PLAINTIFF IN ERROR.** A party who sues out a writ of error; and this, whether in the court below he was plaintiff or defendant.

**PLAN.** The delineation or design of a city, a house or houses, a garden, a vessel, etc., traced on paper or other substance, representing the position and the relative proportions of the different parts.

A plan referred to in a deed describing land as bounded by a way laid down upon a plan may be used as evidence in fixing the locality of such way; 16 Gray 374; and if a plan is referred to in the deed for description, and in it are laid down courses, distances, and other particulars, it is the same as if they were recited in the deed itself; 8 Washb. R. P. 430.

When houses are built by one person agreeably to a plan, and one of them, with windows and doors in it, is sold to a person, the owner of the others cannot shut up those windows, nor has his grantee any greater right; 1 Price 27; 2 Ry. & M. 24; 2 Saund. 114, n. 4; 1 Mood. & M. 396. See 12 Mass. 159; Hamm. N. P. 202; Com. Dig. *Action on the Case for a Nuisance* (A). ANCIENT LIGHTS; PLAT; MAP; WINDOWS.

**PLANT.** The fixtures and tools necessary to carry on any trade or mechanical business. 77 Ga. 752. The term does not cover property forming part of a separate business; 77 Fed. Rep. 938. As used in the business of a wharfinger, a horse was held part of the plant; 19 Q. B. D. 647; and a legacy of plant and good will was held to pass the house of business held by lease; 8 W. R. 410.

**PLANTATIONS.** Colonies; dependencies. 1 Bla. Com. 107.

In England, this word, as it is used in stat. 12 Car. II. c. 18, is never applied to any of the British dominions in Europe, but only to the colonies in the West Indies and America; 1 Marsh. Ins. 69.

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In its ordinary use it is nearly synonymous with farm, and includes all the land forming the parcel or parcels under culture as one farm, or even what is worked by one set of hands. 88 Cal. 291; 10 Ired. 131. It has been held that in order to constitute a plantation, the estate should be under the control of one proprietor. 79 Ga. 721. The devise of a plantation passes the stock, implements, utensils, etc., on it; 1 Sim. 435; but plantation stock does not include cotton seed; 4 Jones, Eq. 203.

**PLASTERING.** Plastering a building includes lathing. 16 Ill. 502; 49 N. Y. 464.

**PLAT.** A map of a piece of land, on which are marked the courses and distances of the different lines, and the quantity of land it contains.

Such a plat may be given in evidence in ascertaining the position of the land and what is included, and may serve to settle the figure of a survey and correct mistakes; 5 T. B. Monr. 160. See 17 Mass. 211; 5 Me. 219; 7 *id.* 61; 4 Wheat. 444; 14 Mass. 149.

**PLEA.** In Equity. A special answer showing or relying upon one or more things as a cause why the suit should be either dismissed, or delayed, or barred. Mitf. Eq. Pl. Jer. ed. 219; Coop. Eq. Pl. 223; Story, Eq. Pl. § 649.

The modes of making defence to a bill in equity are said to be by *demurrer*, which demands of the court whether from the matter apparent from the bill the defendant shall answer at all; by *plea*, which resting on the foundation of a new matter offered, demands whether the defendant shall answer further; by *answer*, which responds generally to the charges of the bill; by *disclaimer*, which denies any interest in the matters in question; Mitf. Eq. Pl. Jer. ed. 13; 2 Stor. 59; Story, Eq. Pl. § 437. Pleas are said to be *pure* which rely upon foreign matter to discharge or stay the suit, and *anomalous* or *negative* which consist mainly of denials of the substantial matters set forth in the bill: Story, Eq. Pl. §§ 651, 667; 2 Dan. Ch. Pr. 97, 110; Beames, Eq. Pl. 123; Adams, Eq. 236.

Pleas to the jurisdiction assert that the court before which the cause is brought is not the proper court to take cognizance of the matter.

Pleas to the person may be to the person of the plaintiff or defendant. Those of the former class are mainly *outlawry, excommunication, popish recusant convict*, which are never pleaded in America and very rarely now in England; *attainder*, which is now seldom pleaded; 2 Atk. 399; *alienage*, which is not a disability unless the matter respect lands, when the alien may not hold them, or he be an alien enemy not under license; 2 V. & B. 323; *infancy, coverture*, and *idiocy*, which are pleadable as at law (see ABATEMENT); *bankruptcy* and *insolvency*, in which case all the facts necessary to establish the plaintiff as a legally declared bankrupt must be set forth; 3 Mer. 667; though not necessarily as of the defendant's own knowledge; Younge 331; 4 Beav. 554; 1 Y. & C. 39; *want of character in which he sues*, as that he is not an administrator; 2 Dick. 510; 1 Cox, Ch. 198; is not heir; 2 V. & B. 159; 2 Bro. C. C. 143; 3 *id.* 489; is not a creditor; 2 S. & S. 274; is not a partner; 6 Madd. 61; as he pretends to be; that the plaintiff named is a fictitious person, or was dead at the commencement of the suit; Story, Eq. Pl. § 727. Those to the person of the defendant may show that the defendant is not the person he is alleged to be, or does not sustain the character given by the bill; 6 Madd. 61; Cas. *temp.* Finch 334; or that he is bankrupt, to require the assignees to be joined; Story, Eq. Pl. § 732. These pleas to the person are pleas in abatement, or, at least, in the nature of pleas in abatement.

Pleas to the bill or the frame of the bill object to the suit as framed, or contend that it is unnecessary. These may be—the *pendency of another suit*, which is analogous to the same plea at law and is governed in most respects by the same principles; Story, Eq. Pl. § 736; 2 My. & C. 602; 1 Phill. 82; 1 S. & S. 491; Mitf. Eq. Pl. Jer. ed. 248; see AUTER ACTION PENDANT; the other suit must be in equity, and not at law; Beames, Eq. Pl. 146; *want of proper parties*, which goes to both discovery and relief, where both are prayed for; Story, Eq. Pl. § 745; see 3 Yo. & C. 447; but not to a bill of discovery merely; 2 Paige, Ch. 280; 3 Cra. 220; a *multiplicity of suits;* 1 P. Wms. 428; 2 Mas. 190; *multifariousness*, which should be taken by way of demurrer, when the joining or confession of the distinct matters appears from the face of the bill, as it usually does; Story, Eq. Pl. § 271. A plea to the jurisdiction which sets up matters affecting the validity of the service, matters showing want of proper citizenship, and also the pendency of a prior suit, is bad for duplicity; 58 Fed. Rep. 717.

Pleas in bar rely upon *a bar created by statute;* as, the Statute of Limitations; 1 S. & S. 4; 3 Sumn. 152; 10 Ves. 466; which is a good plea in equity as well as at law, and with similar exceptions; Cooper, Eq. Pl. 253; see LIMITATION, STATUTE OF; the Statute of Frauds, where its provisions apply; 1 Johns. Ch. 425; 4 Ves. 24, 720; 2 Bro. C. C. 559; or some other public or private statute; 2 Story, Eq. Jur. § 768; *matter of record or as of record in some court*, as a common recovery; 1 P. Wms. 754; 1 Vern. 13; a judgment at law; 1 Keen 456; 2 My. & C. Ch. 602; Story, Eq. Pl. § 781, n.; the sentence or judgment of a foreign court or a court not of record; 12 Cl. & F. 368; 14 Sim. 265; especially where its jurisdiction is of a peculiar or exclusive nature; 12 Ves. 307; 2 How. 619; with limitation in case of fraud; 1 Ves. 284; Story, Eq. Pl. § 788; or a decree of the same or another court of equity: Cas. Talb. 217; 7 Johns. Ch. 1; 2 S. & S. 464; 2 Y. & C. 43; *matters purely in pais*, in which case the pleas may go to discovery, relief, or either, both, or a part of either, of

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which the principal (though not the only) pleas are: account, stated or settled; 7 Paige, Ch. 573; 1 My. & K. 231; accord and satisfaction; 1 Hare 564; award; 2 V. & B.764; purchase for valuable consideration; 2 Sumn. 507; 2 Yo. & C. 457; release; 3 P. Wms. 315; lapse of time analogous to the Statute of Limitations; 1 Yo. & C. 432, 453; 2 J. & W. 1; 1 Hare 594; 1 Johns. Ch. 46; 10 Wheat. 152; 1 Sch. & L. 721; 3 Paige, Ch. 273; 7 *id.* 62; title in the defendant; Story, Eq. Pl. § 812.

The same pleas may be made to bills seeking discovery as to those seeking relief; but matter which constitutes a good plea to a bill for relief does not necessarily to a bill for discovery merely. See Story, Eq. Pl. § 816; Mitf. Eq. Pl. Jer. ed. 281. The same kind of pleas may be made to bills not original as to original bills, in many cases, according to their respective natures. Peculiar defences to each may, however, be sometimes urged by plea; Story, Eq. Pl. § 826; Mitf. Eq. Pl. Jer. ed. 288.

*Effect of a plea.* A plea may extend to the whole or a part, and if to a part only must express which part, and an answer over-rules a plea if the two conflict; 3 Yo. & C. 683; 3 Cra. 220. The plea may be accompanied by an answer fortifying it with a protest against waiver of the plea thereby; Story, Eq. Pl. § 695. A plea or argument may be allowed, in which case it is a full bar to so much of the bill as it covers, if true; Mitford, Eq. Pl. Jer. ed. 301; or the benefit of it may be saved to the hearing, which decides it valid so far as then appears, but allows matter to be disclosed in evidence to invalidate it, or it may be ordered to stand for an answer, which decides that it may be a part of a defence; 4 Paige, Ch. 124; but is not a full defence, that the matter has been improperly offered as a plea, or it is not sufficiently fortified by answer, so that the truth is apparent; 3 Paige, Ch. 459.

While a defendant cannot plead merely the facts averred in the bill of complaint, but must present his objection to their sufficiency by demurrer, yet he may present a good plea by averring along with the facts contained in the bill, other and additional facts, provided that both together establish a defence to the bill; 50 Fed. Rep. 151.

A plea which avoids the discovery prayed for is no evidence for defendant, even when under oath and denying a material averment in the bill; 120 U. S. 303.

**At Law.** The defendant's answer by matter of *fact* to the plaintiff's declaration, as distinguished from a demurrer, which is an answer by matter of *law*.

It includes as well the denial of the truth of the allegations on which the plaintiff relies, as the statement of facts on which the defendant relies. In an ancient use it denoted action, and is still used sometimes in that sense: as, "summoned to answer in a plea of trespass;" Steph. Pl. 38; Warren, Law Stud. 272; Oliver, Prec. 97. In a popular, and not legal, sense, the word is used to denote a forensic argument. It was strictly applicable in a kindred sense when the pleadings were conducted orally by the counsel. Steph. Pl. App. n. 1.

Pleas are either *dilatory*, which tend to defeat the particular action to which they apply on account of its being brought before the wrong court, by or against the wrong person, or in an improper form; or *peremptory*, which impugn the right of action altogether, which answer the plaintiff's allegations of right conclusively. Pleas are also said to be to the jurisdiction of the court, in suspension of the action, in abatement of the writ, in bar of the action. The first three classes are dilatory, the last peremptory. Steph. Pl. And. ed. 136; 1 Chitty, Pl. 425; Lawes, Pl. 36.

Pleas are of various kinds. *In abatement.* See ABATEMENT. *In avoidance*, called also, *confession and avoidance*, which admits, in words, or in effect, the truth of the matters contained in the declaration, and alleges some new matter to avoid the effect of it and show that the plaintiff is, notwithstanding, not entitled to his action. 1 Chitty, Pl. 540; Lawes, Pl. 122. Every allegation made in the pleadings subsequent to the declaration which does not go in denial of what is before alleged on the other side is an allegation of new matter. See Gould, Pl. § 195; CONFESSION AND AVOIDANCE.

*Pleas in bar* deny that the plaintiff has any cause of action. 1 Chitty, Pl. 407; Co. Lit. 303 *b*. They either conclude the plaintiff by matter of estoppel, show that he never had any cause of action, or, admitting that he had, insist that it is determined by some subsequent matter. Steph. Pl. And. ed. 448; Britt. 92 § 190. They either deny all or some essential part of the averments in the declaration, in which case they are said to traverse it, or, admitting them to be true, allege new facts which obviate and repel their legal effect, in which case they are said to confess and avoid; Steph. Pl. And. ed. 146. The term is often used in a restricted sense to denote what are with propriety called special pleas in bar. These pleas are of two kinds; the general issue, and special pleas in bar. The general issue denies or takes issue upon all the material allegations of the declaration, thus compelling the plaintiff to prove all of them that are essential to support his action. There is, however, a plea to the action which is not strictly either a general issue or a special plea in bar, and which is called *a special issue*, which denies only some particular *part* of the declaration which goes to the *gist* of the action. It thus, on the one hand, denies *less* than does the general issue, and, on the other hand, is distinguished from a "special plea in bar" in this,—that the latter universally advances *new matter*, upon which the defendant relies for his defence, which a special issue never does; it simply *denies*. Lawes, Pl. 110, 145; Co. Litt. 126 *a*; Gould, Pl. 5th ed. ch ii. § 38, ch. vi. § 8. The matter which ought to be so pleaded is

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now very generally given in evidence under the general issue. 1 Chitty, Pl. 415. A plea which merely amounts to the general issue, though not such in form, is bad; 84 Md. 414.

Special pleas in bar admit the facts alleged in the declaration, but avoid the action by matter which the plaintiff would not be bound to prove or dispute in the first instance on the general issue. Ld. Raym. 88. They are very various, according to the circumstances of the defendant's case: as, in personal action the defendant may plead any special matter in denial, avoidance, discharge, excuse, or justification of the matter alleged in the declaration, which destroys or bars the plaintiff's action; or he may plead any matter which estops or precludes him from averring or insisting on any matter relied upon by the plaintiff in his declaration. The latter sort of pleas are called pleas in *estoppel*. In real action, the tenant may plead any matter which destroys and bars the demandant's title; as, a general release; Steph. Pl. 115.

The general qualities of a plea in bar are —*first*, that it be adapted to the nature and form of the action, and also conformable to the count. Co. Litt. 303 *a*; 285 *b*; Bac. Abr. *Pleas* (I); Rolle 216. *Second*, that it answers all it assumes to answer, and no more. Co. Litt. 303 *a*; Com. Dig. *Pleader* (E 1, 36); 1 Saund. 28; 2 B. & P. 427. *Third*, in the case of a special plea, that it confess and admit the fact. 3 Term 298; 1 Saund. 28, 14; 10 Johns. 289. *Fourth*, that it be single. Co. Litt. 307; Bac. Abr. *Pleas* (K 1, 2); 2 Saund. 49, 50. *Fifth*, that it be certain. Com. Dig. *Pleader* (E 5-11, C 41). See CERTAINTY; PLEADING. *Sixth*, it must be direct, positive, and not argumentative. See 6 Cra. 126; 9 Johns. 313. *Seventh*, it must be capable of trial. *Eighth*, it must be true and capable of proof.

The parts of a plea are—*first*, the title of the court. *Second*, the title of the term. *Third*, the names of the parties in the margin. These, however, do not constitute any substantial part of the plea. The surnames only are usually inserted, and that of the defendant precedes the plaintiff's: as, "Roe *v.* Doe." *Fourth*, the commencement, which includes the statement of the name of the defendant, the appearance, the defence, see DEFENCE, the actio non, see ACTIO NON. *Fifth*, the body, which may contain the inducement, the protestation, see PROTESTATION, ground of defence, *quæ est eadem*, the traverse. *Sixth*, the conclusion.

*Dilatory pleas* go to destroy the particular action, but do not affect the right of action in the plaintiff, and hence delay the decision of the cause upon its merits. Gould, Pl. ch. ii. § 33. This class includes pleas to the jurisdiction, to the disability of the parties, and all pleas in abatement. All dilatory pleas must be pleaded with the greatest certainty, must contain a distinct, clear, and positive averment of all material facts, and must in general, enable the plaintiff to correct the deficiency or error pleaded to; And. Steph. Pl. 136. See ABATEMENT; JURISDICTION.

*Pleas in discharge* admit the demand of the plaintiff, and show that it has been discharged by some matter of fact. Such are pleas of judgment, release, and the like.

*Pleas in excuse* admit the demand or complaint stated in the declaration, but excuse the non-compliance with the plaintiff's claim, or the commission of the act of which he complains, on account of the defendant's having done all his power to satisfy the former, or not having been the culpable author of the latter. A plea of tender is an example of the former, and a plea of *son assault demesne* an instance of the latter.

*Foreign pleas* go to the jurisdiction; and their effect is to remove the action, from the county in which the venue is originally laid. Carth. 402. Previous to the statute of Anne, an affidavit was required. 5 Mod. 335; Carth. 402; 1 Saund. Pl. 98, n. 1; Viner, Abr. *Foreign Pleas;* 1 Chitty, Pl. 382; Bacon, Abr. *Abatement* (R).

*Pleas of justification* assert that the defendant has purposely done the act of which the plaintiff complains, and in the exercise of his legal rights. 8 Term 78; 8 Wils. 71. No person is bound to justify who is not *prima facie* a wrong-doer; 1 Leon. 301; 2 *id.* 83; Cowp. 478; 4 Pick. 126; 13 Johns. 443, 579; 1 Chitty, Pl. 436.

*Pleas puis darrein continuance* introduce new matter of defence, which has arisen or come to the plaintiff's knowledge since the last continuance. In most of the states, the actual *continuance* of a cause from one term to another, or from one particular day in term to another day in the same term, is practically done away with, and the prescribed times for pleading are fixed without any reference to terms of court. Still, this right of a defendant to change his plea so as to avail himself of facts arising during the course of the litigation remains unimpaired; and though there be no *continuance*, the plea is still called a plea *puis darrein continuance*,—meaning, now, a plea upon facts arising since the *last stage of suit*. They are either in bar or in abatement. Matter which arises after purchase or issue of the writ, and before issue joined, is properly pleaded in bar of the further maintenance of the suit; 4 East 502; 5 Pet. 224; 4 Me. 582; 12 Gill & J. 358; see 7 Mass. 325; while matter subsequent to issue joined must be pleaded *puis darrein continuance;* 30 Ala. N. S. 253; Hempst. 16; 40 Me. 582; 7 Gill 415; 10 Ohio 300. Their object is to present matter which has arisen since issue joined, and which the defendant cannot introduce under his pleadings as they exist, for the rights of the parties were at common law to be tried as they existed at the time of bringing the suit, and matters subsequently arising come in as it were by exception and favor. See 7 Johns. 194.

Among other matters, it may be pleaded

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that the plaintiff has become an alien enemy; 3 Camp. 152; that an award has been made after issue joined; 2 Esp. 504; 29 Ala. N. S. 619; that there has been accord and satisfaction; 5 Johns. 392; 19 Wend. 98; 5 Pet. 231; that the plaintiff has become bankrupt; 1 Dougl. Mich. 267; 15 East 622; that the defendant has obtained a bankrupt-certificate, even though obtained before issue joined; 9 East 82; see 2 H. Bla. 553; 3 B. & C. 28; 3 Den. 269; that a feme plaintiff has taken a husband; Bull. N. P. 310; 1 Blackf. 288; that judgment has been obtained for the same cause of action; 9 Johns. 221; 5 Dowl. & R. 175; that payment has been made; 61 Ind. 453; that letters testamentary or of administration have been granted; 1 Saund. 265, n. 2; or revoked; Com. Dig. *Abatement* (I 4); that the plaintiff has released the defendant; 4 Cal. 331; 3 Sneed 52; 17 Mo. 267. See 33 N. H. 179. But the defendant in ejectment cannot plead release from the lessor of the plaintiff; 4 Maule & S. 300; and the release will be avoided in case of fraud; 4 B. & Ad. 419; 4 J. B. Moo. P. C. 192; 23 N. H. 535. In ejectment a right to the land obtained by defendant since the commencement of the action, must be set up by a plea *puis darrein continuance;* 90 Mich. 253.

As a general rule, such matters must be pleaded at the first continuance after they happen or come to the plaintiff's knowledge; 11 Johns. 424; 1 S. & R. 146; though a discharge in insolvency or bankruptcy of the defendant; 2 Johns. 294; 9 *id.* 255, 392; and coverture of the plaintiff existing at the purchase of the suit, are exceptions; Bull. N. P. 310; in the discretion of the court; 10 Johns. 161; 4 S. & R. 239; 5 Dowl. & R. 521; 2 Mo. 100. *Great certainty* is required in pleas of this description; Freem. 112; Cro. Jac. 261; 2 Wils. 130; 2 Watts 451. They must state the day of the last continuance, and of the happening of the new matter; Bull. N. P. 309; And. Steph. Pl. 356, n; 7 Ill. 252; 75 Me. 551; cannot be awarded after assizes are over; 2 M'Cl. & Y. 350; must be verified on oath before they are allowed; 1 Stra. 493; 1 Const. S. C. 455; and must then be received; 3 Term 554; 1 Marsh. 70, 280; 15 N. H. 410. They stand as a substitute for former pleas; Hob. 81; Hempst. 16; 4 Wisc. 159; 1 Strobh. 17; 73 Me. 465; 14 Wend. 161; and demurrers; 32 E. L. & E. 280; may be pleaded after a plea in bar; 1 Wheat. 215; Freem. 252; and if decided against the defendant, the plaintiff has judgment in chief; 1 Wheat. 215; Al. 67; Freem. 252.

*Sham pleas* are those which are known to the pleader to be false, and are entered for the purpose of delay. There are certain pleas of this kind which, in consequence of their having been long and frequently used in practice, have obtained toleration from the courts, and, though discouraged, are tacitly allowed: as, for example, the common plea of *judgment recovered*, that is, that judgment has been already recovered by the plaintiff for the same cause of action; Steph. Pl. 444, 445. See 14 Barb. 393; 2 Den. 195. The later practice of courts in regard to sham pleas is to strike them out on motion, and give final judgment for the plaintiff, or impose terms (in the discretion of the court) on the defendant, as a condition of his being let in to plead anew. The motion is made on the plea itself, or on affidavits in connection with the plea.

*Pleas in suspension of the action* show some ground for not proceeding in the suit at the present period, and pray that the pleading may be stayed until that ground be removed. The number of these pleas is small. Among them is that which is founded on the nonage of the parties, and termed parol demurrer. Steph. Pl. And. ed. 138.

A plea which avers a legal conclusion is bad, as "that a dam is no higher than the statute authorized;" 13 Wall. 175.

In ecclesiastical courts, a plea is called an allegation. See ALLEGATION.

**PLEAD, TO.** To answer the indictment or, in a civil action, the declaration of the plaintiff, in a formal manner. To enter the defendant's defence upon record. In a popular use, to make a forensic argument. The word is not so used by the profession. Steph. Pl. App. n. I; Story, Eq. Pl. § 4, n.

**PLEADING.** The written allegation of what is affirmed on the one side, or denied on the other, disclosing to the court or jury having to try the cause, the real matter in dispute between the parties. 1 Minn. 17.

**In Chancery Practice.** It consists in making the formal written allegations or statements of the respective parties on the record to maintain the suit, or to defeat it, of which, when contested in matters of fact, they propose to offer proofs, and in matters of law to offer arguments to the court. Story, Eq. Pl. § 4. The substantial object of pleading is the same, but the forms and rules of pleading are very different, at law and in equity.

**In Civil Practice.** The stating in a logical and legal form the facts which constitute the plaintiff's cause of action or the defendant's ground of defence: it is the formal mode of alleging that on the record which constitutes the support or the defence of the party in evidence. 3 Dougl. 278; Com. Dig. *Pleader* (A); Bac. Abr. *Pleas and Pleading.* Pleading is used to denote the act of making the pleadings.

The object of pleading is to secure a clear and distinct statement of the claims of each party, so that the controverted points may be exactly known, examined, and decided, and the appropriate remedy or punishment administered. See Cowp. 682; Dougl. 159. The object is to develop the real issue; 28 Pa. 522. A pleading must proceed upon some single definite theory, and it must be good upon the theory on

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which it proceeds; 118 Ind. 87. Good pleading consists in good matter pleaded in good form, in apt time, and due order. Co. Litt. 303. *Good matter* includes all facts and circumstances necessary to constitute the cause of complaint or ground of defence, and no more. It does not include arguments or matters of law. But some matters of fact need not be stated, though it be necessary to establish them as facts. Such are, among others, *facts of which the courts take notice* by virtue of their office: as, the time of accession of the sovereign; 2 Ld. Raym. 794; time and place of holding parliament; 1 Saund. 131; public statutes and the facts they ascertain; 1 Term 45; including ecclesiastical, civil, and marine laws; Ld. Raym. 338; but not private; 2 Dougl. 97; or foreign laws; 2 Carth. 273; 4 R. I. 523; common-law rights, duties, and general customs; Ld. Raym. 1542; Co. Litt. 175; Cro. Car. 561; the almanac, days of the week, public holidays, etc.; Salk. 269; 6 Mod. 81; 4 Dowl. 48; 4 Fla. 158; political divisions; Co. 2d Inst. 557; 4 B. & Ald. 242; 6 Ill. 73; the meaning of English words and terms of art in ordinary acceptation; 1 Rolle, Abr. 86, 525; their own course of proceedings; 2 Lev. 176; 10 Pick. 470; and that of courts of general jurisdiction; 1 Saund. 73; 5 McLean 167; 10 Pick. 470; 1 Greenl. Ev. § 4; see JUDICIAL NOTICE; *facts which the law presumes:* as, the innocence of a party, illegality of an act, etc.; 4 Maule & S. 105; 1 B. & Ald. 463; 6 Johns. 105; 72 Tex. 272; 6 Conn. 130; 2 Tex. Civ. App. 76; *matters which the other party* should plead, as being more within his knowledge; 1 Sharsw. Bla. Com. 293, n.; 2 H. Bla. 530; 2 Johns. 415; 9 Cal. 286; 1 Sandf. 89; *mere matters of evidence of facts;* 9 Co. 96; 25 Barb. 457; 7 Tex. 603; 6 Blackf. 173; 1 N. Chipm. 293; see 25 Fla. 1; *unnecessary matter:* as, a second breach of condition, where one is sufficient; 2 Johns. 443; 1 Saund. 58, n. 1; 33 Miss. 474; 4 Ind. 409; 23 N. H. 415; 12 Barb. 27; 2 Green, N. J. 577; see DUPLICITY; or intent to defraud, when the facts alleged constitute fraud; 16 Tex. 335; see 3 Maule & S. 182; *irrelevant matter;* 1 Chitty, Pl. 209. Such matter may be rejected without damage to the plea, if wholly foreign to the case, or repugnant; 7 Johns. 462; 3 Day 472; 2 Mass. 283; 8 S. & R. 124; 16 Tex. 656; 7 Cal. 348; 23 Conn. 134; 1 Du. 242; 6 Ark. 468; 8 Ala. N. S. 320; but in many cases the matter must be proved as stated, if stated; 7 Johns. 321; 3 Day 283. The matter must be true and susceptible of proof; but legal fictions may be stated as facts; 2 Burr. 667; 4 B. & P. 140. Facts necessarily implied from direct averments will be treated as having been pleaded; 48 Mo. App. 319; 44 Ill. App. 22; and facts and not conclusions should be pleaded; 44 Ill. App. 203. See 96 Ala. 454; 52 Fed. Rep. 898.

*The form of statement* should be according to the established forms; Co. Litt. 303; 6 East 351; 8 Co. 48 *b*. This is to be considered as, in general, merely a rule of caution, though it is said the courts disapprove a departure from the well-established forms of pleading; 1 Chitty, Pl. 212. In most of the states of the United States, and in England since 1852, many radical changes have been introduced into the law of pleading: still, it is apprehended that a reasonable regard to the old forms will be profitable, although the names of things may be changed. See 3 Sharsw. Bla. Com. 301, n.; 3 Cal. 196; 28 Miss. 766; 14 B. Monr. 83. In general, it may be said that the facts should be stated logically, in their natural order, with certainty, that is, clearly and distinctly, so that the party who is to answer, the court, and the jury may readily understand what is meant; 2 B. & P. 267; Co. Litt. 303; 33 Miss. 669; Hempst. 238; with precision; 13 Johns. 437; 19 Ark. 695; 5 Du. 689; and with brevity; 36 N. H. 458; 1 Chitty, Pl. 212. The facts stated must not be insensible or repugnant; 7 Co. 25; 25 Conn. 431; 5 Blackf. 339; 18 Colo. 16; nor ambiguous or doubtful in meaning; 5 Maule & S. 38; 86 Wis. 64; nor argumentative; Co. Litt. 303; 5 Blackf. 557; nor by way of recital; 2 Bulstr. 214; Ld. Raym. 1413; and should be stated according to their legal effect and operation; Steph. Pl. And. ed. 366; 16 Mass. 443.

*The time* within which pleas must be filed is a matter of local regulation, depending upon the court in which the action is brought. *The order* of pleading different matters is of importance as affecting the defendant, who may oppose the plantiff's suit in various ways. The order is as follows:—

*First*, to the jurisdiction of the court.

*Second*, to the disability, etc., of the person: *first*, of the plaintiff; *second*, of the defendant.

*Third*, to the count or declaration.

*Fourth*, to the writ: *first*, to the form of the writ,—*first*, matter apparent on the face of it, secondly, matters dehors; *second*, to the action of the writ.

*Fifth*, to the action itself in bar.

This is said to be the natural order of pleading, because each subsequent plea admits that there is no foundation for the former; 13 La. An. 147; 41 Me. 102; 7 Gray 38; 5 R. I. 235; 2 Bosw. 267; 1 Grant, Pa. 359; 4 Jones, N. C. 241; 20 Miss. 656. See 16 Tex. 114; 4 Ia. 158. An exception exists where matter is pleaded *puis darrein continuance*; see PLEA; and where the subject-matter is one over which the court has no jurisdiction, a failure to plead to the puis cannot confer jurisdiction; 10 S. & R. 229; 17 Tex. 52.

The science of pleading, as it existed at common law, has been much modified by statutory changes; but, under whatever names it is done,—whether under rules of court, or of the legislative power, by the parties, the court, or the jury,—it is evident that, in the nature of things, the end of pleading must be attained, namely, the production of one or more points of issue, where a single fact is affirmed by one party

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and denied by the other. By pleading at the common law, this was done by the parties; in the civil law, by the court.

In England, pleadings in actions are now governed by the provisions of the Judicature Act, ord. xix., which made a number of changes in the old common-law methods. See Wharton, Dict.; JUDICATURE ACTS.

Up to judgment pleadings are construed most strongly against the pleader, and unknown, unrecited facts are not assumed in his favor; 45 La. Ann. 935. See 45 Mo. App. 519; 84 Ky. 330; 17 Or. 308; 79 Ga. 315.

**In Criminal Practice** the rules of pleading are the same as in civil practice. There is, however, less liberty of amendment of the indictment. The order of the defendant's pleading is as follows:—*first*, to the jurisdiction; *second*, in abatement; *third*, special pleas in bar: as, autrefois acquit, autrefois attaint, autrefois convict, pardon; *fourth*, the general issue.

**PLEADING, SPECIAL.** By special pleading is meant the allegation of special or new matter, as distinguished from a direct denial of matter previously alleged on the opposite side. Gould, Pl. c. 1, s. 18. See SPECIAL PREADING.

**PLEADINGS. In Chancery Practice.** The written allegations of the respective parties in the suit. The pleadings in equity are less formal than those at common law.

The parts of the pleadings are—the *bill*, which contains the plaintiff's statement of his case, or *information*, where the suit is brought by a public officer in behalf of the sovereign; the *demurrer*, by which the defendant demands judgment of the court, whether he shall be compelled to answer the bill or not; the *plea*, whereby he shows some cause why the suit should be dismissed or barred; the *answer*, which, controverting the case stated by the bill, confesses and avoids it; or traverses and denies the material allegations in the bill, or, admitting the case made by the bill, submits to the judgment of the court upon it, or relies upon a new case or upon new matter stated in the answer, or upon both; *disclaimer*, which seeks at once a termination of the suit by the defendants, disclaiming all right and interest in the matter sought by the bill; Story, Eq. Pl. § 546; Mitf. Eq. Pl. by Jer. 13, 106; Cooper, Eq. Pl. 108; 2 Sto. 59.

**In Civil Practice.** The statements of the parties, in legal and proper manner, of the causes of action and grounds of defence. The result of pleading. They were formerly made by the parties or their counsel, orally, in open court, under the control of the judge. They were then called the parole; 3 Bla. Com. 293; 2 Reeves, Hist. Eng. Law 267.

The parts of the pleadings may be arranged under two heads: the regular, which occur in the ordinary course of a suit; and the irregular or collateral, which are occasioned by errors in the pleadings on the other side.

The regular parts are—the *declaration* or count; the *plea*, which is either to the jurisdiction of the court, or suspending the action, as in the case of a parol demurrer, or in abatement, or in bar of the action, or in replevin, an avowry or cognizance; the *replication*, and, in case of an evasive plea, a *new assignment*, or, in replevin, the *plea in bar* to the avowry or cognizance; the *rejoinder*, or, in replevin, the replication to the plea in bar; the *sur-rejoinder*, being in replevin the rejoinder; the *rebutter*; the *sur-rebutter*; Viner, Abr. *Pleas and Pleading* (C); Bac. Abr. *Pleas and Pleadings* (A); pleas *puis darrein continuance*, when the matter of defence arises pending the suit.

The irregular or collateral parts of pleading are stated to be—*demurrers* to any part of the pleadings above mentioned; *demurrers to evidence* given at trials; *bills of exceptions*; *pleas in scire facias*; and *pleas in error*. Viner, Abr. *Pleas and Pleadings* (C).

**In Admiralty**, the proceedings might go on, by turns, as long as the mode of pleadings require it. The successive pleadings, after the replication, were called duplication, triplication, and quadruplication, and so on; but they are now obsolete; Bened. Adm. § 482.

**In Criminal Practice,** the pleadings are—*first*, the *indictment*; *second*, the *plea*; and the other pleadings as in civil practice.

**PLEAS OF THE CROWN. In English Law.** A phrase now employed to signify criminal causes in which the king is a party. Formerly it signified royal causes for offences of a greater magnitude than mere misdemeanors. Pleas of the crown, were so called because the sovereign is supposed by law to be the person injured by every wrong done to the community. Blackstone vol. 4, p. 2.

These were left to be tried in the courts of the barons; whereas the greater offences, or royal causes, were to be tried in the king's courts, under the appellation of pleas of the crown. 1 Robertson, Hist. Charles V. 48.

**PLEAS ROLL. In English Practice.** A record which contains the declaration, plea, replication, rejoinder, and other pleadings, and the issue. Eunom. Dial. 2, § 29, p. 111.

**PLEBEIAN.** One who is classed among the common people, as distinguished from the nobles.

**PLEBISCITUM** (Lat.). **In Roman Law.** A law established by the people (*plebs*), on the proposal of a popular magistrate, as a tribune. Vicat, Voc. Jur.; Calvinus, Lex.; Mackeldey, Civ. Law §§ 27, 37. The term is used in **France to express** a popular vote (*plébiscite*).

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**PLEDGE.** A bailment of personal property as security for some debt or engagement.

The word is also applied to the *res* or personal property forming the subject-matter of the bailment. *Pawn* was synonymous with *pledge* at common law, but modern usage tends to restrict these words to the bailment of tangible chattels for money advanced, and has introduced the term *collateral security*, or simply *collateral*, to designate the subject-matter of a pledge given as security for an engagement other than a simple borrowing of money, and particularly when the subject-matter consists of incorporeal chattels such as stocks, bonds, or choses in action.

A pledge or pawn (Lat. *pignus*), according to Story, is a bailment of personal property as security for some debt or engagement; Story, Bailm. § 286; which see for the less comprehensive definitions of Sir Wm. Jones, Lord Holt, Pothier, etc. Domat broadly defines it as an appropriation of the thing given for the security of an engagement. But the term is commonly used as Sir Wm. Jones defines it: to wit, as a bailment of goods by a debtor to his creditor, to be kept till the debt is discharged. Jones, Bailm. 117; 2 Ld. Raym. 909; Pothier, *De Naut.* art. prelim. 1; Code Civ. 2071; Domat b. 3, tit. 1, § 1; La. Civ. Code 3100; 6 Ired. 309. The pledgee secures his debt by the bailment, and the pledgor obtains credit or other advantage. See 1 Pars. Contr. 591.

In Louisiana there are two kinds of pledges: the pawn and the antichresis. The former relates to movable securities, and the latter to immovables. If a creditor have not a right to enter on the land and reap the fruits, the security is not an antichresis; 3 La. 157. A pledge of negotiable paper is not valid against third parties without transfer from debtor to creditor; 2 La. 387; 96 U. S. 467, 496.

Pledge is distinguished from mortgage because the essential feature of pledge is transfer of *possession*, while the essential feature of mortgage is transfer of *title;* 96 U. S. 467 (see MORTGAGE). The same distinction exists at the civil law between *pignus* and *hypotheca;* Story, Bailm. § 286. In modern transactions title is often transferred under a pledge, but this arises from the nature of the collateral security, and is not a necessity of the relation. In a mortgage, at common law, the property on non-payment of the debt passes wholly to the mortgagee. In a pledge, the property is sold, and only so much of the proceeds as will pay his debt passes to the pledgee. A mortgage is a conditional conveyance of property, which becomes absolute unless redeemed at a specified time. A pledge is not strictly a conveyance at all, nor need any day of redemption be appointed for it. A mortgagee can sell and deliver the thing mortgaged, subject only to the right of redemption. A pledgee cannot sell and deliver the thing pledged until the debt is due and payment denied (though he can assign his contract, and with it the collateral security, or pledge).

Whether a particular contract be held a pledge or a mortgage is often a question of importance, and the courts hold it to be whichever seems best to effectuate the intention of the parties without regard to the language employed; 9 Wend. 80; 47 Minn. 437; 8 So. Dak. 570; leaning, however, to pledge rather than mortgage as ordinarily more favorable to the debtor; 3 Tex. 119; 2 Cow. 324.

*Subject of pledge.* Any personal property capable of delivery or transfer may be pledged, except for the peculiar rules of maritime law which are applicable to shipping, and except, also, that on the ground of public policy the common law (apart from statutory prohibitions which are frequent) does not permit the pay and emoluments of officers and soldiers to be pledged; 1 H. Bla. 627; 4 Term 248. Hence, probably, a fishing bounty could not be pledged, nor any form of government pension or bounty given for the personal benefit of the donee.

Not only goods and chattels and money, but also negotiable paper, may be put in pledge; 3 Pa. 381; 25 Minn. 202; 82 Ill. 584; 22 Gratt. 262. So may choses in action, patent rights, coupon bonds, and manuscripts of various sorts; 2 Taunt. 268; 15 Mass. 389, 534; 2 Blackf. 198; 7 Me. 28; 4 Den. 227; 2 N. Y. 443; 1 Stockt. 667. So may bonds secured by a mortgage on personal property and corporate franchises; 50 N. H. 57; and coupon bonds; 104 U. S. 505; 9 N. J. Eq. 667; and chattel mortgages of every description; and policies of life insurance; 4 Colo. 138; 18 Fed. Rep. 803. Even a lease may be taken in pledge; 8 Cal. 145; L. R. 10 Eq. 92; for leases are but chattels real; or a mortgage of real estate, which, before foreclosure, is now to be ranked with personal property; 9 Bosw. 322. Incorporeal things could be pledged immediately probably, under the civil law, and so in the Scotch law, or, at all events, by assignment; 1 Domat b. 3, tit. 1, § 1; Pothier, *de Naut.* n. 6; 2 Bell, Com. 23. In the civil law, property of which the pledgor had neither present possession nor title could be pledged,—though this was rather a contract for pledge, called a hypothecation. The pledge became complete when the property was acquired by the pledgor. The same rule holds in our law, where a hypothecary contract gives a lien which attaches when the property is vested; 1 Hare 549; 13 Pick. 175; 54 N. Y. 18; 21 Me. 86; 16 Conn. 276; 60 *id.* 463; Daveis 199. And it has been held that a pledge may be made to secure an obligation not yet risen into existence; 12 La. An. 529. In an agreement to pledge a vessel not then completed, the intent of the parties governs in determining when the property passes; 8 Pick. 236; 24 E. L. & E. 220.

Buying and selling through a broker on deposit of a "margin" with him is held in New York to create the relation of pledgor and pledgee; so that, on the

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pledgor's failure to keep his "margin" good, the pledgee or broker cannot sell the stock, except upon the pledge formalities, for repayment of his advances and commissions; 41 N. Y. 385; and the rule has been adopted in other states; 119 Ill. 554; 63 Conn. 198.

*Delivery of possession* is essential to a pledge. Unless the pledgee take and retain possession there is no pledge; 96 U. S. 467; 133 *id.* 243; 37 Me. 543; 167 Mass. 322; 86 Md. 392; 30 W. Va. 586; 48 La. Ann. 488. If possession be given to a third person for the pledgee such person must know of the trust and accept the obligation it imposes; 46 La. Ann. 1036. But a constructive delivery is all that is required, that is, such delivery as the nature or situation of the goods admits. Hence goods in transit or in store will pass by transfer of the bill of lading or warehouse receipt; 8 How. U. S. 384; 86 Ky. 176; 132 N. Y. 41; 133 Mass. 154; 13 Wash. 645; 29 S. E. Rep. (Ga.) 752; 44 S. W. Rep. (Tex.) 572. A change of the location of bulky articles is not in all cases necessary, but it is sufficient if the best means available to give notice of the change of possession are made use of; 147 Pa. 49; such as posting signs on, or marking, the goods; 17 Nev. 401; or appointing an agent to take charge, which agent may be an employe of the pledgor; 12 Pick. 76; 24 Minn. 423. Delivery of a larger quantity than the amount pledged with the right in pledgee to select the pledge, is good; 14 Pick. 497; 2 Gray 195; 2 N. Y. 258; and so where the pledgee is put and kept in possession of a quantity in excess of the pledged amount, allowing the pledgor to add to, or subtract from, the mass, but maintaining the quantity of the pledge, the pledge is good; 81 Fed. Rep. 439. But there cannot be a valid pledge of a portion of a mass, there being no segregation, and the pledgor retaining the whole; 15 Pa. 618; 63 Me. 459. When goods are in the hands of an agent of the pledgor an order on him to hold for the use of the pledgee, accepted by him, constitutes a delivery; 42 W. Va. 156.

In the case of commercial paper, stocks, bonds, and securities, which together constitute by far the most important division of pledges, or collateral securities, and of choses in action, delivery of possession is essential, but to make the delivery effective assignment is necessary, and assignment is transfer of title. As both title and possession are transferred, the distinction between mortgage and pledge ceases to be of much practical importance—the title to the collateral depends not on the principal obligation, but on the mode of transfer; 65 Fed. Rep. (C. C. A.) 643. But there is a distinction between the position of the pledgee in relation to the pledgor and in relation to third persons. His position cannot be described as simply that of a trustee, because he holds the collateral primarily for his own benefit, which affects his relation to the pledge; 174 Pa. 529. So far as the pledgor is concerned the question of the title of the pledgee is determined by the intention of the parties; as to third parties he is practically owner. Thus a pledgee of stock may transfer it to his own name; 82 Tex. 368; though this is not necessary; 43 S. W. Rep. (Tex.) 896; and so far as the corporation is concerned he is the owner of it; 149 Pa. 368. The legal title to a pledged note or chose in action is in him; 36 Fla. 619; 96 Ga. 445; 39 So. West. Rep. (Tex.) 1002. He occupies the position of a *bona fide* holder for value, except when the pledge is for an existing debt; 112 Ala. 228; and though an assignee of a pledgee have notice of equities, he is not bound by them if his assignor, the pledgee, had not; 75 Fed. Rep. (C. C. A.) 433. His title to an accommodation note is good, notwithstanding equities between maker and payee; 15 S. E. Rep. (So. Car.) 430; and he has the rights of a *bona fide* holder against the corporation, when the collateral is a certificate of stock which proves to have been fraudulently issued; 137 N. Y. 231. See STOCK.

He is bound by anything which should amount to notice that the pledgor is without authority to pledge; 131 N. Y. 595; 185 Pa. 476; 5 Wash. 792; 99 Ala. 130; 52 Fed. Rep. 513; 20 Can. S. C. R. 481. But in dealing with one in possession of the securities and having the apparent right to dispose of them he will be protected, though the pledge be a fraud on the real owner; 113 Ala. 372. Of course if the true owner has been deprived of possession by what amounts to embezzlement he can recover from the pledgee; 168 Mass. 573. And a pledgee from one who has no authority either to sell or pledge acquires no lien on the property as against the true owner; 28 So. East. Rep. (W. Va.) 740. As holder of a note to which there is a valid defence against the payee he is protected, but only to the extent of his interest, *i. e.* to the amount which he has advanced; 88 Tex. 653. See 41 Neb. 754.

*Factors and Agents.* A factor cannot, at common law, pledge his principal's goods; and the principal may recover them from the pledgee's hands; 6 Maule & S. 1; 2 Br. & B. 639; 4 B. & C. 5; [1893] 1 Q. B. 62; 1 M'Cord 1; 6 Metc. 68; 20 Johns. 421; 4 Hen. & M. 432; 18 Mo. 147, 191; 11 How. 209, 226; 52 Fed. Rep. 513; and this is so whether entrusted with the goods themselves or with the symbol of them, as a bill of lading; 120 U. S. 20. But the Factors' Acts in England, to remedy the intolerable condition which would exist if an unknown owner were permitted to repudiate transactions of a factor have enacted that a pledge by a factor having a power of sale shall be valid. Similar acts have been passed in many of the States. See AGENTS; FACTOR; FACTORS' ACTS.

*Co-Pledgees.* A pledgee may hold a pledge for another pledgee also, and it will be a good pledge to both; 43 La. Ann. 1049. If the pledge be not large enough for both debts after sale, and no other arrangement be made, the prior pledgee will have the whole of his debt paid before any

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part of the proceeds is applied to the subsequent pledge. If there is no priority of time, they will divide ratably. But an agreement between the parties will always determine the right of two or more pledgees; 12 Mass. 321. Where possession is given to one of three pledgees, to hold for all three the other two have a constructive possession, which is equally good, for the purpose of sharing, with an actual possession. Hence the mere manual possession of one pledge will not give a right to discharge the whole debt of the holder and a part only of that of his co-pledgee's. So, by the rule of constructive possession, if the holder should lose the pledge by his own negligence, he would be liable to his co-bailees out of actual possession, as well as to his bailor.

*Substituted collateral* is held on the same terms as that originally pledged, the surrender of that given up being sufficient consideration for the new deposit; 143 Ill. 598; 132 Mo. 492; 67 Fed. Rep. (C. C. A.) 469. Collateral deposited on a demand by the pledgee for additional "margin" would probably be held to be security given for an existing debt. The point does not appear to have been decided. When the pledgee changes the form of the collateral he continues to hold under the terms of the pledge, *e. g.* where he forecloses a mortgage and buys in the land; 87 Ga. 339. See 114 Cal. 126; 124 Mass. 242; 86 N. Y. 176; 159 Ill. 416.

*Other debts.* A pledge cannot, in general, be held for any other debt than that which it was given to secure, except on the special agreement and consent of the parties; 6 Ves. 226; 83 Tex. 545; 153 N. Y. 490; 154 Mass. 359; 33 Atl. Rep. (R. I.) 370. (The civil and Scotch law are otherwise; 2 Bell, Com. 22.) Unless the intention is clear to the contrary it will be held that this special agreement applies only to subsequent debts; 77 Ind. 423; 52 N. J. Eq. 188; and the court was equally divided where a custom of brokers was set up to justify the application to existing debts; 94 Va. 686. Where a judgment has been paid the parties may lawfully agree that it shall remain as collateral for a new loan made, or to be made; 161 Pa. 469. After his debt is paid the pledgee may continue to hold the pledge as security for another creditor; 47 La. Ann. 800.

The *renewal* of the note or obligation of pledge does not affect the pledgee's rights in regard to the collaterals, it is a mere prolongation of the original contract; 10 U. S. App. 415; Colebrooke, Collat. Secur. § 14.

*Assignment* by the pledgee is valid, in the absence of an agreement to the contrary, and carries with it all the collaterals pledged as security. The pledgor is not injured thereby, his right to redeem remaining unimpaired; 99 Mich. 121; 43 Neb. 489; 19 Colo. 149. The pledgor may sell or transfer his right to a third party, who may bring trover against the pledgee if the latter, after tender of the amount of the debt, refuse to deliver the pledge; 9 Cow. 52; 13 M. & W. 480; L. R. 1 Q. B. 585; 73 Pa. 153; 78 Ill. 449.

*Conversion.* If the pledgee assign the debt without the collateral he loses his lien on the latter, and the pledgor can recover it. If he assign the collateral, except by exercising whatever right of sale he has under the pledge, he is liable to the pledgor, who has an immediate right of action, without tendering the amount due, for the conversion, though the defendant can offset the debt due him; 69 Hun 311. If he hold negotiable paper he has no right to sell it, but should wait until its maturity and then collect it; 25 Minn. 202; 82 Ill. 584; 22 Grat. 262; 16 N. Y. 392; but a court may under certain circumstances order a judicial sale of it; 57 Minn. 341. See 164 Pa. 95; 89 Wis. 444; 55 N. J. L. 296; 79 Md. 41. Treating the pledge as his own property in disregard of his obligation to the pledgor is, of course, a conversion; 41 N. Y. Sup. 451.

*Shares of stock* have no individuality, no earmarks. The certificates are merely evidence of ownership, muniments of title, like title deeds. Therefore a pledgee of stocks need not preserve a careful separation of certificates connected with each transaction, but complies with his obligation by holding at all times a sufficient number of shares to answer the pledge when called on; 11 Fed. Rep. 115; 82 Tex. 368. The right to re-pledge for his own debt was not enjoyed by a common-law pledgee, but where a custom of brokers justifies re-pledging securities of customers it is not unlawful; 68 Conn. 198; [1893] 2 Ch. Div. 120. No usage will justify such re-pledging of the collateral as to put it out of the power of the pledgee to return it on payment of his debt; that would be to destroy the contract; 78 Md. 475. If a broker re-hypothecate for a larger amount than the pledgor's debt to him, for his own benefit, he is guilty of conversion; 17 App. Div. (N. Y.) 329. See, as to pledgees of shares, 12 L. R. A. 781.

*Re-delivery to pledgee.* Possession is of the very essence of the pledge, and if possession be re-delivered by the pledgee, or with his consent, without more, the pledge is extinguished. The exceptions to the rule are where the pledgor holds as the pledgee's agent, or where the pledge is re-delivered for a temporary purpose only, *e. g.* for sale, or for collection or suit by the pledgor; 96 U. S. 478; 127 *id.* 532; [1895] App. Cas. 56; 47 La. Ann. 742; 42 So. West. Rep. (Tenn.) 698; 60 Mo. App. 83; 53 Minn. 327. Such possession by the pledgor will not defeat the pledge.

*Property.* The pledgee has at common law a special property in the pledge, and is entitled to the exclusive possession of it during the time and for the objects for which it is pledged. If a wrong-doer take the pledge from him, he is not thereby ousted from his right. His special property is enough for him to support replevin or trover against the wrong-doer. He has,

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moreover, a right of action, because he is responsible to his pledgor for proper custody of the bailment. The pledgor, also, may have his action against the wrongdoer resting it on the ground of his general property. A judgment for either pledgor or pledgee is a bar against a similar action by the other; 2 Bla. Com. 395; 1 B. & Ald. 59; 5 Binn. 457. See 15 Conn. 302; 9 Gill 7; 13 Me. 436; 13 Vt. 504.

The pledgee may bring replevin or trover against the pledgor if the latter remove the pledge before paying the debt and thus injure the pledgee's rights, on the ground that the owner has parted with his absolute right of disposing of the chattel until he has redeemed it from its state of pledge; 2 Taunt. 268; 1 Sandf. 208; 22 N. H. 196; 11 N. Y. 150; 2 M'Cord 126. He recovers only the value of his special property as against the pledgor, or one who derives title from him; 4 Barb. 491; 13 Ill. 465; but the value of the whole property as against a stranger, and the balance beyond the special property, he holds for the owner; 15 Conn. 302. So if the owner brings the action and recovers the whole damages, including those for deprivation of possession, it must be with the consent of the pledgee.

A creditor of the pledgor can only take his interest, and must pay the debt before securing the pledge. It is now settled that the pledgor's general property in the pledge may be sold on execution, and the purchaser or assignee of the pledgor succeeds to the pledgor's rights and may himself redeem. At common law, a pledge could not be taken in execution; 1 Ves. 278; 3 Watts 258; 17 Pick. 85; 1 Gray 254; 27 Md. 354; 21 N. H. 72. On an extent the king takes a pawn on paying the pawnee's debt; 2 Chit. Prerog. 285.

Where securities have been pledged by assignment and delivery it would seem that the property vests in the pledgee, who in suit upon them can recover their full value; 72 N. W. Rep. (Wis.) 872. It has been held, however, that the pledgor does not entirely lose his right to protect his interests and can proceed against the maker of notes transferred by him as collateral; 47 La. Ann. 1230; and that when the pledgee refuses to proceed for collection he can proceed in equity against the pledgee and the maker; 21 So. Rep. (Miss.) 970. A bill which discloses that complainant has pledged the stock for which he sues is not demurrable on the ground that it fails to show payment in full of the debt for which the stock was pledged, because a pledgor always has an interest sufficient to enable him to maintain a suit; 77 Fed. Rep. 779. Where a pledgee of securities has wrongfully re-hypothecated them, and the owner secures them by paying the debt for which they were re-hypothecated, a judgment recovered by the pledgor against the original pledgee for the conversion does not vest the title to the securities in the pledgee; 78 Fed. Rep. 216.

*Ordinary care.* The pledgee is bound to take ordinary care of the pledge, and is liable only for neglect of such care, the bailment being for the mutual benefit of the parties; 41 Minn. 46; 119 N. Y. 263; 99 Cal. 234. Where he is to do work upon the pledge and incur expenditure he must use reasonable diligence to secure the best net results, and account, showing that expenses for which allowance is claimed were reasonable and necessary; 55 Minn. 14; where he is to sell, paying himself out of the proceeds, he will be liable for carelessness in properly keeping the pledge, and for failing to sell until the market has fallen; 52 Pac. Rep. (Wash.) 229. If the pledge is lost, and the pledgee has not failed to exercise ordinary care, he may still recover his debt. Such losses often result from casualty, superior force, or intrinsic defect against which a man of ordinary prudence would not have effectually guarded himself. If a pledgor find it necessary to employ an agent, and exercise ordinary care in the selection, he will not be liable for the latter's neglect or misconduct; 1 La. An. 344; 10 B. Monr. 239; 4 Ind. 425; 8 N. H. 66; 6 Cal. 643; 68 N. W. Rep. (So. Dak.) 735. Loss or depreciation in value of the thing pledged, through negligence of the pledgee, does not operate to extinguish *pro tanto* the debt secured; 41 Minn. 46; but the pledgee is liable to the pledgor for the depreciation in value of the property pledged after a tender of the amount due and a refusal of the pledgee to deliver; 74 Cal. 250.

Loss by theft is *prima facie* evidence of a want of ordinary care, and the bailee must rebut the presumption. The facts in each case regulate the liability. Theft is only evidence, in short, and not absolute presumption, of negligence. Perhaps the only safe rule is that, where the pledgee pleads loss by theft as ground for not performing his duty, to excuse himself he must show that the theft could not have been prevented by ordinary care on his part. If the bailor should assert in his declaration that the pledge was lost by the bailee's fault, he would be compelled to prove the charge as laid.

The holder of collateral security, by accepting it, binds himself to use reasonable diligence in protecting it; 71 Fed. Rep. (C. C. A.) 113. Thus, by negligently releasing the indorser he becomes chargeable with the amount of a note; 50 Fed. Rep. 798; if he refuse to sue on a note the pledgor may file a bill to have the note collected and credited on the debt; 21 So. Rep. (Miss.) 970; by failure to use due diligence to collect accounts assigned he becomes responsible for the resulting losses; 37 So. Car. 200; he must account for the real value of an insurance policy surrendered to the company for its cash value without notice to the pledgor; 37 Atl. Rep. (R. I.) 8. But as assignee of a policy of life insurance he is not obliged to pay premiums unless he has engaged to do so; 72 Hun 194; though authorized to sell collateral in the event of its depreciation

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he is not bound to do so, nor liable if he fails; 15 App. Div. (N. Y.) 102; by taking notes secured on property he incurs no obligation to sue for the property, and if he does so, at the request of the pledgor, he incurs no obligation to take charge of it, and advance expenses upon it; 97 Tenn. 308; when only required to collect a sufficient sum on a note to pay the debt, and then to turn it over to the pledgor, after collecting such sum, he is not liable for failure to take prompt steps to collect the residue at maturity; 44 So. West. Rep. (Tenn.) 204. But he is responsible as bailee after, as well as before, the maturity of the debt; 49 Neb. 280.

*Pledgee's expenses.* Whatever reasonable expense is necessarily incurred by the pledgee in keeping and caring for the property pledged, and protecting it against liens and taxes and assessments, and asserting title to it, or rendering it available, is a fair charge against the property pledged; 147 Ill. 570; 173 Pa. 633; 116 Cal. 9; 67 Fed. Rep. (C. C. A.) 837. For any unusual care he may get compensation from the pledgor, if it were not contemplated by the parties or is implied in the nature of the bailment; Ld. Raym. 909; 2 Salk. 522; 1 Pars. Contr. 593.

*Use.* The reasonable use of a pledge is allowed to a pledgee, according to Lord Holt, Sir Wm. Jones, and Story, provided it be of no injury or peril to the bailment. The reason given by Story is precise, namely, that where use of the pledge is beneficial to it, or cannot depreciate it, the consent of the pledgor to such use may be fairly presumed; but not otherwise. Still, the word peril is somewhat broad. If the pawn be in its nature a charge upon the pawnee,—as a horse or a cow,—he may use it, moderately, by way of recompense. The pawnee is answerable in damages for an injury happening while he is using the pawn. Still, though he use it tortiously, he is only answerable by action. His pledgee's lien is not thereby forfeited; 4 Watts 414. A pledgee can exercise a horse, but not loan it for hire. The rule is, that if he derive any profits from the pledge they must be applied to the debt; 2 Murph. 111. A sewing machine that is pledged cannot be used; 72 Ill. 358.

*Redemption.* The pledgor may redeem at any time until his right to do so has been foreclosed by judicial decree, or by sale after notice. He has his whole lifetime in which to redeem, and the right survives to his representatives; 3 Mo. 316; 1 Call 290. Failure to pay the debt at maturity works no forfeiture; 10 Utah 3. If the pledgee fail to deliver on tender the pledgor may maintain trover, or if special ground be shown may proceed in equity; 113 Ala. 372.

*Remedies of pledgee.* The contract of pledge is *security* for some debt or engagement, that is to say it is a secondary or subordinate contract, and the pledgee may enforce the primary contract, or may proceed upon any one of several collateral securities, or may proceed upon all together, unless restricted by his engagement with the pledgor, though he can have but one satisfaction of the debt. It is a settled principle of equity that a creditor holding collaterals is not bound to apply them before enforcing his direct remedies against the debtor; 92 U. S. 618; 184 Pa. 318; 164 Mass. 313; 27 Abb. N. C. 278; 56 Ark. 105; 76 Fed. Rep. 86; 85 *id.* (C. C. A.) 536. Even where the pledgee wrongfully claims that he is the owner of the goods, the pledgor cannot recover them without a tender of the debt; 67 L. T. 642; and the levy of an attachment by the pledgee on the pledge in the hands of the pledge-holder is not a waiver of the pledge; 59 Fed. Rep. 249; 34 So. West. Rep (Ky.) 232. But one personal obligation cannot constitute collateral security for another obligation of the same debtor, hence if he hold bonds of a corporation as collateral for its note he cannot, if the pledgor become insolvent, claim both on the notes and the bonds; 3 Wyo. 803; 67 Conn. 324.

Formerly on default the pledgee had no power to realize upon his pledge, in the absence of agreement, except by securing a judicial decree; Glanv. lib. x. c. 6; 5 Bligh N. S. 136; 2 Johns. Ch. 100; 8 Ill. 423; 3 Tex. 119; 22 Pick. 40; 2 N. Y. 443. While this might in some cases still be necessary (see 57 Minn. 341), it is now generally conceded that on default the pledgee may sell after demand for payment and reasonable notice to pledgor. The pledge must be sold at public auction, and if it be divisible, only enough must be sold to pay the debt.

Generally an agreement is entered into when the pledge is made which provides what remedies the pledgee shall have in case of default, and the agreement of the parties will be sustained if not fraudulent or contrary to public policy; 3 Cal. 151; 52 Kan. 195; 49 Neb. 280. Thus the pledgor may waive notice; 133 N. Y. 660; or authorize the pledgee to sell at public or private sale without advertisement or notice, at his discretion; 84 Fed. Rep. 557; but the sale must be in good faith; 80 *id.* 665. The fact that the price realized was small will not affect the purchaser's title; 56 *id.* 164. But a merely colorable and pretended sale of the pledged property by the pledgee does not affect the rights of the pledgor as against one not standing in the position of a *bona fide* purchaser; 41 Minn. 146. The pledgee may in anticipation of default make a valid contract to sell the collateral when the default occurs; 162 Mass. 527. But a stipulation for a forfeiture to pledgee in case of default is void; 84 Hun 496; and a court of equity will scrutinize carefully an agreement for transfer of ownership, and set it aside if it appear to have been obtained under a harsh contract, brought about by the position of vantage occupied by the pledgee; 79 Fed. Rep. 522.

In the absence of an agreement permitting it, the pledgee cannot buy the pledge; 84 Me. 72; 127 U. S. 532; see 81 Fed. Rep.

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450; though his purchase is voidable merely, at the election of the pledgor, and not void; 54 Fed. Rep. 759; 85 *id.* (C. C. A.) 589. But on procuring a decree of foreclosure in a proceeding in equity to which he has made the pledgor a party, he can sell, and buy in, taking an indefeasible title; 145 Ill. 168.

When corporate bonds, pledged to secure claims against the company, are sold at public auction and bought in by the pledgee the latter is entitled to be paid the full value of the bonds, and not merely the amount for which they were pledged; 86 Fed. Rep. 975.

Consult Wigmore, The Pledge Idea, 10 Harv. L. Rev. 1, 389; Jones, Pledges; Colebrooke, Collateral Securities; Story, Bailments; Schouler, Bailments. See MORTGAGE; SALE; CHATTEL MORTGAGE; HYPOTHECATION; LIEN.

**PLEDGEE.** One to whom a thing is pledged.

**PLEDGES. In Pleading.** Those persons who became sureties for the plaintiff's prosecution of the suit. Their names were anciently appended at the foot of the declaration. In time it became purely a formal matter, because the plaintiff was no longer liable to be amerced for a false claim, and the fictitious persons John Doe and Richard Roe became the universal pledges, or they might be omitted altogether; 1 Tidd, Pr. 455; Archb. Civ. Pl. 171; or inserted at any time before judgment; 4 Johns. 90; they are now omitted.

**PLEDGOR.** The party who makes a pledge.

**PLEGII DE RETORNO HABENDO.** Pledges to return the subject of distress, should the right be determined against the party bringing the action of replevin. 3 Steph. Com. 422, n.

**PLEGIIS ACQUIETANDIS, WRIT DE.** The name of an ancient writ in the English law, which lies where a man becomes pledge or surety for another to pay a certain sum of money at a certain day; after the day, if the debtor does not pay the debt, and the surety be compelled to pay, he shall have this writ to compel the debtor to pay the same. Fitzh. N. B. 321.

**PLENA FORISFACTURA.** See FORISFACTURA.

**PLENA PROBATIO. In Civil Law.** A term used to signify full proof, in contradistinction to *semi-plena probatio*, which is not merely a suspicion, but such evidence as produces a reasonable belief though not complete evidence. Tait, Ev. 273; Code 4. 19. 5. etc.; 1 Greenl. Ev. § 119.

**PLENARTY. In Ecclesiastical Law.** Signifies that a benefice is full. See AVOIDANCE.

**PLENARY.** Full; complete.

In the courts of admiralty, and in the English ecclesiastical courts, causes or suits in respect of the different course of proceedings in each are termed plenary or summary. Plenary, or full and formal, suits are those in which the proceedings must be full and formal; the term summary is applied to those causes where the proceedings are more succinct and less formal. 2 Chitty, Pr. 481.

**PLENE ADMINISTRAVIT** (Lat. he has fully administered). **In Pleading.** A plea in bar entered by an executor or administrator, by which he affirms that he had not in his possession at the time of the commencement of the suit, nor has had any time since, any goods of the deceased to be administered; when the plaintiff replies that the defendant had goods, etc., in his possession at that time, and the parties join issue, the burden of the proof will be on the plaintiff. See 15 Johns. 823; 1 B. & Ald. 254; 11 Viner, Abr. 349; 12 *id.* 185; 3 Saund. (a) 315, n. 1; 6 Com. Dig. 311.

**PLENE ADMINISTRAVIT PRÆTER** (Lat. he has fully administered except). **In Pleading.** A plea by which a defendant executor or administrator admits that there is a residue remaining in his hands unadministered.

**PLENE COMPUTAVIT** (Lat. he has fully accounted). **In Pleading.** A plea in an action of account render, by which the defendant avers that he has fully accounted. Bac. Abr. *Accompt* (E). This plea does not admit the liability of the defendant to account. 15 S. & R. 153.

**PLENIPOTENTIARY.** Possessing full powers: as, a minister plenipotentiary is one authorized fully to settle the matters connected with his mission, subject, however, to the ratification of the government by which he is authorized. See MINISTER.

**PLENUM DOMINIUM** (Lat.). The unlimited right which the owner has to use his property as he deems proper, without accountability to any one.

**PLIGHT.** An old English word, used sometimes for the estate with the habit and quality of the land. Co. Litt. 221. It extends to a rent-charge and to a possibility of dower. *Id.*; 1 Rolle, Abr. 447; Littl. § 289.

**PLOUGH ALMS.** The ancient payment of a penny to the church from every plough land. 1 Mon. Aug. 256.

**PLOUGH-BOTE.** An allowance made to a rural tenant of wood sufficient for ploughs, harrows, carts, and other instruments of husbandry.

**PLOUGH-LAND. In Old English Law.** An uncertain quantity of land. According to some opinions, it contains one hundred and twenty acres. Co. Litt. 69 *a*.

**PLOUGH SILVER.** Money formerly paid by some tenants in lieu of service to plough the lord's land.

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**PLUNDER.** The capture of personal property on land by a public enemy, with a view of making it his own. The property so captured is called plunder. See, for a full discussion of the subject, 8 Fed. Rep. 246; 16 Pick. 9; CAPTURE; BOOTY; PRIZE.

**PLUNDERAGE. In Maritime Law.** The embezzlement of goods on board of a ship.

The rule of the maritime law in such cases is that the whole crew shall be responsible for the property thus embezzled, because there must be some negligence in finding out the depredator; Abb. Ship. 457; 3 Johns. 17; 1 Pet. Adm. 200, 239; 4 B. & P. 347.

**PLURIS PETITIO. In Scotch Law.** A demand of more than is due. Bell, Dict.

**PLURIES** (Lat. many times). A writ issued subsequently to a first and second (alias) of the same kind, which have proved ineffectual. The name is given to it from the word *pluries* in the Latin form of the writ: "We command you, as we have often (*pluries*) commanded you before," which distinguishes it from those which have gone before. *Pluries* is variously translated, in the modern forms of writs, by "formerly," "more than once," "often." The next writ to the pluries is called the second pluries; and so on. 3 Sharsw. Bla. Com. 283; App. 15; Nat. Brev. 33.

**PLEVIN.** A warrant, or assurance.

**PLY.** A hackney carriage plies for hire if it solicits passengers in a railway station. L. R. 6 Q. B. 351.

**POACHING.** Unlawfully entering land in night-time, armed, with intent to destroy game. 1 Russ. Crimes 469; 2 Steph. Comm. 11th ed. 20. This offence is punished in England by imprisonment for any period not exceeding three months with hard labor, and at the expiration of such period the party convicted is to be bound over by sureties for good behavior for one year, or in default thereof to be imprisoned for a further period of six months, or until such sureties be found. For a second offence, the offender is liable to an imprisonment of six months and then to be bound in sureties for two years. And for a third, he is guilty of a misdemeanor and liable to penal servitude or imprisonment at hard labor for not more than two years. By 25 & 26 Vict. c. 114, power is given to any constable in the highway to search any person he may have good cause to suspect of coming from any land where he shall have been unlawfully in search of game and to seize such game and to apply to some justice for a summons citing the offender to appear before two justices, by whom the party may, on conviction, be fined. See GAME LAWS.

**POCKET JUDGMENT.** A statute-merchant which was enforceable at any time after non-payment on the day assigned, without further proceedings.

**POCKET SHERIFF. In English Law.** A sheriff appointed by sole authority of the crown, not being one of the three nominated by the judges in the exchequer. 1 Sharsw. Bla. Com. 342.

**PŒNA CORPORALIS.** Corporal punishment.

**PŒNA PILLORALIS.** Punishment of the pillory. Fleta, lib. 1, ch. 38, § 11.

**POINDING. In Scotch Law.** That diligence (process) affecting movable subjects by which their property is carried directly to the creditor. Poinding is real or personal. Erskine, Inst. 3. 6. 11.

**POINDING, PERSONAL.** Poinding of the goods belonging to the debtor, and of those goods only.

It may have for its warrant either letters of horning, containing a clause for poinding, and then it is executed by messengers: or precepts of poinding, granted by sheriffs, commissaries, etc., which are executed by their proper officers. Erskine, Inst. 3. 6. 11. This process is somewhat similar to distress.

**POINDING, REAL. POINDING OF THE GROUND.** Though it be properly a diligence, this is generally considered by lawyers as a species of real action, and is so called to distinguish it from personal poinding, which is founded merely on an obligation to pay.

Every *debitum fundi*, whether legal or conventional, is a foundation for this action. It is, therefore, competent to all creditors in debts which make a real burden on lands. As it proceeds on a real right, it may be directed against all goods that can be found on the lands burdened; but goods brought upon the ground by strangers are not subject to this diligence. Even the goods of a tenant cannot be poinded for more than his term's rent. Erskine, Inst. 4. 1. 3.

**POINT. In Practice.** A proposition or question arising in a case.

It is the duty of a judge to charge the jury on every point of law properly arising out of the issue which is propounded to him by counsel. But where the conclusion of a point does not necessarily flow from the premise contained in the first part of it, it is not error for the court to refuse to affirm it; 182 Pa. 427.

**POINT RESERVED.** A point or question of law, which the court, not being fully satisfied how to decide, in the trial of a cause, rules in favor of the plaintiff, but subject to revision on a motion for a new trial. If, after argument, it be found to have been ruled correctly, the verdict is supported; if otherwise, it is set aside. Tr. & H. Pr. § 708. It must be a pure question of law; the facts on which it is based must appear on the record, distinctly



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stated; and it must be a point which is decisive of the case. The verdict must be in favor of the plaintiff, and the defendant then moves for a new trial and judgment *non obstante veredicto*. See NON OBSTANTE VEREDICTO.

**POINTS.** Marks in writing and in print, to denote the stops that ought to be made in reading, and to point out the sense.

Points are not usually put in legislative acts or in deeds; Eunom. Dial. 2, § 33, p. 239; yet in construing such acts or instruments, the courts must read them with such stops as will give effect to the whole; 4 Term 65.

The points are—the comma, the semicolon, the colon, the full point, the point of interrogation, and the point of exclamation. Barrington, Stat. 294, n. See PUNCTUATION.

Statements of fact and of the law applicable thereto submitted to a trial judge with a request that he so charge the jury. See BRIEF; PAPER BOOK; CHARGE; INSTRUCTION.

**POISON. In Medical Jurisprudence.** A substance of definite chemical composition, which, when taken into the living organism, is capable of causing impairment or cessation of function. Blyth, Poisons.

The history of poisoning, and many remarkable early instances of a wide-spread use of poisons, are recorded in works on medical jurisprudence. See these, and also, especially, Taylor, Poisons; Archb. Cr. Pract. Waterman's ed. 940; Whart. & Stillé, Med. Jur.; 1 Beekman, Hist. Jur. 74. The classification proposed by Mr. Taylor (Med. Jur. § 71, 74, 78) is as follows:—

IRRITANTS.
- MINERAL
  - NON-METALLIC (Acids, Alkalies and their Salts. Metalloids.)
  - METALLIC (*Arsenic*).
- VEGETABLE—*Croton Oil.*
- ANIMAL (*Cantharides*).

NARCOTICS.
- CEREBRAL (*Morphia*).
- SPINAL (*Strychnia*).
- CEREBRO-SPINAL (*Conia, Aconitina*).

GASEOUS. (*Carbon Monoxide, Chlorine*).

*Irritant* poisons, when taken in ordinary doses, occasion speedily violent vomiting and purging, preceded, accompanied, or followed by intense pain in the abdomen, commencing in the region of the stomach. The corrosive poisons, as distinguished from those in a more limited sense termed irritant, generally produce their results more speedily, and give chemical indications; but every corrosive poison acts as an irritant in the sense here adopted.

*Narcotic* poisons act chiefly on the brain or spinal marrow. Either immediately or some time after the poison has been swallowed, the patient suffers from headache, giddiness, paralysis, stupor, delirium, insensibility, and, in some instances, convulsions.

The effects of one class are, however, sometimes produced by the other,—more commonly as secondary, but sometimes even as primary symptoms.

The evidence of poisoning as derived from *symptoms* is to be looked for chiefly in *the suddenness of their occurrence;* this is perhaps the most reliable of all evidence derived from symptoms in cases of criminal poisoning; see Taylor, Pois. 107; Christison, Pois. 42; though none of this class of evidence can be considered as furnishing anything better than a high degree of probability: *the regularity of their increase;* this feature is not universal, and exists in many diseases; *uniformity in their nature;* this is true in the case of comparatively few poisons; *the symptoms begin soon after a meal;* but sleep, the manner of administration, or certain diseases, may affect this rule in the case of some poisons; *when several partake at the same time of the same poisoned food, all suffer from similar symptoms;* 2 Park. C. C. 235; Taylor, Pois. 118; *the symptoms first appearing while the body is in a state of perfect health;* Archb. Cr. Pl. Waterman ed. 948.

*Appearances which present themselves on post-mortem examinations* are of importance in regard to some classes of irritant poisons; see The Hersey Case, Mass. 1861; Palmer's Case, Taylor, Poisons 697; 17 Am. L. Reg. N. S. 145; but many poisons leave no traces which can be so discovered.

*Chemical analysis* often results in important evidence, by discovering the presence of poison, which must then be accounted for; but a failure to detect it by no means proves that it has not been given. Christison, Poisons 61, 62.

The evidence derived from *circumstances* differs in nothing in principle from that in case of commission of other crimes.

Homicide by poisoning is generally either accidental, so as not to amount to murder, or deliberate: yet it has been held that there may be a verdict of murder in the second degree under an indictment for poisoning; 19 Conn. 388. The doctrine of principal and accessory is also modified to some extent in its application to cases of poisoning; 2 Mood. Cr. Cas. 120; 9 C. & P. 358; 9 Co. 81. To constitute an administering of poison, it is not necessary that there should be a delivery by hand; 4 C. & P. 356; 1 Bish. Cr. L. § 651.

Intent to kill need not be specifically alleged in an indictment for murder by poison; 1 East, Pl. Cr. 346; 3 Cox, C. C. 300; 8 C. & P. 418; 2 Allen 173. Where a wholesale dealer supplied a poisonous drug in place of a harmless drug ordered, he was held liable in damages to the customer who bought it from the retailer and suffered injury from taking it; 6 N. Y. 397.

Many of the states have statutes inflicting severe penalties upon the administering of poisons with a malicious intent. See Archb. Cr. Pr. Waterman's ed. 942; 86 Va. 223.

Practicing physicians, who are graduates of a medical college, are competent to tes-

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tify as experts on the subject of arsenical poisoning, although it is not shown that they have had actual experience in poison cases; 143 Ill. 571.

Consult Christison, Taylor, Blyth, Poisons; Beck, Taylor, Wharton & Stillé, Witth. & Beck, Clevenger; Med. Jur.; Archbold, Crim. Pract. Waterman's ed.; Russell, Crimes; Wharton, Homicide. See DRUGGIST. As to gas poison, see 15 Med. Leg. J. 276.

**POLE.** A measure of length, equal to five yards and a half. See MEASURE.

**POLES.** The extended use of poles on highways in connection with electric railways, telegraph, and telephone companies, has raised many interesting questions in connection with the right to erect and maintain them and the relation thereto of abutting owners and municipal corporations. The erection of such poles in a street or on the sidewalk is an obstruction of the highway, and, like all other obstructions, is only justified when done under authority of law; 31 Hun 596; Keasbey, Electric Wires. Where authorized, they must be erected in such manner as to cause the least interference with public travel and this condition is implied even if it were not expressed in the authority given; *id.*; in a proper case it is left to the jury to determine the question of damage; 15 N. J. L. J. 50; 33 Fed. Rep. 320; see 77 Wis. 589; but the rule of reasonable care does not require the company to provide against all contingencies of accident or inconvenience; 36 Fed. Rep. 164. It has been justly said that the question of damage arising from the obstruction of a highway by poles, depends largely on the extent of the right of the public which is under the control of the legislature, and subject to the exercise of its discretion in legalizing new uses of the highway; Keasbey, Electric Wires 157.

The question most discussed with respect to poles, has been whether their erection is a legitimate use of the street, and whether it imposes a new servitude on the land of the abutting owner. A recent writer holds the view that the substitution of electricity for horse power is not a change of use; Keasbey, Electric Wires 106; but a different view was taken by the New Jersey supreme court; 15 N. J. L. J. 39, 45.

Poles have been permitted to stand as being a proper use of the street; 3 Ohio C. C. 425; 22 Wkly. L. Bul. 67; 16 R. I. 668; 85 Mich. 634; 47 *id.* 393; 47 N. J. Eq. 280; 59 N. J. L. 101; 139 Pa. 419; 84 Mich. 634.

The conclusion reached from a detailed examination of the cases by Mr. Keasbey in his work on the subject, is that whilst an electric railway may have some additional elements of damage and obstruction, possibly the solution of the difficulty is to be found in the suggestion of Campbell, C. J., in the case last cited, that compensation should be recoverable for damage actually sustained. In that case poles and wires prevented the extinguishment of a fire, but it was held that the company owning them was not liable to one who had erected buildings alongside of them and permitted a tenant to use one of the wires and had never made any objection to them. The poles are held to be an additional servitude on country roads; 86 Va. 696; 71 Hun 532; 107 Ill. 507; and on a street where the fee was in the abutting owner and there were direct and immediate injuries suffered; 74 Md. 36. In Minnesota the court was evenly divided on the subject; 37 Minn. 347; and in Massachusetts even the owner of the fee was held entitled to no compensation; 136 Mass. 75.

Where the right to erect poles is recognized, the courts will regulate strictly the manner in which the privilege is used. An injunction has been granted against the erection of broken or unsightly poles; 12 Mo. App. 494; so the poles must be set with as little damage as possible and the cutting off trees to clear the way for them will be a ground for recovering damages; 24 L. R. A. 724; 16 Lea 456; 39 La. Ann. 996. See HIGHWAYS; ELECTRIC LIGHT; WIRES; RAILROADS; LICENSE; TELEGRAPH.

**POLICE.** That species of superintendence by magistrates which has principally for its object the maintenance of public tranquillity among the citizens. The officers who are appointed for this purpose are also called the police. See 9 Cent. L. J. 353.

The word *police* has three significations. The *first* relates to the measures which are adopted to keep order, the laws and ordinances on cleanliness, health, the markets, etc. The *second* has for its object to procure to the authorities the means of detecting even the smallest attempts to commit crime, in order that the guilty may be arrested before their plans are carried into execution and delivered over to the justice of the country. The *third* comprehends the laws, ordinances, and other measures which require the citizens to exercise their rights in a particular form.

Police has also been divided into *administrative police*, which has for its object to maintain constantly public order in every part of the general administration; and *judiciary police*, which is intended principally to prevent crimes by punishing the criminals. Its object is to punish crimes which the administrative police has not been able to prevent.

See PENSION.

**POLICE JURY. In Louisiana.** A name given to certain officers who collectively exercise jurisdiction in certain cases of police: as, levying taxes, regulating roads, etc.

**POLICE POWER.** The powers of government inherent in every sovereignty. 5 How. 583.

The power vested in the legislature to make such laws as they shall judge to be for the good of the commonwealth and its subjects. 7 Cush. 814. It is much easier

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to realize the instances and sources of this power than to mark its boundaries or prescribe limits to its exercise; *id.*

The power to govern men and things, extending to the protection of the lives, limbs, health, comfort, and quiet of all persons and the protection of all property within the state. 27 Vt. 149.

The authority to establish such rules and regulations for the conduct of all persons as may be conducive to the public interest. 109 N. C. 279; 117 N. Y. 14.

The exercise of this power has been left with the individual states; 11 Bush 311; 123 U. S. 623; and embraces the whole system of internal regulation by which the state seeks not only to preserve the public order and to prevent offences against itself, but also to establish for the intercourse of citizens with citizens, those rules of good manners and good neighborhood which are calculated to prevent the conflict of rights and to insure to each the uninterrupted enjoyment of his own, so far as it is reasonably consistent with the right enjoyment of rights by others; Cooley, Const. Lim. 572.

Most of the law on this subject has been the growth of the nineteenth century and the latter half of it. The earliest instances of the exercise of this power were found when houses were destroyed to prevent the spread of fire. The right to take a man's property in such cases was called the law of overruling necessity. There are also some very early instances of sanitary legislation. An act of parliament in 1388 imposed a penalty for throwing animal filth or refuse into rivers, and one of 1489 prohibited the slaughtering of cattle in the cities. Laws regulating wharfingers, millers, common carriers, innkeepers, chimney sweeps, auctioneers, ferry-keepers and drovers have been common for many centuries before the term was used.

Among former exercises of the police power which have become obsolete, may be mentioned laws restraining extravagance in dress, punishing heresy, interfering with the worship of particular churches or sects, and restraining speculation, or combinations to control a product and by withholding it, increase the price thereof; Tiedm. Pol. Pow. § 96 *a*; although in some of the states there are statutory provisions forbidding the cornering of grain, they are repetitions of old laws as to forestalling and engrossing; *id.*

This right must be clearly distinguished from the administration of criminal law and from police regulations and police authority, nor should it be confused with eminent domain, as has sometimes been done, or with the power of taxation. It is distinct from both of these. It is more despotic and broader in its action than the right of eminent domain, caring for the public health and morals of the community, restraining individuals from interfering with them, and when it is found necessary to take private property under the police power, no compensation need be given the owner unless expressly provided by statute; 7 Cush. 84; 11 Metc. 55; 81 Pa. 80; 101 U. S. 814; 69 Ga. 320; 78 Mo. 107; 17 Fed. Rep. 109; 50 Tex. 614. It is the application of the personal right or principle of self-preservation of the body politic; 13 N. Y. 378; to its exercises there are no limits except the restrictions contained in the written constitution; 1 Thay. Const. L. 720.

The confusion of police power with the power of taxation usually arises in cases where the police power has affixed a penalty for a certain act, or required licenses for certain occupations to be taken out and the sum paid therefor. But this is in no sense taxation, but an attempt to levy a tax which might be open to the constitutional objection to lack of equality. Its admitted right to regulate includes the implied power to license or tax; 12 Wheat. 419; 5 Wall. 462; 92 U. S. 214; 109 *id.* 3; 113 *id.* 27; 140 *id.* 545. See LICENSE.

Each law relating to the police power involves the questions: First, is there a threatened danger? Second, does the regulation involve a constitutional right? Third, is the regulation reasonable? 66 N. W. Rep. (Mich.) 382. See 144 N. Y. 529; 145 *id.* 32.

The rights insured to private corporations by their charters and the manner of their exercises are subject to such new regulations as from time to time may be made by the state, but these regulations must not conflict with the charter, nor take from the corporation any of its essential rights and privileges; Cooley, Const. Lim. 718; 61 Mo. 24; 18 Conn. 53; 35 Wis. 425; 161 U. S. 695. A municipal corporation may regulate the speed of railroad trains within its limits; 67 Ill. 113; 79 Pa. 33 (but only in the streets and public grounds of the municipality; 29 N. J. L. 170); require the railroad to fence its tracks; 27 Vt. 156; regulate the grade of the railroad and prescribe how the railroads may cross each other and apportion expenses of making necessary crossings between the corporations owning the roads; 77 Pa. 173; 4 Allen 198; it may require the railroad company to abolish a grade crossing at its own expense; 151 U. S. 556; to repair and maintain a safe viaduct over a street in a populous city; C. B. & Q. R. Co. *v.* Nebraska, S. C. of U. S., not yet reported; regulate such crossings in a populous city; 170 *id.* 58; limit the charges by the railroad company; 116 *id.* 307; prevent extortion on their part by unreasonable charges, favoritism, or discrimination; 128 *id.* 174; forbid consolidation of competing lines; 161 *id.* 697; make the company liable for fires; 17 Sup. Ct. Rep. 243; require salaries and expenses of a state commission to be borne by the railroad corporations within the state; 142 U. S. 386; require locomotive engineers to be licensed after examination as to competency; 124 *id.* 265; and the examination of railroad employes for color blindness; 128 *id.* 96; regulate the speed of trains at high-

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way and other crossings; 72 Ill. 235; require the bell to be rung or the whistle blown before crossing highways at grade, and flagmen to be stationed at dangerous crossings; 67 Ill. 37; impose a penalty on conductors for failing to cause their trains to stop five minutes at every station; 4 Tex. App. 545; require them to stop at county seats; 17 Sup. Ct. Rep. 627; direct the printing upon railroad tickets of any condition limiting the liability of a railroad company in type of a specified size, and provide for the redemption by the company of tickets sold but not used; 63 Ind. 552.

It may regulate insurance businesses and forbid unjust and oppressive conditions; 164 Pa. 306; and require returns from insurance companies; 153 U. S. 446; direct companies operating electric conductors to file maps and plans; 145 U. S. 175; forbid the running of freight trains on Sunday; 163 *id.* 299; require prompt delivery of telegraph messages; 162 U. S. 650. It may regulate the use of public highways and their alterations; Cooley, Const. Lim. 725; require the owners of urban property to construct and keep in repair sidewalks in front of it; 8 Mich. 309; 19 Ohio 418; 4 R. I. 230, 445; 36 Barb. 226; 16 Pick. 504; regulate bicycle riding on highways; 97 N. C. 477; control and regulate the use of navigable waters (subject to the commerce powers of congress); Cooley, Const. Lim. 729; prescribe the maximum charges of a business affected by the public interest; 69 Ill. 80; 94 U. S. 113; 153 U. S. 391; 143 *id.* 517; 118 Ind. 194, where a telephone company was held to be a business affected with a public interest; 164 U. S. 579; 154 *id.* 22. It may regulate plumbing; 51 N. E. Rep. (Ohio) 136.

In the exercise of its police power, a state may not invade the domain of the national government; 9 Wheat. 1; 7 How. 572; and the states may pass no laws conflicting with existing regulations by the federal government on the subjects intrusted to it; 95 U. S. 465; 138 *id.* 78; 135 *id.* 100. The power of congress to regulate commerce was never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country; 161 U. S. 701; but since the range of a state's power comes very near to the field committed by the constitution to congress, it is the duty of courts to guard against any needless intrusion; 95 U. S. 465. All that the federal authority can do is to see that the states do not, under cover of this power, invade the sphere of national sovereignty, obstruct or impede the exercise of any power which the constitution has confided to the nation, or deprive any citizen of rights guaranteed by the federal constitution; Cooley, Const. Lim. 715. See 16 Wall. 36; 7 How. 283.

State quarantine laws, prohibiting the entry of persons or cargoes which might bring contagious diseases, are constitutional; and the national government also has jurisdiction in quarantine to prohibit improper immigrants and injurious traffic between the states; 118 U. S. 464; 107 U. S. 687; 141 U. S. 47. Cattle infected with pleuro-pneumonia, dangerous persons. Chinese, coolies, contract laborers, and rags may be kept out of the country: 118 U. S. 465; 130 *id.* 581; 140 *id.* 424; 149 *id.* 698; 169 *id.* 613; peach trees may be destroyed, when affected with peach yellows; 56 Conn. 216; adulteration of food prohibited; 64 N. H. 549; 63 Md. 592; 56 Minn. 69; and the manufacture of oleomargarine; 146 Pa. 265, where it was held that the legislature might prohibit, if it saw fit, the manufacture of a wholesome article of food; but see 99 N. Y. 377, where the decision is criticised, and in 40 L. R. A. (Tex.) 201, it is held that the state cannot constitute it a crime to mix wholesome and nutritious articles of food. See OLEOMARGARINE.

The legislature may require all oleomargarine to be stamped as such; 63 Ind. 592; or to be colored pink; 84 Fed. Rep. 136; or prohibit artificially coloring it; 155 U. S. 461; prescribe the price at which bread should be sold; 3 Ala. 140; suppress gambling and opium dens, and lotteries; 101 U. S. 814; and carrying on offensive manufactures; 47 Barb. 64; regulate laundries; 113 U. S. 703; 31 Fed. Rep. 680; 118 U. S. 356; pawn-brokers, hawkers, and peddlers; 132 Pa. 69; and require a license fee, where no discrimination is made between residents or products of the state and those of another state; 156 U. S. 296; enact laws for the preservation of game and fish; 152 U. S. 133; to prevent the waste of natural gas; 37 L. R. A. 294; the sale or manufacture of intoxicating liquors; 123 U. S. 623; 80 Fed. Rep. 785; forbid the sending of threatening letters by a debtor to a creditor; 135 Mo. 450; close cemeteries within the built-up parts of a city; 5 Cow. 538; 88 Pa. 42; and forbid the pollution of streams; 44 N. J. L. 88; the keeping of gunpowder in cities or villages; 1 Gray 27; the erection of wooden buildings in populous cities; 11 Mich. 425; 7 Cow. 352; or the keeping of swine therein; 97 Mass. 221; or of a slaughter house; 109 *id.* 315; 111 U. S. 746; 39 La. Ann. 247; or a bone boiling factory; 67 Hun 52; or any other business injurious to the public; 35 Wis. 298; the sale of indecent books; 8 Gray 488; 38 N. H. 426; 152 U. S. 133; 135 *id.* 100; restrain the employment of children at a theatrical exhibition; 54 N. Y. 559; or prohibit their employment altogether when below a specified age. Similarly there seems to be no doubt that the hours of labor of women and children and the wages to be paid them may be controlled through the police power; 94 U. S. 113; 5 Hill, N. Y. 121; 48 Am. Dec. 609, 337; 70 N. Y. 569; 36 Barb. 392; 110 N. Y. 418; 105 Ind. 250; 66 Md. 399; 38 Wis. 428; 160 Mass. 86. Laborers wages may be controlled; 5 Ark. 416; 50 Fed. Rep. 628, 681; and the issuance to them, in payment, of scrip or store orders prohibited; 48 Pac. Rep. (Colo.) 512.

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The confinement of the insane and their control in asylums, is an exercise of the police power; 40 Mich. 90; and skilled trades and learned professions often come under its control, as where examinations are provided for those who wish to practise law, medicine, or pharmacy. Physicians, dentists, and midwives may be compelled to take out licenses and report births and deaths; 46 Am. Rep. 63; 113 Ind. 514; 129 U. S. 114. Every city has also numerous regulations about the sale of medicines and poisons, ventilation and drainage, etc.

The following are not within police power:—Laws levying taxes upon alien passengers from foreign ports, for the use of hospitals; 7 How. 283. Requiring a bond to be given for alien passengers from foreign ports to indemnify the state against expense for the support of the person named therein; 92 U. S. 259. Prohibiting the driving of foreign cattle into a state within certain dates; 95 U. S. 465. Requiring an inspection before slaughtering of cattle, etc., so far as they apply to foreign meats; 136 U. S. 313. (This offends against inter-state commerce.) Requiring a license under onerous conditions from the agents of foreign express companies; 141 U. S. 47.

"Whether the prohibited act or omission shall be made a criminal offence, punishable under the general laws, or subject to punishment under municipal by-laws, or, on the other hand, the party be deprived of all remedy for any right which, but for the regulation, he might have had against other persons, are questions which the legislature must decide." Cooley, Const. Lim. 745.

The determination by the legislature as to what is a proper exercise of its police power is subject to the supervision of the courts; 123 U. S. 623; 152 U. S. 137.

See Tiedeman, Prentice; Police Powers; Cooley, Const. Lim.; Thayer, Const. L.; 6 So. L. Rev. N. s. 59; 15 Cr. L. Mag. 9, 200; 5 Detroit Leg. N. 28; and see also the various titles to which the power has been applied. See LIBERTY OF CONTRACT; PRIVILEGES AND IMMUNITIES.

**POLICIES OF INSURANCE, COURT OF.** See COURT OF POLICIES OF INSURANCE.

**POLICY. In Insurance.** The instrument whereby insurance is made by an underwriter in favor of an assured, expressed, implied, or intended, against some risk, peril, or contingency, in reference to some subject.

The written or printed form to which the contract has been reduced, and which evidences the agreement or contract between the parties. It may be either a specialty or simple contract. 1 Joyce, Ins. § 145.

It must show expressly, or by implication, in whose favor it is made. It may be upon a valuable property, interest, or contingency, or be a gaming or wagering policy on a subject in which the assured has no interest, or against risks in respect to which the assured has no interest except what arises from the contract itself.

An *interest* policy is one where the insured has a real, substantial, assignable interest in the thing insured. 37 Wis. 539.

An *open* policy is one on which the value is not fixed, but is left to be definitely determined in case of loss. 1 Phill. Ins. §§ 4, 6, 7; 101 N. Y. 458; 4 Dal. 430. By an "open policy" is also sometimes meant, in the United States, one in which an aggregate amount is expressed in the body of the policy, and the specific amounts and subjects are to be indorsed from time to time; 12 La. An. 259; 19 N. Y. 305; 6 Gray 214; it may also mean one kept open for new subscriptions, or one on cargo kept open for new subjects of insurance; 1 Joyce, Ins. § 156.

A *valued* policy is one where a value has been set on the ships or goods insured, and this value inserted in the policy in the nature of liquidated damages. In such a policy the value of the subject is expressly agreed; 33 Md. 109; 3 Rich. S. C. 331; or is, as between the parties, the amount insured. Under an open policy in case of loss, the insured must prove the true value of the property, while under a valued policy, the sum agreed upon is conclusive, except in case of fraud; 3 Camp. 319; 15 Mass. 341; 48 Pa. 372; May, Ins. § 30.

A *mixed* policy is one which is open as to certain property and valued as to other property. 2 Conn. 868.

A *wager* policy is a pretended insurance, founded on an ideal risk, where the insured has no interest in the thing insured, and can therefore sustain no loss by the happening of any of the misfortunes insured against. These policies are strongly reprobated; 3 Kent 225; Beach, Ins. § 1142.

A *floating* policy is one which applies to goods of a class or kind, which, from its fluctuating, changing nature, differs as to specific articles. 32 N. Y. 405.

In the absence of any insurable interest of the beneficiary, the law will presume that a policy was taken out for the purpose of a wager, or speculation; 122 Pa. 324.

The insured must be held to a knowledge of the conditions of his policy, and the fact that he had never seen it does not help him any more than the fact that he had not read it, where there is no adequate reason shown why he could not have seen it had he so desired, and the company had not kept it from him through any fault or fraud; 71 Mich. 414; 69 Tex. 353.

Records and documents expressly referred to in the policy are, in effect, for the purpose of the reference, a part of the contract; 22 Conn. 235; 37 Me. 137; 23 Pa. 50; 23 E. L. & E. 514; 33 N. H. 203; 10 Cush. 337; 70 N. Y. 72; 16 Or. 283; 84 Ky. 653; 133 Ind. 376; 58 Ark. 277; May, Ins. § 158.

All prior negotiations are presumed to be merged in the written contract, and

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the policy itself, in the absence of fraud, duress, or mistake, must be looked to to ascertain the intent of the parties; 13 Mass. 96. Where the form of the policy is not prescribed by statute, it should contain, either by itself, or by reference to other papers, the exact agreement between the parties, set forth therein in clear, precise, and unambiguous terms, and should embody all the requirements of a valid insurance contract. Where the terms are plain and unambiguous, parol evidence is inadmissible to vary or control them; 42 Mo. 38; 116 N. Y. 317; but if it is ambiguous, extrinsic evidence is admissible, not to contradict or change the contract, but to develop and explain its true meaning; 40 Mo. 33. Conversasations had between the parties at the time have been held admissible; 1 Sto. 574; and when parties have, by certain acts of their own, placed a construction on doubtful terms of the contract, this construction will be adopted by the court against them.

The language of the policy must be construed with reference to the subject-matter and the nature of the property to which it is applied, and with a view to the objects and intentions of the parties, as the same may be gathered from the whole instrument; 2 Gill & J. 136; 30 N. Y. 136; 38 Minn. 501; and the whole policy with all its parts should be construed together as one entire contract; 16 Ore. 283. A special clause in a policy which creates an exception to a general clause governs the latter; 27 Mo. 152. When susceptible of more than one interpretation, the contract should be construed in favor of the assured; 116 N. Y. 54; 105 Ind. 212; 111 U. S. 335; 133 Ill. 556. The written part of the policy controls that part which is printed; 4 East 136; 32 Fed. Rep. 47; 34 *id.* 501; 38 Me. 404; 31 N. Y. 389. A special indorsement exempting from liability for partial loss will control; 97 N. Y. 333. See LEX LOCI.

A policy may take effect on actual or constructive delivery; 1 Phill. Ins. ch. xi. sect. i; 25 Ind. 537; 27 Pa. 268; 42 Me. 259; 25 Conn. 207; 5 Gray 52; and may be retrospective, provided there is no concealment or misrepresentation by either party; Hill, Ins. § 925; 2 Dutch. 268; S. C. 3 *id.* 645.

Every policy, whether marine, against fire, or on life, specifies or imports parties, and specifies the subject or interest intended to be insured, the premium or other consideration, the amount insured, the risks and perils for which indemnity is stipulated, and the period of the risk or the terminus *a quo* and *ad quem*. The subject-matter is usually more minutely described in a separate paper—called *an application;* Beach, Ins. § 352. See APPLICATION. May, Ins. § 29.

The duration of the risk, under a marine insurance, or one on inland navigation, is either from one geographical terminus to another, called a "*Voyage Policy*," or from a specified time, called a "*Time Policy;*" that of a fire policy is for a specified time; one on life is either for life or a term of years, months, etc. It is a leading principle, as to the construction of a policy of insurance, that its distinguishing character as a contract of indemnity is to be favored; which is in conformity with the common maxim, *ut res valeat magis quam pereat;* 8 N. Y. 351; 18 *id.* 385; 8 Cush. 393; 17 Pa. 253; 29 E. L. & E. 111, 215; 2 Du. 419, 554; 5 *id.* 517, 594; 16 Mo. 98; 22 Conn. 235; 13 B. Monr. 311; 11 Ind. 171; 28 N. H. 234; 2 Curt. C. C. 322, 610; 37 Me. 137; 4 Zabr. 447; 18 Ill. 553; 4 R. I. 159. See May, Ins. § 7; 94 U. S. 457. Any reasonable doubt as to the meaning of an insurance policy must be resolved in favor of the insured; 38 Minn. 501; 84 Va. 72; 145 Pa. 346; 3 Ind. App. 361; 151 U. S. 452.

In marine insurance the contract has necessarily more implied reference to customs and usages than most other contracts; or, in other words, a larger proportion of the stipulations are not specifically expressed in the instrument; 1 Phill. Ins. § 119; whence it has been thought to be an imperfect, obscure, confused instrument; 5 Cra. 342; 1 Burr. 347. But the difficulty in giving it a practical construction seems to arise more from the complication of the circumstances necessarily involved than from any remediable defects in its provisions and phraseology. New provisions are, however, needed, from time to time, to adapt the contract to new circumstances. A mistake in filling up a policy may be corrected by order of a court of equity; Beach, Ins. § 509; 5 B. & P. 322; 1 Wash. C. C. 415; 2 Cra. 441; 2 Johns. 330; 1 Ark. 545; 2 Curt. C. C. 277. If by accident, inadvertence, or mistake, the terms of the contract are not fully set forth in a policy, it may be reformed so as to express the real agreement; 136 U. S. 287. A marine policy is assignable without the consent of the insurers; May, Ins. § 377; while a fire policy is not; 16 Wend. 385; 2 Pet. 25; 4 Bro. P. C. 431; 18 Ia. 319; 9 L. T. N. S. 688. An outstanding and valid life policy is held to be assignable without the insurer's consent, provided the sale is *bona fide* and not a device to evade the law; 13 N. Y. 31; 29 Ind. 236; 98 Mass. 381; 26 Pa. 189; 26 Atl. Rep. (Md.) 959. But see, *contra*, 41 Ind. 116. See, generally, 9 L. R. A. 660; Joyce, Insurance. A pre-existing debt is a sufficient consideration for an assignment of insurance policies after loss of the property insured; 40 Ill. 102. When a policy of insurance expressly stipulates that no assignment shall be valid without the consent of the company, an assignment without such consent is without effect; 45 La. Ann. 736; 161 Mass. 320; and it is avoided by an assignment for the benefit of creditors; 64 N. H. 257; but if made subsequently to the loss, it is valid regardless of the conditions; 32 W. Va. 283; 35 Neb. 214.

For the rules of construction of a policy of credit insurance, see 73 Fed. Rep. 95.

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See ABANDONMENT; AVERAGE; INSURABLE INTEREST; INSURANCE; SALVAGE; LOSS; TOTAL LOSS; VOLUNTARY EXPOSURE; RESERVE; PREMIUM.

A standard form of policy is provided by statute in Massachusetts, Maine, Michigan, Minnesota, Missouri, New Hampshire, New York, New Jersey, North Dakota, North Carolina, Wisconsin, Pennsylvania, South Dakota, Connecticut, and Rhode Island. A statute providing for a standard policy without fixing its terms or conditions and leaving them to be fixed by the insurance commissioner is unconstitutional as a delegation of legislative power; it *seems* that the legislature could prescribe a form; 166 Pa. 72, reversing 3 D. R. 788; 65 N. W. Rep. (Wis.) 738.

A method of gambling by betting as to what numbers will be drawn in a lottery. 60 Conn. 87.

**POLICY, PUBLIC.** See PUBLIC POLICY; RESTRAINT OF TRADE.

**POLITICAL.** Pertaining to policy, or the administration of the government. Political rights are those which may be exercised in the formation and administration of the government: they are distinguished from civil rights, which are the rights which a man enjoys as regards other individuals, and not in relation to the government. A political corporation is one which has principally for its object the administration of the government, or to which the powers of government, or a part of such powers, have been delegated. See 37 Ia. 544; 90 Ill. 563.

**POLITICAL OFFENDER.** A political offender if accused of what is *prima facie* an extraditable crime cannot be legally surrendered, if the offence is of a political character, that is if it is incidental to, and forms part of, a political disturbance; [1891] 1 Q. B. 149; [1896] 1 Q. B. 108.

**POLITICAL PARTIES.** See ELECTION; NOMINATION.

**POLITICS.** Everything that concerns the government of the country. 2 Ves. Sr. 156.

**POLL.** A head. Hence poll-tax is the name of a tax imposed upon the people at so much a head.

To *poll* a jury is to require that each juror shall himself declare what is his verdict. This may be done, at the instance of either party, at any time before the verdict is recorded, according to the practice in some states. See 18 Johns. 188; 9 Ill. 336. In some states it lies in the discretion of the judge; 1 M'Cord 24, 525; 22 Ga. 431. A defendant has a right to a poll of the jury to ascertain whether each member concurs in the verdict, but the exact words used by the juror in answering are immaterial, if they indicate clearly the assent of the individual mind to the verdict; 153 Pa. 535. Where a court directs a verdict, a party is not entitled to have the jury polled; 87 Mich. 13.

**In Conveyancing.** A deed-poll, or single deed, is one made by a single party, whose edges are *polled*, or shaved even, in distinction from an *indenture*, whose sides are indented, and which is executed by more than one party. 2 Bla. Com. 296. See DEED POLL.

**POLL-TAX.** A capitation tax; a tax assessed on every head, *i. e.* on every male of a certain age, etc., according to statute. Webst. Dict.; Whart. Dict. See TAXATION.

**POLLICITATION. In Civil Law.** An offer not yet accepted by the person to whom it is made. Langd. Contr. § 1.

It differs from a contract, inasmuch as the latter includes a concurrence of intention in two parties, one of whom promises something to the other, who accepts, on his part, such promise. Grotius l. 2, c. 2; Pothier, Obl. pt. 1, c. 1, s. 1, art. 1, § 2.

**POLLS.** The place where electors cast in their votes.

**POLLUTION OF WATERS.** A riparian proprietor is required to refrain from erecting upon the banks of a water course any works which will pollute the water and thereby create a nuisance; 9 Co. 59; 5 B. & Ald. 1; 4 Mas. 397; 5 C. E. Greene 416; 4 Cush. 845; [1897] Ch. D. 96. See 13 Q. B. 426.

It is the right of the owner of land through which a stream flows, to have the natural flow free from pollution, as also from diversion or obstruction; and for an interference with this right an action will lie; 10 R. I. 106; 14 N. J. Eq. 335. An injury to the purity of the water which affects the riparian owner is considered an injury of the same character as an obstruction or diversion of the water; 122 Mass. 583. So one who pollutes his neighbor's spring is liable therefor; 99 Mass. 582; 89 Ky. 468; 29 Ch. D. 115; and one who deposits filth or noxious matter on his own premises from which it percolates through the soil; 162 Pa. 493; 57 Cal. 412; 29 Ch. D. 115; 92 Ill. 19; 108 Mass. 261; 43 N. J. Eq. 128.

Sources of the pollution of water for which it has been held that an action would lie, are: fouling by the discharge into it of muriatic acid; 7 H. & P. 160; sulphuric acid; 5 Ch. D. 769; vitriol, having a corrosive effect on boilers; 13 Allen 16; dye wares or dye liquors, madder, indigo, potash, etc.; 16 Jur. N. S. 75; heated water, which affects a stream injuriously; 3 Exch. 748; 3 B. & Ad. 304; 2 K. & J. 264; blood from a slaughter-house; 20 N. J. Eq. 296, 415; 57 Md. 1; setting up hog-pens, or lime-pits; 46 Wis. 391; Y. B. Hen. II. b. 6; 11 Mo. 517; the erection of a cess-pool, placing near the water oil or manure; 12 S. W. Rep. (Ky.) 937; placing the carcass of a dead animal in the water; 25 Kan. 608.

It is not always actionable to discharge into a stream waste or impure matter, but it is a question for the jury whether such use of it is, under the circumstances, rea-

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sonable, and as a general rule the same consideration would control as in case of obstructions of the water generally. It is necessary to take into consideration the character of the stream, its natural uses and the importance of the use proposed to be made of it by the party complained of and the extent and character of the injury to the other party. See Ang. Waterc. § 140 *d*. A riparian proprietor cannot use the water in such manner as to pollute the atmosphere, and it is no defence to an action for so doing that the injury was public in its character as affecting an entire community and that it was a subject of criminal indictment; 4 Ohio 833; and if such a condition of things cannot be remedied by action, equity will interfere to abate the nuisance; 21 N. J. Eq. 576; in all these cases where the injury is continuous and irreparable so that an action for damages is not an adequate remedy, an injunction will be granted. See INJUNCTION. For a collection of cases in which injunctions have been granted, see Amer. & Eng. Dec. in Eq. 648, 653.

The weight of authority is in favor of the doctrine that an action by the lower riparian owner will lie for the pollution of the stream by a discharge into it of refuse water from a mine, and that such action may be enjoined; [1893] App. Cas. 691; 54 N. J. Eq. 65, where it was expressly held that it was no defence, that the pollution was a natural and necessary result of mining operations prosecuted in the ordinary way. In this case the defendant was not a riparian owner. The decree was affirmed by the court of appeals in which Garrison, J., thus stated the conclusion: "A non-riparian mine-owner may not artificially cause the injurious discoloration of a natural water course, if, by the use of practicable means within his knowledge and under his control, he may carry on his mining operations without injury to the right of others,—a paraphrase of the maxim, "*Sic utere tuo ut alienum non lædas.*"

In the English case cited, the general principle as laid down by the House of Lords in a much considered case was thus expressed: "Every riparian proprietor is entitled to have the natural water of the stream transmitted to him, without sensible alteration in its character or quality. Any invasion of this right, causing actual damage or calculated to found a claim which may ripen into an adverse right entitles the party injured to the intervention of the court."

The contrary doctrine was held in Pennsylvania in the case of Penn. Coal Co. *v.* Sanderson; 113 Pa. 126; a decision which was criticised and expressly disapproved in both the above cases. The Pennsylvania case had been twice decided otherwise; 86 Pa. 401; 94 *id.* 302; and these decisions were overruled in the third case by a bare majority of the court, Mercur, C. J., Gordon, and Trunkey, JJ., dissenting. Referring to this, Lord Shand, in the English case last cited, says: "This circumstance and the grounds of the judgment seem to me to be sufficient to deprive the case of any real weight." One other case seems in a measure to follow the Pennsylvania case; Barnard *v.* Shirley, 135 Ind. 537, where it was held that one who sinks an artesian well on his own land, and uses the water to bathe the patients in a sanitarium erected by him on said premises, is not liable to injunction and damages for allowing the water, after such use, to flow into a stream which crosses the land of an adjoining owner, and is the only natural and available outlet." Of this case it is remarked: "There were, however, many features to distinguish this from the Sanderson case, so that the adoption of the language of the latter was unnecessary. In the first place, the pollution was slight; in the second, before the water reached the plaintiff's premises, it was further defiled by passing through a city; either of which would tend to defeat the claim, apart from all other considerations;" 3 Eng. & Am. Dec. in Eq. 652, by Henry Budd.

The same writer draws attention to the fact that "even in Pennsylvania, the doctrine of the Sanderson case is carefully limited to the natural drainage of the mine water; and any other means of getting rid of it will be enjoined;" *id.*, citing 7 Kulp 493. See, also, 8 Atl. Rep. 620.

The right of the lower riparian proprietor to have the use of the stream unimpaired, must be adjusted with due regard to the rights possessed by the upper riparian owner to use the stream for the proper purposes, such as casting sewage or waste therein; 74 N. Y. 341; 108 Mass. 208; 44 N. H. 580; and the necessary result of the legitimate use of a stream for irrigation, manufacturing, and domestic purposes, will have a tendency, with the natural increase of population, to render the stream more impure; see 110 Mass. 221; 113 Pa. 126; and the courts will not interfere by injunction with extensive manufacturing enterprises until satisfied from all the circumstances that there is no adequate remedy at law, and that the failure to interfere will result in irreparable injury; 54 Pa. 164; 57 *id.* 105. The pollution, by a properly constructed city sewer, of a stream which is the natural drainage of the land on which the city is built, gives no right of action to a lower riparian owner whose mill property, constructed and operated before the building of the city, is injured thereby; 18 Ind. App. 482. A plaintiff was held entitled to recover damages where sewers constructed by a city, polluted a stream and the foul water found its way to the two springs of the plaintiff, and he was unable to obtain pure water by digging wells, the whole underground supply being polluted; 162 Pa. 493. As a general thing the circumstances of each case must be considered by the court and the conflicting interests, carefully and judiciously weighed, and no general rule can be

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framed which will afford a rule to be applied by the courts in all cases as matter of law. The right to deposit in the stream must be settled as a question of reasonable use in the same way that courts deal with questions of diversion or obstruction; 30 Minn. 249; as to many uses of the water, either by common consent or other obvious considerations, settled rules have been established; Redfield, C. J., in 28 Vt. 459; many of these cases may be found collected in Gould, Waters § 220. See LAND.

Where a municipal corporation was authorized by statute to construct sewers and discharge sewerage into the tide water it was held liable for damages, caused by the sewerage destroying the plaintiff's oysters, although the damage involved no physical taking of property; 22 App. Div. N. Y. 406.

One who had permission to use the water of a canal was held entitled to recover damages from a third person, who fouled the water so that the plaintiff's boilers were injured, the action of the defendant having been without any authority; 2 H. & N. 476; in a case in the Exchequer Chamber, although the judgment was reversed on other grounds, there was no dissent from the doctrine of the court below, "that he had no right to cause dirty water to flow on his neighbors' land without some special right to do so," but it was left doubtful whether the mere permission of the riparian owner to take the water out of the stream was sufficient to authorize the action against the wrong-doer either for diverting or fouling; 3 H. & N. 675.

The pollution of streams has been the subject of extended legislation in England, which is embodied in the Rivers Pollution Prevention Act, 1876, which is of general application, and also various acts of local application, all of which, with notes and decisions are collected in Haworth on Rivers Pollution.

**POLYANDRY.** The state of a woman who has several husbands.

Polyandry is legalized only in Thibet. It is inconsistent with the law of nature. See LAW OF NATURE.

**POLYGAMY.** The act or state of a person who, knowing that he has two or more wives, or that she has two or more husbands, marries another.

It differs from bigamy. Com. Dig. *Justices* (S 5); Co. 3d Inst. 88.

But bigamy is now commonly used even where polygamy would be strictly correct; 1 Russ. Cr. 186, n. On the other hand, polygamy is used where bigamy would be strictly correct; Mass. Gen. Stat. 1860, p. 817.

Every person having a husband or wife living, who marries another, whether married or single, in a territory or other place over which the United States has exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than five hundred dollars, and by imprisonment for a term of not more than five years; R. S. § 5352; 103 U. S. 304.

An act of congress of March 3, 1887, was passed for the express purpose of the suppression of polygamy in Utah Territory. It expressly annuls the act of territorial legislation which contravenes its purposes and provided for winding up the corporation in the territory, known as the Church of Jesus Christ of the Latter Day Saints, and required the attorney-general to take proceedings for that purpose. The act contains elaborate provisions for adjusting property interests involved in this change, and providing severe penalties for violation of its provisions; U.S.R.S. 1 Supp. 568. This act was held constitutional; 136 U. S. 1; where it was also held that the pretence of religious belief cannot deprive congress of the power to prohibit polygamy and all other open offences against the enlightened sentiment of mankind.

See BIGAMY; RELIGION.

**POLYGARCHY.** A term used to express a government which is shared by several persons.

**POND.** A body of stagnant water; a pool. See Call. Sew. 103.

Any one has a right to erect a fish-pond; the fish in it are considered as real estate, and pass to the heir, and not to the executor; Ow. 20. Where land bounding on a lake or pond is conveyed, the grant extends only to the water's edge if it is a natural pond (some cases say to low-water mark; 13 Pick. 261); but to the middle of the stream if it is artificial; Ang. Wat. Cours. § 41. See 3 Washb. R. P. 5th ed. *633.

By the common law, fresh water lakes and ponds, except the great navigable lakes, belong to the owners of the soil adjacent, who own the soil *usque ad filum aquæ;* 140 U. S. 371. See 133 Mass. 364. See LAKES.

**PONE.** (Lat. *ponere*, to put). **In English Practice.** An original writ issuing out of chancery, for the purpose of removing a plaint from an inferior court into the superior courts at Westminster. The word signifies "put": put by gages, etc. The writ is called from the words it contained when in Latin, *Pone per vadium et salvos plegios*, etc.; put by gage and safe pledges, etc. See Fitzh. N. B. 69, 70 *a*; Digby, Hist. R. P. 71.

The writ of *certiorari* is now used in its place.

**PONENDIS IN ASSISIS.** An old writ directing a sheriff to empanel a jury for an assize or real action. Moz. & W. Law Dict.; Whart. Law Lex.

**PONENDUM IN BALLIUM.** A writ commanding that a prisoner be bailed in cases bailable. Whart. Law Lex.; Moz. & W. Law Dict.

**PONENDUM SIGILLUM.** A writ requiring justices to put their seals to a bill of exceptions, according to Stat. West. 2, 13 Ed. I. c. 31. Whart. Law Lex.; Moz. & W. Law Dict.

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**PONERE** (Lat.). To put. The word is used in the old law in various connections, in all of which it can be translated by the English verb "put." See Glanv. lib. 2, c. 3.

**PONIT SE** (Lat. puts himself). **In English Criminal Practice.** When the defendant pleads "not guilty," his plea is recorded by the officer of the court, either by writing the words "*po se*," an abbreviation of the words *ponit se super patriam* (puts himself upon his country), or, as at the central criminal court, *non cul.* 2 Den. C. C. 392. See ARRAIGNMENT.

**PONTAGE.** A contribution towards the maintenance, rebuilding, or repairs of a bridge. The toll taken for this purpose also bears this name. Obsolete. Fleta, lib. 4, c. 1, § 16.

**PONTIBUS REPARANDIS.** An old writ directed to the sheriff commanding him to charge one or more to repair a bridge. Cow.; Reg. Orig. fol. 153.

**POOL.** A small lake of standing water. By the grant of a pool, it is said, both the land and water will pass; Co. Litt. 5. Undoubtedly the right to fish, and probably the right to use hydraulic works, will be acquired by such grant; 2 N. H. 259; Co. Litt. 5; Bac. Abr. *Grants* (H 3); Com. Dig. *Grant* (E 5); 5 Cow. 216; Cro. Jac. 150; 1 Lev. 44; Vaugh. 103. See LAKE.

A combination of stakes, the money derived from which goes to the winner. 146 Mass. 203. See GAMING; HORSE RACE.

A commercial term used to indicate a contract between two competing railroad companies, whereby they agree to divide all their earnings over and above the amounts required for the payment of operating expenses.

They have been held to be illegal; 6 So. Rep. (La.) 888; 61 N. H. 161; 55 *id.* 531; 26 N. E. Rep. (Ind.) 159. See 1 J. & H. 252; 2 *id.* 89; 3 Ry. & Corp. L. J. 144.

As a business term the word "pool," as used in the phrase "real estate pool," means no more than that certain individuals are engaged in dealing in real estate as a commodity of traffic. 103 U. S. 195. See RESTRAINT OF TRADE.

**POOLING AGREEMENT.** See RESTRAINT OF TRADE.

**POOR.** Destitute; helpless and in extreme want; 52 N. W. Rep. (Wis.) 444; so completely destitute of property as to require assistance from the public. 14 Kan. 421. A trust for the benefit of the poor does not generally include those receiving parochial relief; 3 Biss. 395; 1 Jarm. 209; but a trust for the benefit of poor boys was held not confined to those who required parish relief; 31 L. J. Ch. 810. See CHARITABLE USES; LEGACY.

**POOR DEBTORS.** By the constitution of the several states and territories, or by the laws which exist for the relief of poor debtors, it is provided in general terms that there shall be no imprisonment for debt. But this is usually qualified by provisions for the arrest of debtors in certain enumerated cases of fraud. The statutes in the different states are very similar, and as a rule, require the creditor to make affidavit that the debtor is about to remove some of his property out of the jurisdiction of the court with intent to defraud his creditors, or that, for the same reason, he is about to dispose or has disposed of his property, or that he is fraudulently concealing it; or that the debt, concerning which suit is brought, was fraudulently contracted. Such in general is the law in most of the states and territories.

A classification of the states shows that there are constitutional provisions that there shall be no imprisonment for debt in Indiana, Minnesota, Kansas, Maryland, North Carolina, Missouri, Texas, Oregon, Nevada, South Carolina, Georgia, Alabama, Mississippi, and Florida; that there shall be none in any civil action on mesne or final process in Ohio, Iowa, Nebraska, Tennessee, Arkansas, California, Oregon, and Arizona; or in any action or judgment founded on contract in New Jersey, Michigan, and Wisconsin. In Vermont, Rhode Island, Pennsylvania, Illinois, Kentucky, and Colorado, the provision is that no person shall be imprisoned for debt in any civil action when he has delivered up his property for the benefit of creditors in the manner prescribed by law; 1 Stims. Am. Stat. L. § 80.

Subject to these constitutional provisions the subject is regulated in most states by general statutes which should be consulted with respect to any particular case.

It may be stated generally that the object of such statutes is to induce the defendant to pay the debt, give security, or take advantage of the insolvent laws or of some enactments made especially for the relief of poor debtors. It follows therefore that in most of the states a person under arrest for debt may obtain his release in any of these ways. A poor debtor is of course usually compelled to resort to one of the two last mentioned, and, although the proceedings differ in the different states, yet as a rule he is released upon delivering his property to a trustee, or taking oath that he has not more than ten or twenty dollars above the amount exempted by statute in the particular state in which he is confined.

In a few states the rule that there shall be no imprisonment for an ordinary contract debt is strictly adhered to. In Tennessee a debtor may be imprisoned in criminal actions, and in Missouri for the non-payment of fines or penalties imposed by law. So he may be imprisoned for fraud in civil or criminal actions in Vermont, Rhode Island, New Jersey, Pennsylvania, Ohio, Indiana, Illinois, Michigan, Iowa, Minnesota, Kansas, Nebraska, North Carolina, Kentucky, Arkansas, California, Oregon, Nevada, Colorado, South Carolina, Florida, and Arizona. In Georgia and Louisiana the legislature has power to provide for the punishment of fraud, and for reaching property of the

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debtor concealed from his creditors. Debtors may be imprisoned in Oregon if absconding; in Nevada, in cases of libel or slander; in Colorado and California, in actions of tort, and in the latter state also for malicious mischief; in Michigan and Arizona for breach of trust or moneys collected by public officers, or in any professional employment; 1 Stims. Am. Stat. L. § 80.

Women are not subject to arrest as debtors in North Carolina, Rhode Island, South Carolina, Vermont, Pennsylvania, New Jersey, New Hampshire, District of Columbia. See INSOLVENCY; INSOLVENT.

**POOR LAW BOARD.** A government board appointed by statute 10 & 11 Vict. c. 109, to take the place of poor law commissioners, who had general management of the poor and the funds for their relief. The poor law board is now superseded by the local government board, established under 34 & 35 Vict. c. 70; 3 Steph. Com. 49; Moz. & W.

**POOR RATE.** A rate levied by church authorities for the relief of the poor.

**POPE.** The bishop of Rome and head of the Roman Catholic church. He is elected by certain officers called cardinals, and remains in power during life. In the 9th Collation of the Authentics it is declared the bishop of Rome hath the first place of sitting in all assemblies, and the bishop of Constantinople the second. Ridley, Civ. & Eccl. L. pt. 1, c. 3, § 10.

"It does not appear necessary that a Pope be selected either from the ranks of the Cardinals or that he be in Orders." 1 Halleck, Int. L., Baker's ed. 104.

The Catholic powers concede the precedency to the Pope as the visible head of the church; but Russia and Turkey and the Protestant states of Europe consider him only as the bishop of Rome, and a sovereign prince, although since September 20, 1870, he has been dispossessed of substantially all his territory. By the Italian decree of May 13, 1871, he is guaranteed his sovereign rights and other immunities by Italy, but he has refused to accept this decree. He maintains diplomatic relations with France and some other Catholic states; *id.* 118. See PAPACY.

**POPULAR ACTION.** An action given by statute, to any one who will sue for the penalty. A *qui tam* action. Dig. 47. 23. 1.

**POPULAR SENSE.** The sense in which a subject is understood by those conversant therewith. 1 Ex. D. 248.

**POPULAR USE.** The occasional and precarious enjoyment of property by the members of society in their individual capacity, without the power to enforce such enjoyment according to law. 18 Cal. 238.

**POPULISCITUM** (Lat.). An act of the commons; same as *plebiscitum*. Ainsworth, Dict.

A law passed by the whole people assembled in *comitia centuriata*, and at the proposal of one of the senate, instead of a tribune, as was the case with a *plebiscitum*. Tayl. Civ. Law 178; Mackeldey, Civ. Law § 26.

**PORCH.** A portico; a shelter in front of a door. 148 Mass. 584.

**PORT.** A place to which the officers of the customs are appropriated, and which includes the privileges and guidance of all members and creeks which are allotted to them. 1 Chitty, Com. Law 726; Postlewaith, Com. Dict. According to Dalloz, a port is a place within land, protected against the waves and winds and affording to vessels a place of safety. By the Roman law a port is defined to be *locus conclusus quo importantur merces et unde exportantur*. Dig. 50. 16. 59. See 7 Mart. La. N. S. 81. In the revenue laws it is synonymous with district, when the limits of the port and district are the same; 3 Mass. 153. As used in the R. S. § 4347 it means any place from which merchandise may be shipped.

A port differs from a haven, and includes something more. *First*, it is a place at which vessels may arrive and discharge or take in their cargoes. *Second*, it comprehends a ville, city, or borough, called in Latin *caput corpus*, for the reception of mariners and merchants, for securing the goods and bringing them to market, and for victualling the ships. *Third*, it is impressed with its legal character by the civil authority. Hale, *de Portibus Mar.* c. 2; 1 Hargr. Tracts 46, 73; Bac. Abr. *Prerogative* (D 5); Com. Dig. *Navigation* (E); Co. 4th inst. 148; Callis, Sew. 56; 2 Chitty, Com. L. 2; Dig. 50. 16. 59; 43. 12. 1. 13; 47. 10. 15. 7; 39. 4. 15.

The exact meaning of the term was much considered by Lord Esher, M. R., in 15 Q. B. D. 580. He held that it was not usually the legal port as defined by acts of Parliament, but, "a place of safety for the ship and goods, whilst the goods are being loaded and unloaded"; that there never would be a port in the ordinary business sense of the word, unless there was some element of safety in it for the ship and goods, and that nothing was more certain to be such a port than a natural port; that a natural port was "a place in which the conformation of the land with regard to the sea is such that, if you get your ship within certain limits, she is in a place of safety for loading and unloading"; that any place at which the loading and unloading took place might safely be inferred to be within "the port," as understood by the parties; that beyond the place of loading and unloading, the port would extend to any further space over which the court authorities were in the habit of exercising "port discipline."

In L. R. 4 Ex. 238, 245, Byles, J., said: "The passage from Lord Hale, *de Portibus Maris* (ch. 2, p. 46), shows that the limits of a port may depend on the existence of

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wharves, quays, buildings, and other conveniences. It may accordingly, from time to time, vary and increase with the increase of population and of buildings. Lord Hale further says: "The port of London anciently extended to Greenwich in the time of Edward I. and Gravesend is a member of it. The extent of a port therefore after a lapse of years may become a question of fact."

In the same case below the meaning of "port" generally was considered by Martin, B.; L. R. 3 Ex. 330, 345. See HOME PORT.

**PORT OF DELIVERY.** This is sometimes used to distinguish the port of unlading or destination, from any port at which the vessel touches for other purposes. 2 Mas. 319.

**PORT OF DEPARTURE.** As used in the United States statutes requiring a ship to procure a bill of health from the consular officer at the place of departure, it is not the last port at which the ship stops while bound for the United States, but the port from which she cleared. 61 Fed. Rep. 986.

**PORT OF DESTINATION.** As used in a time policy, the phrase has been held to mean any foreign port to which the vessel may be destined during the voyage, as well as her home port, and to include any usual stopping place for lading or unlading cargoes. 12 Gray 501.

**PORT OF DISCHARGE.** The place where the substantial part of the cargo is discharged has been held to be such, although done with the intent to complete the discharge at another basin. 104 Mass. 510. Some cargo must be discharged to make the port of destination the port of discharge; 5 Mas. 414. See, further, 2 Cliff. 4; 1 Sprague 485; 18 Law Rep. 94.

**PORT RISK.** A risk upon a vessel whilst she is lying in port and before she has taken her departure on another voyage. 71 N. Y. 459.

**PORT TOLL.** The toll paid for bringing goods into a port.

**PORTATICA** (L. Lat.) **In English Law.** The generic name for port duties charged to ships. Hargr. Law Tracts 64.

**PORTER.** The name of an ancient English officer who bore or carried a rod before the justices. The door-keeper of the English parliament also bears this name.

One who is employed as a common carrier to carry goods from one place to another in the same town is also called a porter. Such person is, in general, answerable as a common carrier. Story, Bailm. § 496.

**PORTGREVE** (from Sax. *gerefa*, reeve or bailiff, and port). A chief magistrate in certain maritime towns. The chief magistrate of London was anciently so called, as appears from a charter of king William I. Instead of this portgreve of London, the succeeding king appointed two bailiffs, and afterwards a mayor. Camden, Hist. 325.

**PORTION.** That part of a parent's estate, or the estate of one standing *in loco parentis*, which is given to a child. 1 Vern. 204. See 8 Com. Dig. 539; 16 Viner, Abr. 432; 1 Belt, Suppl. Ves. 34, 58, 303; 2 *id.* 46; 108 Pa. 137; 54 Ala. 240.

The part, share, or division, made for a child by the parent. 138 Ill. 541.

**PORTION DISPONIBLE. In French Law.** The part of a person's estate which he may bequeath to others than his natural heirs. A parent having one legitimate child may dispose of one-half only of his property; leaving two, one-third only; and leaving three or more, one-fourth only; and it matters not whether the disposition is *inter vivos*, or by will. See LEGITIME.

**PORTIONIBUS.** Is properly employed to mean a portion of the tithes of one parish claimed by the rector of another parish. 4 Cl. & F. 1.

**PORTORIA** (Lat.). **In Civil Law.** Duties paid in ports on merchandise. Code 4. 61. 3. Taxes levied in old times at city gates. Tolls for passing over bridges. Vicat, Voc. Jur.; Spelman, Gloss.

**PORTRAIT.** A picture of a person painted from life or from reasonable materials, if there are such, from which a likeness can be framed; or a picture painted after a man's death and meant to represent him. If there is nothing affording the materials for the portrait, it is completely an ideal one and cannot properly be called a portrait; Lord Lyndhurst, in 14 L. J. Ch. 73.

**PORTSALES.** Auctions were anciently so called, because they took place in ports.

**PORTSOKA, or PORTSOKEN.** Any place within the jurisdiction of a city. Cowell.

**PORTUGAL.** A kingdom of Europe. The government is an hereditary monarchy, based on the "Carta Constitucional." The executive is vested in the sovereign and a responsible cabinet. The legislature consists of two chambers; the upper or "Camara dos Pares" consists of ninety life members in addition to peers who are at present members by hereditary right. The lower chamber or "Camara dos Deputados" has one hundred and twenty deputies, of whom six are from the colonies. The chambers meet without the intervention of the sovereign, who has no veto on a law passed twice by both houses. The Codigo Civil Portuguëz was established in 1868. The law is administered in about one hundred and twenty public law courts and a high court of appeal at Lisbon. There are three high courts at Lis-

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bon. There are also three other high courts. Some cases are tried before a jury.

**POSITIVE.** Express; absolute; not doubtful. This word is frequently used in composition.

**POSITIVE CONDITION.** One in which the thing which is the subject of it *must* happen: as, if I marry. It is opposed to a negative condition, which is where the thing which is the subject of it *must not* happen: as, if I do not marry.

**POSITIVE EVIDENCE.** That which, if believed, establishes the truth or falsehood of a fact in issue, and does not arise from any presumption. It is distinguished from circumstantial evidence. 3 Bouvier, Inst. n. 3057.

**POSITIVE FRAUD.** See FRAUD.

**POSITIVE LAW.** Law actually ordained or established, under human sanctions, as distinguished from the law of nature or natural law, which comprises those considerations of justice, right, and universal expediency that are announced by the voice of reason or of revelation. Municipal law is chiefly, if not essentially, positive; while the law of nations has been deemed by many of the earlier writers as merely an application of the law of nature. That part of the law of nations which rests on positive law may be considered in a threefold point of view:—1. The *universal voluntary law*, or those rules which become law by the uniform practice of nations in general, and by the manifest utility of the rules themselves; 2. The *customary* law, or that which, from motives of convenience, has, by tacit but implied agreement, prevailed, not necessarily among all nations, nor with so permanent a utility as to become a portion of the *universal* voluntary law, but enough to have acquired a *prescriptive* obligation among certain states so situated as to be mutually benefited by it. 1 Taunt. 241; 3. The *conventional* law, or that which is agreed between particular states by *express treaty*, a law binding on the parties among whom such treaties are in force. 1 Chitty, Com. Law 28. See LAW.

**POSSE.** This word is used substantively to signify a possibility. For example, such a thing is *in posse*, that is, such a thing may possibly be. When the thing is in being, the phrase to express it is, *in esse*.

**POSSE COMITATUS** (Lat.). The power of the county.

The sheriff, or other peace officer, has authority by the common law, while acting under the authority of the writ of the United States, commonwealth, or people, as the case may be, and for the purpose of preserving the public peace, to call to his aid the *posse comitatus*; 1 Bla. Com. 343.

But with respect to writs which issue in the first instance to arrest in civil suits, or on mesne process, the sheriff is not bound to take the *posse comitatus* to assist him in the execution of them; though he may, if he pleases, on anticipated, or actual resistance to the execution of the process; Co. 2d Inst. 193; Co. 3d Inst. 161; 10 Johns. 85; 2 Jones N. C. 339.

Although the sheriff is not bound upon a *capias ad respondendum* to take the *posse comitatus*, it has been held to be his duty to do so if he has any reason to anticipate resistance; nor can it be said to be a hardship on the sheriff that he should be bound to provide against resistance; 12 Jurist 1052; Winst. 144. And likewise with reference to a *capias ad satisfaciendum;* 20 Ga. 598; and he cannot, in an action for escape, plead that the prisoner was rescued; *id.*

Having the authority to call in the assistance of all citizens, he may equally require that of any individual; but to this general rule there are some exceptions; persons of infirm health, or who lack understanding, minors under the age of fifteen years, women, and perhaps some others, it seems, cannot be required to assist the sheriff, and are, therefore, not considered as a part of the power of the county; Viner, Abr. *Sheriff* (B).

A refusal on the part of an individual lawfully called upon to assist the officer in putting down a riot is indictable; 1 Carr. & M. 314. In this case will be found the form of an indictment for this offence.

Although the sheriff is acting without authority, yet it would seem that any person who obeys his command, unless aware of that fact, will be protected; 34 Vt. 69.

An individual not called upon by the sheriff to lend his aid does so at his peril; 5 Tex. App. 60. In a case where the defendant assisted a sheriff's officers in executing a writ of replevin without their solicitation, the court held him justified in so doing; 2 Mod. 244; see 78 Me. 373; 19 Am. Dec. 122; Bac. Abr. *Sheriff* (N); Hamm. N. P. 63; 5 Whart. 437. See SHERIFF; PEACE.

**POSSESSED.** This word is applied to the right and enjoyment of a termor, or a person having a term, who is said to be possessed, and not seised. Bac. Tr. 335; Poph. 76; Dy. 369. It is sometimes synonymous with "seised"; 89 Ga. 632.

"Possessed" is a variable term in the law, and has different meanings as it is used in different circumstances. It sometimes implies a temporary interest in lands: as we say a man is possessed, in contradistinction to being seised. It sometimes implies the corporal having; as we say a man is seised and possessed. But it sometimes implies no more than that one has a property in a thing; that he has it as owner; that it is his; 44 Mich. 603.

**POSSESSIO** (Lat.). **In Civil Law.** The detention of a thing: divided into—*first*, natural, or the naked detention of a thing, without intention to acquire ownership; *second*, civil, or the detention of a thing to which one has a right, or with in-

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tention of acquiring ownership. Hein. *Elem. Jur. Civ.* § 1288; Mackeldey, Civ. Law § 210.

**In Old English Law.** Possession; seisin. Law Fr. & Lat. Dict.; 2 Bla. Com. 227; Bracton, lib. 2, c. 17; Cowell, *Possession*. But *seisina* cannot be of an estate less than freehold; *possessio* can. New England Sheriff 141; 1 Metc. Mass. 450; 6 *id.* 439.

**POSSESSIO FRATRIS** (Lat. the brother's possession). A technical phrase applied in the English law relating to descents, to denote the possession by one in such privity with a person as to be considered the person's own possession.

By the common law, the ancestor from whom the inheritance was taken by descent must have had actual seisin of the lands, either by his own entry, or by the possession of his own or his ancestor's lessee for years, or by being in the receipt of rent from the lessee of the freehold. But there are qualifications as to this rule, one of which arises from the doctrine of *possessio fratris*. The possession of a tenant for years, guardian, or brother is equivalent to that of the party himself, and is termed in law *possessio fratris;* Littl. sect. 8; Co. Litt. 15 *a*; 3 Wills. 516; 7 Term 386.

In Connecticut, Delaware, Georgia, Massachusetts, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, South Carolina, Virginia, and probably in other states, the real and personal estates of intestates are distributed among the heirs without any reference or regard to the actual seisin of the ancestor; Reeve, Desc. 377; 4 Mass. 467; 3 Day 166; 2 Pet. 59. In Maryland, New Hampshire, North Carolina, and Vermont, the doctrine of *possessio fratris*, it seems, still exists; 2 Pet. 625; Reeve, Desc. 377; 4 Kent 384.

**POSSESSION.** The detention or enjoyment of a thing which a man holds or exercises by himself, or by another who keeps or exercises it in his name.

By the possession of a thing we always conceive the condition in which not only one's own dealing with the thing is physically possible, but every other person's dealing with it is capable of being excluded. Thus, the seaman possesses his ship, but not the water in which it moves, although he makes each subserve his purpose.

It expresses the closest relation that can exist between a corporeal thing and the person who possesses it, implying an actual, physical contact, as by sitting or standing upon a thing: 109 N. C. 57.

*Actual* possession exists where the thing is in the immediate occupancy of the party. 3 Dev. 34.

*Constructive* possession is that which exists in contemplation of law, without actual personal occupation. 11 Vt. 129. And see 1 McLean 214, 265; 2 Bla. Com. 116.

In order to complete a possession, two things are required: that there be an occupancy, *apprehension*, or taking; that the taking be with an intent to possess (*animus possidendi*): hence persons who have no legal wills, as children and idiots, cannot possess or acquire possession; Pothier; Etienne. See 1 Mer. 358; Abb. Sh. 9. But an infant of sufficient understanding may lawfully acquire the possession of a thing; Mitch. R. E. 259.

Proof of the possession of property is commonly said to be *prima facie* evidence of title to it; and this is so with respect to land, in which case it has been held that proof of possession is sufficient evidence of title to maintain an action against a powder company for damages caused by an explosion; 58 Fed. Rep. 152. This particular phrase that possession is *prima facie* evidence of title has been very much criticised by Sir Frederick Pollock, who says that "it would be less intelligible at first sight, but not less correct to say that in the developed system of common-law pleading and procedure as it existed down to the middle of this century, proof of title was evidence only of a right to possess." Poll. Torts 317. Under the common-law forms of action, possession was of the utmost importance and was rather to be considered than ownership. "An owner in possession was protected against disturbance, but the rights of an owner out of possession were obscure and weak. To this day it continues so with regard to chattels. For many purposes the true owner of goods is the person, and the only person, entitled to immediate possession." Poll. Torts 316.

Commenting on the suggestion sometimes made that there is no doctrine of possession in our law, the same author says: "The reason of this appearance, an appearance capable of deceiving even learned persons, is that possession has all but swallowed up ownership; and the rights of a possessor, the one entitled to possess, have all but monopolized the very name of property." *Id.* 317.

"Legal possession does not necessarily coincide either with actual physical control . . . or with the right to possess (constantly called property in our books), and it need not have a rightful origin." *Id.* 318. "The common law, when it must choose between denying legal possession to the persons apparently in possession and attributing it to a wrongdoer, generally prefers the latter course. In Roman law there is no such general tendency, though the results are often similar." *Id.* 319.

Judge Holmes considers possession a conception only less important than contract, and he contends that the English system is far more civilized than the Roman. He seeks to answer the question which presents so much difficulty to German philosophers: "Why is possession protected by the law when the possessor is not also an owner?" His reply is that "possession is to be protected because a man by taking possession of an object has brought it within the sphere of his will; he has extended his personality into or over that object." Holmes, Com. Law 207. "Rights of ownership are substantially the same as

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those incident to possession. . . . The owner is allowed to exclude all and is accountable to no one; the possessor is allowed to exclude all but one and is accountable to no one but him." *Id.* 246. See Holmes, Common Law, Lect. 6; Pollock, Torts, 5th ed. ch. 9; F. W. Maitland in 1 Law Quart. Rev. 324; 2 *id.* 481.

A very high degree of legal protection is accorded to one lawfully in possession and, whether its origin is rightful or not, a stranger cannot be heard in opposition to it. The true owner may be heard, but an intruder never. It is said, however, that the bald proposition that possession is a good title against a wrongdoer is inaccurate, if stated entirely without a qualification, and that the true limits of the bare possessor's right to recover damages for interference with his possession are: 1. If the defendant cannot show who the true owner is, the bare possessor may recover the same measure of damages as if he were the true owner, though he may be liable over to the latter. 2. Where the true owner is shown, the bare possessor cannot recover the value of the goods taken or the diminution in their value, or for injury, unless he is liable. 3. Whether the true owner be shown or not, the possessor may recover damages for the taking or trespass, nominal or substantial, as the taking is or is not attended with aggravation. 7 Law Quart. Rev. 242.

Possession in the Roman law is the subject of an extended discussion by a writer in 3 Law Quart. Rev. 32, who takes issue with Judge Holmes' treatment of that subject, as to which he says, that although the differences between the two systems are very striking, Judge Holmes treats the civilians with scant respect, although "the knowledge he shows of their rights proves that he has himself by no means neglected them and we shall not be far wrong in following his practice rather than his precept."

Failure to take possession is sometimes considered a badge of fraud, in the transfer of personal property. See SALE; MORTGAGE.

Possession of real property will be presumed to accompany ownership until the contrary is proved; and constructive possession consequent upon legal ownership is sufficient as against mere trespassers; 120 U. S. 605. Long continued possession and use of real property creates a presumption of lawful origin; and this presumption need not rest upon belief that a conveyance was in point of fact executed; 120 U. S. 534. See ADVERSE POSSESSION; LIMITATIONS.

**In Louisiana.** *Civil* possession exists when a person ceases to reside in a house or on the land which he occupied, or to detain the movable which he possessed, but without intending to abandon the possession. It is the detention of a thing by virtue of a just title and under the conviction of possessing as owner. La. Civ. Code, art. 3392, 3394.

*Natural* possession is that by which a man detains a thing corporeal; as, by occupying a house, cultivating ground, or retaining a movable in his possession. Natural possession is also defined to be the corporeal detention of a thing which we possess as belonging to us, without any title to that possession, or with a title which is void. La. Civ. Code, art. 3391, 3393.

Possession applied properly only to corporeal things, movables and immovables. The possession of incorporeal rights, such as servitudes and other rights of that nature, is only a *quasi*-possession, and is exercised by a species of possession of which these rights are susceptible. *Id.* art. 3395.

Possession may be enjoyed by the proprietor of the thing or by another for him: thus, the proprietor of a house possesses it by his tenant or farmer.

To acquire possession of a property, two things are requisite: the intention of possessing as owner; the corporeal possession of the thing. *Id.* art. 3399.

Possession is lost with or without the consent of the possessor. It is lost *with* his consent—when he transfers this possession to another with the intention to divest himself of it; when he does some act which manifests his intention of abandoning possession: as, when a man throws into the street furniture or clothes of which he no longer chooses to make use. *Id.* art. 3411. A possessor of an estate loses the possession *against* his consent—when another expels him from it, whether by force in driving him away, or by usurping possession during his absence, and preventing him from re-entering; when the possessor of an estate allows it to be usurped and held for a year, without during that time having done any act of possession or interfered with the usurper's possession. *Id.* art. 3412.

**In Criminal Law.** In some states it is made a criminal offence to have possession of burglars' tools with intent to use them for the purpose for which they were intended. Under such statutes it was held (1) that it is sufficient to allege in the information possession with the intent to break open places of deposit in general and take property, without specifying any particular place or property. (2) That where the defendant was found with the tools concealed about his person while stealing a ride on a railway and he testified that he found the tools, it was proper to refuse to take the case from the jury. (3) Where the only evidence produced by the state was the concealment of the tools on the person, and there was no evidence that the defendant had been convicted of theft, the application to him in argument by the prosecuting attorney of the term thief, followed by a ruling by the court that the assertion was warranted by the evidence, was ground for reversal; 91 Wis. 552.

See RECENT POSSESSION OF STOLEN PROPERTY.

**In International Law.** As indicating political control, a possession means the same as a colony. It was so used in the treaty of 1897, between the United States

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and Great Britain, which failed to receive the approval of the senate.

**POSSESSION MONEY.** An allowance to one put in possession of goods taken under writ of *fieri facias*. Holthouse, Dict.

**POSSESSION, WRIT OF.** See HABERE FACIAS POSSESSIONEM.

**POSSESSOR.** He who holds, detains, or enjoys a thing, either by himself or his agent, which he claims as his own.

In general, the possessor of personal chattels is presumed to be the owner; and in case of real estate he has a right to receive the profits until a title adverse to his possession has been established, leaving him subject to an action for the mesne profits.

**POSSESSORY ACTION. In Old English Law.** A real action, in which the plaintiff, called the demandant, sought to recover the *possession* of land, tenements, and hereditaments. On account of the great nicety required in its management, and the introduction of more expeditious methods of trying titles by other actions, it has been laid aside. Finch, Laws 257.

In admiralty law the term is still in use. See PETITIONS.

**In Louisiana.** An action by which one claims to be maintained in the possession of an immovable property, or of a right upon or growing out of it, when he has been disturbed; or to be reinstated to that possession, when he has been divested or evicted. 2 La. 227, 254.

**In Scotch Law.** An action by which the possession of heritable or movable property may be recovered and tried. An action of molestation is one of them. Paterson, Comp. § 1058, n.

**POSSESSORY JUDGMENT. In Scotch Law.** A judgment which entitles a person who has uninterruptedly been in possession for seven years, to continue in possession until the question of right be decided in due course of law. Bell, Dict.

**POSSIBILITY.** An uncertain thing which may happen. Lilly, Reg. A contingent interest in real or personal estate. 1 Madd. 549.

Possibilities are near, as when an estate is limited to one after the death of another; or remote, as that one man shall be married to a woman, and then that she shall die and he be married to another. 1 Fonbl. Eq. n. *e*; Viner, Abr.; 2 Co. 51 *a*.

Possibilities are also divided into—a possibility coupled with an interest. This may, of course, be sold, assigned, transmitted, or devised. Such a possibility occurs in executory devises, and in contingent, springing, or executory uses. See 89 N. C. 81.

A *bare* possibility, or hope of succession. This is the case of an heir apparent during the life of his ancestor. It is evident that he has no right which he can assign, devise, or even release. See Chal. R. P. 66.

A possibility or mere contingent interest, as, a devise to Paul if he survive Peter. Dane, Abr. c. 1, a. 5, § 2, and the cases there cited. See PERPETUITY.

**POSSIBLE.** Liable to happen or come to pass, capable of existing or of being conceived or thought of; capable of being done; not contrary to the nature of things. 38 Kan. 383. It is sometimes equivalent to practicable or reasonable; 44 Wis. 208. An undertaking to supply an article as soon as possible is construed to mean with all reasonable promptitude, regard being had to the manufacturer's means of business, and his orders already in hand; 26 L. J. C. P. 73; 4 Q. B. D. 670.

**POST** (Lat.). After. When two or more alienations or descents have taken place between an original intruder and the tenant or defendant in a writ of entry, the writ is said to be in the *post*, because it states that the tenant had not entry unless *after* the ouster of the original intruder. 3 Bla. Com. 182. Persons claiming under the *propositus* by feofment or inheritance were said to be "in the *per*," while those claiming in any other manner, *e. g.* the limitation of a use, as tenant in dower, etc., were said to be "in the *post*." Except in case of the heir, the distinction is that persons in the *per* take by the act of the party at common law unassisted by statute, while persons in the *post* take by operation of law without any act of the party or by his act aided by statute; 4 L. Quart. Rev. 362. See ENTRY, WRIT OF.

A military establishment where a body of troops is permanently fixed. 19 Wall. 268; a military post is synonymous with military station. 94 U. S. 219.

**POST CONQUESTUM.** After the conquest. Words inserted in the king's title by King Edward I., and constantly used in the time of Edward III. Toml.

**POST-DATE.** To date an instrument a time after that on which it is made. See DATE.

**POST DIEM** (Lat.). After the day; as, a plea of payment *post diem*, after the day when the money became due. Com. Dig. *Pleader* (2 W 29).

**POST DISSEISIN. In English Law.** The name of a writ which lies for him who, having recovered lands and tenements by force of a novel disseisin, is again disseised by a former disseisor. Jacob, Law Dict.

**POST ENTRY. In Maritime Law.** An entry made by a merchant upon the importation of goods, after the goods have been weighed, measured, or gauged, to make up the deficiency of the original or prime entry. The custom of making such entries has arisen from the fact that a merchant in making the entry at the time of importation is not or may not be able to calculate exactly the duties which he



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is liable to pay: he therefore makes an approximately correct entry, which he subsequently corrects by the *post entry*. See Chitty, Com. L. 746.

**POST FACTO.** See EX POST FACTO.

**POST FINE.** A duty formerly paid to the king for a fine acknowledged in his court.

**POST LITEM MOTAM** (Lat.). After the commencement of the suit.

Declarations or acts of the parties made *post litem motam* are presumed to be made with reference to the suit then pending, and, for this reason, are not evidence in favor of the persons making them; while those made before an action has been commenced, in some cases, as when a pedigree is to be proved, may be considered as evidence; 4 Camp. 401.

**POST-MARK.** A stamp or mark put on letters in the postoffice.

Post-marks are evidence of a letter's having passed through the postoffice; 2 Camp. 620; 2 B. & P. 316; 15 East 416; 1 Maule & S. 201; 15 Conn. 206. But they are not evidence *per se* without proof; 1 Campb. 215; *id.* 178; 16 M. & W. 124; 3 Stark. 64; R. & R. C. C. 264. The opinion of a person in the habit of receiving letters is, it seems, evidence of the genuineness of a post-mark; 5 Bing. 299. Cited in Stark. Ev., Sharsw. ed. 174, note *e*. See LETTER; POSTAL SERVICE.

**POST MORTEM** (Lat.). After death: as, an examination *post mortem* is an examination made of a dead body to ascertain the cause of death; an inquisition *post mortem* is one made by the coroner.

It is the duty of the coroner, after death by violence, to cause a *post mortem* examination to be made by a competent medical authority. A physician thus employed may, at common law, maintain an action against the county for trouble and labor expended in such examination; Gibson, C. J., in 4 Pa. 269.

A father may maintain an action against one to whom he has intrusted his child for treatment, for an autopsy performed upon it after death; 47 N. E. Rep. 401, where it was held that as the natural guardian of the child, the father had the right to the possession of the dead body. Being entitled to such possession for the purpose of burial, his right against one who unlawfully interferes with it and mutilates it is as great as if that one had unlawfully removed the body from the lot in which it was buried. See 55 Alb. L. J. 434. A widow may recover damages in a similar case for the unlawful dissection of the body of her dead husband; 47 Minn. 307. The right of a person entitled to the possession of a body is thus defined by Patterson, J.: "The right is to the possession of the corpse in the same condition it was in when death supervened. It is the right to what remains when the breath leaves the body, and not merely to such a hacked, hewed, and mutilated corpse as some stranger, an offender against the criminal law, may choose to turn over to an afflicted relative;" 1 App. Div. N. Y. 551; other authorities to the same general effect are 125 Ind. 536; 81 Md. 358; 19 Am. Law Rev. 251; 10 Alb. L. J. 71; 4 Am. L. T. 127; 3 Chic. Leg. N. 378; Perley, Mortuary Law 26. See DEAD BODY.

**POST-NATUS** (Lat.). Literally, after born; it is used by the old law writers to designate the second son. See PUISNE; POST-NATI.

**POST NOTES.** A species of bank-notes payable at a distant period, and not on demand. 2 W. & S. 463. A kind of bank-notes intended to be transmitted at a distance by post. See 24 Me. 36.

**POST-NUPTIAL.** Something which takes place after marriage: as, a post-nuptial settlement, which is a conveyance made generally by the husband for the benefit of the wife.

A post-nuptial settlement is either with or without consideration. The former is valid even against creditors, when in other respects it is untainted with fraud; 4 Mas. 443; 2 Bail. 477. The latter, when made without consideration, if *bona fide*, and the husband be not involved at the time, and it be not disproportionate to his means, taking his debts and situation into consideration, is valid; 4 Mas. 443. See 4 Dall. 304; SETTLEMENT; VOLUNTARY CONVEYANCE.

**POST-OBIT** (Lat.). An agreement by which the obligor borrows a certain sum of money and promises to pay a larger sum, exceeding the lawful rate of interest, upon the death of a person from whom he has some expectation, if the obligor be then living. 7 Mass. 119; 6 Madd. 111; 5 Ves. 57; 19 *id.* 628. See CATCHING BARGAIN; EXPECTANCY; MACEDONIAN DECREE.

**POSTOFFICE.** A government office for the receipt and delivery of the mail.

All the streets of the city are post roads, because they are letter carrier routes, as are all public roads and highways while kept up and maintained as such; 1 Suppl. 423; and all railroads; 148 U. S. 92; 160 *id.* 1, 40; 38 Fed. Rep. 552; all the waters, canals, and plank roads of the United States during the time the mail is carried thereon; R. S. § 3964. See also 3 How. 151; 13 Ct. Cl. 199.

The power to establish postoffices does not enable the postmaster-general to bind the government by leasing a postoffice for twenty years when there is no appropriation therefor; 155 U. S. 489.

The top of a letter-box is not an authorized depository for mail matter; 17 Op. A. G. 524.

A repair shop though designated as a station is not a branch postoffice or station; 30 Ct. Cl. 59.

Where goods are sent by mail the postoffice is the agent of the buyer and not the seller; [1898] A. C. 200; and when they are

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delivered by the seller to the postoffice the title vests in the buyer; *id.* 204.

No person shall furnish any private conveyance for letters or packets, or in any manner cause or provide for the conveyance of the same by regular trips or at stated periods over any post route or between places between which the mail is carried. See 16 Fed. Rep. 609.

**POST ROADS.** See POSTOFFICE.

**POSTAGE.** The money charged by law for carrying and delivering mail matter.

The rates of postage between places in the United States are fixed by law; the rates of postage upon foreign letters are fixed by arrangements entered into by the postmaster-general, in pursuance of authority vested in him by congress for that purpose.

All mailable matter is divided into four classes: *letters*, embracing all correspondence wholly or partly in writing, except that mentioned in the third class; *regular printed matter*, embracing all mailable matter exclusively in print and regularly issued at stated periods, without addition by writing, mark, or sign; see 12 How. 284; 4 Opin. Atty. Genl. 10; *miscellaneous matter*, including pamphlets, occasional publications, books, book-manuscripts, and proof-sheets, whether corrected or not, maps, prints, engravings, blanks, flexible patterns, samples, and sample cards, phonographic paper, letter envelopes, postal envelopes or wrappers, cards, paper, plain or ornamental, photographic representations of different types, seeds, cuttings, bulbs, roots, and scions, and all other matters not embraced in the first, second, and third classes and which does not exceed four pounds in weight; U. S. Rev. Stat. 2 Suppl. 507.

The postmaster-general is authorized and directed to furnish and issue to the public, with postage stamps impressed upon them, "postal-cards," which cards shall be used as a means of postal intercourse, under rules and regulations to be prescribed by the postmaster-general, and when so used shall be transmitted through the mails at a postage charge of one cent each. R. S. § 3916.

It is lawful to transmit through the mail, free of postage, any letters, packages, or other matters, relating exclusively to the business of the government of the United States, provided that every such letter or package, to entitle it to pass free, shall bear over the words "official business," an indorsement showing also the name of the department and bureau or office, as the case may be, whence transmitted; R. S. 1 Supp. p. 288.

Senators, representatives, and delegates in congress, the secretary of the senate, and clerk of the house of representatives, may send and receive through the mail all public documents printed by order of congress; and the name of each senator, representative, delegate, secretary of the senate, and clerk of the house shall be written thereon, with the proper designation of the office he holds, and the provisions of this act apply to each of the persons named therein until the first of December following the expiration of his term of office; R. S. 1 Supp. p. 288.

**POSTAGE-STAMPS.** The act of congress approved March 3, 1847, section 11, and the act of congress of March 3, 1841, sections 3, 4, provide that, to facilitate the transportation of letters in the mail, the postmaster-general be authorized to prepare postage-stamps, which when attached to any letter or packet shall be evidence of the payment of the postage chargeable on such letter. The same sections declare that any person who shall falsely or fraudulently make, utter, or forge any post-stamp, with the intent to defraud the postoffice department, shall be deemed guilty of felony, and be punished by a fine not exceeding five hundred dollars, or by imprisonment not exceeding five years, or by both such fine and imprisonment. And if any person shall use or attempt to use, in prepayment of postage, any postage-stamp which shall have been used before for like purposes, such person shall be subject to a penalty of fifty dollars for every such offence; to be recovered in the name of the United States, in any court of competent jurisdiction. See, also, Act of Mar. 3, 1851, 9 Stat. at L. 589; Act of Aug. 31, 1852, 10 Stat. at L. 141; 1 Supp. R. S. p. 249, § 28. It is made penal to sell stamps or stamped envelopes for a larger sum than that indicated on the stamp or than is charged by the department; Act of Mar. 3, 1855, 10 Stat. at L. 642. See R. S. § 5468. Postmasters and other postal employes are forbidden to dispose of postage-stamps, stamped envelopes, or postal cards except for cash, or sell or dispose of them for any larger or less sum than the values indicated on their faces; 1 Supp. R. S. p. 187.

**POSTAL SERVICE.** That relating to the mails, their transmission and delivery.

The act of July 26, 1892, provides that after a general advertisement for the transportation of the mails, the postmaster-general may secure any mail service that may become necessary, and the contract shall be made with the lowest bidder. Where a contract is awarded to the lowest bidder, it can be changed only in the manner provided in §§ 3957–3959; 31 Ct. Cl. 332. The contract should be in the name of the United States; 18 Op. Atty. Gen. 112; and the bid must have with it an acceptable bond; 17 *id.* 294. Under § 3962 the postmaster-general may by order make a mail service subject to fines and deductions; 24 Ct. Cl. 61, 350; 26 *id.* 344.

A contractor for mail messenger service is not required to haul mail bags for repairs to and from a subsequently established repair shop; 30 Ct. Cl. 59.

The compensation of mail contractors is fixed by contract and by law of congress. The postmaster-general may make deduction for failure to perform services, and may also deduct the price of the trip in all cases where the trip is not performed; 24 Ct. Cl. 61; 26 *id.* 344. Compensation for additional services in carrying the mail is not to be in excess of the exact proportion which the original compensation bears to the original services; 131 U. S. 31, 35. The original letting, and not any subsequent increase of service or pay, is made the standard of limitation under § 3960; 17 Op. Atty. Gen. 166. If an allowance is made under false representations or by mistake, the money paid can be recovered; 132 U. S. 271, 644; 135 *id.* 550; and money received under an expedited schedule as payment for additional horses and men and never used, though allowed in the order of expedition, was held bound to be subject to being refunded to the United States; 132 U. S. 271. The clause providing that the compensation should not be in excess of the exact proportion does not prevent its being less; 19 Op. Atty. Gen. 147.

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Most of the criminal legislation of congress rests upon no express grant of power, but upon the power to make all laws necessary and proper for carrying into execution the powers conferred; Ordron. Const. Leg. 559. The power to establish postoffices and post roads includes the power to punish offences committed against its administration, by whatever name it may be known; 13 Blatch. 335; 2 Cra. 212; 7 Wall. 482; and to forbid the use of the mails to carry matter which disseminates crime and immorality; 143 U. S. 110.

Opening a letter which had been in the postoffice, before delivery to the person to whom it was directed, with the intent to pry into his correspondence, is an offence against the postal laws, even though the letter was not sealed at the time; 2 Curt. 265; and though it come from a criminal and is supposed to contain improper information; 1 Biss. 227; 162 U. S. 420; but in order to constitute an offence against the postal laws the letter must have been in the custody of the postmaster or his agents; 20 Fed. Rep. 625.

*Obstructing mails.* The United States may enjoin obstructions to highways used in interstate commerce and in transporting the mails; 158 U. S. 564. This applies to obstructions upon railroads and electric railways, and includes employes who suddenly desert their work: *id.*; 55 Fed. Rep. 380; 44 *id.* 592. See LABOR UNION.

Arresting a letter carrier on an indictment for murder is not obstructing the mail; 7 Wall. 482. A state statute which necessarily interferes with speedy and uninterrupted carriage of the United States mails cannot be considered as a reasonable police regulation; 163 U. S. 642. The committing an unprovoked assault upon a postmaster, the necessary result whereof was an obstruction and retarding of the passage of the mail, is an offence, unless the act was independent and disconnected from the postoffice and matters pertaining thereto; 14 Fed. Rep. 127.

A person having a lien against horses for their keeping cannot enforce the same in such a manner as to stop the United States mail in a stage coach drawn by such horses; 3 Hughes 545. But no offence is committed by enforcing it unless the mail is *in transitu* and unless the horses or vehicle taken are actually being used in carrying mail; *id.* It has been held that it is an offence under the statute to stop a mail train although one had obtained a judgment and writ of execution from a state court against the railway company; 3 Fed. Rep. 478. It is not an offence under the statute to restrain the driver of a mail coach from driving through a crowded city at such a rate as seriously to endanger the lives of the citizens; 9 Pet. 390. Restricting the speed of trains to six miles an hour by city ordinance does not obstruct the mails; 5 Op. Atty. Gen. 554.

*Larceny and robbery.* Embezzlement or destruction of mail matter by an employe in any department of the postal service is an offence against the postal laws. This statute has been held to create two distinct offences; viz.: (1) the embezzlement of a letter carried in the United States mail, and (2) the stealing of its contents; and one may be punished separately for each offence; 37 Fed. Rep. 200; 34 *id.* 316; and see 134 U. S. 624. Under the statute no one can be convicted who is not an employe of the postoffice department; 1 McLean 499; 2 *id.* 14. One who steals from the mail, whether an employe or not, commits an offence against the postal laws; 35 Fed. Rep. 59; and in taking or abstracting articles or receiving them when so taken, with the object of opening, secreting, destroying, embezzling, or stealing the same constitutes the offence; 37 Fed. Rep. 108.

As to the use of decoy letters, see that title.

As to using the mails for improper or non-mailable matter, see LIBEL; LIBERTY OF THE PRESS; LOTTERY; OBSCENITY.

See SAVINGS BANKS.

**POSTAL UNION.** A treaty made at Berne in October, 1874, for the regulation of rates of postage and other matters connected with the postoffice between England and various other countries. See 38 & 39 Vict. c. 22; 1 Hall. Int. L. 286. Several international conferences have since been held on the subject.

**POSTEA** (Lat. afterwards). **In Practice.** The indorsement, on the *nisi prius* record, purporting to be the return of the judge before whom a cause is tried, of what has been done in respect of such record.

It states the day of trial, before what judge, by name, the cause is tried, and also who is or was an associate of such judge; it also states the appearance of the parties by their respective attorneys, or their defaults, and the summoning and choice of the jury, whether those who were originally summoned, or those who were tales, or taken from the standers-by; it then states the finding of the jury upon oath, and, according to the description of the action, and the assessment of the damages, with the occasion thereof, together with the costs.

These are the usual matters of fact contained in the *postea;* but it varies with the description of the action. See Lee, Dict. *Postea;* 2 Lilly, Abr. 337; 16 Viner, Abr. 465; Bacon, Law Tr. 127.

When the trial is decisive, and neither the law nor the facts can afterwards be controverted, the postea is delivered by the proper officer to the attorney of the successful party, to sign his judgment; but it not unfrequently happens that after a verdict has been given there is just cause to question its validity: in such case the postea remains in the custody of the court. Eunomus, Dial. 2, § 33, p. 116.

**POSTERIORES** (Lat.). This term was used by the Romans to denote the descendants in a direct line beyond the sixth

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degree. It is still used in making genealogical tables.

**POSTERIORITY.** Being or coming after. It is a word of comparison, the correlative of which is *priority:* as, when a man holds lands from two landlords, he holds from his ancient landlord by priority, and from the other by posteriority. Co. 2d Inst. 392.

These terms, priority and posteriority, are also used in cases of liens: the first are prior liens, and are to be paid in the first place; the last are posterior liens, and are not entitled to payment until the former have been satisfied.

**POSTERITY.** All the descendants of a person in a direct line to the remotest generation. 8 Bush 527.

**POSTHUMOUS CHILD.** One born after the death of its father; or, when the Cæsarean operation is performed, after that of the mother. The doctrine is universally adopted throughout the United States, that posthumous children inherit in the same manner as if born during the father's life; and this relates back to the conception of the child, if it is born alive; 3 Washb. R. P. *412; 4 Paige 52; 30 Pa. 173; Mitch. R. E. 231. The court will allow a longer time than nine months for the birth of the child, when the opinion of physicians, or circumstances warrant it; 2 Greenl. Cruise, R. P. 140.

When a father makes a will without providing for a posthumous child, the will is generally considered as revoked, *pro tanto;* 3 Washb. R. P. 699, 412; 4 Kent 412, 521, n., 525; 28 Am. Rep. 486; 160 Pa. 433.

In most of the states there are statutes providing that in case of future estates or remainders limited to heirs, issue, or children of any person, posthumous children take as if living at the death of the parent without the limitation of an estate to support contingent remainders; and most of such statutes also provide that the future estate limited to take effect on the death of a person without heirs, etc., is defeated by the birth of a posthumous child. In a few states the time within which such child must be born is limited to ten months after the death of the father. See 31 Fla. 139; LEGACY; DESCENT AND DISTRIBUTION; EN VENTRE SA MERE.

**POSTLIMINIUM** (Lat. from *post*, after, and *limen*, threshold). A fiction of the civil law, by which persons or things taken by the enemy were restored to their former state on coming again under the power of the nation to which they formerly belonged. Calvinus, Lex.; 1 Kent 108. It is also recognized by the law of nations. But movables are not entitled to the benefit of this rule, by strict law of nations, unless promptly recaptured. If recaptured after twenty-four hours they vest in the recaptor, subject, amongst most nations, to revest in the owner, upon payment of military salvage; Risley, Law of War 143.

The rule does not affect property which is brought into a neutral territory; 1 Kent 108. It is so called from the return of the person or thing over the threshold or boundary of the country from which it was taken.

When an enemy's military occupation comes to an end, the legal state of things previously existing is deemed to have been in continuous existence during the occupation. Postliminium applies to territory, to private immovable property, and to every kind of property that may not lawfully be seized. But property, public or private, that has been lawfully taken by an enemy, such as booty or treasure, is not subject to the fiction. Acts done once and for all, within an invader's competence to perform, hold good. There is no postliminium as regards lawful prize, though it is said there may be by recapture; which, if it occur before capture is complete, may have effects like those of postliminium, though the latter fiction does not include any idea of salvage; Risley, Law of War 143.

The *jus postliminii* in international law is derived from a similar term in the Roman law by which persons and property captured by an enemy and then recaptured are restored to their original owner. The term now applies almost exclusively to property both real and personal which when recaptured does not belong to the recaptor but to the original owner. Snow, Int. Law 116.

**POSTLIMINY.** See POSTLIMINIUM.

**POSTMAN.** A senior barrister in the court of exchequer, who has precedence in motions; so called from place where he sits. 2 Bla. Com. 28; Wharton, Dict. A letter-carrier. Webster, Dict.

**POSTMASTER.** An officer who keeps a postoffice, attending to the receipt, forwarding, and delivery of letters and other matter passing through the mail.

Postmasters must reside within the delivery district for which they are appointed. For those offices where the salary or compensation is less than a thousand dollars a year, the postmaster-general appoints; where it is more, the president. Postmasters are divided into four classes, exclusive of the postmaster at New York, according to the amount of salary; those of the first class receiving three thousand or more, those of the fourth less than one thousand; 1 Supp. R. S. p. 110; *id.* 417. They must give bond to the United States of America; see 19 How. 73; Gilp. 54; which remains in force, for suit upon violation, during the term; 1 W. & M. 150; for three, formerly two, years after the expiration of the term of office; R. S. § 3838; 7 How. 681. See R. S. § 3836.

Where an office is designated as a money-order office, the bond of the postmaster shall contain an additional condition for the

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faithful performance of all duties and obligations in connection with the money-order business; R. S. § 3834.

The presumption that public officers do their duty applies to the duty of postmasters to report a contractor's delinquencies; 132 U. S. 644.

Every postmaster is required to keep an office in the place for which he may be appointed; and it is his duty to receive and forward by mail, without delay, all letters, papers, and packets as directed, to receive the mails, and deliver, at all reasonable hours, all letters, papers, and packets to the persons entitled thereto.

Every person who, without authority from the postmaster-general, sets up any office bearing the title of postoffice is liable to a penalty of $500 for each offence; R. S. § 3829.

A postmaster is liable for all losses occasioned by his own default in office; 3 Wils. 443; Cowp. 754; 5 Burr. 2709; Edw. Bailm. 483; 1 Bell, Com. 468; 2 Kent 474; Story, Bailm. § 463; see 97 Ala. 710; but in order to make him liable for negligence, it must appear that the loss or injury sustained was in consequence of such negligence; 7 Cra. 242; 6 Barb. 232. He is bound only to the exercise of due diligence in the care of matter deposited in the postoffice; 15 Wall. 337. See 1 Ld. Raym. 646, where the question is elaborately discussed.

A postmaster is liable for the acts of his clerks or servants who were not regularly appointed and sworn as his assistants; 23 Vt. 663; 106 Mass. 446. In Pennsylvania it has been decided that he is not responsible for their secret delinquencies; though, perhaps, he is answerable for want of attention to the official conduct of his subordinates; 8 Watts 453; but see 97 Ala. 710. An attempt to induce a postmaster to sell stamps on credit is in violation of a statute providing against the attempt to influence any officer of the United States to a violation of his lawful duties; 136 U. S. 257.

**POSTMASTER-GENERAL.** The chief officer of the postoffice department of the executive branch of the government of the United States.

His duties, in brief, are, among other things, to establish postoffices and appoint postmasters (see POSTMASTER) at convenient places upon the post-roads established by law; to give instructions for conducting the business of the department; to provide for the carriage of the mails; to obtain from the postmasters balances due, with accounts and vouchers of expenses; to pay the expenses of the department; see 15 Pet. 377; to prosecute offences, and, generally, to superintend the business of the department in all the duties assigned to it. He is assisted by four assistants and a large corps of clerks,—the four assistants being appointed by the president. He must make ten several reports annually to congress, relating chiefly to the financial management of the department, with estimates of the expenses of the department for the ensuing year. R. S. § 413. He is a member of the cabinet. See R. S. §§ 388–414; DEPARTMENT; OFFICER.

**POSTNATI** (Lat.). Those born after. Applied to American and British subjects born after the separation of England and the United States; also to the subjects of Scotland born after the union of England and Scotland. Those born after an event, as opposed to *antenati*, those born before. 2 Kent 56; 2 Pick. 395; 5 Day 169*. See ANTENATI.

**POSTPONE.** To put off; to delay; to continue or adjourn, as to postpone a hearing.

**POSTULATIO** (Lat.). **In Roman Law.** The name of the first act in a criminal proceeding.

A person who wished to accuse another of a crime appeared before the prætor and requested his authority for that purpose, designating the person intended. This act was called *postulatio*. The postulant (*calumnium jurabat*) made oath that he was not influenced by a spirit of calumny, but acted in good faith with a view to the public interest. The prætor received this declaration, at first made verbally, but afterwards in writing, and called a libel. The *postulatio* was posted up in the forum, to give public notice of the names of the accuser and the accused. A second accuser sometimes appeared and went through the same formalities.

Other persons were allowed to appear and join the postulant or principal accuser. These were said *postulare subscriptionem*, and were denominated *subscriptores*. Cic. in Cæcil. Divin. 15. But commonly such persons acted concurrently with the postulant, and inscribed their names at the time he first appeared. Only one accuser, however, was allowed to act; and if the first inscribed did not desist in favor of the second, the right was determined, after discussion, by judges appointed for the purpose. Cic. in Verr. i. 6. The preliminary proceeding was call *divinatio*, and is well explained in the oration of Cicero entitled Divinatio. See Aulus Gellius, Att. Noct. lib. ii. cap. 4.

The accuser having been determined in this manner, he appeared before the prætor, and formally charged the accused by name, specifying the crime. This was called *nominis et criminis delatio*. The magistrate reduced it to writing, which was called *inscriptio*, and the accuser and his adjuncts, if any, signed it, *subscribebant*. This proceeding corresponds to the indictment of the common law.

If the accused appeared, the accuser formally charged him with the crime. If the accused confessed it, or stood mute, he was adjudged to pay the penalty. If he denied it, the *inscriptio* contained his answer, and he was then *in reatu* (indicted, as we should say), and was called *reus*, and a day was fixed, ordinarily after an interval of at least ten days, according to the nature of the case, for the appearance of the parties. In the case of Verres, Cicero obtained one hundred and ten days to prepare his proofs; although he accomplished it in fifty days, and renounced, as he might do, the advantage of the remainder of the time allowed him.

At the day appointed for the trial, the accuser and his adjuncts or colleagues, the accused, and the judges, were summoned by the herald of the prætor. If the accuser did not appear, the case was erased from the roll. If the accused made default, he was condemned. If both parties appeared, a jury was drawn by the prætor or *judex quæstionis*. The jury was called *jurati homines* and the drawing of them *sortitio*, and they were, taken from a general list made out for the year. Either party had a right to object to a certain extent to the persons drawn; and then there was a second drawing called *subsortitio*, to complete the number.

In some tribunals *quæstiones* (the jury) were *editi* (produced) in equal number by the accuser and the accused, and sometimes by the accuser

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alone, and were objected to or challenged in different ways, according to the nature of the case. The number of the jury also varied according to the tribunal (*quæstio*): they were sworn before the trial began. Hence they were called *jurati*.

The accusers, and often the *subscriptores*, were heard, and afterwards the accused, either by himself or by his advocates, of whom he commonly had several.

After the pleadings were concluded, the prætor or the *judex quæstionis* distributed tablets to the jury, upon which each wrote, secretly, either the letter A. (*absolvo*), or the letter C. (*condemno*), or N. L. (*non liquet*). These tablets were deposited in an urn. The president assorted and counted the tablets. If the majority were for acquitting the accused, the magistrate declared it by the words *fecisse non videtur*, and by the words *fecisse videtur* if the majority were for a conviction. If the tablets marked N. L. were so many as to prevent an absolute majority for a conviction or acquittal, the cause was put off for more ample information, *ampliatio*, which the prætor declared by the word *amplius*. Such, in brief, was the course of proceedings before the *quæstiones perpetuæ*.

The forms observed in the *comitia centuriata* and *comitia tributa* were nearly the same, except the composition of the tribunal and the mode of declaring the vote.

**POSTULATIO ACTIONIS** (Lat.). **In Civil Law.** Demand of an action (*actio*) from the prætor, which some explain to be a demand of a *formula*, or form of the suit; others, a demand of leave to bring the cause before the judge. Taylor, Civ. Law 80; Calvinus, Lex. *Actio*.

**POT-DE-VIN. In French Law.** A sum of money frequently paid at the moment of entering into a contract, beyond the price agreed upon.

It differs from *arrha* in this that it is no part of the price of the thing sold, and that the person who has received it cannot by returning double the amount, or the other party by losing what he has paid, rescind the contract; 18 Toullier, n. 52.

**POTENTATE.** One who has a great power over an extended country; a sovereign.

By the naturalization laws of the United States, an alien is required, before he can be naturalized, to renounce all allegiance and fidelity to any foreign prince, potentate, state, or sovereign whatever.

**POTENTIALLY.** In possibility, not in act, not positively; in efficacy, not in actuality. 19 Neb. 556.

**POTESTAS** (Lat.). **In Civil Law.** Power; authority; domination; empire. *Imperium*, or the jurisdiction of magistrates. The power of the father over his children, *patria potestas*. The authority of masters over their slaves, which makes it nearly synonymous with *dominium*. See Inst. 1. 9. 12; Dig. 2. 1. 13. 1; 14. 1; 14. 4. 1. 4.

**POUND.** A place, enclosed by public authority, for the temporary detention of stray animals. 4 Pick. 258; 9 *id.* 14.

Animals may not be impounded unless they are suffered by the owner to run at large within the strict construction of the statute; 1 Aik. 316; if the impounding is illegal, they can be recovered by the owner; 28 Me. 481; 21 N. H. 448; 23 Vt. 674. If it is legal, the owner must pay the costs imposed; 20 Ill. 363; and the pound-keeper need not deliver over the animals until all legal charges are paid; 5 Cush. 263; 39 Vt. 34; the impounder has the right to use the same force to maintain his possession as a sheriff has to protect his possession under legal process; 36 Vt. 625.

Where the proper officer finds cattle running at large in public streets, he may pursue them upon private property; 63 Me. 84; but when a man finds strange cattle in his field, he is not bound to impound or retain them for the owner, but may drive them off into the highway; 18 Pick. 227; if, however, he impounds, he must feed and water them properly, according to the usage of the country and good husbandry; 13 *id.* 384; he must proceed strictly according to the statute, or he will be a trespasser; 16 Pa. 22; notice must be given before the impounded animal can be sold; 126 Mass 364; and such notice must state the legal charges; 16 Metc. 198. Laws authorizing the impounding and sale of stock without notice or judicial investigation are held to be unconstitutional as authorizing a sale of private property without due process of law; 35 N. Y. 302; 98 N. C. 44; 64 Miss. 283; but it has been held that such laws are valid under the police power; 58 Wis. 144. See ANIMAL; ESTRAY; RUNNING AT LARGE.

**Weights.** There are two kinds of weights, namely, the troy and the avoirdupois. The pound avoirdupois is greater than the troy pound in the proportion of seven thousand to five thousand seven hundred and sixty. The troy pound contains twelve ounces, that of avoirdupois sixteen ounces.

**Money.** The sum of twenty shillings. Previous to the establishment of the federal currency, the different states made use of the pound in computing money: it was of different value in the several states.

*Pound Sterling* is a denomination of money of Great Britain. It is of the value of a *sovereign* (*q. v.*). In calculating the rates of duties, the pound sterling shall be considered and taken as of the value of four dollars and eighty-six cents and six and one-half mills; R. S. § 3565.

The pound sterling of *Ireland* is to be computed, in calculating said duties, at four dollars and ten cents; *id.*

**POUND-BREACH.** The offence of breaking a pound in order to take out the cattle impounded. 3 Bla. Com. 146. The writ *de parco fracto*, or pound-breach, lies for recovering damages for this offence; also case. *Id.* It is also indictable.

**POUND-KEEPER.** An officer charged with the care of a pound, and of animals confined there.

**POUNDAGE. In Practice.** The amount allowed to the sheriff, or other officer, for commissions on the money made

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by virtue of an execution. This allowance varies in different states and to different officers.

**POUR FAIRE PROCLAIMER.** An ancient writ addressed to the mayor or bailiff of a city or town, requiring him to make proclamation concerning nuisances, etc. Fitz. Nat. B. 176.

**POURPARLER. In French Law.** The conversations and negotiations which have taken place between the parties in order to make an agreement. These form no part of the agreement. Pardessus, *Dr. Com.* 142.

**POURSUIVANT.** A follower; a pursuer. In the ancient English law, it signified an officer who attended upon the king in his wars, at the council-table, exchequer, in his court, etc., to be sent as a messenger. A poursuivant was, therefore, a messenger of the king.

**POVERTY AFFIDAVIT.** An affidavit furnished by a party to a suit that he is not able to furnish security for costs. 36 Kan. 263. In the United States courts, an affidavit of poverty for the purpose of avoiding the giving of a cost bond, may be filed after the granting, on notice to plaintiff, of an order for such bond; 82 Fed. Rep. 865.

**POWER.** The right, ability, or faculty of doing something.

The distinction between "power" and "right," whatever may be its value in ethics, in law is very shadowy and unsubstantial. He who has legal power to do anything has the legal right; 143 Pa. 64.

Technically, an authority by which one person enables another to do some act for him. 2 Lilly, Abr. 339.

**Derivative Powers** are those which are received from another. This division includes all the powers technically so called. They are of the following classes:—

*Coupled with an interest*, being a right or authority to do some act, together with an interest in the subject on which the power is to be exercised. Marshall, C. J., 8 Wheat. 203; and the interest coupled with a power in order to make it irrevocable, must be an interest in the thing itself; 125 U. S. 342.

A power of this class survives the person creating it, and, in case of an excess in execution, renders the act valid so far as the authority extends, leaving it void as to the remainder only. It includes powers of sale conferred on a mortgagee.

*Naked*, being a right of authority disconnected from any interest of the donee in the subject-matter. 3 Hill, N. Y. 365. In the case of a naked power not coupled with an interest the law requires that every prerequisite to the exercise of that power should precede it; 4 Wheat. 77; 134 U. S. 256. A naked power given to several persons cannot be executed by the survivors; 16 Beav. 233.

**Inherent Powers.** Those which are enjoyed by the possessors of natural right, without having been received from another. Such are the powers of a people to establish a form of government, of a father to control his children. Some of these are regulated and restricted in their exercise by law, but are not technically considered in the law as powers.

**Powers under the Statute of Uses.** An authority enabling a person, through the medium of the statute of uses, to dispose of an interest in real property, vested either in himself or another person.

Methods of causing a use, with its accompanying estate, to spring up at the will of a given person. Will. R. P., 16th ed. 333; 2 Washb. R. P. 300.

The right to designate the person who is to take a use. Co. Litt. 271 *b*, Butler's note, 231, § 3, pl. 4.

A right to limit a use. 4 Kent 334.

An authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the owner granting or reserving such power might himself lawfully perform.

They are distinguished as—

*Appendant.* Those which the donee is authorized to exercise out of the estate limited to him, and which depend for their validity upon the estate which is in him. 2 Washb. R. P. 304. A life-estate limited to a man, with a power to grant leases in possession, is an example. Hardr. 416; 1 Cai. Cas. 15; Sugd. Pow. 107; Burton, R. P. § 179.

*Of appointment.* Those which are to create new estates. Distinguished from powers of revocation.

*Collateral.* Those in which the donee has no estate in the land. 2 Washb. R. P. 305.

*General.* Those by which the donee is at liberty to appoint to whom he pleases.

*In gross.* Those which give a donee, who has an estate in the land, authority to create such estates only as will not attach on the interest limited to him or take effect out of his own interest. 2 Cow. 236; Tudor, Lead. Cas. 293; Watk. Conv. 260.

*Of revocation.* Those which are to divest or abridge an existing estate. Distinguished from those of appointment; but the distinction is of doubtful exactness, as every new appointment must divest or revoke a former use. Sanders, Uses 154.

As to the effect of the insertion of a power of revocation, either single or in connection with one of appointment, see Styles 389; 2 Washb. R. P. 307.

*Special.* Those in which the donee is restricted to an appointment to or among particular objects only. 2 Washb. R. P. 307.

The person bestowing a power is called the *donor;* the person on whom it is bestowed is called the *donee.*

The person who receives the estate by appointment is called the appointee; the donee of the power is sometimes called the appointor.

*The creation* of a power may be by *deed or will;* 2 Washb. R. P. 314; Mitch. R. E.

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506; by *grant* to a grantee, or *reservation* to the grantor; 4 Kent 319; and the reservation need not be in the same instrument, if made at the same time; 1 Sugd. Pow. 158; by *any form of words* indicating an intention; 2 Washb. R. P. 315. The doubt whether a power is created or an estate conveyed can, in general, exist only in cases of wills; 2 Washb. R. P. 316; and in any case is determined by the intention of the grantor or devisor, as expressed in or to be gathered from the whole will or deed; 10 Pet. 532; 8 How. 10; 3 Cow. 651; 6 Watts 87; 4 Bibb 307. It must be limited to be executed, and must be executed within the period fixed by the rules against perpetuities; 5 Bro. P. C. 592; 2 Ves. 368; 13 Sim. 393.

*The interest of the donee* is not an estate; Watk. Conv. 271; 2 Prest. Abstr. 275; but is sufficient to enable the donee to act, if the intention of the donor be clear, without words of inheritance; 3 Ves. 467; 1 P. Wms. 171; 7 Johns. Ch. 34; see Co. Litt. 271 *b*, Butler's note 231; and may coexist with the absolute fee in the donee; 10 Ves. 255; 4 Greenl. Cruise, Dig. 241, n. As a general rule a power to sell does not include a power to mortgage; 3 Hill N. Y. 361; 66 Tex. 31; 89 Va. 873; but where it is for raising a particular charge, and the estate itself is settled or devised subject to that charge, then it may be proper under the circumstances to raise the money by mortgage, and the court will support it as a conditional sale; 1 De G. M. & G. 645; 3 Jur. N. S. 1143; Sugd. Powers 425; and sale generally means a cash sale; 4 Kent 331; 3 Hill N. Y. 373. See *infra*.

As to exercising the power. If it be simply one in which no person is interested but the donee, it is a matter of election on his part whether to exercise it or not; 1 Sugd. Pow. 158; see *infra*; but if coupled with a trust in which other persons are interested, equity will compel an execution; Story, Eq. Jur. § 1062; 2 Mas. 244, 251.

A power to appoint by will, conferred on a life tenant, does not empower him to devise the land for the payment of his own debts; 69 Md. 390. But a power conferred by will to invest or use includes the power to sell; 115 N. C. 40.

*The execution* must be in the manner prescribed, by the proper person, see APPOINTMENT, and cannot be by an assignee; 2 Washb. R. P. 321; unless authorized by the limitation; 4 Cruise, Dig. 211; or unless an interest be coupled with the power; 2 Cow. 236; 8 Wheat. 203; nor by a successor, as on the death of an executor; 13 Metc. 220. As to whether a sale by a donee who has also an estate in the land is held to be an execution of the power, see 2 Washb. R. P. 325; Tudor, Lead. Cas. 306; 5 B. & C. 720; 6 Co. 18; 16 Pa. 25.

A power to sell gives authority to sell for cash only, and does not uphold a mere exchange; 140 U. S. 253; 22 How. 75; 62 Ia. 91; Perry, Trusts § 769; or mortgage; 15 Minn. 212; 6 Cush. 117; 66 Tex. 31; *contra*, 151 Pa. 322; 163 *id.* 626; and see 153 Mass. 137.

Where three executors, given power to sell real estate, have accepted the trust, one alone cannot execute the power; 73 Tex. 293; and in a devise to two sisters to sell if they desired, the power can only be exercised by their joint deed and is lost by the death of either of them; 56 Conn. 316. A power given by will cannot be delegated, but an appointment under it need not allude to the power; 88 Va. 588.

Where an exact execution is impossible under authority of court, it may be executed as near as may be (*cy-près*) to carrying out the donor's intention; 2 Term 241; 4 Ves. 681; 5 Sim. 632; 3 Wash. C. C. 12.

It must be made at a proper time, and, where several powers are given over different parts of the same estate, in proper succession; 1 Co. 174; 1 W. Bla. 281.

Equity will compel the donee to execute a power where it is coupled with a trust in which other persons are interested; Story, Eq. Jur. § 1062; and to correct a formal defect in the manner of execution; 2 P. Wms. 489, 622; 2 Mas. 251; 3 Edw. Ch. 175.

Three classes of cases have been held sufficient demonstrations of an intended exercise of a power: 1. Where there has been some reference in the will, or other instrument, to the power; 2. or a reference to the property, which is the subject on which it is to be executed; 3. or when the provisions in the will or other instrument, executed by the donee of the power, would otherwise be ineffectual or a mere nullity, in other words it would have no operation, except as an execution of the power; 184 U. S. 590. See 98 *id.* 326; 109 *id.* 366; 33 N. Y. 392; 92 Ill. 538.

*The suspension or destruction* of a power may sometimes happen by a release by the donee, by an alienation of his estate, by his death, and by other circumstances.

An appendant power may be suspended by a conveyance of his interest by the donee; 4 Cruise, Dig. 221; Cro. Car. 472; 4 Bingh. N. C. 734; 2 Cow. 237; and may be extinguished by such conveyance; 2 B. & Ald. 93; 10 Ves. 246; or by a release; 1 Russ. & M. 431, 436, n.; 1 Co. 102 *b*; 2 Washb. R. P. 308.

*Illusory powers.* It was held at common law that when a power is given to appoint among certain persons, it is a sufficient and legal exercise of the power if a large part of property is appointed to some of the beneficiaries and very little to the others. Thus a power to appoint a thousand dollars between A. and B. would be satisfied if nine hundred and ninety-nine were given to A. and only one dollar to B. The courts of equity interfered in such case and compelled a substantial distribution to prevent the appointment becoming illusory or a fraud on the power. But by 1 Wm. IV. c. 36, the common-law rule was restored; 44 Pa. 527; 66 Pa. 248.

*A power in gross* may be released to one having the freehold in possession, rever-

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sion, or remainder, and not by any other act of the donee; Tud. Lead Cas. 294; Burt. R. P. § 176; Chance, Pow. § 3172; Hardr. 416; 1 P. Wms. 777; an infant may execute a power in gross; 7 Ch. D. 728.

*A collateral* power cannot be suspended or destroyed by act of the donee; F. Moo. 605; 5 Mod. 457; such a power may be executed by an infant; 4 Kent 342. And see 1 Russ. & M. 431; 13 Metc. 220.

Impossibility of immediate vesting in interest or possession does not suspend or extinguish a power; 2 Bingh. 144. A power of sale in a mortgage for condition broken is not revoked by the mortgagor's death; 143 Mass. 49; 4 S. D. 604. In general, a power of sale is exhausted by a single exercise of power; 30 Fed. Rep. 532.

A power may be executed by a married woman; 4 Kent 342; but she will not be compelled to exercise a power of appointment of which she is donee for the benefit of her creditors; 17 Q. B. D. 521.

For the distinction between *political* and *judicial* power, see 78 Ill. 261; 75 *id.* 152; 29 Mich. 451; 43 Ia. 452; 114 Mass. 247; s. c. 19 Am. Rep. 341; 10 Bush 72; Cooley, Const. Lim. 122.

**POWER OF ATTORNEY.** An instrument authorizing a person to act as the agent or attorney of the person granting it. It is often called *letter of attorney.*

A *general* power authorizes the agent to act generally in behalf of the principal.

A *special* power is one limited to particular acts.

It may be by parol or under seal. 1 Pars. Contr. 94. The attorney cannot, in general, execute a sealed instrument so as to bind his principal, unless the power be under seal; 2 B. & P. 338; 5 B. & C. 355; 2 Me. 358. See 7 M. & W. 322, 331; 7 Cra. 299; 4 Wash. C. C. 471; 19 Johns. 60; 2 Pick. 345.

Powers of attorney are strictly construed; 6 Cush. 117; 5 Wheat. 326; 8 M. & W. 806; 5 Bingh. 442. General terms used with reference to a particular subject-matter are presumed to be used in subordination to that matter; 7 B. & C. 278; 5 Den. 49; 7 Gray 287. See, as to a power to collect a debt; 1 Blackf. 252; to settle a claim; 5 M. & W. 645; 8 Blackf. 291; to make an adjustment of all claims; 8 Wend. 494; 7 Watts 716; 14 Cal. 399; 7 Ala. N. S. 800; to accept bills; 7 B. & C. 278.

Where a power of attorney is executed in a foreign country in the language of that country, the intention of the writer is to be ascertained by evidence of competent translators and experts, including, if necessary, lawyers of the country, as to the meaning of the language used; and if, according to such evidence, the intention appears to be that the authority shall be acted upon in other countries, the extent of the authority in any country in which the authority is acted upon must be determined by the law of that country; [1891] 1 Q. B. 79.

Third parties dealing with an agent on the basis of a written letter of attorney are not prejudiced by any private instructions from the principal to the agent, unless such instructions are in some way referred to in the letter; 15 Johns. 44; 3 Term 757; 81 N. C. 5; 27 Gratt. 119. Where an agent is acting under such a written letter, it is the duty of third persons to examine the instrument; Story, Ag. § 72. A failure to do this precludes a recovery unless the claim is based on fraud; 1 Pet. 264; Whart. Ag. § 227; 22 N. H. 360; 72 Pa. 351; 53 Md. 28. When a power of attorney is to a partnership as such, a deed executed in the partnership name by one of the partners is good; 81 Tex. 505.

A power of attorney to convey lands is immediately revoked by the death of the principal, and deeds subsequently made by the attorney are void; 50 Fed. Rep. 712; and upon the death of some of the donors of a power of attorney, it is revoked as to them if not as to all; 119 U. S. 156.

See AGENCY; PRINCIPAL.

**PRACTICABLE, PRACTICABLY.** Practicable is that which may be done, practiced, or accomplished, that which is performable, feasible, possible; and the adverb practically means in a practical manner. 43 Ill. 165.

Reasonably practicable, when used in directing the observance of a set of affirmative and negative rules, will usually apply to the negative; 16 Q. B. D. 340.

Where a statute provides that persons having in charge animals affected with a contagious disease shall notify the police of the fact with all practicable speed, it was held to be necessary that the person shall have knowledge of the animal's being diseased before it becomes neglect to give notice; L. R. 8 C. P. 322.

**PRACTICAL LOCATION.** Means the same as actual location. 47 Barb. 287.

**PRACTICE.** The form, manner, and order of conducting and carrying on suits or prosecutions in the courts through their various stages, according to the principles of law and the rules laid down by the respective courts. In its ordinary meaning it is to be distinguished from the pleadings. The term applies to a distinct part of the proceedings of the court. 10 Jur. N. S. 457. In a popular sense, the business which an attorney or counsellor does: as, A B has a good practice.

The books on practice are very numerous: among the most popular are those of Tidd, Chitty, Archbold, Sellon, Graham, Dunlap, Caines, Troubat & Haly, Blake, Impey, Daniell, Benedict, Colby, Curtis, Hall, Law, Day, Abbott.

A settled, uniform, and long-continued practice, without objection, is evidence of what the law is; and such practice is based on principles which are founded in justice and convenience: 2 Russ. 19, 570; 2 Jac. 232; 5 Term 380; 1 Y. & J. 167, 168; 2 C. & M. 55; Ram, Judgm. c. 7.

With respect to criminal practice, it has

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been forcibly remarked by a learned judge that even where the course of practice in criminal law has been unfavorable to parties accused, and entirely contrary to the most obvious principles of justice and humanity, as well as those of law, it has been held that such practice constituted the law, and could not be altered without the authority of parliament. Per Maule, J., Scott, N. C. 599, 600.

**PRACTICE COURT. In English Law.** A court attached to the court of king's bench, which heard and determined common matters of business and ordinary motions for writs of mandamus, prohibition, etc.

It was usually called the bail court. It was held by one of the puisne justices of the king's bench.

**PRACTICES.** A succession of acts of a similar kind or in a like employment. Webst.

**PRACTICING.** A retired lawyer who tries a case for a neighbor gratuitously, is not a practicing lawyer subject to a penalty for practicing without having paid the license tax. "The term practicing implies something more than a single act or effort." 1 So. Rep. (Miss.) 161; 98 N. C. 644.

**PRACTITIONER.** He who is engaged in the exercise or employment of any art or profession.

**PRÆCEPTORS** (Lat.). Heretofore masters in chancery were so called, as having the direction of making out remedial writs. Fleta 76; 2 Reeve, Hist. Eng. Law 251. A species of benefice, so called from being possessed by the principal templars (*præceptores templi*), whom the chief master by his authority created. 2 Mon. Ang. 543.

**PRÆCIPE, PRECIPE** (Lat.). A slip of paper upon which the particulars of a writ are written. It is lodged in the office out of which the required writ is to issue. Wharton, Dict. A written order to the clerk of a court to issue a writ.

**PRÆCIPE IN CAPITE.** A writ out of chancery for a tenant holding of the crown *in capite*, viz., in chief. Magna Char. c. 24.

**PRÆCIPE QUOD REDDAT** (Lat.). Command him to return. An original writ, of which *præcipe* is the first word, commanding the person to whom it is directed to do a thing or to show cause why he has not done it. 3 Bla. Com. 274; Old, N. B. 13. It is as well applied to a writ of right as to other writs of entry and possession.

**PRÆCIPE QUOD TENEAT CONVENTIONEM.** The writ which commenced the action of covenant in fines, which are abolished by 3 & 4 Wm. IV. c. 74.

**PRÆCIPITIUM.** The punishment of casting headlong from some high place.

**PRÆCIPUT CONVENTIONNEL. In French Law.** Under the *régime en communauté*, when that is of the conventional kind, if the survivor of husband and wife is entitled to take any portion of the common property by a paramount title and before partition thereof, this right is called by the somewhat barbarous title of the conventional *præciput*, from *præ*, before, and *capere*, to take. Brown.

**PRÆDIA** (Lat.). **In Civil Law.** Lands.

*Prædia urbana*, those lands which have buildings upon them and are in the city.

*Prædia rustica*, those lands which are without buildings or in the country. Voc. Jur. Uta.

*Prædia stipendiaria*, provincial lands belonging to the people.

*Prædia tributaria*, provincial lands belonging to the emperor.

*Prædia volantia*, certain things movable which were ranked among immovable things. 2 Bla. Com. 428.

It indicates a more extensive domain than *fundus*. Calvinus, Lex.

**PRÆDIA BELLI** (Lat.). Booty. Property seized in war. See BOOTY.

**PRÆDIAL.** That which arises immediately from the ground: as, grain of all sorts, hay, wood, fruits, herbs, and the like.

**PRÆDIUM DOMINANS** (Lat. the ruling estate). **In Civil Law.** The name given to an estate to which a servitude is due; it is called the ruling estate.

**PRÆDIUM RUSTICUM** (Lat. a country estate). **In Civil Law.** By this is understood all heritages which are not destined for the use of man's habitation; such, for example, as lands, meadows, orchards, gardens, woods, even though they should be within the boundaries of a city.

**PRÆDIUM SERVIENS** (Lat.). **In Civil Law.** The name of an estate which suffers or yields a service to another estate.

**PRÆDIUM URBANUM** (Lat.). **In Civil Law.** By this term is understood buildings and edifices intended for the habitation and use of man, whether they be built in cities or whether they be constructed in the country.

**PRÆFECTI APOSTOLICI.** Officers of the same character as the Vicarius Apostolicus (*q. v.*), but without the power of exercising episcopal functions. 2 Phill. Int. L. 529.

**PRÆFECTUS URBI.** An officer who had the superintendence of the city and its police with jurisdiction extending one hundred miles from the city and power to decide both civil and criminal cases. Whart.

**PRÆFECTUS VIGILIUM** (Lat.). **In Roman Law.** The chief officer of the night-watch. His jurisdiction extended to

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certain offences affecting the public peace, and even to larcenies. But he could inflict only slight punishments.

**PRÆMUNIRE** (Lat.). In order to prevent the pope from assuming the supremacy in granting ecclesiastical livings, a number of statutes were passed in England, during the reigns of Edward I. and his successors, punishing certain acts of submission to the papal authority therein mentioned. In the writ for the execution of these statutes, the words *præmunire facias* (cause to be forewarned), being used to command a citation of the party, gave not only to the writ, but to the offence itself of maintaining the papal power, the name of *præmunire*. Co. Litt. 129; Jacob, Law Dict.

The penalties of *præmunire* were subsequently applied to other offences of various kinds, as the molestation of possessors of abbey lands, the assertion that the houses of parliament have a legislative authority without the sovereign or the sending subjects of the realm into parts beyond the seas. Whart. Law Dict.

**PRÆNOMEN. In Civil Law.** See COGNOMEN.

**PRÆSUMPTIO HOMINIS.** A presumption based upon what is probable in human experience, whereby, from a given fact or state of facts, another fact or state of facts may be naturally inferred. Morey, Rom. L. 411.

**PRÆSUMPTIO JURIS** (Lat.). **In Roman Law.** A deduction from the existence of one fact as to the existence of another, which admits of proof to the contrary. A rebuttable presumption. An intendment of law which holds good until it is weakened by proof or a stronger presumption. Best, Pres. 29.

**PRÆSUMPTIO JURIS ET DE JURE** (Lat.). **In Roman Law.** A deduction drawn, by reason of some rule of law, from the existence of one fact as to the existence of another, so conclusively that no proof can be admitted to the contrary. A conclusive presumption.

**PRÆTOR. In Roman Law.** A municipal officer of Rome, so called because (*præiret populo*) he went before or took precedence of the people.

The consuls were at first called *prætors*. Liv. Hist. iii. 55. The word *prætor* means literally a general and is a title of honor accorded to the counsels in the first centuries of the republic. The *prætor* was really a third consul who was specially intrusted, not with the military command, but with the administration of justice. This is the reason why, in point of rank (and in the number of his lictors), he was inferior to the consul, though, on principle, his power was consular; Sohm, Inst. Rom. L. 48, n. 1. He was a sort of minister of justice, invested with certain legislative powers, especially in regard to the forms or formalities of legal proceedings. Ordinarily, he did not decide causes as a judge, but prepared the grounds of decision for the judge, and sent to him the questions to be decided between the parties. The judge was always chosen by the parties, either directly, or by rejecting, under certain rules and limitations, the persons proposed to them by the *prætor*. Hence the saying of Cicero (*pro Cluentio* 43) that no one could be judged except by a judge of his own choice. There were several kinds of officers called prætors. See Vicat, Voc.

Before entering on his functions, he published an edict announcing the system adopted by him for the application and interpretation of the laws during his magistracy. The edict issued by the *prætor* on his taking office was called the *edictum perpetuum*. It was said that these edicts were of great authority. They were called the *jus honorarium* "because those who bear honors in the state, that is the magistrate, have given it their sanction; Inst. 1. 2. 7; Howe, Stud. Civ. L. 10; the fact that the circumstances and habits of thought, untrammelled as they were under this system, led to the exercise by the *prætor* of equitable functions and extension of the narrow limits of the old civil law, was a potent factor in the judge-made law which replaced the ancient technical and rigid system by one more flexible. The *lex Cornelia* (B. C. 67) forbade a *prætor* to depart during his term from the edict promulgated by him at its beginning. The edicts of preceding *prætors* were collected and condensed by Salvius Julianus, who had filled the office during the time of Hadrian, this was a final *edictum perpetuum*, and it was known distinctively by that title. It is doubtful whether after that annual edicts were issued; Sand. Inst. Just. 11; Sohm, Rom. L. § 14; Mack. Rom. L. § 47.

The authority of the *prætor* extended over all jurisdictions, and was summarily expressed by the words *do dico*, *addico*, i. e. *do* I give the action, *dico* I declare the law, I promulgate the edict, *addico* I invest the judge with the right of judging. There were certain cases which he was bound to decide himself, assisted by a council chosen by himself,—perhaps the *decemvirs*. But the greater part of causes brought before him he sent either to a judge, an arbitrator, or to *recuperatores*, or to the centumvirs, as before stated. The *prætor* had no power to legislate, but he might grant or refuse an action; Sohm, Rom. L. 52. Under the empire, the powers of the *prætor* passed by degrees to the prefect of the *prætorium* or the prefect of the city; so that this magistrate, who at first ranked with the consuls, at last dwindled into a director or manager of the public spectacles or games.

The *prætor urbanus* was a special officer appointed to administer justice in the city; afterwards (about 242 B. C.) the increase of business made it necessary to appoint a second *prætor*, who was called a *prætor peregrinus* to whom were assigned all cases in which either or both of the parties were foreigners. *Prætores tutelares* were special magistrates nominated in Rome and vested with the power of appointing *tutors* which right had previously been exercised by the *prætor urbanus*.

A *prætor fidei commissarius* was a magistrate specially appointed to have jurisdiction of *fidei commissa*.

The *prætor fiscalis* has special jurisdiction of cases affecting the public treasury.

**PRAGMATIC SANCTION. In French Law.** An expression used to designate those ordinances which concern the most important object of the civil or ecclesiastical administration. Merlin *Répert.*; 1 Fournel, *Hist. des Advocats* 24, 38.

**In Civil Law.** The answer given by the emperors on questions of law, when consulted by a corporation or the citizens of a province or of a municipality, was called a pragmatic sanction. *Leçons El. du Dr. Civ. Rom.* § 53. This differed from a rescript.

**PRAIRIE.** An extensive tract of land destitute of trees, covered with coarse grass, and usually characterized by a deep, fertile soil; a meadow or tract of grassland; especially a so called "natural meadow." 51 Kan. 23.

**PRAYER. In Equity Practice.** The request in a bill that the court will grant the aid which the petitioner desires.

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That part of the bill which asks for relief. The word denotes, strictly, the request, but is very commonly applied to that part of the bill which contains the request.

Of Process. That part of the bill which asks that the defendant may be compelled to appear and answer the bill, and abide the determination of the court upon the subject.

It must contain the names of all the parties; 1 P. Wms. 593; 2 Dick. Ch. 707; 2 Johns. Ch. 245; Coop. Eq. Pl. 16; Bisph. Eq. § 9; see 55 Fed. Rep. 825; although they are out of the jurisdiction; 1 Beav. 106; Mitf. Eq. Pl. 164. The ordinary process asked for is a writ of subpœna; Story, Eq. Pl. § 44; and in case a distringas against a corporation; Coop. Eq. Pl. 16; or an injunction; 2 S. & S. 219; 1 Sim. 50; is sought for, it should be included in the prayer.

For Relief, is *general*, which asks for such relief as the court may grant; or *special*, which states the particular form of relief desired. A special prayer is generally inserted, followed by a general prayer, 4 Madd. 408; 16 Pet. 195; 23 Vt. 247; 6 Gill 105; 25 Me. 153; 10 Rich. Eq. 53; 7 Ind. 661; 15 Ark. 555; a general prayer if omitted, may be added by amendment or amended bill; 38 W. Va. 583. Unless the general prayer is added, if the defendant fails in his special prayer he will not be entitled to any relief; 1 Ves. 426; 12 *id.* 62; 2 R. I. 129; 15 Ala. 9; except in case of charities and bills in behalf of infants; 1 Atk. 6, 355; 18 Ves. 325; 1 Russ. 235; 2 Paige, Ch. 396.

A general prayer is sufficient for most purposes; and the special relief desired may be prayed for at the bar; 4 Madd. 408; 1 Edw. 26; Story, Eq. Pl. § 41; 31 N. H. 193; 2 Paine 11; 9 How. 390; 9 Mo. 201; 9 Gill & J. 80; 19 Ark. 62; 18 Ala. 371; 23 Vt. 247; but where a special order and provisional process are required, founded on peculiar circumstances, a special prayer therefor is generally inserted; 6 Madd. 218; 3 Ind. 419. A prayer for general relief is sufficient to support any decree warranted by the allegations of the bill; 148 Ill. 622; but under such a prayer a party cannot recover a claim distinct from that demanded by the bill; 29 W. Va. 1.

Such relief, and such only, will be granted, either under a special prayer, whether at bar; 2 Ves. 299; 4 Paige, Ch. 229; 25 Me. 153; 30 Ala. N. S. 416; or in the bill; 16 Tex. 399; 18 Ga. 492; 21 Pa. 131; or under a general prayer, as the case as stated will justify; 7 Ired. Eq. 80; 4 Sneed 623; 18 Ill. 142; 5 Wisc. 117, 424; 24 Mo. 31; 7 Ala. N. S. 193; 13 Ark. 183; 3 Barb. Ch. 613; 3 Gratt. 518; 9 How. 390; and a bill framed apparently for one purpose will not be allowed to accomplish another, to the injury of the defendant; 16 Tex. 399; 21 Pa. 131; 6 Wend. 63.

And, generally, the decree must conform to the allegations and proof; 7 Wheat. 522; 19 Johns. 496; 2 Harr. Ch. 401; 1 Ired. Eq. 88; 6 Ala. N. S. 518; 4 Bibb 376; 13 Conn. 146. See 75 Tex. 287. But a special prayer may be disregarded, if the allegations warrant relief under the general prayer; 15 Ark. 555; 4 Tex. 20; 2 Cal. 269; 22 Ala. N. S. 646; 8 Humphr. 230; 1 Blackf. 305; the relief granted must be consistent with the special prayer; 27 Ala. 507; 21 Pa. 131; 1 Jones, Eq. 100; 14 Ga. 52; 1 Edw. Ch. 654; 9 Gill & J. 80; 4 Des. Eq. 530; 9 Yerg. 301; 1 Johns. Ch. 111.

**PREAMBLE.** An introduction prefixed to a statute, reciting the intention of the legislature in framing it, or the evils which led to its enactment. It is no part of the law; 26 Pa. 287. It is no more than a recital of some inconveniences, which does not exclude any other, for which a remedy is given by the enacting part of the statute. Resort cannot be had to the preamble of a statute to ascertain the intention of an act unless there is an ambiguity in the enacting part. Effect should be given to a preamble to the extent that it shows what the legislature intended, and if the words of enactment have a meaning which does not go beyond that preamble, or which may come up to the preamble, in either case that meaning should be preferred to one which shows an intention of the legislature which would not answer the purposes of the preamble or would go beyond them. To that extent only is the preamble material; 8 App. Cas. 388. The clear language of an act cannot be cut down by a reference to the preamble; 29 Ch. D. 950. It may explain what is of doubtful meaning, but will not limit what is clear; 15 R. I. 299; 19 Fed. Rep. 304.

A preamble is said to be the key of a statute, to open the minds of the makers as to the mischiefs which are to be remedied and the objects which are to be accomplished by the provisions of the statute; Co. 4th Inst. 330; 6 Pet. 301. In modern legislative practice, preambles are much less used than formerly, and in some of the United States are rarely inserted in statutes. In the interpretation of a statute, though resort may be had to the preamble, it cannot limit or control the express provisions of the statute; Dwarris, Stat. 504; Wilberf. Stat. Law 277. Nor can it by implication enlarge what is expressly fixed; 1 Story, Const. b. 3, c. 6; 3 M'Cord 298; 15 Johns. 89; Busb. 131; Daveis 38.

A preamble reciting the existence of public outrages, provision against which is made in the body of the act, is evidence of the facts it recites. See 4 Maule & S. 532; 2 Russ. Cr. 720.

The facts recited in a preamble of a private statute are not evidence, as between the person for whose benefit the act passed and a third person; 3 Litt. 472; 7 Hill 80; but the statement of legislative reasons in the preamble will not affect the validity of an act; 42 Conn. 583.

See Statute; Construction.

A recital inserted in a contract for the purpose of declaring the intention of the parties.

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**PREBEND. In Ecclesiastical Law.** The stipend granted to an ecclesiastic, in consideration of officiating in the church. It is in this distinguished from a canonicate, which is a mere title and may exist without stipend. The prebend may be a simple stipend, or a stipend with a dignity attached to it, in which case it has some jurisdiction belonging to it. 2 Burn, Eccl. Law 88; Stra. 1082; 1 Term 401; 2 *id.* 630; 1 Wils. 206; Dy. 273 *a*; 7 B. & C. 113; 8 Bingh. 490; 5 Taunt. 2; Jacob, L. Dict.

**PRECARIÆ.** Day works which the tenants of certain manors were bound to give their lords in harvest time. Cowel.

**PRECARIOUS.** The affairs of an executor are precarious only when conducted with such recklessness as in the opinion of prudent and discreet men endangers their security. 60 Barb. 56.

**PRECARIOUS RIGHT.** The right which the owner of a thing transfers to another, to enjoy the same until it shall please the owner to revoke it.

If there is a time fixed during which the right may be used, it is then vested for that time, and cannot be revoked until after its expiration, Wolff, Inst. § 333.

**PRECARIUM** (Lat.). The name of a contract among civilians, by which the owner of a thing, at the request of another person, gives him a thing to use as long as the owner shall please. Pothier, n. 87. See Yelv. 172; Cro. Jac. 235; 9 Cow. 687; Rolle 128; Bac. Abr. *Bailment* (C); Ersk. Inst. 3. 1. 9; Story, Bailm. §§ 127, 253 *b*.

A tenancy at will is a right of this kind.

**PRECATORY WORDS.** Expressions in a will praying or requesting that a thing shall be done. A trust created by such words, which are more like words of entreaty and permission, than of command or certainty.

Examples of such words, which the courts have held sufficient to constitute a trust, are "wish and request," "have fullest confidence," "heartily beseech," and the like; Rap. and Lawr. L. Dict.

Although recommendatory words used by a testator, of themselves, seem to leave the devisee to act as he may deem proper, giving him a discretion, as when a testator gives an estate to a devisee, and adds that he hopes, recommends, has a confidence, wish, or desire that the devisee shall do certain things for the benefit of another person, yet courts of equity have formerly construed such precatory expressions as creating a trust; 8 Ves. Ch. 380; 18 *id.* 41; Bac. Abr. *Legacies* (B); 98 Mass. 274; 35 Vt. 173; 4 Am. L. Rev. 617; 113 Mo. 112. See, *contra*, 20 Pa. 268; 1 McCart. 397; 2 Story, Eq. Jur. § 1069; 49 N. J. Eq. 570; 139 Mass. 117; Bisph. Eq. 73.

But this construction will not prevail when either the objects to be benefited are imperfectly described, or the amount of property to which the trust should attach is not sufficiently defined; 1 Bro. C. C. 142; 1 Sim. 542, 556.

While the expression of confidence, if the context shows that a trust is intended, may create a trust, yet, if upon the whole will the confidence is merely that the legatee will do what is right in disposing of the property, a trust is not imposed; 4 Kent 305; [1895] 2 Ch. 370; 140 N. Y. 122; 152 Pa. 108; 159 Mass. 229. As to when the words confidence, etc., create a trust, see note to Lloyd & G. 154; see also 2 Pa. 129. The words *in the fullest confidence* were held to create a trust; 1 Turn. & R. 143.

The current of decision in England with regard to precatory words is said to be now changed. A trust will not be created where the testator shows an intention to leave property absolutely; 27 Ch. Div. 394. See 70 Pa. 153; 19 Conn. 351. The leaning of the courts is against the implication of a trust; 1 Jarm. Wills 365. It is a question of what was the intention, not of what particular word was used; [1895] 2 Ch. 370. But it was held that a testamentary gift with added words of entreaty or recommendation, or expressing a hope or confidence will constitute a trust; 100 Mass. 340; 34 Ala. 349. See the cases in 1 Jarm. Wills 385, on this subject.

"The true rule, upon principle, and according to the weight of more recent authorities, is said to be that the whole will must be examined to determine whether the words used were to impose an obligation or to give the devisee full discretion." 4 Kent 305, note b, citing 8 Ch. D. 540; 109 U. S. 725; 126 Mass. 213; 79 Ky. 378. See 140 N. Y. 122.

Vagueness in the object tends to show that no trust was intended. See L. R. 8 Eq. 673. It has been held that precatory words are *prima facie* imperative, and create a trust; 83 Md. 200; 71 *id.* 108; 127 U. S. 300.

Precatory words do not always create a trust. The question in every case is one of intention. Expressions *per se* sufficient to create a trust may be deprived of that effect by a context especially declaring or by implication showing no trust was intended. The question in all cases is, was the direction imperative? The real question to be determined when such words are used is whether the confidence, hope, or wish expressed is meant to govern the donee, or whether it was a mere indication of that which the testator thinks would be a reasonable or suitable use of the property conveyed, leaving the matter ultimately to the decision of the donee; 1 Jarm. Wills 406, n.

**PRECEDENCE.** The right of being first placed in a certain order,—the first rank being supposed the most honorable.

In this country no precedence is given by law to men.

Nations, in their intercourse with each other, do not admit any precedence: hence, in their treaties, it is the usage for the

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powers to alternate, both in the preamble and in the signatures, so that each power occupies, in the copy intended to be delivered to it, the first place. Sometimes signatures are made in alphabetical order of the states which are parties to the act, the French alphabet being adopted for that purpose. 2 Hall. Int. L. 122.

In some cases of officers, when one must of necessity act as the chief, the oldest in commission will have precedence: as, when the president of a court is not present, the associate who has the oldest commission will have a precedence; or if their commissions bear the same date, then the oldest man.

In the army and navy there is a regular order of precedence. See RANK.

For rules of precedence in England, see Whart. Law Dict.

**PRECEDENTS. In Practice.** Legal acts or instruments which are deemed worthy to serve as rules or models for subsequent cases.

The word is similarly applied in respect to political and legislative action. In the former use, precedent is the word to designate an adjudged case which is actually followed or sanctioned by *a court* in subsequent cases. An adjudged case may be of any degree of weight, from that of absolute conclusiveness down to the faintest presumption: and one which is in fact disregarded is said never to have become a precedent. In determining whether an adjudication is to be followed as a precedent, the following considerations are adverted to. First, the justice of the principle which it declares, and the reasonableness of its application. Hob. 270. If a precedent is to be followed because it is a precedent, even when decided against an established rule of law, there can be no possible correction of abuses, because the fact of their existence would render them above the law. It is always safe to rely upon principles. See 16 Viner, Abr. 499; 2 J. & W. 318; 3 Ves. 527; 2 P. Wms. 258; 2 Bro. C. C. 86; 1 Tex. 11; 2 Evans, Poth. 377, where the author argues against the policy of making precedents binding when contrary to reason. "The reason and spirit of cases make law: not the letter of particular precedents." 3 Burr. 1364, per Lord Mansfield. See, also, 1 Kent 475; Liverm. Syst. 104; Gresl. Eq. Ev. 300; 16 Johns. 402; 20 *id.* 722; Cro. Jac. 527; 33 Hen. VII. 41; Jones, Bailm. 46; 1 Hill, N. Y. 438; 9 Barb. 544; 50 N. Y. 451; Wells, Res. Adj. & Dec.

According to Lord Talbot, it is "much better to stick to the known general rules than to follow any one particular precedent which may be founded on reasons unknown to us." Cas. *t.* Talb. 26. Blackstone, 1 Com. 70, says that a former decision is, in general, to be followed, unless "manifestly absurd or unjust;" and in the latter case it is declared, when overruled, not that the former sentence was *bad law*, but that it was *not* law. If an adjudication is questioned in these respects, the degree of consideration and deliberation upon which it was made; 4 Co. 94; the rank of the court, as of inferior or superior jurisdiction, which established it, and the length of time during which it has been acted on as a rule of property, are to be considered. The length of time which a decision has stood unquestioned is an important element; since where a rule declared to be law, even by an inferior tribunal, has been habitually adopted and acted upon by the community, and becomes thus imbedded in the actual affairs of men, it is frequently better to enforce it as it is, instead of allowing it to be re-examined and unsettled. It is said that in order to give precedents binding effect there must be a current of decision; Cro. Car. 528; Cro. Jac. 386; 8 Co. 163; 10 Wisc. 370; and even then, injustice in the rule often prevails over the antiquity and frequency of its adoption, and induces the court to overrule it. But this is to be very cautiously done where it is a rule of property, or wherever a departure from it would unjustly affect vested rights; 8 Cal. 188; 47 Ind. 286; 30 Miss. 256; 23 Wend. 340.

"The only use of authorities, or decided cases, is the establishment of some principle which the judge can follow out in deciding the case before him. . . . Where a case has decided a principle, although I myself do not concur in it, and although it has been only the decision of a tribunal of co-ordinate jurisdiction, I have felt bound to follow it where it is of respectable age and has been used by lawyers as settling the law, leaving to the appellate court to say that a case is wrongly decided, if the appellate court should so think." 13 Ch. D. 712, per Jessel, M. R.

"Without minutely examining all the cases, or saying whether I do or do not agree with them, it is sufficient for me to abide by the principle established by them; the principle is the thing which we are to extract from cases, and to apply it in the decision of other cases." 7 Term 148, per Lord Kenyon, C. J.

"Now, I have often said, and I repeat it, that the only thing in a judge's decision binding as an authority upon a subsequent judge is the principle upon which the case was decided; but it is not sufficient that the case should have been decided on a principle, if that principle is not itself a right principle, or one not applicable to the case." 13 Ch. D. 785, per Jessel, M. R.

"If one authority were produced to me, and my own opinion were the other way, I would not follow that authority; but if the authorities are numerous, I admit that I must be bound." L. R. 19 Eq. 460, per Jessel, M. R.

"Courts should be careful not to overrule decisions which, not being manifestly erroneous and mischievous, have stood for some time unchallenged, and from their nature and the effect which they may reasonably be supposed to have produced upon the conduct of a large portion of the com-

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munity, as well as of parliament itself, in matters affecting rights of property, may fairly be treated as having passed into the category of established and recognized law." 15 Ch. D. 336, per Thesiger. L. J.

"Where an old case is contrary to the principles of the general law, the court of appeal ought not to shrink from overruling it even after a considerable lapse of time. But when an old decided case has made the law on a particular subject, the court of appeal ought not to interfere with it, because people have considered it as establishing the law and have acted upon it;" 9 Q. B. D. 352, per Jessel, M. R., cited by Lord Esher, M. R., in 22 Q. B. D. 619. See also 12 Q. B. D. 318.

"Where there is a decision which has stood for more than two hundred years in respect of a subject-matter constantly arising in practice, the court does not overrule it unless absolutely obliged to do so. . . . Even if the court did not agree with the decision, it would not overrule it." [1895] 2 Q. B. 665. Where a dictum of law has been accepted, and is likely to have affected divers contracts and dealings between man and man, and if not followed, many transactions done on the faith of it would be disturbed, the court will follow the dictum; 26 Ch. D. 821. But where a decision had not stood wholly unquestioned the court need not feel bound to follow it merely because it has stood for twelve years without being authoritatively overruled; 27 Ch. D. 154.

"Where the decision is really one as to the jurisdiction of another court there is no reason why, at any distance of time, a superior court may not overrule it." 13 Q. B. D. 591, per Brett, M. R.

"Speaking for myself, I do not pay much attention to the *dicta* of modern judges, as I consider it my duty to decide for myself. This, of course, does not apply to decisions of modern judges, nor to old recognized *dicta* by eminent judges." 23 Ch. D. 49, per Jessel, M. R. See, also, 23 Ch. D. 127; [1891] 3 Ch. 376.

Decisions on the constructions of instruments, if the words are identical, are not strictly binding, much less so if the words are only similar; L. R. 10 Ch. 397; 22 Ch. D. 488; and this is true even of the decisions of the appeal court; 23 Ch. D. 111.

In 25 Q. B. D. 57, Lord Esher drew a distinction between "fundamental propositions of law," which could be changed only by parliament, and "the evidence of the existence of such a proposition," which was within the disposition of the court.

There is no common law or statutory rule to oblige a court to bow to its own decision; it does so again on the grounds of judicial comity. But when a court is equally divided, this comity does not exist, for there is no authority of the court as such, and those who follow must choose one of two adverse decisions. When the court is equally divided, if the case comes before it again, it will exercise an independent opinion and abide by one of the two views. The case may be different as regards the house of lords, for it is the ultimate court of appeal, for if it is otherwise there exists an uncertainty as to the law; 9 P. D. 98.

In 44 L. T. 440, Jessel, M. R., stated that he had frequently differed from the courts of co-ordinate jurisdiction and the same was said by Brett, L. J., in 10 Q. B. D. 328, in reference to a decision in the Exchequer Chamber, where the judges were equally divided, and it was said by Brett, M. R., in 13 Q. B. D. 355, that a court of law is not justified in overruling the decisions of another court of co-ordinate jurisdiction, citing Jessel, M. R., in 13 Ch. D. 130.

"For us to reverse the judgment of a lord chancellor would require a tremendous case—a case of a clear error." 12 Ch. D. 47, per James, L. J. While the decisions of the lord chancellor, at all events sitting alone, are not absolutely binding, yet the greatest weight ought to be given to them, and unless manifestly wrong, they ought not to be overruled; 12 Ch. D. 54, per Thesiger, L. J. The old lord chancellors overruled one another, and sometimes they overruled their own decisions without the slightest trouble; 21 Ch. D. 346, Jessel, M. R.

It is said that the house of lords has the same power that every other tribunal has in subsequently applying the law laid down by it to other cases; 5 H. L. Cas. 63. The observations made by the members beyond the *ratio decidendi* which is propounded and acted upon in giving judgment, although they may be entitled to respect, are only to be followed in so far as they may be considered agreeable to sound reason and to prior authorities. But the house of lords, as a tribunal, is bound by its own precedents which it will not overrule, and the doctrine on which the judgment of the house is founded must be universally taken for law, and can only be altered by act of parliament; 3 H. L. Cas. 391; 8 *id.* 391; 9 *id.* 338; L. R. 8 C. P. 313. This doctrine has just been again laid down, after argument, in 78 L. T. Rep. 361. If two cases in the house of lords are not to be reconciled, the more recent ought to prevail; 5 App. Cas. 798; 7 *id.* 294, 302.

The judicial committee of the privy council is not bound by its own precedents; see 4 Moore, P. C. 63; but where a decision of the privy council has been reported to the queen, and been sanctioned and embodied in an order in council, it becomes the decree or order of the final court of appeal, and every subordinate tribunal to whom the order is addressed should carry it into execution; 6 App. Cas. 483.

The supreme court of the United States has overruled its own precedents in some instances, notably on the question of the extent of admiralty jurisdiction and in the legal tender cases.

It has been said that a judgment made by an equally divided court has no weight as a precedent; 5 Wend. 372; 25 *id.* 256; and does not even settle the question of

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law; 5 *id.* 372; but a judgment affirmed by a divided court in the house of lords is a binding precedent; 9 H. L. Cas. 338. The subject of precedents both in English law and in other systems is treated by Prof. John C. Gray in 9 Harv. L. Rev. 327.

Instances of a lower court disregarding the decision of a higher court will be found in L. R. 2 Eq. 335, where a case formerly decided by Lord Westbury was disregarded because he had decided it in ignorance of a statute, and in L. R. 3 Ch. 420, where the lord chancellor made a ruling as to the abatement of legacies, which was nothing more than a blunder, and was subsequently disregarded by the vice-chancellors. See 9 Harv. Law Rev. 327.

See STARE DECISIS.

Mr. Powell (Appellate Proceedings) develops at some length the thought that two of the most important ideas and principles in judicial proceedings are essentially of modern origin. These are the force and effect of precedent, and the aid afforded by appellate proceedings in the correction of errors and the perfecting of the law. Neither of these ideas were known to the ancients, or recognized in the civil law, and they were almost entirely disregarded in the courts of continental Europe until the present day. We are indebted for their development to England. Both of the subjects—the citation of a former case as evidence of the law, upon the trial of a subsequent case, and the supervision by the superior courts of the correctness of the proceedings and decisions of the inferior courts began to make their appearance about the time of Edward I.

The argument until quite recently so much used by jurists of continental Europe and civilians, is thus summarized and answered: "They say that judicial decisions are either conformable to law or not; if the former, they are mere applications of a pre-existing rule to individual cases falling within it, and do not therefore create new laws; if the latter, they are not binding, but are themselves against law. This is more ingenious than fair or truthful; for such decisions are not made and called into requisition where a pre-existing rule existed, but in those doubtful and evenly balanced questions between two or more opinions, and further light and aid are called for, where all pre-existing rules have failed, satisfactorily, to give that aid. The assumption of the dilemma is contrary to experience and reason; for it is the frequent experience of the jurist to find cases where pre-existing rules entirely fail him; and reason also teaches that it must be so, since it is found that all human productions are imperfect. The using of such former judicial decisions as aids in forming a judgment and decision, is no more than what was done under the civil law, in calling in aid the opinion and writings of distinguished *juris consulti*. But the usefulness and justice of thus using previous judicial decisions is now generally admitted and followed." The earliest use of judicial proceedings as precedents is said, on the authority of Guterbock on Bracton and his Relation to the Roman Law, to have been by Bracton about the time of Edward I.

The considerations bearing upon the weight of authority given to judicial decisions are said by the author quoted to be:

1. The decisions of the appellate courts are of absolute authority in the subordinate courts, no matter how much the latter may differ in their conclusions "unless in any case it was considered (which is hardly supposable) to be contrary to the constitution or common sense."

2. Decisions of the same court, or co-ordinate ones, are authorities, but subject to be reviewed, dissented from, or overruled with reference to the time when they were made, and the extent to which they have been acted upon.

3. The decision of any court or the opinion of any jurist, is an authority, to be more or less relied upon as it accords with settled principles of law, and as it is justified by reason. The opinions of jurists, though they may be received, are not to be accorded the weight of judicial decisions.

These principles, it is contended, though very important, are only made effective by a judicious system of appellate jurisdiction, sifting out errors and irregularities, and bringing the decisions into harmony with the law and rendering it one consistent whole; Powell, App. Proc. 4.

The real object and function of appellate tribunals is, in this last sentence, very well expressed. It has been the subject of much discussion in connection with regulating the right of appeal by the amount in controversy. Such limitations are sometimes thought to cause inequality in the administration of justice, between, as it is said, the rich and the poor. It may, however, be said that the primary purpose of an appellate tribunal is to settle and unify the law as administered by the various subordinate courts under the general supervisory jurisdiction of the appellate court. In theory, an appeal to a higher court cannot be considered as a right of any litigant; the rights of a litigant are fully protected by giving him a day in court for the trial of his cause in the court below, with the opportunity, by motion for a new trial, to secure the correction of any error of law or manifest injustice in the verdict.

Of the place filled by case law in the jurisprudence of England and America, it has been said: "The resource of English lawyers, when called on to fill the gap which was elsewhere supplied by the Roman law, was custom. Of this custom the judges were themselves, in the last resort, the repository. Thus it comes to pass that English case law does for us what the Roman law does for the rest of western Europe." Markby, Elem. of Law § 90. The difference between the common law of England and the continental law is thus characterized by the same author: "Where the principles of the Roman law are



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adopted, the advance must always be made on certain lines. An English or American judge can go wherever his good sense leads him. The result has been that whilst the law of continental Europe is formally correct, it is not always easily adapted to the changing wants of those amongst whom it is administered. On the other hand, the English law, whilst it is cumbrous, ill-arranged, and barren of principles, whilst it is obscure and frequently in conflict with itself, is yet a system under which justice can be done; anyhow it stands alone in the history of the world." *Id.* § 92. Freeman says: "The life and soul of English law has ever been precedent," and to this he ascribes, not only the growth of the common law but that of the unwritten constitution of England. Freem. Eng. Const. ch. ii. iii.

In a lucid discussion of the value of judicial decisions as an essential part of the English and American systems, Judge Dillon says: "Judicial precedent is not simply part of the law in a general sense . . . but it is a part of our law in a sense, and with effects, which are distinctively and most strikingly peculiar. The doctrine, as established, is shortly this: that a decision by a court of competent jurisdiction of a point of law lying so squarely in the pathway of judicial judgment that the case could not be adjudged without deciding it, is not only binding upon the parties to the cause in judgment, but the point, so decided, becomes, until it is reversed or overruled, evidence of what the law is in like cases, which the courts are bound to follow, not only in cases precisely like the one which was first determined, but also in those which, however different in their origin or special circumstances, stand, or are considered to stand, upon the same principles." Laws and Jurisp. 231. Passing over the question whether a judicial decision is law or only evidence of it, the same writer notes the difference between the authoritative effect of a judicial decision in our system, and the entire want of it in continental Europe, the result being that under the former system "a point solemnly decided has the force and effect of law, binding the judges in all other cases that clearly fall within its principle, which the judges are therefore bound to follow and apply, unless, to use Blackstone's well-known and much criticised qualification, the precedent is 'flatly absurd or unjust;'" *id.*

Allusion is very properly made to a point of great importance in estimating the value of judicial decisions, which is frequently overlooked, that is, the contribution made by the arguments of counsel. The writer quoted says: "Indirectly, the reports embody also the results of the researches, studies, experience, and ability of the bar during the same period, since of these the judges have had the advantage in the argument of the causes so decided. Indeed the doctrine of judicial precedent implies that the point of the decision whereof such force is attributed should have been argued by opposing counsel." *Id.* 233. So important is this consideration that it might almost be suggested as a wise rule to apply to the use of judicial decisions as precedents, that no case should be held to acquire binding force as law unless the point on which it was decided had been argued by counsel.

The fortuitous and irregular growth of case law is the necessary result of the rule of its existence, that no point can become the subject of a judicial decision until it actually arises for judgment. So that it is left, as has been observed, to "the casual exigencies of litigation to determine what parts of it shall be filled up and what left incomplete," with the result that "all kinds of curious little questions receive elaborate answers, while great ones remain in a provoking state of uncertainty." Pollock, Essays on Jurisprudence and Ethics, ch. iii.

Concerning the true office and use of adjudged cases, the views of Mr. Justice Miller are expressed in a letter which is published in a note to lecture IX. of Judge Dillon's work already referred to. After adverting to the difficulty experienced by a judge in the use of judicial decisions, he groups the cases into three classes: 1. Those which must be decided by principles not disputed, in which citations are of little value, because the duty of the judge is confined to the application of principles in a particular case. 2. Those which construe the constitutions and statutes, as to which the decisions of the highest court of the government which adopted them, are generally conclusive. 3. Those depending upon general principles of law or equity which must be determined, if there is a conflict of decision, by the weight of authority, and in which the citation of adjudged cases is most useful.

Allusion is also made to the fact that the opinions of certain judges, even when dissenting or *obiter*, carry special weight apart from the courts in which they were delivered.

Another very able writer considers that the development of the law, by this system, results, to some extent, in a paradox both in form and substance. "In form its growth is logical. The official theory is that each new decision follows syllogistically from existing precedents," but they "survive in the long run after the use they once served is at an end and the reason for them has been forgotten. The result of following them must often be failure and confusion from a merely logical point of view." On the other hand, he considers that the growth of the law, in substance, is legislation in the sense that "the secret root from which it draws all the juices of life" is really to be found in the consideration of what is "expedient for the community concerned" on "more or less definitely understood views of public policy," not less so because the "unconscious result of instinctive preferences and inarticulate convictions." When the law is administered with ability and experience, even if ancient rules are maintained, they will be fitted

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with new reasons, so that both form and substance are changed by the transplanting. Holmes, Com. L. 35.

Few modern writers agree with the older theory formulated by Blackstone, that the courts are "not delegated to pronounce a new law, but to maintain and expound the old one;" 1 Bla. Com. 69; but see Lieber, Hermaneutics Ham. ed. 312. The tendency is strongly to accept the view that it is a "childish fiction employed by our judges that judiciary or common law is not made by them, but is a miraculous something made by nobody; existing from eternity and merely declared from time to time by the judges;" 2 Aust. Lect. Jurisp. 655. The same view is elaborated by Sir Henry Maine who makes judicial decision the beginning of all law, and contends that the distinction between case law and code law is only one of form, and that both are, properly speaking, written, not unwritten, law. Anc. Law ch. 1.

"I cannot understand how any person who has considered the subject can suppose that society could possibly have gone on if judges had not legislated, or that there is any danger whatever in allowing them that power which they have in fact exercised to make up for the negligence or incapacity of the avowed legislature. That part of the law of every country which was made by judges has been far better made than that part which consists of statutes enacted by the legislature." 1 Aust. Lect. Jurisp. 224.

It must be accepted as a fact that courts have always exercised the power of making rules for new cases or modifying existing laws in accordance with current ideas of equity or changed conditions, and that they justify themselves under cover of exercising the judicial function of determining whether a binding custom exists or applying general laws to particular cases. Holland, Jur. 56.

But it has also been said that the application of an existing principle to a new state of facts is not judicial legislation. To call it such is to assert that the existing body of law consists practically of the statutes and decided cases and to deny that the principles (of which these cases are ordinarily said to be evidence) existed at all. 4 Harv. L. Rev. 213.

As to what are considered precedents in prize courts, see that title.

See, generally, Cooley, Const. Lim. 47–54; Ram, Leg. Judgm. Ch. 3, 4, 5; Broom, Leg. Max. 154; 12 Ohio St. 11; 5 Harv. L. Rev. 172; JUDGE-MADE LAW; STARE DECISIS; DICTUM; JUDICIAL POWER; RES JUDICATA; LAW; Wambaugh, Case Law.

Written forms of procedure which have been sanctioned by the courts or by long professional usage, and are commonly to be followed, are designated precedents. Steph. Pl. 392. And this term, when used as the title of a law-book, usually denotes a collection of such forms.

**PRECEPARTIUM.** The continuance of a suit by consent of both parties. Cowell.

**PRECES PRIMARIÆ, OR PRIMÆ.** A right of the crown to name to the first prebend that becomes vacant after the accession of the sovereign, in every church of the kingdom. This right was exercised by the crown of England in the reign of Edward I. 2 Steph. Com. 670, n.

**PRECEPT** (Lat, *precipio*, to command). A writ directed to the sheriff, or other officer, commanding him to do something.

**PRECINCT.** The district for which a high or petty constable is appointed is, in England, called a precinct. Wilcox, Const. xii. See 124 Mass. 172.

Precinct is used, in certain legislation in Wyoming, relatively to assessing taxes on railroad property, as a general word and not a technical one, and indicates any district marked out and defined. It further signifies a district inferior to a county and superior to a township. 116 U. S. 524.

In Pennsylvania and other states it is used to indicate a subdivision of a city for election purposes.

**PRECIPUT. In French Law.** An object which is ascertained by law or the agreement of the parties, and which is first to be taken out of property held in common by one having a right, before a partition takes place.

The preciput is an advantage or a principal part to which some one is entitled *præcipium jus*, which is the origin of the word preciput. Dalloz, Dict.; Pothier, Obl. By preciput is also understood the right to sue out the preciput.

**PRECISE.** When the terms "clear, precise, explicit, unequivocal, and indubitable," are used by the courts to define the requisite proof of a fact, it is meant that the witnesses shall be credible, that the facts are distinctly remembered by them, that details are narrated exactly, and that their statements are true. 89 Pa. 314.

**PRECLUDI NON** (Lat.). **In Pleading.** A technical allegation contained in a replication which denies or confesses and avoids the plea.

It is usually in the following form: "And the said A B, as to the plea of the said C D, by him secondly above pleaded, says that he, the said A B, by reason of anything by the said C D in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against the said C D, because he says that." etc. 2 Wils. 42; 1 Chitty, Pl. 573; Steph. Pl. 398.

**PRECOGNITION. In Scotch Law.** The examination of witnesses who were present at the commission of a criminal act, upon the special circumstances attending it, in order to know whether there is ground for a trial, and to serve for direction to the prosecutor. But the persons examined may insist on having their declaration cancelled before they give testimony at the trial. Erskine, Inst. 4. 4. n. 49.

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**PRECONTRACT.** An engagement entered into by a person which renders him unable to enter into another; as, a promise or covenant of marriage to be had afterwards. When made *per verba de presenti*, it is in fact a marriage, and in that case the party making it cannot marry another person. Bish. Mar. & D. § 53; 1 Bish. Mar. Div. & Sep. § 280, 1891. See PROMISE OF MARRIAGE.

**PREDECESSOR.** One who has preceded another.

This term is applied in particular to corporators who are now no longer such, and whose rights have been vested in their successor; the word ancestor is more usually applicable to common persons. The predecessor in a corporation stands in the same relation to the successor that the ancestor does to the heir.

One who has filled an office or station before the present incumbent.

**PREDICATE.** To affirm logically.

**PREDOMINANT.** Something greater or superior in power and influence to others with which it is connected or compared. 22 Pick. 53.

**PRE-EMPTION. In International Law.** The right of pre-emption is the right of a nation to detain the merchandise of strangers passing through her territories or seas, in order to afford to her subjects the preference of purchase. 1 Chitty, Com. Law 103; 2 Bla. Com. 287.

According to general modern usage the doctrine of pre-emption rests upon the distinction between articles which are contraband (*q. v.*) *universally*, and those which are contraband only under the particular circumstances of the case. The carrying of the former class alone is punishable, and entails the penalty of confiscation, either of ship or cargo or both. The latter class are subject to the milder belligerent right of *pre-emption*, which is regarded as a fair compromise between the right of the belligerent to seize, and the claim of the neutral to export his *native commodities*, though immediately subservient to the purpose of hostility; 3 Phill. Int. L. 450; 1 C. Rob. 241. The right of pre-emption is said to be rather a waiver of a greater right than a right itself; an indulgence to the neutral rather than a right of the belligerent; Ward, Contraband 196.

This right is sometimes regulated by treaty. In the treaty made between the United States and Great Britain, November 19, 1794, ratified in 1795, it was provided, after mentioning that the usual munitions of war, and also naval materials, should be confiscated as contraband, that, "whereas the difficulty of agreeing on precise cases in which alone provisions and other articles not generally contraband may be regarded as such, renders it expedient to provide against the inconveniences and misunderstandings which might thence arise, it is further agreed that whenever any such articles so being contraband according to the existing laws of nations shall for that reason be seized, the same shall not be confiscated, but the owners thereof shall be speedily and completely indemnified; and the captors, or, in their default, the government under whose authority they act, shall pay to the masters or owners of such vessel the full value of all articles, with a reasonable mercantile profit thereon, together with the freight, and also the damages incident to such detention." According to the practice of the British prize court, a profit of ten per cent. has been usually allowed to the proprietor of the goods seized, for the purposes of pre-emption; 3 Phill. Int. L. 451.

See NEUTRALITY.

**PRE-EMPTION RIGHT.** The right given to settlers upon the public lands of the United States to purchase them at a limited price in preference to others.

It gave a right to the actual settler who was a citizen of the United States, or who had filed a declaration of intention to become such, and had entered and occupied without title, to obtain a title to a quarter-section at the minimum price fixed by law, upon entry in the proper office and payment, to the exclusion of all other persons. It is an equitable title; 15 Miss. 780; 9 Mo. 688; 15 Pet. 407; and does not become a title at law to the land till entry and payment; 2 Sandf. Ch. 78; 11 Ill. 529; 15 *id.* 131. It may be transferred by deed; 9 Ill. 454; 15 *id.* 131; and descends to the heirs of an intestate; 2 Pet. 201; 12 Ala. N. S. 822.

No person is entitled to more than one pre-emption right to public land; and where a party has filed a declaration, he cannot file another for another tract, or for an addition to the first tract; 139 U. S. 642.

A person cannot acquire by his occupation only of unsurveyed lands of the United States, a right of pre-emption to them under the laws of the United States; 130 U. S. 232. The word heirs as used in R.S. § 269, which provides for the issuance of a patent to the heirs of a deceased pre-emptor, includes illegitimate children, when such can inherit it from their father in the state where he was domiciled and the land located; 162 U. S. 65.

By act of March 3, 1891, the pre-emption laws were repealed, saving the rights of claims already initiated; 1 R. S. Sup. 942; and *bona fide* pre-emption claimants were permitted to transfer any part of their land for church, cemetery, and school purposes and for the right of way of railroads, canals and irrigation and drainage works.

See LANDS, PUBLIC.

**PRE-EXISTING.** "Pre-existing" debt includes all debts previously contracted whether they have become payable or not; 136 Mass. 340.

**PREFECT. In French Law.** A chief officer invested with the superintendence of the administration of the laws in each department. Merlin, *Répert.*

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**PREFER.** To bring any matter before a court: as,—A. preferred a charge of assault against B.

To apply or move: thus,—"to prefer for costs." Abb. Law Dict.

**PREFERENCE.** The paying or securing to one or more of his creditors, by an insolvent debtor, the whole or a part of their claim, to the exclusion of the rest. The right which a creditor has acquired over others to be paid first out of the assets of his debtor; as, when a creditor has obtained a judgment against his debtor which binds the latter's land, he has a preference.

A failing creditor, if an individual or partnership, may prefer any one creditor to the exclusion of others; 6 Cow. 285; 12 Pet. 178; 38 Pa. 446; 7 Hun 146; 15 Mo. 378; 48 Ala. 377. See 144 Mass. 192; 48 Ala. 376; 76 Va. 276; 13 R. I. 463.

At common law, unless prohibited by statute, a corporation whether insolvent or not, had a right to pay a creditor, whether a director, officer, stockholder or outsider; 94 N. Y. 168; 2 Moraw. Corp. § 802; 18 N. Y. L. J. 1601; so had an individual a right to prefer any creditor; 94 N. Y. 168. As to preference by failing corporations, there are now two doctrines; one that the assets are a trust fund for the benefit of all creditors *pro rata* and no preference can be given to any creditor; 45 Fed. Rep. 7; 130 Ill. 162; 64 Wis. 639; 46 Ohio St. 86, 493; 5 L. R. A. 378; 3 N. Y. 479; 39 Mo. App. 131; 96 Ala. 439; 76 Mich. 634. The other that a corporation has the same power in dealing with the assets and preferring creditors as an individual has under similar circumstances; 70 Ia. 697; 16 N. J. Eq. 229; 41 *id.* 635; 45 Fed. Rep. 148; 30 W. Va. 95, 123; 78 Va. 737; 14 Mich. 477; 25 Fed. Rep. 577; 35 *id.* 433; 5 W. & S. 223; 25 Mo. App. 190; 79 Ga. 135; 13 Ark. 563; 46 Am. Dec. 743; 78 Fed. Rep. 71; 150 U. S. 371; 184 Pa. 1; 18 N. Y. L. J. 1601. In the absence of statutory prohibition it has been held a corporation may convey its property to the creditor upon condition that he pay himself and return the surplus; 5 W. S. 223, 247; 6 Conn. 233; Am. Dec. 561.

It has been held that a failing corporation may prefer its own stockholders; 106 Ill. 439; 17 B. Mon. 412; 66 Am. Dec. 165; 20 Vt. 425; but not its own directors; 149 Pa. 148; 39 N. Y. 202; 36 Md. 60; 61 N. H. 632; 96 Ala. 357, 439; 23 Mo. App. 132; 44 Fed. Rep. 231; 45 *id.* 7; 130 Ill. 162; 64 Wis. 639; 25 Fed. Rep. 577; but see, *contra*, 70 Ia. 697; 72 *id.* 666; 78 Va. 737; 1 Spears, Eq. 545; 92 Mo. 79. After suspension and insolvency no preference will be allowed; 43 N. H. 263; 16 R. I. 597; 5 L. R. A. 361. The directors may advance money to a corporation in difficulties and secure themselves by mortgage of its property; 91 U. S. 587; 138 Ill. 655. If the preferred creditor be one of its officers, he must show that the preference was fair and conscionable and not collusive for the mere purpose of preference; 184 Pa. 1. The liquidation in good faith of debts due to directors with the hope of continuing business, is not invalid; 164 Mass. 437; 59 N. Y. 5. Judge Thompson takes very strong ground against the right of a corporation to prefer any creditor, but especially an officer, or stockholder; Thompson, Corp. § 6492; 32 Am. L. Rev. 188. The opposite ground is taken on principle in 2 No. W. L. Rev. by Prof. Harriman. In New York, by statute, a failing corporation cannot transfer any of its property to an officer, director or stockholder. This does not apply to a non-stock, mutual insurance company; 18 N. Y. L. J. 1601.

Preferences in assignment are allowed: *Arizona*, to creditors who will accept their share and release; *Arkansas*, generally, but not by corporations; *Georgia*, by individuals and firms, not by corporations; *Massachusetts*, if assented to by creditors in excess of the amount assigned and not valid against insolvent assignee; *Mississippi* and *N. Carolina*, generally; *Virginia*, certain preferences allowed, but not by limited partnerships; *Montana*, good, if absolute; *New York*, as to one-third of the estate, less claims preferred by law; but none by corporations or limited partnerships; *Utah*, none, if conditioned on release. In the other states and the territories, preferences appear to be invalid. In some states assignments which attempt to create a preference are void and the assignment is for the equal benefit of all creditors. See 4 Am. Lawy. 344. Preferences are usually invalidated by bankrupt acts.

**PREFERENCE SHARES.** Shares of a corporation or a joint-stock company entitling their holders to a preferential dividend and sometimes to priority on the division of the assets. See STOCK.

**PREFERENTIAL DEBTS.** Preferential debts, in bankruptcy, are those prior to all others; as, wages of a clerk, servant, or workman, rates due and taxes. Brett, Comm. 890.

**PREFERRED.** This word is relative; it refers to something else, and it means that the thing to which it is attached, whatever that may be, has some advantage over another thing of the same character, which, but for this advantage, would be like the others. 16 S. C. 530.

**PREFERRED CLAIMS.** See MORTGAGE; RECEIVER.

**PREFERRED CREDITOR.** A creditor whom the debtor has directed shall be paid before other creditors. See PREFERENCE.

**PREFERRED STOCK.** See STOCK.

**PREGNANCY. In Medical Jurisprudence.** The condition of a woman who has within her the product of a conception which has occurred within a year. Billings, Nat. Med. Dictionary.

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Extra uterine or ectopic pregnancy is the development of the ovum outside of the uterine cavity, as in the Fallopian tubes or ovary. Extra uterine pregnancy commonly terminates by rupture of the sac, profuse internal hemorrhage, and death if not relieved promptly by a surgical operation. Rupture usually takes place between the second and sixth month of pregnancy.

*The signs of pregnancy.* These acquire a great importance from their connection with the subject of *concealed*, and also of *pretended*, pregnancy. The first may occur in order to avoid disgrace, and to accomplish in a secret manner the destruction of offspring. The second may be attempted to gratify the wishes of a husband or relations, to deprive the legal successor of his just claims, to gratify avarice by extorting money, and to avoid or delay execution.

These signs and indications are both subjective and objective. The chief subjective signs are: (1) *cessation of menstruation*, which rarely may not occur, and on the other hand may occur in other conditions; (2) *nausea and vomiting* which usually develop about the 6th week; (3) *nervous disorders*, including changes in disposition; (4) pain or discomfort in the breasts; (5) *quickening* or sensations due to the movements of the fœtus within the uterus. These sensations are first noticed about the end of the fourth month. The movements begin much earlier but are not felt until the uterus has developed sufficiently to come in contact with the abdominal walls.

The chief objective symptoms are: (1) changes in the facial expression with dark rings about the eyes and often spots of figmentation resembling large freckles; (2) enlargement of the breast, the nipple becoming prominent, and in brunettes surrounded by an aureola of figmentation; (3) enlargement of the abdomen, usually not evident before the third or fourth month. The prominence is pear-shaped with the small end downward; (4) Fœtal movements which can be felt through the abdominal walls as early as the end of the fifth month; (5) the *uterine souffle* or sound heard with the ear upon the abdomen and caused by the blood current in the dilated uterine arteries. This sound may be heard as early as the end of the fourth month; (6) the most important of all the signs consists of the sounds of the fœtal heart. These sounds can be heard about the beginning of the fifth month, and are of course a positive sign of pregnancy. The sounds have been aptly compared to the ticking of a watch heard through a pillow; (7) softening of the cervix or neck of the uterus; (8) Ballottement, the impulse or wave excited by suddenly lifting the uterus with a hand in the vagina, the other hand being placed firmly upon the abdomen.

The duration of pregnancy is normally about nine calendar or ten lunar months, or about 275 days from the cessation of the last menstrual period. The possibility of prolonged pregnancy has long been a fruitful subject of discussion but "by a study of the analogy of other functions of the body, by observations in the lower animals, and by accurate reliable data, from women in particular, we are forced to the conclusion that pregnancy may be and often is prolonged. . . . Gestation may be lengthened, parturition may be delayed from a few days to several months." American Text-Book of Obstetrics, Saunders, 1896.

The laws relating to pregnancy concern the circumstances under and the manner in which the fact is ascertained. There are two cases where the fact whether a woman is or has been pregnant is important to ascertain. The one is when it is supposed she pretends pregnancy, and the other when she is charged with concealing it.

Pretended pregnancy may arise from two causes: the one when a widow feigns herself with child in order to produce a supposititious heir to the estate. The presumptive heir may in such case have a writ *de ventre inspiciendo*, by which the sheriff is commanded to have such made, and the fact determined whether pregnancy exists or not, by twelve matrons, in the presence of twelve knights. If the result determine the fact of pregnancy, then she is to be kept under proper guard until she is delivered. If the pregnancy be negatived, the presumptive heir is admitted to the inheritance; 1 Bla. Com. 456; Cro. Eliz. 566; 4 Bro. C. C. 90; 2 P. Wms. 591; Cox, C. C. 297. A practice quite similar prevailed in the civil law.

The second cause of pretended pregnancy occurs when a woman is under sentence of death for the commission of a crime. At common law, in case this plea be made before execution, the court must direct a jury of twelve matrons, or discreet women, to ascertain the fact, and if they bring in their verdict *quick with child* (for barely *with child*, unless it be alive in the womb, is not sufficient), execution shall be stayed, generally till the next session of the court, and so from session to session, till either she is delivered or proves by the course of nature not to have been with child at all; 4 Bla. Com. 394; 1 Bay 497.

In Scotland, all that is necessary to be proved, to have execution delayed, is the fact of pregnancy, no difference being made whether she be quick with child or not. This is also the provision of the French penal code upon this subject. In this country, there is little doubt that clear proof that the woman was pregnant, though not quick with child, would at common law be sufficient to obtain a respite of execution until after delivery. The difficulty lies in making the proof sufficiently clear, the signs and indications being all somewhat uncertain, some of them wanting, all liable to variation, and conviction of the fact only fastening upon the mind when a number of them, inexplicable upon any other hypothesis, concur in that one result.

It has been held that pregnancy at the time of marriage by another than the hus-

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band is sufficient ground for divorce, provided the pregnancy was unknown to the husband and there was no reasonable ground of suspicion by him; 99 Pa. 196; 79 Mich. 591. This can hardly be laid down as an absolute rule; 1 Bish. Mar. Div. & Sep. § 483. And in a later case it was held that false representations of pregnancy made by a woman to induce a man, with whom she has had illicit intercourse, to marry her are not such fraud as will entitle him to a divorce if he does so, at least if they were not believed by him; 24 Atl. Rep. (Pa.) 128. See 20 Ore. 579.

Pregnancy is seldom concealed except for the criminal purpose of destroying the life of the fœtus in utero, or of the child immediately upon its birth. Infant life is easily extinguished; while proof of the unnatural crime is hard to be furnished. This has led to the passage of laws, both in England and in this country, calculated to facilitate the proof and also to punish the very act of concealment of pregnancy and death of the child when, if born alive, it would have been illegitimate. In England, the very stringent act of 21 Jac. I. c. 27, required that any mother of such child who had endeavored to conceal its birth should prove by at least one witness that the child was actually born dead; and for want of such proof it arrived at the forced conclusion that the mother had murdered it. This cruel law was essentially modified in 1803, by the passage of an act declaring that women indicted for the murder of bastard children should be tried by the same rules of evidence and presumption as obtain in other trials of murder.

The early legislation of Pennsylvania was characterized by the same severity. The act of May 31, 1781, made the concealment of the death of a bastard child conclusive evidence to convict the mother of murder. This was repealed by the act of 5th April, 1790, s. 6, which declared that the constrained presumption that the child whose death is concealed was therefore murdered by the mother shall not be sufficient to convict the party indicted, without probable presumptive proof is given that the child was born alive. The law was further modified by the act of 22d April, 1794, s. 18, which declares that the concealment of the death of any such child shall not be conclusive evidence to convict the party indicted for the murder of her child, unless the circumstances attending it be such as shall satisfy the mind of the jury that she did wilfully and maliciously destroy and take away the life of such a child. The act also punishes the concealment of the death of a bastard child by fine and imprisonment. The act of 31 March, 1860, P. & L. Dig. 1118, now governs in Pennsylvania. It makes the concealment of the death of an illegitimate child a substantive offence punishable by fine and imprisonment, and leaves the question of the murder of the child by its mother, subject to the mode of trial and punishment as ordinary cases of murder. Counts for murder and concealing the death of the child may, however, be united in the same indictment. The states of New York, Massachusetts, Vermont, Connecticut, New Jersey, New Hampshire, Georgia, Illinois, and Michigan, all have enactments on this subject,—the punishment prescribed being, generally, fine and imprisonment. For duration of pregnancy, see GESTATION.

See PHYSICAL EXAMINATION; JURY OF WOMEN; EN VENTRE SA MERE.

**PREGNANT.** See AFFIRMATIVE PREGNANT; NEGATIVE PREGNANT.

**PREJUDICE** (Lat. *præ*, before, *judicare*, to judge).

A forejudgement. A leaning toward one side of a cause for some reason other than its justice. See 12 Ga. 448.

**PRELATE.** The name of an ecclesiastical officer. There are two orders of prelates: the first is composed of bishops, and the second, of abbots, generals of orders, deans, etc.

**PRELEVEMENT. In French Law.** The portion which a partner is entitled to take out of the assets of a firm before any division shall be made of the remainder of the assets between the partners.

The partner who is entitled to a prelèvement is not a creditor of the partnership: on the contrary, he is a part-owner; for, if the assets should be deficient, a creditor has the preference over the partner; on the other hand, should the assets yield any profit, the partner is entitled to his portion of it, whereas the creditor is entitled to no part of it, but he has a right to charge interest when he is in other respects entitled to it.

**PRELIMINARY.** Something which precedes: as, *preliminaries of peace*, which are the first sketch of a treaty, and contain the principal articles on which both parties are desirous of concluding, and which are to serve as the basis of the treaty.

**PRELIMINARY ACT. In English Law.** A document stating the time and place of a collision between vessels, the names of the vessels, and other particulars required to be filed by each solicitor in actions for damage by such collisions. Whart. Law. Dict.

**PRELIMINARY EXAMINATION.** The hearing given to a person accused of crime, by a magistrate or judge, exercising the functions of a committing magistrate, to ascertain whether there is evidence to warrant and require the commitment and holding to bail of the person accused. See Bish. New Cr. L. § 32, 225–239 *a*.

Coroners generally have the powers of a committing magistrate as also have the mayors of cities in many of the states; *id.* 229 *b*.

In case, as it often happens, there is

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question as to what precise crime should be charged against the prisoner or whether more than one crime is involved in the facts shown, the commitment should be so framed as to cover them all, leaving to the prosecuting officer and the grand jury the opportunity for election; but if the commitment does not cover all charges it does not discharge the prisoner from liability for the rest; *id.* § 33. The discharge of a prisoner on a preliminary examination will not operate as a bar to further proceedings; 47 N. J. L. 251; 16 Tex. App. 321; 10 Neb. 78.

It is said that a person charged with crime, unless a fugitive from justice, is entitled to a preliminary examination; 44 Neb. 417; but it was also held that such examination is not necessary as a basis for finding an indictment; 3 Pac. Rep. (Ida.) 272; and that in proper cases the court may direct the prosecuting attorney to submit indictments without such examination; 2 Dist. Rep. Pa. 743. A complaint made on such examination may be dismissed and a new charge prosecuted before another magistrate; 7 Wash. 506; but after holding the accused to bail the magistrate cannot discharge him without notice to the prosecutor; 160 Pa. 119. The denial of the right to be taken before a magistrate of the county in which one is arrested, to give bail does not vitiate a subsequent trial and conviction; 79 Hun 410.

Where the evidence seems to warrant the commitment of the accused person, or time is required for the introduction of other evidence or for further investigation, the person may be committed or held to bail for further hearing. The examination may be postponed on account of the physical inability to attend of important witnesses for the state; 47 La. Ann. 1677.

Generally the offence charged is stated in the complaint and warrant and a preliminary examination is waived; and a plea that there was no such examination will not be entertained after information filed; 54 Kan. 206. An objection that there was no preliminary examination must be raised before trial by plea in abatement or motion to quash; 44 Neb. 417.

A person arrested and taken before a magistrate for preliminary examination may waive it even where the state constitution secures the right to such examination; 115 Cal. 57; 47 Pac. Rep. (Idaho) 945. See, also, 46 Neb. 631. See, also, as to waiver of such examinations, 83 Wis. 486; 103 Mich. 473; 25 Fla. 675; 45 Hun 34.

It is the duty of the committing magistrate to secure the attendance of witnesses for the prosecution who are examined by him, for which purpose he may require them to give bail for their appearance before the grand jury or in the criminal court, with or without surety which is usually in his discretion; 1 Bish. N. Cr. L. 34. Where the preliminary examination is provided for by law, the testimony of the witnesses taken thereat may be afterwards shown in contradiction; 85 Cal. 421; 17 Vt. 658; 34 La. Ann. 1037; 40 Ark. 454; see 2 Swan 237; 32 Ia. 36. And the witnesses are liable to the penalties of perjury for false swearing if so authorized, otherwise not; 40 La. Ann. 460; 26 Me. 69; 2 McClain, Cr. Law § 858.

The filing of an information after the preliminary examination, but before a return of it made by the examining magistrate, is a mere irregularity and does not vitiate the proceedings; 115 Cal. 57. In Colorado, by statute, an information may be filed without a preliminary examination, upon the affidavit of any person who has knowledge of the commission of the offence and is a competent witness; 23 Col. 1, 9.

Where a complaint charged perjury on a certain date, and examination was waived, and the information subsequently filed charged the commission of the crime on another date, a plea in abatement on the ground that there was no examination on the offence charged in the information, was substained; 91 Wis. 245.

A statutory requirement that the magistrate shall, on preliminary examination, examine the witnesses to support the accusation, does not require that all of the witnesses known to the state shall be examined, but merely sufficient to justify the magistrate in binding over the accused for trial; 65 N. W. Rep. (Wis.) 848.

United States commissioners holding preliminary examinations have no judicial power, but only authority to determine whether there is probable cause to believe that the offence was committed; 70 Fed. Rep. 972; and a district judge holding a preliminary examination has only, *quoad hoc*, the powers of a commissioner; *id.*

Where an examining magistrate certified that he found probable cause to believe that an offence had been committed and had taken bail, it was sufficient to sustain an information without a positive certificate by the magistrate that an offence had been committed; 102 Mich. 519.

In England, when an accused person has been arrested, either without warrant or by a justice's warrant, if he is charged with an offence for which he may be tried before a jury, the justice holds a preliminary inquiry to decide whether he ought or ought not to be sent for trial. The admission of the public during these inquiries is a matter of discretion with the justice. The witnesses for the prosecution are examined under oath and may be cross-examined by the defendant or his counsel or solicitor. The evidence is taken down in writing and after the prosecution is closed, it is read in the hearing of the defendant and he is asked whether he has anything to say in answer to the charge, being first told that he is not required to speak but that whatever he does say will be taken down in writing and may be given in evidence against him on the trial. The defendant is then allowed to call witnesses to prove his innocence. He may examine these himself or by his counsel or

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solicitor, and they may be cross-examined by the prosecutor. The defendant may not be questioned nor may he give evidence on his own behalf, except in certain special cases. If he choose to give evidence on oath he is liable to be cross-examined by the prosecutor.

If a *prima facie* case is not made out the defendant is discharged. If the justices are of opinion that a case has been made out they send him to trial. Hearings may be adjourned upon reasonable grounds to a stated time and place, in which case the accused is either removed under custody or discharged on his own recognizance, with or without sureties, to appear at the adjourned hearing. The limit of time must not exceed eight days. If the accused be held for trial, the prosecutor and the witnesses are bound by recognizance to appear and give evidence at the trial. The accused will not be released on bail when the charge is treason. In cases of felony and a large number of misdemeanors, the justice has a discretion in the matter. In case of misdemeanors not specially provided for, they have no power to refuse bail. Haycraft, Exec. Pow. in Rel. to Crime.

As to present French system, See JUGE D'INSTRUCTION.

See PRISONER.

**PRELIMINARY PROOF. In Insurance.** Marine policies in the United States generally have a provision that a loss shall be payable in a certain time, usually sixty days, "after proof," meaning "preliminary proof," which is not particularly specified. Fire policies usually specify the preliminary proof. Life policies, like marine, usually make the loss payable sixty or ninety days after notice and proof; 31 Me. 325; 6 Gray 396; 6 Harr. & J. 408; 3 Gill 276; 2 Wash. Va. 61; 23 Wend. 43; 1 La. 216; 11 Miss. 278; Stew. Low. C. 354; 14 Mo. 220; 10 Pet. 507; 6 Ill. 434; 5 Sneed 139; 2 Ohio 452; 6 Ind. 137; 30 Vt. 659; Beach, Ins. 1216. See PROOFS OF LOSS.

**PREMEDITATEDLY.** Thought of beforehand, for any length of time, however short. 106 Mo. 198. "Deliberately" logically contains in it all that is meant by "premeditatedly," and more. But "premeditatedly" is also contained in the phrase "malice aforethought." 108 Mo. 205; 118 *id.* 96.

**PREMEDITATION.** A design formed to commit a crime or to do some other thing before it is done. 3 Wash. St. 99.

Intent before the act, but not necessarily existing any extended time before. 28 Fla. 313.

Premeditation differs essentially from *will*, which constitutes the crime; because it supposes, besides an *actual* will, a *deliberation*, and a *continued persistence* which indicate more perversity. The preparation of arms or other instruments required for the execution of the crime are indications of premeditation, but are not absolute proof of it; as these preparations may have been intended for other purposes, and then suddenly changed to the performance of the criminal act. Murder by poisoning must of necessity be done with premeditation. See MALICE.

**PREMIER.** The principal minister of state; the prime minister. See CABINET.

**PREMISES** (Lat. *præ*, before, *mittere*, to put, to send).

That which is put before. The introduction. Statements previously made. See 1 East 456.

**In Conveyancing.** That part of a deed which precedes the *habendum*, in which are set forth the names of the parties with their titles and additions, and in which are recited such deeds, agreements, or matters of fact as are necessary to explain the reasons upon which the contract then entered into is founded: and it is here, also, the consideration on which it is made is set down and the certainty of the thing granted. 2 Bla. Com. 298; 8 Mass. 174; 6 Conn. 289; 13 N. J. Eq. 331; 15 *id.* 418.

**In Equity Pleading.** The stating part of a bill. It contains a narrative of the facts and circumstances of the plaintiff's case, and the wrongs of which he complains, and the names of the persons by whom done and against whom he seeks redress. Cooper, Eq. Pl. 9; Bart. Suit in Eq. 28; Mitf. Eq. Pl. 43; Story, Eq. Pl. § 27.

Every material fact to which the plaintiff intends to offer evidence must be stated in the premises; otherwise, he will not be permitted to offer or require evidence of such fact; 1 Bro. C. C. 94; 3 P. Wms. 276; 11 Ves. 240; 2 Hare 264; 6 Johns. 565; 9 Ga. 148.

**In Estates.** Lands and tenements. 1 East 453; 3 Maule & S. 169; 21 Ohio St. 188.

**PREMIUM. In Insurance.** The consideration for a contract of insurance.

A policy of insurance always expresses the consideration called the *premium*, which is a certain amount or a certain rate upon the value at risk, paid wholly in cash, or partly so and partly by promissory note or otherwise. 2 Pars. Marit. Law 182. By the charters of mutual fire insurance companies, the insured building is usually subject to a lien for the premium; 19 Miss. 53; 21 How. 35. The premium may be payable by service rendered; 5 Ind. 96.

In life insurance, the premium is usually payable periodically; 18 Barb. 541; and the continuance of the risk is usually made to depend upon the due payment of a periodical premium; 2 Dutch. 268. But if the practice of the company and its course of dealings with the insured, and others known to him, have been such as to induce a belief that so much of the contract as provides for a forfeiture upon non-payment at a fixed time will not be insisted on, the

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company will not be allowed to set up such a forfeiture, as against one in whom their conduct has induced such belief; May, Ins. § 361; 95 U. S. 380; 85 Ala. 348. The acceptance by a manager and agent of a life insurance company of a promissory note from the insured for the amount of the advance premium, and a delivery of the policy upon receipt of the note, constitute a waiver of the cash premium provided for in the application and policy which binds the company, although the policy also provides that the first premium shall be paid at the home office of the company on the delivery of the policy, and that no agent has power in any way to waive the terms of the contract; 18 N. Y. L. J. 1785. An action lies to recover a premium paid on a policy of life insurance where the company, upon the discovery of certain false statements inserted therein by the company's agents, cancelled the policy, but the cost of the insurance enjoyed by the insured during the life of the policy must first be deducted; 38 Atl. Rep. (N. H.) 500. But this is doubted in 46 Am. L. Reg. 40, because the insured should be entitled to recover the entire premium, he never having had any insurance under the void policy. See 117 U. S. 519. So far as the agreed risk is not run in amount or time under a marine policy, the whole or a proportional stipulated or customary part of the premium is either not payable, or, if paid, is to be returned unless otherwise agreed; 2 Pars. Mart. Law 185; 16 Barb. 280; 7 Gray 246. Where an insurance company authorizes the insured to send a premium by mail, such premium is paid when the letter containing it is deposited in the post office addressed to the company; 77 Hun 556.

**PREMIUM NOTE. In Insurance.** A note given in place of payment of the whole or a part of the premium.

The premium, or a part of it, is not unfrequently paid wholly or in part by a promissory note, with a stipulation in the policy that the unpaid amount shall be set off and deducted in settling for a loss; 1 Phill. Ins. § 51. It is also usually collaterally secured by a stipulation in the policy for the forfeiture of the policy by non-payment of the premium note, or any amount due thereon by assessment or otherwise; 12 N. Y. 477; 2 Ind. 65; 3 Gray 215; 19 Miss. 135; 35 N. H. 328; 29 Vt. 23; 32 Pa. 75; 84 Me. 451; Beach, Ins. 520.

**PREMIUM PUDICITÆ** (Lat. the price of chastity.) The consideration of a contract by which a man promises to pay to a woman with whom he has illicit intercourse a certain sum of money.

When the contract is made as the payment of *past* cohabitation, as between the parties, it is good, and will be enforced, if under seal, but such consideration will not support a parol promise; 3 Q. B. 483; Poll. Contr. 288; 1 Story, Contr. § 670. It cannot be paid on a deficiency of assets, until all creditors are paid, though it has a preference over the heir, next of kin, or devisee. If the contract be for future cohabitation, it is void; 1 Story, Eq. Jur. 13th ed. § 296; 5 Ves. 286; 3 E. & B. 642; 2 P. Wms. 432; 1 W. Bla. 517; 1 Ball & B. 360; Roberts, Fraud. Conv. 428; Cas. Talb. 153, and the cases there cited; 6 Ohio 21; 5 Cow. 253; Harp. 201; 3 T. B. Monr. 35; 11 Mass. 368; 2 N. & M'C. 251. See CONSIDERATION.

**PRENDER, PRENDRE** (L. Fr.). To take. This word is used to signify the right of taking a thing before it is offered: hence the phrase of law, it lies in render, but not in prender. See A PRENDRE; PROFITS A PRENDRE; Gale & W. Easem; Washb. Easem.

**PRENOMEN** (Lat.). The first or Christian name of a person. Benjamin is the prenomen of Benjamin Franklin. See Cas. Hardw. 286; 1 Tayl. 148.

**PREPENSE.** Aforethought. See 2 Chitty, Cr. Law 1784.

**PREPONDERENCE OF EVIDENCE.** Greater weight of evidence, or evidence which is more credible and convincing to the mind. 80 Wis. 193. See 37 Ark. 588.

**PREROGATIVE. In Civil Law.** The privilege, pre-eminence, or advantage which one person has over another: thus, a person vested with an office is entitled to all the rights, privileges, *prerogatives*, etc., which belong to it.

**In English Law.** The royal prerogative is an arbitrary power vested in the executive to do good and not evil. Rutherforth, Inst. 279; Co. Litt. 90; Chitty, Prerog. Bac. Abr. The word simply means a power or will which is discretionary, and above and uncontrolled by any other will. It is frequently used to express the uncontrolled will of a sovereign power in the state and is applied not only to the king but also to the legislative and judicial branches of the government.

It is sometimes applied by law writers to the thing over which the power or will is exercised, as fiscal prerogatives, meaning king's revenues; 1 Halleck, Int. L. 147.

**PREROGATIVE COURT. In English Law.** An ecclestiastical court held in each of the two provinces of York and Canterbury before a judge appointed by the archbishop of the province.

Formerly in this court testaments were proved, and administrations granted where a decedent left chattels to the value of five pounds (*bona notabilia*) in two distinct dioceses or jurisdictions within the province, and all causes relating to the wills, administrations, or legacies of such persons were originally cognizable. This jurisdiction was transferred to the court of probate by 20 & 21 Vict. c. 77, § 4, and 21 & 22 Vict. c. 95, and now, by the Judicature Acts, it is included in the supreme court of judicature.

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An appeal lay formerly from this court to the king in chancery, by stat. 25 Hen. VIII. c. 19, afterwards to the privy council, by stat. 2 & 3 Will. IV. c. 92; 2 Steph. Com. 11th ed. 206; 3 Bla. Com. 65.

**In American Law.** A court having a jurisdiction of probate matters, in the state of New Jersey.

**PREROGATIVE WRITS.** Processes issued by an exercise of the extraordinary power of the crown on proper cause shown. They are the writs of *procedendo*, *mandamus*, prohibition, *quo warranto*, *habeas corpus*; 3 Stephens, Com. 11th ed. 626. They differ from other writs in that they are never issued except in the exercise of the judicial discretion, and are directed generally not to the sheriff, but to the parties sought to be affected themselves; 3 Bla. Com. 132.

**PRESCRIBABLE.** To which a right may be acquired by prescription.

**PRESCRIPTION.** A mode of acquiring title to incorporeal hereditaments by immemorial or long-continued enjoyment.

A prescribing for title; the claim of title to a thing by virtue of immemorial use and enjoyment; the right or title acquired by possession had during the time and in the manner fixed by law; a mode of acquiring real property, when a man can show no other title to what he claimed than that he and those under whom he claimed had immemorially used to enjoy it; 26 W. Va. 427.

The distinction between a *prescription* and a *custom* is that a custom is a local usage and not annexed to a person: a prescription is a personal usage confined to the claimant and his ancestors or grantors. The theory of prescription was that the right claimed must have been enjoyed beyond the period of the memory of man, which for a long time, in England, went back to the time of Richard I. To avoid the necessity of proof of such long duration, a custom arose of allowing a presumption of a grant on proof of usage for a long term of years.

The length of time necessary to raise a strict prescription was limited by statute 32 Hen. VIII. at sixty years; 8 Pick. 308; 7 Wheat. 59; 4 Mas. 402; 2 Greenl. Ev. § 539. See 29 Vt. 43; 24 Ala. N. S. 130; 29 Pa. 22: 4 Del. Ch. 643.

Grants of incorporeal hereditaments are presumed upon proof of enjoyment of the requisite character for a period of years equal to that fixed by statute as the period of limitation in respect of real actions; 3 Kent 442; 12 Wend. 330; 27 Vt. 265; 2 Bail. 101; 4 Md. Ch. Dec. 386; 13 N. H. 360; 4 Day 244; 10 S. & R. 63; 9 Pick. 251. See 3 Me. 120; 1 B. & P. 400; 5 B. & Ald. 232; 7 Mackey 1; 84 Ky. 420; 82 Ga. 770; 66 Hun 633; but a grant cannot be presumed where it would have been unlawful; 112 N. Y. 142.

Prescription properly applies only to incorporeal hereditaments; 3 Barb. 105; Finch, Law 132; such as *easements* of water, light and air, way, etc.; 4 Mas. 397; 20 Pa. 331; 1 Gale & D. 205, 210, n.; Tudor, Lead. Cas. 114; see 140 Ill. 581; 4 Misc. Rep. 48; 44 La. Ann. 492; 156 Mass. 89; a class of *franchises*; Co. Litt. 114; 10 Mass. 70; 10 S. & R. Pa. 401. See FERRY; Herbert, Prescription.

A person cannot acquire a prescriptive right of way over his own lands, or the lands of another which he occupies as tenant; 116 Mo. 379. The fact that certain persons have a right of way by grant does not prevent other persons from acquiring a prescriptive right to use the way; 156 Mass. 449.

It has been held that corporations may exist by prescription; 2 Kent *277; 12 Mass. 400. It is necessary in such case to presuppose a grant by charter or act of parliament, which has been lost; 35 Barb. 319.

*In Louisiana*, a manner of acquiring property or discharging debts by the effect of time. Rev. Code of La. Art. 3457. See 40 La. Ann. 761.

See as to rights by prescription to use lands of another, 10 Lawy. Rep. Ann. 484.

In France thirty years has been substituted for immemorial prescription, and in Prussia periods of from thirty to fifty years.

**In International Law.** The doctrine of Immemorial Prescription is indispensable in public law; 1 Phill. Int. L. § 255. The general consent of mankind has established the principle that long and uninterrupted possession by one nation excludes the claim of every other. All nations are bound by this consent, since all are parties to it; none can safely disregard it without impugning its own title to its possessions; 1 Wheat. Int. L. 207. The period of time cannot be fixed in public law as it can in private law; it must depend upon varying and variable circumstances; 1 Phill. Int. L. § 260.

Burke speaks of the "solid rock of prescription—the soundest, the most general, the most recognized title between man and man that is known in municipal, as in public jurisprudence." Vol. ix. p. 449.

**PRESENCE.** The being in a particular place.

In many contracts and judicial proceedings it is necessary that the parties should be present in order to render them valid; for example, a party to a deed, when it is executed by himself, must personally acknowledge it, when such acknowledgment is required by law, to give it its full force and effect, and his presence is indispensable, unless, indeed, another person represent him as his attorney, having authority from him for that purpose.

*Actual* presence is being bodily in the precise spot indicated.

*Constructive* presence is being so near to or in such relation with the parties actually in a designated place as to be considered in law as being in the place.

Attempting to deter a witness from testifying, while he is in the witness-room or hallway of the court-room, by offering him money, is a misdemeanor in the presence of the court, and punishable without indictment, as contempt; 131 U. S. 267.

It is a rule in the civil law that he who is incapable of giving his consent to an act is not to be considered present although he

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be actually in the place. A lunatic, or a man sleeping, would not, therefore, be considered present; Dig. 41. 2. 1. 3. And so if insensible; 4 Bro. P. C. 71; 3 Russ. 441; or if the act were done secretly so that he knew nothing of it; 1 P. Wms. 740.

The English statute of frauds, § 5, directs that all devises and bequests of any lands or tenements shall be attested or subscribed in the presence of the devisor. Under this statute it has been decided that an actual presence is not indispensable, but that where there was a constructive presence it was sufficient; as, where the testatrix executed the will in her carriage standing in the street before the office of her solicitor, the witness retiring into the office to attest it, and it being proved that the carriage was accidentally put back, so that she was in a situation to see the witness sign the will, through the window of the office; Bro. C. C. 98. See 2 Curt. Eccl. 320, 331; 2 Salk. 688; 3 Russ. 441; 1 Maule & S. 294; 2 C. & P. 491; 135 Mass. 241; 81 Va. 410.

**In Criminal Law.** In trials for cases in which corporal punishment is assigned, the defendant's appearance must ordinarily be in person, and must so appear on record. There can be no judgment of conviction taken by default; 6 Pa. 387; Whart. Cr. Pl. & Pr. § 540. The prisoner's actual presence is not requisite at the making and arguing of motions of all kinds, though in motions for arrest of judgment and in error, the old practice was to require it; 88 Ill. 284; Bish. New Cr. Pro. 265; 63 Mo. 159. This is not now usually required in proceedings in error; 1 Park. C. C. 360. In felonies presence at the verdict is essential, and this right cannot be waived; 18 Pa. 103; 63 *id.* 386; but where a prisoner was voluntarily absent during the taking of a portion of the testimony in an adjoining room, he was considered as constructively present; 25 Alb. L. J. 303. See 88 Pa. 189. In trials for misdemeanors these rules do not apply; 9 Dana 304; 7 Cow. 525; Whart. Cr. Pl. & Pr. § 550.

**PRESENT.** A gift, or more properly, the thing given. It is provided by the constitution of the United States, art. 1, s. 9, n. 7, that "no person holding any office of profit or trust under them [the United States] shall, without the consent of congress, accept of any present, emolument, or office, or title, of any kind whatever, from any king, prince, or foreign state."

**PRESENT USE.** One which has an immediate existence and is at once operated upon by the statute of uses.

**PRESENTATION. In Ecclesiastical Law.** The act of a patron offering his clerk to the bishop of the diocese to be instituted in a church or benefice.

**PRESENTATION OFFICE.** The office of the lord chancellor's official, the secretary of presentations.

**PRESENTEE. In Ecclesiastical Law.** A clerk who has been presented by his patron to a bishop in order to be instituted in a church.

**PRESENTMENT. In Criminal Practice.** The written notice taken by a grand jury of any offence, from their own knowledge or observation, without any bill of indictment laid before them at the suit of the government. 4 Bla. Com. 301.

Upon such presentment, when proper, the officer employed to prosecute afterwards frames a bill of indictment, which is then sent to the grand jury, and they find it to be a true bill. In an extended sense, presentments include not only what are properly so called, but also inquisitions of office and indictments found by a grand jury. 2 Hawk. Pl. Cr. c. 25, s. 1.

The difference between a presentment and an inquisition is this: that the former is found by a grand jury authorized to inquire of offences generally, whereas the latter is an accusation found by a jury specially returned to inquire concerning the particular offence. 2 Hawk. Pl. Cr. c. 25, s. 6. See, generally, Com. Dig. *Indictment* (B); Bac. Abr. *Indictment* (A); 1 Chitty, Cr. Law 163; 7 East 387; 1 Meigs 112; 11 Humphr. 12.

The writing which contains the accusation so presented by a grand jury. 1 Brock. 156.

**In Contracts.** The production of a bill of exchange or promissory note to the party on whom the former is drawn, for his acceptance, or to the person bound to pay either, for payment.

The holder of a bill is bound, in order to hold the parties to it responsible to him, to present it in due time for acceptance, and to give notice, if it be dishonored, to all the parties he intends to hold liable; 2 Pet. 170; 12 Pick. 399; 7 Gray 217; 20 Wend. 321; 12 Vt. 401; 13 La. 357; 7 B. Monr. 17; 8 Mo. 268; 7 Blackf. 367; 1 M'Cord 322; 7 Leigh 179. See 20 D. C. 26; 1 App. D. C. 171. And when a bill or note becomes payable, it must be presented for payment.

In general, the presentment for payment should be made to the maker of a note, or the drawee of a bill, for acceptance, or to the acceptor for payment; 2 Esp. 509; but a presentment made at a particular place, when payable there, is, in general, sufficient; 8 N. Y. 266. A personal demand on the drawee or acceptor is not necessary; a demand at his usual place of residence; 1 M. & G. 83; 3 B. Monr. 461; 17 Ohio 78; of his wife, or other agent, is sufficient; Byles, Bills 283; 17 Ala. N. S. 42; 1 Const. 367; 2 Esp. 509; Holt 313; or place of business, of the acceptor; 3 Kent 64, 65; 4 Mo. 52; 11 Gratt. 260; 2 Camp. 596. See 158 Mass. 90. When, on presentment of a bill of exchange at the acceptor's usual place of business, within proper hours, a notary finds the doors closed, he is justified, nothing further appearing, in protesting the bill for non-payment, without inquiry for the acceptor at his residence, and without making further effort to find him; 86 Tenn. 201. The term residence is not used in a strict sense, so necessarily implying a permanent, exclusive, or actual abode in a place, but it may be satisfied by a tempo-

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rary, partial, or even constructive residence; 148 Mass. 181. See RESIDENCE.

The presentment for acceptance must be made in reasonable time; and what this reasonable time is depends upon the circumstances of each case; 9 Moore, P. C. 66; 2 H. Bla. 565; 4 Mass. 336; 1 M'Cord 322; 7 Gray 217; 7 Cow. 205; 9 Mart. La. 326; 7 Blackf. 367. See 65 Miss. 242. The presentment of a note or bill for payment ought to be made on the day it becomes due; 4 Term 148; 8 Mass. 453; 3 N. H. 14; 12 La. 386; 22 Conn. 213; 20 Me. 109; 7 Gill & J. 78; 8 Ia. 394; 10 Ohio 496; and notice of non-payment given, otherwise the holder will lose the security of the drawer and indorsers of a bill and indorsers of a promissory note; 1 Wheat. 171; 1 Harr. Del. 10; 5 Leigh. 522; 5 Blackf. 215; 2 Jones, N. C. 23; 13 Pick. 465; 19 Johns. 391; 8 Vt. 191; 1 Ala. N. S. 375; 8 Mo. 336; and if the money be lodged there for its payment, the holder would probably have no recourse against the maker or acceptor if he did not present them on the day and the money should be lost; 5 B. & Ald. 244; 27 Me. 149. The facts being undisputed, the question of reasonable time for presentment of a draft is one of law; 51 Mo. App. 245.

The excuses for not making a presentment are general, and applicable to all persons who are indorsers; or they are special, and applicable to the particular indorser only.

Among the former are—*inevitable accident* or overwhelming calamity; Story, Bills § 308; 3 Wend. 488; 2 Ind. 224. *The prevalence of a malignant disease*, by which the ordinary operations of business are suspended; 2 Johns. Cas. 1; 3 Maule & S. 267. The *breaking out of war* between the country of the maker and that of the holder; 1 Paine 156. *The occupation of the country* where the note is payable, or where the parties live, by a public enemy, which suspends commercial operations and intercourse; 8 Cra. 155; 15 Johns. 57; 7 Pet. 586; 2 Brock 20. *The obstruction of the ordinary* negotiations of trade by *vis major*. *Positive interdictions* and public regulations of the state which suspend commerce and intercourse. *The utter impracticability of finding* the maker or ascertaining his place of residence; Story, Pr. Notes §§ 205, 236, 238, 241, 264; 4 S. & R. 480; 14 La. An. 484; 3 M'Cord 494; 1 Dev. 247; 2 Cai. 121.

Among the latter, or special excuses for not making a presentment, may be enumerated the following. *The receiving the note by the holder* from the payee, or other antecedent party, too *late* to make a due presentment; this will be an excuse as to such party; 16 East 248; 7 Mass. 483; Story, Pr. Notes §§ 201, 265; 11 Wheat. 431; Byles, Bills 206. *The note being an accommodation note* of the maker for the benefit of the indorser; Story, Bills § 370. See 2 Brock. 20; 7 Harr. & J. 381; 7 Mass. 452; 1 Wash. C. C. 461; 1 Hayw. 271; 4 Mas. 413; 1 Cai. 157; 1 Stew. Ala. 175. A *special agreement* by which the indorser waives the presentment; 8 Me. 213; 11 Wheat. 629; Story, Bills § 371. *The receiving security or money by an endorser* to secure himself from loss, or to pay the note at maturity. In this case, when the indemnity or money is a full security for the amount of the note or bill, no presentment is requisite; Story, Bills § 374; Story, Pr. Notes § 281; 4 Watts 328; 9 Gill & J. 47; 7 Wend. 165; 2 Me. 207; 5 Mass. 170; 5 Conn. 175. *The receiving the note by the holder* from the indorser as a collateral security for another debt; Story, Pr. Notes § 284; Story, Bills § 372; 2 How. 427, 457.

Where a negotiable note is by its terms payable at a particular bank, proof of presentment at that bank for payment, at its maturity, is indispensable to a recovery in an action thereon against an endorser; 29 W. Va. 528.

A want of presentment may be waived by the party to be affected, after full knowledge of the fact; 8 S. & R. 438. See 6 Wend. 658; 3 Bibb 102; 5 Johns. 385; 4 Mass. 347; 8 Cush. 157; Bac. Abr. *Merchant, etc.* (M); 47 Mo. App. 151; 114 Mo. 276. See, generally, 1 Hare & W. Sel. Dec. 214, 224; Story, Pr. Notes; Byles, Bills; Parsons, Bills; Dan. Neg. Instr.; 12 L. R. A. 727.

**PRESENTS.** This word signifies the writing then actually made and spoken of: as, *these presents;* know all men by *these presents;* to all to whom *these presents* shall come.

**PRESERVATION.** Keeping safe from harm; avoiding injury. This term always presupposes a real or existing danger.

A jettison, which is always for the preservation of the remainder of the cargo, must therefore be made only when there is a real danger existing. See AVERAGE; JETTISON.

In certain cases the court may make orders for the preservation of the subject-matter of litigation. An order has been made for the sale of a horse which was consuming its value in food while an action on a warranty was pending; 3 C. P. D. 316; Brett, Comm. 762 See PERISHABLE GOODS.

**PRESIDENT.** An officer of a company who is to direct the manner in which business is to be transacted. From the decision of the president there is an appeal to the body over which he presides.

**PRESIDENT JUDGE.** A title sometimes given to the presiding judge. It was formerly used in England and is now used in the courts of common pleas in Pennsylvania. The lord chief justice is now permanent president of the high court in England. The title president is said to have a high Norman flavor. Inderwick, King's Peace 225.

**PRESIDENT OF A BANK.** This officer, under the banking system in the

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United States, is ordinarily a member of the board of directors of the bank, and is chosen by them. It is his duty to preside at all meetings of the board of directors; to exercise a constant, immediate, and personal supervision over the daily affairs of the bank; and to institute and carry on legal proceedings to collect demands or claims due the institution; Morse, Banks 144, citing 2 Metc. (Ky.) 240; 5 How. 83; Bolles, Bank Off. 1-70; 28 Vt. 24. Mortgages to secure subscriptions to stock are often put in his name; 1 Sandf. Ch. 179; but he has no more control over the property of the bank than any other director; 7 Ala. 281; 1 Seld. 320. He has no authority to release the claims of the bank without the authorization of the board of directors; 7 R. I. 224; 115 Mass. 547; and an agreement made by him, after the bank has gone into liquidation, to continue its guarantee upon certain notes, is not binding upon the stockholders; 133 U. S. 67. See NATIONAL BANKS; OFFICER. See, generally, Ball, Nat. Banks 58.

**PRESIDENT OF THE COUNCIL.** An officer of state who is a member of the cabinet. He attends on the sovereign, proposes business at the council table, and reports to the sovereign the transactions there. 1 Bla. Com. 230.

**PRESIDENT OF THE UNITED STATES OF AMERICA.** The title of the chief executive officer of the United States.

The constitution directs that the executive power shall be vested in a president of the United States of America. Art. 2, s. 1.

No person except a natural-born citizen, or a citizen of the United States at the time of the adoption of the constitution, shall be eligible to the office of president; neither shall any person be eligible to that office who shall not have attained the age of thirty-five years and been fourteen years resident within the United States. Art. 2, s. 1, par. 5.

He is chosen by presidential electors (*q. v.*). See 1 Kent 276; Story, Const. 5th ed. § 1453. The votes of the electors are transmitted to the vice-president and by him opened in the presence of both houses of congress and counted by tellers previously selected by the two houses separately. If there is no election, a president is chosen by the house of representatives, the members voting by states, from the candidates not exceeding three, having the highest number of electoral votes.

In case of a vacancy the vice-president succeeds, and if there be none then the members of the cabinet succeed in a prescribed order. See CABINET.

The president shall, at stated times, receive for his services a compensation which shall neither be increased nor diminished during the period for which he shall have been elected; and he shall not receive within that period any other emolument from the United States, or any of them. Art. 2, s. 1, par. 7. The act of March 3d, 1873, c. 226, fixed the salary of the president at fifty thousand dollars.

In addition to certain specified powers, the president is vested by the constitution with the executive power of the federal government and the duty of seeing that the laws are faithfully executed. As to his powers, generally, and the historical development of the executive office, see EXECUTIVE POWER.

The president and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors. Art 2, sec. 4.

**PRESIDENTIAL ELECTORS.** Persons chosen in the different states whose sole duty it is to elect a president and vice-president of the United States. Each state appoints a number of electors equal to the whole number of senators and representatives to which the state is entitled in congress, and it is within the power of the state legislature to direct how such electors shall be appointed. (Const. art. ii. sect. 1). The electors have frequently been appointed by the state legislatures directly, and they have been elected separately by congressional districts; but the more usual method of appointment is by general ballot, so that each voter in a state votes for the whole number of electors to which his state is entitled.

The appointment and mode of appointment of electors belong exclusively to the states, under the constitution; 146 U. S. 1.

The constitution provides, Amend. art. 12, that "the electors shall meet in their respective states, and vote by ballot for president and vice-president, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as president, and in distinct ballots the person voted for as vice-president; and they shall make distinct lists of all persons voted for as president, and of all persons voted for as vice-president, and of the number of votes for each, which list they shall sign and certify, and transmit, sealed, to the seat of the government of the United States, directed to the president of the senate." See PRESIDENT OF THE UNITED STATES; ELECTORAL COLLEGE.

**PRESS.** By a figure this word signifies the art of printing.

All men have a right to print and publish whatever they may deem proper, unless by doing so they infringe the rights of another, as in the case of copyrights (*q. v.*), when they may be enjoined. For any injury they may commit against the public or individuals they may be punished, either by indictment or by a civil action at the suit of the party injured, when the injury has been committed against a private individual. See U. S. Const. Amendm. art. 1; LIBERTY OF THE PRESS; LIBEL.

**PRESS COPIES.** The identity of the handwriting as shown on the impression

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is not destroyed, nor rendered unrecognizable by persons acquainted with its characteristics. A person having accurate knowledge can testify to the genuineness with as much accuracy as if the original sheets were before him. Such copies are the same as other writings partially obliterated by damp and exposure, which are admissible as evidence, if duly identified by testimony. They are not however satisfactory as standards of comparison of handwriting. Enough originality is left to be identified by a witness when its own originality is in question; 7 Allen 561; 1 Cush. 217; to prove the contents of a lost letter, or where a party refused to give up the original; 6 S. & R. 420; 19 La. An. 91; 37 Conn. 555. The necessity of producing the original, or laying the foundation in the usual way for secondary evidence, is not obviated by the fact that a party keeps letter press copies; 44 N. Y. 171; so in 35 Md. 123. A copy, sworn to be correctly made from a press copy of a letter, is admissible as secondary evidence, to prove its contents, without producing the press copy; 102 Mass. 362. Press copies are admissible against a party when they appear to be in his handwriting and the originals cannot be produced; 7 Allen 561. Strictly speaking, a letter-press copy is secondary to the document from which it is taken, and cannot be treated as an original; 3 Camp. 228; 4 McLean 378; 35 Md. 123; 19 La. An. 91; 31 Fed. Rep. 313. See, generally, 57 Ga. 50; 73 Ill. 161; 18 Kan. 546.

**PREST.** A duty in money that was to be paid by the sheriff on his account in the exchequer, or for money left or remaining in his hands. Cowell.

**PRESTATION.** A right by which neutral vessels may be appropriated by way of hire by a belligerent on payment of freight beforehand. In 1870 the Prussian troops sank six British vessels to obstruct navigation in the river Seine. The act was defended by Prussia on the ground of military necessity; indemnification was subsequently made; 1 Halleck, Int. L. 485.

**PRESTIMONY, OR PRÆSTIMONIA. In the Canon Law.** A fund or revenue appropriated by the founder for the subsistence of a priest, without being erected into any title or benefice, chapel, prebend, or priory. It is not subject to the ordinary; but of it the patron, and those who have a right from him, are the collators. Whart. Law Lex.

**PRESUME.** To believe or accept upon probable evidence. It is not so strong a word as infer; 46 Conn. 385. See INFERENCE; PRESUMPTION.

**PRESUMPTION.** An inference affirmative or disaffirmative of the truth or falsehood of any proposition or fact drawn by a process of probable reasoning in the absence of actual certainty of its truth or falsehood, or until such certainty can be ascertained. Best, Presump. 4.

An inference affirmative or disaffirmative of the existence of a disputed fact, drawn by a judicial tribunal, by a process of probable reasoning, from some one or more matters of fact, either admitted in the cause or otherwise satisfactorily established. Best, Presump. 12.

A rule of law that courts and judges shall draw a particular inference from a particular fact, or from particular evidence, unless and until the truth of such inference is disproved. Steph. Ev. 4; 136 N. Y. 120.

*Conclusive presumptions* are inferences which the law makes so peremptorily that it will not allow them to be overturned by any contrary proof, however strong. Best, Presump. 20. They are called, also, *absolute* and *irrebuttable* presumptions.

*Disputable presumptions* are inferences of law which hold good until they are invalidated by proof or a stronger presumption. Best, Presump. 29; 2 H. & M'H. 77; 4 Johns. Ch. 287.

*Presumptions of fact* are inferences as to the existence of some fact drawn from the existence of some other fact; inferences which common sense draws from circumstances usually occurring in such cases. 3 B. & Ad. 890; 3 Hawks 122; 1 Wash. C. C. 372.

*Presumptions of law* are rules which, in certain cases, either forbid or dispense with any ulterior inquiry. 1 Greenl. Ev. § 14. Inferences or positions established, for the most part, by the common, but occasionally by the statute, law, which are obligatory alike on judges and juries. Best, Presump. 17. They are either conclusive or disputable.

*Mixed presumptions* hold an intermediate place and consist of presumptive inferences which, from their strength, importance, or frequent occurrence, attract the observation of the law, and, from being constantly recommended by judges and acted on by juries, become as familiar to the courts as presumptions of law, and occupy as important a place in the administration of justice. They have been termed *quasi* legal presumptions, and are divided into three classes: 1st, Where the inference is one which common-sense would have made for itself; 2d, Where an artificial weight is attached to the evidentiary facts, beyond their mere natural tendency to produce belief; and 3d, Where from motives of legal policy, juries are recommended to draw inferences which are purely artificial. Chamb. Best, Ev. § 324.

The distinctions between presumptions of law and presumptions of fact are—*first*, that in regard to presumptions of law a certain inference must be made whenever the facts appear which furnish the basis of the inference; while in case of other presumptions a discretion more or less extensive is vested in the tribunal as to drawing the inference. See 9 B. & C. 643. *Second*, in case of presumptions of law, the court may draw the inference whenever the requisite facts are developed in pleading;

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Steph. Pl. 382; while other presumptions can be made only by the intervention of a jury. Presumptions of law are reduced to fixed rules, and form a part of the system of jurisprudence to which they belong; presumptions of fact are derived wholly and directly from the circumstances of the particular case, by means of the common experience of mankind. See 2 Stark. Ev. 684; 35 Pa. 440.

It has been said that a more useful and accurate division of presumptions of fact is obtained by treating them with reference to their effect upon the burden of proof and designating them in this aspect as *slight* and *strong;* Chamb. Best, Ev. § 319. Slight presumptions, though sufficient to excite suspicion or produce an impression in favor of the truth of the facts they indicate, do not, when taken singly, either constitute proof or shift the burden of proof; *id.* Strong presumptions shift the burden of proof even though the evidence to rebut them involved the proof of a negative; *id.* § 321. These are of great weight and in the absence of other evidence are decisive in civil cases; *id.* § 322. It has been suggested as the characteristic distinction between presumptions of law and presumptions of fact, either simple or mixed, that when the former are disregarded by a jury, a new trial is granted as matter of right, but that the disregard of any of the latter, however strong and obvious, is only ground for a new trial at the discretion of the court; Chamb. Best, Ev. § 327; 1 Term 167; 44 Ala. 159; 31 Ga. 331.

The lack of precision which attaches to the use of the word presumption springs naturally from the variety of the uses to which the word is applied. Of these Prof. J. B. Thayer in his pamphlet on the Presumption of Innocence enumerates seven: (1) The presumption of facts properly defined, where a fact or set of facts furnishes evidence or inference of another. (2) The presumption of law properly defined, as, where a fact or set of facts is considered sufficient evidence of another in the absence to the contrary. (3) Where a fact or set of facts makes out a case which shall stand until overthrown by a specific quantity of evidence; (*a*) sufficient to satisfy a jury; (*b*) a preponderance; (*c*) evidence beyond a reasonable doubt. (4) Where the term is used to imply that a certain fact is the legal equivalent of another fact; *e. g.* the presumption of malice. (5) Where the contrary of the so-called presumption is not to be taken as true without evidence, the effect being to regulate the burden of proof. (6) Where neither a fact nor the contrary of it is to be assumed as true without evidence, the presumption being of the truth of what is termed a neutral fact, or in other words, that there is no presumption; as in case of shipwreck where there is no presumption of survivorship. 8 H. L. Cas. 183. (7) Where the word is used as a rhetorical term to express a legal doctrine as the presumption of innocence. See, for a discussion of this classification and a collection of cases relating thereto, Chamb. Best, Ev. 306.

In giving effect to presumptions of fact, it is said that the presumption stands until proof is given of the contrary; 1 Cr. M. & R. 895; 2 H. & M'H. 77; 2 Dall. 22; 4 Johns. Ch. 287. See BURDEN OF PROOF; ONUS PROBANDI. This contrary proof may be a conflicting presumption; and Mr. Best lays down the following rules for application in such cases: *first*, special presumptions take the place of general ones; see 8 B. & C. 737; 9 *id.* 643; 5 Taunt. 326; 1 Marsh. 68; *second*, presumptions derived from the ordinary course of nature are stronger than casual presumptions; 4 B. & C. 71; Co. Litt. 373 *a*; *third*, presumptions are favored which tend to give validity to acts; 1 Mann. & R. 668; 3 Camp. 432; 7 B. & C. 573; 2 Wheat. 70; 1 South. 148; 7 T. B. Monr. 344; 2 Gill & J. 114; 10 Pick. 359; 1 Rawle 386; 72 Mich. 446; 38 Minn. 143; and see MAXIMS, *Omnia præsumuntur*, etc.; *fourth*, the presumptions of innocence is favored in law; 4 C. & P. 116; Russ. & R. 61; 10 M. & W. 15.

Among conclusive presumptions may be reckoned *estoppels* by deed, see ESTOPPELS; *solemn admissions*, of parties, and *unsolemn admissions* which have been acted on; 1 Camp. 139; 1 Taunt. 398; 15 Mass. 82; see ADMISSIONS; 1 Greenl. Ev. § 205; *that a sheriff's return is correct* as to facts stated therein as between the parties; 15 Mass. 82; *that an infant under the age of seven years* is incapable of committing a felony; 4 Bla. Com. 23; see 84 Ky. 457; *that a boy under fourteen* is incapable of committing a rape; 7 C. & P. 582; *contra*, 5 Lea 352; 84 Ky. 457; that children born in wedlock are presumed to be legitimate; 2 Allen 453; 75 Ill. 315; 2 Bush 621; 75 Cal. 379; at least where the husband might have had access and though the infidelity of the wife be proved; 3 C. & P. 215; 5 Cl. & F. 163; and positive proof of non-access is required to rebut the presumption; 58 Vt. 49; 85 Va. 245; and it cannot be proved by the wife; 60 Wis. 583; *that despatches of an enemy* carried in a neutral vessel between two hostile ports are hostile; 6 C. Rob. 440; *that all persons subject to any law* which has been duly promulgated, or which derives its validity from general or immemorial custom, are acquainted with its provisions; 4 Bla. Com. 27; 1 Co. 177; 2 *id.* 3 *b*; 6 *id.* 54 *a*. See, also, LIMITATION; PRESCRIPTION.

A person not heard from for seven years by those who would probably have heard from him if alive is presumed to be dead; 1 Greenl. Ev. § 41; Chamb. Best, Ev. 304, note citing cases; 180 Pa. 644; and though the time at which death is presumed to have taken place is a subject of controversy, the better opinion is that there is no presumption as to that; Chamb. Best, Ev. 305; 2 Brett, Com. 941; 2 M. & W. 894; and the onus is on the person whose case requires proof of death at a particular period; 75 Ala. 27; 72 Wis. 170; 13 Ired. Law 333; 8 U. C. Q. B. 291; though in

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some cases it has been held that death will be presumed at the end of seven years; 11 N. H. 197; 15 N. J. Eq. 119; 4 Bradf. Sur. N. Y. 117; 4 U. C. Q. B. 510. In most states this subject is regulated by statute but it is held that the statutory presumption of death from absence or concealment for seven years, without having been heard from, does not apply to children of tender age, incapable of absenting or concealing themselves of their own volition, and whose movements are governed by others; 73 Miss. 417. In order to establish a presumption of death the place to look for the person is his last known place of residence, and not the place from which he has removed; 183 Pa. 155. See, as to presumption of death, 8 Eng. Rul. Cas. 512–553.

Among rebuttable presumptions may be reckoned the presumptions that a *man is innocent* of the commission of a crime; Steph. Ev. 97; 2 Lew. Cr. Cas. 227; see 3 Gray 465; 4 B. & C. 247; 2 B. & Ald. 385; 23 Neb. 33; 44 N. J. Eq. 329; that *the possessor of property* is its owner; 1 Stra. 505; 9 Cush. 150; 21 Barb. 333; 35 Me. 139, 150; 113 N. Y. 284; 4 Harring. 327; that buildings belong to the owner of the land on which they stand; 150 U. S. 483; that possession of real property accompanies ownership; 120 U. S. 605; that *possession of the fruits of crime* is guilty possession; 2 C. & P. 359; 1 Den. Cr. Cas. 596; 7 Vt. 122; 9 Conn. 527; 19 Me. 398; 111 N. Y. 569; 25 Tex. App. 751; that *things usually done in the course of trade* have been done; 8 C. B. 827; 7 Q. B. 846; 7 Wend. 198; 9 S. & R. 385; 9 N. H. 519; 10 Mass. 205; 7 Gill 34; 45 Me. 516, 550; 15 Conn. 206; and in the usual and ordinary way; 96 Mo. 591; that *solemn instruments are duly executed;* 1 Rob. Eccl. 10; 9 C. & P. 570; 15 Me. 470; 1 Metc. 349; 15 Conn. 206; that a *person, relation, or state of things* once shown to exist continues to exist, as, *life;* 2 Rolle 461; 1 Pet. 452; 3 McLean 390; see 2 Camp. 113; 14 Sim. 28, 277; 19 Pick. 112; 1 Ga. 538; 11 N. H. 191; 36 Me. 176; 13 Ired. 333; 1 Penn. N. J. 167; 18 Am. L. Reg. N. S. 639; 22 Alb. L. J. 38; 14 Cent. L. J. 86; 126 Pa. 297; 69 Tex. 19; see DEATH; a *partnership;* 1 Stark. 405; *insanity;* 3 Bro. C. C. 443; 3 Metc. Mass. 164; 39 N. H. 163; 4 Wash. C. C. 262; 5 Johns. 144; 1 Pet. C. C. 163; 2 Va. Cas. 132; 24 Alb. L. J. 304; 100 N. C. 457; that *official acts have been properly performed;* 1 J. J. Marsh. 447; 14 Johns. 182; 19 *id.* 345; 3 N. H. 310; 3 Gill & J. 359; 12 Wheat. 70; 7 Conn. 350; 35 Fed. Rep. 134; 120 U. S. 605; but see 84 Wis. 135; that *statutes of other states* are the same as those of the state in which the court is sitting; 40 La. Ann. 766; 125 Pa. 204; 144 *id.* 205; 85 Tenn. 616; 35 Neb. 375; 76 Hun 200; 93 Cal. 172; but see 50 Ark. 237; that a *mature male has normal powers* of virility; 81 Ga. 144; that a *child was born* in lawful wedlock; 127 Ill. 554; that a *person has testamentary capacity;* 45 N. J. Eq. 708; that he is *sane;* 127 Ill. 523; 26 Neb. 655; *identity of person* is presumed from identity of name; 75 Cal. 98, 240; 83 Ala. 528; *homicide* committed by means of a deadly weapon, creates a presumption of malice; 83 Ala. 33; 100 N. C. 512; that a *vote is legal;* 40 Kan. 270; 97 Mo. 311; 98 N. C. 591; that a letter duly directed and mailed, was received by the person to whom it was directed, in the regular course of mail; 63 Hun 624; 147 Ill. 176; 141 U. S. 25.

A favorite maxim is that *ignorantio legis neminem excusat*, or that every one is conclusively presumed to know the law. There is no such presumption in fact; 2 C. B. 720; L. R. 3 Q. B. 629. The fact is simply that it is a rule of public policy that ignorance of the law shall not be set up as a defence against legal liability; 11 Blatch. 200; 37 Miss. 379; 7 Pick. 279. In many cases a commonly accepted misconstruction of law has been held sufficient excuse; 80 Pa. 430; 2 Black 872; 21 Wall. 178; 91 U. S. 45; 36 N. J. L. 125; 43 Ala. 197.

Another very much misused maxim is that one is presumed to intend the natural consequence of his act. This has been characterized as "merely a fantastic transference into the law of evidence of the phraseology of positive law;" Chamb. Best, Ev. 310; 10 Cush. 373; 7 Md. 108. So far as it is a rule of law it means simply that mere carelessness is not a ground of defence against legal liability; 72 N. Y. 90; 80 Ill. 28; 23 Vt. 151; 8 Cal. 113; 100 Mass. 505.

There is a presumption of jurisdiction which attaches to the record of the judgment or the decree of a court of general jurisdiction in another state, and where the record discloses nothing in regard to the service of process or notice and no evidence is given on the subject, jurisdiction over the person will be presumed; 154 N. Y. 333, affirming 12 App. Div. N. Y. 278.

Consult Greenleaf, Starkie, Phillips, Wharton, Stephen, on Evidence; Best, Matthews, on Presumptive Evidence; Russell on Crimes.

**PRESUMPTIVE EVIDENCE.** See EVIDENCE.

**PRESUMPTIVE HEIR.** See HEIR PRESUMPTIVE.

**PRESUMPTIVE TITLE.** See TITLE.

**PRET A USAGE.** (Fr. loan for use). A phrase used in the French law instead of *commodatum.*

**PRETENDED TITLE STATUTE.** The statute 32 Hen. VIII. c. 9, § 2. It enacts that no one shall sell or purchase any pretended right or title to land, unless the vendor hath received the profits thereof for one whole year before such grant, or hath been in actual possession of the land, or of the reversion or remainder, on pain that both purchaser and vendor shall each forfeit the value of such land to the king and the prosecutor.

**PRETENSION. In French Law.** The claim made to a thing which a party



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believes himself entitled to demand but which is not admitted or adjudged to be his.

The words *right*, *actions*, and *pretensions* are usually joined; not that they are synonymous, for *right* is something positive and certain, *action* is what is demanded, while *pretension* is sometimes not even accompanied by a demand.

**PRETERITION** (Lat. *præter* and *eo*, to go by). **In Civil Law.** The omission by a testator of some one of his heirs who is entitled to a legitime (*q. v.*) in the succession.

Among the Romans, the preterition of children when made by the mother was presumed to have been made with design; the preterition of sons by any other testator, was considered as a wrong, and avoided the will, except the will of a soldier in service, which was not subject to so much form.

**PRETEXT** (Lat. *prætextum*, woven before). The reasons assigned to justify an act, which have only the appearance of truth, and which are without foundation, or which, if true, are not the true reasons for such act. Vattel, liv. 3, c. 3, § 32.

Ostensible reason or motive assigned or assumed as a color or cover for the real reason or motive; false appearance, pretence. 27 Neb. 604.

**PRETIUM AFFECTIONIS** (Lat.). An imaginary value put upon a thing by the fancy of the owner in his affection for it or for the person from whom he obtained it. Bell, Dict.

When an injury has been done to an article, it has been questioned whether in estimating the damage there is any just ground, in any case, for admitting the *pretium affectionis*. It seems that when the injury has been done accidentally by culpable negligence, such an estimation of damages would be unjust, but when the mischief has been intentional it ought to be so admitted. Kames, Eq. 74, 75.

**PRETIUM PERICULI.** The price of the risk, *e. g.* the premium paid on a policy of insurance; also the interest paid on money advanced on bottomry or respondentia.

**PRETORIUM.** A court house or hall of justice. 3 How. St. Tr. 425.

**PREVAILING PARTY.** To be such does not depend upon the degree of success at different stages of the suit, but whether, at the end of the suit, or other proceeding, the party who has made a claim against the other, has successfully maintained it. 60 Me. 286. See 53 Mo. 330.

**PREVARICATION. In Civil Law.** The acting with unfaithfulness and want of probity. The term is applied principally to the act of concealing a crime. Dig. 47. 15. 6.

**PREVENT.** To hinder; to obstruct; to intercept. 20 Ark. 185. It is held not to mean to obstruct by physical force; 17 Q. B. 145.

**PREVENTION** (Lat. *prevenire*, to come before). **In Civil Law.** The right of a judge to take cognizance of an action over which he has concurrent jurisdiction with another judge.

In Pennsylvania it has been ruled that a justice of the peace cannot take cognizance of a cause which has been previously decided by another justice. 2 Dall. 77, 114.

**PREVIOUS QUESTION.** In parliamentary practice, the question whether a vote shall be taken on the main issue, or not, brought forward before the main or real question is put by the speaker and for the purpose of avoiding, if the vote is in the negative, the putting of this question. The motion is in the form "that the question be now put," and the mover and seconder vote against it.

In the house of representatives of the United States and in many state legislatures the object of moving the previous question is to cut off debate and secure immediately a vote on the question under consideration.

**PREVIOUSLY.** An adverb of time, used in comparing an act or state named, with another act or state, subsequent in order of time, for the purpose of asserting the priority of the first. 40 Ia. 94.

**PRICE.** The consideration in money given for the purchase of a thing.

It is not synonymous with value; 51 Kan. 408.

There are three requisites to the quality of a price in order to make a sale.

It must be *serious* and such as may be demanded; if, therefore, a person were to sell me an article, and by the agreement, reduced to writing, he were to release me from the payment, the transaction would no longer be a sale, but a gift. Pothier, *Vente*, n. 18.

It must be *certain* and *determinate;* but what may be rendered certain is considered as certain; if, therefore, I sell a thing at a price to be fixed by a third person, this is sufficiently certain, provided the third person make a valuation and fix the price; Pothier, *Vente*, n. 23; 2 Sumn. 539; 4 Pick. 179; 13 Me. 400; 2 Ired. 36; 3 Pa. 50; 2 Kent 477. When the parties have not expressed any price in their contract, the presumption of law is that the thing is sold for the price it generally brings at the time and place where the agreement was made; 3 T. B. Monr. 133; 6 H. & J. 273; Coxe 261; 10 Bingh. 376; 11 U. C. Q. B. 545.

The third quality of a price is that it consists in money, to be paid down, or at a future time; for if it be of anything else it will no longer be a price, nor the contract a sale, but exchange or barter; Pothier, *Vente*, n. 30; 16 Toullier, n. 147; 12 N. H. 390; 10 Vt. 457; see, 54 N. Y. 173, where it was held that *price* in an act meant *value* or *compensation*.

The true price of a thing is that for which things of a like nature and quality are usually sold in the place where situated, if real property; in the place where exposed

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to sale, if personal; Pothier, *Vente*, n. 243. The first price or cost of a thing does not always afford a sure criterion of its value. It may have been bought very dear or very cheap; Ayl. Parerg. 447; Merlin, *Répert*; 4 Pick. 179; 16 *id.* 227.

In a declaration in trover it is usual, when the chattel found is a living one, to lay it as of such a price; when dead, of such a value; 8 Wentw. Pl. 372, n.; 2 Lilly, Abr. 629.

Lord Tenterden's act has substituted *value* for *price* in the English statute of frauds; 25 L. J. C. P. 257. See Campb. Sales 162; COST.

**PRICE CURRENT.** A list or enumeration of various articles of merchandise, with their prices, the duties (if any), payable thereon, when imported or exported, with the drawbacks occasionally allowed upon their exportation. Wharton.

**PRIDE GAVEL.** A rent or tribute. Tayl. Gavelk. 112.

**PRIEST.** An officer in the second order of ministry in the church.

**PRIMA FACIE** (Lat.). At first view or appearance of the business; as the holder of a bill of exchange, indorsed in blank, is *prima facie* its owner.

*Prima facie* evidence of fact is in law sufficient to establish the fact, unless rebutted; 6 Pet. 622, 632; 14 *id.* 334. See, generally, 7 J. J. Marsh. 425; 3 N. H. 484; 7 Ala. 267; 5 Rand. 701; 1 Pick. 332; 1 South. 77; 1 Yeates 347; 2 N. & M'C. 320; 1 Mo. 334; 11 Conn. 95; 2 Root 286; 16 Johns. 66, 136; 1 Bail. 174; 2 A. K. Marsh. 244; 97 U. S. 3. For example, when buildings are fired by sparks emitted from a locomotive engine passing along the road, it has been held to be *prima facie* evidence of negligence on the part of those who have the charge of it; 3 C. B. 229; and proof of the mailing of a letter is *prima facie* evidence of its receipt by the person to whom it is addressed; 147 Ill. 176; 27 S. W. Rep. (Mo.) 436; 63 Hun 624.

**PRIMA TONSURA** (Lat.). A grant of a right to have the first crop of grass. 1 Chitty, Pr. 181.

**PRIMAGE. In Mercantile Law.** A duty payable to the master and mariners of a ship or vessel,—to the master for the use of his cables and ropes to discharge the goods of the merchant, to the mariners for lading and unlading in any port or haven. Abb. Sh. 270.

A small payment to the master for his care and trouble which he is to receive for his own use, unless he has otherwise agreed with the owner. Abb. Sh. 13th ed. 531; it is of a very ancient date and subject to authority and regulations. "In the 'Guidon,' it is called *la contribution des chausses ou pot de vin du maître.*" It is sometimes called the master's hat-money;" *id.*

It is no longer a gratuity to the master, unless especially stipulated; but it belongs to the owners or freighters, and is nothing but an increase of the freight rate; 14 Fed. Rep. 421.

**PRIMARY.** That which is first or principal: as, *primary evidence*, that evidence which is to be admitted in the first instance, as distinguished from secondary evidence, which is allowed only when primary evidence cannot be had.

**PRIMARY ELECTION.** A popular election held by members of a particular political party, for the purpose of choosing delegates to a convention empowered to nominate candidates for that party to be voted for at an approaching election. 125 Ind. 210. In many states they are regulated by law and frauds are punishable as in a general election.

**PRIMARY EVIDENCE.** The best evidence of which the case in its nature is susceptible. 3 Bouvier, Inst. n. 3053. See Steph. 67; EVIDENCE.

**PRIMARY OBLIGATION.** An obligation which is the principal object of the contract: for example, the primary obligation of the seller is to deliver the thing sold, and to transfer the title to it. It is distinguished from the accessory or secondary obligation to pay damages for not doing so. 1 Bouvier, Inst. n. 702.

**PRIMARY POWERS.** The principal authority given by a principal to his agent: it differs from *mediate powers*. Story, Ag. § 58.

**PRIMATE. In Ecclesiastical Law.** An archbishop who has jurisdiction over one or several other metropolitans.

**PRIME.** In a contract for delivery of "prime barley" prime will be understood according to its use among merchants. 14 Mo. 9.

*Prime cost*, the true price paid for goods upon a *bona fide* purchase. 2 Mas. 53.

**PRIME MINISTER.** See CABINET; PREMIER.

**PRIME SERJEANT.** The Queen's first serjeant at law.

**PRIMER ELECTION.** A term used to signify first choice.

In England, when coparcenary lands are divided, unless it is otherwise agreed, the eldest sister has the first choice of the purparts: this part is called the *enitia pars*. Sometimes the oldest sister makes the partition; and in that case, to prevent partiality, she takes the last choice. Hob. 107; Litt. §§ 243; 245; Bac. Abr. *Coparceners* (U)

**PRIMER FINE.** The fine due the crown by ancient prerogative on suing out the writ of præcipe. 1 Steph. Com. 560.

**PRIMER SEISIN. In English Law.** The right which the king had, when any of his tenants died seised of a knight's fee, to receive of the heir, provided he were of

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full age, one whole year's profits of the lands, if they were in immediate possession; and half a year's profits, if the lands were in reversion, expectant on an estate for life. 2 Bla. Com. 66. See FEUDAL LAW.

**PRIMICERIUS.** The first of any degree of men. 1 Mon. Ang. 838.

**PRIMO BENEFICIO.** A writ directing a grant of the first benefice in the sovereign's gift. Cowell.

**PRIMOGENITURE.** The state of being first born; the eldest.

At common law, in cases of the descent of land, primogeniture gave a title to the oldest son in preference to the other children. This distinction has been abolished in the United States. Formerly in Pennsylvania, in cases of intestacy, the oldest son took a double portion of the real estate; 1 Binn. 91, where it was held that a trust estate (the legal title) descends as at common law; and this case was followed in Delaware; 4 Houst. 648.

The law of primogeniture has not been altered in England; see however the radical act of 1897, cited in LAND TRANSFER.

**PRIMOGENITUS** (Lat.). The first-born. 1 Ves. 290. And see 3 Maule & S. 25; 8 Taunt. 468; 3 Vern. 660.

**PRIMUM DECRETUM** (Lat.). In the courts of admiralty, this name is given to a provisional decree. Bacon, Abr. *The Court of Admiralty* (E).

**PRINCE.** In *a general sense*, a sovereign; the ruler of a nation or state. The son of a king or emperor, or the issue of a royal family: as, princes of the blood. The chief of any body of men.

**PRINCE OF WALES.** A title given to the eldest son of the British sovereign or to the heir apparent to the crown.

**PRINCES OF THE BLOOD.** The younger sons of the British sovereign and male members of other branches of the royal family not in the direct line of succession.

**PRINCE EDWARD ISLAND.** A province of the Dominion of Canada. Its government is vested in a lieutenant-governor and a ministry of nine members. Its legislature consists of a council of thirteen members and a house of assembly of thirty members, both elected by the people. Charlottetown is the seat of government. The judicial establishment consists of the chief justice of the supreme court and two assistant judges, and three county court judges.

**PRINCIPAL.** Leading; chief; more important.

This word has several meanings. It is used in opposition to *accessary*, to show the degree of crime committed by two persons. Thus, we say, the principal is more guilty than the accessary after the fact.

In estates, principal is used as opposed to *incident* or *accessary*: as in the following rule: "The incident shall pass by the grant of the principal; but not the principal by the grant of the incident: *accessorium non ducit sed sequitur suum principale.*" Co. Litt. 152 *a*.

It is used in opposition to *agent*, and in this sense it signifies that the principal is the prime mover.

It is used in opposition to *interest*: as, the principal being secured, the interest will follow.

The corpus or capital of the estate in contradistinction to the income.

Money bearing interest; a capital sum lent on interest.

It is used also in opposition to *surety*: thus, we say, the principal is answerable before the surety.

Principal is used also to denote the more important: as, the principal person.

In the English law, the chief person in some of the inns of chancery is called principal of the house. Principal is also used to designate the best of many things: as, the principal bed, the principal table, and the like.

**In Contracts.** One who, being competent *sui juris* to do any act for his own benefit or on his own account, confides it to another person to do for him. 1 Domat b. 1, tit. 15, Introd.; Story, Ag. § 3.

Every one of full age, and not otherwise disabled, is capable of being a principal; for it is a rule that whenever a person has power, as owner, or in his own right, to do a thing, he may do it by another; Com. Dig. *Attorney* (C 1); Heineccius, ad Pand. p. 1,l. 3, tit. 1, § 424; 9 Co. 75 *b*; Story, Ag. § 6. Infants are generally incapable of appointing an agent; but under special circumstances they may make such appointments. For instance, an infant may authorize another to do any act which is beneficial to him, but not to do an act which is to his prejudice; 2 Kent 233; 9 Co. 75; 3 Burr. 1804; 6 Cow. 393; 10 Ohio 37; 10 Pet. 58, 69; 14 Mass. 463. A married woman could not, in general, appoint an agent or attorney; and when it was requisite that one should be appointed, the husband usually appointed for both. She might, perhaps, dispose of or incumber her separate property, through an agent or attorney; Cro. Car. 165; 2 Bulstr. 13; but this seemed to be doubted; Cro. Jac. 617; 1 Brownl. 134; Ad. Ej. 174. Idiots, lunatics, and other persons *sui juris* are wholly incapable of appointing an agent; Story, Ag. § 6.

The general principle which governs the liability of a principal is that the responsibility is measured by the character and extent of the authority given; see AGENCY; AGENT; for example, authority to an agent to vote at a corporate meeting upon the stock of his principal does not empower the former to act for the latter in connection with other stockholders, who were also creditors of the corporation, in taking

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measures for cancelling a mortgage of the corporation under which the claims of the principal and those stockholders against the corporation were secured; 112 Ala. 228. The powers of the agent must be measured and determined by the application to each particular case of ordinary business principles, and sound judgment to be exercised by the agent in executing his authority, and by the court which is to deal with the case in considering the question of the responsibility of the principal. Where a discretion has been conferred upon the agent the principal must abide the result of its exercise and will be held liable to third persons where it has been honestly exercised. So where an agent has power to borrow money on exceptional terms in cases of emergency, a lender is not bound to inquire whether in the particular case the emergency has or has not arisen; 15 L. R. App. 357. And where the agent was entrusted with securities and instructed by the principal to raise a certain sum upon them, but borrowed a larger sum and fraudulently appropriated the difference, the principal could not redeem the securities without paying the lender in full where he had acted *bona fide* and in ignorance of the limitation, although he had no knowledge of the agent's authority to borrow and made no inquiry, and the agent practised fraud and forgery to obtain the loan; [1895] App. Cas. 173, affirming [1895] 3 Ch. 130.

The principal is entitled to the service of the agent with respect to the matter in hand as though the agent were attending to his own business; and the latter will be considered, to that extent, as merging his own individuality and will be held to act entirely for the benefit of the principal. He cannot make a profit out of the business which he transacts for the principal derived from any knowledge acquired by him in the course of it, except consistently with the engagements between the principal and agent. So where an agent, acting in a confidential capacity, obtained information of a defect in his principal's title and put in an outstanding claim through a third party, it was held that he could not profit by his purchase but held the title for his principal; 12 U. S. App. 606. On the other hand, a principal cannot retain the fruit of his agent's acts and yet disclaim his authority in order to escape the corresponding obligation. Where a corporation obtained from the plaintiff the right to construct a road in front of his property and constructed it, it could not refuse to recognize its agent's authority to bind it to pay the sum he agreed to pay; 47 N. Y. Supp. 327. It is said in this case that agency cannot be proved by the uncorroborated testimony of the agent, nor can any implication of consent to the work done arise, in the absence of proof of knowledge that it was being done.

The rights to which principals are entitled arise from obligations due to them by their agents or by third persons.

The rights of principals in relation to their agents are—*first*, to call them to an account at all times in relation to the business of the agency; 2 Bouvier, Inst. 28. *Second*, when the agent violates his obligations to his principal, either by exceeding his authority, or by positive misconduct, or by mere negligence or omissions in the discharge of the functions of his agency, or in any other manner, and any loss or damage falls on his principal, the latter will be entitled to full indemnity; Story, Ag. § 217 c; 12 Pick. 328; 6 Hare 366; 7 Beav. 176. But the loss of damage must be actual, and not merely probable or possible; Story, Ag. § 222; Paley, Ag. 7, 8, 74, 75. But see *id.* 74, *note* 2. *Third*, where both the principal and agent may maintain a suit against a third person for any matter relating to the agency, the principal has a right to supersede the agent by suing in his own name; and he may by his own intervention intercept, suspend, or extinguish the right of the agent under the contract; Story, Ag. § 403; 4 Camp. 194; 3 Hill, N. Y. 72, 73; 6 S. & R. 27; 2 Wash. C. C. 223; 1 Maule & S. 576. See 57 Fed. Rep. 463. But, as we shall presently see, an exception to this rule arises in favor of the agent, to the extent of any lien, or other interest, or superior right, he may have in the property; Story, Ag. §§ 393, 397, 407, 424. The principal has a right to determine or revoke the authority given to his agent, at his own mere pleasure, where not otherwise agreed between them; 141 U. S. 627.

Agents are not entitled to use the materials gained or collected by them in the cause of their employment to the detriment of their principal; [1893] 1 Ch. 218.

In general, the principal, *as against third persons*, has a right to all the advantages and benefits of the acts and contracts of his agent, and is entitled to the same remedies against such third persons, in respect to such acts and contracts, as if they were made or done with him personally; Story, Ag. §§ 418, 420; Paley, Ag. 323; 8 La. 296; 2 Stark. 443. See 103 Cal. 43. But to this rule there are the following exceptions. *First*, when the instrument is under seal, and it has been exclusively made between the agent and the third person, as, for example, a charter-party or bottomry bond made by the master of a ship in the course of his employment, in this case the principal cannot sue or be sued on it; Story, Ag. § 422; Abb. Sh. pt. 3, ch. 1. § 2; 4 Wend. 285; 1 Paine 251; 3 Wash. C. C. 560. *Second*, when an exclusive credit is given to and by the agent, and therefore the principal cannot be considered in any manner a party to the contract, although he may have authorized it and be entitled to all the benefits arising from it. The case of a foreign factor buying or selling goods is an example of this kind; he is treated, as between himself and the other party, as the sole contractor, and the real principal cannot sue or be sued on the contract. This, it has been well observed, is a general rule of com-

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mercial law, founded upon the known usage of trade; and it is strictly adhered to, for the safety and convenience of foreign commerce; Story, Ag. § 425; 9 B. & C. 87; 4 Taunt. 574. *Third*, when the agent has a lien or claim upon the property bought or sold, or upon its proceeds, which is equal to or exceeds the amount of its value, the principal cannot sue without the consent of the agent; Story, Ag. §§ 403, 407, 424.

But contracts are not unfrequently made without mentioning the name of the principal. In such case he may avail himself of the agreement; for the contract will be treated as that of the principal as well as of the agent. If, however, the person with whom the contract was made, *bona fide* dealt with the agent as owner, he will be entitled to set off any claim he may have against the agent, in answer to the demand of the principal; and the principal's right to enforce contracts entered into by his agent is affected by every species of fraud, misrepresentation, or concealment of the agent which would defeat it if proceeding from himself; Story, Ag. §§ 420, 440; 2 Kent 632; Paley, Ag. 324; 3 B. & P. 490; 24 Wend. 458.

Where the principal gives notice to the debtor not to pay money to the agent, unless the agent has a superior right, from a lien or otherwise, the amount of any payment afterwards made to the agent may be recovered by the principal from the debtor; Story, Ag. § 429; 4 Camp. 60; 6 Cow. 181, 186. Money paid by an agent may also be recovered by the principal under any of the following circumstances: *first*, where the consideration fails; *second*, where money is paid by an agent through mistake; *third*, where money is illegally extorted from an agent in the course of his employment; *fourth*, where the money of the principal has been fraudulently applied by the agent to an illegal and prohibited purpose; Paley, Ag. 335. When goods are intrusted to an agent for a specific purpose, a delivery by him for a different purpose, or in a manner not authorized by the commission, passes no property in them, and they may, therefore, be reclaimed by the owner; Paley, Ag. 340; 3 Pick. 495. Third persons are also liable to the principal for any tort or injury done to his property or rights in the course of the agency. If both the agent and third person have been parties to the tort or injury, they are jointly as well as severally liable to the principal, and he may maintain an action against both or either of them. Story, Ag. § 436; 3 Maule & S. 562.

The liabilities of the principal are either to his agent or to third persons. The liabilities of the principal to his agent are—to reimburse him all his advances, expenses, and disbursements lawfully incurred about the agency, and also to pay him interest upon such advances and disbursements whenever interest may fairly be presumed to have been stipulated for or to be due to the agent; Story, Ag. § 335; Story, Bailm. 196, 197; Paley, Ag. 107, 108; *second*, to pay him his commissions as agreed upon, or according to the usage of trade, except in cases of gratuitous agency; Story, Ag. § 324; Paley, Ag. 100; *third*, to indemnify the agent when, without his own default, he has sustained damages in following the directions of his principal: for example, when the agent has innocently sold the goods of a third person, under the direction or authority of his principal, and a third person recovers damages against the agent, the latter will be entitled to reimbursement from the principal; Story, Ag. § 339; 9 Metc. Mass. 212.

The principal is bound to fulfil all the engagements made by the agent for or in the name of the principal, which come within the scope of his usual employment, although the agent in the particular instance has in fact exceeded or violated his private instructions; Story, Ag. 443; 4 Watts 222; 21 Vt. 129; 26 Me. 84; 1 Wash. C. C. 174; 114 N. Y. 415; 98 Mo. 478. See [1893] 1 Q. B. 346. And where an exclusive credit is not given to the agent, the principal is liable to third persons upon contracts made by his agent within the scope of his authority, although the agent contracts in his own name and does not disclose his agency; Story, Ag. § 446. But if the principal and agent are both known, and exclusive credit be given to the latter, the principal will not be liable though the agent should subsequently become insolvent; Story, Ag. § 447. When goods are sold to a person who in fact is the agent of another, but the seller has no knowledge of the agency, the latter may elect to make the principal his debtor on discovering him; 48 Conn. 314; 50 Ark. 433. The same principle applies where the seller is informed at the time of the sale that the buyer is an agent, but is not informed who the principal is; 9 B. & C. 78; 2 Metc. 319. Where money is paid by a third person to the agent, by mistake or upon a consideration that has failed, the principal will be liable to repay it although he may never have received it from his agent; Story, Ag. § 451; Paley, Ag. 293; 2 Esp. 509.

An interesting collection of cases illustrating the doctrine of the liability of the principal for the act of the agent is the subject of an annotation in 35 Am. L. Reg. N. S. 530, as to the authority of officers of corporations to employ physicians and nurses in cases of accident to employes or others. It has been held that the superintendent or general manager of a railroad company has the authority to employ a physician in such cases; 126 Ind. 99; 28 Mich. 289; 24 Kan. 328; L. R. 2 Ex. 228. Such employment was sustained in the case of any superior officer, where no higher one was present; as, a division superintendent; 52 Kan. 433; a conductor; 121 Ind. 353; 22 Fla. 356; a master mechanic; 19 Kan. 256; a yard master; 28 Mich. 289; and a station agent; 3 Ex. 268. In any case the company will be bound if the employment be ratified by the superintend-

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ent; 98 Ind. 391; 19 Kan. 256. There is no inherent power in the general manager, but the question of his delegated authority is for the jury; 45 Mo. App. 232; 42 Conn. 556; 7 Ind. App. 676; and so the authority of a superintendent and general manager of an electric light company, who was also a director, to bind the corporation by employing a nurse, was held a question for the jury; 67 N. W. Rep. (Mich.) 564.

The death of the principal usually revokes the authority to act for him or for his estate; 150 U. S. 520; 75 Cal. 349. Where an agent by the sudden death of his principal without known heirs is left in sole charge of his principal's estate, he is entitled to compensation for services in connection with the estate until the persons entitled to the property are found and their rights established in the orphans' court; 180 Pa. 192. See AGENCY.

There is a general presumption that an agent is presumed to have disclosed to his principal all facts which come to his knowledge in the course of the agency, and this presumption remains in force so long as the agent acts within the scope of his employment in good faith for the interest of the principal; but if he forms the purpose of dealing with the principal's property for his own benefit or that of some one else opposed in interest, his subsequent action based upon such purpose is considered to be in fraud of the rights of the principal, and the presumption no longer prevails; 18 N. Y. L. J. 1121.

The principal is not, in general, liable to a criminal prosecution for the acts or misdeeds of his agent, unless he has authorized or co-operated in such acts or misdeeds; Story, Ag. § 452; Paley, Ag. 303; 1 Mood. & M. 433. He is, however, civilly liable to third persons for the misfeasance, negligence, or omission of duty of his agent in the course of the agency, although he did not authorize or know of such misconduct, or even although he forbade it; Story, Ag. § 452; Paley, Ag. 294; 26 Vt. 112, 123; 6 Gill & J. 291; 20 Barb. 507; 7 Cush. 385; 83 Ala. 333; 51 Fed. Rep. 160; 33 Fla. 696; 5 Tex. Civ. App. 476; see 78 Ga. 328; and he is liable for the injuries and wrongs of sub-agents who are retained by his direction, either express or implied; Story, Ag. § 454; Paley, Ag. 296; 1 B. & P. 409. But the responsibility of the principal for the negligence or unlawful acts of his agent is limited to cases properly within the scope of the agency. Nor is he liable for the *wilful* acts of his agent whereby damage is occasioned to another, unless he originally commanded or subsequently assented to the act; Paley, Ag. 298, 299; Story, Ag. § 456; 9 Wend. 268; 23 Pick. 25; 20 Conn. 284. See 11 Colo. 233. Strict compliance with the instructions of a principal by the agent is a condition of exemption of the agent from liability; 137 U. S. 473.

A principal who accepts the benefits of a contract made on his behalf by his authorized agents is responsible for the fraudulent representation of the agent, although made without authority; 85 Tenn. 139; 2 C. C. App. 535; and a person who has adopted a sale made by his agent, and receives the benefit of it, takes the sale with all the burdens created by false representations of the agent; 78 Cal. 490; 40 Minn. 476; 52 Kan. 245; 65 Hun 182; see 160 Mass. 177; and a principal must adopt the acts of his agents as a whole; 24 Neb. 653; 150 U. S. 128; 15 So. Rep. (La.) 16. A ratification by a principal of an unauthorized contract made by his agent, relates back to the beginning of the transaction; 57 Fed. Rep. 973; and a principal having the right to disaffirm acts of an agent must do it promptly, and if not done within a reasonable time ratification will be presumed; 120 U. S. 256. There can be no ratification by a principal of the acts of his agent, where he has no knowledge of such acts; 71 Md. 200; 76 Ia. 129.

**In Criminal Law.** The actor in the commission of a crime.

All who are present, either actually or constructively, at the place of a crime, and are either aiding, abetting, assisting, or advising its commission, or are present for such purpose, are principals in the crime; 45 Fed. Rep. 851. See 25 Tex. App. 538; 21 *id.* 107.

Principals are of two kinds, namely, principals in the first degree, and principals in the second degree.

A *principal in the first degree* is one who is the actual perpetrator of the act. 1 Hale, Pl. Cr. 233, 615; 15 Ga. 346. But to constitute him such it is not necessary that he should be actually present when the offence is consummated; 3 Denio 190; 21 Tex. App. 107. For if one lay poison purposely for another, who takes it and is killed, the offender, though absent when it was taken, is a principal in the first degree; Clark, Cr. L. 83; 1 Hawk. Pl. Cr. c. 31, § 7; 4 Bla. Com. 34; 1 Chitty, Cr. L. 257. And the offence may be committed in his absence, through the medium of an innocent agent: as, if a person incites a child under the age of discretion, or any other instrument excused from the responsibility of his actions by defect of understanding, ignorance of the fact, or other cause, to the commission of crime, the inciter, though absent when the act was committed, is *ex necessitate* liable for the act of his agent and a principal in the first degree; 1 Hale, Pl. Cr. 514; 2 Leach 978. But if the instrument be aware of the consequences of his act, he is a principal in the first degree; the employer, in such case, if present when the fact is committed, is a principal in the second degree, and, if absent, an accessary before the fact; Russ. & R. 163; 1 C. & K. 589; 1 Archb. Cr. L. 58.

*Principals in the second degree* are those who are present aiding and abetting the commission of the act. 2 Va. Cas. 356. They are generally termed aiders and abettors, and sometimes, improperly, ac-

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complices; for the latter term includes all the *particeps criminis*, whether principals in the first or second degree or mere accessaries. A person to be a principal in the second degree need not be actually present, an ear or eye-witness of the transaction. The presence may be constructive. He is, in construction of law, present aiding and abetting if, with the intention of giving assistance, he be near enough to afford it should the occasion arise. If, for instance, he be outside the house watching to prevent surprise or the like, whilst his companions are in the house committing a felony, such constructive presence is sufficient to make a principal in the second degree; Clark, Cr. L. 85; 1 Russ. Cr. L. 27; 1 Hale 555; Wright, Ohio 75; 9 Pick. 496; 9 C. & P. 437; 15 Ill. 511. There must, however, be a participation in the act; for although a person be present when a felony is committed, yet if he does not consent to the felonious purpose or contribute to its execution, he will not be a principal in the second degree merely because he does not endeavor to prevent the felony or apprehend the felon; 1 Russ. Cr. 27; 1 Hale, Pl. Cr. 439; 9 Ired. 440; 3 Wash. C. C. 223; 1 Wisc. 159.

The law recognizes no difference between the offence of principals in the first and principals in the second degree. And so immaterial is the distinction considered in practice that, if a man be indicted as principal in the first degree, proof that he was present aiding and abetting another in committing the offence, although his was not the hand which actually did it, will support the indictment; and if he be indicted as principal in the second degree, proof that he was not only present, but committed the offence with his own hand, will support the indictment. So, when an offence is punishable by a statute which makes no mention of principals in the second degree, such principals are within the meaning of the statute as much as the parties who actually commit the offence; 1 Archb. Cr. L. 66. See 89 Mo. 312.

In treason, and in offences below felony, and in all felonies in which the punishment of principals in the first degree and of principals in the second degree is the same, the indictment may charge all who are present and abet the fact as principals in the first degree, provided the offence permits of a participation, or specially, as aiders and abettors; Archb. Cr. Pl. 7; 11 Cush. 422; 1 C. & M. 187. But where by particular statutes the punishment is different, then principals in the second degree must be indicted specially as aiders and abettors; Archb. Cr. Pl. 7. If indicted as aiders and abettors, an indictment charging that A gave the mortal blow, and that B, C, and D were present aiding and abetting, will be sustained by evidence that B gave the blow, and that A, C, and D were present aiding and abetting; and even if it appears that the act was committed by a person not named in the indictment, the aiders and abettors may, nevertheless, be convicted; Dougl. 207; 1 East, Pl. Cr. 350. And the same though the jury say that they are not satisfied which gave the blow, if they are satisfied that one of them did, and that the others were present aiding and abetting; 1 Den. Cr. Cas. 52; 2 C. & K. 382.

**PRINCIPAL CHALLENGE.** See CHALLENGE.

**PRINCIPAL CONTRACT.** One entered into by both parties on their own account or in the several qualities they assume.

**PRINCIPAL OBLIGATION.** That obligation which arises from the principal object of the engagement which has been contracted between the parties. It differs from an accessory obligation. For example, in the sale of a horse, the principal obligation of the seller is to deliver the horse; the obligation to take care of him till delivered is an accessory engagement. Pothier, Obl. n. 182. By principal obligation is also understood the engagement of one who becomes bound for himself, and not for the benefit of another. Pothier, Obl. n. 186.

**PRINCIPLES.** By this term is understood truths or propositions so clear that they cannot be proved nor contradicted unless by propositions which are still clearer.

That which constitutes the essence of a body or its constituent parts. 8 Term 107. See 5 McLean 63; PATENT.

They are of two kinds: one when the principle is universal, and these are known as axioms or maxims: as, *no one can transmit rights which he has not; the accessory follows the principal*, etc. The other class are simply called first principles. These principles have known marks by which they may always be recognized. These are —*first*, that they are so clear that they cannot be proved by anterior and more manifest truths; *second*, that they are almost universally received; *third*, that they are so strongly impressed on our minds that we conform ourselves to them whatever may be our avowed opinions.

First principles have their source in the sentiment of our own existence, and that which is in the nature of things. A principle of law is a rule or axiom which is founded in the nature of the subject, and it exists before it is expressed in the form of a rule. Domat, *Lois Civiles*, liv. prél. t. 1, s. 2; Toullier, tit. prél. n. 17. *The right to defend one's self continues as long as an unjust attack*, was a principle before it was ever decided by a court: so that a court does not *establish* but *recognizes* principles of law.

**PRINT.** The word includes most of the forms of figures or characters or representations, colored or uncolored, that may be impressed on a yielding surface. 97 U. S. 367; 20 Blatchf. 464; 38 Fed. Rep. 829.

**PRINTED FORMS.** A court in construing a contract will look at what was

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originally the printed form and at what was introduced in writing to alter that printed form; 2 C. & M. 539. Words written in a printed form, such as an insurance policy, will in case of doubt have a greater effect than the printed words; 22 Q. B. D. 501.

**PRINTING.** The art of impressing letters; the art of making books or papers by impressing legible characters.

In patent cases in the circuit court, the taxable costs do not include expenditures for printing, charts, models, exhibits, printed records, briefs, copies of testimony, and the like; 83 Fed. Rep. 183; but the practice varies in different circuits.

See LIBEL; LIBERTY OF THE PRESS; PRESS.

**PRIORITY.** Precedence; going before.

He who has the precedency in time has the advantage in right, is the maxim of the law; not that time, considered barely in itself, can make any such difference, but because, the whole power over a thing being secured to one person, this bars all others from obtaining a title to it afterwards; 1 Fonbl. Eq. 320.

In the payment of debts, the United States is entitled to priority when the debtor is insolvent or dies and leaves an insolvent estate. The priority was declared to extend to cases in which the insolvent debtor had made a voluntary assignment of all his property, or in which his effects had been attached as an absconding or absent debtor, on which an act of legal bankruptcy had been committed; 1 Kent 243.

Among common creditors, he who has the oldest lien has the preference,—it being a maxim both of law and equity, *qui prior est tempore potior est jure;* 2 Johns. Ch. 608. See INSOLVENCY.

But in respect to privileged debts, arising *ex contractu*, existing against a ship or vessel under the general admiralty law, the order of priority is most generally that of the inverse order of their creation,—thus reversing the order of priority generally adopted in the courts of common law. The ground of this inversion of the rule is that the services performed at the latest hour are more efficacious in bringing the vessel and her freightage to their final destination. Each foregoing incumbrance is, therefore, actually benefited by means of the succeeding incumbrance; 16 Bost. Law Rep. 1, 264; 17 *id.* 421. See MARITIME LIENS; ASSETS; LIEN.

**PRISAGE.** An ancient duty or right of the crown of one-tenth of the amount of wine carried by the ships of merchants, aliens, or denizens. 3 Bulstr. 1.

**PRISEL EN AUTER LIEU.** A taking in another place. A plea in abatement to a writ of replevin.

**PRISON.** A public building for confining persons, either to insure their production, in court, as accused persons and witnesses, or to punish them as criminals.

The root is French, as is shown by the Norman *prisons*, prisoners; Kelham, Norm. Fr. Dict.; and Fr. *prisons*, prisons. Britton, c. 11, *de Prisons*. Originally it was distinguished from gaol, which was a place for confinement, not for punishment. See Jacob, Dict. *Gaol*. But at present there is no such distinction.

The United States has no prisons. The joint resolution of September 3, 1789, recommended to the states to authorize state prisons to receive United States prisoners, the latter paying the states for the service. In the absence of a state prison, the marshal, under the jurisdiction of the district judge, may procure a suitable place. See R. S. § 5537, 5539; 9 Cra. 76; PENITENTIARY; GAOL; PRISONER; DETAINER.

**PRISON BREAKING.** The act by which a prisoner, by force and violence, escapes from a place where he is lawfully in custody. This is an offence at common law. This offence is to be distinguished from rescue (*q. v.*), which is a deliverance of a prisoner from lawful custody by a third person. 2 Bish. Cr. L. § 1065.

To constitute this offence there must be —a *lawful commitment* of the prisoner on criminal process; Co. 2d Inst. 589; 1 Carr. & M. 295; 2 Ashm. 61; 1 Ld. Raym. 424; see 43 N. J. L. 555; an *actual breach* with force and violence of the prison, by the prisoner himself, or by others with his privity and procurement; Russ. & R. 458; 1 Russ. Cr. 380; *the prisoner must escape;* 2 Hawk. Pl. Cr. c. 18, s. 12. See 1 Hale, Pl. Cr. 607; 4 Bla. Com. 130; Co. 2d Inst. 500; 1 Gabb. Cr. Law 305; Alison, Scotch Law 555; Dalloz, Dict. *Effraction;* 3 Johns. 449; 5 Metc. Mass. 559. See BREACH OF PRISON; ESCAPE.

**PRISON LABOR.** In most of the states prisoners convicted of crime are sentenced to hard labor, and in the constitution of the United States and of several of the states, the right to require the services of prisoners is secured by the exception of cases of punishment for crime from the provisions which abolish involuntary servitude.

In some states convict labor is farmed out to contractors, who thereby acquire a right in the prison and its inmates where the former is leased. The state, in order to resume its possession, must compensate the lessee as in other cases of taking private property; 16 Cal. 11. The right of the lessee, however, is subject to the pardoning power; 15 *id.* 429; and to the legislative power to modify and control the punishment: *id.*; 55 Mo. 101. A contract by the warden of a penitentiary for the hire of convicts is substantially a contract by the state, and a bill for the specific performance of it will not lie; 70 Ala. 493; 7 Paige 301.

In some states the sale or lease of convict labor is forbidden by constitution or statute. See 1 Stims. Am. Stat. L. § 141, where these provisions are collected. In North Carolina it is unlawful, unless authorized by the court before which the prisoner has been

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tried, and it has been held that this authority cannot be given at a term other than that at which the prisoner was convicted; 100 N. C. 414.

Where the statute provides as to how the letting of contracts shall be done, the directions as to advertising, etc., are mandatory and not directory; 1 Mich. 438.

As the result of labor agitation there have been attempts by legislation to forbid or regulate strictly the sale of convict-made goods. The Ohio act of May 19, 1894, forbidding any person to sell without license convict-made goods, was held unconstitutional. The court said: "It is not competent for a state legislature to declare that convict-made goods are not articles of traffic and commerce, and then to act upon such declaration, and discriminate against such goods, or exclude them from the state by unfriendly legislation. Whatever congress, either by silence or statute, recognizes as articles of traffic and commerce, must be so received and treated by the several states. There is no act of congress declaring that convict-made goods are not fit for traffic or commerce, and it therefore follows that such goods are the subject of commerce, and when transported from one state to another for sale or exchange, become articles of interstate commerce, and entitled to be protected as such; and any discrimination against such goods in the state where offered for sale is unconstitutional. . . . The act in question is not a police regulation, but an attempt to prevent, or at least to discourage, the importation of convict-made goods from other states, and thereby protect our citizens, laborers, and market against such goods. But if we are in a condition to require such protection, the appeal for relief must be made to congress, which body alone has the power to legally grant such relief." 56 Ohio St. 417.

In Massachusetts a law limiting the production of goods in prison work-shops went into effect on Jan. 1, 1898. It provides that not over thirty per cent. of the number of the inmates of any penal institution in the state having more than one hundred inmates, shall be employed in any one industry, except in the industry of cane-seating and in the manufacture of umbrellas. See PRISONER; HARD LABOR.

In England, by 60 & 61 Vict. c. 63, the importation of foreign prison-made goods is absolutely prohibited.

**PRISON-MADE GOODS.** See PRISON LABOR.

**PRISONER.** One held in confinement against his will.

*Lawful prisoners* are either prisoners charged with crimes or for a civil liability. Those charged with crimes are either persons accused and not tried; and these are considered innocent, and are therefore entitled to be treated with as little severity as possible, consistently with the certain detention of their persons; they are entitled to their discharge on bail, except in capital cases; or those who have been convicted of crime, whose imprisonment, and the mode of treatment they experience, is intended as a punishment: these are to be treated agreeably to the requisitions of the law, and, in the United States, always with humanity. See PENITENTIARY. Prisoners in civil cases are persons arrested on original or mesne process, and these may generally be discharged on bail; and prisoners in execution, who cannot be discharged except under the insolvent laws.

Persons unlawfully confined are those who are not detained by virtue of some lawful, judicial, legislative, or other proceeding. They are entitled to their immediate discharge on *habeas corpus*. For the effect of a contract entered into by a prisoner, see 1 Salk. 402, n.; 6 Toullier 82.

Throughout the United States there have grown up abuses in the treatment of prisoners, particularly by the detective force of larger cities, which amount in those cases to a practical denial of the plainest constitutional guaranties of liberty of person and property and of freedom from unreasonable searches. Among these abuses have been the illegal searches of the person of prisoners arrested on bare suspicion, who are often the victims of the mere whim of the arresting officer. The growth of these abuses is promoted by the fact that the large majority of prisoners in whose cases they occur are, through ignorance or poverty, unable to assert their rights.

In a recent case in Illinois the principles governing this subject were thus stated: "An officer may take from a prisoner any articles of property which it is presumable may furnish evidence against him, but money should not be taken unless it is in some way connected with the charge or proof against him, as he is thereby deprived of the means of making his defence. The arresting officer if he finds on the prisoner's body, or otherwise in his possession, either goods or money which he reasonably believes to be connected with the supposed crime as its fruits, or as supplying proofs relating to the transaction, may take and hold them to be disposed of as the court directs." It was there held that whether money found on a prisoner and taken from him by the officer is the fruits of the crime, is a question for the jury; 69 Ill. App. 668. By statute in Iowa an officer making an arrest, or a jailer upon committing a person to jail, may search him and take from him all offensive weapons and property which might be used in effecting an escape, but he has no right to take from him watches and money in no way connected with crime; 65 Ia. 666, where it was said: "Where a party submits to a search of his person by an officer, it cannot be said that the search was with his consent, because he makes no physical resistance; when the search is completed and the fruits thereof are retained by the officer, it would require a strong showing to hold that this was with the consent of the prisoner."

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Where money had been taken from a prisoner and an effort was made to reach it by garnishment against the officer, it was held that it was illegally taken, not being connected with the offence charged or necessary as evidence of the crime; but an application for a mandamus to compel the restoration of the money by the officer was denied because the propriety of its restoration was the subject of litigation under the attachment; 92 Ala. 102; s. c. 13 L. R. A. 120.

Pieces of silver intended for the manufacture of counterfeit coin were held to have been properly taken by the sheriff from the person who was carrying them to the place of manufacture, and it was held that the owner could not sustain trover therefor against the sheriff; 21 Vt. 9, where it was held by Redfield, J., that the base metal was properly detained both as evidence and because from its character it was, "so to speak, outlawed, and common plunder." In New Hampshire it was held that "if a prisoner has about his person money, or other articles of value, by means of which, if left in his possession, he might obtain tools or implements, or assistance, or weapons, with which to effect his escape, the officer arresting him may seize and hold such property for a time, without being liable for a conversion of the property, if he acts in good faith and for the purposes aforesaid. It is a question of fact in such cases for the jury, whether the officer taking such property from his prisoner, acted in good faith and for a proper purpose, or in bad faith, with an improper and unlawful purpose." 47 N. H. 482.

It has been held that United States officials have no right to confiscate money found on federal prisoners, and when it has been done and the money paid into the treasury, it may be recovered back by suit against the United States under the act of March 3, 1887, 1 Supp. 559; 77 Fed. Rep. 821.

In England it has been held that an officer who arrests a prisoner has no right to take from him money which he has about him unless it is in some way connected with the offence with which he is charged, as he thereby deprives him of the means of making his defence; 7 C. & P. 138, 488, 515; and it was also so held with respect to a watch and other articles taken by a police officer at the time of arrest; *id.* 447. In this case the indictment was for rape, and it was said by Patteson, J.: "Certainly the property must be given up; it has nothing whatever to do with the charge. It ought not to have been taken." And Gurney, B., said: "It should not have been taken; it must be delivered up to the prisoner himself," See SEARCH.

Handcuffing an accused person arrested on suspicion, not yet put upon his trial, was characterized at the hearing of a prisoner before a Manchester magistrate in England as degrading and improper, and in the unreported case of Norman *v.* Smith at the Manchester Assizes, in 1880, a plaintiff was awarded £15 damage for being wrongfully handcuffed; 29 Chi. Leg. News 88. It was laid down as early as 1825 that handcuffing could only be justified in cases when it was necessary to prevent the prisoner from escaping when he has attempted to escape; 4 B. & C. 596. Recently Lord Russell, C. J., remarked that "handcuffing was only justifiable where reasonable necessity existed, and if it were resorted to in the absence of such necessity, the person so treated might bring an action to recover damages for such a grievous indignity." 59 J. P. 393. In commenting on these cases it is said that handcuffs may be justified when the prisoner is of notoriously bad character, violent or dangerous, or threatens or assaults the constable, or the offence is of a grave nature, or when there is an attempt to escape. In the absence of such grounds or in case of trivial offences he should not be. Nor should women or aged prisoners; 29 Chi. Leg. News 88. See FETTERS.

A party waives his constitutional right "to be confronted with the witness against him," by admitting that witnesses, if present, would testify to certain facts stated in the affidavit of the district attorney for a continuance, and thereby preventing a postponement of the trial; 2 Mont. 239; or by wrongfully keeping away the witnesses; 7 Am. L. Reg. 9.

**Bertillon System.** The increase of habitual criminals in modern times has given additional interest to the various expedients for their identification, and records of various kinds are kept of all persons confined as prisoners for criminal offences. The simplest and most natural expedient of photographing all such persons gives rise to the "rogues' gallery," which is now, in most cities, a prominent institution in connection with the criminal administration. But an improved method which is considered the most effectual, is what is known as the Bertillon system of anthropometrical measurements. This system rests upon three distinct bases which it is said by M. Bertillon, Chief of the Central Bureau of Identification of France since 1882, have been shown by ten years' experience to be unimpeachable. (1) The almost absolute immutability of the human frame after the twentieth year of age; the growth thereafter, being only of the thigh bone, is so little that it is easy to make allowance for it. (2) The diversity of dimension of the human skeleton of different subjects is so great that it is difficult, if not impossible, to find two individuals whose bony structure is even sufficiently alike to make confusion between them possible. (3) The facility and comparative precision with which certain dimensions of the skeleton may be measured in the living subject by calipers of simple construction. The measurements which, as the result of minute criticism, have been preferred, are as follows: (1) Height (man standing); (2) reach (finger tip to finger tip); (3) trunk (man sitting);

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(4) length; (5) width; (6) length of right ear; (7) width of right ear; (8) length of left foot; (9) length of left middle finger; (10) length of left little finger; (11) length of left forearm.

Measurements are classified and grouped and preserved in an elaborate card index. The French statistics indicate that practically the result of this system is certainly in the recognition of a criminal by measurements. It has been adopted by statute in the states of Massachusetts and New York, and permitted by statute in Pennsylvania, and adopted by prison regulations in Illinois, Ohio, and some United States military posts. There is a bureau of identification on this system in Chicago to which resort is had by the police of any cities, and the use of the system is rapidly extending in the United States. See the work of M. Bertillon on his System of Identification; Rep. U. S. Commr. Education, 1895-6, vol. 2, ch. 28, where the system is fully described and the statutes on the subjects are collected.

See PRISON; PRISON LABOR; PRISON-MADE GOODS; FETTERS; SEARCH; ESCAPE; PRELIMINARY EXAMINATION; PENITENTIARY.

The subject of granting a parole to convicts, independently of the exercise of the power of pardon, is the subject of an able report made to the American Bar Association, 1898, by Hon. J. Franklin Fort of Newark, N. J.

Acts have been passed in Alabama, California, Colorado, Connecticut, Idaho, Illinois, Indiana, Kansas, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Utah, and Wisconsin. Iowa, Vermont, Virginia, and West Virginia have a system of conditional pardon which has a very similar operation. Maryland has a statute which permits the trial court to parole any person convicted of a crime not capital, by which he is not sentenced, but is subject to recall for sentence at any time. Nearly all of these acts have been passed within the last five years. None of them extend to any person convicted of murder in the first or second degree, and most of them are limited to persons serving a term for a first offence. In some states there is a further limitation to persons between the ages of 16 and 25 or 30 at the time of their conviction. The committee report that the most carefully considered statute is that of Indiana passed in 1897.

The same committee reports on indeterminate sentences, which it defines as "sentences imposed by the court without fixing a definite period of limitation or term of imprisonment, but which simply directs that the convict be imprisoned or placed in the custody of the prison authorities to be held for not less than the minimum nor longer than the maximum fixed by law for the offence for which the prisoner stands convicted." New York, Massachusetts, Pennsylvania, Minnesota, Illinois, Ohio, and Indiana have passed such acts which have worked well in practice. They are mostly confined to prisoners who are first offenders and are between the ages of 16 and 30 years. The committee reported that it was not willing to give this system its unconditional approval, though it might prove successful in connection with the parole system provided the judge who sentenced the prisoner should fix a maximum term. Indeterminate sentences as defined by the committee have been sustained as constitutional in 43 Ohio 629; 148 Ill. 413; 167 *id.* 447; 49 N. E. Rep. (Ind.) 894; 167 Mass. 144. They have been held unconstitutional in 88 Mich. 249.

The committee report that after careful investigation and correspondence with the executives of various states the system of paroling convicts has been beneficial.

In England, by statute, a convict undergoing a term of servitude may be set at large by a license granted by the home secretary, who may revoke the license at any time. It is subject to the conditions indorsed upon it, which generally are that the holder shall produce it when called upon to do so by a magistrate or police officer, shall abstain from any violation of the law, shall not habitually associate with notoriously bad characters, and shall not lead an idle and vicious life without visible means of obtaining an honest livelihood. The holder is obliged to report his place of residence to the general officer of the district where he resides and report himself there once a month. When he removes from one district to another, he must notify his removal to the general officer of the old district and report his address to the general officer of the new district. If a licensed convict is indicted and convicted of any offence his license is forfeited thereby. When forfeited the convict is liable to undergo a term of penal servitude equal to the unexpired portion of his original term. See TICKET-OF-LEAVE; SENTENCE.

**PRISONER OF WAR.** One who has been captured while fighting under the banner of some state. He is a prisoner although never confined in a prison.

In modern times, prisoners are treated with more humanity than formerly: the individual captor has now no personal right to his prisoner. Prisoners are under the superintendence of the government, and they are now frequently exchanged. See 1 Kent 14.

The Brussels Conference, 1874, laid down rules which are generally accepted. Lawful combatants become prisoners of war when captured: and so may such non-combatants as guides, messengers, newspaper correspondents, balloonists, telegraphers, and contractors who are with their army and so clearly associated with it as to be rendering it direct service; Risley, Law of War 129. Important public officials may be captured in any place where acts of war are lawful. Sailors may become prisoners of war, but surgeons and chaplains are considered as exempt; *id.*

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It is a general rule that a prisoner is out of the protection of the laws of the state so far that he can have no civil remedy under them, and he can, therefore, maintain no action. But his person is protected against all unlawful acts. Bac. Abr. *Abatement* (B 3), *Aliens* (D). See PAROLE.

**PRIVACY.** The right of privacy has been defined as the right of an individual to withhold himself and his property from public scrutiny, if he so chooses. The doctrine is of recent growth, and is as yet insufficiently defined. It is said to be incapable of exact definition, and to exist only so far as its assertion is consistent with law or public policy, and in a proper case equity will interfere, if there is no remedy at law, to prevent an injury threatened by the invasion of, or infringement upon, this right from motives of curiosity, gain, or malice. Such remedy has been invoked to prevent the publication of oral lectures delivered by a professor; 12 App. Cas. 326; 3 L. J. Ch. 209; or copies of private drawings and etchings; 1 MacN. & G. 25; or a letter in the possession of a person by whom it was received, without the writer's consent, where the publication is not necessary for the vindication of the receiver or the public interests; 2 Ves. & B. 19; 2 Atk. 342; Ambl. 737; 2 Swanst. 402; 4 Duer 379; 2 Bush 480; a telegram of a private nature; 50 How. Pr. 194; a scientific, artistic, or literary composition kept for the private use of the composer; 4 Burr. 2303, 2330, 2408; 2 Eden 329; 2 Meriv. 435; 8 Pet. 591; a portrait in a newspaper; 6 Misc. Rep. 290; or a photograph by the photographer; 40 Ch. Div. 345; 64 Fed. Rep. 280. But such publication of a photograph or portrait will not be prevented where the person is a "public character," such as a foremost inventor of world-wide reputation; 64 Fed. Rep. 280, reversing 57 *id.* 434, on this point. The case on appeal held that the publication of such a photograph will not be restrained. The doctrine prevailed one time that an injunction against the publication of letters could only be granted where they were of the nature of a literary composition; 3 Edw. Ch. 515; 3 Barb. Ch. 320; but this doctrine no longer prevails; 4 Duer 379. In many cases the unauthorized use of one's name, where it will tend to cause irreparable damage, will be enjoined, as a recommendation of a medicinal preparation by a physician; 27 Abb. N. C. 402; see 11 Beav. 561; a use of a person's name as director of a corporation; 10 Beav. 561; or a publisher's statement that one is a member of a bankrupt firm; 7 L. R. Eq. 488; a false statement of a dispute pending a suit in relation thereto; 52 L. J. Ch. 134; 8 W. R. 734.

The property of an author or composer of any work, whether of literature, art, or science, in such work, unpublished and kept for his private use or pleasure, cannot be questioned; 1 MacN. & G. 42.

Every clerk employed in a merchant's counting house is under an implied contract that he will not make public that which he learns in the execution of his duty as clerk; 2 Hare 393; 1 Mac N. &G. 45.

The court will interfere by injunction to prevent a party's availing himself in any manner of a title arising out of the violation of right or any breach of confidence; 1 MacN. & G. 25.

A photographer who had taken a negative likeness of A, for money, was restrained from selling or exhibiting copies, both on the ground that there was an implied contract not to use the negative for such purposes, and also that such sale or exhibition was a breach of confidence. The right to enjoin the copying of a photograph does not depend on the existence of a property right; the court of chancery has always had original jurisdiction to prevent what it considered and treated as a wrong, whether arising from the violation of a right or from breach of contract or confidence; 40 Ch. Div. 354, following 1 MacN. & G. 25.

Where a party was employed to make a certain number of copies of a picture, his employment carried with it the necessary implication that he would not make more copies for himself or sell the additional copies in competition with his employer. Such conduct on his part is a gross breach of contract and a gross breach of faith, which clearly entitles the employer to an injunction whether there is a copyright on the picture or not; 19 L. R. Q. B. Div. 639.

Where the defendant was intrusted by the plaintiff with the secret of making a kind of medicine which the plaintiff called a patent medicine, though he had no patent, it was held that there was such a relation between the plaintiff and the defendant and such a breach of contract or breach of faith on the part of the defendant as would entitle the plaintiff to an injunction restraining the use of the secret by the defendant; 9 Hare 241 (approved in 19 L. R. Q. B. Div. 639). In 9 Hare 241, the court said that different grounds have been assigned for the exercise of the jurisdiction; in some cases it has been referred to property, in others to contract, and in others again it has been treated as founded upon trust or confidence, but upon whatever grounds the jurisdiction is founded, the authorities leave no doubt as to the exercise of it.

In Prince Albert *v.* Strange, De G. & S. 652, and, on appeal, 1 MacN. & G. 23, it was held that the reproduction of etchings belonging to the plaintiff and Queen Victoria, and made for their own pleasure, would be restrained, and the defendants would also be restrained from publishing a description of them, whether more or less limited or summary, and whether in the form of a catalogue or otherwise.

An author of letters or papers of whatever kind, whether they be letters of business or private letters, or literary compositions, has a common and exclusive copyright therein unless he has unequivocally dedicated them to the public or some pri-

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vate person, but no person has the right to publish them without his consent unless such publication be required to establish a personal right or claim or to vindicate character. The government has perhaps a right to publish official letters addressed to it by public officers; but no private person has such a right without the sanction of the government; 2 Story 100.

If the recipient of a letter attempt to publish such letter on occasions not justifiable, equity will prevent the publication as a breach of private rights. . . . . The general property, and the general rights incident to property, belong to the writer, whether the letter is a literary composition, or a familiar letter, or contains details of business. Third persons standing in no privity with either party are not entitled to publish letters to subserve their own private purposes of interest or curiosity or passion; 2 Story 111. The writer of letters, though written without any purpose of profit or any idea of literary property, possesses such a right of property in them that they cannot be published without his consent, unless the purposes of justice, civil or criminal, require the publication; 2 Swanst. 418, Romilly, arguendo; but see High, Inj. § 1012, *contra*.

This subject of the right to privacy was much discussed in the case Schuyler *v.* Curtis, in which an injunction was sought to prevent certain persons from making a statue of a deceased woman and exhibiting it at the Columbian Exposition, the avowed object being to honor her as a philanthropist and reformer. A decree for an injunction entered by the supreme court of New York was affirmed by the general term, but was reversed by the court of appeals; 147 N. Y. 434, reversing 70 Hun 598; s. c. 2 Am. & Eng. Dec. Eq. 462, and 24 N. Y. Supp. 512 [1893]. In this case the question whether the action contemplated was a violation of the right of privacy was discussed, and the conclusion reached by a majority of the court that "the individual right of privacy which any person has during his life dies with the person, and any right of privacy which survives is a right pertaining to the living only," and that "any privilege of surviving relatives of a deceased person to protect his memory exists for the benefit of the living to protect their feelings and to prevent a violation of their own rights in the character and memory of the deceased." It was held that "persons attempting to raise a statue or bust of a woman who is no longer living, if their motive is to do honor to her, and if the work is to be done in an appropriate manner, cannot be restrained by her surviving relatives from carrying out such a purpose, merely because they had not the honor of her personal acquaintance or friendship while she was living, or, at the most, had merely been associated with her philanthropic enterprises. The mere fact that a person's feelings may be injured by the erection of a statue to a deceased relative was decided not to be a ground for an injunction against its erection, unless there is reasonable and plausible ground for the existence of this mental distress and injury. It must not be the creation of mere caprice, nor of pure fancy, nor the result of a supersensitive and morbid mental organization dwelling with undue emphasis upon the exclusive and sacred character of this right of privacy."

The opposite view was presented by Gray, J., who dissented:

"Upon the findings in this case, I think we are bound to say that the purpose of the defendants was to commit an act which was an unauthorized invasion of the plaintiff's right to the preservation of the name and memory of Mrs. Schuyler intact from public comment and criticism. As the representative of all her immediate living relatives, it was competent for him to maintain action to preserve them from becoming public property, as would be the case if a statue were erected by strangers for public exhibition under such classification, with respect to the characteristic virtues of the deceased, as they judged befitting. I cannot see why the right of privacy is not a form of property, as much as is the right of complete immunity of one's person."

In 1893 it was held in a New York case that an injunction will lie to restrain the publication of the plaintiff's picture in a newspaper, with an invitation to the readers of the newspaper to vote upon the question of the popularity of the plaintiff as compared with that of another person whose picture was also published; 26 N. Y. Supp. 908.

In an article in 4 Harv. Law Rev. 193, by Samuel D. Warren and Louis Brandeis, the following are suggested as the limitations to the right to privacy:—

1. The right to privacy does not prohibit any publication of matter which is of public or general interest.

2. The right to privacy does not prohibit the publication of any matter, if in itself not private, when the publication is made under circumstances which would render it a privileged publication according to the law of slander and libel.

3. The law would probably not grant any redress for the invasion of privacy by oral publication in the absence of special damage.

4. The right to privacy ceases upon the publication of facts by the individual, or with his consent.

5. The truth of the matter published does not afford a defence.

6. The absence of "malice" in the publisher does not afford a defence.

See No. Amer. Rev. July, 1896; 30 Am. Law Rev. 582; 2 A. & E. Dec. Eq. 462, with note by Ardemas Stewart; INJUNCTION; LETTER; MANUSCRIPT; PHOTOGRAPH; PHYSICAL EXAMINATION; TRADE SECRETS.

**PRIVATE.** Affecting or belonging to individuals, as distinct from the public generally. Not clothed with office.

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**PRIVATE ACT.** See STATUTE; GENERAL LAW.

**PRIVATE BILL OFFICE.** An office of the British parliament where the business of securing private acts of parliament is conducted.

**PRIVATE CARRIER.** One who agrees in some special case with some private individual to carry for hire, as distinguished from a common carrier who holds himself out to all persons who choose to employ him as ready to carry for hire. Story, Cont. 752 *a*; 37 N. Y. 342. See CARRIER.

**PRIVATE CORPORATION.** See CORPORATION.

**PRIVATE DWELLING-HOUSE.** A covenant which requires a house to be used as a private dwelling-house only, is broken by its being used as a school or dancing academy; 25 L. J. Q. B. 264; or as an institution for educating the daughters of missionaries; 47 L. J. Ch. 230; or as a club; *id.*; or as a hotel or lodging-house; 53 *id.* 682; but not by a public auction of the furniture of the house; 24 W. R. 485.

**PRIVATE INTERNATIONAL LAW.** A name used by some writers to indicate that branch of the law which is now commonly called conflict of laws.

Mr. Dicey, in 6 Law Quart. Rev., says: This department of law has been called by various names, none of which are free from objection. The defect in the use of the term "conflict of laws" is that the supposed "conflict" is fictitious, and the expression has the further radical effect of concealing from view the circumstance that the question by the law of what country a given transaction shall be governed is often a matter too plain to admit of doubt. The term has been defended on account of its applicability, not to any conflict between the laws themselves, but to a question in the mind of the judge as to which of two systems of law should govern a given case. This, however, gives a new and forced sense to a received expression.

The term private international law is convenient and manageable. It brings into light the great and increasing harmony between the rules as to the application of foreign laws which prevail in all civilized countries, but the term is at bottom incorrect. The words private international law should mean a private species of the body of rules which prevails between one nation and another, but nothing of this sort is, however, intended, and the unfortunate employment of the phrase has led to endless misconception of the true nature of this department of legal science. Further, it confounds two classes of rules which are generically different from each other. The principles of international law, properly so called, are international because they prevail among nations, but they are not in the proper sense laws. On the other hand, the principles of private international law are laws in the strictest sense of that term, but they are not international, for they are laws which determine the private rights of one individual as against another, and these individuals may or may not belong to one and the same nation. The expression International Private Law is no doubt a slight improvement, but the name has the insuperable fault of giving to the adjective, international, a meaning different from the sense in which it is generally and correctly employed.

The same learned author further approaches the subject from the standpoint adopted by English judges when it is their duty to deliver a judgment on any question which may raise a so-called conflict of laws. If the case falls within the terms of any English statute there is no further room for discussion. If it does not fall within a statute, the next inquiry for the judge is whether it is covered by any English precedent which has the authority of law, and if it does, discussion is again closed. If, lastly, it falls neither within the terms of a statute nor under any principle established by authority, English judges look for guidance to foreign decisions, to the opinions of jurists, or to arguments drawn from general principles. See INTERNATIONAL LAW; CONFLICT OF LAWS.

**PRIVATE LAND CLAIMS.** The United States obtained from the Republic of Mexico by the treaty of Guadalupe Hidalgo, on the 2d of February, 1848, and by the treaty of Masilla, known as the Gadsen purchase, dated December 30, 1853, all the property included in what is now the states of California, Colorado, Utah, Wyoming, and Nebraska, and the territories of new Mexico and Arizona; and by these treaties the United States agreed to protect and recognize the rights of property of every kind belonging to Mexicans that was situated in the ceded territory. Under the stipulations contained in the treaty of Guadalupe Hidalgo, congress, on March 3, 1851, passed a law to determine the validity of private land grants in the state of California; and on March 3, 1891 (26 Stat. L. 854), it passed a law for the settlement of title to private land grants under both treaties, entitled "An act to establish a court of private land claims and to provide for the settlement of private land claims in certain states and territories." By this act all persons claiming rights protected by the treaties, whether their title was complete and perfect or incomplete and inchoate, are given the right to present their claims and have the validity thereof ascertained and determined by the court.

These private land claims originated from grants and cessions made by Spain to various settlers, emigrants, and citizens up to the treaty of Cordoba, August 24, 1821 (which was the initiation of the severance of Mexico from Spain, and which culminated, after many desultory revolutions, in the complete independence of

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Mexico, by the adoption of the new constitution on October 23, 1835), and from various sales and grants, made by the Mexican government, both under the monarchy and under the republic, from 1835 down to the treaty of Guadalupe Hidalgo on February 2, 1848.

These various sales and grants of public lands may be conveniently divided into the first and second epoch of the Central System of Government, beginning on Oct. 8, 1835, when all legislatures were abolished and departmental councils (*juntas*) were established, and (December 29, 1836) when the new constitution was adopted, which divided the national territory into departments, provided for the appointment of governors and the election of departmental councils and defined their powers, and running down to August 4, 1846, when the constitution of 1824 was re-established. It was at this time (August 18, 1846) that General Kearney entered Santa Fe and took possession of New Mexico in the name of the United States. This period marks the end of the first epoch of the central system of government.

From that time, March 17, 1853, there was a succession of revolutions and counter-revolutions, culminating in the election of Santa Anna as president of the republic, from which time dates the beginning of the second epoch of the central system of government. Many of these claims are conflicting in their nature; many of them which were granted by one government were declared null upon the inauguration of another, and as each revolution succeeded the other, attempts were made to undo everything that had been done during the lease of power by the other forces, so that the titles to the lands of that portion of the United States obtained through the treaty of Guadalupe Hidalgo and the Gadsen purchase, having for their foundation the grants made by Spain and the various succeeding governments of Mexico, were in an almost hopeless state of confusion and uncertainty, rendering the passage of the act of March 3, 1891, establishing the court of private land claims, for the purpose of passing upon these titles, at once a necessity and a boon.

For a history and compilation of the various Spanish and Mexican land laws, see Reynolds on Spanish and Mexican land laws, *passim*. This work, compiled by the United States attorney for the court of private land claims, contains, in addition to the court of private land claims act and the rules of practice in that court, an historical sketch of new Spain and New Mexico and old Mexico under its Spanish dominion and subsequently, together with a translation of all of the Spanish and Mexican land laws, and to any one interested in these matters it will be found to be an invaluable aid.

**Court of Private Land Claims.** By the act of March 3, 1891 (26 Stat. L. 854), congress created a court of private land claims. The court is composed of a chief justice and four associate justices, appointed by the president of the United States. The United States are represented by a United States attorney appointed by the president to protect the interests of the government in litigation before that court. The jurisdiction and method of procedure is specifically pointed out in section 9 of the act. The jurisdiction embraces all claims for lands within the limits of the territory derived by the United States from the republic of Mexico, and now embraced within the territories of New Mexico, Arizona, or Utah, or within the states of Nevada, Colorado, or Wyoming, claimed by virtue of any Spanish or Mexican grant, concession, warrant, or survey, which the United States are bound to recognize and confirm by virtue of the treaties of cession of said country by Mexico to the United States, which at the date of the passage of the said act had not been confirmed by act of congress or otherwise finally decided upon lawful authority and are not already complete and perfect. The action is begun by filing a petition, whereupon procedure is had in accordance with the act and in accordance with the rules of practice laid down by the court. If a title shall be found to be perfect and be confirmed, the confirmation shall be for so much land only as is found to be held by a perfect title, excepting any part of such land that shall have been disposed of by the United States, and always subject to and not to affect any conflicting private interests, rights, or claims held or claimed adversely to any such claim or title, or adversely to the holder of any such claim or title. No confirmation of claims or title shall have any effect other or further than as a release of all claims of title by the United States; and no private right of any person as between himself and other claimants or persons in respect of any such lands, shall be in any wise affected thereby. It is also provided that the head of the Department of Justice may, through the United States attorney for the court of private land claims, file in the court a petition against the holder or possessor of any claim or land within these states or territories who shall not have voluntarily come in under the provisions of this act for the purpose of settling the title to the claim held by him. It is provided, also, that any party against whom the court shall in any case decide, may appeal to the supreme court of the United States, and that the United States may appeal in case of the confirmation of any title, such appeals to be taken within six months after the rendition of the decision. Upon any such appeal, the supreme court is required to try the case *de novo*. Whenever a decision of confirmation shall have become final, the clerk of the court is required to certify that fact to the commissioner of the general land office, together with a copy thereof, and the commissioner is required thereupon, without

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delay, to cause the tract so confirmed to be surveyed at the cost of the United States, and when this shall have been done, he is required to give notice thereof, by publication in Spanish and in English, in newspapers published in the capital of the territory or state. Such survey shall be open to public inspection for ninety days, and if, at the expiration of that period, no objection shall have been filed, shall be approved and forwarded to the general land office. If objection be made, the survey is to be forwarded, together with such objections and the proofs thereof and report thereon. The commissioner of the general land office is required to transmit the survey to the court of final decision, by which, if found to be correct, it shall be approved, and if found incorrect, shall be corrected. When any survey is finally approved by the court, it is required to be returned to the commissioner of the general land office, who is required to issue a patent to the proper party; the neglect to file a petition in this case for the period of two years is a bar to the claim, except in cases of minors, married women, or persons *non compos mentis*, in which case the court is required to appoint a guardian *ad litem* for such persons. It is provided that no claim shall be allowed unless it appear to be upon a title lawfully and regularly derived from the government of Spain or Mexico, or from some of the states of the republic of Mexico having lawful authority to make grants of lands, and one that, if not then complete and perfect at the date of the acquisition of the territory by the United States, the claimant would have had a lawful right to make perfect had the territory not been acquired by the United States, and such that the United States are bound, upon the principles of public law or by the provisions of the treaty of cession, to respect and permit to become complete and perfect if the same was not at said date already complete and perfect. No claim can be allowed that will interfere with or overthrow any just and unextinguished Indian title or right. No confirmation confers title to mines or minerals, unless the grantee has become otherwise entitled thereto in law or in equity, but all such mines and minerals remain the property of the United States. No claim hitherto decided by congress shall be confirmed. Private rights of persons, as between each other, are not concluded by a decree under this act, but only the rights as between the United States and claimants, and that only for the purpose of releasing to the claimant such right or title to the land as the United States may have acquired from the treaties. No confirmation can be made for more than eleven square leagues to the original grantee.

There are other minor and unimportant exceptions and reservations, for which see the act itself.

By the original act this court was to cease to exist on December 31, 1895, but its life was subsequently extended to December 31, 1897, and again to March 4, 1899 (Sup. Rev. Stats. vol. 2, pp. 417 and 556). See UNITED STATES COURTS.

**PRIVATE NUISANCE.** Anything done to the hurt and annoyance of the lands, tenements, or hereditaments of another. 3 Bla. Com. 215; 131 N. Y. 211. See NUISANCE.

**PRIVATE PROPERTY.** As used in a constitution, the term applies to such property as belongs absolutely to an individual, and of which he has the exclusive right of disposition; property of a specific, fixed, and tangible nature, capable of being had in possession and transmitted to another, as houses, lands, and chattels; 29 Miss. 32.

**PRIVATE WAY.** An incorporeal hereditament of a real nature, entirely different to a common highway. The right of going over another man's ground. 98 Pa. 5. See WAY.

**PRIVATEER.** A vessel owned by one or more private individuals, armed and equipped at his or their expense, for the purpose of carrying on a maritime war, by the authority of one of the belligerent parties.

A privateer is a private vessel commissioned by the state by the issue of a letter of marque to its owner to carry on all hostilities by sea, presumably according to the laws of war. She continues under the control of her private owner, and her crew are under the same discipline as the crew of a merchant ship. Formerly a state issued letters of marque to its own subjects, and to those of neutral states as well, but a privateersman who accepted letters of marque from both belligerents was regarded as a pirate.

For the purpose of encouraging the owners of private armed vessels, they are usually allowed to appropriate to themselves the property they capture, or, at least, a large proportion of it; 1 Kent 96. See 2 Dall. 36; 1 Wheat. 46; 2 Gall. 19, 56, 526; 1 Mass. 365; 3 Wash. C. C. 209.

By the Declaration of Paris (*q. v.*) privateering was abolished, but the United States, Spain, Mexico, and Venezuela did not accede to this declaration.

The creation of a volunteer navy by a belligerent was not prohibited by the Declaration of Paris. A volunteer cruiser is a vessel loaned by her private owner to the state. Her officers are commissioned and her crew are subject to the discipline of a ship of war; she only resembles a privateer in that her prizes belong to her owner. In 1870, when Prussia proposed the creation of a volunteer navy, the French government protested, but the English government held that such a navy was to be distinguished from privateers, and that their employment was no evasion of the Declaration of Paris; but from this opinion Phillimore decidedly dissented; Risley, Law of War 112.

A merchant vessel without any commis-



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sion may become a lawful combatant in self-defence, and if she captures her assailant, the latter may be condemned as lawful prize.

During the civil war in America, congress authorized the president to issue letters of marque, but he did not do so. The confederates offered their letters of marque to foreigners, but they were not accepted. The confederate vessels were commissioned as of its regular navy. Boyd's Wheat. Int. Law.

The president's proclamation at the outbreak of the Spanish-American war, 1898, declared that privateering would not be resorted to by the United States.

It has been thought that the constitutional provision empowering congress to issue letters of marque deprives it of the power to join in a permanent treaty abolishing privateering. See 28 Am. L. Rev. 615; 24 *id.* 902; 19 Law Mag. & Rev. 35.

**PRIVATION.** A taking away or withdrawing. Co. Litt. 239.

**PRIVEMENT ENCEINTE** (L. Fr.). A term used to signify that a woman is pregnant, but not *quick with child*. See Wood, Inst. 662; ENCEINTE; FŒTUS; PREGNANCY.

**PRIVIES.** Persons who are partakers or have an interest in any action or thing, or any relation to another. Wood, Inst. b. 2, c. 3, p. 255; Co. Litt. 271 *a*.

There are several kinds of privies: namely, privies in blood, as the heir is to the ancestor; privies in representation, as is the executor or administrator to the deceased; privies in estate, as the relation between the donor and donee, lessor and lessee; privies in respect to contracts; and privies on account of estate and contract together. Prest. Conv. 327. Privies have also been divided into privies in fact and privies in law. 8 Co. 42 *b*. See Viner, Abr. *Privity;* 5 Com. Dig. 347; Hamm. Part. 131; Woodf. Landl. & T. 279; 1 Dane, Abr. c. 1, art. 6. The latter are created by the law casting land upon a person, as in escheat; 1 Greenl. Ev. § 189.

No one is privy to a judgment whose succession to the rights of property thereby affected occurred previously to the institution of the suit. Freem. Judg. § 162; 83 Fed. Rep. 515.

**PRIVIGNUS** (Lat.). **In Civil Law.** Son of a husband or wife by a former marriage: a stepson. Calvinus, Lex.; Vicat, Voc. Jur.

**PRIVILEGE.** Exemption from such burdens as others are subjected to. 24 N. J. L. 557. See 67 Tex. 542; 123 Mass. 519.

**In Civil Law.** A right which the nature of a debt gives to a creditor, and which entitles him to be preferred before other creditors. Dalloz, Dict. *Privilege;* Domat, *Lois Civ.* liv. 2, t. 1, s. 4, n. 1; 43 La. Ann. 1078, 1194.

Privilege is "a real right in a thing (*jus in re*) springing from the nature of a debt which has been contracted with reference to that thing, and securing the debt by a preference on the proceeds of the thing when it is sold under legal process." Howe, Stud. Civ. L. 86.

"A mortgage under the civil law is to all intents and purposes what it is in equity in the English law or the law of Connecticut, a security for a debt given by the agreement of the debtor. But a debtor cannot, by his mere agreement, *proprio vigore*, confer a privilege.

"If he contracts a debt, which by its nature has a privilege under the law, then the privilege exists, as a method of securing the debt. It inheres in the thing with reference to which the debt has been contracted, follows it into the hands of third persons (in the absence of some law of recordation providing to the contrary), and as a rule would prime a mortgage of the same property." Howe, Stud. Civ. L. 87.

"The one is legal; the other conventional. This former is sometimes called by the civilians a privileged hypothecation; the latter a mere hypothecation." Howe, Stud. Civ. L. 88.

The civil law privilege became, by adoption of the admiralty courts, the admiralty lien; Howe, Stud. Civ. L. 89; 19 How. 82, 90; 148 U. S. 1.

Creditors of the same rank of privileges are paid in concurrence, that is, on an equal footing. Privileges may exist either in movables or immovables, or in both at once. They are general or special, on certain movables. The debts which are privileged on *all the movables in general* are the following, which are paid in this order. *Funeral charges. Law charges*, which are such as are occasioned by the prosecution of a suit before the courts. But this name applies more particularly to costs, which the party cast has to pay to the party gaining the cause. It is in favor of these only that the law grants the privilege. Charges, of whatever nature, occasioned by the *last sickness*, concurrently among those to whom they are due. See LAST SICKNESS. The *wages of servants* for the year past, and so much as is due for the current year. *Supplies of provisions* made to the debtor or his family during the last six months by retail dealers, such as bakers, butchers, grocers, and during the last year by keepers of boarding-houses and taverns. The *salaries of clerks, secretaries*, and other persons of that kind. *Dotal rights* due to wives by their husbands.

The debts which are privileged on *particular movables* are—the debt of a workman or artisan, for the price of his labor, on the movable which he has repaired or made, if the thing continues still in his possession; that debt on the pledge which is in the creditor's possession; the carrier's charges and accessory expenses on the thing carried; the price due on movable effects, if they are yet in the possession of the purchaser; and the like. See LIEN.

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As to privileges on movables, see a good summary in 1 Stims. Am. Stat. L. § 4662, and compare with the texts.

Creditors who have a privilege on moveables in Louisiana are (1) vendors for purchase money, (2) architects, mechanics, contractors, etc., for construction, rebuilding and repair of houses, etc., (3) material men, (4) those who have worked by the job in the manner required by law or police regulation on levees, bridges, ditches, and roads of a proprietor; Code §§ 3249–51.

In regard to privilege, Domat says, "We do not reckon in the number of privileges the preference which the creditor has on the moveables that have been given him in a pawn, and which are in his custody. The privilege of a creditor is the distinguishing right which the nature of his credit gives him, and which makes him to be preferred before other creditors, even those who are prior in time, and who have mortgages." Domat, pt. 1, lib. iii. tit. i. sec. v.

These privileges were of two kinds: one gave a preference on all the goods, without any particular assignment on any one thing; the other secures to the creditors their security on certain things, and not on the other goods.

Among creditors who are privileged, there is no priority of time, but each one is in the order of his privilege, and all creditors who have a privilege of the same kind take proportionately, although their debts be of different dates. And all privileges have equally a preference over those of an inferior class, and over debts which do not have this favored character, whether subsequent or antecedent in point of time.

The vendor of immovable property, for which payment has not been made, is preferred before creditors of the purchaser, and all other persons, as to the thing sold. By the Roman law, this principle applies equally to movables and immovables; and the seller may seize upon the property in the hands of his vendee, or wherever he can find it.

So, too, a person who has lent money to repair a thing, or to make improvements, has this privilege. And this, though he lends to workmen or architects, etc., if it be done with the knowledge of the owner.

Carriers have a privilege not only for the price of carriage, but for money paid on account of the goods.

Landlords have a privilege for the rents due from their tenants even on furniture of the under-tenants, if there be a sublease. But not if payment has been made to the tenant by an immediate lessor; although a payment made by the sub-tenant to the landlord would be good as against the tenant.

The privilege was lost by a novation, or by anything in the original contract which showed that the vendor had taken some other security inconsistent with the privilege. See Domat, pt. i. lib. iii. tit. i. sec. v.

See Dalloz, Dict. *Privilege;* LIEN; LAST SICKNESS; PREFERENCE.

**In Maritime Law.** An allowance to the master of a ship of the general nature of primage, being compensation, or rather a gratuity, customary in certain trades, and which the law assumes to be a fair and equitable allowance, because the contract on both sides is made under the knowledge of such usage by the parties.

**PRIVILEGE FROM ARREST.** Privilege from arrest on civil process.

It is either permanent, as in case of ambassadors, public ministers, and their servants, the royal family and servants, peers and peeresses, etc., or temporary, as in case of members of both houses of congress, and of the state legislature, who are privileged *eundo, manendo, et redeundo;* 1 Kent 243; Cooley, Const. Lim. 163; 8 R. I. 43; see 2 Stra. 985; practising barristers, while actually engaged in the business of the court; 2 Dowl. 51; 1 H. Bla. 636; 1 M. & W. 488; 6 Ad. & E. 623; a clergyman in England whilst going to church, performing services, and returning; 7 Bingh. 320; witnesses and parties to a suit and bail, *eundo, manendo, et redeundo;* 5 B. & Ad. 1078; 6 Dowl. 632; 1 Maule & S. 638; 1 M. & W. 488; 6 Ad. & E. 623; 17 R. I. 715; 136 N. Y. 585; and other persons who are privileged by law. See ARREST. Privilege (from arrest) does not extend to defendants in criminal cases; 6 Dist. Rep. Pa. 595.

In case of the arrest of a legislator contrary to law, the house of which he is a member may give summary relief, by ordering his discharge, and if this be not complied with, by punishing the persons concerned in such arrest, as for contempt of its authority. If the houses neglect to interfere, the court from which the process issued should set it aside, on the fact being shown to it; and any court or officer having authority to issue writs of *habeas corpus* may inquire into the case and release the party; Cooley, Const. Lim. 163; Cush. Parl. Pract. § 546. "When attachment is mere process, privilege exists; when it is punitive or disciplinary, privilege does not exist." Brett, Comm. 748. See 1 H. L. Cas.

By the constitutions of some of the states, the privilege has been enlarged, so as to exempt the persons of legislators from any service of civil process; *e. g.* Michigan, Kansas, Nebraska, California, Wisconsin, Indiana, Oregon, and others.

See EXTERRITORIALITY; Piggott, Consular Jurisdiction.

**PRIVILEGE, WRIT OF.** A process to enforce or maintain a privilege. Cowell.

**PRIVILEGED COMMUNICATIONS.** Communications made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, if made

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to a person having a corresponding interest or duty, although it contain criminatory matter which without this privilege would be slanderous and actionable.

Duty, in this canon, cannot be confined to legal duties, which may be enforced by indictment, action, or mandamus, but must include moral and social duties of imperfect obligation; 5 E. & B. 347. The proper meaning of a privileged communication, said Baron Parke, is only this: that the occasion on which the communication was made rebuts the inference *prima facie* arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact,—that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made; 2 Cr. M. & R. 573. So, also, in 16 N. Y. 373. See 73 Mich. 445; 40 Minn. 475; 83 Va. 106; 3 How. 287; [1891] App. Cas. 78; 85 Wis. 451.

The law recognizes two classes of cases in which the occasion either supplies an absolute defence, or a defence subject to the condition that the party acted *bona fide* without malice. The distinction turns entirely on the question of malice. The communications last mentioned lose their privilege on proof of express malice; 12 Fed. Rep. 526. The former depend in no respect for their protection upon the *bona fides* of the defendant. The occasion is an absolute privilege, and the only questions are whether the occasion existed, and whether the matter complained of was pertinent to the occasion; Heard, Lib. & S. § 89. See Webb, Poll. Torts 335; Odg. Sl. & L. 184; 109 N. C. 270.

As to communications which are thus absolutely privileged, no person is liable, either civilly or criminally, in respect of anything published by him as a member of a legislative body, in the course of his legislative duty, or in respect of anything published by him in the course of his duty in any judicial proceeding. This privilege extends not only to parties, counsel, witnesses, jurors, and judges in a judicial proceeding, but also to proceedings in legislative bodies, and to all who, in the discharge of public duty or the honest pursuit of private right, are compelled to take part in the administration of justice, or in legislation. A fair report of any judicial proceeding or inquiry is also privileged; Heard, Lib. & S. §§ 90, 103, 110; Odg. Lib. & S. *185; but to be privileged it must be an accurate and impartial account of what actually occurred; 50 Ohio St. 71. A report to a newspaper of judicial proceedings if made by an outsider is actionable if made from motives of personal hostility; 5 Ex. Div. 53. See 46 Ill. App 313; 45 La. Ann. 1184; [1893] 1 Q. B. 65.

The *bona fide* statements of one church member on the trial of another, before a church tribunal, are privileged; 88 Ga. 620. They have a qualified privilege; Poll. Torts 253.

Freedom of speech in parliament is protected by the Bill of Rights; 1 W. & M. Sess. 2, c. 2. An action will not lie against a judge for words spoken in his judicial capacity in a court of justice; L. R. 3 Ex. 220.

Unfounded insinuations made by counsel against the prosecutor are privileged; 11 Q. B. Div. 588; so are volunteered statements of a witness involving a criminal charge against a person not connected with the case under inquiry. Military courts stand in the same way; L. R. 7 H. L. 744; communications relating to affairs of state and passing between officials are absolutely privileged; Poll. Torts 253; [1895] 1 Q. B. 888; as to whether military and naval reports, not made in the cause of some judicial inquiry, are absolutely privileged, or have only a qualified privilege, see L. R. 5 Q. B. 94. Fair reports of judicial and parliamentary inquiries are said to have an absolute privilege; Poll. Torts 253.

A communication is privileged when made in good faith in answer to one having an interest in the information sought, and it will be privileged if volunteered, when the party to whom it is made has an interest in it and such party stands in such relation to him as to make it a reasonable duty, or at least proper, that he should give the information.

"A communication which would otherwise be privileged, if made with malice in fact or through hatred, ill-will, and a malicious design to injure, is not a privileged communication, but the burden of proof is on the plaintiffs to show malice in fact." 12 Fed. Rep. 526; 111 Pa. 404. A member of a legislative body cannot take advantage of his position to utter private slanders against others; 184 Pa. 108.

Information furnished by a charity organization society at the request of a person not a member, but who was interested, is a privileged communication; 13 Cent. L. J. 432. So are communications to a near relative respecting the character of a person with whom the relative is negotiating for a marriage; 8 C. & P. 88 (but not by a stranger; 5 Allen 170); so where one communicated to an employer his suspicions of dishonest conduct in a servant towards himself; 8 C. B. N. S. 597.

A publication by a newspaper of an article without inquiry is not privileged because received from a regular correspondent; 68 Hun 474. Communications between an applicant for a patent and the patent office touching an unissued patent are not privileged; 44 Fed. Rep. 294. As to statements made to commercial agencies, see that title. Whenever it is right in the interest of society for one person to communicate to another what he believes or has heard concerning any person's conduct or character is a privileged occasion; Poll. Torts 256; L. R. 5 Q. B. 11. Thus a solicitor to his client about the soundness of a security, or a father to his daughter about her suitor; Poll. Torts 256; a creditor of a firm in liquidation to another of its creditors as to a member of the debtor

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firm; L. R. 4 Ex. 232; communications addressed to a person in public position relating to the redress of grievances: 5 E. & B. 344. Where the defendant dismissed the plaintiff from its service on account of gross neglect of duty, a statement by the defendant to its servants of the reason for plaintiff's dismissal is a privileged communication, The occasion being privileged, the communication is so, unless the plaintiff can show that it was malicious; [1891] 2 Q. B. 189.

In making privileged communications of a confidential kind, the failure to use the ordinary means of insuring privacy will destroy the privilege; L. R. 9 C. P. 393.

If the occasion be privileged the plaintiff must prove malice, that is dishonest or reckless ill-will. To constitute malice there must be something more than the absence of reasonable ground for belief; Poll. Torts 262. See 8 Harv. L. Rev. 9; CONFIDENTIAL COMMUNICATIONS; LIBEL; MALICE; JUSTIFICATION; SLANDER.

In America, as in England, the defence of privilege is confined to comment and criticism of the acts of public men, as they actually happened, and does not extend to false assertions of fact; 55 Fed. Rep. 456. See 152 Pa. 406; 13 Lawy. Rep. Ann. 97.

**PRIVILEGED COPYHOLDS.** Those copyholds which are held according to the *custom of the manor* and not according to the *will of the lord.* They include ancient demesne and customary freehold. See CUSTOMARY COPYHOLD; 2 Woodd. Lect. 33; Lee, Abs. 63; 1 Crabb, R. P. 709, 919; 2 Bla. Com. 100.

**PRIVILEGED DEBTS.** Those which an executor or administrator, assignee in bankruptcy, etc., may pay in preference to others, such as funeral expenses, servants' wages, and doctors' bills during last sickness, etc. See PRIVILEGE; ADMINISTRATOR.

**PRIVILEGED DEED. In Scotch Law.** An instrument, for example, a testament, in the execution of which certain statutory formalities usually required are dispensed with, either from necessity or expediency. Erskine, Inst. 3. 2. 22; Bell, Dict.

**PRIVILEGED VILLEINAGE.** Villein socage. 1 Steph. Com. 188, 223. See SOCAGE.

**PRIVILEGES AND IMMUNITIES.** The words privileges and immunities are used in the XIV amendment of the constitution, and in other parts of that document, and were also used in the articles of confederation. They are such privileges as are fundamental, which belong to the citizens of all free governments and which have at all times been enjoyed by citizens of the United States; 16 Wall. 76; 123 U. S. 150; 144 U. S. 361.

These have been enumerated as some of the principal privileges: Protection by the government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; 16 Wall. 76; 123 U. S. 156; 144 *id.* 361; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through or reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise (but he is entitled to no greater privileges and immunities than are possessed by the citizens of the latter state; 135 U. S. 492), to claim the benefit of the writ of *habeas corpus*, to institute and maintain actions of every kind in the courts of the state, to take, hold, and dispose of property, and an exemption from higher federal taxes or impositions than are paid by the citizens of other states, etc.; 4 Wash. C. C. 371. Other judges have preferred to leave the meaning of the phrase to be determined as each case arises; 94 U. S. 391. See Cooley, Const. 24.

The constitution also declares that "no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States;" but this amendment does not control the power of the state over its own citizens; 31 Atl. Rep. (Md.) 322.

A citizen of the United States has been said to have a right as such to participate in foreign and inter-state commerce, to have the benefit of the postal laws, to make use in common with others of the navigable waters of the United States, to pass from state to state and into foreign countries; he may petition the federal authorities, visit the seat of government without being subjected to the payment of a tax for the privilege (6 Wall. 35), be the purchaser of public lands on the same terms as others; 112 U. S. 76; 144 *id.* 263; participate in the government if he comes within the conditions of suffrage, be protected from violence while exercising his right of suffrage; 144 U. S. 263; demand the protection of the government on the high seas or in foreign countries; Cooley, Const. 489, 246; see 16 Wall. 36; take out patents and copyrights, buy, sell, or devise United States securities, and take the benefit of the national bankrupt laws; Black, Const. L. 531. A state may not impose a tax upon travellers passing by public conveyance out of the state: 6 Wall. 35; nor impose conditions upon the rights of citizens of other states to sue its citizens in the federal courts; 20 Wall. 445; see 37 Ia. 145; nor deny to colored citizens the privilege of serving on the jury, because of their color; 100 U. S. 303, 313, 339; or to citizens who have become such by naturalization; 5 Leigh 743.

The right to free education is not a privilege and immunity; 30 Chi. Leg. N. 138; or the right of suffrage; 21 Wall. 162; 48 Hun 198; or the right to practise law in the courts of the state; 16 Wall. 130; or to have a controversy in the state court prosecuted or determined by one

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form of action rather than by another; 160 U. S. 389; nor does an act forbidding the practice of medicine until after examination by a state board; 4 Wash. St. 424.

Among statutes which have been held not to abridge the privileges or immunities of citizens are: Requiring that every child attending school shall be vaccinated; 65 Conn. 183; that policies of insurance shall not be issued without securing a charter of incorporation; 164 Pa. 306; that contractors shall accept no more than eight hours' work in twenty-four except in cases of necessity; 77 Hun 120; that every person before registration for election must be able to read and write; 34 N. E. Rep. (Mass.) 521; that one who sells patents shall file an authenticated copy of the letters patent and an affidavit that such letters are genuine; 51 Fed. Rep. 774 (distinguishing 25 *id.* 394); that women shall not be employed in saloons, theatres, etc., where liquor is sold; 83 Fed. Rep. 157; that minors shall not remain therein; 73 N. W. Rep. (Mich.) 111; prohibiting plumbers from exercising their calling without a certificate from a board of examiners; 81 Hun 434; requiring that the seller of fertilizers shall take out a license; 43 Fed. Rep. 609; that those carrying on the banking business shall comply with the provisions of an act relating thereto; 51 N. W. Rep. (S. D.) 858; regulating the right to practise medicine; 10 Col. 383; 88 Ala. 122; 112 Ind. 462; dentistry; 52 Ark. 228; 44 Kan. 565 (but such regulation cannot discriminate against citizens of other states; 65 N. H. 103); suppressing a nuisance; 82 Fed. Rep. 623; regulating or prohibiting the sale of liquor within a state. See LIQUOR LAWS.

Refusal to any person of the accommodations of any public conveyance or place of amusement; 109 U. S. 3; refusing to allow colored children to attend the public schools; 103 Mo. 546 (but see 7 Nev. 342); excluding persons of color *not taxed*, in an enumeration of inhabitants for the purpose of reorganizing a senatorial district; 19 N. Y. S. 978; the establishment of separate schools for white and colored children; 107 N. C. 609; or prohibiting the carrying of dangerous weapons; 35 W. Va. 367; 153 U. S. 535; do not abridge the privileges or immunities of citizens; nor does a statute prohibiting the intermarriage of white and colored persons; 36 Ind. 389; 63 N. C. 547.

See Black, Const. L.; Cooley, Const. Lim.; 14 L. R. A. 579; CIVIL RIGHTS; DUE PROCESS OF LAW; PROTECTION OF THE LAW; LIBERTY OF CONTRACT; SCHOOLS.

**PRIVILEGIUM** (*priva lex*, i. e. *de uno homine*). **In Civil Law.** A private law inflicting a punishment or conferring a reward. Calvinus, Lex.; Cicero, *de Lege* 3, 19; *pro Domo* 17; Vicat, Voc. Jur. Every peculiar right by which one creditor or class of creditors is preferred to another in personal actions. Vicat, Voc. Jur. Every privilege granted by law in derogation of common right. Mackeldey § 188. A claim or lien on a thing, which once attaching, continues till waiver or satisfaction, and which exists apart from possession. So at the present day in maritime law; *e. g.* the lien of seamen on ship for wages. 2 Pars. Marit. Law 561. See PRIVILEGE.

**PRIVILEGIUM CLERICALE** (Lat.) Benefit of clergy, which see.

**PRIVILEGIUM, PROPTER, PROPERTY.** A qualified property in animals *feræ naturæ*, *i. e.* a privilege of hunting, taking, and killing them, in exclusion of others. 2 Bla. Com. 394.

**PRIVITY.** The mutual or successive relationship to the same rights of property. 1 Greenl. Ev. § 189; 6 How. 60; 1 U. S. App. 101; 2 Colo. App. 571.

**PRIVITY OF CONTRACT.** The relationship which subsists between two contracting parties.

From the nature of the covenant entered into by him, a lessee has both privity of contract and of estate; and though by an assignment of his lease he may destroy his privity of estate, still the privity of contract remains, and he is liable on his covenant notwithstanding the assignment; Dougl. 458, 764; Viner, Abr.; 6 How. 60.

**PRIVITY OF ESTATE.** Identity of title to an estate.

The relation which subsists between a landlord and his tenant.

It is a general rule that a termor cannot transfer the tenancy or privity of estate between himself and his landlord without the latter's consent: an assignee who comes in only in privity of estate is liable only while he continues to be legal assignee: that is, while in possession under the assignment; Bac. Abr. *Covenant* (14); Woodf. Landl. & T. 261; Viner, Abr.; Washb. R. P.

**PRIVITY OF POSSESSION.** To establish this, the later occupant must enter under the prior one, and must obtain his possession either by purchase or deed. When the possession is actual, it may commence in parol without deed or writing; and it may be transferred or pass from one occupant to another by parol, bargain, and sale, accompanied by delivery. All the law requires is continuity of possession, where it is actual; 2 Sawy. 545; 22 Or. 77.

**PRIVY.** One who is a partaker or has any part or interest in any action, matter, or thing.

**PRIVY COUNCIL.** The chief council of the sovereign, called, by pre-eminence, "the Council," composed of those whom the king appoints. 1 Bla. Com. 229.

The statute of Charles II. in 1679 limited the number to thirty,—fifteen of the chief officers of the state *ex virtute officii*, the other fifteen at the king's pleasure; the number is now indefinite. A com-

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mittee of the privy council was a court of ultimate appeal in admiralty and ecclesiastical cases and cases of lunacy; 3 P. Wms. 108; and from all dominions of the crown except Great Britain and Ireland; H. Wood. Lect. 157 *b*. The court of appeal now has its jurisdiction in lunacy and admiralty. See JUDICIAL COMMITTEE.

**PRIVY PURSE.** The income set apart for the sovereign's personal use.

**PRIVY SEAL. In English Law.** A seal which the king uses to such grants or things as pass the great seal. Co. 2d Inst. 554.

**PRIVY SIGNET.** The seal which is first used in making grants, etc., of the crown. It is always in custody of the secretary of state. 2 Bla. Com. 347; 1 Woodd. Lect. 250; 1 Steph. Comm., 11th ed. 598.

**PRIVY TOKEN.** By stat. 33 Henry VIII. c. 1, punishment is provided against those evil-disposed persons who devised how they might unlawfully get into their possession goods, chattels, and jewels of other persons by "privy tokens and counterfeit letters in other men's names," unto divers persons their friends and acquaintances, by color whereof they have unlawfully obtained the same. A false privy token within the statute has generally been taken to denote some seal, visible mark, or thing, as a key, a ring, etc. 13 Viner, Abr. 460. When one makes use of a false token, he is indictable for the cheat, though the act is not larceny; 1 Bish. Cr. L. § 585. But when the consent obtained covers no more than the possession, and the goods are converted to his own use, the offence becomes larceny; 1 Leach 420; East, Pl. Cr. 691. See FALSE TOKEN.

**PRIVY VERDICT.** One which is delivered privily to a judge out of court.

**PRIZE. In Maritime Law.** The apprehension and detention at sea of a ship or other vessel, by authority of a belligerent power, either with the design of appropriating it, with the goods and effects it contains, or with that of becoming master of the whole or a part of its cargo. 1 C. Rob. 228. See Bened. Adm. § 509.

The vessel or goods thus taken.

Goods taken on land from a public enemy are called booty; and the distinction between a prize and booty consists in this, that the former is taken at sea and the latter on land.

A lawful prize includes enemy's property captured on the high seas or in territorial waters belonging either to the captor or to the enemy, and property of neutrals captured and confiscated for breach of blockade or as contraband of war; Risley, Law of War 144.

In order to vest the title of the prize in the captors, it must ordinarily be brought with due care into some convenient port for adjudication by a competent court. But circumstances may render such a step improper; and of these the captor must be the judge. In making up his decision, good faith and reasonable discretion are required; 18 How. 110; 1 Kent 101. The condemnation must be pronounced by a prize court of the government of the captor sitting in the country of the captor or his ally; 7 Wheat. 283; the prize court of an ally cannot condemn.

Strictly speaking, as between the belligerent parties the title passes, and is vested when the capture is complete; and that was formerly held to be complete and perfect when the battle was over, or the flag hauled down, and the *spes recuperandi* was gone. Later, twenty-four hours' possession was required, and in still later times it was considered that the captured vessel must be brought *infra præsidia* (*q. v.*) to a place of safety. But by the modern usage of nations this is not sufficient to change the property. A judicial tribunal must pass upon the case; and the property is not charged in favor of a neutral vendee or recaptor, so as to bar the original owner, until a regular sentence of condemnation; 1 Kent 102; 1 C. Rob. 135; but this rule is not inflexible.

A neutral ship in the employment of a belligerent is, as well as the enemy's cargo, subject to capture; 24 Fed. Rep. 33. Where a vessel is captured by the army it is not subject to condemnation as prize; 108 U. S. 92.

Formerly prizes could be brought into a neutral port and kept there until condemned by a prize court sitting in the belligerent's territory; but it is probable that, at present, this right would be limited to cases arising out of stress of weather, lack of supplies, etc., and only for such length of time as necessity requires; Risley, Law of War 176.

All captures are made for the government; 10 Wheat. 306; and the title to captured property always vests primarily in the government of the captors. The rights of individuals, where such rights exist, are the result of local law or regulation; 101 U. S. 42; 2 Russ. & M. 56. The question of prize or no prize in England is triable only in a court of admiralty under a commission from the crown, with an appeal to the crown in council, for the crown reserves the right to decide such questions by its own authority and does not commit its determination to any municipal court.

Under the prize laws of the United States a ship includes a torpedo steam launch; 113 U. S. 747.

Where there is a probable cause to believe that a vessel is liable to capture, it is proper to take her and subject her to the examination and adjudication of a prize court; 4 Dall. 34. Circumstances creating a reasonable suspicion of conduct warranting her capture are sufficient; 1 Mas. 24.

A captured vessel is usually put in charge of a prize master, whose duty is, immediately on his arrival in port, to institute

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proceedings for condemnation. He is a bailee for the captors, and may become liable for negligence resulting in loss to them, for demurrage, etc.; 2 Halleck, Int. L., Baker's ed. 391. A captor should bring his prize, as speedily as may be consistent with his other duties, within the jurisdiction of a competent prize court, though under imperious circumstances, he may take it to a foreign port or even sell it. The proceeds of a sale must be subject to the order of a prize court.

The Navy Department rules of August, 1876, and the act of June 30, 1864, prescribe rules for the captors of prizes.

A captor's right of prize may be forfeited in various ways, as by delay in seeking a prize court; cruel treatment of the captured crew, embezzlement, etc.

See PRIZE COURT; NEUTRALITY; RECAPTURE; CAPTURE; INFRA PRÆSIDIA; PREEMPTION.

**In Contracts.** A reward which is offered to one of several persons who shall accomplish a certain condition; as, if an editor should offer a silver cup to the individual who shall write the best essay in favor of peace. In this case there is a contract subsisting between the editor and each person who may write such essay that he will pay the prize to the writer of the best essay; Wolff, *Dr. de la Nat.* § 675.

**PRIZE COURT. In English Law.** That branch of admiralty which adjudicates upon cases of maritime captures made in time of war. A special commission issues in England, in time of war, to the judge of the admiralty court, to enable him to hold such court. See ADMIRALTY.

Some question has been raised whether the prize court is or is not a separate court from the admiralty court. Inasmuch as the commission is always issued to the judge of that court, and the forms of proceeding are substantially those of admiralty, while the law applicable is derived from the same sources, the fact that the commission of prize is only issued occasionally would hardly seem to render the distinction a valid one. But Lord Mansfield said that the whole system of procedure, litigation, and jurisprudence is different; Dougl. 613. See JUDICATURE ACTS.

In the United States, the admiralty courts discharge the duties both of a prize and an instance court (*q. v.*). The district courts are prize courts; 3 Dall. 6. The president cannot confer jurisdiction to act as a prize court; 13 How. 498. The circuit and district courts and the supreme court are now courts of admiralty for the condemnation of prizes, the original jurisdiction being in the district court. Appeals may be taken directly from it to the supreme court if the amount in controversy exceeds two thousand dollars, or if there is a certificate of the district judge that the question involved is one of general importance; but by the act of March 3, 1891, this limitation is probably removed.

On the breaking out of hostilities the district court appoints commissioners to examine witnesses, etc., under the direction of the court; R. S. § 4621. For the practice see Bened. Adm. §§ 509–512; 1 Wheat. 494; 2 *id.* 429; and as to the English practice, 2 Halleck, Int. L., Baker's ed. 421. Questions of booty may be referred to the admiralty by the crown; Knapp, P. C. 360.

If there is probable cause for the seizure of a vessel that is not a good prize, the captors may have their costs though the vessel is not condemned; 12 Ct. Cls. 408; they are not liable in damages; 2 Gall. 240, 325; but if a captor unreasonably delays bringing suit for condemnation, he is liable for demurrage if the court decrees a restoration; 108 U. S. 92, where the United States was held liable for demurrage from the time when surrender might have been made, at the rate fixed by the charter party. A captor does not lose his right by delay in sending home a prize for adjudication, if he thinks it necessary and uses discretion and good faith; 18 How. 110. It is the usual practice of the prize court to give freight to the neutral carrier of enemy's goods that are seized; 3 Phill. Int. L. 373. The burden of proof that the prize is neutral rests upon the claimant; and if he fails to show it, condemnation ensues; 2 C. Rob. 77; he must clear himself of suspicion; 22 Ct. Cls. 408.

A prize court of the captors cannot sit in neutral territory, though it may in conquered territory, and in that of a co-belligerent; 2 Halleck, Int. L., Baker's ed. 401.

The decision of a prize court is conclusive against the subject of the state and as to the property in the subject-matter against all parties; but unlawful condemnation may subject the state of the captors to demands for indemnity by a foreign state; *id.* 407. But courts of other nations may examine as to the jurisdiction of a prize court, and if a condemnation therein was not according to the rules of international law, may treat it as a nullity; *id.* 411. Condemnations of prize courts are final in actions between individuals, and as to the vessel condemned, giving purchasers a good title against all the world, but do not bind foreign nations, if wrongfully decreed; 22 Ct. Cls. 1.

There is a clearly marked distinction between proceedings for prize and forfeiture. "The libel for prize is founded upon the law of nations, and depends for proof upon the facts of her acts upon the high seas. The libel for forfeiture is for the violation of a municipal statute, and depends upon a set of facts and circumstances entirely different from that of piratical aggression. The offences charged are separate and distinct, and the cause of action is in no wise the same." 28 Fed. Rep. 150. In the case of *The Itata*, it was said that "when a ship is libelled for prize, and the facts fail to sustain the libel, but make out a strong *prima facie* case of a statutory forfeiture, it would be the duty of the

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court to remand the case for a new libel; but under no circumstances could a ship be libelled for one offence, and have a decree entered against it for another distinct and separate offence." 56 *id.* 505, 515.

The duties of prize courts are thus described by Lord Stowell:—

"In forming my judgment, I trust that it has not for a moment escaped my anxious recollection what it is that the duty of my station calls for from me; namely, not to deliver occasional and shifting opinions to serve present purposes of particular national interests, but to administer, with indifference, that justice which the Law of Nations holds out, without distinction, to independent States, some happening to be neutral, and some belligerent. The seat of judicial authority is, indeed, locally *here*, in the belligerent country, according to the known law and practice of nations; but the law itself has no locality. It is the duty of the person who sits here, to determine this question exactly as he would determine the same question, if sitting at Stockholm; to assert no pretensions on the part of Great Britain which he would not allow to Sweden in the same circumstances; and to impose no duties on Sweden, as a neutral country, which he would not admit to belong to Great Britain in the same character." 1 C. Rob. 350.

In another case, he says:

"It is to be recollected that this is a court of the Law of Nations, though sitting here under the authority of the King of Great Britain. It belongs to other nations as well as to our own; and what foreigners have a right to demand from it, is the administration of the Law of Nations simply, and exclusively of the introduction of principles borrowed from our own municipal jurisprudence, to which it is well known they have at all times expressed no inconsiderable reluctance." 6 *id.* 349.

**PRIZE-FIGHT.** A public prize-fight is an indictable offence. No concurrence of wills can justify a public tumult and alarm; therefore, persons who voluntarily engage in a prize-fight and their abettors are all guilty of assault; 4 C. & P. 537; Poll. Tort 186, n.; 1 Cox, C. C. 177; 2 Bish. C. L. § 35. Prize-fights are unlawful, and all persons guilty of aiding and abetting a prize-fight are guilty of an assault; 8 Q. B. Div. 534. See, also, 108 Mass. 302; 67 Miss. 350.

To constitute prize-fighting there must be an expectation of reward to be gained by the contest or competition, either to be won from the contestant or to be otherwise awarded, and there must be an intent to inflict some degree of bodily harm on the contestant; 96 Mich. 576.

Prize-fighting is unlawful; 1 Bish. Cr. Law § 535; C. & M. 314; fighting with the fists is an assault and battery, though the parties agree thus to fight and have no ill-will toward each other; Washb. Manual of Crim. Law; it is a breach of the peace; Poll. Torts 139; 9 C. & P. 214.

If two persons go out to fight with their fists, by consent, and do fight with each other, each is guilty of an assault, although there is no danger or ill-will; 119 Mass. 350, disagreeing with 1 Hill S. C. 10; it is no bar to an action for assault that the parties fought with each other by mutual consent, but such consent may be shown in mitigation of the damages; 33 Ind. 531; one may recover in an action for assault and battery, although he agreed to fight with his adversary; for such agreement to break the peace being void, the maxim *volenti non fit injuria* does not apply; 3 Jones N. C. 131; mere voluntary presence at a fight does not, as a matter of law, necessarily render persons so present guilty of an assault, as aiding and abetting in such fight; 8 Q. B. Div. 534 (4 C. & P. 537, distinguished); *semble*, mere presence of a person at a prize-fight affords some evidence for the consideration of a jury of an aiding and abetting in such fight; 8 Q. B. Div. 534.

To constitute a prize-fight it is not essential that the fight should be with the naked fist or hand, but the fact that a contest was had with gloved hands, as also the kind, size, weight, and other characteristics of the gloves so used, may be looked to in connection with the other evidence in the case in determining whether a contest was a prize-fight, or merely a sparring or boxing exhibition without prize or reward to the victor; 4 Ohio N. P. 81.

Prize-fighting was not a distinct offence at common law and participants were indictable and punishable for assault, riot, or affray; 8 Q. B. Div. 534; 3 C. & M. 314; 2 C. & P. 234; 67 Miss. 350.

A spectator at a sparring match is not *particeps criminis*; there is nothing unlawful in sparring, unless the men fight until they are so weak that a dangerous fall is likely to be the result of the game. Therefore, except in the latter case, death caused by an injury received during a sparring match does not amount to manslaughter; 10 Cox, C. C. 371.

In Arkansas a court of equity has power to issue an injunction to restrain a prize-fight advertised to take place within its jurisdictional limits; 35 Am. Law Reg. & Rev. 100; 28 L. R. A. 727; in Indiana an injunction was granted at the suit of the state, upon the ground that a corporation was misusing its franchise and maintaining its property as a nuisance, although the act complained of was a crime; 143 Ind. 98.

Consent to engage in a boxing match is not a defence to an indictment for a breach of the peace. It is for the jury to determine from the nature of the contest whether it was a breach of the peace, under proper instructions as to what constitutes such a breach.

Evidence is not admissible to prove that such matches are common and harmless amusements, practised in the colleges of this country, nor was there error in refusing to allow the jury to examine the boxing gloves used by the respondent; 56 Vt. 445.

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It is not necessary that an indictment aver that the fight took place in public; nor that it contain averments which negative the existence of matters mentioned in the proviso of § 6890 of the revised statutes; 49 Ohio St. 117.

An agreement to engage in a prize-fight is a conspiracy to commit a crime; and the declarations of either party with reference to the common object, or in furtherance of the criminal design, while engaged in its prosecution, are competent evidence against the other, though the agreement was made through backers or other representatives of the principals and the latter were unknown to each other. Letters written by one of the principals, while in training for the fight, describing what the fight is to be, stating when and where it is to occur, and requesting the presence of his friends and others thereat, are in furtherance of the unlawful enterprise, and admissible in evidence against the other; 49 Ohio St. 117.

Whether a pugilistic encounter is a fight or boxing exhibition, is not a question upon which expert testimony is admissible on the trial of an indictment for engaging in a prize-fight. The question must be decided by the jury upon the evidence of what actually took place, under proper instructions from the court, and not upon the opinions of professional pugilists, and others experienced in such combats, or the rules adopted by associations for conducting such contests; 49 Ohio St. 117.

Statutes prohibiting prize-fights have been passed in nearly all the states. That of Nevada (1897) alone need be set forth. Any male person over twenty-one years may procure a license for an exhibition in a public place for any contest or exhibition with gloves between man and man for a wager or reward, and the weight of the gloves used shall not be less than four ounces. The sheriff of any county in which such exhibition is to be held, shall issue a license therefor on payment to him of one thousand dollars. The licensee shall, ten hours before any proposed contest, file with the county clerk where such contest is to be held, a certificate in writing executed by two regular practising physicians of the state showing that the contestants are in sound physical health and condition. The exhibition shall be within an enclosure sufficient to exclude the view of the public not in attendance thereat; no intoxicating liquors of any kind shall be sold or given away at or during the contest upon the grounds or within the enclosure. A charge may be made for admission. Any persons who shall participate in, conduct, or manage any glove contest contrary to the provisions of this act shall be guilty of a misdemeanor.

What constitutes prize-fighting is a question of law; but it is a term in common use, and the very employment of the word indicates what is meant; 96 Mich. 576.

By statute it is even made criminal for inhabitants of a state by previous agreement to leave the state and engage in a fight outside of its limits; 108 Mass. 302.

See McClain, Cr. Law §§ 196, 249, 1013; 1 Bish. Cr. Law §§ 632-633; 6 L. Quart. Rev. 110.

**PRIZE PACKAGES.** See SALES; LOTTERY.

**PRO BONO PUBLICO.** For the public good.

**PRO CONFESSO** (Lat. as confessed). **In Equity Practice.** A decree taken where the defendant has either never appeared in the suit, or, after having appeared, has neglected to answer. 1 Dan. Ch. Pr. 479; Ad. Eq., 8th ed. *328, 330, 374; 1 Sm. Ch. Pr. 254.

**PRO CONSILIO.** For counsel given. An annuity *pro consilio* amounts to a condition, but in a feoffment or lease for life, etc., it is the consideration, and does not amount to a condition; for the state of the land by the feoffment is executed, and the grant of the annuity is executory. Plowd. 412.

**PRO DEFECTU EXITUS.** For, or in case of, default of issue. 2 Salk. 620.

**PRO DIGNITATE REGALI.** In consideration of the royal dignity. 1 Bla. Com. 223.

**PRO EO QUOD** (Lat.). **In Pleading.** For this that. This is a phrase of affirmation, and is sufficiently direct and positive for introducing a material averment. 1 Saund. 117, n. 4; 2 Chit. Pl. 369-393; Gould, Pl. c. 3, § 34.

**PRO FALSO CLAMORE SUO.** A nominal amercement of a plaintiff for his *false claim*, which used to be inserted in a judgment for the defendant.

**PRO FORMA.** As a matter of form. 2 Kent 245.

**PRO HAC VICE** (Lat.). For this occasion.

**PRO INDIVISO** (Lat.). For an undivided part. The possession or occupation of lands or tenements belonging to two or more persons, and where, consequently, neither knows his several portion till divided. Bract. l. 5.

**PRO INTERESSE SUO** (Lat.). According to his interest.

**PRO LÆSIONE FIDEI.** For breach of faith. 3 Bla. Com. 52.

**PRO LEGATO.** As a legacy.

**PRO MAJORI CAUTELA.** From greater caution.

**PRO PARTIBUS LIBERANDIS.** An ancient writ for partition of lands between co-heirs. Reg. Orig. 316.

**PRO QUERENTE** (Lat.). For the plaintiff; usually abbreviated *pro quer.*

**PRO RATA** (Lat.). According to the rate, proportion, or allowance. A creditor

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**PRO RATA** (Lat.). According to the rate, proportion, or allowance. A creditor of an insolvent estate is to be paid *pro rata* with creditors of the same class.

According to a certain rule or proportion. 19 Am. L. Reg. N. S. 355, n. (U. S. D. C. Cal.). It is presumed to be used in that sense in a will; *id.*

**PRO RE NATA** (Lat.). For the occasion as it may arise.

**PRO SALUTE ANIMÆ.** For the good of his soul,

**PRO TANTO** (Lat.). For so much. See 17 S. & R. 400.

**PRO TEMPORE.** For the time being; temporary.

**PROAMITA** (Lat.). A grandfather's sister; a great aunt. Ainsworth, Dict.

**PROAVIA** (Lat.). A great-grandmother. Ainsworth, Dict.

**PROAVUNCULUS** (Lat.). A great-grandmother's brother. Ainsworth, Dict.

**PROAVUS** (Lat.). Great-grandfather. This term is employed in making genealogical tables.

**PROBABILITY.** Likelihood; consonance to reason; for example, there is a strong probability that a man of good moral character, and who has heretofore been remarkable for truth, will, when examined as a witness under oath, tell the truth; and, on the contrary, that a man who has been guilty of perjury will not, under the same circumstances, tell the truth: the former will, therefore, be entitled to credit, while the latter will not.

**PROBABLE.** Having the appearance of truth; appearing to be founded in reason.

**PROBABLE CAUSE.** A reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that a person accused is guilty of the offence with which he is charged. 53 N. Y. 17; 109 Mo. 281; 63 Hun 626; *id.* 254; 1 Colo. App. 297.

Want of probable cause is one of the elements required to support an action for malicious prosecution, which title see for a discussion of the subject.

In extradition cases, probable cause is made out by proof furnishing good reason to believe that the crime alleged has been committed by the person charged with having committed it; 161 U. S. 502. See EXTRADITION.

In cases of municipal seizure for the breach of revenue, navigation and other laws, if the property seized is not condemned, the party seizing is exempted from liability for such seizure if the court before which the cause is tried grants a certificate that there was *probable cause* for the seizure. If the seizure was without probable cause, the party injured has his remedy at common law. See 7 Cra. 339; 2 Wheat. 118; 9 *id.* 362; 16 Pet. 342; 3 How. 197; 4 *id.* 251; 13 *id.* 498.

**PROBATE.** Originally, relating to proof; afterwards, relating to the proof of wills. In American law, now a general name or term used to include all matters of which probate courts have jurisdiction. 47 Minn. 575.

**PROBATE CODE.** The body or system of law relating to the estates of deceased persons, and of persons under guardianship. 47 Minn. 575.

**PROBATE COURT.** See COURT OF PROBATE.

**PROBATE COURTS.** See COURTS OF PROBATE.

**PROBATE DUTY.** A tax laid by the government on the gross value of the personal property of the deceased testator.

**PROBATE OF A WILL.** The proof before an officer authorized by law that an instrument offered to be proved or registered is the last will and testament of the deceased person whose testamentary act it is alleged to be.

*Jurisdiction.* In England, the ecclesiastical courts were the only tribunals in which, except by special prescription, the validity of wills of personal estate could be established or disputed. Hence in all courts, the seal of the ecclesiastical court is conclusive evidence of the factum of a will of personalty; from which it follows that an executor cannot assert or rely on his authority in any other court, without showing that he has previously established it in the spiritual court,—the usual proof of which is the production of a copy of the will by which he is appointed, certified under the seal of the ordinary. This is usually called the probate. The probate of a will is conclusive as to personalty; but not as to realty, which can only be settled by an issue out of chancery or a trial at law; 4 Kent 510.

The ecclesiastical courts had no jurisdiction of devises of lands; and in a trial at common law or in equity the probate of a will is not admissible as evidence, but the original will must be produced, and proved the same as any other disputed instrument. This rule has been modified by statute in some of the United States. In New York, the record, when the will is proved by the subscribing witnesses, is *prima facie* evidence, and provision is made for perpetuating the evidence. See 12 Johns. 192; 14 *id.* 407. In Massachusetts, North Carolina, and Michigan the probate is conclusive of its validity, and a will cannot be used in evidence till proved; 12 Allen 1; 1 Gall. 622; 2 Mich. Comp. Laws (1871) 1375; Battle, Rev. 849. In Pennsylvania, the probate was held not conclusive as to lands, and, although not allowed by the register's court, it might be read in evidence; 5 Rawle 80; but see 119 Pa. 138; but it becomes conclusive as to realty, unless within five years from probate those interested

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shall contest its validity. In South Carolina the will must be proved *de novo* in the court of common pleas, though allowed in the ordinary; 1 N. & M'C. 326. In New Jersey, probate is necessary, but it is not conclusive; 1 Penn. N. J. 42; except in actions not commenced within seven years from the probate; N. J. Rev. Stat. 1250. See LETTERS TESTAMENTARY.

*The effect* of the probate in this country, and the rules in regard to jurisdiction, are generally the same as in England; but, as no ecclesiastical courts exist in the United States, probate is granted by some judicial officer, who performs the part of the ordinary in England, but generally with more ample powers in relation to the administration of the estate. See SURROGATE; LETTERS TESTAMENTARY.

*The proof* of the will is a judicial proceeding, and the probate a judicial act. The party propounding the instrument is termed the proponent, and the party disputing, the contestant. In England, proof *ex parte* was called probate in common form, and proof on notice to the next of kin, proof in solemn form. In the United States, generally speaking, proofs are not taken until citation or notice has been issued by the judge to all the parties interested to attend. On the return of the citation, the witnesses are examined, and the trial proceeds before the court. If the judge, when both parties have been heard, decides in favor of the will, he admits it to probate; if against the will he rejects it. In Pennsylvania no citation is required.

More than one instrument may be proved; and where the contents of two or more instruments are not wholly inconsistent with each other, they may all be admitted as together constituting the last will and testament of the deceased; Will. Exec. *138.

On the probate the alleged will may be contested on any ground tending to impeach its validity; as, that it was not executed in due form of law and according to the requisite statutory solemnities; that it was forged, or was revoked, or was procured by force, fraud, misrepresentation, or undue influence over a weak mind, or that the testator was incompetent by reason of idiocy or lunacy.

**PROBATION.** The evidence which proves a thing. It is either by record, writing, the party's own oath, or the testimony of witnesses. Proof. It also signifies the time of a novitiate; a trial. Nov. 5.

**PROBATOR. In Old English Law.** Strictly, an accomplice in felony who to save himself confessed the fact, and charged or accused any other as principal or accessary, against whom he was bound to make good his charge. It also signified an approver, or one who undertakes to prove a crime charged upon another. Jacob, Law Dict.

**PROBATORY TERM.** In the British courts of admiralty, after the issue is formed between the parties, a time for taking the testimony is assigned. This is called a probatory term.

This term is common to both parties, and either party may examine his witnesses. When good cause is shown, the term will be enlarged. 2 Brown, Civ. Law 418; Dunlop, Adm. Pr. 217.

**PROBI ET LEGALES HOMINES** (Lat.). Good and lawful men; persons competent in point of law to serve on juries. Cro. Eliz. 654, 751; Cro. Jac. 635; Mart. & Y. 147; Hard. 63; Bac. Abr. *Juries* (A).

**PROCEDENDO** (Lat.). **In Practice.** A writ which issues where an action is removed from an inferior to a superior jurisdiction by *habeas corpus*, *certiorari*, or writ of privilege, and it does not appear to such superior court that the suggestion upon which the cause has been removed is sufficiently proved; in which case the superior court by this writ remits the cause to the court from whence it came, commanding the inferior court to *proceed* to the final hearing and determination of the same. See 2 W. Bla. 1060; 6 Term 365; 52 Conn. 166.

**PROCEDURE.** The methods of conducting litigation and judicial proceedings.

It might be termed, by way of illustration, the mechanism of the law, as distinguished from jurisprudence, which is the science of the law.

The term is so broad in its signification that it is seldom employed in our books as a term of art. It includes in its meaning whatever is embraced by the three technical terms, pleading, evidence, and practice, And practice in this sense means those legal rules which direct the course of proceeding to bring parties into the court and the course of the court after they are brought in; and evidence as a part of procedure signifies those rules of law whereby we determine what testimony is to be admitted and what rejected in each case, and what is the weight to be given to the testimony admitted. Bish. Cr. Proc. § 2; 107 U. S. 231. See 5 Ind. App. 95.

The term is, with respect to its present use, rather a modern one. Recently the supreme court of the United States commented on the fact that it was unable to find anywhere a satisfactory definition of it. Apart from observations of the most general character the subject is one which does not admit of distinct or detailed treatment under this title. It includes all the practical titles of the law to which reference should be had, with respect to any particular matter, as they are separately treated in this work.

Probably the most salient fact with respect to legal procedure in civil cases is the modern tendency in England and the United States to obliterate technical distinctions between law and equity and to authorize the enforcement of equitable remedies, as well in courts of law as of

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chancery. But with respect to this tendency it has been very justly said that:

"Although, under modern systems, courts of law may enforce equitable rights, the proof must agree with the pleadings, and the relief granted must be within the prayer for relief and the grounds relied on." 70 Fed. Rep. 949.

Another feature of modern thought on the subject of procedure is the controversy between the advocates of common-law practice and that under codes, which will be found discussed at length under the titles CODE and COMMON LAW, respectively. See also Clarke, The Science of Law and Law-Making.

In England the last quarter of the century has witnessed the most radical change in procedure as the result of the Judicature Acts, which title see. Under the changes thus introduced, where one formerly, in seeking relief from judicial tribunals, was obliged to use different forms of procedure in different courts, these acts, and the rules made pursuant to them, "have to a very large extent introduced uniformity in this respect into the practice of the different divisions of the court." 1 Brett, Com. 336.

In criminal procedure there is a strong tendency indicated towards simplification and expedition. The most notable tendency of a general character is that towards the abolition or modification of the grand jury system, as to which see that title. Very recently vital and comprehensive changes have been made in the criminal procedure of France relating to the preliminary examination of accused persons. See JUGE D'INSTRUCTION.

A new criminal code, notable both as to the changes introduced and the care with which it was prepared, went into effect in Italy in 1890, a careful analysis of which will be found in 35 Am. L. Reg. N. S. 696. In Great Britain the criminal procedure of Scotland is very different from that of England notwithstanding the union, and a carefully detailed account of it may be found in 35 Am. L. Reg. N. S. 619.

In a case defining the functions and authority of a prosecuting attorney and his right to enter a *nolle prosequi* after conviction, the supreme court of Louisiana, in a very able opinion, directed attention to some differences between the criminal procedure of that state and that of England and the states which follow English precedence. The great power given to the prosecuting officer under the common law is greatly diminished in that state, and the court concludes its examination of the subject by the statement that:

"First. The inauguration or preliminary stage, when the prosecuting officer has absolute control of his indictments.

"Second. The trial of the cause, and its incidents, during which the court has control and the power of the prosecuting officer is suspended.

"Third. The period between the verdict of the jury and the sentence of the court, when the pardoning power comes into operation." 48 La. Ann. 109, 144.

See POSTULATIO.

**PROCEDURE ACTS.** Three acts of parliament passed in 1852, 1854, and 1860, for the amendment of procedure at common law. Moz. & W. They have been largely superseded by the Judicature Acts of 1873 and 1875. See JUDICATURE ACTS.

**PROCEEDING.** In its general acceptation, the form in which actions are to be brought and defended, the manner of intervening in suits, of conducting them, the mode of deciding them, of opposing judgments, and of executing. It includes certified copies of pleadings on which the case was tried. 62 N. W. Rep. (Neb.) 1084.

*Ordinary proceedings* intend the regular and usual mode of carrying on a suit by due course at common law.

*Summary proceedings* are those where the matter in dispute is decided without the intervention of a jury; these must be authorized by the legislature, except, perhaps, in cases of contempt, for such proceedings are unknown to the common law.

In 81 Fed. Rep. 830 the question was suggested whether proceedings before pension commissioners are judicial proceedings within the meaning of R. S. § 860, which provides that evidence obtained from a party or witness shall not be used against him in any criminal proceeding. The court passed the question without deciding it, though apparently inclined to the affirmative.

In Louisiana there is a third kind of proceeding, known by the name of executory process (*q. v.*).

In New York the code of practice divides remedies into actions and special proceedings. An action is an ordinary proceeding in a court of justice, by which one party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence. Every other remedy is a special proceeding.

**PROCEEDS.** Money or articles of value arising or obtained from the sale of property. Goods purchased with money arising from the sale of other goods, or obtained on their credit, are *proceeds* of such goods. 2 Pars. Marit. L. 201; Bened. Adm. 290. See 61 Hun 372. The sum, amount, or value of goods sold, or converted into money. Whart. Dict. Proceeds does not mean necessarily money; 101 U. S. 380.

**PROCERES** (Lat.). The name by which the chief magistrates in cities were formerly known. St. Armand, Hist. Eq. 88.

**PROCES-VERBAL. In French Law.** A true relation in writing in due form of law, of what has been done and said verbally in the presence of a public officer, and what he himself does upon the occasion. It is a species of inquisition of office.

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The *procès-verbal* should be dated, contain the name, qualities, and residence of the public functionary who makes it, the cause of complaint, the facts tending to prove the existence of the crime, that which serves to substantiate the charge, point out its nature, the time, the place, the circumstances, state the proofs and presumptions, describe the place,—in a word, everything calculated to ascertain the truth. It must be signed by the officer. Dalloz, Dict. See JUGE D'INSTRUCTION.

**PROCESS. In Practice.** The means of compelling a defendant to appear in court, after suing out the original writ, in civil, and after indictment, in criminal, cases.

The method taken by law to compel a compliance with the original writ or commands of the court.

A writ, warrant, subpœna, or other formal writing issued by authority of law; also the means of accomplishing an end, including judicial proceedings; 84 Ia. 567; the means or method pointed out by a statute, or used to acquire jurisdiction of the defendants, whether by writ or notice. 108 Mo. 588.

In civil causes, in all real actions and for injuries not committed against the peace, the first step was a summons, which was served in personal actions by two persons called summoners, in real actions by erecting a white stick or wand on the defendant's grounds. If this summons was disregarded, the next step was an attachment of the goods of the defendant, and in case of trespasses the attachment issued at once without a summons. If the attachment failed, a distringas issued, which was continued till he appeared. Here process ended in injuries not committed with force. In case of such injuries, an arrest of the person was provided for. See ARREST. In modern practice some of these steps are omitted; but the practice of the different states is too various to admit of tracing here the differences which have resulted from retaining different steps of the process.

In the English law, process in civil causes is called *original* process, when it is founded upon the original writ; and also to distinguish it from *mesne* or intermediate process, which issues pending the suit, upon some collateral interlocutory matter, as, to summon juries, witnesses, and the like; *mesne* process is also sometimes put in contradistinction to *final* process, or process of execution; and then it signifies all process which intervenes between the beginning and end of a suit. 3 Bla. Com. 279. See REGULAR PROCESS; OBSTRUCTING PROCESS.

No court can, at common law, exercise jurisdiction over a party unless he is served with the process within the territorial jurisdiction of the court, or voluntarily appears; 149 U. S. 194. See JURISDICTION.

As to the grant of letters patent for a process, see PATENT.

**PROCESS OF INTERPLEADER.** See INTERPLEADER.

**PROCESS OF LAW.** See DUE PROCESS OF LAW.

**PROCESSION.** A peaceable procession in the streets of a town, if lawful, and the streets are not obstructed more than is ordinarily the case under such circumstances, is not an indictable offence on the part of those composing it. 72 N. C. 25.

The peaceable procession in the streets of a religious body, known as the Salvation Army, has been held lawful, although the members were aware of the lawless intention of their opponents to make it the occasion of a riot; 26 Sol. Journ. 505. See 26 Alb. L. J. 22.

**PROCESSIONING.** A term used to denote the manner of ascertaining the boundaries of land, as provided for by the laws of that state. 1 Tenn. Comp. Stat. § 2020. The term is also used in North Carolina and Georgia. 3 Murph. 504; 3 Dev. 268; 79 Ga. 406.

**PROCESSUM CONTINUANDO.** A writ for the continuation of process after the death of the chief justice or other justices in the commission of *oyer* and *terminer*. Reg. Orig. 128.

**PROCHEIN** (L. Fr.). Next. A term somewhat used in modern law, and more frequently in the old law; as, *prochein ami, prochein cousin*. Co. Litt. 10.

**PROCHEIN AMI** (L. Fr.; spelled, also, *prochein amy* and *prochain amy*). Next friend (*q. v.*).

**PROCLAMATION.** The act of causing some state matters to be published or made generally known. A written or printed document in which are contained such matters, issued by proper authority: as, the president's proclamation, the governor's, the mayor's proclamation. Also used to express the public nomination made of any one to a high office: as, such a prince was *proclaimed* emperor.

The president's proclamation may give force to a law, when authorized by congress; as, if congress were to pass an act, which should take effect upon the happening of a contingent event, which was to be declared by the president by proclamation to have happened, in this case the proclamation would give the act the force of law, which till then it wanted. How far a proclamation is evidence of facts, see Bac. Abr. *Evidence* (F); Bull. N. P. 226; 12 Mod. 216; 8 How. St. Tr. 212; 4 Maule & S. 546; 2 Camp. 44; Dane, Abr. ch. 96, a. 2, 3, 4; 6 Ill. 577; Brooke, Abr. The public proclamation of pardon and amnesty has the force of public law, of which courts and officers will take notice though not specially pleaded; 145 U. S. 546. Courts take judical notice of official proclamations and messages of the governor of the state; 110 Mo. 286.

On the breaking out of war it is usual

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for a nation to issue a proclamation announcing the existence of hostilities. See MANIFESTO; WAR.

**In Practice.** The declaration made by the crier, by authority of the court, that something is about to be done.

It usually commences with the French word *Oyez, do you hear*, in order to attract attention: it is particularly used on the opening of the court, and at its adjournment; it is also frequently employed to discharge persons who have been accused of crimes or misdemeanors.

**PROCLAMATION OF EMANCIPATION.** See BONDAGE.

**PROCLAMATION OF EXIGENTS. In Old English Practice.** On awarding an *exigent*, in order to outlawry, a writ of proclamation issued to the sheriff of the county where the party dwelt, to make three proclamations for the defendant to yield himself or be outlawed.

**PROCLAMATION OF A FINE.** The proclamation of a fine was a notice, openly and solemnly given at all the assizes held in the county where the lands lay. It was made within one year after engrossing the fine; and anciently consisted in the fine as expressed being openly read in court sixteen times,—four times in the term in which it was made, and four times in each of the three succeeding terms. This, however, was afterwards reduced to one reading in each term. These proclamations were upon transcripts of the fine, sent by the justices of the common pleas to the justices of assize and the justices of the peace. Abb. Law Dict. See 2 Bla. Com. 352.

**PROCLAMATION OF REBELLION. In Old English Practice.** When a party neglected to appear upon a *subpœna*, or an attachment in chancery, a writ bearing this name issued; and, if he did not surrender himself by the day assigned, he was reputed and declared a rebel.

**PROCLAMATOR.** An officer of the English court of common pleas.

**PROCREATION.** The generation of children: it is an act authorized by the law of nature. One of the principal ends of marriage is the procreation of children. Inst. tit. 2, in pr.

**PROCTOR.** One appointed to manage the affairs of another or represent him in judgment. The authority was in writing under the hand of the principal and was called a proxy.

One who is employed to manage for another proceedings in admiralty and ecclesiastical causes.

A proctor, strictly speaking, conducts the proceeding out of court, as an English solicitor does in common-law courts; while the advocate conducts those in court. But in this country the distinction is not observed. A proctor is properly appointed in writing, but not necessarily so. Until final decree, he has entire control of the cause; but after decree he has no power except to enforce it. See Bened. Adm. § 334; W. Rob. 335. The fees of proctors are fixed by R. S. §§ 823–829; but fees not in the statute may be allowed in special cases; 7 Fed. Rep. 246; 25 *id.* 672.

In England under the judicature acts proctors may practise in all divisions of the supreme court of judicature.

One of the representatives of the clergy in the convocations of the two provinces of Canterbury and York in the church of England.

An official in a university whose function it is to see that good order is kept.

See QUEEN'S PROCTOR.

**PROCURATION. In Civil Law.** The act by which one person gives power to another to act in his place, as he could do himself. A letter of attorney.

An *express* procuration is one made by the express consent of the parties. An *implied* or *tacit* procuration takes place when an individual sues another managing his affairs and does not interfere to prevent it. Dig. 17. 1. 6. 2; 50. 17. 60; Code 7. 32. 2.

Procurations are also divided into those which contain absolute power, or a general authority, and those which give only a limited power. Dig. 3. 3. 58; 17. 1. 60. 4.

Procurations are ended in three ways: *first*, by the revocation of the authority; *second*, by the death of one of the parties; *third*, by the renunciation of the mandatory, when it is made in proper time and place and it can be done without injury to the person who gave it. Inst. 3. 27; Dig. 17. 1; Code 4, 35. See AUTHORITY; LETTER OF ATTORNEY; MANDATE; PER PROC.

**PROCURATIONS. In Ecclesiastical Law.** Certain sums of money which parish priests pay yearly to the bishops or archdeacons, *ratione visitationis*. Dig. 3. 39. 25; Ayliffe, Parerg. 429; 17 Viner, Abr. 544.

**PROCURATOR. In Civil Law.** A proctor; a person who acts for another by virtue of a procuration. *Procurator est, qui aliena negotia mandata Domini administrat.* Dig. 3. 3. 1. See ATTORNEY; AUTHORITY.

**PROCURATOR FISCAL. In Scotch Law.** A public prosecutor. Bell, Dict.

**PROCURATOR LITIS** (Lat.). **In Civil Law.** One who by command of another institutes and carries on for him a suit. Vicat, Voc. Jur. *Procurator* is properly used of the attorney of *actor* (the plaintiff), *defensor* of the attorney of *reus* (the defendant). It is distinguished from *advocatus*, who was one who undertook the defence of persons, not things, and who was generally the patron of the person whose defence he prepared, the person himself speaking it. It is also distinguished from *cognitor* who conducted the cause in

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the presence of his principal, and generally in cases of citizenship; whereas the procurator conducted the cause in the absence of his principal. Calvinus, Lex.

**PROCURATOR IN REM SUAM. In Scotch Law.** A term which imports that one is acting as attorney as to his own property. When an assignment of a thing is made, as a debt, and a procuration or power of attorney is given to the assignee to receive the same, he is in such case procurator *in rem suam*. 3 Stair, Inst. 1. 2. 3. etc.; Erskine, Inst. 3. 5. 2; Bell, Dict.

**PROCURATORIUM** (Lat.). The proxy or instrument by which a proctor is constituted and appointed.

**PROCURATORY OF RESIGNATION.** A proceeding by which the vassal authorized the return of the fee to his superior. Bell, Dict.

**PROCURE.** To contrive, effect, or bring about; to cause. 23 Neb. 45.

There is a clear legal distinction between procuring an act to be done and suffering it to be done. 2 Ben. 196.

**PROCUREUR DE LA REPUBLIQUE.** The name of an officer charged with the prosecution of crimes under the French procedure, corresponding to the prosecuting attorney in the United States. See JUGE D'INSTRUCTION.

**PRODIGAL. In Civil Law.** A person who, though of full age, is incapable of managing his affairs, and of the obligations which attend them, in consequence of his bad conduct, and for whom a curator is therefore appointed.

**PRODITORIE** (Law Lat.). Treasonably. This is a technical word formerly used in indictments for treason, when they were written in Latin. Tomlins.

**PRODUCE.** The product of natural growth, labor, or capital. The produce of a farm has been held not to include beef raised and killed thereon; 6 W. & S. 269; and yearly produce of a farm is held to be confined to crops gathered annually; 19 Conn. 513.

**PRODUCE BROKER.** A person occupied in buying and selling agricultural or farm products. 1 Abb. 470. See BROKER; COMMISSION MERCHANT; FACTOR.

**PRODUCENT. In Ecclesiastical Law.** He who produces a witness to be examined.

**PRODUCTION.** That which is produced or made product; fruit of labor; as the productions of the earth, comprehending all vegetables and fruits; the productions of intellect, or genius, as poems and prose compositions; the productions of art, as manufactures of every kind. 27 Ark. 567.

**PRODUCTION OF DOCUMENTS.** Where there is an issue either direct or collateral on the forgery of papers, courts of equity or law will compel their production for inspection in advance of trial. A party to an action at law may, before trial, maintain a bill for discovery of letters relied on by the other party to the suit and alleged to have been written by the plaintiff in the bill, but which the plaintiff alleges are forgeries. The production of private writings in which another person has an interest may be had by a bill of discovery in proper cases, or in trials at law by an order for inspection, a notice to produce or a writ of subpœna *duces tecum*.

The *order for inspection*, though now provided for by statute in most states, was within the practice of the English common-law courts at an early date. It is resorted to where documents in the possession of the other party are required for use in preparing the pleadings either by the plaintiff; 4 Bing. 539; 1 Taunt. 386; 8 Dowl. 118; 89 Hun 613; or the defendant; 2 Cr. & M. 456; 6 B. & S. 888; 1 App. Div. N. Y. 136; but an order requiring a prospective defendant to produce books at an examination by plaintiff to enable the latter to prepare his complaint is erroneous; 81 Hun 496. Where there was but one copy of an agreement between two persons, he who retained it would be compelled to produce it for the inspection of the other who might also take a copy of it, as, in the case of a partnership agreement; 1 Brod. & B. 318; or a lease; 4 Taunt. 666; or plans constituting part of an agreement sued on; 70 Fed. Rep. 337.

The practice was originally confined to cases in which there was but one copy, but it was speedily extended to any case in which the parties seeking an inspection have an interest in the document; 8 C. B. N. S. 617; nor was it necessary that it should be a single paper, but it extended to correspondence, as, a letter accepting an oral offer; *id.* An order for inspection might also be obtained by a defendant who suggested the alteration or forgery of the document which formed the cause of action; 2 Man. & G. 758. In such a case it was usual and proper for the application to be founded on an affidavit attacking the genuineness of the paper; 3 Cow. 17.

The right of inspection is confined to documents supporting the case of the party applying for it and does not extend to those which support the case of his opponent; 1 Myl. & K. 88; 4 Ves. 66; 8 Eng. Rul. Cas. 712, and notes; nor can the right be used for the purpose of finding out the case of the other party; 6 C. B. N. S. 679; [1897] 2 Q. B. 62; or where the books applied for contain entries of a confidential, privileged nature, not relative to the action, and the legitimate information from them can be obtained at the trial, and they are in possession of the plaintiff and can be produced under subpœna; 20 App. Div. N. Y. 330; and in a libel suit an order will not be made for the production of the original manuscript where the publication is admitted; [1897] 2 Q. B. 188; [1895] 2 Q. B. 148. If, however, the party is entitled

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to the production of the document as being applicable to his case, his right is unaffected by the circumstance that it discloses the case of his opponent; *id.*; or that it is evidence for the other party's case also; 180 Pa. 14.

The right of common-law courts to order an inspection was established in England by stat. 14 & 15 Vict. c. 99, § 6, which authorized the exercise of the power where an action was pending, and documents were in the control of the other party, of which by a bill of discovery the inspection could be secured. In the United States prior to the statutes of the same character which were passed in most states, the courts were indisposed to assume the power; 6 Cow. 62; and resort was more frequently had to a bill of discovery, the use of which is now usually unnecessary except in special cases. There is no federal statute definitely applying to the subject, though Rev. Stat. §§ 724, 858, 914, provide for the production of documents at the trial and in those courts therefore to secure an inspection before the trial a bill of discovery must still be resorted to. At least it would appear that the weight of the earlier authorities confines production under the section cited to the trial; 23 Fed. Rep. 82; 32 *id.* 743; *contra*, 9 *id.* 577; 67 *id.* 18. See, also, 1 Fost. Fed. Pr. § 267.

As to *notice to produce* and *subpœna duces tecum*, see those titles.

Public documents are subject to the general rule that their inspection will not be ordered where it would be detrimental to the public interest; 3 Tayl. Ev., 9th ed. § 1483; 1 Greenl. Ev. §§ 251, 476. As to the right of inspection of public records generally, see RECORDS.

It has been held that corporation books are not open to the inspection of strangers; 8 Term 590; 8 B. & C. 375; 44 Barb. 64; or in a litigation to which the corporation is not a party; 35 Fed. Rep. 15; *contra*, 15 *id.* 716; but its members or stockholders or officers always have the right of inspection and production in their interest; 3 Pick. 108; 70 N. Y. 220; 105 Pa. 111; 40 N. J. Eq. 392; 28 La. Ann. 204; 53 Vt. 519.

An objection to the production of documents on the ground that they may tend to criminate the party ordered to produce them must be taken only to the production of the documents alleged to have that effect and not to the order; [1897] 2 Q. B. 124. A person who has obtained an order for inspection of books cannot have irrelevant parts kept concealed during the whole litigation or unsealed and resealed on oath from time to time as the books are required in business, so as to cause interruption of it; it is sufficient if irrelevant entries are covered, during the actual inspection, with the affidavit of the person producing them that nothing material has been covered; [1897] 1 Ch. 761.

The provisions for production and inspection of documents in the New Jersey common-law practice act are held to apply to the court of chancery; 38 Atl. Rep. (N. J.) 864. An order for production will be refused where the party applying refuses to state how the papers in question are material; 25 S. E. Rep. (Ga.) 31.

Too great generality in the application for production of books is cured by particularizing books in the order; 12 Misc. Rep. 3.

See NOTICE TO PRODUCE PAPERS; SUBPŒNA DUCES TECUM; PROFERT IN CURIA.

**PRODUCTION OF SUIT** (*productio sectæ*). The concluding clause of all declarations is, "and thereupon he brings his suit." In old pleading, this referred to the production by the plaintiff of his *secta* or suit, *i. e.* persons prepared to confirm what he had stated in the declaration. The phrase has remained; but the practice from which it arose is obsolete; 3 Bla. Com. 295; Steph. Pl., Andr. ed. § 220.

**PROFANE.** That which has not been consecrated. By a profane place is understood one which is neither sacred, nor sanctified, nor religious. Dig. 11. 7. 2. 4.

**PROFANELY.** In a profane manner. In an indictment, under the act of assembly of Pennsylvania, against profanity, it is requisite that the words should be laid to have been spoken profanely. 11 S. & R. 394. See BLASPHEMY.

**PROFANENESS, PROFANITY. In Criminal Law.** A disrespect to the name of God or His divine providence. This is variously punished by statute in the several states. See Cooley, Const. Lim., 2d ed. 580. See BLASPHEMY.

**PROFECTITUS** (Lat.). **In Civil Law.** That which descends to us from our ascendants. Dig. 23. 3. 5.

**PROFERT IN CURIA** (Lat. he produces in court: sometimes written *profert in curiam*, with the same meaning). **In Pleading.** A declaration on the record that a party produces the deed under which he makes title in court. In ancient practice, the deed itself was actually produced; in modern times, the allegation only is made in the declaration, and the deed is then constructively in possession of the court; 3 Salk. 119; 6 M. & G. 277; 11 Md. 322; 67 Fed. Rep. 597.

Profert is, in general, necessary when either party pleads a deed and claims rights under it, whether plaintiff; 2 Dutch. 293; or defendant; 17 Ark. 279; to enable the court to inspect and construe the instrument pleaded, and to entitle the adverse party to oyer thereof; 10 Co. 92 *b*; 1 Chitty, Pl. 414; 1 Archb. Pr. 164; Andr. Steph. Pl. 160; and is not necessary when the party pleads it without making title under it; Gould, Pl. c. 7, p. 2, § 47. But a party who is actually or presumptively unable to produce a deed may plead it without profert. as in suit by a stranger; Com. Dig. *Pleader*, O 8; Cro. Jac. 217; Cro. Car. 441; or one claiming title by operation of law; Co. Litt. 225; Bac. Abr.

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*Pleas* (I 12); 5 Co. 75; or where the deed is in the possession of the adverse party or is lost. In all these cases the special facts must be shown, to excuse the want of profert. See Gould, Pl. c. 8, p. 2; Lawes, Pl. 96; 1 Saund 9 *a*. Profert and oyer are abolished in England by the Common Law Procedure Act, 15 & 16 Vict. c. 76; and a provision exists, 14 & 15 Vict. c. 99, for allowing inspection of all documents in the possession or under the control of the party against whom the inspection is asked. See 25 E. L. & E. 304. In many of the states of the United States profert has been abolished, and in some instances the instrument must be set forth in the pleading of the party relying upon it. The operation of profert and oyer, where allowed, is to make the deed a part of the pleadings of the party producing it; 11 Md. 322; 3 Cra. 234. See 7 Cra. 176; PRODUCTION OF DOCUMENTS.

**PROFESSION.** A public declaration respecting something. Code 10. 41. 6. A state, art, or mystery: as, the legal profession. Dig. 1. 18. 6. 4; Domat, *Dr. Pub.* l. 1, t. 9, s. 1, n. 7.

**In Ecclesiastical Law.** The act of entering into a religious order. See 17 Viner, Abr. 545.

The term professions in a statute laying a tax includes lawyers; 59 Ga. 187. See 41 Mich. 155; 19 *id.* 217.

**PROFIT A PRENDRE.** The right to take soil, gravel, minerals, and the like from the land of another. An interest in the estate. 49 Fed. Rep. 549; Washb. Easem. 11. This right may be the subject of a separate grant; 85 Me. 448. It is an interest in the estate; 22 Wend. 425; 70 N. Y. 419.

*Profit à prendre* is a peculiar species of easements. It is "the right to take something which is the produce of the land." It is in its nature an incorporeal right incapable of livery, though it is imposed upon corporeal or tangible property. It may be appurtenant to a dominant tenement, in the nature of an easement, or it may be a right in gross. It may be held apart from the possession of land, and differs therein from an easement, which requires a dominant tenement for its existence. When attached to other land it is in the nature of an easement; when not so attached it cannot properly be said to be an easement, but is an interest or estate in the land itself. Jones, Easements § 49.

The right can be acquired only by grant or prescription. Such a right in the soil of another cannot be claimed by custom. Thus a claim by the inhabitants of a township upon the land of another to take sand, etc., from the seashore, is without foundation; 15 C. B. N. S. 240; 17 N. H. 524.

The privilege of watering cattle at a pond or brook or of taking the water for domestic purposes is an easement and not a *profit à prendre;* 5 Ad. & El. 758; the right to take seaweed from the shores is a right to a profit in the soil; 48 Me. 100; and so is the right to take coal or any mineral from the land of another; 53 Pa. 206; and so is a right to use lands of another to cut grass, for pasturage, for hunting, or fishing; Jones, Easements 57; so is the right to take and kill game on land or water; 9 Q. B. D. 315.

The right to *profit à prendre* acquired by grant or prescription as appurtenant to certain lands cannot be used as a right in gross by one not holding any connection with the land: 12 C. B. N. S. See EASEMENTS: A PRENDRE.

**PROFITS.** The advance in the price of goods sold beyond the cost of purchase. See 84 N. Y. 23.

The gain made by the sale of produce or manufactures, after deducting the value of the labor, materials, rents, and all expenses, together with the interest of the capital employed.

An excess of the value of returns over the value of advances.

The excess of receipts over expenditures; that is, net earnings. 15 Minn. 519.

The receipts of a business, deducting current expenses; it is equivalent to net receipts. 94 U. S. 500; 5 Super. Ct. Pa. 276.

This is a word of very extended signification. In *commerce*, it means the advance in the price of goods sold beyond the cost of purchase. In distinction from the wages of labor, it is well understood to imply the net return to the capital of stock employed, after deducting all the expenses, including not only the wages of those employed by the capitalist, but the wages of the capitalist himself for superintending the employment of his capital or stock. Adam Smith, Wealth of Nat. b. i. c. 6, and M'Culloch's Notes; Mill, Polit. Econ. c. 15. After indemnifying the capitalist for his outlay, there commonly remains a surplus, which is his profit, the net income from his capital. 1 Mill, Polit. Econ. c. 15. The word profit is generally used by writers on political economy to denote the difference between the value of advances and the value of returns made by their employment.

The profit of the farmer and the manufacturer is the gain made by the sale of produce or manufactures, after deducting the value of the labor, materials, rents, and all expenses, together with the interest of the capital employed,—whether land, buildings, machinery, instruments, or money. The rents and profits of an estate, the income or the net income of it, are all equivalent expressions. The income or the net income of an estate means only the profit it will yield after deducting the charges of management; 5 Me. 202; 35 *id.* 420.

Under the term profit is comprehended the produce of the soil, whether it arise above or below the surface: as, herbage, wood, turf, coals, minerals, stones; 23 S. E. Rep. (W. Va.) 666; also fish in a pond or running water. Profits are divided into *profits à prendre*, or those taken and en-

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joyed by the mere act of the proprietor himself, and *profits à vendre*, namely, such as are received at the hands of and rendered by another. Hamm. N. P. 172.

Profits are divided by writers on political economy into gross and net,—gross profits being the whole difference between the value of advances and the value of returns made by their employment, and net profits being so much of that difference as is attributable solely to the capital employed. The remainder of the difference, or, in other words, the gross profits minus the net profits, has no particular name; but it represents the profits attributable to industry, skill, and enterprise. See Malthus, Political Econ.; M'Culloch, Political Econ. 563. But the word profit is generally used in a less extensive signification, and presupposes an excess of the value of returns over the value of advances.

It was said by Jessel, M. R., that "there is no such thing as gross profits." See 10 App. Cas. 446. Where a life insurance company issued "participating policies" for an increased premium, agreeing at the end of every five years to give two-thirds of the "gross profits" of such policies to the policy holders, it was held that this two-thirds constituted "annual profits or gains" of the company and were assessable to income tax; 10 App. Cas. 438, per Lords Blackburn and Fitzgerald, Lord Bramwell dissenting. The case seems to disregard the nature of the return of that portion of the premium charged in advance and subsequently ascertained to have been excessive, which the companies curiously call "dividends." See DIVIDENDS; NET PROFITS; OPERATING EXPENSES.

Using profit in this more limited and popular sense, persons who share profits do not necessarily share losses; for they may stipulate for a division of gain, if any, and yet some one or more of them may, by agreement, be entitled to be indemnified against losses by the others: so that whilst all share profits, some only bear losses. Persons who share gross returns share profits in the sense of gain; but they do not by sharing the returns share losses, for these fall entirely on those making the advances. Moreover, although a division of gross returns is a division of profits if there are any, it is so only incidentally, and because such profits are included in what is divided: it is not a division of profits as such; and under an agreement for a division of gross returns, whatever is returned must be divided, whether there be profit or loss, or neither; 1 Lindl. Part. 8, 17. These considerations have led to the distinction between agreements to share profits and agreements to share gross returns, and to the doctrine that, whilst an agreement to share profits creates a partnership, an agreement to share gross returns does not. See PARTNERS; PARTNERSHIP.

Commissions may be considered as profits, for some purposes. A participation in commissions has been held such a participation in profits as to constitute the participants partners; 2 H. Bla. 235; 4 B. & Ald. 663. So, commissions received from the sales of a pirated map are profits which must be accounted for by the commission merchant on a bill by the proprietor of the copyright; 2 Curt. C. C. 608. As between partners, all gains which equitably belong to the firm, but which are clandestinely received by one partner, are accounted profits of the firm; Story, Part. § 174; 2 Curt. C. C. 608.

Depreciation of buildings in which a business is carried on, though they were erected by expenditure of the capital invested, is not ordinarily or necessarily considered in estimating the profits; 94 U. S. 500.

In computing the profits to which a party is entitled, interest on fines, debts, and taxes should be charged off and also a proper sum for depreciation of plant; 24 N. Y. Supp. 547.

A direction or power given in a will to raise money out of the rents and profits of an estate for the payment of debts and legacies, or to raise a portion within a definite period, within which it could not be raised out of the annual rents and profits, authorizes a sale; 2 Ch. Cas. 205; 1 Vern. 104; 2 *id.* 26, 310, 420, 424; 1 Ves. Sen. 491. And judges in later times, looking to the inconvenience of raising a large sum of money in this manner, have inclined much to treat a trust to apply the rents and profits in raising a portion, even at an indefinite period, as authorizing a sale or mortgage; 2 Jarm. Wills, 282; 1 Ves. 234; 1 Ves. Sen. 42. But, as a general rule, the question whether the money is to be raised by a sale or mortgage or out of the annual rents and profits will depend upon the nature of the purpose for which the money is to be raised, and the general tenor of the will; 2 Jarm. Wills 383; 3 Bro. P. C. 66; 3 Yo. & J. 360; 1 Atk. 550; 1 Russ. & M. 590; 2 P. Wms. 63. The circumstances that have chiefly influenced the decisions are—the appointment of a time within which the charge cannot be raised by annual profits; the situation of the estate, where a sale or mortgage would be very prejudicial, as in the case of a reversion, especially if it would occasion any danger that the charge would not be answered in its full extent; the nature of the charge, as where it is for debts or portions, and, in the latter instance, the age or death of the child; 2 Ves. 480, n. 1; 2 Vern. 26, 72, 420; 2 P. Wms. 13, 650; 1 Atk. 506, 550; 2 *id.* 358. But in no case where there are subsequent restraining words has the word profit been extended; Prec. Ch. 586, note, and the cases cited there; 1 Atk. 506; 2 *id.* 105.

A devise of the rents and profits of land is equivalent to a devise of the land itself, and will carry the legal as well as the beneficial interest therein; 1 Ves. Sen. 171; 2 B. & Ald. 42; 9 Mass. 372; 1 Cush. 93; 1 Spenc. 142; 17 Wend. 393; 35 Me. 414; 1 Bro. C. C. 310. A direction by the testator that a certain person *shall receive for his support the net profits of the land* is a devise

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of the land itself, for such period of time as the profits were devised; 35 Me. 419.

An assignment of the profits of an estate amounts to an equitable lien, and would entitle the assignee in equity to insist upon a mortgage. Thus, if a tenant for life of the real estate should, by covenant, agree to set apart and pay the whole or a portion of the annual profits of that estate to trustees for certain objects, it would create a lien in the nature of a trust on those profits against him and all persons claiming as volunteers or with notice under him; 2 Cox, Ch. 253; s. c. 1 Ves. 477; 3 Bro. C. C. 531, 538.

Profits expected to arise from merchandise employed in maritime commerce are a proper subject of insurance in England and in the United States; 3 Kent 271; 16 Pick. 399; 1 Sumn. 451. So in Italy; Targa, cap. xliii. no. 5; Portugal; Santerna, part iii. no. 40; and the Hanse Towns; 2 Magnus 213; Beneck, Ass. chap. 1, sect. 10, vol. 1, p. 170. But in France; *Code de Comm.* art. 347; Holland; Rynkershoek, Quæst. Priv. Jur. lib. iv. c. 5; and in Spain, except to certain distant parts; Ordinanzas de Bilboa, ch. xxii. art. 7, 8, 11; it is illegal to insure expected profits. Such insurance is required by the course and interest of trade, and has been found to be greatly conducive to its prosperity; 3 Kent 271; 2 East 544; 1 Arn. Ins., 6th ed. 37, 205. Sometimes the profits are included in a valuation of the goods from which they are expected to arise; sometimes they are insured as profits; 1 Johns. 433; 3 Pet. 222; 1 Sumn. 45.; 6 E. & B. 312. They must be insured as profits; May, Ins. § 79. They may be insured equally by valued and by open policies; 1 Arn. Ins. 205; 3 Camp. 267. But it is more judicious to make the valuation; 1 Johns. 433; 3 Kent 273. The insured must have a real interest in the goods from which the profits are expected; 3 Kent 271; but he need not have the absolute property in them; 16 Pick. 397, 400. See May, Ins. § 79; INSURANCE.

A trustee, executor, or guardian, or other person standing in a like relation to another, may be made to account for and pay all the profits made by him in any of the concerns of his trust, as by embarking the trust funds in trade; 1 Story, Eq. Jur. 465; 2 Myl. & K. 66, 672, note; Lindl. Part., Am. ed. 523; 1 Ves. 32, 41; 11 *id.* 61; 2 V. & B. 315; 1 J. & W. 122, 131; 2 Will. Exec. 139, n.; 1 S. & R. 245; 1 Maule & S. 412; 2 Bro. C. C. 400; 10 Pick. 77; Lind. Part.

The expected profits of a special contract may be reckoned as a part of the damages for a failure to fulfil it, where it appears that such profits would have accrued from the contract itself as the direct and immediate consequence of its fulfilment; 13 How. 307, 344; 7 Cush. 516, 522; 8 Exch. 401; 16 N. Y. 489; Mayne, Dam. 15; 2 C. B. N. S. 592; 90 Ga. 416; 9 Utah 175; 66 Hun 631; 83 Wis. 309; 92 Mich. 606; 88 *id.* 390. But where the profits are such only as were expected to result from other independent bargains actually entered into on the faith of such special contract, or for the purposes of fulfilling it, or are contingent upon future bargains or speculations or states of the market, they are too remote and uncertain to be relied upon as a proper basis of damages; 13 How. 307, 344; 38 Me. 361; 7 Cush. 516, 522; 7 Hill 61; 13 C. B. 353. See, also, 21 Pick. 378, 381; 1 Pet. C. C. 85, 94; 3 Wash. C. C. 184; 1 Pet. 172; 11 S. & R. 445; 48 Ill. App. 26. Profits may be recovered as damages for the breach of a contract, where they are not uncertain or remote, or where, from the terms of the contract itself or the special circumstances under which it was made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time the contract was made; 139 U. S. 199; 153 *id.* 540. See MEASURE OF DAMAGES; PATENT.

A purchaser is entitled to the profits of the estate from the time fixed upon for completing the contract, whether he does or does not take possession of the estate; 2 Sugd. Vend. ch. 16, sect. 1, art. 1; 6 Dana 298; 3 Gill 82. See 12 M. & W. 761.

Under what circumstances a participation or sharing in profits will make one a partner in a trade or adventure, see PARTNERS; PARTNERSHIP.

**PROGRESSION** (Lat. *progressio;* from *pro* and *gredior*, to go forward). That state of a business which is neither the commencement nor the end. Some act done after the matter has commenced and before it is completed. Plowd. 343. See CONSUMMATION; INCEPTION.

**PROHIBITIO DE VASTO DIRECTA PARTI.** A judicial writ which was formerly addressed to a tenant, prohibiting him from waste pending suit. Reg. Jud. 21.

**PROHIBITION** (Lat. *prohibitio;* from *pro* and *habeo*, to hold back). Forbidden to do; inhibition; interdiction. 74 Md. 545.

**In Practice.** The name of a writ issued by a superior court, directed to the judge and parties of a suit in an inferior court, commanding them to cease from the prosecution of the same, upon a suggestion that the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court. 3 Bla. Com. 112; Com. Dig.; Bac. Abr.; Viner, Abr.; 2 Sell. Pr. 308; Ayliffe, Parerg. 434; 2 H. Bla. 533; 4 Wash. 655; 142 U. S. 479; 147 *id.* 14.

The writ of prohibition may also be issued when, having jurisdiction, the court has attempted to proceed by rules differing from those which ought to be observed; Bull. N. P. 219; or when by the exercise of its jurisdiction, the inferior court would defeat a legal right; 2 Chitty, Pr. 355; or to prevent a judge from granting a new trial after expiration of the trial term; 113 Mo. 42.

A writ of prohibition is a civil remedy

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given in a civil action, even when instituted to arrest a criminal prosecution; 129 U. S. 104; and only lies in case of the unlawful exercise of judicial functions; 31 W. Va. 617; 2 Hill 367; 41 Mo. 44; 33 Wis. 93; 36 Barb. 341.

The writ of prohibition issues only in cases of extreme necessity, and before it can be granted, it must appear that the party aggrieved has applied in vain for redress; and it is never allowed except in cases of usurpation or abuse of power, and not then unless other existing remedies are inadequate to afford relief, or no other remedy exists; 30 W. Va. 532; 40 La. Ann. 837. When a writ of error or appeal furnishes a complete and effective remedy, a writ of prohibition will not be issued; 98 Mo. 252; 40 La. Ann. 837; 46 *id.* 29; 78 Ga. 683; 84 Va. 696. Prohibition will not issue after judgment and sentence unless want of jurisdiction appears on the face of the proceedings, but before judgment the supreme court can examine not simply the process and pleadings of record, but also the facts and evidence upon which action was taken; 143 U. S. 472, 513, 515.

A writ of prohibition will not be issued to restrain a district court from taking jurisdiction of a petition of the owner of a barge for the benefit of the limited liability act; 146 U. S. 357.

When a party aggrieved by a judgment has an appeal to the supreme court which becomes inefficacious through his neglect, a writ of prohibition will not issue to prevent the enforcement of the judgment; 143 U. S. 472, 513.

"Where it appears that the court whose action is sought to be prohibited has clearly no jurisdiction of the cause originally, or of some collateral matter arising therein, a party who has objected to the jurisdiction at the outset and has no other remedy is entitled to a writ of prohibition as a matter of right. But where there is another legal remedy by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful, or depends on facts which are not made matter of record, or where the application is made by a stranger, the granting or refusal of the writ is discretionary. Nor is the granting of the writ obligatory where the case has gone to sentence, and the want of jurisdiction does not appear upon the face of the proceedings." See 155 U. S. 402, followed in 166 U. S. 110.

The supreme court of Mississippi has revisory jurisdiction only and cannot grant a writ of prohibition to circuit courts; 47 Miss. 200, 668.

The term *prohibition* is also applied to the interdiction of making and of selling or giving away, intoxicating liquors, either absolutely or for other than medicinal, scientific, and religious (sacramental) purposes. Anderson's L. Dict. See LIQUOR LAWS.

**PROHIBITIVE IMPEDIMENTS.** Those impediments to a marriage which are only followed by a punishment but do not render the marriage null. Bowyer, Mod. Civ. Law 44.

**PROJET. In International Law.** The draft of a proposed treaty or convention.

**PROLES** (Lat.). Progeny; such issue as proceeds from a lawful marriage; and, in its enlarged sense, it signifies any children.

**PROLETARIUS. In Civil Law.** One who had no property to be taxed, and paid a tax only on account of his children (*proles*); a person of mean or common extraction. The word has become, in French, *prolétaire* signifying one of the common people; and in English proletariat.

**PROLICIDE** (Lat. *proles*, offspring, *cædere*, to kill). **In Medical Jurisprudence.** A word used to designate the destruction of the human offspring. Jurists divide the subject into *fœticide*, or the destruction of the *fœtus in utero*, and *infanticide*, or the destruction of the new-born infant. Ryan, Med. Jur. 137.

**PROLIXITY.** The unnecessary and superfluous statement of facts in pleading or in evidence. This will be rejected as impertinent. 7 Price 278, n.

**PROLOCUTOR** (Lat. *pro* and *loquor*, to speak before). **In Ecclesiastical Law.** The president or chairman of a convocation.

The speaker of the house of lords is called the prolocutor. The office belongs to the lord chancellor by prescription; 3 Steph. Com. 347.

**PROLONGATION.** Time added to the duration of something.

When the time is lengthened during which a party is to perform a contract, the sureties of such a party are, in general, discharged, unless the sureties consent to such prolongation. See GIVING TIME.

In the civil law the prolongation of time to the principal did not discharge the surety; Dig. 2. 14. 37; 12. 1. 40.

**PROLYTÆ** (Lat.). **In Roman Law.** The term used to denominate students of law during the fifth and last year of their studies. They were left during this year very much to their own direction, and took the name prolytæ, *omnino soluti*. They studied chiefly the Code and the imperial constitutions. See Dig. Pref. Prim. Const. 2; Calvinus, Lex.

**PROMATERTERA** (Lat.). Great maternal aunt; the sister of one's grandmother. Inst. 3. 6. 3; Dig. 38. 10. 10. 14.

**PROMISE** (Lat. *promitto*, to put forward). An engagement by which the promisor contracts with another to perform or do something to the advantage of the latter.

Within the statute of frauds a promise to pay the debt of another is an undertaking by a person not before liable, for the purpose of securing or performing the same duty for which the party for whom the un-

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dertaking is made, continues liable. 60 Conn. 71.

When an oral promise is made, all that is said at the time in relation to it must be considered; if, therefore, a man promises to pay all he owes, accompanied by a denial that he owes anything, no action will lie to enforce such a promise; 15 Wend. 187.

Strictly speaking a promise is not a representation; the failure to make it good may give a cause of action, but it is not a false representation, which will authorize the rescission of a contract; 96 Ala. 564.

And when the promise is conditional, the condition must be performed before it becomes of binding force; 7 Johns. 36. See CONDITION; CONTRACTS; 5 East 17; 2 Leon. 224; 4 B. & Ald. 595.

**PROMISE OF MARRIAGE.** A contract mutually entered into by a man and a woman that they will marry each other. Every marriage is necessarily preceded by an express or implied contract of this description, as a wedding cannot be agreed upon and celebrated at one and the same instant; Addison, Contr. 1196.

When a man and a woman agree to marry and subsequently either one refuses, the other may bring suit for damages, such suits being called breach of promise suits. It is no defence to an action for breach of promise that the defendant was married if the plaintiff did not have knowledge of such fact; 60 N. Y. Sup. Ct. 222; 133 N. Y. 623. If a man refuse to marry a woman she need not make a demand before bringing action; 77 Wisc. 663. Before the Reformation no action for breach of promise could be maintained, for marriage was a matter of spiritual jurisdiction. It was not till the middle of the seventeenth century that marriage was recognized by our law as a temporal benefit, and a breach of promise as cognizable by the temporal courts; 20 Q. B. D. 494, 504, 505.

A promise of marriage is not to be likened to an actual marriage. The latter, as has been seen in the article on marriage, is not a contract, but a legal relation; while the former is an executory contract in the strict sense of the term, and governed in general by the ordinary law of contracts, though it has certain peculiarities of its own. As in other contracts, the parties must be *sui juris*. If, therefore, the man or the woman be an infant, or labor under any other legal disability, he or she will not be bound by a promise of marriage; but if one of the parties be an infant and the other be an adult, the promise will be binding upon the latter; Stra. 937; 5 Cow. 475; 7 *id.* 22; 5 Sneed 659; 1 D. Chipm. 252; 42 Ill. App. 511. A promise made during infancy may be ratified after the infant attains majority. A late English statute requires a new and distinct contract, after majority, in order to bind the infant on his promise to marry after he comes of age; but a new contract may be inferred from continued acceptance of the engagement; L. R. 5 C. P. 410; and see 4 C. P. Div. 485. Neither does it follow, as we shall see presently, that a promise of marriage is not binding because the parties to the promise cannot form a valid marriage; they may be competent to *contract*, though not competent to *marry*.

There must be a legal and valid consideration; but as there are always mutual promises, they are a sufficient consideration for each other. There must be a meeting of the minds of the parties, *i. e.* a request or proposition on the one side, and an assent on the other. If the communications between the parties are verbal, the only questions which usually arise relate to evidence and proof. The very words or time or manner of the promise need not be proved, but it may be inferred from the conduct of the parties, and from the circumstances which usually attend an engagement to marry: as, visiting, the understanding of friends and relations, preparations for marriage, and the reception of the man by the woman's family as a suitor; 3 Salk. 16; 15 Mass. 1; 2 D. & C. 282; Leake, Contr. 210; 13 Pa. 331; 1 Ohio St. 26; 2 C. & P. 553; 6 Cow. 254; 26 Conn. 398; 4 Zabr. 291; 65 Vt. 273. But as to the evidence of a contract to marry, more direct proof is now commonly required than formerly, since modern statutes permit parties themselves to take the stand; Schoul. Husb. & W. § 43. Therefore a promise cannot be inferred from devoted attention, frequent visits, and apparently exclusive attention; 53 N. Y. 267; nor from mere presents or letters not to the point; see 2 Brewst. 487; [1891] 2 Q. B. 534; nor from the plaintiff's wedding preparations, unknown to the defendant; 48 Ind. 562; 63 Ill. 41; nor from the woman's unexplained possession of an engagement ring; 2 Brewst. 487. See, generally, 53 N. Y. 267.

A later New York case holds that under the law allowing parties to an action to testify, a promise of marriage cannot be inferred from the mere proof of circumstances such as usually attend an engagement to marry. In the absence of fraud, there must be proof of an actual contract; a meeting of minds of the two parties. Courtship alone or mere intention to marry is not enough. Thorough acquaintance with character, habits, and disposition is essential in order to enter into such a contract intelligently, and an opportunity must be allowed to form the acquaintance which is required, without raising the inference of a contract; 151 N. Y. 598. Mere courtship is not an agreement to marry; 14 Am. R. 111; 63 Am. Dec. 529; 63 Ill. 41.

When the parties are at a distance from each other, and the offer is made by letter, it will be presumed to continue for a reasonable time for the consideration of the party addressed; and if accepted within a reasonable time, and before it is expressly revoked, the contract is then complete; 1 Pars. Contr. 84. No particular form of word is necessary; 53 N. Y. 267.

A promise of marriage is not within the third clause of the fourth section of the

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statute of frauds, relating to agreements made upon consideration of marriage; but if not to be performed within a year, it has been held to be within the fifth clause, and must, therefore, be in writing in order to be binding; 1 Ld. Raym. 387; 58 Ind. 29; 2 N. H. 515. But the later cases are inclined to construe the statute so as not to affect promises to marry; 56 Me. 187; 20 Conn. 495; Schoul. Husb. & W. § 44; the marriage may be performed within a year, and that is enough. See 85 Ill. 222.

If no time be fixed and agreed upon for the performance of the contract, it is, in contemplation of law, a contract to marry within a reasonable period, considering the circumstances of the age, pecuniary means, etc., of the contracting parties, and either party may call upon the other to fulfil the engagement, and in case of default may bring an action for damages. If both lie by for an unreasonable period, and do not treat the contract as continuing, it will be deemed to be abandoned by mutual consent. If the parties are somewhat advanced in years, and the marriage is appointed to take place at a remote period of time, the contract would be voidable at the option of either party, as in restraint of marriage; Addison, Contr. 678. The fact that the plaintiff consented to a two years' postponement of the wedding-day does not relieve defendant from his promise; 71 Hun 137.

Upon a refusal to marry, an action lies at once, although the time set for the marriage has not come; Leake, Contr. 752; 42 N. Y. 246; 60 N. Y. Super. Ct. 222; so if a party puts it out of his power to perform his promise of marriage; 27 Mich. 217; 15 M. & W. 189. An action lies when one party has given notice that he will not fulfil his promise, although the time for fulfilment has not arrived; L. R. 8 C. P. 167. See PERFORMANCE. A refusal to fulfil the contract may be as well manifested by acts as by words. After the lapse of a reasonable time, if one party, without excuse, neglects or refuses to fulfil his promise, the other may consider this a breach and sue; 42 Mich. 346. It is sufficient if plaintiff shows that defendant has violated his promise by refusing to marry her, without averring or proving an offer on her part to marry defendant; 25 Atl. Rep. (R. I.) 346. See 71 Wis. 663.

It has been said that the action has curious points of affinity with actions of tort, one of which is a very large discretion given to the jury as to damages; Poll. Torts 184; and damages are often given which are, in fact, exemplary; L. R. 1 C. P. 331. The amount awarded is usually estimated according to plaintiff's loss of reputation, wealth, social position, and prospects in life, as well as the endurance of mortification, pain, or disgrace; 12 Ohio St. 313; 53 Wis. 462; 8 Barb. 323; 58 Mo. 600; 52 Mich. 336.

The defences which may be made to an action for a breach of promise of marriage are, of course, various; but it is only necessary to notice in this place such as are in some degree peculiar. Thus, if either party has been convicted of an infamous crime, or has sustained a bad reputation generally, and the other was ignorant of it at the time of the engagement, or if the woman has committed fornication, and this was unknown at the time to the man who promised to marry her, or if the woman prove unchaste subsequently; 77 Pa. 504; 51 Ill. 288; or if the woman is deeply involved in debt at the time of the engagement, and the fact is kept secret from her intended husband; Add. Contr. 680; but see 1 E. B. & E. 7, 96; or if false representations are made by the woman, or by her friends in collusion with her, as to her circumstances and situation in life and the amount of her fortune and marriage portion, either of these will constitute a good defence; 1 C. & P. 350, 529; 3 Esp. 236; 44 Me. 164; 1 C. & K. 463; 3 Bingh. N. C. 54; 5 La. Ann. 316; 18 Ill. 44. But it has been held not to be a defence that the plaintiff at the time of the engagement was under an engagement to marry another person, unless the prior engagement was fraudulently concealed; 1 E. B. & E. 796. But see 2 Pars. Contr. 550. And the defendant's pre-engagement would be no defence; Schoul. Husb. & W. § 48. It is not justification of a breach of promise to marry a woman, to show that she has been heard to use obscene language; 8 Can. L. J. 426; and where marriage between cousins is not forbidden by statute, such relationship will not mitigate or excuse a breach of promise to marry; 78 Wis. 72. A bare offer of marriage is not a defence to a prosecution for seduction; it must be accepted; 50 Pac. Rep. (Ore.) 800; but the contrary was held in 27 S. W. Rep. (Ky.) 815, which is said to be the only case sustaining that view; 57 Alb. L. J. 51. The general rule is undoubtedly that nothing short of actual marriage is a bar; 79 Ia. 703; 82 *id.* 393; 118 Mo. 181; 97 Cal. 448.

If after the engagement either party is guilty of gross misconduct, inconsistent with the character which he or she was fairly presumed to possess, the other party will be released; 4 Esp. 256; so if either party is guilty of acts of unchastity after the making the promise, the other party will be absolved; 51 Ill. 288; 77 Pa. 504; but mutual improprieties and lewdness between the parties will not be allowed to bar the action or to go in mitigation or aggravation of damages; 3 Pittsb. 84; or excuse the performance of the contract; 107 Mo. 471. If the engagement is made without any agreement respecting the woman's property, and she afterwards disposes of any considerable portion of it without her intended husband's knowledge and consent, or if she insists upon having her property settled to her own separate use, it is said that this will justify him in breaking off the engagement: Add. Contr. 1201. So, if the situation and position of either of the parties as regards his or her fitness for the marriage relation is materially and permanently altered for the worse (whether

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with or without the fault of such party) after the engagement, this will release the other party. Thus, if one of the parties is attacked by blindness, or by an incurable disease, or any malady calculated permanently to impair and weaken the constitution, this will dispense with the performance of the contract on the part of the other party; Add. Contr. 1199; Pothier, Tr. du Mar. no. 1, 60, 61, 63. (In 1 Abb. App. Dec. 282, it was held that evidence that the plaintiff drank intoxicating liquors to excess was not admissible as a defence.) Whether it will also constitute a defence for the party afflicted, is a question of much difficulty. In 1 E. B. & E. 746, 765, where it appeared that the defendant since the engagement had become afflicted with consumption, whereby he was rendered incapable of marriage without great danger of his life, it was held, by six judges against five, that this constituted no defence; though it seemed to be agreed that it would have been a good defence for the other party.

The common opinion that an agreement to marry between persons incapable of forming a valid marriage is necessarily void, is erroneous. If the disability pertains only to one of the parties, and the other party was ignorant of it at the time of the engagement, it will constitute no defence for the former. Thus, if a man who already has a wife living makes a promise of marriage to another woman who is ignorant of the former marriage, he will be liable in damages for a breach of his promise, although a performance is impossible; Leake, Contr. 597; 2 C. & P. 553; 7 C. B. 999; 5 Exch. 775; 29 Barb. 22; 106 Mass. 339; 60 Hun 578. Otherwise, if the woman knew at the time the engagement to marry was entered into, that the man was married; 39 N. J. L. 133; 63 Ill. 99. Knowledge that the man was married, obtained by the woman subsequently to the engagement to marry, is not a defence, but may go in mitigation of damages; 1 Heisk. 368.

In an action for breach of promise of marriage, the court will not interfere with the discretion of the jury as to the amount of damages, unless there has been some obvious error or misconception on their part, or it is made apparent that they have been actuated by improper motives; 1 C. B. N. S. 660; 1 Y. & J. 477; 26 Conn. 398. And if the defendant has undertaken to rest his defence, in whole or in part, on the general bad character or the criminal conduct of the plaintiff, and fails altogether in the proof, the jury may take this into consideration as enhancing the damages; 6 Cow. 254; 27 Mo. 600. Where such an action is brought by a woman, she may prove, in aggravation of damages, that the defendant, under color of a promise of marriage, has seduced her; 106 *id.* 395; S. C. 8 Am. Rep. 838, n.; 42 Mich. 346; S. C. 36 Am. Rep. 442; 37 Wisc. 46; 33 Md. 288; S. C. 3 Am. Rep. 174; L. R. 1. C. P. 331; 8 Barb. 323; 2 Ind. 402; 3 Mass. 73; 75 Tex. 352. But see, *contra*, 2 Pa. 80, commented on in 11 *id.* 316; 1 R. I. 493. And misconduct, showing that the plaintiff would be an unfit companion in married life, may be given in evidence in mitigation of damages; 1 Abb. App. Dec. 282. The defendant may show that his failure to marry the plaintiff proceeded from opposition by his mother to the marriage; 24 N. Y. 252; or that he was afflicted with an incurable disease at the time of his breach of the promise to marry, in mitigation of damages; 51 Ill. 288; 129 Ind. 430. Evidence that the general character of the plaintiff for chastity previously to the engagement was bad, is admissible in mitigation of damages; 71 Pa. 240; 4 Mo. App. 94; 2 Bradw. 236; so is indelicate conduct (not criminal) of plaintiff before the promise was made; 7 Wend. 142. Evidence of the defendant's financial standing is admissible: 42 Mich. 346; S. C. 36 Am. Rep. 442; so of his social position; Schoul. Husb. & W. § 49.

See 21 Alb. L. J. 327; Schoul. Husb. & W. § 40; 5 So. L. Rev. N. S. 57; Maccola, Breach of Promise; Bishop, M. & D. chap. xi.

**PROMISEE.** A person to whom a promise has been made.

In general, a promisee can maintain an action on a promise made to him; but when the consideration moves not from the promisee, but some other person, the latter, and not the promisee, has a cause of action, because he is the person for whose use the contract was made; Latch 272; Cro. Jac. 77; 1 T. Raym. 271, 368; 4 B. & Ad. 435; 1 N. & M. 303; Cowp. 437; Dougl. 142. But see Carth. 5; 2 Ventr. 307; 9 M. & W. 92, 96.

**PROMISES.** When a defendant has been arrested, he is frequently induced to make confession in consequence of promises made to him that if he will tell the truth he will be either discharged or favored; in such a case, evidence of the confession cannot be received, because, being obtained by the flattery of hope, it comes in so questionable a shape, when it is to be considered evidence of guilt, that no credit ought to be given to it; 1 Mass. 144; 1 Leach 299. This is the principle; but what amounts to a promise is not so easily defined. See CONFESSION.

**PROMISOR.** One who makes a promise.

The promisor is bound to fulfil his promise, unless when it is contrary to law, as a promise to steal or to commit an assault and battery; when the fulfilment is prevented by the act of God, as where one has agreed to teach another drawing and he loses his sight, so that he cannot teach it; when the promisee prevents the promisor from doing what he agreed to do; when the promisor has been discharged from his promise by the promisee; when the promise has been made without a sufficient consideration; and perhaps in some other cases.

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**PROMISSORY NOTE.** A written promise to pay a certain sum of money, at a future time, unconditionally. 7 W. & S. 264; 2 Humphr. 143; 10 Wend. 675; 1 Ala. 233; 7 Mo. 42; 2 Cow. 536; 6 N. H. 364; 7 Vern. 22; 112 Mo. 251; the form of a promissory note is unessential, provided it contain the essential ingredients thereof. See 50 Pac. Rep. (Mont.) 713.

An unconditional written promise, signed by the maker, to pay absolutely and at all events, a sum certain in money, either to the bearer or to a person therein designated or his order. Benj. Chalm. Bills § 271.

A promissory note differs from a mere acknowledgment of a debt without any promise to pay, as when the debtor gives his creditor an I O U. See 2 Yerg. 50; 15 M. & W. 23. But see 2 Humphr. 143; 6 Ala. N. S. 373. In its form it usually contains a promise to pay, at a time therein expressed, a sum of money to a certain person therein named or to his order, for value received. It is dated and signed by the maker. It is never under seal; 9 Hun 931; even when made by a corporation; 15 Wend. 265; 3 Houst. 288; 8 Fed. Rep. 408. But in L. R. 3 Ch. Ap. 758, it was held that a "debenture" under a corporate seal was provable against the company by the indorsee, free from equities between the payee and the corporation, and, *semble*, that it was a promissory note. In 15 R. I. 121, it was held that a paper seal of a corporation on an instrument in the form of a promissory note should be regarded as "mere excess." No particular form of words is necessary; but there must be an intention to make a note; see 15 M. & W. 29; Benj. Chalm. Bills, etc. 274; and it should amount in legal effect to an absolute promise to pay money; 75 Cal. 268.

He who makes this promise is called the *maker*, and he to whom it is made is the payee; 3 Kent 46. A writing in the form of a note payable to the maker's order, becomes a note by indorsement; 22 Pa. 89. A note payable to the maker's order, and indorsed by him in blank, is, in legal effect, a note payable to bearer and is transferable by delivery; 6 C. C. App. 423.

Although a promissory note in its original shape bears no resemblance to a bill of exchange, yet when indorsed it is exactly similar to one; for then it is an order by the indorser of the note upon the maker to pay the indorsee. The indorser is as it were the drawer; the maker, the acceptor; and the indorsee, the payee; 4 Burr. 669; 4 Term 148; 3 Burr. 1224.

Most of the rules applicable to bills of exchange equally affect promissory notes. No particular form is requisite to these instruments: a promise to deliver the money, or to be accountable for it, or that the payee shall have it, is sufficient; Chitty, Bills 53.

There are two principal qualities essential to the validity of a note: *first*, that it be payable at all events, not dependent on any contingency; 20 Pick. 132; nor payable out of any particular fund; 3 J. J. Marsh. 170, 542; 5 Ark. 441; 2 Blackf. 48; 1 Bibb 503; 9 Miss. 393; 3 Pick. 541; 4 Hawks 102; 5 How. 382. *Second*, it is required that it be for the payment of money only; 10 S. & R. 94; 47 Wisc. 551: 27 Mich. 191; 35 Me. 364; 11 Vt. 268 (though statutes in some states have made notes payable in merchandise negotiable); that is, in whatever is legal tender at the place of payment; 2 Ames, Bills 828; and not in bank-notes; though it has been held differently in the state of New York; 9 Johns. 120; 19 *id.* 144. The rule on this subject is said to be more strict in England than here, but to have been relaxed there in 2 Q. B. Div. 194. It is said that the tendency here is to use the term money in a very wide sense; Benj. Chalm. Bills, 2d Am. ed. 10.

A promissory note payable to order or bearer passes by indorsement, and although a chose in action, the holder may bring suit on it in his own name. Although a simple contract, a sufficient consideration is implied from the nature of the instrument. See 5 Com. Dig. 133, n., 151, 472; 4 B. & C. 235; 1 C. & M. 16. It has been urged that, upon principle, negotiable instruments are contracts binding by their own force, and therefore not requiring any consideration; Langd. Contr. § 49. When the back of a note is covered by various indorsements, an assignment of the note, written on a piece of paper pasted to the note, will pass the legal title. See INDORSEMENT.

A negotiable instrument payable to bearer is one which, by custom of trade, passes from hand to hand by delivery, and the holder of which for the time being, if he is a *bona fide* holder for value without notice, has a good title, notwithstanding any defect in title in the person from whom he took it; [1891] 1 Ch. 270.

As to whether a stipulation in an instrument, otherwise in the form of a promissory note, for the payment of an attorney's fee for the collection of the note in case of dishonor renders the instrument non-negotiable, see BILLS OF EXCHANGE.

A promissory note on the face of which, across one end, is written an agreement that the note will be renewed at maturity, is not negotiable; 126 Pa. 194; nor is one indorsed "without recourse"; 59 Fed Rep. 853.

A promissory note does not discharge the debt for which it is given unless such be the agreement of the parties; it only operates to extend the period for the payment of the debt; 131 U. S. 287. The holder of a note which is destroyed may recover on the note without giving a bond of indemnity; 47 Pac. Rep. (Col.) 1037. See, also, 9 Wheat. 558; 16 N. Y. 582; 21 Grat. 556; *contra*, 4 Cal. 37; 2 Dev. & B. Eq. 122; 1 Humph. 145. See 7 B. & C. 90.

As to promises to pay a debt in specific articles, see 21 Am. Dec. 422.

See BILL OF EXCHANGE; INDORSEMENT; NOTICE; PAYMENT; Dan. Neg. Instr.; Ames, Bills & Notes; Byles, Bills.

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**PROMOTERS.** Those who, in popular and penal actions, prosecute offenders in their own name and the king's.

Persons or corporations at whose instance private bills are introduced into and passed through parliament. Especially those who press forward bills for the taking of land for railways and other public purposes, who are then called promoters of the undertaking.

Persons who assist in organizing joint stock companies or corporations. Mozl. & W.

It has been said to be a term usefully summing up in a single word a number of business operations familiar to the commercial world, by which a company is generally brought into existence; 28 W. R. 351. One who does an act with reference to the formation of a company or in aid of its organization, is, as regards that act, a promoter of the company. Lloyd, Corp. Liab. for Acts of Prom. 17. It applies to any person who takes an active part in inducing the formation of a company, whether he afterwards becomes connected with the company or not; 97 Cal. 610. See 89 Va. 455.

Promoters stand in a relation of trust and confidence to the intended company, and are bound to exercise *uberrima fides;* Lloyd Corp. Liab. 18; 64 Pa. 43; L. R. 6 Ch. Div. 372; their acts are carefully scrutinized; L. R. 3 App. Cas. 1218; they are precluded from making a secret advantage over the other stockholders; 64 Pa. 43.

The relation of promoters to the company has been considered as similar to that of a trustee to a beneficiary; 25 N. E. Rep. (N. Y.) 505; 6 Ch. Div. 371; or of an agent to a principal; *id.;* or as analogous to that of partners; 64 Pa. 43.

As between themselves, the relation has been said to be that of partners; 86 Mo. 382; 2 Rawle 359; *contra*, 34 Minn. 355; or to be rather that of agency; 55 Mo. 315; promoters may, in fact, be partners. It has also been held that their relation towards each other is that of principal and agent; each is liable for such contracts as he authorizes; 64 N. W. Rep. (Minn.) 826.

As to the liability of a corporation in regard to any contract made by its promoters on its behalf (supposing the contract to be one which the corporation, after its organization, could legally have made), these rules have been laid down by a writer in 16 Am. L. Rev. 281.

I. As long as the contract remains executory on both sides, the party who contracted with the promoter cannot enforce the contract against the corporation, unless the corporation has ratified the same; and the corporation cannot enforce the contract against the other contracting party without carrying out all the engagements entered into with the other contracting party at the time of making the contract.

II. When a contract made by a promoter on behalf of a future corporation has been ratified and performed by the latter, it may force the party who contracted with the promoter to perform on his side.

III. When the contract has been executed by the other contracting party, the corporation should be held to perform on its side, if (1) it has ratified the contract, or (2) voluntarily accepted the benefit arising from the performance of the contract in such a manner as to estop the corporation from denying that it has ratified the contract. But on the other hand if the benefit from the contract came to the corporation without any voluntary action on its part, or on the part of those whose acts in regard to the subject-matter of the contract are to be regarded as the acts of the corporation, then there is no principle in law or in equity on which it can be compelled to carry out engagements entered into without its authority, and which it has never even impliedly ratified.

A promoter though he purport to act on behalf of a projected corporation cannot bind it by acts performed before it came into existence; 86 Tex. 350; also 44 Ark. 383; 63 Mo. App. 477; 29 Pac. Rep. (Utah) 878; 19 N. Y. Supp. 592; 134 N. Y. 197; 39 Pac. Rep. (Colo.) 584; 43 *id.* (Oreg.) 719. It has been said in one case, 143 N. Y. 430, that this rule does not apply to a private corporation; 9 N. Y. Supp. 184. The rule does not apply when there was a *de facto* corporation in existence when the acts were performed; 93 Ill. 153; or when the charter provides that the company shall be liable; 129 Mo. 106; 103 N. Y. 58. "Except as a fiction, therefore, this doctrine that a company can be bound before it is formed, and enters upon its corporate life '*cum onere*,' must be regarded as unfounded in principle. . . . It is discredited in England and has not been followed (as far as can be ascertained) since the decision in 2 Macq. H. of L. 393. The American authorities repudiate it." Lloyd, Corp. Liab. for Acts of Prom. 42, citing 5 H. L. 605. The fact that all the stockholders were promoters and entered into the contract, does not make it binding upon the company when formed; 33 N. W. Rep. (Minn.) 327; 37 Ark. 164; but see 2 Nev. 257. A corporation cannot, by ratification, become liable on a contract made by its promoters before it came into existence; L. R. 2 C. P. 175; L. R. 9 C. P. 503; 86 Tex. 350; *contra*, 59 Conn. 272; 21 Neb. 621; 129 Mo. 106; 50 N. W. Rep. (Wis.) 776; such ratification, if binding, would date back to the original agreement; 59 Conn. 272. It has been held that the company may "adopt" the original contract and thus become liable under it; 86 Tex. 350; 103 N. Y. 58; 141 Mass. 145; but see 150 Mass. 248; 72 Ill. 531. But adoption is, in effect, the making of a new contract on the same terms as the old; L. R. 33 Ch. Div. 16; 51 N. W. Rep. (Minn.) 216. It has been held that estoppel will constitute a ground of liability; 40 Md. 395; 86 Tex. 350.

Where a promoter has contracted for something to be performed after incorpo-

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ration, the company, if it accept performance, with knowledge of the facts, is liable; 141 Mass. 145; L. R. 38 Ch. Div. 156; 143 N. Y. 430. Where the performance is partly before and partly after incorporation, the company may, by acceptance, render itself liable; 51 N. W. Rep. (Minn.) 216; but see 86 Tex. 350, where services were rendered, under different contracts, before and after incorporation, and a recovery was allowed for the latter and not for the former.

A vote of the directors (under a clause in the articles of association) that the promoter's preliminary expenses be paid, was held not a ground of recovery; L. R. 9 C. P. 503; but see 59 Conn. 272; and a vote of the directors that "the agreement of purchase be ratified" was held not to bind the corporation; L. R. 16 Ch. Div. 125.

A recovery for work done before incorporation, at the request of a promoter, has been allowed on the ground of a *quasi*-contractual obligation; 13 N. Y. Supp. 583; but see 27 Conn. 170; 65 Ill. 328; L. R. 9 C. P. 503; 86 Tex. 350. See Keener, Quasi-Contracts.

Ratification may be express, or may be implied from the voluntary acceptance of the benefit of the contract, whereby an estoppel is worked. See 12 N. H. 205; 15 Barb. 323. See, also, 7 Ch. Div. 368; L. R. 2 C. P. 174. A corporation cannot enforce a subscription to shares made before its formation on the faith of certain promises of its promoters, without fulfilling the promises; 10 N. Y. 550.

Promoters are personally liable on contracts made by them for the intended company when the latter proves abortive; L. R. 2 C. P. 174; and also for subscriptions paid in to an abortive company, and that without any deduction for expenses incurred; Beach, Priv. Corp. 159; 3 B. & C. 814.

A promoter is not liable *ex contractu* to a person who has been induced by his fraud to take shares in a company, but he may be liable *ex delicto;* 2 E. & B. 476. Promoters are liable in damages to subscribers whose subscriptions are obtained by fraud; 42 Vt. 389; 66 N. Y. 558; a bill in equity lies to recover back money which a person has been induced, through fraud, to invest in a bubble; 2 P. Wms. 153. As against a person acting as promoter, the corporation is entitled to the full benefit of all acts done and contracts made by him while acting in that capacity; and the promoter, as between himself and the corporation, is entitled to no secret profits; he may not purchase property for the corporation, and then sell the same to the corporation at an advance; 61 Pa. 202; 5 Ch. Div. 73, 395; 6 *id.* 371. Where one has already purchased a certain property at a good bargain, it is no fraud to organize a company and sell the property to it at an advance; Thomp. Liab. of Off. 222. See 1 Ch. Div. 182; 4 Hun 192. But if at the time of making the sale he occupies towards the corporation a position of trust, as promoter or otherwise, it would seem that he should not be allowed to sell at an exorbitant price; 16 Am. L. Rev. 289; but see 64 Penn. 43; and he should faithfully state to the company all material facts relating to the property which would influence it in deciding as to the purchase; Thomp. Liab. of Off. 219; L. R. 5 Eq. 464. See 2 Lind. Part. 580.

The writer quoted (Lloyd, Corp. Liab. for Acts of Prom.) states four propositions as the result of the cases as to the relation between the corporation and its promoters: 1. Where a promoter buys property intending to sell it to the company (already in process of formation) he cannot make a profit on the transaction without the fullest disclosure; L. R. 11 Ch. Div. 918. 2. Where one owns property he is at liberty to form a company and sell it at any price and without disclosing his profit, providing he make no fraudulent misrepresentations; 64 Pa. 43. 3. Where one buys property and soon after begins to promote a company, and declares that he bought the property for the company, and effects a sale to the company, he is liable for any profit made, on the ground that he has alleged that he acted as an agent in the matter; 61 Pa. 202. 4. If the promoter receive a gift or commission from the vendors of the property for arranging a sale to the company, he must account therefor; L. R. 11 Ch. Div. 918.

Where a promoter acts as the agent of the company, if he is under no special duty to purchase the land in question for the corporation, he may sell his own land to it, or buy any other land, and sell at a profit, provided he do so fairly, but it must appear that the company had an independent board of directors, who could exercise their own discretion in the purchase of the property; 3 App. Cas. 1218; 23 Can. Sup. Ct. 644; 52 N. J. Eq. 219; he must disclose his interest in the property; 3 App. Cas. 1218; 101 Cal. 94; he must state truly all the material facts; 3 App. Cas. 1218; 101 Cal. 90; 74 Wis. 307. A promoter who acts as a mere agent for the purchase of the property cannot retain a secret profit out of the transaction; 11 Ch. D. 918; 4 C. P. D. 396; 30 Fed. Rep. 538; 122 N. Y. 349; but a profit made with the knowledge and assent of all the members of the corporation may be retained; 14 Ch. D. 390. But where a promoter deals with the corporation at arm's length, he may make such profit as he can; 2 Hare 461.

The remedy for the corporation is either to rescind the contract, if no equities intervene to prevent, or to call upon the promoter to account for his unlawful profit; 4 Russ. 562; 54 N. Y. 403.

When a solvent trader converts his business into a limited liability company, complying with all the statutory requirements, the court will not go behind the transaction and decide that the company is not validly constituted on account of the non-fulfilment of conditions which are not found in the company's acts; [1897] A. C. 22. This case sustains the validity of what

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are known in England as "one man companies."

The use of the English Company Acts to enable two partners to carry on business with limited liabilities is an abuse of those acts; but the company so created is an effectual company, and the parties cannot be sued as partners, though, possibly, if they and the company were both before the court, the creditors might be entitled to an indemnity from them personally; 74 L. T. 149.

The subject is fully treated by Judge Thompson in his work above cited. See, also, Alger, Promoters; 16 Am. L. Rev. 281; 3 Am. & Eng. Dec. in Eq. 489; Keener, Quasi-Contracts; PROSPECTUS.

**PROMPT.** Quick, sudden, or precipitate. One who is ready is said to be prepared at the moment; one who is prompt is said to be prepared beforehand. 105 N. Y. 412.

**PROMULGATION.** The order given to cause a law to be executed, and to make it public; it differs from publication. 1 Bla. Com. 45; Stat. 6 Hen. VI. c. 4.

With regard to trade, unless previous notice can be brought home to the party charged with violating their provisions, laws are to be considered as beginning to operate in the respective collection districts only from the time they are received from the proper department by the collector. Paine 23, 32.

The promulgation of laws is an executive function. The mode may be prescribed by the legislature. It is the extrinsic act which gives a law, perfect in itself, executory force. Unless the law prescribes that it shall be executory from its passage, or from a certain date, it is presumed to be executory only from its passage; 17 La. Ann. 390. Formerly promulgation meant introducing a law to the senate; Aust. Jur. Lect. 28. See STATUTE.

**PROMUTUUM (Lat.). In Civil Law.** A *quasi*-contract, by which he who receives a certain sum of money, or a certain quantity of fungible things, which have been paid to him through mistake, contracts towards the payer the obligation of returning him as much. Pothier, *de l'Usure*, pt. 3, s. 1, a. 1.

This contract is called *promutuum*, because it has much resemblance to that of *mutuum*. This resemblance consists in this: *first*, that in both a sum of money or some fungible things are required; *second*, that in both there must be a transfer of the property in the thing; *third*, that in both there must be returned the same amount or quantity of the thing received. But, though there is this general resemblance between the two, the *mutuum* differs essentially from the *pro-mutuum*. The former is the actual contract of the parties, made expressly, but the latter is a *quasi*-contract, which is the effect of an error or mistake. 1 Bouvier, Inst. n. 1125.

**PRONEPOS (Lat.).** Great-grandson.

**PRONEPTIS (Lat.).** A niece's daughter. A great-granddaughter. Ainsworth, Dict.

**PRONURUS (Lat.).** The wife of a great-grandson.

**PROOF. In Practice.** The conviction or persuasion of the mind of a judge or jury, by the exhibition of evidence, of the reality of a fact alleged. Thus, *to prove* is to determine or persuade that a thing does or does not exist; 8 Toullier, n. 2; Ayliffe, Parerg. 442; 2 Phil. Ev. 44, n. a; Steph. Ev. 62; 1 Greenl. Ev. § 1; 31 Cal. 203; 36 Ia. 106. Proof is the perfection of evidence; for without evidence there is no proof, although there may be evidence which does not amount to proof: for example, if a man is found murdered at a spot where another has been seen walking but a short time before, this fact will be *evidence* to show that the latter was the murderer, but, standing alone, will be very far from *proof* of it.

Ayliffe defines *judicial proof* to be a clear and evident declaration or demonstration of a matter which was before doubtful, conveyed in a judicial manner by fit and proper arguments, and likewise by all other legal methods: first, by proper arguments, such as conjectures, presumptions, indicia, and other adminicular ways and means; secondly, by legal methods, or methods according to law, such as witnesses, public instruments, and the like. Ayliffe, Parerg. 442; Aso & M. Inst. b. 3, t. 7.

**PROOF OF DEATH.** See DEATH.

**PROOF OF LOSS.** See LOSS.

**PROOF OF SPIRITS.** Testing the strength of alcoholic spirits, also the degree of strength; as high proof, first proof, second, third, and fourth proofs. In the internal revenue law it is used in the sense of degree of strength. 6 U. S. App. 53.

**PROPER.** That which is essential, suitable, adapted, and correct.

Congress is authorized, by art. 1, s. 8, of the constitution of the United States, "to make all laws which shall be necessary and *proper* for carrying into execution the foregoing powers, and all other powers vested by this constitution of the United States, in any department or officer thereof."

**PROPER LAW OF CONTRACT.** See LEX LOCI.

**PROPERTY.** The right and interest which a man has in lands and chattels to the exclusion of others. 6 Binn. 98; 4 Pet. 511; 17 Johns. 283; 11 East 290, 518; 14 *id.* 370.

The sole and despotic dominion which one man claims and exercises over the external things of the world in total exclusion of the right of any other individual in the universe. 2 Bla. Com. 2. The right to

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possess, use, enjoy, and dispose of a thing. 56 N. Y. 268; which is in itself valuable; 4 McLean 603. The right or interest which one has in lands or chattels. 6 Binn. 94; 4 Pet. 511. The free use and enjoyment by a person of all his acquisitions, without any control or diminution, save only by the law of the land. 2 Ark. 291; 61 Hun 571. The right of a person over a thing (*in rem*) indefinite in point of user. Austin's Lectures.

That which is peculiar or proper to any person; that which belongs exclusively to one; the first meaning of the word from which it is derived—*proprius*—is one's own. Drone, Copyr. 6.

A vested right of action is property in the same sense that tangible things are property; 106 U. S. 132. It is a thing owned, that to which a person has or may have a legal title; 43 N. Y. 389. See 50 Ala. 509; 20 Cal. 387; 59 Ill. 142; 9 Ind. 202; 13 B. Mon. 293; 11 East 290.

In the treaty by which Louisiana was acquired, property comprehends every species of title, inchoate or complete, legal or equitable, and embraces rights which lie in contract, executory as well as executed; 113 U. S. 179.

The term "property" embraces every species of valuable right and interest, including real and personal property, easements, franchises, and hereditaments; 46 N. Y. Super. Ct. 138; it includes money as well as other assets; 12 Colo. 152; a chose in action; 49 Ohio St. 60; a mining claim; 143 U. S. 431; a debt; 55 Ill. App. 563; a ferry franchise; 1 Black 603; 110 Mo. 557; 9 C. C. App. 174; the reciprocal rights of the wife to the society, protection, and support of her husband, and his right to her society and services in his household may be regarded as the property of the respective parties; 39 Hun 40; 89 Mich. 123. A liquor license is not property; 13 S. E. Rep. (Ga.) 197. See LIQUOR LAWS.

All things are not the subject of property; the sea, the air, and the like cannot be appropriated; every one may enjoy them, but he has no exclusive right in them. When things are fully our own, or when all others are excluded from meddling with them or from interfering about them, it is plain that no person besides the proprietor, who has this exclusive right, can have any claim either to use them, or to hinder him from disposing of them as he pleases: so that property, considered as an exclusive right to things, contains not only a right to use those things, but a right to dispose of them, either by exchanging them for other things, or by giving them away to any other person without any consideration, or even throwing them away. Rutherforth, Inst. 20; Domat, liv. prél. tit. 3; Pothier, *des Choses;* 18 Viner, Abr. 63; Com. Dig. *Biens.* See, also, 2 B. & C. 281; 9 *id.* 396; 3 Dowl. & R. 394; 1 C. & M. 39; 4 Call 472; 18 Ves. 193; 6 Bingh. 630.

See 90 N. Y. 122; 130 *id.* 360, where easements of light and air and ingress and egress to buildings were held to be property.

The ownership of property implies its use in the prosecution of any legitimate business which is not a nuisance in itself; 89 Fed. Rep. 623.

Property is said to be real and personal property. See those titles.

Dicey (Confl. Laws, Moore's ed. 72) treats of property as consisting of movables and immovables, but says that this "does not square with the distinction known to English lawyers between *things real*, or real property, and *things personal*, or personal property." Movables are equivalent to personal property with the omission of chattels real; immovables are equivalent to realty, with the addition of chattels real or leaseholds. Law is concerned, not with things but with rights over, or in reference to property.

It is also said to be, when it relates to goods and chattels, *absolute* or *qualified.* Absolute property is that which is our own without any qualification whatever: as, when a man is the owner of a watch, a book, or other inanimate thing, or of a horse, a sheep, or other animal which never had its natural liberty in a wild state.

Qualified property consists in the right which men have over wild animals which they have reduced to their own possession, and which are kept subject to their power; as, a deer, a buffalo, and the like, which are his own while he has possession of them, but as soon as his possession is lost his property is gone, unless the animals go *animo revertendi*; 2 Bla. Com. 396; 3 Binn. 546; but a whale, harpooned, but not connected with a boat by line, is vested in the crew that harpooned it, and not in one which afterwards followed and captured it; 8 Fed. Rep. 159; when killed and marked, it belongs to the person who killed it; 1 Sprague 315.

But property in personal goods may be absolute or qualified without any relation to the nature of the subject-matter, but simply because more persons than one have an interest in it, or because the right of property is separated from the possession. A bailee of goods, though not the owner, has a qualified property in them; while the owner has the absolute property. See BAILEE; BAILMENT.

Personal property is further divided into property in possession, and property or choses in action. See CHOSE IN ACTION.

Property is again divided into corporeal and incorporeal. The former comprehends such property as is perceptible to the senses, as lands, houses, goods, merchandise, and the like; the latter consists in legal rights, as choses in action, easements, and the like.

In a strict legal sense, land is not property, but the subject of property. The term property, although in common parlance applied to a tract of land or a chattel, in its legal signification means only the right of the owner in relation to it. It denotes a right over a determinate thing. Property is the right of any person to possess, use,

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enjoy, and dispose of a thing. 18 N. Y. 378; 1 Bla. Com. 186; 2 Austin, Jurispr. 817. If property in land consists in certain essential rights, and a physical interference with the land substantially subverts one of those rights, such interference takes, *pro tanto*, the owner's property. The right of using a thing indefinitely is an essential quality of absolute property, without which absolute property can have no legal existence. Use is the real side of property. This right of user necessarily includes the right and power of excluding others from the land; 103 Mass. 14. From the very nature of these rights of user and of exclusion, it is evident that they cannot be materially abridged without, *ipso facto*, taking the owner's property. If the right of indefinite user is an essential element of absolute property or complete ownership, whatever physical interference annuls this right, takes property, although the owner may still have left to him valuable rights in the article of a more limited and circumscribed nature; 51 N. H. 512.

Property is lost by the act of man by—*first, alienation;* but in order to do this the owner must have a legal capacity to make a contract; *second*, by the voluntary abandonment of the thing; but unless the abandonment be purely voluntary the title to the property is not lost: as, if things be thrown into the sea to save the ship, the right is not lost; Pothier, n. 270; 3 Toullier, n. 346. But even a voluntary abandonment does not deprive the former owner from taking possession of the thing abandoned at any time before another takes possession of it.

It is lost *by operation of law—first*, by the forced sale, under a lawful process, of the property of a debtor to satisfy a judgment, sentence, or decree rendered against him, to compel him to fulfil his obligations; *second*, by confiscation, or sentence of a criminal court; *third*, by prescription; *fourth*, by civil death: *fifth*, by capture by a public enemy. It is lost *by the act of God*, as in the case of the death of slaves or animals, or in the total destruction of a thing: for example, if a house be swallowed up by an opening in the earth during an earthquake.

It is proper to observe that, in some cases, the moment that the owner loses his possession he also loses his property or right in the thing; animals *feræ naturæ*, as mentioned above, belong to the owner only while he retains the possession of them. But, in general, the loss of possession does not impair the right of property, for the owner may recover it within a certain time allowed by law. Bouvier, Inst.

As to the *situs* of property, it has been said:—"Lands, and generally, though not invariably, goods, must be held situate at the place where they, at a given moment, actually lie; debts, choses in action, and claims of any kind must be held situate where the debtor or other person against whom a claim exists, resides; or, in other words, debts or choses in action are generally to be looked upon as situate where they are properly recoverable or can be enforced." Dicey, Confl. Laws, Moore's ed. 318.

A British ship belonging to a deceased person, and registered at any port of the United Kingdom, is to be held, for some purposes at any rate, to be situate at that port. Goods on the high seas, which are capable of being dealt with in England by means of bills of lading in that country, are held situate in England, and goods which at the death of the deceased owner are *in transitu* to that country, and arrive there after his death, are apparently to be held situate in England at his death. Money in a bank in Canada belonging to one who dies in England is considered as virtually *in transitu*. Bonds or other securities forming part of the property of a deceased person, if they are in fact in England and are marketable securities there, saleable and transferable there by delivery only, without its being necessary to do any act out of England to make the transfer valid, are situate in England, though the debts or money are owing from foreigners. Such bonds differ essentially from foreign loans, which cannot be fully transferred without doing some act in a foreign country. A debt due on a deed situate in England from a debtor resident abroad, and a debt due on a deed situate abroad from a debtor resident in England, are situate in England. A judgment debt is assets where the judgment is recorded; 4 M. & W. 171. A share in a partnership business is situate where the business is carried on, but it has been said to be only a claim, and therefore situate wherever it can be enforced. See 15 App. Cas. 482. Most of the cases arise upon the liability of a decedent's property to the payment of probate duties, but sometimes on the question of jurisdiction; Dicey, Confl. Laws, Moore's ed. 318.

A license to use a patent in New South Wales could not be said to be locally situate anywhere. However, for the purposes of probate duty, property is capable of being localized, yet, for any other purposes, incorporeal rights could not be said to have any local situation. [1896] 2 Q. B. 178. See 22 Law Mag. & Rev. 116.

The locality of a mortgage debt is that of the debt and does not depend on that of the mortgaged property. See Dicey, Confl. Laws 319.

"The general rule of law is well settled that for the purpose of founding administration, all simple contract debts are assets at the domicil of the debtor; and that the locality of such a debt for this purpose is not affected by a bill of exchange or promissory note having been given for it, because . . . the bill or note is merely evidence of it, and therefore the debt is assets where the debtor lives, without regard to the place where the instrument is found or payable." 109 U. S. 654, citing 102 Mass. 186; 10 Ohio St. 136; 4 M. & W. 171. See 143 Ill. 25; 74 Me. 85.

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A claim against the United States is not a local asset in the District of Columbia; 27 Ct. Cl. 529. A bond does not come within the rule as to simple contract debts, but is assets for the purpose of administration in the place in which it is found; 73 N. Y. 292. A life insurance policy is assets, for the purpose of founding an administration, in a state into which it is brought after the death of the insured; 111 U. S. 138. An insurance policy, issued and payable in New York, on the life of a person domiciled in Virginia, was held to have passed to his administrator in Virginia, although it was deposited with a person in Mississippi, who, as administrator there, sought to collect it; 71 Miss. 590. See note to Dicey, Confl. Laws 331.

As between the states of the United States, a ship at sea is presumed to be situate in the state in which it is registered; 16 Wall. 610.

See TAXATION, as to the *situs* of property for the purposes of taxation; and Waples, Debt. & Cred., where the subject of the location of property is treated.

**PROPINQUITY** (Lat.). Kindred; parentage. See AFFINITY; CONSANGUINITY; NEXT OF KIN.

**PROPIOR SOBRINA, PROPIOR SOBRINO** (Lat.). The son or daughter of a great-uncle or great-aunt on the father's or mother's side. Calvinus, Lex.

**PROPIOS, PROPRIOS. In Spanish Law.** Certain portions of ground laid off and reserved when a town was founded in Spanish America, as the inalienable property of the town, for the purpose of erecting public buildings, markets, etc., or to be used in any other way, under the direction of the municipality, for the advancement of the revenues or the prosperity of the place. 12 Pet. 442.

**PROPONENT. In Ecclesiastical Law.** One who propounds a thing; as, "the party proponent doth allege and propound." 6 Eccl. 356, n. Often used of one who offers a will for probate.

**PROPORTUM.** Intent or meaning. Cowel.

**PROPOSAL.** An offer. A formal offer to perform some undertaking, stating the time and manner of performance and price demanded, or one or more of these particulars, either directly or by implied or direct reference to some announcement requesting such an offer. See 35 Ala. N. S. 33. A proposal of this character is not to be considered as subject to different rules from any other offer. Pierce, Am. Railw. Law 364; Poll. Contr. 13. See OFFER.

**PROPOSITUS** (Lat.). The person proposed. In making genealogical tables, the person whose relations it is desired to find out is called the *propositus*.

**PROPOUND.** To offer; to propose; as, the *onus probandi* in every case lies upon the party who propounds a will. 1 Curt. Eccl. 637; 6 Eccl. 417.

**PROPRES. In French Law.** The term *propres* or *biens propres* is used to denote that property which has come to an individual from his relations, either in a direct line, ascending or descending, or from a collateral line, whether the same have come by operation of law or by devise. *Propres* is used in opposition to *acquêts*. Pothier, *Des Propres*; 2 Burge, Confl. of Law 61.

**PROPRIA PERSONA** (Lat. in his own person). It is a rule in pleading that pleas to the jurisdiction of the court must be plead *in propria persona*, because if pleaded by attorney they admit the jurisdiction, as an attorney is an officer of the court, and he is presumed to plead after having obtained leave, which admits the jurisdiction. Lawes, Pl. 91.

An appearance may be *in propria persona*, and need not be by attorney.

**PROPRIETARY.** In its strict sense, this word signifies one who is master of his actions, and who has the free disposition of his property. During the colonial government of Pennsylvania, William Penn was called the proprietary.

Belonging to ownership; as proprietary rights. 117 U. S. 487.

**PROPRIETATE PROBANDA.** See DE PROPRIETATE PROBANDA.

**PROPRIETOR.** The owner.

One who has the legal right or exclusive title to anything. In many instances it is synonymous with owner. 83 Tex. 218. A receiver is not a proprietor; 32 S. W. Rep. (Tex.) 77.

**PROPRIO VIGORE** (Lat.). By its own force and vigor: an expression frequently used in construction. A phrase is said to have a certain meaning *proprio vigore*.

**PROPTER AFFECTUM** (Lat.). For or on account of some affection or prejudice. See CHALLENGE.

**PROPTER DEFECTUM** (Lat.). On account of or for some defect. See CHALLENGE.

**PROPTER DELICTUM** (Lat.). For or on account of crime. See CHALLENGE.

**PROPTER HONORIS RESPECTUM.** On account of respect or honor of rank. See CHALLENGE.

**PROROGATED JURISDICTION. In Scotch Law.** That jurisdiction which, by the consent of the parties, is conferred upon a judge who, without such consent, would be incompetent. Erskine, Inst. 1. 2. 15.

At common law, when a party is entitled to some privilege or exemption from jurisdiction he may waive it, and then the jurisdiction is complete; but the consent cannot give jurisdiction.

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**PROROGATION.** Putting off to another time. It is generally applied to the English parliament, and means the continuance of it from one time to another; it differs from adjournment, which is a continuance of it from one day to another in the same session. 1 Bla. Com. 186.

**In Civil Law.** The giving time to do a thing beyond the term prefixed. Dig. 2. 14. 27. 1. See PROLONGATION.

**PROSCRIBED** (Lat. *proscribo*, to write before). **In Civil Law.** Among the Romans, a man was said to be proscribed when a reward was offered for his head; but the term was more usually applied to those who were sentenced to some punishment which carried with it the consequences of civil death. Code 9. 49.

**PROSECUTION** (Lat. *prosequor*, to follow after). **In Criminal Law.** The means adopted to bring a supposed offender to justice and punishment by due course of law. See 34 La. Ann. 1198.

Prosecutions are carried on in the name of the government, and have for their principal object the security and happiness of the people in general. Hawk. Pl. Cr. b. 2, c. 25, s. 3; Bac. Abr. *Indictment* (A 3).

In England, the modes most usually employed to carry them on are—by indictment; 1 Chitty, Cr. L. 132; presentment of a grand jury; *id.* 133; coroner's inquest; *id.* 134; and by an information. In this country, the modes are—by indictment, by presentment, by information, and by complaint, which see. See POSTULATIO; MALICIOUS PROSECUTION.

**PROSECUTOR. In Practice.** He who prosecutes another for a crime in the name of the government.

The *public* prosecutor is an officer appointed by the government to prosecute all offences: he is the attorney-general or his deputy.

A *private* prosecutor is one who prefers an accusation against a party whom he suspects to be guilty.

Every man may become a prosecutor; but no man is bound, except in some few of the more enormous offences, as treason, to be one; but if the prosecutor should compound a felony he will be guilty of a crime. The prosecutor has an inducement to prosecute, because he cannot, in many cases, have any civil remedy until he has done his duty to society by an endeavor to bring the offender to justice. If a prosecutor act from proper motives, he will not be responsible to the party in damages though he was mistaken in his suspicions; but if, from a motive of revenge, he institute a criminal prosecution without any reasonable foundation, he may be punished by being mulcted in damages, in an action for a malicious prosecution (*q. v.*).

In Pennsylvania, a defendant is not bound to plead to an indictment, where there is a private prosecutor, until his name shall have been indorsed on the indictment as such, and on acquittal of the defendant, in all cases except where the charge is for a felony, the jury may direct that he shall pay the costs. See 1 Chitty, Cr. Law 110; 2 Va. Cas. 3, 20; 1 Dall. 5; 2 Bibb 210; 6 Call 245; Bish. Cr. Pro. 691; DISTRICT ATTORNEY OF THE UNITED STATES; INFORMER.

**PROSECUTOR OF THE PLEAS.** The title of the prosecuting officer in each county in New Jersey and one or two other states.

The term is used in the same sense as district attorney in other states.

**PROSOCER** (Lat.). A father-in-law's father; grandfather of wife. Vicat, Voc. Jur.

**PROSOCERUS** (Lat.). A wife's grandmother.

**PROSPECTIVE** (Lat. *prospicio*, to look forward). That which is applicable to the future: it is used in opposition to retrospective. To be just, a law ought always to be prospective. 1 Bouvier, Inst. n. 116. See RETROSPECTIVE.

**PROSPECTUS.** A prospectus of an intended company ought not to omit actual and material facts, or to conceal facts material to be known, the misrepresentation or concealment of which may improperly influence the mind of the reader; for if he is thereby deceived into becoming an allottee of shares and suffers loss he may proceed against those who have misled him. The proper purpose of a prospectus of an intended company is held to be only to invite persons to become original shareholders or allottees of shares in the company. When it has performed this office, it is exhausted; Peek *v.* Gurney, L. R. 6 H. L. 377; but a purchaser of shares from an original allottee may maintain an action for misrepresentations contained in a prospectus, if he can show that it was intended by those issuing it to be, and was, communicated to him prior to his purchase of shares; [1896] 1 Q. B. 372; such an intention may be inferred if the prospectus was circulated after all its shares had been allotted, particularly if they were taken up by the promoters themselves. See [1892] 3 Ch. 566; 17 Ch. D. 467.

The doctrine of Peek *v.* Gurney is considered by Judge Thompson (Corp. § 1471) as "destitute of any foundation in reason and opposed to the common opinions of justice and business morality." It is not followed in this country, where it is held that it is sufficient if the prospectus was issued to influence the public, and the plaintiff saw it and was induced thereby to purchase shares; *id.*

A prospectus set forth that a tramway company had the right to use steam power as well as horses; the directors believed the statement to be true, but it was not; it was held that the officers of the company were not liable for deceit: Derry *v.* Peek, L. R. 14 App. Cas. 337. This decision was followed in England by an act of 1890

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which provided that when a prospectus contains any untrue statement the directors of the company issuing it shall be liable in damages to any person taking shares, etc., for any loss he may sustain; see Beach, Priv. Corp. § 271.

If a director of a company knowingly issues or sanctions the circulation of a false prospectus, containing untrue statements of material facts tending to deceive the community, and to induce the public to buy the stock in the market, he is responsible to those who are injured thereby; 62 N. Y. 319.

A letter intended to be used to promote the sale of bonds of a trust company is a representation to all persons to whom it is shown; 159 Mass. 437.

A prospectus is admissible in evidence in an action at law by a company against its promoters for secret profits; 61 Pa. 202. See Thomp. Liab. of Off. 309.

A statement in a prospectus of the purpose for which money is wanted, is a material statement of fact, and if untrue may be ground for an action of deceit; 29 Ch. Div. 459.

A prospectus of a new company, so far as it alleges facts concerning the position and prospects of the undertaking, is a representation to all persons who may apply for shares therein, but not to subsequent transferees of shares; L. R. 6 H. L. 377; but it may be as to the latter, if actively used to induce the purchase of shares; [1896] 1 Q. B. 372; Poll. Torts 284. The material question as to a prospectus is, "Was there or was there not misrepresentation in point of fact?" *id.*

See 7 Eng. Rul. Cas. 561; Alger, Promoters; DECEIT; MISREPRESENTATION; PROMOTERS.

**PROSTITUTION.** The common lewdness of a woman for gain. The act of permitting a common and indiscriminate sexual intercourse for gain. 12 Metc. 97.

The act or practice of prostituting or offering the body to an indiscriminate intercourse with men; common lewdness of a woman for gain; the act of permitting a common and indiscriminate sexual intercourse for hire. 108 Mo. 575. See 54 Me. 24; 98 Ala. 61.

By the word in its most general sense is understood the act of setting one's self to sale, or of devoting to infamous purposes what is in one's power: as, the prostitution of talents or abilities; the prostitution of the press, etc. 8 Barb. 610.

In all well-regulated communities this has been considered a heinous offence, for which the woman may be punished; and the keeper of a house of prostitution may be indicted for keeping a common nuisance.

A landlord cannot recover for the use and occupation of a house let for the purpose of prostitution; 1 Esp. Cas. 13; 1 B. & P. 340, n. It is not a crime to let rooms to prostitutes for quiet and decent occupation, nor to permit a house to be visited by disreputable people, if they visit it for innocent and proper purposes; 15 R. I. 24.

In a figurative sense, it signifies the bad use which a corrupt judge makes of the law, by making it subservient to his interest: as, the prostitution of the law, the prostitution of justice.

**PROTECTION. In Mercantile Law.** The name of a document generally given by notaries public to sailors and other persons going abroad, in which is certified that the bearer therein named is a citizen of the United States.

**In Governmental Law.** That benefit or safety which the government affords to the citizens.

**In English Law.** A privilege granted by the king to a party to an action, by which he is protected from a judgment which would otherwise be rendered against him. Of these protections there are several kinds. Fitzh. N. B. 65.

**PROTECTION ORDERS.** Orders granted by the court upon the application of a wife living apart from her husband to protect her property. Brett, Com. 988.

**PROTECTION OF THE LAWS.** The fourteenth amendment of the constitution of the United States, among other provisions respecting the life, liberty, and property of citizens, provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." This provision has been subjected to much judicial construction. The protection extends to "acts of the state whether through its legislative, its executive, or its judicial authorities;" 154 U. S. 45; 100 *id.* 313, 339; 103 *id.* 370. In a late case the court said: "But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the state, to its legislative, executive, and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that amendment against deprivation by the state, 'violates the constitutional inhibition, and, as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state.' This must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'the state has clothed one of its agents with power to annul or evade it.'" Harlan, J., in 166 U. S. 226. See 162 *id.* 565; 118 *id.* 356. That amendment conferred no new and additional rights, but only extended the protection of the federal constitution over rights of life, liberty, and property that previously existed under all state constitutions. Prior to the passage of this amendment "the laws of all the states in terms gave equal protection to all white persons. This amendment, however, is general, and forbids the denial to any class of persons the equal protection of the laws by any state; and there is no doubt that class legislation is forbidden;" 14 Utah 71. "What must constitute a denial of the equal protection



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of the law will depend, in this view, in a large measure, upon what rights of the law have been conferred, or protection extended, under the constitution and laws of the particular state in which the question arises. As the constitution and laws of the states vary, the proposition that each case must, to an extent, depend upon its own facts, is especially applicable to this class of cases. When the state itself undertakes to deal with its citizens by legislation, it does so under certain limitations, and it may not single out a class of citizens, and subject that class to oppressive discrimination, especially in respect to those rights so important as to be protected by constitutional guaranty. That the prohibitions of that amendment are now regarded as protecting the citizen against a denial of the equal protection of the law, and against taking property without due process of law, under the power of taxation, is a proposition clearly deducible from the many causes in which that question has been considered;" 86 Fed. Rep. 168, 185. The state statute providing that in case of a loss under a life insurance policy, the insurer shall be liable to pay, in addition to the amount thereof, 12 per cent. with attorney's fees for the collection of the same, is in violation of the fourteenth amendment of the constitution of the United States, which secures the equal protection of the laws, inasmuch as it is a discrimination against such companies; 41 S. W. Rep. (Tex.) 680.

By equal protection is meant equal security to every one in his private rights—in his rights to life, to liberty, to property, and to the pursuit of happiness. It implies not only that the means which the laws afford for such security shall be equally accessible to him, but that no one shall be subject to any greater burdens or charges than such as are imposed upon all others under like circumstances; 18 Fed. Rep. 898. See PRIVILEGES AND IMMUNITIES; CIVIL RIGHTS; DUE PROCESS OF LAW.

**PROTECTORATE.** Treaties of protection are treaties in the nature of unequal alliance, from which they are chiefly distinguished by keeping a garrison within the protected state; Twiss, Rights of Nations § 247. The rights of sovereignty must be exercised *de facto* as well as *de jure*. See Halleck, Int. L. 69; 1 Kent, Gould's ed. *23.

The term protectorate is one of which the meaning is somewhat divided; or rather, perhaps, it may be said with more correctness to have different meanings under different circumstances. As exercised, however, by a European power over a smaller civilized state, it differs from the relation which links an Eastern protected state with a European country; a German protectorate inclines to the assumption of more full control than a British.

Formerly protected nations were said to retain their independence and internal sovereignty, placing their foreign relations under a stronger country. It is believed that all the states represented at the Berlin Conference in 1885, except Great Britain, maintained that a Protectorate includes the right of administering justice over the subjects of a protected state. See Hall, For. Jur. of the British Crown.

**PROTEST. In Contracts.** A notarial act, made for want of payment of a promissory note, or for want of acceptance or payment of a bill of exchange by a notary public, in which it is declared that all parties to such instruments will be held responsible to the holder for all damages, exchanges, re-exchange, etc.

A formal notarial certificate attesting the dishonor of a bill of exchange or promissory note. Benj. Chalm. Bills, etc., art. 176.

There are two kinds of protest, namely, protest for non-acceptance, and protest for non-payment. There is also a species of protest common in England, which is called protest for better security. Protest for non-acceptance or non-payment, when duly made and accompanied by notice to all the parties to the bill or note, has the effect of making all of them responsible to the holder for the amount of the bill or note, together with damages, etc.; 3 Kent 63; Byles, Bills 273, 394; Chitty, Bills 278; Com. Dig. *Merchant* (F 8, 9, 10); Bac. Abr. *Merchant*, etc. (M 7). Protest for better security may be made when the acceptor of a bill fails, becomes insolvent, or in any other way gives the holder just reason to suppose it will not be paid. It seems to be of doubtful utility, except that it gives the drawer of a bill on a foreign country an opportunity of availing himself of any attachment law there in force; 1 Ld. Raym. 745.

The protest is a formal paper signed and sealed by a notary wherein he certifies that on the day of its date he presented the original bill attached thereunto, or a copy (a description of the bill is enough; 17 How. 606), to the acceptor, or the original note to the maker thereof, and demanded payment, or acceptance, which was refused, for reasons given in the protest, and that thereupon he protests against the drawer and indorsers thereof for exchange, re-exchange, damages, costs, and interest. See Benj. Chalm. Bills, art. 176; 2 Ames, Bills & N. 863. It is usual, also, for the notary to serve notices of the protest on all the parties to the bill. The notice contains a description of the bill, including its date and amount, the fact of demand and refusal, and that the holder looks to the person notified for payment. Protest of foreign bills is proof of demand and refusal to pay or accept; 2 H. & J. 399; 8 Wheat. 333; 2 Pet. 179, 688. Protest is said to be part of the constitution of a foreign bill; and the form is governed by the *lex loci contractus;* 2 Hill N. Y. 227; 11 La. 14; 2 Pet. 179, 180; Story, Bills 176 (by the place where the protest is made; Benj. Chalm. Bills, art. 180). A protest must be

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made by a notary public or other person authorized to act as such; Benj. Chalm. Bills, art. 177; but it has been held that the duties of a notary cannot be performed by a clerk or deputy; 102 Mass. 141. Inland bills and promissory notes need not be protested; 6 How. 23; see 1 App. D. C. 171; but the term protest, as applied to inland bills of exchange, includes only the steps necessary to charge the drawer and indorser; 36 Neb. 744. See 8 Misc. Rep. 516. Protest is unnecessary to fix the liability of an indorser on a non-negotiable instrument; 70 Tex. 568. See ACCEPTANCE; BILLS OF EXCHANGE; NOTICE OF DISHONOR.

**In Legislation.** A declaration made by one or more members of a legislative body that they do not agree with some act or resolution of the body: it is usual to add the reasons which the protestants have for such a dissent.

**In Maritime Law.** A writing, attested by a justice of the peace, a notary public, or a consul, made and verified by the master of a vessel, stating the severity of a voyage by which a ship has suffered, and showing that it was not owing to the neglect or misconduct of the master. See Beach, Ins. § 1321; 1 Wash. C. C. 145, 238, 408, n.; 1 Pet. C. C. 119; 1 Dall. 6, 10, 317; 2 *id.* 195; 3 W. & S. 144.

The protest is not, in general, evidence for the master of the vessel or his owners in the English or American courts; yet it is often proper evidence against them; Abb. Sh., 13th ed. 457.

**PROTEST, PAYMENT UNDER.** A person who without the compulsion of legal process, or duress of goods or of the person, yields to the assertion of an invalid or unjust claim by paying it, cannot by mere protest, either in writing or oral, change its character from a voluntary to an involuntary payment. The payment overcomes and nullifies the protest; 4 Wait, Act. & Def. 493. Where an illegal tax is paid under protest to one having authority to enforce its collection, it is an involuntary payment and may be recovered back; 29 Ia. 310; 21 Mich. 483; but see 34 *id.* 170; s. c. 22 Am. Rep. 512.

A mere apprehension of legal proceedings to collect a tax is not sufficient to make the payment compulsory; there must be an immediate power or authority to institute them; 46 Md. 552.

An action will not lie to recover money voluntarily paid to redeem land sold upon a void tax judgment when the party making the payment has at the time full knowledge of the character of the sale and all the facts affecting its validity; 26 Minn. 543.

The payment of illegal fees cannot generally be considered as voluntary, so as to preclude the plaintiff from recovering them back; 2 B. & C. 729; 2 B. & A. 562. Where money is paid under an illegal demand, *colore officii*, the payment can never be voluntary; 8 Exch. 625.

Where a railway company exacted from a carrier more than they charged to other carriers in breach of the acts of parliament, it was held that sums thus exacted could be recovered back; 7 M. & G. 253. Where a man pays more than he is bound to do by law for the performance of a duty which the law says is owed to him for nothing, or for less than he has paid, he is entitled to recover back the excess; L. R. 4 H. L. C. 249.

The object of the protest is to take from the payment its voluntary character; it serves as evidence that the payment was not voluntary, and in order to be efficacious there must be actual coercion, duress, or fraud, presently existing, or the payment will be voluntary in spite of the protest; 59 N. Y. 603; 115 Mass. 367. Whether actual protest, in case of the payment of money illegally demanded by a public officer is a condition precedent to a recovery by the party paying the money is not clearly settled; 4 Wait, Act. & Def. 495. Where the person demanding the money has notice of the illegality of the demand, a protest is not necessary, but otherwise it is necessary; 49 Cal. 624.

On *certiorari* the supreme court held that when duties are paid in order to get possession of the goods, a protest made within ten days after the ascertainment and liquidation of the duties is sufficient; 164 U. S. 54, where the statutes on the subject are collated and examined and the decision of the circuit court of appeals was affirmed; Fuller, C. J., and Field, Harlan, and Brewer, JJ., dissenting.

**PROTESTANDO.** See PROTESTATION.

**PROTESTANT.** It includes all those who believe in the Christian religion and do not acknowledge the supremacy of the pope. 52 Conn. 418; 53 *id.* 493. See 53 N. H. 57.

**PROTESTATION. In Pleading.** The indirect affirmation or denial, by means of the word protesting (in the Latin form of pleadings, *protestando*), of the truth of some matter which cannot with propriety or safety be positively affirmed, denied, or entirely passed over. See 3 Bla. Com. 311.

The exclusion of a conclusion. Co. Litt. 124.

Its object was to secure to the party making it the benefit of a positive affirmation or denial in case of success in the action, so far as to prevent the conclusion that the fact was admitted to be true as stated by the opposite party, and at the same time to avoid the objection of duplicity to which a direct affirmation or denial would expose the pleading; 19 Johns. 96; 2 Saund. 103; Com. Dig. *Pleader* (N). Matter which is the ground of the suit upon which issue could be taken could not be protested; Plowd. 276; 2 Johns. 227. But see 2 Wms. Saund. 103, n. Protestations are no longer allowed; 3 Bla. Com. 312: and were generally an unnecessary form; 3 Lev. 125.

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The common form of making protestations was as follows: "because protesting that," etc., excluding such matters of the adversary's pleading as are intended to be excluded in the protestando, if it be matter of fact; or, if it be against the legal sufficiency of his pleading, "because protesting that the plea by him above pleaded in bar" (or by way of reply, or rejoiner, etc., as the case might be) "is wholly insufficient in law." See, generally, 1 Chitty, Pl. 534; Com. Dig. *Pleader* (N); Steph. Pl. 235.

**In Practice.** An asseveration made by taking God to witness. A protestation is a form of asseveration which approaches very nearly to an oath. Wolffius, Inst. § 375.

**PROTHONOTARY.** The title given to an officer who officiates as principal clerk of some courts. Viner, Abr.

In ecclesiastical law, the name of prothonotary is given to an officer of the court of Rome. He is so called because he is the *first notary*,—the Greek word πρωτος signifying *primus*, or first. These notaries have pre-eminence over the other notaries, and are put in the rank of prelates. There are twelve of them. Dalloz, *Dict. de Jur.*

**PROTOCOL.** A record or register. Among the Romans, *protocollum* was a writing at the head of the first page of the paper used by the notaries or tabellions. Nov. 44.

In France the minutes of notarial acts were formerly transcribed on registers, which were called protocols. Toullier, *Dr. Civ. Fr.* liv. 3, t. 3, c. 6, s. 1, n. 413.

By the German law it signifies the minutes of any transaction. Encyc. Amer. In the latter sense the word has of late been received into international law. *Id.*

**In International Law** it is a diplomatic expression which signifies the register on which the deliberations of a conference, etc., are inscribed, whence the word comes to signify the deliberations themselves. 1 Halleck, Int. L. 298, note.

It is used to indicate a preliminary treaty, as the instrument of August 12, 1898, entered into between the United States and Spain.

**PROTOCOLO. In Spanish Law.** The original draft of an instrument which remains in the possession of the notary. White, New Recop. l. 3, t. 7, c. 5, § 2.

**PROTUTOR** (Lat). **In Civil Law.** He who, not being the tutor of a pupil or minor, has administered his property or affairs as if he had been, whether he thought himself legally invested with the authority of a tutor or not.

He who marries a woman who is tutrix becomes, by the marriage, a protutor. The protutor is equally responsible with the tutor.

**PROUT PATET PER RECORDUM** (Lat.). As appears by the record. This phrase is frequently used in pleading; as, for example, in debt on a judgment or other matter of record, unless when it is stated as an inducement, it is requisite, after showing the matter of record, to refer to it by the *prout patet per recordum*. 1 Chitty, Pl. *358; 10 Me. 127.

**PROVER. In Old English Law.** One who undertakes to prove a crime against another. 28 Edw. I.; 5 Hen. IV. One who, being indicted and arraigned for treason or felony, confesses before plea pleaded, and accuses his accomplices to obtain pardon; state's evidence. 4 Bla. Com. 330*. To prove. Law Fr. & Lat. Dict.; Britton, c. 22.

**PROVIDED.** The word always expresses a condition, unless it appears from the context to be the intent of the parties that it shall constitute a covenant; 16 Conn. 419; but it has been held that, though it is apt to create a condition, it does not necessarily do so; it is often used by way of limitation or qualification only, especially when it does not introduce a new clause, but only serves to qualify or restrain the generality of a former clause; 8 Allen 596. The word is often used as a conjunction to an independent paragraph; 128 U. S. 174

*Provided always* may constitute a condition, limitation, or covenant, according to circumstances; 20 Ind. 403.

See PROVISO.

**PROVINCE.** Somtimes this signifies the district into which a country has been divided: as, the province of Canterbury, in England; the province of Languedoc, in France. Sometimes it means a dependency or colony: as, the province of New Brunswick. It is sometiines used figuratively to signify power or authority: as, it is the province of the court to judge of the law, that of the jury to decide on the facts.

**PROVINCIAL CONSTITUTIONS.** The decrees of provincial synods held under divers archbishops of Canterbury.

**PROVING THE TENOR. In Scotch Law.** An action for reviving a writing which has been destroyed or is missing. Ersk. Prin. 496.

**PROVISION. In Common Law.** The property which a drawer of a bill of exchange places in the hands of a drawee: as, for example, by remittances, or when the drawee is indebted to the drawer when the bill becomes due, provision is said to have been made. Acceptance always presumes a provision. See *Code de Comm.* art. 115–117.

**In French Law.** An allowance granted by a judge to a party for his support,—which is to be paid before there is a definite judgment. In a civil case, for example, it is an allowance made to a wife who is separated from her husband, Dalloz, Dict.

**PROVISIONAL INJUNCTION.** Sometimes, though not correctly, used for interlocutory injunction.

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**PROVISIONAL REMEDY.** One provided for present need, or for the occasion, that is, one adapted to meet a particular exigency. 54 How. Pr. 100.

**PROVISIONAL SEIZURE. In Louisiana.** A term which signifies nearly the same as attachment of property.

It is regulated by the Code of Practice as follows, namely :—

The plaintiff may, in certain cases, hereafter provided, obtain the provisional seizure of the property which he holds in pledge, or on which he has a privilege (*q. v.*), in order to secure a payment of his claim. La. Code, art. 284.

Provisional seizure may be ordered in the following cases: *first*, in executory proceedings, when the plaintiff sues on a title importing confession of judgment; *second*, when a lessor prays for the seizure of furniture or property used in the house, or attached to the real estate which he has leased; *third*, when a seaman, or other person, employed on board of a ship or water craft, navigating within the state, or person having furnished materials for or made repairs to such ship or water craft, prays that the same may be seized, and prevented from departing, until he has been paid the amount of his claim; *fourth*, when the proceedings are *in rem*, that is to say, against the thing itself which stands pledged for the debt, when the property is abandoned, or in cases where the owner of the thing is unknown or absent. La. Code, art. 285. See 6 Mart. La. N. S. 168; 7 *id.* 153; 8 *id.* 320; 1 Mart. La. 168; 12 *id.* 32.

**PROVISIONS.** Food for man; victuals.

Corn on the ear in the shuck is provisions within the meaning of a constitutional provision with reference to exemptions; 88 Ga. 352; 23 Ark. 103; but the word does not include a milch cow; 80 Ga. 733; nor cotton; 79 Ga. 172. It has been held to mean only articles of food; 20 Wend. 177. The sale of unwholesome provisions is a misdemeanor; 2 East, Pl. Cr. 822; 3 Maule & S. 10; 4 *id.* 214; 4 Camp. 10. And the rule is that the seller impliedly warrants that they are wholesome; 3 Bla. Com. 166. See ADULTERATION; FOOD; GROCERIES; SALE; WARRANTY.

**PROVISO.** The name of a clause inserted in an act of the legislature, a deed, a written agreement, or other instrument, which generally contains a condition that a certain thing shall or shall not be done, in order that an agreement contained in another clause shall take effect.

A limitation or exception to a grant made, or authority conferred, the effect of which is to declare that the one shall not operate, or the other be exercised, unless in the case provided. 10 Pet. 471; 98 Cal. 433.

The general purpose of a proviso is to except the clause covered by it from the provisions of a statute or to qualify the operation of the statute; 128 U. S. 174. See 93 *id.* 83. It always implies a condition, unless subsequent words change it to a covenant; 12 Conn. 419; but when a proviso contains the mutual words of the parties to a deed, it amounts to a covenant; 2 Co. 72; Cro. Eliz. 242; Moore 707.

A proviso differs from an exception; 1 B. & Ald. 99. An exception *exempts*, absolutely, from the operation of an engagement or an enactment; a proviso defeats their operation, *conditionally*. An exception takes out of an engagement or enactment something that would otherwise be part of the subject-matter of it; a proviso avoids them by way of defeasance or excuse; 8 Am. Jur. 242; Plowd. 361; 1 Saund. 234*a*, note; Lilly, Reg., and the cases there cited. The natural presumption from a proviso is, that, but for the proviso, the enacting part of the section would have included the subject-matter of the proviso; 5 Q. B. D. 173. See, generally, Am. Jur. no. 16, art. 1; Bac. Abr. *Conditions* (A); Com. Dig. *Conditions* (A 1), (A 2); Dwarris, Stat. 660; PROVIDED.

The proper use of provisoes in drafting acts is explained by Coode on Legislative Construction, printed as an appendix to Purdon's Pennsylvania Digest. He considers that the abuse of the proviso is universal, and doubts if it need ever be employed in drafting acts. The early, and, as he thinks, the correct use, is by way of taking special cases out of general enactments and *providing for them*. The courts have generally assumed that such was the proper mode of using a proviso. It is incorrectly used to introduce mere exceptions to the operation of the enactment where no special provision is made for the exception; these are better expressed as exceptions. If a general provision is merely to be negatived in some particular, the negative should be expressed in immediate contact with the general words. Sometimes a proviso introduces several stages of consecutive operation, which would be better expressed by "and." It is impossible to deduce any general rule from the doctrines laid down by the courts in the multitude of adjudicated cases.

*Trial by proviso.* A trial at the instance of a defendant in a case in which the plaintiff, after issue joined, does not proceed to trial when by the practice of the court he ought to have done so.

**PROVISOR.** He that hath the care of providing things necessary; but more especially one who sued to the court of Rome for a provision. Jacob; 25 Edw. III. One nominated by the pope to a benefice before it became void, in prejudice of the right of the true patron. 4 Bla. Com. 111*.

**PROVOCATION** (Lat. *provoco*, to call out). The act of inciting another to do something.

Provocation simply, unaccompanied by a crime or misdemeanor, does not justify the person provoked to commit an assault and battery. In cases of homicide it may re-

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duce the offence from murder to manslaughter; but not if the provocation is by mere words, however exasperating; 164 U. S. 492. But when the provocation is given for the purpose of justifying or excusing an intended murder, and the party provoked is killed, it is no justification; Whart. Cr. L. 457; 2 Gilb. Ev. by Lofft 753. See 81 Va. 298.

The unjust provocation by a wife of her husband, in consequence of which she suffers from his ill usage, will bar her divorce on the ground of the husband's cruelty; her remedy in such cases is to change her manners; 2 Lee 172; 1 Hagg. Cons. 155. See CRUELTY; 1 Russ. Cr. 434, 486; 1 East, Pl. Cr. 232-241.

**PROVOKE.** To excite; to stimulate; to arouse. 34 Conn. 279. See PROVOCATION.

**PROVOST.** A title given to the chief of some corporations or societies.

The chief officer of certain colleges, *e. g.* the University of Pennsylvania.

The chief dignitary of a cathedral or collegiate church. In France, this title was formerly given to some presiding judges. The word is derived from the Latin *præpositus*.

**PROVOST MARSHAL.** An officer appointed by some general officer commanding a body or force of troops, for police duty, or for the general maintenance of order and the repression of all offences in connection with military occupation. He or his assistants may, at any time, arrest and detain for trial, persons subject to military law committing offences, and may carry into execution any punishments to be inflicted in pursuance of a court martial.

**PROXENETÆ** (Lat.). **In Civil Law.** Among the Romans these were persons whose functions somewhat resembled those of the brokers of modern commercial nations. Dig. 50. 14. 3; Domat, l. 1, t. 17, § 1, art. 1.

**PROXIMATE.** In its legal sense, closeness of causal connection. 55 N. J. L. 205.

**PROXIMATE CAUSE.** That which, in a natural and continuous sequence, unbroken by any new cause, produces an event, and without which the event would not have occurred. The proximate cause is that which is most proximate in the order of responsible causation; 37 W. Va. 180; 30 Pac. Rep. (N. M.) 916. That which stands next in causation to the effect, not necessarily in time or space but in causal relation; 143 Ill. 242. See 93 U. S. 130; CAUSA PROXIMA NON REMOTA SPECTATUR; NEGLIGENCE.

**PROXIMITY** (Lat.). Kindred between two persons. Dig. 38. 16. 8.

**PROXY** (contracted from procuracy, procurator). A person appointed in the place of another, to represent him.

The instrument by which a person is appointed so to act.

The right of voting at an election of an incorporated company by proxy is not a general right, and the party claiming it must show a special authority for that purpose; Ang. & A. Corp. § 128; 76 Pa. 42; and although not defined on the face of the proxy, it will be held to be for the election then in contemplation, and for no other; 5 R. R. & Corp. L. J. 255. At common law it was allowable only by the peers of England, and that is said to be in virtue of a special permission of the king; 1 Paige 590; but that practice has been discontinued; Bagehot, Eng. Const. 175.

Where there was no clause in the act of incorporation empowering the members to vote by proxy, but a by-law provided that the shareholders may so vote, it was held, in view of this by-law, that a vote given by proxy should have been received; 5 Day 329. The court did not say how they would have decided had there been no such by-law, but drew a clear distinction between public and moneyed corporations. A by-law prohibiting voting by proxy has been held unreasonable and invalid; 38 Pac. Rep. (Cal.) 452. In 2 Green N. J. 222, it was held that it required legislative sanction before any corporation could make a by-law authorizing members to vote by proxy. So, also, in 3 Grant, Cas. 209. See 2 Kent 294; Beach, Pub. Corp. 391; 6 Wend. 509. Stockholders of national banks may vote by proxy, but no officer, clerk, teller, or bookkeeper of a bank may act as proxy; R. S. § 5144; many of the states have passed statutes regulating the right to vote by proxy. Where it is provided in the charter of a corporation that votes may be given by proxy, and an appointment is made without limitation, a vote by the proxy binds the stockholder, whether exercised in his interest or not, to the same extent as if the vote had been cast in person; 98 Ala. 92.

A power of attorney, irrevocable for ten years, executed by joint owners of stock, is not against public policy, nor within an act providing that every proxy shall be revocable at the pleasure of the person issuing it; 36 N. Y. S. 627; and a by-law providing that no proxy should be voted by any one not a stockholder of the corporation is invalid under an act providing generally that stockholders may be represented by proxies; 104 Cal. 649.

A stockholder who holds a proxy from another stockholder, and votes at a corporate meeting by a show of hands, counts as one person, without regard to the number of proxies he has; [1897] 1 Ch. 1; 52 L. T. N. S. 846; 101 L. T. J. 327; *contra*, per Kekewich, J., 22 Law Mag. & Rev. 46; but if proxies are held by non-members, every such has one vote (*semble*); [1897] 1 Ch. 1. In England it is said that proxy-holders cannot demand a poll; 3 Q. B. D. 442. See VOTING TRUST; MEETING.

**In Ecclesiastical Law.** A judicial proctor, or one who is appointed to

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manage another man's law concerns is called a proxy. Ayliffe, Parerg.

An annual payment made by the parochial clergy to the bishop, etc., on visitations. Tomlins, Law Dict.

In Rhode Island and Connecticut the name of an election or day of voting for officers of government. Webst. Dict.

**PRUDENCE.** That degree of care required by the exigencies or circumstances under which it is to be exercised. 3 S; Dak. 93. See NEGLIGENCE.

**PRYK.** A kind of service of tenure. It signified an old-fashioned spur with one point only, which the tenant, holding land by this tenure, was to find for the king. Blount.

**PSEUDOGRAPH.** False writing.

**PUBERTY. In Civil Law.** The age in boys of fourteen, and in girls of twelve years. Ayliffe, Pand. 63; Toullier, *Dr. Civ. Fr.* tom. 5, p. 100; Inst. 1. 22; Dig. 1. 7. 40. 1; Code 5. 60. 3; 1 Bla. Com. 436.

**PUBLIC.** The whole body politic, or all the citizens of the state. The inhabitants of a particular place.

This term is sometimes joined to other terms, to designate those things which have a relation to the public: as, a public officer, a public road, a public passage, a public house.

A distinction has been made between the terms *public* and *general*: they are sometimes used as synonymous. The former term is applied strictly to that which concerns all the citizens and every member of the state; while the latter includes a lesser, though still a large, portion of the community. Greenl. Ev. § 128.

When the public interest and its rights conflict with those of an individual, the latter must yield. Co. Litt. 181. See EMINENT DOMAIN.

**PUBLIC ACT.** An act which concerns the whole community and of which courts of law are bound to take judicial notice. A land patent granted by a sister state is a public act. 4 Hen. & M. 146.

See JUDICIAL NOTICE. As to giving full faith and credit to the public acts of a state, see FOREIGN JUDGMENTS.

**PUBLIC AMUSEMENT.** See PLACE OF AMUSEMENT; THEATRE.

**PUBLIC BID.** See BIDDER.

**PUBLIC BRIDGE.** See BRIDGE.

**PUBLIC BUILDING.** One of which the possession and use, as well as the property in it, are in the public. 34 N. J. L. 383.

**PUBLIC CARRIER.** See COMMON CARRIER.

**PUBLIC CHAPELS.** Chapels of ease. See CHAPEL.

**PUBLIC CHARACTER.** An individual who asks for and desires public recognition. A statesman, author, artist, or inventor who does so may be said to have surrendered his right of protection against the publication of his portrait; 64 Fed. Rep. 280. See INJUNCTION; PRIVACY; LIBEL.

**PUBLIC CHARITY.** A charity which is so general and indefinite in its objects as to be of common and public benefit. 11 Allen 456. It would be almost impossible to say what charities are public and what private in their nature; 2 Atk. 87. A devise to the poor of a parish is a public charity; *id.* An incorporated library association, the object of which is the diffusion of public knowledge and the acquirement of the arts and sciences, and the revenues and income of which are devoted exclusively to such objects and purposes, is an institution of purely public charity under a statute exempting such institutions from taxation; 36 Ohio St. 53; as is an orphan asylum which restricts its inmates to children of a specified religion; 90 Pa. 21. See CHARITABLE USE.

**PUBLIC CORPORATION.** See CORPORATIONS.

**PUBLIC DEBT.** That which is due or owing by the government.

The constitution of the United States provides, art. 6, s. 1, that "all debts contracted and engagements entered into, before the adoption of this constitution, shall be as valid against the United States under this constitution as under the confederation." The fourteenth amendment provides that "the validity of the public debt of the United States authorized by law, including debts incurred for the payment of pensions and bounties for the services in suppressing insurrection or rebellion, shall not be questioned." See FUNDING SYSTEM.

**PUBLIC DOCUMENTS.** The publications printed by order of congress or either house thereof. 1 Dak. Ter. 328. In an action involving a title to swamp lands the official correspondence and reports of public officers of the United States relating to swamp lands and published by the authority of the legislature are public documents which the court may consult even if not made formal proof in the case; 39 Fed. Rep. 66.

**PUBLIC ENEMY.** This word, used in the singular number, designates a nation at war with the United States, and includes every member of such nation. Vattel 3, c. 5, § 70.

To make a public enemy, the government of the foreign country must be at war with the United States; for a mob, how numerous soever it may be, or robbers, whoever they may be, are never considered as a public enemy; 2 Marsh. Ins. 508; 3 Esp. 131, 132; 74 Me. 413.

A common carrier is exempt from responsibility whenever a loss has been occasioned to the goods in his charge by the act of a public enemy; but the burden of proof lies on him to show that the loss was so occasioned; 3 Munf. 239; 4 Binn. 127; Edw. Bailm. 547–548; 2 Bail. 157. See COMMON CARRIER.

In the late rebellion, the federal troops were a public enemy, against whose acts a

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common carrier within the confederate lines did not insure. 1 Heisk. 256.

**PUBLIC FUND.** See FUNDING SYSTEM.

**PUBLIC GRANT.** See FRANCHISE; CORPORATION; LANDS, PUBLIC.

**PUBLIC HEALTH.** See ADULTERATION; POLICE POWER; HEALTH; QUARANTINE.

**PUBLIC HIGHWAY.** One under the control of and kept by the public, established by regular proceedings for the purpose, or generally used by the public for twenty years, or dedicated by the owner of the soil and accepted by the proper authorities and for the maintenance of which they are responsible. 119 N. C. 868. It includes roads, streets, alleys, and lanes, laid out or erected as such by the public, or dedicated or abandoned to the public by the owner; 93 Cal. 128. A railroad is a public highway; 112 Mo. 103; but not a road on paper; 182 Pa. 681, reversing 2 Super. Ct. Pa. 265; nor, it is said, is a turnpike; 10 Ired. 222. See HIGHWAY.

**PUBLIC HOUSE.** A house kept for the entertainment of all who come lawfully and pay regularly. 3 Brewst. 344. It does not include a boarding-house; *id.*; but under a statute, a store-house in the country is included in this term; 29 Ala. 40; and a barber shop; 30 *id.* 550; and a broker's office; 31 *id.* 371. A room to which persons generally are permitted to resort, to play cards, though not every one has access to it, is a public gambling-house. See many cases collected in 22 Alb. L. J. 24, and Abb. Dic.

In England it applied to a licensed place where liquor is sold. The keeper of a public house is bound to serve any person who presents ready money; 2 Q. B. Div. 136.

**PUBLIC INTEREST.** If by public permission one is making use of public property and he chances to be the only one with whom the public can deal with respect to the use of that property, his business is affected with a public interest which requires him to deal with the public on reasonable terms; Cooley, Const. Lim. 746.

Business affected with a public interest. 1. Where the business is one, the following of which is not of right but is permitted by the state as a privilege or franchise. 2. Where the state on public grounds renders to the business a special assistance by taxation or otherwise. 3. Where for the accommodation of a business special use is allowed to be made of public property or of a public easement. 4. Where special privileges are granted in consideration of some special return to be made to the public; *id.*

As to the publication of matter of public interest, see LIBEL; PRIVILEGED COMMUNICATION.

**PUBLIC LANDS.** Such lands as are subject to sale or other disposition by the United States, under general laws; 92 U. S. 761; 145 *id.* 535. See LANDS, PUBLIC; 10 Nev. 260.

**PUBLIC MEETING.** See ASSEMBLY; UNLAWFUL ASSEMBLY.

**PUBLIC MONEY.** As used in the U. S. statutes, the money of the federal government received from the public revenues, or intrusted to its fiscal officers, wherever it may be. It does not include money in the hands of the marshals and other officers of the courts, held to await the judgment of the court. 12 Ct. Cl. 281.

**PUBLIC OFFICE.** Where, by virtue of law, a person is clothed, not as an incidental or transient authority, but for such time as denotes duration and continuance, with independent power to control the property of the public, or with public functions to be exercised in the supposed interest of the people, the service to be compensated by a stated yearly salary, and the occupant having a designation or title, the position so created is a public office. 29 N. E. Rep. (Ohio) 593. See OFFICER.

**PUBLIC PASSAGE.** A right to pass over a body of water. This term is synonymous with public highway, with this difference: by the latter is understood a right to pass over the land of another; by the former is meant the right of going over the water which is on another's land. Carth. 193; Hamm. N. P. 195. See PASSAGE.

**PUBLIC PEACE.** "That invisible sense of security which every man feels so necessary to his comfort, and for which all governments are instituted." Redfield, J., in 11 Vt. 236. See 6 Daly 280. See PEACE.

**PUBLIC PLACE.** Any place so situated that what passes there can be seen by any considerable number of persons, if they happen to look. Steph. Cr. L. 115. Under a statute against gaming, a steamboat carrying passengers and freight is a public place; 13 Ala. 602; so is an infirmary; 19 *id.* 551; so is a shoemaker's shop into which many went, but a few were excluded during the gaming; 17 *id.* 369; but a secluded place on a mountain, some distance from a roadway and in a dense thicket, is not; 26 S. W. Rep. (Tex.) 394. Under statutes against indecent exposure, a public omnibus is a public place; 3 C. & K. 360; so is a urinal in a public park; L. R. 1 C. C. 282; and a part of the sea beach, visible from inhabited houses; 2 Campb. 89. See many cases cited in 22 Alb. L. J. 24, and Abb. Dict. See PUBLIC HOUSE; PLACE.

**PUBLIC POLICY.** That principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good. 4 H. L. Cas. 1; Greenh. Pub. Pol. 2. It has been designated by Burroughs, J., as

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"an unruly horse pursuing us, and when once you get astride of it you never know where it will carry you." 2 Bingh. 229.

"Public policy is a variable quantity; it must and does vary with the habits, capacities, and opportunities of the public." 36 Ch. Div. 359.

Public policy is manifested by public acts, legislative and judicial, and not by private opinion, however eminent; 42 Fed. Rep. 470. See POLICE POWER; STATUTE; CONSTITUTIONAL.

As to public policy in the law of contracts, see VOID CONTRACTS.

**PUBLIC PURPOSE.** As employed to denote the objects for which taxes may be levied, it has no relation to the urgency of the public need or to the extent of the public benefit which is to follow. It is on the other hand merely a term of classification to distinguish the objects for which, according to settled usage, the government is to provide, from those which by the like usage are left to private inclination, interest, or liberality. 20 Mich. 452. The power of a municipal corporation to borrow money for a public purpose gives it authority to borrow money and issue bonds to aid a railroad company in making its road as a way of public travel and transportation; 3 Wall. 654, affirmed in 4 *id.* 270.

**PUBLIC SALE.** See SALE; AUCTION.

**PUBLIC SCHOOLS.** Common schools. 103 Mass. 97. See SCHOOLS.

**PUBLIC SHIP.** See SHIPS OF WAR.

**PUBLIC SQUARE.** In its popular import, the phrase refers almost exclusively to ground occupied by a courthouse and owned by a county. 8 Ind. 378; but it may be used as synonymous with park; 33 N. J. L. 13. See PARK.

As to the right of a municipality to prohibit lecturing, preaching, etc., in public squares, see LIBERTY OF SPEECH; POLICE POWER; PROCESSION.

**PUBLIC STATUTES.** See STATUTE.

**PUBLIC TRUST.** See TRUST.

**PUBLIC, TRUE, AND NOTORIOUS.** The old form by which charges in the *allegations* in the ecclesiastical courts were described at the end of each particular.

**PUBLIC USE. Under Eminent Domain.** Implies the use of many, or by the public. It may be limited to the inhabitants of a small or restricted locality, but must be in common, and not for a particular individual. Lewis, Em. Dom. c. 7; 130 N. Y. 249; 62 Cal. 182; 66 Hun 619. It arises when the sovereign power is essential to an enterprise, and is for that reason therein exercised; 50 Fed. Rep. 312. See EMINENT DOMAIN.

**PUBLICAN. In Civil Law.** A farmer of the public revenue; one who held a lease of some property from the public treasury. Dig. 39. 4. 1. 1; 39. 4. 12. 3; 39. 4. 13.

**PUBLICATION.** The act by which a thing is made public.

It differs from promulgation, which see; and see, also, Toullier, *Dr. Civ. Fr.* titre *Préliminaire*, n. 59, for the difference in the meaning of these two words.

Publication has different meanings. When applied to a law it signifies the rendering public the existence of the law; when it relates to the opening of the depositions taken in a case in chancery, it means that liberty is given to the officer in whose custody the depositions of witnesses in a cause are lodged, either by consent of parties, or by the rules or orders of the court, to show the depositions openly, and to give out copies of them; Pract. Reg. 297; Blake, Ch. Pr. 143. And when spoken of a will it signifies that the testator has done some act from which it can be concluded that he intended the instrument to operate as his will; 3 Atk. 161; 4 Me. 220; 3 Rawle 15; Com. Dig. *Estates by Devise* (E 2). See Com. Dig. *Chancery* (Q). As to the publication of an award, see 6 N. H. 36.

Some of the state constitutions provide that general laws shall not take effect till published. The mode of publication is for the legislature to determine. A general law printed in a volume of private laws was held to have been *published;* 9 Wisc. 264; but an unauthorized publication is no publication; 10 Wisc. 136. In Pennsylvania, where the constitution did not require publication, it was held to be necessary before an act could be operative; but nevertheless that publication in the legislative journals was sufficient, and that neglect to publish an act in the pamphlet laws did not invalidate the act; 31 Pa. 432. An inaccuracy in the publication of a statute which does not change its substance or legal effect, will not invalidate the publication; 14 Wisc. 212; a joint resolution of a general nature must be published; 4 Kan. 261. See Cooley, Const. Lim., 2d. ed. 189–191.

A commercial agency book is a publication; 75 Fed. Rep. 703. See LIBEL.

**PUBLICI JURIS.** Of public right.

**PUBLICIANA** (Lat.). **In Civil Law.** The name of an action introduced by the prætor Publicius, the object of which was to recover a thing which had been lost. Inst. 4. 6. 4; Dig. 6. 2. 1. 16 et 17. Its effects were similar to those of our action of trover.

**PUBLICITY.** The doing of a thing in the view of all persons who chose to be present.

The law requires that courts should be open to the public: there can therefore be no secret tribunal, except the grand jury (*q. v.*); and all judgments are required to be given in public. See OPEN COURT.

Publicity must be given to the acts of the legislature before they can be in force;

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but in general their being recorded in a certain public office is evidence of their publicity.

**PUBLISH.** Primarily it means to make known. 54 N. J. L. 111.

**PUBLISHER.** One who by himself or his agent makes a thing publicly known; one engaged in the circulation of books, pamphlets, and other papers.

The publisher of a libel is responsible as if he were the author of it, and it is immaterial whether he has any knowledge of its contents or not; 9 Co. 59; Odger, L. & Sl. 125, 166, 432; Hawk. Pl. Cr. c. 73, § 10; 4 Mas. 115; and it is no justification to him that the name of the author accompanies the libel; 10 Johns. 447; 2 Mood. & R. 312.

When the publication is made by writing or printing, if the matter be libellous, the publisher may be indicted for a misdemeanor, provided it was made by his direction or consent; but if he was the owner of a newspaper merely, and the publication was made by his servants or agents, without any consent or knowledge on his part, he will not be liable to a criminal prosecution. But see 107 Mass. 199. In either case he will be liable to an action for damages sustained by the party aggrieved; 7 Johns. 260; 60 Ill. 51; 38 Mich. 10.

In order to render the publisher amenable to the law, the publication must be maliciously made; but malice will be presumed if the matter be libellous. This presumption, however, will be rebutted if the publication be made for some lawful purpose, as, drawing up a bill of indictment, in which the libellous words are embodied for the purpose of prosecuting the libeller; or if it evidently appear that the publisher did not, at the time of publication, know that the matter was libellous; as, when a person reads a libel aloud in the presence of others, without beforehand knowing it to be such; 9 Co. 59. See LIBEL; LIBELLER; PUBLICATION; Odg. Lib. & S.

**PUDICITY.** Chastity; the abstaining from all unlawful carnal commerce or connection. A married woman or a widow may defend her pudicity as a maid may her virginity. See CHASTITY; RAPE.

**PUDZELD. In Old English Law.** To be free from the payment of money for taking of wood in any forest. Co. Litt. 233 *a*. The same as *Woodgeld*.

**PUEBLO.** In its original signification, it means people or population, but is used in the sense of the English word "town." It has the indefiniteness of that term, and, like it, is sometimes applied to a mere collection of individuals residing at a particular place, a settlement, or village, as well as to a regularly organized municipality. 100 U. S. 251.

**PUER** (Lat. a boy; a child). In its enlarged sense this word signifies a child of either sex; though in its restrained meaning it is applied to a boy only.

A case once arose which turned upon this question, whether a daughter could take lands under the description of *puer*; and it was decided by two judges against one that she was entitled; Dy. 337 *b*. In another case, it was ruled the other way; Hob. 33.

**PUERILITY. In Civil Law.** A condition which commenced at the age of seven years, the end of the age of infancy, and lasted till the age of puberty,—that is, in females till the accomplishment of twelve years, and in males till the age of fourteen years fully accomplished. Ayliffe, Pand. 63.

The ancient Roman lawyers divided puerility into *proximus infantiæ*, as it approached infancy, and *proximus pubertati*, as it became nearer to puberty. 6 Toullier, n. 100.

**PUERITIA** (Lat.). **In Civil Law.** Age from seven to fourteen. 4 Bla. Com. 22; Wharton, Dict. The age from birth to fourteen years in the male, or twelve in the female. Calvinus, Lex. The age from birth to seventeen. Vicat, Voc. Jur.

**PUFFER.** A person employed by the owner of property which is sold at auction to bid it up, who does so accordingly, for the purpose of raising the price upon *bona fide* bidders.

This is a fraud, which, at the option of the purchaser, invalidates the sale. 3 Madd. 112; 2 Kent 423; 3 Ves. 628; 2 Bro. C. C. 326; 11 S. & R. 89; 2 Hayw. 328; 4 H. & McH. 282; 2 Dev. 126. See AUCTION; BIDDER; BY BIDDER.

**PUIS DARREIN CONTINUANCE** (L. Fr. since last continuance). **In Pleading.** A plea which is put in after issue joined, for the purpose of introducing new matter, or matter which has come to the knowledge of the party pleading it subsequently to such joinder. See CONTINUANCE; PLEA.

**PUISNE** (L. Fr.). Younger; junior. Associate. *Puisne* judge, an associate judge; not the chief justice.

**PULLMAN CAR.** See SLEEPING CAR.

**PUNCTUALITY.** As a general rule, a railroad company is liable to damage accruing to a passenger for a negligent failure on its part to run its trains according to the company's time tables; but there must be proof of negligence. Neither time table nor advertisement is a warrant of punctuality. Whart. Negl. § 662.

The publication of the time table cannot amount to less than this, viz.: a representation that it is ordinarily practicable for the company, by the use of due care and skill, to run according to the table, and an engagement on their part that they will do all that can be done, by the use of due care and skill, to accomplish that result; 52 N. H. 596. See also 5 E. & B. 860. The company is undoubtedly liable for any want of punctuality which they could

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have avoided by the use of due care and skill; nor can they excuse a want of conformity to the time table for any cause, the existence of which was known to them, or ought to have been known to them, at the time of publishing the table; 52 N. H. 596. See 8 E. L. & Eq. 362; 14 Allen 433; 36 Miss. 660; L. R. 2 C. P. 339. In Ang. Carriers 527 *a*, it is said that time tables are in the nature of a special contract, so that any deviation from them renders the company liable. But it does not appear that the cases go so far.

**PUNCTUATION.** The division of a written or printed instrument by means of points, such as the comma, semicolon, and the like.

Courts of law in construing statutes and deeds must read them with such punctuation as will give effect to the whole; 4 Term 65.

In construing deeds, it is said that no regard is to be had to punctuation, and although stops are sometimes used, they are not to be regarded in the construction of the instrument; 3 Washb. R. P. 397. See 21 W. Va. 707. Punctuation is not allowed to throw light on printed statutes in England; 24 Beav. 330.

In an act of parliament there are no such things as brackets, any more than there are such things as stops; 24 Q. B. D. 478.

Punctuation may be considered in determining the meaning of a contract, when it is doubtful; 138 U. S. 1.

Where a comma after a word in a statute, if any force were attached to it, would give the section containing it broader scope than it would otherwise have, it was held that that circumstance should not have a controlling influence. Punctuation is no part of the statute; 105 U. S. 77; in construing statutes, courts will disregard punctuation; or, if need be, repunctuate, to render the true meaning of the statute; 16 Ohio St. 432, approved in 105 U. S. 77; also 65 Pa. 311; 9 Gray 385.

Punctuation is a most fallible standard by which to interpret a writing; it may be resorted to when all other means fail, but the court will first ascertain the meaning from the four corners of the instrument; 11 Pet. 64.

Lord St. Leonards said: "In wills and deeds you do not ordinarily find any stops; but the court reads them as if they were properly punctuated;" 2 Dr. & War. 98.

Judges in the later cases have been influenced in construing wills by the punctuation of the original document; 2 M. & G. 679; 26 Beav. 81; 1 Phila. 528; 17 Beav. 589; 24 L. J. Ch. 523; but see 1 Mer. 651, where Sir William Grant refused to resort to punctuation as an aid to construction. See, also, 25 Barb. 405; 16 Can. L. J. 183.

**PUNISHABLE.** Liable to punishment. 118 Mass. 36. See 107 *id.* 225; 49 Conn. 232; 135 U. S. 266.

**PUNISHMENT. In Criminal Law.** Some pain or penalty warranted by law, inflicted on a person for the commission of a crime or misdemeanor, or for the omission of the performance of an act required by law, by the judgment and command of some lawful court.

The penalty for the transgression of the law. Whart.; 8 N. Y. Crim. R. 355.

"The infliction of pain in vengeance of crime." Dr. Johnson.

The right of society to punish is derived, by Beccaria, Mably, and some others, from a supposed agreement which the persons who composed the primitive societies entered into, in order to keep order, and, indeed, the very existence of the state. According to others, it is the interest and duty of man to live in society; to defend his right, society may exert this principle, in order to support itself; and this it may do whenever the acts punishable would endanger the safety of the whole. And Bentham is of opinion that the foundation of this right is laid in public utility or necessity. Delinquents are public enemies, and they must be disarmed and prevented from doing evil, or society would be destroyed. But, if the social compact has ever existed, says Livingston, its end must have been the preservation of the natural rights of the members; and therefore the effects of this fiction are the same with those of the theory which takes abstract justice as the foundation of the right to punish; for this justice, if well considered, is that which assures to each member of the state the free exercise of his rights. And if it should be found that utility, the last source from which the right to punish is derived, is so intimately united to justice that it is inseparable from it in the practice of law, it will follow that every system founded on one of these principles must be supported by the other.

The proper end of human punishment is not the satisfaction of justice, but the prevention of crime; Paley.

The end of punishment, therefore, is neither to torment sensible beings nor undo a crime already committed, nor yet recall the past, nor reverse the crime. It is to punish the criminal for doing some injury to society; to repair the wrong done to society or to a private individual, and to amend his life for the future, and by his example to prevent others from committing like offences. The chief end of punishment is by punishing the crime and preventing the doing of it again: and that by means of fines, imprisonment, hard labor, moral and physical treatment, and new habits formed. The infliction of pain for its own sake is now condemned by all enlightened governments, statesmen, and philanthropists; 16 L. Mag. & Rev. 99.

The main objects of penal justice is laid down by Bentham: example, reformation, incapacitation, satisfaction for the person injured, economy to the public. He further says that all our forms of punishment should be put to these five tests and

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should be subjected most especially to all except the last.

To attain their social end, punishments should be *exemplary*, or capable of intimidating those who might be tempted to imitate the guilty; *reformatory*, or such as should improve the condition of the convicts; *personal*, or such as are at least calculated to wound the feelings or affect the rights of the relations of the guilty; *divisible*, or capable of being graduated and proportioned to the offence and the circumstances of each case; *reparable*, on account of the fallibility of human justice.

Punishments are either corporal or not corporal. The former are—death, which is usually denominated capital punishment; imprisonment, which is either with or without labor, see PENITENTIARY; whipping, in some states; and banishment.

The punishments which are not corporal are—fines, forfeitures; suspension or deprivation of some political or civil right; deprivation of office, and being rendered incapable to hold office; compulsion to remove nuisances.

The object of punishment is to reform the offender, to deter him and others from committing like offences, and to protect society. See 4 Bla. Com. 7; Whart. Cr. L. 3, 4, 7; Rutherforth, Inst. b. 1, c. 18. A state may provide for a severer punishment for a second than for a first offence, provided it is dealt out to all alike; 159 U. S. 678.

The constitution of the United States, Amendments, art. 8. forbids the infliction of cruel and unusual punishments. This is intended only for congress and the federal courts; 12 S. & R. 220; 3 Cow. 686; and does not apply to the states; 144 U. S. 323 (Field, Harlan, and Brewer, J.J., dissenting). Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the federal constitution; 136 U. S. 436.

A state statute which provides for the punishment of death by electricity, and which is held by the state courts not to inflict a cruel and unusual punishment, does not abridge the privileges or immunities of a convict under the federal constitution: 142 U. S. 155.

What punishment is suited to a specified offence must in general be determined by the legislature, and the case must be very extraordinary in which its judgment could be brought in question. A punishment may possibly be unlawful because it is so manifestly out of all proportion to the offence as to shock the moral sense with its barbarity, or because it is a punishment long disused for its cruelty until it has become unusual; Cooley, Const., 2d ed. 401-403. So, for example, is the punishment of depriving a native of China of his hair; 18 Am. L. Reg. 676. Whipping, as a punishment for stealing mules, is not contrary to this provision: 1 New Mex. 415. In New York, where a general law created a crime and fixed the maximum of its punishment, a special statute operating only in localities, or upon particular individuals, whereby, for no perceptible reason, the same identical crime, which consists in the violation of a statute applicable to the whole state, can therein or in those persons be punished with double the severity that it can be elsewhere in the same state, is within the prohibition of section five of article one of the constitution of the state as to "cruel and unusual punishments"; 61 How. Pr. 294; 35 L. R. A. 562. See INFAMY; INFAMOUS CRIME; JEOPARDY; CAPITAL PUNISHMENT; PRISONER; SENTENCE; PARDON; ELECTROCUTION; HANGING; CRUEL AND UNUSUAL PUNISHMENT; ACCUMULATIVE SENTENCES.

**PUNITIVE DAMAGES.** See MEASURE OF DAMAGES.

**PUPIL. In Civil Law.** One who is in his or her minority. See Dig. 1. 7; 26. 7. 1. 2; 50. 16. 239; Code 6. 30. 18. One who is in ward or guardianship. See SCHOOLS; ASSAULT; BATTERY; CORRECTION.

**PUPILLARIS SUBSTITUTIO** (Lat.). **In Civil Law.** The nomination of another besides his son as pupil to succeed, if the son should not be able or inclined to accept the inheritance, or should die before he came of age to make a testament.

If the child survived the age of puberty, though he made no testament, the substitute had no right of succession. See Bell, Dict. *Substitution*; Dig. 28. 6.

**PUPILLARITY. In Civil Law.** That age of a person's life which included infancy and puerility.

**PUR.** A corruption of the French word *par*, by or for. It is frequently used in old French law phrases; as *pur autre vie*. It is also used in the composition of words: as, puparty, purlieu, purview.

**PUR AUTRE VIE** (old French, *for another's life*). See ESTATE PUR AUTRE VIE.

**PURCHASE.** A term including every mode of acquisition of estate known to the law, except that by which an heir on the death of his ancestor becomes substituted in his place as owner by operation of law. 2 Washb. R. Prop., 5th ed. *401; 15 Barb. 568; 9 Cow. 437. A title by purchase is one that is vested in a person by his own act or agreement; 2 Bla. Comm. 241. A title by devise is a title by purchase; 134 Ind. 78.

There are six ways of acquiring a title by purchase, namely, by deed; by devise; by execution; by prescription; by possession or occupancy; by escheat. In its more limited sense, purchase is applied only to such acquisitions of lands as are obtained by way of bargain and sale for money or some other valuable consideration: Cruise, Dig. tit. 30, §§ 1-4; 1 Dall. 20. See 96 Ill. 535. In common parlance, purchase signifies the buying of real estate and of goods and chattels.

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**PURCHASER.** A buyer; a vendee. A mortgagee or a conditional vendee is not a purchaser; 46 Neb. 830.

See SALE; PARTIES; CONTRACTS.

**PURCHASE-MONEY.** The consideration which is agreed to be paid by the purchaser of a thing in money. See 15 Barb. 568. As to vendor's lien, see LIEN. See APPLICATION OF PURCHASE-MONEY.

**PURE DEBT. In Scotch Law.** A debt actually due, in contradistinction to one which is to become due at a future day certain, which is called a future debt, and one due provisionally, in a certain event, which is called a contingent debt. 1 Bell, Comm. 315.

**PURE OBLIGATION.** One which is not suspended by any condition, whether it has been contracted without any condition, or, when thus contracted, the condition has been performed. Pothier, Obl. n. 176.

**PURE PLEA. In Equity Pleading.** One which relies wholly on some matter *dehors* the bill, as, for example, a plea of a release on a settled account.

Pleas not pure are so called in contradistinction to pure pleas; they are sometimes also denominated negative pleas. 4 Bouvier, Inst. n. 4275.

**PURGATION** (Lat. *purgo*, from *purum* and *ago*, to make clean). The clearing one's self of an offence charged, by denying the guilt on oath or affirmation.

*Canonical* purgation was the act of justifying one's self, when accused of some offence, in the presence of a number of persons worthy of credit, generally twelve, who would swear they believe the accused. See COMPURGATOR; WAGER OF LAW.

*Vulgar* purgations consisted in superstitious trials by hot and cold water, by fire, by hot irons, by battel, by corsned, etc.

See OATH PURGATORY.

**PURGED OF PARTIAL COUNSEL.** In Scotland every witness, before making oath or affirmation, is *purged of partial counsel, i. e.* cleared by examination on oath of having instigated the plea of having been present with the party for whom he testifies at consultations of lawyers, where it might be shown what was necessary to be proved, or of having acted as his agent in any of the proceedings. So, in a criminal case, he who is agent of prosecutor or who tampers with the panel cannot be heard to testify, because of *partial counsel.* Stair, Inst. p. 768, § 9; Bell, Dict. *Partial Counsel.*

**PURGING A TORT.** Is like the ratification of a wrongful act by a person who has power of himself to lawfully do the act. But, unlike ratification, the purging of the tort may take place even after commencement of the action. 1 Brod. & B. 282.

**PURLIEU. In English Law.** A space of land near a forest, known by certain boundaries, which was formerly part of a forest, but which has been separated from it.

The history of purlieus is this. Henry II., on taking possession of the throne, manifested so great a taste for forests that he enlarged the old ones wherever he could, and by this means enclosed many estates which had no outlet to the public roads; forests increased in this way until the reign of king John, when the public reclamations were so great that much of this land was disforested, — that is, no longer had the privileges of the forests—and the land thus separated bore the name of purlieu. See FOREST LAWS.

**PURPARTY.** That part of an estate which, having been held in common by parceners, is by partition allotted to any of them. To make purparty is to divide and sever the lands which fall to parceners. Old, N. B. 11.

**PURPORT. In Pleading.** The substance of a writing as it appears on the face of it to the eye that reads it. It differs from tenor. 2 Russ. Cr. 365; 1 East 179.

**PURPOSELY.** Intentionally; designedly. 23 Ind. 231.

**PURPRESTURE.** An enclosure by a private individual of a part of a common or public domain.

An inclosure by a private person of a part of that which belongs to, and ought to be open and free to the enjoyment of the public at large. 34 Mich. 472; 89 *id.* 94. See 76 Cal. 156.

According to Lord Coke, purpresture is a close or enclosure, that is, when one encroaches or makes several to himself that which ought to be in common to many: as, if an individual were to build between high and low water mark on the side of a public river. In England this is a nuisance, and in cases of this kind an injunction will be granted, on *ex parte* affidavits, to restrain such a purpresture and nuisance; 2 Bouvier, Inst. n. 2382; 4 *id.* n. 3798; Co. 2d Inst. 28. And see Skene, *Pourpresture;* Glanville, lib. 9, ch. 11, p. 239, note; Spelman, Gloss. *Purpresture;* Hale, *de Port. Mar.;* Hargrave, Law Tracts 84; 2 Anstr. 606; Bisph. Eq. 443; Callis, Sew. 174.

**PURSER.** The person appointed by the master of a ship or vessel, whose duty it is to take care of the ship's books, in which everything on board is inserted, as well the names of mariners as the articles of merchandise shipped. Roccius, Ins. note.

By statute pursers in the navy are now called paymasters. R. S. § 1383.

**PURSUE.** To execute or carry out. Co. Litt. 52 *a.*

**PURSUER.** The name by which the complainant or plaintiff is known in the ecclesiastical courts. 3 Eccl. 350.

**PURVIEW.** That part of an act of the legislature which begins with the words, "Be it enacted," etc., and ends before the

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repealing clause. Cooke 330; 3 Bibb 181. According to Cowel. this word also signifies a conditional gift or grant. It is said to be derived from the French *pourvu*, provided. It always implies a condition.

**PUT. In Pleading.** To select; to demand: as, "the said C D puts himself upon the country;" that is, he selects the trial by jury as the mode of settling the matter in dispute, and does not rely upon an issue in law. Gould, Pl. c. 6, part 1, § 19.

**PUT OFF.** To postpone. In a bargain for the sale of goods, it may mean to postpone its completion or to procure a resale of the goods to a third person. 11 Ex. 302.

**PUTATIVE.** Reputed to be that which is not. The word is frequently used: as, putative father, putative marriage, putative wife, and the like. And Toullier, tome 7, n. 29, uses the words putative owner, *proprietaire putatif*. Lord Kames uses the same expression. Princ. of Eq. 391.

**PUTATIVE FATHER.** The reputed father.

This term is usually applied to the father of a bastard child.

The putative father is bound to support his children; and is entitled to the guardianship and care of them in preference to all persons but the mother. 1 Ashm. 55. And see 5 Esp. 131; 1 B. & Ald. 491; Bott, Poor Law 499; 1 C. & P. 268; 3 *id.* 36; 1 Ball & B. 1.

**PUTATIVE MARRIAGE.** A marriage which is forbidden but which has been contracted in good faith and ignorance of the impediment on the part of at least one of the contracting parties.

Three circumstances must concur to constitute this species of marriage. *There must be bona fides.* One of the parties at least must have been ignorant of the impediment, not only at the time of the marriage, but must also have continued ignorant of it during his or her life, because if he became aware of it he was bound to separate himself from his wife. *The marriage must be duly solemnized. The marriage must have been considered lawful* in the estimation of the parties or of that party who alleges the *bona fides*.

A marriage in which these three circumstances concur, although null and void, will have the effect of entitling the wife, if she be in good faith, to enforce the rights of property which would have been competent to her if the marriage had been valid, and of rendering the children of such marriage legitimate.

This species of marriage was not recognized by the civil law: it was introduced by the canon law. It is unknown to the law of the United States, and in England and Ireland. In France it has been adopted by the Code Civil, art. 201, 202. In Scotland the question has not been settled. Burge, Confl. Laws 151, 152.

**PUTS AND CALLS.** As used in a board of brokers. A "put" is defined in the evidence to be a privilege of delivering or not delivering the grain, and a "call" is a privilege of calling or not calling for the grain. 79 Ill. 353. See OPTION.

**PUTTING IN FEAR.** These words are used in the definition of a robbery from the person: the offence must have been committed by *putting in fear* the person robbed. Co. 3d Inst. 68; 4 Bla. Com. 243.

This is the circumstance which distinguishes robbery from all other larcenies. But what force must be used or what kind of fears excited are questions very proper for discussion. The goods must be taken *against the will* of the possessor.

There must either be a putting in fear or actual violence, though both need not be positively shown, for the former will be inferred from the latter, and the latter is sufficiently implied in the former. For example, when a man is suddenly knocked down, and robbed while he is senseless, there is no fear, yet in consequence of the violence, it is presumed; 2 East, Pl. Cr. 711; 4 Binn. 379; 3 Wash. C. C. 209.

In an indictment for robbery, at common law, it is not necessary to allege a putting in fear in addition to the allegation of force and violence; 7 Mass. 242; 8 Cush. 217.

**PYROMANIA.** An irresistible propensity to burn.

Pyromania always occurs in young subjects, and is supposed to be connected with disordered menstruation, or that physiological evolution which attends the transition from youth to manhood. See MANIA.

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# Q.

**QUACK.** One who, without sufficient knowledge, study, or previous preparation, undertakes to practise medicine or surgery, under the pretence that he possesses secrets in those arts.

To call a regular physician a quack is actionable. A quack is criminally answerable for his unskilful practice, and also civilly to his patient in certain cases. See MALPRACTICE; PHYSICIAN.

**QUADRANS** (Lat.). **In Civil Law.** The fourth part of the whole. Hence the heir *ex quadrante;* that is to say, of the fourth part of the whole.

**QUADRIENNIUM UTILE** (Lat.). **In Scotch Law.** The four years of a minor between his age of twenty-one and twenty-five years are so called. During this period he is permitted to impeach contracts made against his interest previously to his arriving at the age of twenty-one years. 1 Bell, Com. 135.

**QUADRIPARTITE** (Lat.). Having four parts, or divided into four parts: as, this indenture quadripartite, made between A B, of the one part, C D, of the second part, E F, of the third part, and G H, of the fourth part.

**QUADROON.** A person who is descended from a white person and another person who has an equal mixture of the European and African blood. 2 Bail. 558. See MULATTO.

**QUADRUPLATORES.** Informers among the Romans, who, if their information were followed by conviction, had the fourth part of the confiscated goods for their trouble.

**QUADRUPLICATION. In Pleading.** A pleading in admiralty, third in order after a replication; now obselete. Formerly this word was used instead of surrebutter. 1 Brown, Civ. Law. 469, n.

**QUÆ EST EADEM** (Lat. which is the same). **In Pleading.** A clause containing a statement that the trespass, or other fact mentioned in the plea, is the same as that laid in the declaration, where from the circumstances there is an apparent difference between the two. 1 Chitty, Pl. *582; Gould, Pl. c. 3, § 79, 80; 29 Vt. 455.

The form is as follows: "which are the same assaulting, beating, and ill-treating, the said John, in the said declaration mentioned, and whereof the said John hath above thereof complained against the said James." See 1 Saund. 14, 208, n. 2; 2 *id.* 5 a., n. 3; Arch. Civ. Pl. 217; Com. Dig. *Pleader* (E 31); Cro. Jac. 372.

**QUÆ PLURA.** A writ which lay where an inquisition had been taken by an escheator of lands, etc. of which a man died seised, and all the land was supposed not to be found by the office or inquisition; it was to inquire of "what more" lands or tenements the party dies seised. Reg. Orig. 293.

**QUÆRE** (Lat.). Query: noun and verb. A word frequently used to denote that an inquiry ought to be made of a doubtful thing. 2 Lilly, Abr. 406. Commonly used in the syllabi of the reports, to mark points of law considered doubtful.

**QUÆRENS NON INVENIT PLEGIUM** (Lat.). **In Practice.** The plaintiff has not found pledge. The return made by the sheriff to a writ directed to him with this clause, namely, *si A fecerit B securum de clamore suo prosequendo*, when the plaintiff has neglected to find sufficient security. Fitz. N. B. 38.

**QUÆSTIO** (Lat.). **In Roman Law.** A sort of commission (*ad quærendum*) to inquire into some criminal matter given to a magistrate or citizen, who was called *quæsitor* or *quæstor*, who made report thereon to the senate or the people, as the one or the other appointed him. In progress of time he was empowered (with the assistance of a counsel) to adjudge the case; and the tribunal thus constituted was called *quæstio*.

This special tribunal continued in use until the end of the Roman republic, although it was resorted to, during the last times of the republic, only in extraordinary cases.

The manner in which they were constituted was this. If the matter to be inquired of was within the jurisdiction of the comitia, the senate, on the demand of the consul, or of a tribune, or of one of its members, declared by a decree that there was cause to prosecute a citizen. Then the consul *ex auctoritate senatus* asked the people in comitia (*rogabat rogatio*) to enact this decree into a law. The comitia adopted it, either simply or with amendment, or they rejected it.

The increase of population and of crimes rendered this method, which was tardy at best, onerous, and even impracticable. In the year A. U. C. 604, or 149 B. C., under the consulship of Censorinus and Manilius, the tribune Calpurnius Piso procured the passage of a law establishing a *questio perpetua*, to take cognizance of the crime of extortion committed by Roman magistrates against strangers *de pecuniis repetundis*. Cicero, Brut. 27; *de Off.* ii. 21; *in Verr.* iv. 25.

Many such tribunals were afterwards established, such as Quæstiones de majestate, de ambitu, de peculatu, de vi, de sodalitiis, etc. Each was composed of a certain number of judges taken from the senators, and presided over by a prætor, although he might delegate his authority to a public officer, who was called *judex quæstionis*. These tribunals continued a year only; for the meaning of the word *perpetuus* is *non interruptus*, not interrupted during the term of its appointed duration.

The establishment of these *quæstiones* deprived the comitia of their criminal jurisdiction, except for the crime of treason; they were, in fact, the depositories of the judicial power during the sixth and seventh centuries of the Roman republic, the last of which was remarkable for civil dissensions and replete with great public transactions. Without some knowledge of the constitution of the *Quæstio perpetua*, it is impossible to understand the forensic

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speeches of Cicero, or even the political history of that age. But when Julius Cæsar, as dictator, sat for the trial of Ligarius, the ancient constitution of the republic was, in fact, destroyed, and the criminal tribunals, which had existed in more or less vigor and purity until then, existed no longer but in name. Under Augustus, the concentration of the triple power of the consuls, pro-consuls, and tribunes in his person transferred to him, as of course, all judicial powers and authorities.

**QUÆSTOR** (Lat.). The name of a magistrate of ancient Rome.

**QUALE JUS.** A judicial writ, which lay where a man of religion had judgment to recover land before execution was made of the judgment.

**QUALIFICATION.** The endowment or acquirement which renders eligible to place or position. 52 Miss. 672; 64 Mo. 89. It relates to the fitness or capacity of a party for a particular pursuit or profession; 4 Wall. 319. It has been held not only to imply the presence of every requisite demanded, but the absence of every disqualification imposed. 17 B. Monr. 786.

**QUALIFIED ELECTOR.** A person who is legally qualified to vote. 28 Wisc. 358.

**QUALIFIED FEE.** One which has a qualification subjoined to it, and which must be determined whenever the qualification annexed to it is at an end. A limitation to a man and *his heirs on the part of his father* affords an example of this species of estate. Littleton § 254; 2 Bla. Com. 109; Chall. R. P. 50. See BASE FEE.

**QUALIFIED INDORSEMENT.** A transfer of a bill of exchange or promissory note to an indorsee, without any liability to the indorser: the words usually employed for this purpose are *sans recours*, without recourse. 1 Bouv. Inst. n. 1138.

**QUALIFIED OATH.** See OATH.

**QUALIFIED PROPERTY.** Property not in its nature permanent, but which may sometimes subsist and at other times not subsist. A defeasible and precarious ownership, which lasts as long as the thing is in actual use and occupation: *e. g. first*, property in animals *feræ naturæ*, or in light, or air, where the qualified property arises from the nature of the thing; *second*, property in a thing held by any one as a bailee, where the qualified property arises not from the nature of the thing, but from the peculiar circumstances under which it is held; 2 Bla. Com. 391, 395*; 2 Kent 347; 2 Woodd. Lect. 385.

Any ownership not absolute.

**QUALIFIED VOTER.** A person qualified to vote generally. 9 Colo. 629; or, it may mean a person qualified and actually voting. 111 U. S. 565.

**QUALIFY.** To become qualified or fit for any office or employment. To take the necessary steps to prepare one's self for an appointment: as, to take an oath to discharge the duties of an office, to give the bond required of an executor, etc.

It is held synonymous with probate in a statute authorizing probate judges to qualify wills by receiving the evidence of witnesses, etc. 23 Pac. Rep. (N. M.) 238.

**QUALITY. Of Persons.** The state of condition of a person.

Two contrary qualities cannot be in the same person at the same time. Dig. 41. 10. 4. Every one is presumed to know the quality of the person with whom he is contracting. In the United States the people are all upon an equality in their civil rights.

**In Pleading.** That which distinguishes one thing from another of the same kind.

It is, in general, necessary, when the declaration alleges an injury to the goods and chattels, or any contract relating to them, that the quality should be stated; and it is also essential, in an action for the recovery of real estate, that its quality should be shown: as, whether it consists of houses, lands, or other hereditaments, whether the lands are meadow, pasture, or arable, etc. The same rule requires that in an action for an injury to real property, the quality should be shown; Steph. Pl. 214, 215. See, as to the various qualities, Ayliffe, Pand. [60].

It is often allowable to omit from the indictment, and it is seldom necessary to prove with precision, allegations of quality, or, in other words, those allegations which describe the mode in which certain acts have been done. Thus, if the charge is of a felonious assault with a staff, and the proof is of such an assault with a stone, or if a wound, alleged to have been given with a sword, is proved to have been inflicted by an axe, or if a pistol is stated to have been loaded with a bullet, and it turns out to have been loaded with some other destructive material, the charge is substantially proved, and no variance occurs: 1 East, Pl. C. 341; 5 C. & P. 128; 9 *id.* 525, 548.

**QUAMDIU SE BENE GESSERIT** (Lat. as long as he shall behave himself well). A clause inserted in commissions, when such instruments were written in Latin, to signify the tenure by which the officer held his office.

**QUANDO ACCIDERINT** (Lat. when they fall in).

**In Practice.** When a defendant, executor, or administrator pleads *plene administravit*, the plaintiff may pray to have judgment of assets *quando acciderint*; Bull. N. P. 169; Bac. Abr. *Executor* (M). A similar judgment may be taken at the plaintiff's election, in an action against an heir, on a plea of *riens perdescent*, instead of taking issue on the plea. In either of these cases if assets afterwards come to the hands of the executor or heir a *scire facias* must be sued out before execution can issue, or there may be an action of debt, suggesting a *devastavit*; 2 Bouv. Inst. 3708. It is also sometimes termed a judgment *of assets in futuro*.

By taking a judgment in this form the plaintiff admits that the defendant has

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fully administered to that time; 1 Pet. C. C. 442, n.; and therefore the plaintiff will not be allowed to give evidence of effects come to defendant's hands before the judgment. For this reason the *scire facias* on a judgment of assets *quando acciderint* must only pray execution of such assets as have come to the defendant's hands since the former judgment, and if it pray judgment of assets generally, it cannot be supported. See 2 Bouv. Inst. 3708; 11 Viner, Abr. 379; Com. Dig. *Pleader* (2 D 9).

**QUANTI MINORIS** (Lat.). The name of a particular action in Louisiana. An action *quanti minoris* is one brought for the reduction of the price of a thing sold, in consequence of defects in the thing which is the object of the sale.

Such action must be commenced within twelve months from the date of the sale, or from the time within which the defect became known to the purchaser; 3 Mart. La. N. S. 287; 11 Mart. La. 11.

**QUANTITY. In Pleading.** That which is susceptible of measure.

It is a general rule that, when the declaration alleges an injury to goods and chattels, or any contract relating to them, their quantity should be stated; Gould, Pl. § 35. And in actions for the recovery of real estate the quantity of the land should be specified; Bracton 431 *a*; 11 Co. 25 *b*, 55 *a*; Doctr. Plac. 85, 86; 1 East 441; 13 *id.* 102; Steph. Pl., Andr. ed. § 163.

**QUANTITY OF ESTATE.** Its time of continuance, or degree of interest, as in fee, during life, or for years. See ESTATE.

**QUANTUM DAMNIFICATUS** (Lat.). **In Equity Practice.** An issue directed by a court of equity to be tried in a court of law, to ascertain by a trial before a jury the amount of damages suffered by the non-performance of some collateral undertaking which a penalty has been given to secure. When such damages have thus been ascertained, the court will grant relief upon their payment. 4 Bouvier, Inst. n. 3913.

**QUANTUM MERUIT** (Lat.). **In Pleading.** As much as he has deserved.

When a person employs another to do work for him, without any agreement as to his compensation, the law implies a promise from the employer to the workman that he will pay him for his services as much as he may deserve or merit. In such case the plaintiff may suggest in his declaration that the defendant promised to pay him as much as he reasonably deserved, and then aver that his trouble was worth such a sum of money, which the defendant has omitted to pay. This is called an assumpsit on a *quantum meruit*. 2 Bla. Com. 162, 163; 1 Viner, Abr. 346. See 43 Mo. App. 653.

When there is an express contract for a stipulated amount and mode of compensation for services, the plaintiff cannot abandon the contract and resort to an action for a *quantum meruit* on an implied assumpsit; 14 Johns. 326; 18 *id.* 169; 10 S. & R. 236; Ans. Contr. 278–279; 51 Fed. Rep. 725. But see 7 Cra. 299; Stark. 277; Holt, N. P. 236; 10 Johns. 36; 12 *id.* 374; 13 *id.* 56, 94, 359; 14 *id.* 326; 5 M. & W. 114; 4 C. & P. 93; 4 Scott N. S. 374; 4 Taunt. 475; 1 Ad. & E. 333; 126 Ind. 461. See COMMON COUNTS.

**QUANTUM VALEBAT.** (Lat. as much as it was worth). **In Pleading.** When goods are sold without specifying any price, the law implies a promise from the buyer to the seller that he will pay him for them as much as they were worth.

The plaintiff may, in such case, suggest in his declaration that the defendant promised to pay him as much as the said goods were worth, and then aver that they were worth so much, which the defendant has refused to pay. See the authorities cited under the article QUANTUM MERUIT.

**QUARANTINE. In Maritime Law.** The space of forty days, or less, during which the crew of a ship or vessel coming from a port or place infected or supposed to be infected with disease are required to remain on board after their arrival, before they can be permitted to land. It was probably established by the Venetians in 1484. Baker, Quar. 3. In England it is governed by 6 George IV. c. 78, and the Public Health Act of 1875. Ships of war are bound, equally with merchant ships, to respect municipal quarantine regulations.

By act of congress of April 29, 1878, ch. 66, vessels from foreign ports where contagious and other diseases exist, are forbidden to enter the United States, excepting subject to certain regulations prescribed.

The object of the quarantine is to ascertain whether the crew are infected or not. To break the quarantine without legal authority is a misdemeanor; 1 Russ. Cr. 133.

Quarantine regulations made by the states are sustainable as the exercise of the police power; Cooley, Const. Lim. 729; 95 U. S. 465; 118 *id.* 455; 57 Fed. Rep. 276. See 25 Am. L. Rev. 45, where the subject is discussed at large. The detention and disinfection of immigrants by order of a state board of health, with the purpose of preventing infectious disease, is not a regulation of foreign commerce by a state, within the meaning of the constitution; 57 Fed. Rep. 276; 12 Wheat. 419.

In cases of insurance of ships, the insurer is responsible when the insurance extends to her being moored in port twenty-four hours in safety, if before the twenty-four hours are expired she is ordered to perform quarantine, and any accident contemplated by the policy occur; 1 Marsh. Ins. 264. Where a ship was prevented from complying with her charter party by quarantine regulations, it was held that this was "restraint of princes or rulers and people"; 3 U. S. App. 147. See CHARTER PARTY.

See Baker, Quarantine; 47 Am. St. Rep. 540; POLICE POWER.



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**In Real Property.** The space of forty days during which a widow has a right to remain in her late husband's principal mansion immediately after his death. The right of the widow is also called her quarantine.

In some of the states provision has been made by statute securing to the widow this right for a greater or less space of time. See 4 Kent 62; Digb. Hist. R. P. 110; Walk. Am Law, 9th ed. § 106, 231; 3 Washb. R. P., 5th ed. *272. Quarantine is a personal right, forfeited, by implication of a law, by second marriage; Co. Litt. 32. See Bacon, Abr. *Dower* (B); Co. Litt. 32 *b*, 34 *b*; Co. 2d Inst. 16, 17.

**QUARE** (Lat.). **In Pleading.** Wherefore.

This word is used sometimes in the writ in certain actions, but is inadmissible in a material averment in the pleadings, for it is merely interrogatory; and, therefore, when a declaration began with complaining of the defendant, "wherefore with force, etc., he broke and entered" the plaintiff's close, it was considered ill; Bacon, Abr. *Pleas* (B. 5, 4); Gould, Pl. c. 3, § 34.

**QUARE CLAUSUM FREGIT.** See TRESPASS; TRESPASS QUARE CLAUSUM FREGIT.

**QUARE EJECIT INFRA TERMINUM.** See EJECTMENT.

**QUARE IMPEDIT** (Lat. why he hinders). **In English Law.** A real possessory action which can be brought only in the court of common pleas, and lies to recover a presentation when the patron's right is disturbed, or to try a disputed title to an advowson. See DISTURBANCE; Mireh. Advow. 265; 2 Saund. 336 *a*.

**QUARE INCUMBRAVIT.** Why he incumbered. A writ which lay against a bishop, who, within six months after the vacation of a benefice, conferred it on his clerk, whilst two others were contending at law for the right of presentation, calling upon him to show cause why he had incumbered the church. Reg. Orig. 32.

**QUARE OBSTRUXIT** (Lat. why he obstructs). The name of a writ formerly used in favor of one who, having a right to pass through his neighbor's grounds, was prevented enjoying such right, because the owner of the grounds had obstructed the way.

**QUARREL.** A dispute; a difference. In law, particularly in releases, which are taken most strongly against the releasor, when a man releases all quarrel he is said to release all actions, real and personal. 8 Co. 153.

**QUARRY.** A place whence stones are dug for the purpose of being employed in building, making roads, and the like. In mining law it is said to be an open excavation where the works are visible at the surface. It is said to be derived from *quadratarius*, a stone-cutter or squarer. Bainbr. Mines 2.

When a farm is let with an open quarry, the tenant may, when not restrained by his contract, take out the stone; but he has no right to *open* new quarries. See MINES; WASTE.

**QUART.** A liquid measure, containing one-fourth part of a gallon.

**QUARTER.** A measure of length, equal to four inches. See MEASURE.

**In the Law of War.** By the end of the seventeenth century quarter became a recognized usage of war. It is forfeited only under exceptional circumstances. 1. In case of absolute and overwhelming necessity, as where a small force is incumbered with a large number of prisoners in a savage and hostile country, and may be justified in killing them for their own self-preservation. 2. Where belligerents violate the laws of war they may be refused quarter. 3. By way of retaliation against an enemy who has denied quarter without a cause. Risley, The Law of War.

**QUARTER DAYS.** The four days of the year on which rent payable quarterly becomes due.

**QUARTER DOLLAR.** A silver coin of the United States, of the value of twenty-five cents.

Previous to the act of Feb. 21, 1853, c. 79, 10 U. S. Stat. at Large 160, the weight of the quarter-dollar was one hundred and three and one-eighth grains; but coins struck after the passage of that act were of the weight of ninety-six grains. The fineness was not altered by the act cited: of one thousand parts, nine hundred are pure silver and one hundred alloy. By the act of 12th of Feb. 1873, the weight of the quarter-dollar is fixed at one-half that of the half-dollar (twelve and one-half grams); R. S. § 3573; and by act of July 22, 1876, it is made legal tender in all sums public and private not exceeeding ten dollars; 1 Supplement R. S. p. 488.

See HALF-DOLLAR; ANNUAL ASSAY; LEGAL TENDER.

**QUARTER-EAGLE.** A gold coin of the United States, of the value of two and a half dollars. See MONEY; COIN.

**QUARTER-SALES.** In New York a certain fraction of the purchase-money is often conditioned to be paid back on alienation of the estate; and this fine on alienation is expressed as a tenth-sales, a quarter-sales, etc. 7 Cow. 285; 7 Hill 253; 7 N. Y. 490.

**QUARTER SEAL. In Scotch Law.** The seal kept by the director of the chancery in Scotland is so called. It is in the shape and impression of the fourth part of the great seal Bell, Dict.

**QUARTER SESSIONS.** A court bearing this name, mostly invested with the trial of criminals. It takes its name

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from sitting quarterly, or once in three months. See COURT OF QUARTER SESSIONS.

The English courts of quarter sessions were erected during the reign of Edward III. See stat. 36 Edw. III.; Crabb, Eng. Law 278.

**QUARTER-YEAR.** In the computation of time, a quarter-year consists of ninety-one days. Co. Litt. 135 *b*; 2 Rolle, Abr. 521, l. 40.

**QUARTERING.** A barbarous punishment formerly inflicted on criminals by tearing them to pieces by means of four horses, one attached to each limb.

**QUARTERING OF SOLDIERS.** Furnishing soldiers with board or lodging or both. The constitution of the United States, Amendm. art. 3, provides that "no soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war but in a manner to be prescribed by law." See Cooley, Const. Lim., 6th ed. 373; Rawle, Const. 126.

**QUARTEROON.** One who has had one of his grandparents of the black or African race.

**QUARTO DIE POST** (Lat. fourth day after). Appearance-day, which is the fourth day inclusive from the return of the writ; and if the person summoned appears on that day, it is sufficient. On this day, also, the court begins to sit for despatch of business. These three days were originally given as an indulgence. 3 Sharsw. Bla. Com. 278*; Tidd, New Pr. 134. But this practice is now altered. 15 & 16 Vict. c. 76. It still obtains in Pennsylvania.

**QUASH. In Practice.** To overthrow or annul.

When proceedings are clearly irregular and void, the courts will quash them, both in civil and criminal cases: for example, when the array is clearly irregular, as, if the jurors have been selected by persons not authorized by law, it will be quashed. 3 Bouvier, Inst. n. 3342.

In criminal cases, when an indictment is so defective that no judgment can be given upon it, should the defendant be convicted, the court, upon application, will, in general, quash it: as, if it have no jurisdiction of the offence charged, or when the matter charged is not indictable; 1 Burr. 516, 543; Andr. 226; 49 Fed. Rep. 914. It is in the discretion of the court to quash an indictment or to leave the defendant to a motion in arrest of judgment; 1 Cush. 189; 97 N. C. 401; 100 *id.* 543. When the application to quash is made on the part of the defendant, in English practice, the court generally refuses to quash the indictment when it appears some enormous crime has been committed; Comyns, Dig. *Indictment* (H); Wils. 325; 3 Term 621; 5 Mod. 13; 6 *id.* 42; 3 Burr. 1841; Bacon, Abr. *Indictment* (K).

When the application is made on the part of the prosecution, the indictment will be quashed whenever it is defective so that the defendant cannot be convicted, and the prosecution appears to be *bona fide*. If the prosecution be instituted by the attorney-general, he may, in some states, enter a *nolle prosequi*, which has the same effect; 1 Dougl. 239, 240. The application should be made before plea pleaded: Leach 11; 4 How. State Tr. 232; 1 Hale 35; Fost. 231; 35 Pac. Rep. (Idaho) 710; and before the defendant's recognizance has been forfeited; 1 Salk. 380. See CASSETUR BREVE.

**QUASI** (Lat. as if, almost). A term used to mark a resemblance, and which supposes a difference between two objects. Dig. 11. 7. 1. 8. 1. See 60 Ill. 402. It is exclusively a term of classification, Prefixed to a term of Roman law, it implies that the conception to which it serves as an index is connected with the conception with which the comparison is instituted by a strong superficial analogy or resemblance. It negatives the idea of identity, but points out that the conceptions are sufficiently similar for one to be classed as the equal of the other; Maine, Anc. Law 332. Civilians use the expressions *quasi-contractus*, *quasi-delictum*, *quasi-possessio*, *quasi-traditio*, etc.

**QUASI-AFFINITY. In Civil Law.** The affinity which exists between two persons, one of whom has been betrothed to the kindred of the other, but who have never been married. See AFFINITY.

**QUASI-CONTRACTUS** (Lat.). **In Civil Law.** An obligation similar in character to that of a contract, but which arises not from an agreement of parties but from some relation between them, or from a voluntary act of one of them.

An obligation springing from voluntary and lawful acts of parties in the absence of any agreement. Howe, Stud. Civ. L. 171.

An obligation which grows out of certain relations between persons whereby they become bound to each other by duties similar to those arising from a contract. Morey, Rom. L. 371.

*Quasi*-contracts were a well-defined class under the civil law. By the civil code of Louisiana they are defined to be "the lawful and purely voluntary acts of a man, from which there results any obligation whatever to a third person and sometimes a reciprocal obligation between parties. In *quasi*-contract the obligation arises not from consent, as in the case of contracts, but from the law or natural equity. The term was not found in the common law, but it has been taken by writers of the common law from the Roman law and may be considered now as quite domesticated even to the extent of being used as the title of a very valuable common-law text book; Keener, Quasi-Contract. The subject will be found treated in a sub-title of CONTRACT, *supra*. See also CONTRACTUAL OBLIGATION.

It need only be added here that *quasi*-contracts were in the Roman law of almost

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infinite variety but were divided into five classes:—1 *Negotiorum gestio*, the management of the affairs of another, without authority. 2, *Tutelæ administratio*, the administration of a tutorship. 3. *Rei communis administratio*, or *communio bonorum*, the management of common property. 4. *Hereditatis aditio*, the entering upon an inheritance. 5, *Indebiti Solutio*, payment by mistake of money not due. They all have certain general features, as that from their nature each has an affinity with some contract; and persons under disabilities may be affected by them though incapable of contracting. A common error which needs to be avoided is the confusion of *quasi*-contracts with implied contracts. The latter are real contracts, differing from express contracts in the nature of the proof by which they are established, but in *quasi*-contracts the essential part of the contract, the agreement or convention, is wanting; Maine, Anc. L. 332. See, generally, Inst. 3. 28; Dig. 3. 5; Ayl. Pand. b. 4, tit. 31; 1 Bro. Civ. L. 386; Ersk. Inst. 3. 3. 16; Pard. n. 192; Poth. Obl. n. 113; Merl. *Rép.* h. t.; Keener, Quasi-Contract; Howe, Stud. Civ. L. Lect. x.; Morey, Rom. Law 371; Sohm, Inst. Rom. Law 315–21.

**QUASI-CORPORATIONS.** A term applied to those bodies or municipal societies which, though not vested with the general powers of corporations, are yet recognized, by statutes or immemorial usage, as persons or aggregate corporations, with precise duties which may be enforced, and privileges which may be maintained by suits at law. They may be considered *quasi*-corporations, with limited powers, co-extensive with the duties imposed upon them by statute or usage, but restrained from a general use of the authority which belongs to those metaphysical persons by the common law. See 13 Mass. 192; L. R. 1 H. L. 293; Boone, Corp. § 10.

Among *quasi*-corporations may be ranked counties, and also towns, townships, parishes, hundreds, and other political divisions of counties, which are established without an express charter of incorporation; commissioners of a county, most of the commissions instituted for public use, supervisors of highways, overseers, or guardians or the poor, loan officers of a county, trustees of a school fund, trustees of the poor, school districts, trustees of schools, judges of a court authorized to take bonds to themselves in their official capacity, and the like, who are invested with corporate powers *sub modo* and for a few specified purposes only. The governor of a state has been held a *quasi*-corporation sole; 8 Humph. 176; so has a trustee of a friendly society in whom, by statute, property is vested, and by and against whom suits may be brought; see 1 B. & Ald. 157; so of a levee district organized by statute to reclaim land from overflow; 51 Cal. 406; and fire departments having by statute certain powers and duties which necessarily invest them with a limited capacity to sue and be sued; 1 Sweeny 224. It may be laid down as a general rule that where a body is created by statute possessing powers and duties which involve incidentally a qualified capacity to sue and be sued, such body is to be considered a *quasi*-corporation; *id.*; 51 Cal. 406. See, generally, Ang. & A. Corp. § 24; 13 Am. Dec. 524; Beach, Pub. Corp. 971, n. 1003; but not such a body as the general assembly of the Presbyterian church, which has not the capacity to sue and be sued; 4 Whart. 531; Ang. & A. Corp. § 24. See CORPORATION; MUNICIPAL CORPORATION.

**QUASI-CRIMES.** Offences for which some person other than the actual perpetrator is responsible, the perpetrator being presumed to act by command of the responsible party.

Injuries which have been unintentionally caused. See MASTER AND SERVANT.

All offences not crimes or misdemeanors, but which are in the nature of crimes; a class of offences against the public which have not been declared crimes, but wrongs against the general or local public which it is proper should be repressed or punished by forfeitures and penalties. 68 Ill. 375. See 29 Minn. 132.

**QUASI-DELICT. In Civil Law.** An act whereby a person, without malice, but by fault, negligence, or imprudence not legally excusable, causes injury to another.

A *quasi*-delict may be public or private; the neglect of the affairs of a community, when it is our duty to attend to them, may be a crime; the neglect of a private matter, under similar circumstances, may be the ground of a civil action. Bowyer, Mod. Civ. Law, c. 43, p. 265.

**QUASI-DEPOSIT.** A kind of involuntary bailment, which takes place where a person acquires possession of property lawfully, by finding. Story, Bailm. § 85.

**QUASI-DERELICT.** The condition of a vessel which is not abandoned, but those on board of which are physically incapable of doing anything for their safety. 1 Newb. Adm. 452.

**QUASI-ENTAIL.** An estate *pur autre vie*, to a man and the heirs of his body.

The interest so granted is not properly an estate tail, but so far in the nature of one that it will go to the heir of the body as special occupant during the life of the *cestui que vie* in the same manner as an estate of inheritance would descend, if limited to the grantee and the heirs of his body.

**QUASI-FEE.** An estate gained by wrong.

**QUASI-OFFENCES.** See QUASI-CRIMES.

**QUASI-PARTNERS.** Partners of lands, goods, or chattels, who are not actual partners, are sometimes so called. Pothier, *de Société* App. n. 184. See PART-OWNERS.

**QUASI-PERSONALTY.** Things immovable in point of law; though fixed to things real either actually or fictitiously.

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**QUASI-POSTHUMOUS CHILD.** In Civil Law. One who, born during the life of his grandfather or other male ascendant, was not his heir at the time he made his testament, but who by the death of his father became his heir in his lifetime. Inst. 2. 13. 2; Dig. 28. 3. 13.

**QUASI-PUBLIC CORPORATION.** See CORPORATION.

**QUASI-PURCHASE.** This term is used in the civil law to denote that a thing is to be considered as purchased from the presumed consent of the owner of a thing; as, if a man should consume a cheese, which is in his possession and belonging to another, with an intent to pay the price of it to the owner, the consent of the latter will be presumed, as the cheese would have been spoiled by keeping it longer. Wolff, *Dr. de la Nat.* § 691.

**QUASI-REALTY.** Things which are fixed in contemplation of law to realty, but movable in themselves, as heirlooms (or limbs of the inheritance), title deeds, court rolls, etc. Whart. Law Lex.

**QUASI-TRADITIO** (Lat.). In Civil Law. A term used to designate that a person is in the use of the property of another, which the latter suffers and does not oppose. *Lec. Elem.* § 396. It also signifies the act by which the right of property is ceded in a thing to a person who is in possession of it; as, if I loan a boat to Paul, and deliver it to him, and afterwards I sell him the boat, it is not requisite that he should deliver the boat to me to be again delivered to him: there is a *quasi*-tradition or delivery.

**QUATUORVIRI** (Lat. four men). In Roman Law. Magistrates who had the care and inspection of roads. Dig 1. 2. 3. 30.

**QUAY.** A wharf at which to load or land goods. (Sometimes spelled *key*.)

In its enlarged sense the word *quay* means the whole space between the first row of houses of a city, and the sea or river; 5 La. 152, 215. So much of the quay as is requisite for the public use of loading and unloading vessels is public property, and cannot be appropriated to private use, but the rest may be private property.

A public quay in a city, dedicated to public use, does not cease to be *locus publicus* and become private property because it is leased by the public authorities for a purpose subservient to the public use; 140 U. S. 654.

**QUE EST MESME** (L. Fr.). Which is the same. See QUÆ EST EADEM.

**QUE ESTATE** (*quem statum*, or *which estate*). A plea by which a man prescribes in himself those whose estate he holds. 2 Bla. Com. 270; 18 Viner, Abr. 133–140; Co. Litt. 121 *a*.

**QUEAN.** A worthless woman; a strumpet. The meaning of this word, which is now seldom used, is said not to be well ascertained. 2 Rolle, Abr. 296; Bacon, Abr. *Slander* (U 3).

**QUEBEC.** One of the provinces of the Dominion of Canada. The government is vested in a lieutenant-governor and responsible ministry. There is a legislative council of 24 members and a legislative assembly of 63 members. Quebec is the seat of government. Justice is administered by a chief justice of queen's bench and five puisne judges, the chief justice of the superior court and 26 puisne judges, a judge of the vice-admiralty court, and a judge of sessions of the peace at Montreal.

The judicial system in the province of Quebec is based upon that in France in the last century, while that in Ontario and the other provinces is modelled mainly after the English system.

The province of Quebec is divided into twenty judicial districts, in which circuit and superior courts are held. The circuit court has jurisdiction in cases up to $200, except in Montreal and Quebec, where it is limited to $100. The superior court has unlimited jurisdiction in civil matters beyond that of the circuit. A single superior court judge presides over each court. The court of review is a revisionary tribunal consisting of three judges of the superior court, sitting in Montreal and Quebec, before which all superior court cases and cases in the circuit court over $100 may be re-argued, after decision of a single judge. The judgment of this court—confirming or reversing the original judgment—becomes the judgment of record, but in case of a reversal of the original judgment an appeal may be taken to the court of queen's bench (appeal side) to which appeals may also be taken direct from the first judgment. This court consist of six judges, five of whom constitute a full bench, and sits alternately at Montreal and Quebec. A judge of this court is detailed in both Montreal and Quebec to hold the terms of the criminal court, a duty imposed in country districts upon the judge of the superior court.

In this province (Quebec) the members of the bar are incorporated by act of parliament under the name of "The Bar of the Province of Quebec," with absolute control over their own organization, —both as to admission to its ranks and control and discipline over its members.

The notarial profession is also regularly organized and incorporated. Its members are obliged to take a certain course of study and clerkship before admission. A notary when once admitted becomes a public functionary. Documents executed before him remain always in his custody, and copies only are delivered to the parties, but these copies when authenticated by the notary make proof of themselves in all courts and legal proceedings. Upon the decease of the notary his original documents (*minutes*, as they are called), all numbered consecutively, are delivered up to the clerk of the superior court, and deposited in the archives of that court for future reference. A very elaborate system of registration is in force in all the provinces for all transactions affecting real estate, and throughout the cities and older provinces, Cadastral plans are in force showing the exact position and dimensions of each property with its Cadastral number, which is a sufficient designation of it for legal or registration purposes.

In the province of Quebec either the English or French language may be used in contracts, in writs or other legal proceedings or pleadings, and both languages are used in all official proclamations and in the publication of the statutes.

In the other provinces the English language only is officially used, and the procedure in all the courts —based upon that of England—is quite uniform and similar to that still in use there.

**QUEEN.** A woman who is sovereign of a kingdom. The wife of a king.

**QUEEN ANNE'S BOUNTY.** By stat. 2 Anne, c. 11, all the revenue of first-

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fruits and tenths was vested in trustees forever, to form a perpetual fund for the augmentation of poor livings. 1 Bla. Com. 286; 2 Burn, Eccl. Law 260–268.

**QUEEN CONSORT.** The wife of a reigning king. 1 Bla. Com. 218. She is looked upon by the law as a *feme sole*, as to her power of contracting, suing, etc. *Id.*

**QUEEN DOWAGER.** The widow of a king. She has most of the privileges belonging to a queen consort. 1 Bla. Com. 229.

**QUEEN-GOLD.** A royal revenue belonging to every queen consort during her marriage with the king, and due from every person who has made a voluntary fine or offer to the king of ten marks or upwards, in consideration of any grant or privilege conferred by the crown. It is due of record on the recording of the fine. It was last exacted in the reign of Charles I. It is now quite obsolete. 1 Bla. Com. 220–222; Fortescue, *de Laud.* 398.

**QUEEN REGNANT.** She who holds the crown in her own right. She has the same duties and prerogatives, etc., as a king. Stat. 1 Car. I. st. 3, c. 1; 1 Bla. Com. 218; 1 Woodd. Lect. 94.

**QUEEN'S ADVOCATE.** See ADVOCATE.

**QUEEN'S COUNSEL.** Barristers appointed as counsel to the crown on the nomination of the lord chancellor, taking precedence over ordinary barristers, and having the privilege of wearing a silk gown as their professional robe. See [1898] App. Cas. 252.

**QUEEN'S ENEMIES.** A phrase used in bills of lading importing a limitation upon the liability of the ship owner under the contract therein contained.

It includes the enemies of the sovereign of the carrier; 34 L. J. C. P. 14. It does not include the acts of an armed band of depredators; 1 Term 27; or a seizure of goods by a foreign revenue official for a breach of revenue laws; 10 Q. B. 517. It is less extensive in its scope than Restraint of Rulers and Princes (*q. v.*). See PUBLIC ENEMY.

**QUEEN'S PROCTOR.** A proctor or solicitor representing the crown in the former practice of the courts of probate and divorce. Moz. & W. Law Dict.

**QUEENSLAND.** A colony of Great Britain including the whole northeastern portion of the continent of Australia. It was separated from New South Wales in 1859. It has a governor appointed by the crown and an assembly consisting of two houses. The legislative council consists of 37 life members appointed by the crown and the legislative assembly of 72 members elected for three years by the people. To compose the courts there are a chief justice, four puisne judges, and three district court judges.

**QUERELA** (Lat.). An action preferred in any court of justice. The plaintiff was call *querens*, or complainant, and his brief, complaint, or declaration was called *querela*. Jacob, Law Dict.

**QUERELA CORAM REGE ET CONCILIO DISCUTIENDA ET TERMINANDA.** A writ by which one was called to justify a complaint of a trespass made to the king himself, before the king and his council. Reg. Orig. 124.

**QUERELA INOFFICIOSI TESTAMENTI** (Lat. complaint of an undutiful or unkind will). **In Civil Law.** A species of action allowed to a child who had been unjustly disinherited, to set aside the will, founded on the presumption of law, in such cases, that the parent was not in his right mind. Calvinus, Lex.; 2 Kent 327; Bell, Dict.

**QUESTION.** Something in controversy or which may be the subject of controversy. 39 Mich. 45.

A means sometimes employed, in some countries, by torture, to compel supposed great criminals to disclose their accomplices or to acknowledge their crimes.

This torture is called *question* because, as the unfortunate person accused is made to suffer pain, he is *asked questions* as to his supposed crime or accomplices. This is unknown in the United States. See Pothier, *Procédure Criminelle*, sect. 5, art. 2, § 3.

**In Evidence.** An interrogation put to a witness, requesting him to declare the truth of certain facts as far as he knows them.

Questions are either *general* or *leading*. By a *general* question is meant such a one as requires the witness to state all he knows, without any suggestion being made to him: as, *Who gave the blow?*

A leading question is one which leads the mind of the witness to the answer, or suggests it to him: as, *Did A B give the blow?*

The Romans called a question by which the fact or supposed fact which the interrogator expected or wished to find asserted in and by the answer was made known to the proposed respondent, a *suggestive* interrogation: as, *Is not your name A B?* See LEADING QUESTION.

**In Practice.** A point on which the parties are not agreed, and which is submitted to the decision of a judge and jury.

When the doubt or difference arises as to what the law is on a certain state of facts, this is said to be a *legal question*; and when the party demurs, this is to be decided by the court; when it arises as to the truth or falsehood of facts, this is a *question of fact*, and is to be decided by the jury. See JURY.

Proof beyond reasonable question is held synonymous with proof beyond reasonable doubt; 103 N. C. 1.

**QUESTORES CLASSICI** (Lat.). **In Roman Law.** Officers entrusted with the care of the public money.

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Their duties consisted in making the necessary payments from the *ærarium*, and receiving the public revenues. Of both they had to keep correct accounts in their *tabulæ publicæ*. Demands which any one might have on the ærarium, and outstanding debts were likewise registered by them. Fines to be paid to the public treasury were registered and exacted by them. They were likewise to provide proper accommodations for foreign ambassadors and such person as were connected with the republic by ties of public hospitality. Lastly, they were charged with the care of the burials and monuments of distinguished men, the expenses for which had been decreed by the senate to be paid by the treasury. Their number at first was confined to two; but this was afterwards increased as the empire became extended. There were questors of cities and of provinces, and questors of the army; the latter were in fact paymasters.

**QUESTORES PARRICIDII** (Lat.). **In Roman Law.** Public accusers, two in number, who conducted the accusation of persons guilty of murder or any other capital offence, and carried the sentence into execution. They ceased to be appointed at an early period. Smith, Dict. Gr. & Rom. Antiq.

**QUESTUS EST NOBIS.** A writ of nuisance, which, by 15 Edw. I., lay against him to whom a house or other thing that caused a nuisance descended or was alienated; whereas, before that statute the action lay only against him who first levied or caused the nuisance to the damage of his neighbor. Cowel.

**QUI IMPROVIDE.** A *supersedeas* granted where a writ was erroneously sued out or misawarded.

**QUI TAM** (Lat. who as well). An action under a statute which imposes a penalty for the doing or not doing an act, and gives that penalty in part to whomsoever will sue for the same, and the other part to the commonwealth, or some charitable, literary, or other institution, and makes it recoverable by action. The plaintiff describes himself as suing *as well* for the commonwealth, for example, as for himself. Espinasse, Pen. Act 5, 6; 1 Viner, Abr. 197; 1 Salk. ‡29, n.; Bac. Abr.

**QUIA** (Lat.). **In Pleading.** Because. This word is considered a term of affirmation. It is sufficiently direct and positive for introducing a material averment. 1 Saund. 117, n. 4; Com. Dig. *Pleader* (C 77).

**QUIA EMPTORES** (Lat.). A name sometimes given to the English Statute of Westminster 3, 18 Edw. I. c. 1, which prohibited sub-infeudation; so called from its initial words. 2 Bla. Com. 91. See MANOR; SUB-INFEUDATION; TENURE.

**QUIA TIMET** (Lat. because he fears). A term applied to preventive or anticipatory remedies. According to Lord Coke, "there be six writs of law that may be maintained *quia timet*, before any molestation, distress, or impleading: as, *First*, a man may have his writ or mesne before he be distrained. *Second*, a *warrantia chartæ*, before he be impleaded. *Third*, a *monstraverunt*, before any distress or vexation. *Fourth*, an *audita querela*, before any execution sued. *Fifth*, a *curia claudenda*, before any default of enclosure. *Sixth*, a *ne injuste vexes*, before any distress or molestation. And these are called *brevia anticipantia*, writs of prevention." Co. Litt. 100. And see 7 Bro. P. C. 125.

These writs are generally obsolete. In chancery, when it is contemplated to prevent an expected injury, a bill *quia timet* is filed. See BILL QUIA TIMET.

**QUIBBLE.** A slight difficulty raised without necessity or propriety; a cavil.

No justly eminent member of the bar will resort to a quibble in his argument. It is contrary to his oath, which is to be true to the court as well as to the client; and bad policy, because by resorting to it he will lose his character as a man of probity.

**QUICK DESPATCH.** A steamer chartered to be discharged with customary "quick despatch" arrived in port, March 8th, was ordered to berth March 10th, and began to discharge March 11th at one o'clock, and completed March 20th at noon; discharged by "sticks" instead of platform scales, and from but one hatch, while there were four to be discharged from. It was held that this was not "customary quick despatch"; 28 U. S. App. 383. See DEMURRAGE; LAY DAYS.

**QUICK WITH CHILD.** See QUICKENING.

**QUICKENING. In Medical Jurisprudence.** The sensation a mother has of the motion of the child she has conceived.

The period when quickening is first experienced varies from the tenth to the twenty-fifth, but is usually about the sixteenth week from conception; Denman, Midw. 129.

It was formerly supposed that either the child was not alive until the time of quickening, or that it had acquired some new kind of existence that it did not possess before: hence the presumption of law that dates the life of the child from that time.

The child is, in truth, alive from the first moment of conception, and, according to its age and state of development, has different modes of manifesting its life, and, during a portion of the period of gestation, by its motion. By the growth of the embryo, the womb is enlarged until it becomes of too great a size to be contained in the pelvis, it then rises to the abdomen, when the motion of the fœtus is for the first time felt.

Quickening as indicating a distinct point in the existence of the fœtus has no foundation in physiology; for it arises merely from the relation which the organs of gestation

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bear to the parts that surround them; it may take place early or late, according to the condition of these different parts, but not from any inherent vitality for the first time manifested by the fœtus.

As life, by law, is said to commence when a woman first becomes quick with child, so procuring an abortion after that period is a misdemeanor. Before this time, formerly the law did not interfere to prevent a pregnant woman convicted of a capital offence from being executed; 2 Hale, Pl. Cr. 413. If, however, the humanity of the law of the present day would not allow a woman to be executed who is, as Blackstone terms it, *privément enceinte*, Com. 129, *i. e.* pregnant, although not quick, it would be but carrying out the same desire to interfere with long-established rules, to hold that the penalty for procuring abortion should also extend to the whole period of pregnancy.

"Quick with child is having conceived; 49 N. Y. 86; with quick child is where the child has quickened." 8 C. & P. 265; approved in 1 Leg. Gaz. Rep. (Pa.) 183; 2 Whar. & St. Med. Jur., 4th ed. III. § 7. See 26 Am. Dec. 60, n.; 2 Zabr. 52.

**QUID JURIS CLIMAT.** A judicial writ issued out of the record of a fine which lay for the grantee of a reversion or remainder, when the particular tenant would not attorn. Cowel.

**QUID PRO QUO** (Lat. what for what). A term denoting the consideration of a contract. See Co. Litt. 47 *b*; 7 M. & G. 998.

**QUIDAM** (Lat. some one; somebody). **In French Law.** A term used to express an unknown person, or one who cannot be named.

A *quidam* is usually described by the features of his face, the color of his hair, his height, his clothing, and the like, in any process which may be issued against him. Merlin, *Répert.*

**QUIET ENJOYMENT.** The name of a covenant in a lease, by which the lessor agrees that the lessee shall peaceably enjoy the premises leased. This covenant goes to the possession, and not to the title; 3 Johns. 471; 5 *id.* 120; 2 Dev. 388; 3 *id.* 200. A covenant for quiet enjoyment does not extend as far as a covenant of warranty; 1 Aik. 233.

The covenant for quiet enjoyment is broken only by an entry, or lawful expulsion from, or some actual disturbance in, the possession; 3 Johns. 471; 8 *id.* 198; 15 *id.* 483; 7 Wend. 281; 2 Hill N. Y. 105; Ham. Cov. 35; 9 Metc. 63; 4 Whart. 86; 4 Cow. 340. But the tortious entry of the covenantor, without title, is a breach of the covenant for quiet enjoyment; 7 Johns. 376. The covenant for quiet possession in a deed merges all previous representatives as to the possession, and limits the liability growing out of them; 130 U. S. 643.

See COVENANT FOR QUIET ENJOYMENT.

**QUIET TITLE.** See BILL TO QUIET POSSESSION AND TITLE.

**QUIETUS** (Lat. freed or acquitted). **In English Law.** A discharge; an acquittance.

An instrument by the clerk of the pipe and auditors in the exchequer, as proof of their acquittance or discharge of accountants. Cowel.

Discharge of a judge or attorney-general. 3 Mod. *99.

**In American Law.** The discharge of an executor by the probate court. 4 Mas. 131.

**QUINTO EXACTUS** (Lat.). **In Old English Law.** The fifth call or last requisition of a defendant sued to outlawry.

**QUIT-CLAIM. In Conveyancing.** A form of deed of the nature of a release containing words of grant as well as release. 3 Washb. R. P., 5th ed. 606.

The term is in constant and general use in American law to denote a deed substantially the same as a release in English law. It presupposes a previous or precedent conveyance or a subsisting estate and possession; Thornt. Conv. 44. It is a conveyance at common law, but differs from a release in that it is regarded as an original conveyance in American law, at least in some states; 6 Pick. 499; 3 Conn. 398; 9 Ohio 96; 5 Ill. 117; Me. Rev. Stat. c. 73, § 14; Miss. Code 1857, p. 309, art. 17. The operative words are remise, release, and forever quit-claim; Thornt. Conv. 44. Covenants of warranty against incumbrances by the grantor are usually added. See a full article in 12 Cent. L. J. 127; 34 *id.* 174.

The rule that a purchaser by a quit-claim deed is not to be regarded as a *bona fide* purchaser without notice of a prior incumbrance; 85 Ala. 80; 89 Tex. 214; has no application where the registry laws require the recording of such an incumbrance in order to make it a lien on lands in the hands of a subsequent purchaser; 47 Fed. Rep. 420. One accepting a quit-claim deed from his grantor is bound, at his peril, to ascertain what equities, if any, exist against his title; 35 Neb. 361; but the receipt of the quit-claim deed does not of itself prevent the grantee from showing that he is a *bona fide* purchaser; 148 U. S. 21, 31, 49; and the grantee under such deed may be a *bona fide* purchaser under the recording acts; 146 Ind. 77.

A quit-claim deed conveys only the interest of the grantor at the time of the conveyance; 39 Neb. 741; but such a deed is as effectual to divest and transfer a complete title as any other form of conveyance; 148 U. S. 21. Such a deed from a judgment debtor of land, sold under execution, passes merely the right of redemption and does not relieve the land of dower of the debtor's wife, though she did not reside in the state when the deed was executed; 19 Mont. 23. A title acquired subsequently to the execution of a quit-claim, with special warranty simply, does not enure to the grantee, and a subsequent purchaser from the grantor is not affected

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by the recording of the deed executed before the grantor acquired the title; 90 Me. 457.

Under a Massachusetts statute, a quit-claim deed takes precedence over a prior deed, recorded subsequently to the quit-claim, where the grantee in the latter is without notice of the other; 167 Mass. 443. A quit-claim deed, duly recorded, is held to be within the protection of a statute providing that deeds shall take effect only on delivery for record; 49 Neb. 187, where will be found much learning on the subject of these deeds.

**QUIT-RENT.** A rent paid by the tenant of the freehold, by which he goes quit and free,—that is, discharged from any other rent. 2 Bla. Com. 42.

In England, quit-rents were rents reserved to the king or a proprietor, on an absolute grant of waste land, for which a price in gross was at first paid, and a mere nominal rent reserved as a feudal acknowledgment of tenure. Inasmuch as no rent of this description can exist in the United States, when a quit-rent is spoken of some other interest must be intended. 5 Call 364. A perpetual rent reserved on a conveyance in fee-simple is sometimes known by the name of quit-rent in Massachusetts. See GROUND-RENT; RENT.

**QUO ANIMO** (Lat. with what intention). The intent; the mind with which a thing has been done: as, the *quo animo* with which the words were spoken may be shown by the proof of conversations of the defendant relating to the original defamation. 19 Wend. 296.

**QUO JURE, WRIT OF. In English Law.** The name of writ commanding the defendant to show *by what right* he demands common of pasture in the land of the complainant who claims to have a fee in the same. Fitzh. N. B. 299.

**QUO MINUS** (Lat.). The name of a writ. In England, when the king's debtor is sued in the court of the exchequer, he may sue out a writ of *quo minus*, in which he suggests that he is the king's debtor, and that the defendant has done him the injury or damage complained of, *quo minus sufficiens existit*, by which *he is less able* to pay the king's debt. This was originally requisite in order to give jurisdiction to the court of exchequer; but now this suggestion is a mere form. 3 Bla. Com. 46.

**QUO WARRANTO** (Lat. by what authority). **In Practice.** The name of a writ (and also of the whole pleading) by which the government commences an action to recover an office or franchise from the person or corporation in possession of it.

The writ commands the sheriff to summon the defendant to appear before the court to which it is returnable, to show (*quo warranto*) *by what authority* he claims the office or franchise. It is a writ of right, a civil remedy to try the mere right to the franchise or office, where the person in possession never had a right to it or has forfeited it by neglect or abuse; 3 Bla. Com. 262, 263.

The action of *quo warranto* was prescribed by the Statute of Gloucester, 6 Edw. I., and is a limitation upon the royal prerogative. Before this statute, the king, by virtue of his prerogative, sent commissions over the kingdom to inquire into the right to all franchises, *quo jure quove nomine illi retinent*, etc.; and, as they were grants from the crown, if those in possession of them could not show a charter, the franchises were seized into the king's hands without any judicial proceeding. Like all other original civil writs, the writ of *quo warranto* issued out of chancery, and was returnable alternatively before the king's bench or justices in eyre; Co. 2d Inst. 277, 494; 2 Term 549.

The writ of *quo warranto* has given place to an *information in the nature of quo warranto*. This, though in *form* a criminal; see 14 Fla. 256; is in *substance* a civil, proceeding, to try the mere right to the franchise or office; 3 Bla. Com. 263; 1 S. & R. 382; Ang. & A. Corp. 469; 2 Kent 312; 3 Term 199; 23 Wend. 537, 591; but see 13 Ill. 66. Leave to file an information in the nature of *quo warranto* rests in the sound discretion of the court, and, without strong grounds for questioning defendant's title to the office, the court will refuse to grant it; 6 Houst. 487. A constitutional provision that the right of trial by jury shall remain inviolate, does not guarantee the right of trial by jury in *quo warranto* proceedings; 16 Wash. St. 382.

If the proceedings refer to the usurpation of the franchises of a municipal corporation, the right to file the information is in the state, at the discretion of the attorney-general; Beach, Pub. Corp. § 1613; 14 Fla. 256; see 59 Miss. 453; 126 Mass. 300; 81 N. C. 298; 49 N. J. L. 515; not of citizens; *id.*; see 20 Pa. 518; 51 N. J. L. 180. Individuals cannot take proceedings to dissolve a corporation; 16 S. & R. 144; but in regard to the election of a corporate officer the writ may issue at the suit of the attorney-general or of any person interested. 1 Zab. 9; 20 Pa. 415; but a private citizen must have some interest; 50 Mo. 97. See 80 Ill. 496; 46 Conn. 479. In Pennsylvania it was held that a stock-holder, whose votes were wrongly rejected at a corporate election, was the proper party to institute proceedings of *quo warranto* against the officers who claimed to have been elected, though the petitioner was at the same time elected to an office and his title was in dispute; 168 Pa. 582. The attorney-general may act without leave of court; 83 Pa. 105; 38 N. J. L. 282; 12 Fla. 190; but a private relator may not; 15 S. & R. 127; s. c. 16 Am. Dec. 531; and the court will use its discretion in granting the writ; 70 Ill. 25; 2 Johns. 184. Leave is granted on a petition or motion with affidavits, upon which a rule to show cause is granted; 70 Ill. 25. The writ lies against the corporate body, if it is to restrain a

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usurpation; 50 Mo. 56; or enforce a forfeiture; 57 N. H. 498; but if it is to inquire whether a corporation has been legally organized, the writ lies against the individuals; 15 Wend. 113; s. c. 30 Am. Dec. 34. Whether a corporation *de facto* is also one *de jure* can be determined only in *quo warranto;* 125 Ill. 664.

In New York a statutory action in the nature of a *quo warranto* has been substituted. Code Civ. Proc. § 1983. This is a civil writ of legal, not equitable, cognizance; 52 N. Y. 576. So in other states it is subject to the rules strictly applicable to civil proceedings; 50 Ala. 568; 44 Mo. 154; Boone, Corp. § 161. The terms "*quo warranto*" and "information in the nature of a *quo warranto*" are synonymous; 34 Wisc. 197; *contra*, 25 Mo. 555; 26 Ark. 281.

Although *quo warranto* proceedings will lie against a municipal corporation in this country, yet they are seldom employed. See a case in 32 Vt. 50; and see 66 Mo. 328; 30 Ala. 66. They will lie against members of a city council; 70 Pa. 465; 80 N. Y. 117; 23 Neb. 365; *contra*, 47 Cal. 624; 20 Kans. 692; a county treasurer; 15 Ill. 517; district school trustees; 84 Ill. 162; a sheriff; 5 Mich. 146; 83 Pa. 105; a lieutenant-governor; 12 Fla. 265; a governor; 4 Wisc. 567; a judge of probate; 77 N. C. 18; a mayor; 55 N. Y. 525; an elector of president of the United States, proceedings being taken in the name of the United States; 8 S. C. 400; a major-general of militia; 5 R. I. 1; so of other militia officers; 26 Pa. 31; 2 Green, Law 84; but see 1 Rich. 42; superintendent of the poor; 73 Mich. 234; but not against a policeman; 84 Mich. 223. There must first be a user of the office; 83 Ill. 128; 5 T. R. 85; but taking the oath; *id.;* or exercising its functions without taking the oath; 52 Miss. 665; is enough.

*Quo warranto* lies against a corporation to determine whether there has been a misuser or a nonuser of corporate franchises, or whether the corporation has usurped franchises never granted to it; but does not lie to test the legality of any act of the corporation; 37 Mo. App. 496.

*Quo warranto* is the only direct and adequate remedy for trying title to public office; 58 N. J. L. 340. The review of an election to public office by *certiorari* may determine collateral questions respecting validity of laws or ordinances, but can have no effect as a bar in a subsequent information in the nature of a *quo warranto;* *id.* 325.

The validity of proceedings for the election of a minor officer such as janitor of a court-house, may be reviewed on *certiorari;* *id.* 319.

An incumbent cannot proceed in *quo warranto* against one not in possession of the office, he must await the attack of his adversary; *id.* 325.

*Pleadings* in *quo warranto* are anomalous. In ordinary legal proceedings, the plaintiff, whether he be the state or a person, is bound to show a case against the defendant. But in an information of *quo warranto*, as well as in the writ for which it is substituted, the order is reversed. The state is not bound to show anything, but the defendant is bound to show that he has a right to the franchise or office in question; and if he fail to show authority, judgment must be given against him; 4 Burr. 2146, 2127; Ang. & A. Corp. 686. To the writ of *quo warranto* the defendant simply pleaded his charter, which was a full answer to the writ; just as before the statute of Edward I. the production of the charter to the king's commissioners was full authority for the possession of the franchise or office. But to an information of *quo warranto* the plea of the defendant consists of his charter, with an *absque hoc* denying that he usurped the franchise, and concludes with a verification. The plea is in *form* a special traverse, but in *substance* it is not such. The information was originally a criminal proceeding, to punish the usurpation of the franchise by a fine, as well as to seize the franchise; therefore the information charged usurpation, and the defendant was compelled to deny the usurpation, as well as to show his charter, which he did in the form of an *absque hoc* to his plea. But when the proceeding ceased to be criminal, and, like the writ of *quo warranto*, was applied to the mere purpose of trying the civil right to the franchise, the *absque hoc* denying the usurpation became immaterial, though it is still retained in the forms; 2 Jacob, Law Dict. 374; 4 Cow. 106, note. In Coke's Entries 351, there is a plea to an information of *quo warranto* without the *absque hoc*. The *absque hoc*, being immaterial, should not be answered by the replication, as it must always be in a special traverse; but the charter, in the first part of the plea, though occupying the place of an inducement, must be denied by the replication, its existence and character being the sole question in controversy upon which the legality of the acts of the corporation turns; Gilb. Ev. 6, 145; 10 Mod. 111, 296.

Until the statute 32 Geo. III. c. 58, the defendant could not plead double in an information of *quo warranto* to forfeit an office or franchise; 1 P. Wms. 220; 4 Burr. 2146, n.; 1 Chitty, Pl. 479; 5 Bac. Abr. 449; 4 Cow. 118; 2 Dutch. 215.

In information of *quo warranto* there are two forms of judgment. When it is against an officer or against individuals, the judgment is *ouster;* but when it is against a corporation by its corporate name, the judgment was *ouster* and *seizure*. In the first case, there being no franchise forfeited, there is none to seize; in the last case, there is; consequently the franchise is seized; 2 Kent 312, and note; 2 Term 521, 550. Now judgment is ouster and dissolution; 15 Wend. 113; s. c. 30 Am. Dec. 34; but there may be a judgment of ouster of a particular franchise, and not of the whole charter; 15 Wend. 113. See, as to the judgment, 32 Vt. 50; 4 Cow. 120. By such judgment of ouster and seizure the franchises are not de-

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stroyed, but exist in the hands of the state; but the corporation was destroyed, and ceased to be the owner or possessor of lands or goods, or rights or credits. The lands reverted to the grantor and his heirs, and the goods escheated to the state. But, later, it has been held that the judgment must be confined to seizure of the franchises; if it be extended to seizure of the property, so far it is erroneous; 1 Blackf. 267.

*Quo warranto* lies against a corporation to determine its right to exercise its franchises, but not to divest it of the ownership of property, unless acquired by a usurpation of the proprietary rights of the state; 33 N. E. Rep. (Ohio) 1051. See SCIRE FACIAS; 30 Barb. 588.

The principle of forfeiture is that the franchise is a trust; and all the terms of the charter are conditions of the trust; and if any one of the conditions of the trust be violated, it will work a forfeiture of the charter. And the corporate powers must be construed strictly, and must be exercised in the manner and in the forms and by the agents prescribed in the charter; 2 Kent 298, 299; 1 Bla. Com, 485; 13 Viner, Abr. 511; 13 Pet. 587; 5 Wend. 211; 2 Term 546; 4 Gill & J. 121.

Cases of forfeiture may be divided into two great classes. *Cases of perversion:* as, where a corporation does an act inconsistent with the nature, and destructive of the ends and purposes, of the grant. In such cases, unless the perversion is such as to amount to an *injury to the public* who are interested in the franchise; 34 Pa. 283; it will not work a forfeiture. *Cases of usurpation:* as, where a corporation exercises a power which it has no right to exercise. In such cases the cause of forfeiture is not determined by any question of *injury to the public*, but the abuse which will work a forfeiture need not be of any particular measure or extent; 3 Term 216, 246; 23 Wend. 242; 34 Miss. 688; 21 Ill. 65. See 30 Ala. N. S. 66. In case of usurpation of an office or franchise by an individual, it must be of a public nature to be reached by this writ; 21 Ill. 65; 28 Vt. 594, 714; 9 Cush. 596.

In England corporations are the creatures of the crown, and on dissolution their franchises revert to the crown; and they may be re-granted by the crown either to the old, or to the new, or to the old and new, corporators: and such grant restores the old rights, even to sue on a bond given to the old corporation, and the corporation is restored to the full enjoyment of its ancient liberties; and if it were a corporation by prescription it would still be so; 2 Term 524, 543; 3 *id.* 241. In the United States, corporations are the creatures of the legislature, and on dissolution their franchises revert to the state: and the legislature can exercise the same powers by legislation over the franchises, and with the same effects, as the crown can in England; Ang. & A. Corp. 652 (subject, however, at the present time, to constitutional provision that corporations must be created by general acts; see GENERAL LAWS; STATUTES).

By the statute of Anne, c. 20, an information in the nature of *quo warranto* may by leave of court be applied to disputes between party and party about the right to a corporate office or franchise; 4 Zabr. 529; 1 Dutch. 354; 32 Pa. 478; 33 Miss. 508; 7 Cal. 393, 432. See 75 Mich. 508. And the person at whose instance the proceeding is instituted is called the *relator;* 3 Bla. Com. 264. The court will not give leave to private informers to use the king's name and suit to call in question the validity of a franchise, when such persons apply under very unfavorable circumstances; 4 Burr. 2123. As to where the burden falls of showing the lawful or unlawful character of a franchise or right, see 28 Pa. 383; 5 Mich. 146; 100 Cal. 87. Where a proceeding to oust the incumbent of an office is prosecuted in the name of the party asserting title to such office, the burden of proof is on plaintiff; 93 Ky. 600; 58 N. W. Rep. (Mich.) 883. The information, it is said, may be filed after the expiration of the term of office; 2 Jones No. C. 124; but see High, Extr. Leg. Rem. § 633; Beach, Pub. Corp. § 35, n.

See High, Extr. Leg. Rem.; 30 Am. Dec. 33 and full note; Boone, Corp.; Ang. & A. Corp.

**QUOAD HOC** (Lat. as to this; with respect to this). A term frequently used to signify, *as to the thing named*, the law is so and so.

**QUOD BILLA CASSETUR.** See BILLA CASSETUR; CASSETUR BREVE.

**QUOD CLERICI BENEFICIATI DE CANCELLARIA.** A writ to exempt a clerk of the chancery from the contribution towards the proctors of the clergy in parliament, etc. Reg. Orig. 261.

**QUOD COMPUTET** (Lat. that he account). The name of an interlocutory judgment in an action of account-render; also the name of a decree in the case of creditors' bills against executors or administrators. Such a decree directs the master to take the accounts between the deceased and all his creditors, to cause the creditors, upon due and public notice, to come before him to prove their debts, at a certain place and within a limited period, and also directs the master to take an account of all personal estate of the deceased in the hands of the executor or administrator; Story, Eq. Jur., 13th ed. § 548. See JUDGMENT; ACCOUNT; CAPIAS AD COMPUTANDUM.

**QUOD CUM** (Lat.). **In Pleading.** For that whereas. A form of introducing matter of inducement in those actions in which introductory matter is allowed to explain the nature of the claim: as, assumpsit and case. Hardr. 1; 2 Show. 180.

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the matter which constitutes the gravamen of the charge, as such matter must be stated by positive averment, while *quod cum* introduces the matter which depends upon it by way of recital merely. Hence in those actions, as trespass *vi et armis*, in which the complaint is stated without matter of inducement, *quod cum* cannot be properly used; 2 Bulstr. 214. But its improper use is cured by verdict; 1 P. A. Browne 68; Comyns, Dig. *Pleader* (C 86).

**QUOD EI DEFORCEAT** (Lat.). **In English Law.** The name of a writ given by stat. Westm. 2, 18 Edw. I. c. 4, to the owners of a particular estate, as for life, in dower, by the curtesy, or in fee-tail, who are barred of the right of possession by a recovery had against them through their default or non-appearance in a possessory action; by which the right was restored to him who had been thus unwarily deforced by his own default. 3 Bla. Com. 193.

**QUOD PERMITTAT** (Lat.). **In English Law.** That he permit. The name of a writ which lies for the heir of him who is disseised of his common of pasture against the heir of the disseisor, he being dead. *Termes de la Ley.*

**QUOD PERMITTAT PROSTERNERE** (Lat. that he give leave to demolish). **In English Law.** The name of a writ which commands the defendant to permit the plaintiff to abate the nuisance of which complaint is made, or otherwise to appear in court and to show cause why he will not. On proof of the facts, the plaintiff is entitled to have judgment to abate the nuisance and to recover damages. This proceeding, on account of its tediousness and expense, has given way to a special action on the case.

**QUOD PERSONA NEC PREBENDARI.** A writ which lay for spiritual persons, distrained in their spiritual possessions, for payment of a fifteenth with the rest of the parish. Fitz. Nat. Brev. 175.

**QUOD PROSTRAVIT** (Lat.). The name of a judgment upon an indictment for a nuisance, that the defendant abate such nuisance.

**QUOD RECUPERET.** See JUDGMENT QUOD RECUPERET.

**QUORUM.** Used substantively, quorum signifies the number of persons belonging to a legislative assembly, a corporation, society, or other body, required to transact business. A quorum is such a number of the officers or members of any body as is competent by law or constitution to transact business. 18 Col. 18. There is a difference between an act done by a definite number of persons, and one performed by an indefinite number; in the first case a majority is required to constitute a quorum, unless the law expressly directs that another number may make one; in the latter case any number who may be present may act, the majority of those present having, as in other cases, the right to act; 7 Cow. 402; 9 B. & C. 856; 34 Vt. 316; Beach, Pub. Corp. 485; 27 Miss. 517.

It has been said that there are two rules as to quorum in legislative bodies: one, where the quorum is fixed by the power creating the body, in which case a majority of the specified quorum may transact business; the other, where the quorum is not fixed by such power, in which case the general rule is that a quorum is a majority of all the members; 108 N. C. 678; Cush. Elect. § 247.

In England where the articles of a company provide that the business of a corporation shall be conducted by not less than a specified number of directors, the words are mandatory, and at least the specified number must join in the performance of any act; 16 Ch. D. 681.

In a private corporation a majority of the directors must be present to constitute a quorum, unless the charter, a valid by-law, or a usage provides a different number; 3 Thomps. Corp. § 3913; 23 N. H. 555; but when a quorum is present a majority may act; 92 Mo. 79. It is settled that those stockholders who attend a duly called stockholders' meeting may transact the business of that meeting although a majority in interest or number are not present; 1 Cook, St. & Stockh. § 607. Where a meeting is composed of an indefinite number of persons like stockholders, that is the rule; but where a definite number is involved, as directors, a majority must be present; 87 Pa. 42; 10 W. N. C. 85; 5 Blatch. 585.

Where articles of association did not prescribe the number of directors necessary for a quorum, it was held that the number who usually transacted the business constituted a quorum; L. R. 4 Eq. 233. A single shareholder was held not to constitute a meeting; 2 Q. B. Div. 26; at least two persons are necessary to make a corporate meeting; 46 L. J. 104. Where one stockholder, holding also proxies of the three remaining stockholders, held a meeting and voted and elected officers, the meeting was held invalid; W. N. [1877] 223. When an authority is confided to several persons for a private purpose, all must join in the act, unless otherwise authorized; 6 Johns. 38; 17 Abb. Pr. 201; otherwise if the trust is a continuous public duty; 17 Abb. Pr. 201. See AUTHORITY; MAJORITY; PLURALITY; MEETINGS; Cook, Stockholders. A majority of a board of directors is a quorum, and a majority of such quorum can act; 19 N. J. Eq. 402; so of a board of selectmen of a town; Maine Laws (1880) 225.

The rule of the lower house of congress, that the names of the members present who do not vote shall be noted and counted in determining the presence of a quorum to transact business, is a constitutional mode of ascertaining the presence of a quorum; 144 U. S. 1. In such case no quorum is present until such a number convene.

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**QUOT. In Scotch Law.** The twentieth part of the movables, computed without computation of debts, was so called.

Formerly the bishop was entitled, in all confirmations, to the quot of the testament. Erskine, Inst. 3. 9. 11.

**QUOTA.** That part which each one is to bear of some expense: as, his quota of this debt; that is, his proportion of such debt.

**QUOTATION. In Practice.** The allegation of some authority or case, or passage of some law, in support of a position which it is desired to establish.

The transcript of a part of a book or writing from a book or paper into another.

If the quotation is fair, and not so extensive as to extract the whole value or the most valuable part of an author, it will not be a violation of the copyright. It is mostly difficult to define what is a fair quotation. When the quotation is unfair, an injunction will lie to restrain the publication. See 17 Ves. 424; 1 Bell, Com. 121.

"That part of a work of one author found in another," observed Lord Ellenborough, "is not of itself piracy, or sufficient to support an action; a man may adopt part of the work of another; he may so make use of another's labors for the promotion of science and the benefit of the public." 1 Camp. 94. See Curtis, Copyr. 242; 3 Myl. & C. 737; 17 Ves. 422; 2 Stor. 100; 2 Beav. 6; ABRIDGMENT; COPYRIGHT; PIRACY.

**QUOUSQUE.** A Latin adverb, which signifies how long, how far, until.

In old conveyances it is used as a word of limitation; 10 Co. 41.

In practice, it is the name of an execution which is to have force until the defendant shall do a certain thing. Of this kind is the *capias ad satisfaciendum*, by virtue of which the body of the defendant is taken into execution, and he is imprisoned *until* he shall satisfy the execution; 3 Bouvier, Inst. n. 3371.

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# R.

**RACHETUM** (Fr. *racheter*, to redeem). **In Scotch Law.** Ransom: corresponding to Saxon *weregild*, a pecuniary composition for an offence. Skene; Jacob, Law Dict.

**RACING.** The offering of prizes or purses of a definite sum by a racing association, to be awarded to the successful horses in a race, and to be paid out of the general funds of the association, made up in part of entrance fees paid by the owners of the competing horses, is not a violation of the constitutional provision against gambling. 6 Park. Cr. Rep. 256.

See HORSE RACE.

**RACK.** An engine with which to torture a supposed criminal, in order to extort a confession of his supposed crime and the names of his supposed accomplices.

**RACK RENT. In English Law.** The full extended value of land left by lease, payable by a tenant for life or years. Wood, Inst. 192.

**RADIUS.** A straight line drawn from the centre of a circle to any point of the circumference. Its length is half the diameter of that circle, or is the space between the centre and the circumference. 40 La. Ann. 174.

An act prohibiting private markets within a radius of six squares of any public market was held to meet six squares measured on city streets; 41 La. Ann. 46.

A contract not to practise dentistry within a radius of ten miles was held a valid contract not to practise within ten miles of the centre point of the village; 47 Conn. 175.

**RADOUR. In French Law.** A term including the repairs made to a ship, and a fresh supply of furniture and victuals, munitions, and other provisions required for the voyage. Pardessus, n. 602.

**RAFFLE.** A kind of lottery. A raffle may be described as a species of "adventure or hazard," but has been held not to be a lottery. 2 Mills (S. C.) 128.

See LOTTERY.

**RAFT.** See LOGS.

**RAGMAN'S-ROLL, or RAGIMUND'S ROLL.** A roll, called from one Ragimund, or *Ragimont*, a legate in Scotland, who, summoning all the beneficed clergymen in that kingdom, caused them on oath to give in the true value of their benefices, according to which they were afterwards taxed by the court of Rome. Whart. Law Lex.

**RAILROAD.** A road graded and having rails of iron or other material for the wheels of railroad cars to run upon.

In their modern form, railroads are usually owned by corporations; 2 Col. 673; 18 Pa. 187. But a private individual may construct and work a railroad if he can obtain a right of way by purchase; 70 Pa. 210; L. R. 4 H. L. 171; 30 Vt. 182.

Railroads were once regarded as public highways upon which private individuals might place their cars, to be drawn by the

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company; 12 Gray 180; 63 Pa. 18. A land grant conditioned that the road should be a public highway for the government, free of toll, applied only to the tracks; 93 U. S. 442.

Railroad and railway are ordinarily interchangeable terms; 136 Pa. 96; 30 Minn. 522; 88 Fed. Rep. 588; where a summons was against a railroad company and a judgment was entered against a railway, it was held immaterial; 89 Ind. 88; so in 83 Ala. 518. But in 60 Mo. 334, railway was held to mean the rails when laid, and railroad the highway in which the railway is laid.

A railroad and a street railway are distinct and different things; 2 Duv. 175. Whether "railroad" in a statute includes street railways depends upon the general intent of the act and the circumstances. Thus an act forbidding the obstruction of a railroad track applies to both; 74 Ga. 78; so does an act giving powers to railroad companies to enter into operating contracts; 24 Ill. 52; and an act authorizing the lease of one railroad to another; 89 Pa. 210; and an act giving a right of action against any railroad for death by negligence; 10 Bush 231; and an act relating to crossing the tracks of a railroad; 22 So. Rep. (Ala.) 279; but a constitutional clause forbidding the merger of competing railroads was held not to apply to street railways; 136 Pa. 96; and so of an act giving a mechanic's lien upon a "railroad or other structure;" 2 Wash. St. 115 (*contra*, 3 Mo. App. 559); and an early act (1857) giving a penal action against railroad companies for demanding fares in excess of the amount allowed by law; 4 Abb. Pr. N. S. 357; and an act giving a laborer's lien upon a railroad or other structure and the land upon which it is erected; 25 Pac. Rep. (Wash.) 1084. A passenger railway in Fairmount Park, Philadelphia, where there are no streets, but only country roads, is not a street passenger railway within the constitution of the state which requires local consent for building such; 175 Pa. 33.

A railroad company is a *quasi*-public corporation and owes certain duties to the public; 27 U. S. App. 1. In 128 U. S. 182, it was said that a railroad company is a private corporation though its uses are public. In 169 U. S. 466, it was said that a railroad is a public highway and is created for public purposes.

The charter of a public railroad requires the grant of the supreme legislative authority of the state; 3 Engl. Railw. Cas. 65; 2 Railw. Cas. 177; 3 N. Y. 430. It is usually conferred upon a private corporation, but sometimes upon a public one, where the stock is owned and the company controlled by the state; Redf. Railw. 17; 1 Ohio St. 657; 21 Conn. 304; 10 Leigh 454; 4 Wheat. 668; 8 Watts 316. It is sometimes by special act, but now, more commonly, under general laws. A railroad may be chartered by act of congress; 1 Dill. 314. If created by two states, it is a corporation of each state; 31 Ohio St. 317. See MERGER. Such charter, when conferred upon a private company or a natural person, as may be, is, in the absence of constitutional or statutory provisions to the contrary, irrevocable, and only subject to general legislative control, the same as other persons natural or artificial; 4 Wheat. 668; 2 Kent 275; 27 Vt. 140. See IMPAIRING THE OBLIGATION OF CONTRACTS.

But a company must be held to have accepted its rights, etc., subject to the condition that the legislature may protect the people against the exaction of unreasonable charges for the services rendered by it, subject to the constitutional guarantee for the protection of its property; 169 U. S. 466.

An act requiring that all regular passenger trains shall stop at all railroad stations and county seats is unconstitutional when its effect is to compel a fast interstate mail train to turn aside from its direct route to a county seat three and a half miles away, the company having provided ample accommodations for travel from such county seat; 163 U. S. 143; otherwise, if applicable only to trains running within a state; 166 U. S. 427. An act requiring railroad companies where there is a telegraph office to note on a blackboard in each station whether trains are late, etc., and if so, how late, is constitutional; 41 N. E. Rep. (Ind.) 937. See PUNCTUALITY.

A state statute which requires railroad companies to provide separate accommodations for white and colored persons and makes a passenger who insists upon occupying a coach other than the one set apart for his race, liable to a penalty, does not violate either the thirteenth or the fourteenth amendment; 163 U. S. 537, Harlan, J., dissenting.

Their charters are now usually subject to legislative control, either by virtue of a right reserved in the charter or in general laws subject to which they are organized. In either case legislation is binding upon the company. But where there is a right to repeal the charter for cause, it cannot be done without inquiry; 1 Abb. (U. S.) 9. A corporation maintaining a public highway, although it owns the property it employs for accomplishing public objects, must be held to have accepted its rights, etc., subject to the condition that the legislature may protect the people against the exaction of unreasonable charges for the services rendered by it, subject to the constitutional guarantee for the protection of its property; 169 U. S. 466.

But a municipal ordinance which requires a street railway to sell six tickets for twenty-five cents is invalid; 57 Alb. L. J. 390; U. S. C. C. (Wisc.). The power of a municipality to reduce street railway fares is subject to limitations; (1) that there is reasonable need on the part of the public of lower rates; (2) that the rates fixed by the ordinance are not unreasonable in view of all the conditions; 87 Fed. Rep. 577. See an important case in 83 Fed. Rep. 529, as to the constitutionality of an act

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regulating fares, and a case *contra*, on the same act, in 51 N. W. Rep. (Ind.) 80.

The *right of way* is generally obtained by the exercise of the right of eminent domain. This can only be done in strict conformity to the charter or grant; 4 Engl. Railw. Cas. 235, 513, 524; 6 Gill 363. In this country, in many cases, the provisions of the charter enable companies to obtain land by purchase; 25 Vt. 49. The company may enter upon lands for the purpose of making preliminary surveys, by legislative permission, without becoming trespassers, and without compensation; 34 Me. 247; 9 Barb. 449; Wright Ohio 132; but compensation must be made or secured before the permanent occupation of the lands. See 6 Biss. 168; 27 Ind. 260. A company may not take land for speculation, or to prevent competition; 43 N. Y. 137. It may make any use of the land acquired for the right of way, which contributes to the safe and efficient operation of the road, and which does not interfere with the rights of property pertaining to the adjacent lands; 95 Ala. 631. See EMINENT DOMAIN. Railroad corporations possess the powers conferred upon them by charter and such as are fairly incidental thereto; and they cannot, except with the consent of the state, disenable themselves from the discharge of their functions, duties, and obligations. The general rule is that a contract by which a railroad company renders itself incapable of performing its duties to the public, or contracts beyond the scope of its powers, cannot be rendered enforcible by the doctrine of estoppel; but where the subject-matter is not foreign to the purposes of its creation, a contract embracing whatever may be fairly regarded as incidental to the things authorized, ought not, unless expressly prohibited, to be held to be *ultra vires;* 163 U. S. 364.

The construction and operation by a railroad of a part of its road proves an acceptance of its charter where no particular mode of acceptance is designated; 106 Mo. 557. See 83 Me. 440.

The company may lay their road across a highway, but not without making compensation to the owner of the fee for the additional servitude thus imposed upon the land; 26 N. Y. 526; 75 Ill. 74; 41 Cal. 256; 1 Exch. 723; 21 Mo. 580; 27 Pa. 339; 9 Cush. 1.

Steam railroads on highways impose an additional burden thereby and cannot be built without compensation to abutting land-owners; 48 Ind. 178; 19 N. J. Eq. 386; 124 Pa. 544; *contra*, 16 R. I. 668; 35 Minn. 112; 85 Ky. 640. In the absence of constitutional provisions, the legislature may authorize the use of streets by a steam or street railroad without municipal consent; 66 Mo. 228; 6 Whart. 25; 45 Ga. 602.

If it is required by statute to be raised out of a cut in a street and placed on a viaduct, the company is liable for additional damages; N. Y. L. J., Nov. 19, 1897 (S. C. of N. Y.).

The legislature may authorize a railroad to be constructed *under*, as well as *upon*, highways; and when so constructed, the rights of the land-owners are determined upon the same principles as if they were built upon the surface; Peirce, Railr. 248; 42 Md. 117. It may also authorize elevated railroads, or railroads built upon structures raised above the highway; Peirce, Railr. 248. See 70 N. Y. 327, 361; 6 Blatch. 487; 82 N. Y. 95. But a company incorporated as a street passenger railroad cannot build an elevated railroad over and along the streets of Philadelphia; 161 Pa. 409.

*The construction of the road* must be within the prescribed limits of the charter. The right of deviation secured by the charter or general laws is lost when the road is once located; 1 Myl. & K. 154; 2 Ohio St. 235; 31 N. J. L. 205. The location can then be changed only by act of legislature: 35 Barb. 373; 42 Miss. 555; 31 N. J. L. 205. Distance, having reference either to the length of the line or to deviation, is to be measured in a straight line through a horizontal plane; 9 Q. B. 76; 27 Vt. 766. But charters must be taken to allow such discretion in the location of the route as is incident to an ordinary practical survey thereof, with reference to the nature of the country; 6 Minn. 150. A right to build *to* a city named imports a right to extend *within* the city limits; 45 Tex. 88. Where a location of a terminus was fixed at or near P. it was held that a point a mile and a half from P. was a compliance with the charter; 64 Pa. 137. A deviation from the line specified in the charter will not be permitted; 27 Pa. 339; but slight deviations may be allowed; Wood, Ry. 1104. A charter power to change the location of the line in case of any obstacle to the one first selected, will authorize a relocation before, but not after, the line has been constructed; 15 Ohio St. 21. Ordinarily the courts will not interfere with the selection of a route; 13 Barb. 646.

A railroad company constructing its line is bound to do so in a careful manner; and if it is so constructed it is not liable to adjacent property owners; but if it appears that it exceeded its authority, or exercised it negligently, it will become liable; 85 Ill. 370; 149 Mass. 335; 29 Ia. 153. So if the injury amounts to taking property, as by the destruction of an easement.

A company cannot build only part of its charter line; 126 N. Y. 29. It cannot abandon a part; 63 Tex. 529.

*Liability for the acts of contractors, sub-contractors, and agents.* The company are not in any case liable for the act of a contractor or sub-contractor, or their agents, if it be not in doing precisely what is contemplated in the contract; 6 M. & W. 499; 12 Ad. & E. 737; 24 Barb. 355; 3 Gray 349; Redf. Railw. § 168.

Railroad companies are liable for the acts of their agents within the range of their employment; and for all acts of their agents within the most extensive range of their charter-powers; 14 How. 483; 27 Vt.

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110; 7 Cush. 385; but not for the wilful acts of their agents, out of the range of their employment, unless directed by the company or subsequently adopted by them; 2 Harr. N. J. 514; 1 Fla. 136.

Railroad companies are liable for any injury accruing to the person or property of another through any want of reasonable care and prudence on the part of their employes. See MASTER AND SERVANT.

A railroad company operating its road through the streets of a populous city is bound to observe extraordinary precautions for the safety of the public, particularly at street crossings; 40 La. Ann. 810; 70 Tex. 126; 84 Va. 63; 85 Ky. 224.

It is the duty of the company to use on its cars, etc., all the modern improvements in machinery commonly used; 65 Barb. 92; 76 N. C. 454; 83 Ala. 518; 76 Ia. 387.

*Express business.* Railroad companies are not required to transport the traffic of independent express companies over their lines in the manner in which such traffic is usually carried; or to do more as express carriers than to provide the public at large with reasonable express accommodation. They need not furnish all express companies equal facilities on their passenger trains; 117 U. S. 1; Miller and Field, JJ., dissenting; 70 Cal. 169; 57 Fed. Rep. 673; 43 N. J. Eq. 77. But it has been held that they may be compelled to admit the agents of express companies on their trains, with their safes; 6 L. R. A. (N. C.) 271. And an early case held that a contract giving exclusive privileges to one express company is void; 2 Phila. 107; and in Maine a statute provides for equal facilities to all; 81 Me. 92. It has been held that a railroad company cannot assume the exclusive right of carrying on the express business over its own lines; 4 Fed. Rep. 481; but this was decided prior to the case in 117 U. S. 1, *supra*. See EXPRESS COMPANIES; FACILITIES.

The exclusive grants to railroad companies are to be strictly construed in favor of the corporation, and liberally expounded in favor of public rights and interests; 11 Pet. 420; 13 How. 71; 1 La. Ann. 253.

The power to build a railroad includes the power to build switches; 56 Pa. 325; but all customers have not an equal right to have switches built for them. 31 U. S. App. 252.

An act providing that a carrier accepting goods for transportation over connecting lines assumes an obligation for their safe carriage to the point of destination, etc., is not a regulation of interstate commerce, but establishes a rule of evidence and does not conflict with the United States constitution touching interstate commerce; 169 U. S. 311. But a carrier is not liable beyond its own lines, unless its liability be established by clear evidence; 155 U. S. 333. See COMMON CARRIERS.

A railroad corporation is a person within the fourteenth amendment declaring that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws; 169 U. S. 466. See PERSON.

Railroad grants of lands by congress are granted *in presenti*, and take effect upon the section of the land when the road is definitely located, by relation, as of the date of the grant; 137 U. S. 528. See 133 *id.* 496. When different grants cover the same premises, the earlier takes the title; 130 U. S. 1; 146 *id.* 570; 152 *id.* 284. Title does not pass until the act is complied with. 15 U. S. App. 339. See LAND GRANTS.

A company is not liable for injuries to a person who goes into its yard, merely because such yard is a dangerous place, but it must be shown to be unnecessarily dangerous and that the injury resulted from the negligence of the company; 48 Pac. Rep. (Kan.) 16.

A hotel-keeper who sends his servant to the station to accompany guests, etc., has no right to use the station except with the leave of the railway company; 56 Alb. L. J. 130.

Where a number of passengers who have right to take a certain train is in excess of its capacity, the company must exercise the same care and forethought in providing additional cars as it is bound to exercise in relation to its other passengers; 43 N. W. Rep. (Ill.) 698.

It is the duty of a railroad company to heat its cars in cold weather; 34 S. W. Rep. (Tex.) 677.

When a person (in this case a physician) is, while driving along a public highway, detained for twenty minutes at a grade crossing by the negligent delay of the employes of the railroad company in opening the gates, the company is liable in damages for delay; [1895] 2 Ir. R. 255.

When no legislative prohibition is shown, a railroad company may lease and maintain a summer hotel at its seaside terminus; 160 U. S. 514.

Mandamus will lie to compel a railroad company to operate its road; 28 Hun 453; 91 U. S. 343 (though the business be unprofitable; 7 Neb. 357; but not where it carries traffic on another line owned by it; 103 N. Y. 95); also to build a bridge; 70 N. Y. 569. The remedy for abandonment of a railroad may also be by indictment or by proceedings to forfeit the charter; 24 N. Y. 261.

An agreement whereby a railroad company has the right to run its trains into the depot of another railroad company is not a lease; 143 U. S. 596. See a contract for trackage in 45 Fed. Rep. 304.

Neither a railroad, nor any part of its property, is subject to levy under execution, unless by statute. See 114 U. S. 340; 65 Pa. 278; 117 Ind. 501. See LEASE.

STREET RAILWAYS. As to the difference between street and steam railways, see *supra*.

When a railway is laid in a street, to facilitate its use by the public, it is a street

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railway; 87 Mich. 371; so, if confined within the limits of a city and to be used exclusively under the streets; 107 N. Y. 52. A distinctive feature is that it is entirely for the carriage of passengers; Booth, Rys. § 1. It makes no difference whether it be on, above, or below the surface; *id.;* see *supra;* or what kind of motor power it uses; 41 Fed. Rep. 556. The difference between street railroads and steam railroads lies in their use and not in their motive power; 88 Fed. Rep. 588.

Street railroads belong to the surface of an open highway. They must conform to the grade of the highway. They must carry passengers only, under Pennsylvania acts; 161 Pa. 396. A street railway has been said to be one which is used expressly for the transportation of passengers, and which stops its cars at frequent intervals to take on passengers. 47 N. J. Eq. 380; 24 Atl. Rep. (Pa.) 179.

The general (steam) railroad act of Pennsylvania does not authorize the incorporation of elevated street passenger railroads in the streets of a city, and they cannot be incorporated under the general act providing for the incorporation of street passenger railways; 161 Pa. 396.

The right to permit their construction or refuse consent, is often vested in the local authorities. See Booth, Rys. § 28, as to the legislation of various states. Whether they have implied, in the absence of express, authority, is said not to be settled; *id.* § 15. A city cannot, without legislative authority, grant the right to build a street railway; 73 Ia. 513; 3 Duer 119; 24 Ill. 52; 66 Mo. 228; 9 Bush 127. See 10 Wall. 38. But the power to open and improve streets has been held to confer such authority; 85 Mo. 263; so of a power to regulate and improve streets and regulate vehicles thereon; 14 La. Ann. 842. It is also held that it cannot grant an exclusive right without legislative authority; 24 Fed. Rep. 306; 11 So. Rep. (La.) 77; which must be express: Booth, Rys. § 17. The power to grant easements in city streets, in perpetuity and in monopoly, can only be conferred by express words, or, if inferred from other powers, must be indispensable to their exercise; 171 U. S. (not reported).

Where the authority is express, it cannot be delegated; 34 Ohio St. 194.

A city cannot grant to individuals the exclusive right to lay tracks; 61 Ia. 11; 36 N. J. L. 79; 38 N. Y. 201; *contra*, 26 Pac. Rep. (Utah) 286. See Booth, Rys. § 2.

Ordinarily, and apart from constitutional or statutory provisions, a second company may be authorized to lay additional tracks; 45 Cal. 365; 23 Atl. Rep. (Md.) 463.

It is held that the local authorities, when their consent to building a street railway is required by law, may impose any conditions they choose; 37 Mich. 558; 168 Pa. 181; but it has been also held that if the conditions imposed by the local authorities relate to matters over which the legislature has entire control, the acts of the legislature cannot be affected by the local authorities; 105 N. Y. 97. The legislature may impose conditions other than, and in addition to, those prescribed by the constitution, and the local authorities may prescribe conditions additional to both the constitutional and statutory provisions on the subject; 102 N. Y. 343. See 118 *id.* 113. Where a municipality has the right to control the use of its streets, its action is not subject to judicial control: 17 N. J. Eq. 83; 40 La. Ann. 446; Booth, Rys. § 40.

Where local authorities have granted a right to construct a street railway, they cannot, without the consent of the company and in the absence of a reserved right so to do, impose additional obligations: 84 Mich. 257; as, the use of iron poles instead of wooden poles; *id.;* or requiring the railway company to pave and keep in repair a portion of the street outside of the tracks; 26 N. E. Rep. (W. Va.) 188.

The consent of the local authorities once given and accepted and acted upon, cannot be revoked; 109 N. C. 688; 45 Tex. 88; see 23 Chi. L. News 147; but where a right to revoke has been reserved, it may be exercised by the local authorities; 111 Mass. 282.

The use of its tracks by a railway company may be temporarily interrupted by municipal authorities, when necessary for the purpose of repairs on the streets; 48 Md. 168; 11 Phila. 358; 103 Mass. 262.

Where a route has been established under the direction of the local authorities, the company cannot change the location so fixed without a new consent for that purpose; 53 Hun 131. The local authorities may permit the tracks to be relaid on another part of the street; 23 La. Ann. 535; and may compel a change where it has reserved the right so to do; 10 Phila. 70. A railway company may adopt any gauge for its track which it sees fit and afterwards change the same, in the absence of anything to the contrary; 131 Pa. 1; and it may ordinarily adopt any kind of rails and change the same from time to time; 19 Atl. Rep. (N. J.) 263; but the rails used must be such as not to interfere with the use of the street by the public; 133 Pa. 505.

A city cannot grant the use of its streets to so many companies as to impair its public use; 48 Mich. 433. It cannot, ordinarily, grant the right to build in a city park; 26 La. Ann. 478; 67 Ill. 540; but see 76 Cal. 156; 175 Pa. 33; PARK. See 20 Hun 201.

The legislature, unless forbidden by the constitution, may grant a right to lay a street railway in a street; 10 Wall. 38; 24 N. J. Eq. 158.

Many cases hold that a street railway is not a new servitude on the street, for which the owners of abutting lands are entitled to compensation; 24 N. J. Eq. 158; 58 Md. 603; 94 U. S. 324; 38 Mich. 66; 78 Md. 261; 55 N. J. L. 605; 27 Wis. 194; 32 Conn. 579; 125 Mass. 515; 2 Dill. Mun. Corp. 725; and their consent to the construction of such railways is not necessary; but see an able dissenting opinion, 85 Mich. 634. It has been held that the abutting



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owner may recover where the tracks were laid next the curb; 14 Ohio St. 523.

It is held that this is so even if steam motors are used in propelling the cars; 79 Me. 363; 35 Minn. 112; 47 N. J. Eq. 380; or electricity; 85 Mich. 634; 75 Md. 222; 47 N. J. Eq. 380; 16 R. I. 668. But as to whether the use of steam on street railways imposes an additional servitude, the weight of judicial opinion is said to be very nearly evenly balanced; Booth, Rys. § 86.

The substitution of cable propulsion for horse power imposes no new servitude on the street; 19 N. E. Rep. (Ga.) 831; 121 N. Y. 536; 32 Fed. Rep. 270.

In New York it is held that street railways impose an additional burden on the streets; 39 N. Y. 404; 121 *id.* 505; unless the fee of the soil of the street is vested in the city; 27 N. Y. 108; but even then the abutting owner has a right of action if access to his property is cut off; 128 *id.* 157.

An elevated railroad is an additional burden on the highway; 23 Atl. Rep. (Md.) 463; 90 N. Y. 123; 129 N. Y. 252. Their structures are incompatible with the free and unobstructed use of the street and abutting property owners are entitled to an injunction unless their rights have been properly acquired by the company and they have received compensation therefor. See 90 N. Y. 122; 128 *id.* 157; 125 *id.* 164; 130 *id.* 14; 131 *id.* 505; 128 *id.* 157. Though not owning the soil of the street, they have easements of light, air, and access therein; 130 N. Y. 14; 90 *id.* 122.

Non-abutting property owners are not entitled to damages by reason of the use of a street by an elevated railway; 16 Daly 145; 18 N. Y. Supp. 238.

An elevated railway in New York which has not acquired the right from abutting proprietors is a continuous trespass upon their property which gives rise to a separate cause of action at law for damages. See 128 N. Y. 426; 120 *id.* 119. Equity will prevent the continuance of trespass by including as damages injuries permanently resulting from the interference of easement with light, air, and access, An abutting owner has a right of action for the pollution of air by smoke.

Constructing an elevated railroad on pillars in a public street is held, in 36 L. R. A. (Ill.) 97, not to constitute a new servitude or an unlawful use of the street. In Pennsylvania a street railway on a country road in a township is an additional burden on the highway and cannot be constructed without the consent of abutting property owners, though it is otherwise as to the streets of a city or borough; 167 Pa. 162.

An electric street railway between cities and villages for the transportation of passengers, merchandise, and baggage imposes an additional servitude on the highway; 70 N. W. Rep. (Wis.) 678.

It is said that equity will not relieve an abutting property owner but will leave him to his remedy at law; 147 U. S. 248. But the rule appears to be otherwise in Pennsylvania. See 167 Pa. 162.

Ordinarily street railways have no right of eminent domain.

In 152 Pa. 163, the court seemed to consider that the right to build a passenger railway carries with it, at least in the absence of specific denial, the right from time to time, to operate it by new methods, but the point was not decided. An ordinance permitting the building of a horse-car railway covers an electric railway; 135 N. Y. 393.

The erection of trolley poles in the middle of the street does not entitle the abutting owners to compensation; 47 N. J. Eq. 380. Where electric railways are authorized the authority extends to the necessary and proper apparatus for operating them; 139 Pa. 419; including poles and wires; 47 N. J. Eq. 380. But where this right encroaches on property rights of an abutting owner it should be so exercised by the company as to minimize the inconveniences and danger to such rights; 51 N. J. Eq. 213.

Poles must be so placed as not to interfere with the rights of ingress and egress to abutting property; 85 Mich. 634; stringing a wire along the street twenty feet above the surface is no interference with the right to light and air; 51 N. J. Eq. 213. See POLES; WIRES.

If a street railway is constructed and operated without lawful authority, it is a nuisance; 137 Pa. 533; 133 *id.* 505; 2 Colo. 673; 87 Mich. 361; and a railroad company cannot grant to an individual a right to operate a railroad for his private purposes over a part of its line which it does not use; 102 N. Y. 441.

Where the use of a street is unlawful, an injunction will lie at the suit of an abutting owner; 19 Ohio St. 78; *contra*, 16 R. I. 533; 100 Mo. 508; 112 Ill. 611; or at the suit of a duly authorized public officer; 50 Ga. 451; 27 N. Y. 611; 102 *id.* 441; a company so operating a steam road may be indicted for a nuisance; 14 Gray 93; 101 Pa. 92; and, by analogy, a street railway; Booth, Rys. § 4.

A municipality can maintain proceedings in the nature of *quo warranto* to oust a street railway company of its franchises for non-user; 140 Mo. 539.

Ordinarily, a franchise to build a street railway is not exclusive; 48 Mich. 433; 41 La. Ann. 561; 73 Ia. 513.

A right or permit from a muncipality to construct a street railway on a given street, is not a part of the company's franchise, but is property, and is an incorporeal right; 87 Ill. 317.

Street railway companies are subject to regulation by statutes and by ordinances under the police power; Booth, Rys. § 221; such as ordinances regulating the speed of cars; 84 Mo. 119; 129 Mass. 310; requiring cars to stop at designated places; 42 Ark. 321; requiring the watering of tracks; 77 Ga. 731; forbidding the use of sand upon tracks; 47 Hun 221.

Where a railway company has not built all the line specified in its charter and

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has abandoned a part of what it had built its charter is subject to forfeiture; 126 N. Y. 29; 63 Tex. 529.

A street railway company owns the structure laid by it in the highway, and has a superior right to the space covered by its track; Peirce, Railr. 252. See 14 Gray 69; 76 N. Y. 530; 34 Ia. 527. The public, on foot or in carriages, may cross its tracks, and travel on the spaces covered by it, and even incidentally drive ordinary carriages on the rails. But a person driving a carriage on the track should leave it without retarding the cars; 76 N. Y. 530; 69 Ill. 388. See 9 Misc. Rep. 270. It is also held that an electric street railway company has a common right in the highway with other travellers, not a superior right, and they must be so managed as not unnecessarily to interfere with the like rights of others; 37 Atl. Rep. (Conn.) 879. But its rails cannot be used by other competing common carriers driving railway or other carriages, without special legislative authority; 72 N. Y. 330; 4 Stew. N. J. 525; 81 Ill. 523.

A company may remove snow from its track to another part of the street, but in so doing, it must avoid unnecessary injury to the owners of property; 50 Md. 73. See Peirce, Railr. 252.

When an electric street railway car is stopping at a crossing, it should not run its car in an opposite direction on the other track without warning pedestrians; 34 Atl. Rep. N. J. 1094; 97 Cal. 553; *contra*, 16 N. Y. Supp. 350; but one who crosses a street behind a moving car at a place which is not a regular crossing, is bound to look for cars on the other track; 145 N. Y. 196; though it is held that a passenger alighting from a car has a right to presume that the other track will be kept clear; 127 Ill. 1; 36 N. Y. Supp. 105; but it is also held that it is a question of ordinary care; 126 Pa. 559. See 39 N. Y. Supp. 440. Where a passenger alights from a car on a double track trolley line, it is the duty of the company to regulate the speed of its cars and to give such warning of their approach as will reasonably protect the passenger from injury; 43 N. E. Rep. (Ohio) 207.

A street car has recently been held by the house of lords to be a *coach* within the meaning of an act relating to tolls on a particular bridge.

See various related titles treating subjects connected with railroads; LATERAL RAILROADS; STATION.

**RAILROAD-AID BONDS.** See BOND.

**RAILROAD COMMISSIONERS.** officers appointed in various states for the supervision of the construction and operation of railroads.

A suit against railroad commissioners to restrain the enforcement of rates, as unjust, is not a suit against the state; 154 U. S. 362, 418, 420.

**RAILROAD PROPERTY.** The property which is essential to a railroad company to enable it to discharge its functions and duties as a common carrier by rail. It includes the road bed, right of way, tracks, bridges, stations, rolling stock, and such like property. Lands owned and held for sale, or other disposition for profit, and in no way connected with the use or operation of the railroad, are not railroad property in the sense mentioned, but are property of the company independently of its functions and duties as a common carrier. 47 Fed. Rep. 681.

**RAILROAD RELIEF FUNDS.** A term applied to funds raised by periodical contributions of corporations' employes, or by them jointly with the corporation, and usually managed jointly, for the purpose of providing relief to the employes in case of injury, and the payment of money to their families in case of death, in the service. They are usually managed jointly by the corporation and representatives of the members, the business facilities being furnished by the corporation, which usually guarantees the funds and undertakes to make good deficiencies. Their management usually constitutes a department of the corporation business. They have been instituted in England and in some of the largest railroad systems in the United States. Compulsory contribution to funds for charitable, financial, etc., purposes, is forbidden in some states. In Massachusetts, acts provide for such societies for employes of railroad, street railroad, and steamboat companies.

Members are usually required to contract that the acceptance of relief benefits from the fund in case of injury or death shall operate as a release to the company of all rights of action for damages for injury or death made by, or on behalf of, the member or his legal representatives.

Such contracts are sustained as defences to actions for personal injuries; 169 Ill. 312; 64 Ill. App. 444; 44 Neb. 44; 70 N. W. Rep. (Ia.) 630; 61 *id.* 971; 71 Fed. Rep. 136, 139, 931; 10 Ind. App. 47; 37 N. E. Rep. (Ind.) 423; 75 Md. 162; 81 *id.* 412; 63 Mich. 690; 41 Fed. Rep. 125; 36 *id.* 655; 9 Q. B. Div. 357; L. R. 3 Q. B. 555.

A contract by which, if the member or his representatives accept benefits, he or they thereby release all rights of action against the company, for damages for injury, etc., is valid; and when the injured party after the right of action has arisen accepts the benefits, he is merely settling for the past; 163 Pa. 133. See 164 *id.* 329.

But it was held that where, under such a contract, the widow of a member accepted a benefit upon her husband's death, and personally released the fund and the company, the contract of the husband did not waive a right of action, and that neither the contract nor the widow's receipt of the benefit discharged her right of action; 58 N. W. Rep. (Neb.) 1120. In 65 Fed. Rep. 308, the court, on a demurrer to such a defence, upheld the demurrer and held the contract and release void, and expressed

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its surprise at finding that several courts of unquestionable dignity and authority had sustained such defences. This case was affirmed on appeal, though not quite on such broad ground as was taken below; 76 Fed. Rep. 439.

A rule of a railway relief department which provides that all claims of beneficiaries shall be submitted to the superintendent, with the right of appeal to an advisory committee whose decision shall be final, does not bar the holder of a claim which has been rejected by such committee from the right of action in the courts; 46 N. E. Rep. (Ohio) 577.

An Ohio act which provides that no railroad company shall require any stipulation with any person in or about to enter its employ, whereby such person agrees to waive any right of action against the company for personal injuries, and that all such agreements shall be void, is in violation of the fourteenth amendment to the federal constitution as taking away liberty of contract; 71 Fed. Rep. 931.

See an address by Josiah Calef Bartlett of Chicago.

**RAILROAD STATION.** See STATION.

**RAILWAY COMMISSIONERS.** A body of three commissioners appointed under the English regulation of railways act, 1873, principally to enforce the provisions of the railway and canal traffic act, 1854, by compelling railway and canal companies to give reasonable facilities for traffic, to abstain from giving unreasonable preference to any company or person, and to forward through traffic at through rates.

**RAIN-WATER.** The water which naturally falls from the clouds.

No one has a right to build his house so as to cause the rain-water to fall over his neighbor's land; 1 Rolle, Abr. 107; 1 Stra. 643; Fortesc. 212; Bacon, Abr. *Action on the Case* (F); 5 Co. 101; unless he has acquired a right by a grant or prescription.

When the land remains in a state of nature, said a learned writer, and by the natural descent the rain-water would descend from the superior estate over the lower, the latter is necessarily subject to receive such water; 1 *Lois des Batiments* 15, 16. See 2 Rolle 140.

**RAISE.** To create. A use may be raised; *i. e.* a use may be created. 1 Spence, Eq. Jur. 449.

When a child has reached the age of twenty-one years, he is *raised;* 59 Ind. 598.

**RAISE REVENUE.** Is to collect revenue, not necessarily to increase the amount; 58 Ala. 546. Authority to raise money for prosecuting and defending suits only authorizes raising money by taxation and not by borrowing; 119 N. Y. 280 *a*.

**RANGE.** A word used in the land-laws of the United States to designate the order of the location of public lands. In patents from the United States to individuals for public lands, they are described as being within a certain range.

**RANGER.** A sworn officer of the forest to inquire of trespasses, and to drive the beasts of the forest out of the deforested ground into the forest. Jacob, Law Dict.

**RANK.** The order or place in which certain officers are placed in the army and navy, in relation to others.

It is a maxim that officers of an inferior rank are bound to obey all the lawful commands of their superiors, and are justified for such obedience.

*Army and Navy.* In 1868, a retiring board found a colonel incapacitated from the result of wounds received in battle while commanding a division with the brevet rank of major-general. He was thereupon retired by the president, under the act of July 18, 1866, with the full rank of major-general. Subsequently his retired rank was changed by the provisions of the act of March 3, 1875, to that of brigadier-general. It was held that he was not appointed to the *office* of major-general; that he still retained on the retired list the *office* of colonel; that the *rank* conferred upon him by act of congress was in no sense a constitutional appointment to a *new office:* and that the same power that gave him his rank could take it away. *Rank* is often used to express something different from *office*. It then becomes a designation or title of honor, dignity, or distinction conferred upon an officer in order to fix his relative position in reference to other officers in matters of privilege, precedence, and sometimes of command, or by which to determine his pay and emoluments. This is the case with the staff officers of the army. 15 Ct. Cl. 159. See R. S. §§ 1122, 1128, 1131, 1168, for instances.

The distinction between rank and office is more clearly apparent with reference to staff officers than to officers of the line, because in the latter case the words used to designate the rank and the office are usually the same, while in the former case they are always different.

In some cases, officers of the line have a rank assigned to them different from the title of their office. See R. S. §§ 1096, 1097. Selections under these sections are usually made from among officers whose rank is raised to a higher degree by the service assigned to them, but the new *rank* does not confer a new *office*.

In the army, all officers, except chaplains, are paid according to their rank; in the navy, the pay of staff officers does not depend upon their rank; and there rank only determines matter of precedence, etc., among officers.

*Grade* is a step or degree in either office or rank. See 15 Ct. Cl. 151, per Richardson, J.

Officers in the regular army, active or retired, who served in the volunteer forces in the civil war may receive a brevet equal

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to their highest rank held in the said forces; act of Feb. 16, 1897.

**RANKING. In Scotch Law.** Determining the order in which the debts of a bankrupt ought to be paid.

**RANSOM.** A redemption for money or other consideration of that which is taken in war. 8 Term 277.

The custom of ransom of prisoners of war, which superseded slavery, has given place to the exchange of prisoners; Risley, Law of War 127. See PRISONERS OF WAR; RANSOM BILL.

**RANSOM BILL.** A contract for payment of ransom of a captured vessel, with stipulations of safe conduct if she pursue a certain course and arrive at a certain time. If found out of time or course, the safe conduct is void; Wheaton, Int. Law 107. The payment cannot be enforced in England, during the war, by an action on the contract, but can in this country; 1 Kent 104, 105; 4 Wash. C. C. 141; 2 Gall. 325.

By the general maritime law ransoms are allowed and the master of a ship may bind the whole cargo as well as the ship, by his contract for ransom; 3 C. Rob. 240. They were formerly prohibited in England, but now the queen in council may make rules for prohibiting or allowing them, under the act of 1864.

Ransoms have never been prohibited by the United States; 15 Johns. 6; nor by the other nations, except England; 1 Kent 112.

A belligerent may deliver up neutral property on ransoms as well as enemy's property; per Story, J., in 2 Gall. 337, where the subject of ransom is discussed.

A ransom strictly speaking is not a repurchase of the captured property, it is rather a repurchase of the actual right of the captors at the time, be it what it may, or, more properly, it is a relinquishment of all the interest or benefit which the captors might acquire or consummate in the property by the regular adjudications of a prize tribunal. There seems to be no legal difference between the case of a ransom of the property of an enemy and of a neutral, for if the property be neutral and yet there be probable cause of capture, or if the delinquency be such that the penalty of confiscation might be justly applied, there can be no intrinsic difficulty in supporting a contract by which the captors agree to waive their rights in consideration of a sum of money voluntarily paid or agreed to be paid by the captured; 3 Phil. Int. L. 645.

In the absence of stipulation, if the ransomed vessel be lost, the contract is still binding; but usually there is a clause excepting loss on the high seas, but not by stranding; 2 Halleck, Int. L., Baker's ed. 331.

**RAPE** (Lat. *rapere*, to snatch, to seize with violence). **In Criminal Law.** The carnal knowledge of a woman by a man forcibly and unlawfully against her will. Russ. Cr. L. 904.

The statute of Westminster 2, c. 34, defines the crime to be where "a man do ravish a woman, married, maid, or other, *where she did not consent neither before nor after*." And this statute definition has been adopted in several very recent cases. Addenda to 1 Den. Cr. Cas.; 1 Bell, Cr. Cas. 63, 71.

Much difficulty has arisen in defining the meaning of *carnal knowledge*, and different opinions have been entertained,—some judges having supposed that penetration alone is sufficient, while others deemed emission an essential ingredient in the crime; Hawk. Pl. Cr. b. 1, c. 41, s. 3; 12 Co. 37; 1 Hale, Pl. Cr. 638; 2 Chitty, Cr. Law 810. *Penetration* is the act of inserting the penis into the female organs of generation. 9 C. & P. 118. See 5 C. & P. 321; 9 *id.* 31. It was once held that in order to commit the crime of rape it is requisite that the penetration should be such as to rupture the hymen; 5 C. & P. 321. But this case has since been expressly overruled; 2 Mood. Cr. Cas. 90; 9 C. & P. 752; Whart. Cr. L. 554. In the United States in modern times the better opinion seems to be that both penetration and emission are not necessary; 1 East, Pl. Cr. 439; Add. Pa. 143; 3 Greenl. Ev. § 410; 2 Bish. N. Cr. Law § 1131; 111 Ind. 279; 14 Neb. 205; 1 Houst. Cr. Cas. 363; 25 Fla. 702; *contra*, 14 Ohio 222; but later cases in that state intimated that if the question were new, the decision would be the other way; 22 Ohio St. 102, 541. See 65 N. C. 466. Slight penetration has been held to be sufficient; 76 Ga. 623. By statute in England carnal knowledge is completely proved by proof of penetration; 9 Geo. IV. c. 31, § 18. Statutes to the same effect have been passed in some of the United States; but these statutes have been thought to be merely declaratory of the common law; 3 Greenl. Ev. § 210. See, on this subject, 1 Hale, Pl. Cr. 628; 1 East, Pl. Cr. 437; 1 Chitty, Med. Jur. 386; 1 Russ. Cr. Law 860. It is to be remarked, also, that very slight evidence may be sufficient to induce a jury to believe there was emission; Add. Pa. 143; 2 Const. 351; 1 Beck, Med. Jur. 140; 4 Chitty, Bla. Com. 213, note 8. See [1891] 2 Q. B. 149. In Scotland, emission is not requisite; 1 Swint. 93. See EMISSION.

By the term *man* in this definition is meant a male of the human species, of the age of fourteen years and upwards; for an infant under fourteen years is supposed by law incapable of committing this offence; Whart. Cr. L. 551; 1 Hale, Pl. Cr. 631; 8 C. & P. 738; Tayl. Ev. 127; 29 Fla. 565. But this presumption has been held by some authorities not to be conclusive, but capable of removal by proof; 5 Lea 352. But not only can an infant under fourteen years, if of sufficient mischievous discretion, but even a woman may be guilty as principal in the second degree; 83 N.C. 605. And the husband of a woman may be a principal in the second degree of a rape committed upon his wife; as, where he held her while his servant committed the

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rape; 1 Hargr. St. Tr. 388. See 62 Mich. 280; 2 Bish. N. Cr. L. § 1135.

Drunkenness is no excuse for rape; nor can it excuse or mitigate an assault with intent to commit a rape; 98 Mo. 431.

The knowledge of the woman's person must be *forcibly and against her will*; and if her consent has not been voluntarily and freely given (when she has the power to consent), the offence will be complete, nor will any subsequent acquiescence on her part do away the guilt of the ravisher. A consent obtained from a woman by actual violence, by duress or threats of murder, or by the administration of stupefying drugs, is not such a consent as will shield the offender or turn his crime into adultery or fornication; and if the connection took place when she was in a state of insensibility from liquor, having been made drunk by the prisoner, though the liquor was given only for the purpose of exciting her, it is a rape; 1 Den. Cr. Cas. 89; 1 C. & K. 746; 12 Cox, C. C. 311. Having carnal knowledge of a woman by a fraud which induces her to suppose it is her husband, does not amount to a rape; 8 C. & P. 265, 286. But it is otherwise by act of 1885. No doubt the party would be liable in such a case for an assault.

The injured party cannot condone the crime of rape by excusing or forgiving the guilty party; 147 Mass. 423.

It has been decided that if a physician professing to take steps to cure a woman of disease, induces her to submit to sexual intercourse with him, under the impression that it is a necessary portion of her medical treatment, this does not amount to rape. To constitute rape there must be an actual resistance of the will on the part of the woman; 19 L. J. M. C. 174; 1 Den. C. C. 580; 12 Am. Rep. 283, n.; s. c. 25 Mich. 356; and it has been held that this must be shown beyond a reasonable doubt; 126 Ind. 185. If it appear that the intercourse was effected without her consent, the crime of rape is proved, although no positive resistance by her is shown; 85 Va. 638. Some authorities have held that the woman's resistance is not sufficient to render the crime rape, if finally she consent through fear, duress, or fraud. It must appear that she showed the utmost reluctance and resistance; 50 Wisc. 418; s. c. 36 Am. Rep. 856; 59 N. Y. 374. But this is not the general rule, the better opinion being that a consent obtained by fear of personal violence is no consent—and though a man puts no hand on a woman, yet if, by the array of physical force, he so overpowers her mind that she dares not resist, he is guilty of rape; 2 Bish. Cr. L. § 1125; 36 Am. Rep. 860, n.; s. c. 50 Wisc. 518. The offence of rape is complete where prosecutrix is rendered unconscious in consequence of the assault and violence; 39 Minn. 277. It has been said that consent during any part of the act will prevent its being rape; 73 Ia. 532; 36 Mich. 203; 50 Wis. 518; but Mr. Bishop takes the very sensible view that after the offence has been completed by penetration no subsequent consent is of any avail to relieve the man from the charge of rape; 2 Bish. N. Cr. L. § 1122. A written statement by the prosecutrix on a trial for rape cannot be used to contradict her where she admits making it, but testifies that she did so under compulsion and that it is false; 136 Mo. 74.

The matrimonial consent of the wife cannot be retracted; and, therefore, her husband cannot be guilty of a rape on her, as his act is not *unlawful*. But, as already observed, he may be guilty as principal in the second degree.

As a child under ten years of age is incapable in law to give her consent, it follows that the offence may be committed on such a child whether she consent or not. See stat. 18 Eliz. c. 7, s. 4.

There is a recent trend in legislation in this country in the direction of raising the age of consent. This has resulted from a very active agitation on the subject largely promoted by the societies for the prevention of cruelty to children and persons who devote themselves especially to the promotion of social purity. In most of the states there are statutes, some of which are extremely drastic. By recent legislation the age of consent is made in Virginia, Wisconsin, and Indiana, fourteen years; in Iowa, Texas, and Delaware, fifteen years; Connecticut, Louisiana, Massachusetts, Michigan, Oregon, and South Dakota, sixteen years; and in Arizona, Colorado, Idaho, Missouri, Nebraska, New York, Utah, and Wyoming, it is eighteen years. In England, thirteen years, but it is a misdemeanor if between thirteen and sixteen. Ignorance of the woman's age is no defence; 117 Cal. 583; nor is the fact that she was large for her age and physically strong; 73 N. W. Rep. (Ia.) 344.

It has been questioned whether rape was a felony at common law, or was made one by a statute in the reign of Edward I. The benefit of clergy was first taken away by a statute of Elizabeth. By a statute of Victoria, the offence is no longer punishable with death, but, at most, with transportation for life; previously to that statute, the capital punishment was almost invariably enforced.

See, as to the possibility of committing a rape, and as to the signs which indicate it, 1 Beck, Med. Jur. c. 12; Merlin, *Répert. Viol.*; Biessy, *Manuel Médico-Légal.* etc., 149; Parent-Duchatellet, *De la Prostitution*, etc., c. 3, § 5; 9 C. & P. 752; 2 Pick. 380; 12 S. & R. 69; 7 Conn. 54. See, generally, 2 Bish. N. Cr. L. ch. xxxvi; McClain, Cr. L.; 2 Witth. & Beck. 415–477; 32 Cent. Law J. 102; 80 Am. Dec. 361.

**In English Law.** A division of a county similar to a hundred, but oftentimes containing in it more hundreds than one.

**RAPE OF THE FOREST.** Trespass committed in a forest by violence. Cowell.

**RAPINE. In Criminal Law.** The felonious taking of another man's personal

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property, openly and by violence, against his will. The civilians define rapine to be the taking with violence the movable property of another, with the fraudulent intent to appropriate it to one's own use. *Leç. El. Dr. Rom.* § 1071.

**RAPPORT A SUCCESSION** (Fr.; similar to *hotchpot*). **In Louisiana.** The reunion to the mass of the succession of the things given by the deceased ancestor to his heir, in order that the whole may be divided among the co-heirs.

The obligation to make the rapport has a triple foundation. *First*, it is to be presumed that the deceased intended, in making an advancement, to give only a portion of the inheritance. *Second*, it establishes the equality of a division, at least, with regard to the children of the same parent, who all have an equal right to the succession. *Third*, it preserves in families that harmony which is always disturbed by unjust favors to one who has only an equal right. Dalloz, Dict. See ADVANCEMENT; COLLATION; HOTCHPOT.

**RASCAL.** An opprobious term, applied to persons of bad character. The law does not presume that a damage has arisen because the defendant has been called a rascal, and therefore no general damages can be recovered for it; if the party has received special damages in consequence of being so called, he can recover a recompense to indemnify him for his loss.

**RASURE.** The scratching or scraping a writing, so as to prevent some part of it from being read. The word writing here is intended to include printing.

**RATABLE ESTATE.** Within the meaning of a tax law, taxable estate. 55 Vt. 545.

**RATABLE PROPERTY.** Property in its quality and nature capable of being rated, *i. e.* appraised, assessed. 10 B. & S. 323; 16 R. I. 240.

**RATE.** A public valuation or assessment of every man's estate; or the ascertaining how much tax every one shall pay. See Pow. Mortg.; 1 Hopk. Ch. 37.

**RATE OF EXCHANGE. In Commercial Law.** The price at which a bill drawn in one country upon another may be sold in the former.

**RATES.** The power of the legislature to regulate rates or charges of corporation is treated under IMPAIRING THE OBLIGATION OF CONTRACTS. The case of Smyth *v.* Ames, 169 U. S. 466, has since decided: While rates for the transportation of persons and property within a state are primarily for the determination of the state, the question whether they are made so unreasonably low as to deprive the carrier of its property without just compensation cannot be so determined by the legislature of the state that the matter cannot become the subject of judicial inquiry. The reasonableness of rates prescribed by a state must be determined without reference to the interstate business done by the company. A railroad is a public highway and is therefore subject to governmental control. It may not fix its rates with a view solely to its own interests, but the rights of the public will be ignored if rates are imposed without reference to the fair value of the property, and, in order simply that the company may meet operating expenses, pay its interest and declare a dividend: but where a company has bonded its property in excess of its fair value or if its capitalization is largely fictitious, it may not impose on the public the burden of such increased rates as may be required to realize profits thereon, and the apparent value of the property as represented by its securities is not alone to be considered on the question of reasonable rates. It must be held to have accepted its rights and franchises subject to the condition that the government may protect the people against unreasonable charges.

The basis of all calculations as to the reasonableness of rates must be the fair value of the property used by it, and this includes the original cost of construction, probable earning capacity of the property under particular rights prescribed by the statute, and the sum required to meet operating expenses. All these items are to be given such weight as may be just and right in each case. The company is entitled to ask a fair return upon the value of its property and the public is entitled to demand that no more be exacted than the services rendered are reasonably worth. Neither market nor par value of stock is a criterion of value, but the owner is entitled to any appreciation above the original cost; 82 Fed. Rep. 850.

Stockholders are not the only persons to be considered: if the establishment of new lines of transportation should cause a diminution in the tolls collected, that, in itself, is not a sufficient reason why the corporation maintaining the road should be allowed to maintain rates that would be unjust to those who use its property. It is not necessary that all corporations exacting tolls should be placed upon the same footing as regards rates; 164 U. S. 578.

The doctrine of state control over rates has been applied as follows:—To *Bridges;* 8 Fed. Rep. 190. See 154 U. S. 204. *Ferries;* 24 N. J. L. 718, where the charter subjected the ferry company to such regulations as might be fixed by law. *Boom Companies;* 150 Pa. 475; 50 Fed. Rep. 902. See 44 Mich. 403. *Gas Companies;* 5 Ohio C. C. 559 (natural gas); 34 Ohio St. 572. See 27 Am. L. Reg. 286. *Mills for Grinding;* 86 Me. 102; 40 W. Va. 480. *Railroads;* 94 U. S. 155, 180; 143 U. S. 339; 82 Ia. 312; 22 Neb. 313; 15 Colo. 601; 64 Fed. Rep. 165 (where the company was incorporated by an act of congress). *Railways, Street;* 36 Neb. 307 (by ordinance); 111 N. Y. 132. *Stock Yards.* See 82 Fed. Rep. 850. *Telegraphs;* 116 N. C. 211. *Telephones;* 105 Ind.

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250; 118 Ind. 194, 598. See 96 Mo. 623. *Water;* 110 U. S. 347 (a California case under the constitution). *Warehouses;* for grain, etc., requiring them to keep insured for the benefit of its owner of grain stores; 153 U. S. 391. This power cannot be delegated to private persons or corporations; 160 Mass. 62; 100 Mich. 350. An act fixing minimum rates for railroad freight and passenger fares does not apply to the transportation of messengers and freight of express companies; 6 Fed. Rep. 426. An act requiring a railroad company to sell one thousand mile books for twenty dollars and to accept for fare such books issued by other companies, was held unconstitutional, because it attempted to compel one company to carry passengers on the credit of another company; 160 Mass. 62.

An act of Illinois making it a penal offence for a railroad company within that state to charge or receive for transporting passengers or freight of the same class the same or a greater sum for any distance than it does for a longer distance, is unconstitutional. A state statute intended to regulate or to tax or to impose any other restriction upon the transmission of persons or property or telegraph messages from one state to another is not within that class of legislation which the states may enact in the absence of legislation by congress, and such statutes are void even as to that part of such transmission as may be within the state; 118 U. S. 557.

The authority of a city under a street railway charter to fix the rates of fare thereon is exhausted by fixing such rates in an ordinance granting it the use of the streets; 83 Fed. Rep. 39. See RAILROAD.

A statute fixing the rate of compensation to be paid for labor or service performed on public works is not unconstitutional; 142 N. Y. 101; nor is an act of congress making it a misdemeanor for a pension agent to charge more than ten dollars on a pension claim; 157 U. S. 160.

The interstate commerce commission (*q. v.*) cannot fix rates; 168 U. S. 144.

As to discrimination in rates, see DISCRIMINATION; INSTERSTATE COMMERCE COMMISSION; FACILITIES.

See 33 L. R. A. 177, a full note on rates; 79 Fed. Rep. 665; Butterworth, Max. Rates, as to the English practices; RAILROADS.

**RATIFICATION.** An agreement to adopt an act performed by another for us.

*Express* ratifications are those made in express and direct terms of assent. *Implied* ratifications are such as the law presumes from the acts of the principal; as, if Peter buy goods for James, and the latter, knowing the fact, receive them and apply them to his own use.

Ratification of a contract implies an existing person on whose behalf the contract might have been made at the time. There cannot, in law, be a ratification of a contract which could not have been made binding on the ratifier at the time it was made, because the ratifier was not then in existence. 48 Minn. 319.

By ratifying a contract a man adopts the agency altogether, as well what is detrimental as what is for his benefit; 2 Stra. 859; 6 East 164; 16 Mart. La. 105; 1 Ves. 509; Story, Ag. § 250; 9 B. & C. 59; 24 Neb. 653; 34 *id.* 110; 31 U. S. App. 340. See 150 U. S. 128.

A ratification, to be efficacious, must be made by a party who had power to do the act in the first place, and it must be made with knowledge of the material facts; 152 U. S. 346.

Where there has been actual and positive fraud, or the adverse party has acted *mala fide*, there can be no such thing as a confirmation; 8 W. & S. 36. The ratification of the signing of a bond by an obligor whose signature has been forged, does not render him liable thereon, there being no new consideration; 67 Pa. 391; s. c. 5 Am. Rep. 445, n.; 33 Ohio St. 405; s. c. 31 Am. Rep. 546, n. But if a contract be merely against conscience, then if a party, being fully informed of all the circumstances of it and objections to it, voluntarily confirms it, his ratification will stand; 67 Pa. 217; 62 Ill. 483; s. c. 14 Am. Rep. 106. When a claim is founded upon an act done without the claimant's knowledge and authority, by a person claiming to act as his agent, the bringing of an action by him based upon that act is a ratification of it; 155 U. S. 13. A forged note cannot be ratified; L. R. 6 Ex. 49; 92 Pa. 447; but see 4 Allen 447.

A party from whom a contract has been wrung by duress must disclaim it on the recovery of freedom, subsequent recognition is the equivalent of ratification; 23 Misc. Rep. 173.

Ratification will, in general, relieve the agent from all responsibility on the contract, when he would otherwise have been liable; 2 Br. & B. 452. See 16 Mass. 461; 8 Wend. 494. See ASSENT; Ayliffe, Pand. *386; 18 Viner, Abr. 156; Story, Ag. 239. See, generally, 25 Am. Law Rev. 14; AGENCY.

A principal having the right to disaffirm acts of an agent must do it promptly, and if not done within a reasonable time ratification will be presumed; 120 U. S. 256. The principle of ratification by laches or delay is applicable to a municipal corporation, such as a county; 139 U. S. 684.

An infant is not, in general, liable on his contracts; but if, after coming of age, he ratify the contract by an actual or express declaration, he will be bound to perform it, as if it had been made after he attained full age. The ratification must be voluntary, deliberate, and intelligent, and the party must know that without it he would not be bound; 3 Pa. 428; see 12 Conn. 551; 10 Mass. 137; 4 Wend. 403; and now in England must be in writing. But a confirmation or ratification of a contract may be implied from acts of the infant after he becomes of age, as, by enjoying or claiming a benefit under a contract he might have wholly rescinded;

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1 Pick. 221; and an infant partner will be liable for the contracts of the firm, or at least such as were known to him, if he, after becoming of age, confirm the contract of partnership by transacting business of the firm, receiving profits, and the like; 2 Hill S. C. 479; 1 J. B. Moore 289; 33 S. C. 285.

Where an infant, during his minority, has made a deed or mortgage, his mere failure to disaffirm the conveyance on coming of age, without some positive and clear act of affirmation, will not amount to a ratification; 86 Ala. 442; 86 Ky. 572. See INFANT.

A board of directors may ratify and authorize the execution of a promissory note by the secretary of the corporation for money borrowed; 12 U. S. App. 699.

When a contract is not *ultra vires* a corporation may ratify it though made without proper authority by its agents; 6 U. S. App. 26.

**RATIFICATION OF TREATIES.** See TREATY.

**RATIHABITION.** Confirmation; approbation of a contract; ratification.

**RATIO** (Lat.). A reason; a cause; a reckoning of an account.

**RATIONABILI PARTE BONORUM.** See DE RATIONABILE PARTE BONORUM.

**RATIONABILIBUS DIVISIS, WRIT DE.** See DE RATIONALIBUS DEVISIS.

**RATIONE TENURÆ.** By reason of tenure.

**RATTENING.** The offence on the part of members of a trades union, of causing the tools, clothes, or other property of a workman to be taken away or hidden, in order to compel him to join the union or cease working. 38 & 39 Vict. c. 86.

**RAVINE.** A long, deep, and narrow hollow, worn by a stream or torrent of water; a long, deep, and narrow hollow or pass through the mountains. 36 Ia. 60.

**RAVISHED. In Pleading.** A technical word necessary in an indictment for rape.

No other word or circumlocution will answer. The defendant should be charged with having "*feloniously ravished*" the prosecutrix, or woman, mentioned in the indictment; Bac. Abr. *Indictment* (G 1); Com. Dig. *Indictment* (G 6); Hawk. Pl. Cr. 2, c. 25, s. 26; Cro. Car. 37; Co. Litt. 184, n. p; Co. 2d Inst. 180; 1 East, Pl. Cr. 447. The words "feloniously did ravish and carnally know" imply that the act was done forcibly and against the will of the woman; 12 S. & R. 70. See 3 Chitty, Cr. L. 812.

**RAVISHMENT. In Criminal Law.** An unlawful taking of a woman, or of an heir in ward. Rape, which see.

**RAVISHMENT OF WARD. In English Law.** The marriage of an infant ward without the consent of the guardian. It is punishable by statute Westminster 2, c. 35.

**READING.** The act of pronouncing aloud, or of acquiring by actual inspection, a knowledge of the contents of a writing or of a printed document.

In order to enable a party to a contract, or a devisor, to know what a paper contains, it must be read, either by the party himself or by some other persons to him. When a person signs or executes a paper, it will be presumed that it has been read to him; 14 Pa. 496; 82 *id.* 203; see 82 Ala. 496; 117 U. S. 532; but this presumption may be rebutted.

In the case of a blind testator, if it can be proved that the will was not read to him, it cannot be sustained; 3 Wash. C. C. 580. But when the testator was blind and there are any circumstances giving reasonable ground for suspicion of fraud or imposition, the burden is on those who support the will to show that it was read to him; 1 Houst. 44.

Where one who cannot read or write is disqualified for jury service, the words mean that he must be able to do so in the English language, and that he is able to read and write in German will not remove the objection; 12 Tex. App. 167.

**READY.** Prepared. The words, "I will be ready to," are held to imply a covenant. 1 Rolle, Abr. 519, pl. 8.

**READY AND WILLING.** Implies capacity to act as well as disposition. 11 L. J. Ex. 322. See 5 Bing. N. C. 399.

**READY MONEY.** A bequest of ready money includes cash at the banker's, whether balance on current account, or a deposit, or withdrawable after notice; 12 L. J. Ch. 385; 27 *id.* 797; but not unreceived dividends on stock; 18 L. J. Ch. 401; nor money in the hands of a sales-master; 9 Ir. Eq. Rep. 398; but it has been held that a debt would pass under a bequest of ready money. 23 L. J. Ch. 496.

**REAL. At Common Law.** A term which is applied to land in its most enlarged signification. *Real security*, therefore, means the security of mortgages or other incumbrances affecting lands. 2 Atk. 806; s. c. 2 Ves. Sen. 547.

**In Civil Law.** That which relates to a *thing*, whether it be movable or immovable, lands or goods: thus, a real injury is one which is done to a thing, as a trespass to property, whether it be real or personal in the common-law sense. A real statute is one which relates to a thing, in contradistinction to such as relate to a person.

**REAL ACTION. In Practice.** IN THE CIVIL LAW. One by which a person seeks to recover his property which is in the possession of another. Dig. 50. 16. 16. It is to be brought against the person who has possession.

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**At the Common Law.** One brought for the specific recovery of lands, tenements, or hereditaments. Stephen, Pl. 3.

They are *droitural* when they are based upon the right of property, and *possessory* when based upon the right of possession. They are either writs of right; writs of entry upon disseisin (which lie in the per, the per et cui, or the post), intrusion, or alienation; writs ancestral possessory, as mort d'ancestor, aiel, besaiel, cossinage, or nuper obiit. Comyns, Dig. *Actions* (D 2).

These actions were always local, and were to be brought in the country where the land lay; Bracton 189, 414. They are now pretty generally laid aside in practice, upon account of the great nicety required in their management, and the inconvenient length of their process,—a much more expeditious method of trying titles being since introduced by other actions, personal and mixed. See Stearns; Booth, Real Act.; Bac. Abr. *Actions;* Com. Dig. *Actions;* 3 Bla. Com. 118; Action.

**REAL ASSETS.** See Assets.

**REAL BURDEN. In Scotch Law.** Where a right to land is expressly granted under the burden of a specific sum, which is declared a burden on the lands themselves, or where the right is declared null if the sum be not paid, and where the amount of the sum and the name of the creditor in it can be discovered from the records, the burden is said to be real. Bell, Dict.

**REAL CHATTELS.** See Chattel.

**REAL CONTRACT. At Common Law.** A contract respecting real property. 3 Rep. 22 *a*.

**In Civil Law.** Those contracts which require the interposition of a thing (*res*) as the subject of them. See Contract.

**REAL COVENANT.** A covenant whereby a man binds himself to pass a real thing, as lands or tenements; as, a covenant to levy a fine, etc. Shepp. Touchst. 161; Fitzh. N. B. 145; Co. Litt. 384 *b*.

A covenant, the obligation of which is so connected with the realty that he who has the latter is either entitled to the benefit of or liable to perform the other. 2 Bla. Com. 304, Coleridge's note; Stearns, Real Act. 134; 4 Kent 472.

A covenant by which the covenantor binds his heirs. 2 Bla. Com. 304.

Those by which a single covenantor undertakes the performance of the covenant. It frequently happens that each one of several covenantors binds himself to perform singly the whole undertaking. The words commonly used for this purpose are "severally," "each of us." Still more commonly the undertaking is both joint and several.

It is the nature of the interest, and not the form of the covenant, which determines its character in this respect; 16 How. 580; 1 Gray 376.

Very considerable confusion exists among the authorities in the use of the term real covenants. The definition of Blackstone which determines the character of covenants from the insertion or non-insertion of the word "heir" by the covenantor, is pretty generally rejected. Of the other definitions, that which makes a real covenant an obligation to pass realty is the most ancient. The second definition is that now ordinarily understood when the term "real covenant" is employed. The benefit of such covenants will always run with the land and can be enforced by any vendee, no matter how remote. The burden, however, will not run with the land so as to be capable of enforcement unless there be privity either of contract or estate between the plaintiff and the defendant; Spencer's Case, 1 Sm. L. C. 115. These covenants are of various kinds. Some are used in lieu of the ancient warranty. Of these the most common are covenants of warranty, both general and special, covenants of seisin, that the vendor has a good right to convey, for quiet enjoyment, for freedon from incumbrances, and for further assurance. Wms. R. P. 447. In regard to all these, it may be said that in England the right of action passes to and vests in the party in whose time the substantial breach occurs, and who ultimately sustains injury: Rawle, Cov. 324. In the United States, however, the covenants for seisin, for right to convey, and against incumbrances are usually construed to be broken as soon as made and cannot enure to the advantage of subsequent grantees. Covenants of warranty and for quiet enjoyment are, however, prospective, and no breach occurs until eviction, actual or constructive; *id.* 313. See Covenant, and the various titles thereunder.

Other real covenants now in use are as follows: either *to preserve the inheritance*, as to keep in repair; 9 B. & C. 505; 17 Wend. 148; 1 Dall. 210; 6 Yerg. 512; 6 Vt. 276; 38 E. L. & E. 462; to keep buildings insured, and reinstate them if burned; 5 B. & Ald. 1; 6 Gill & J. 372; *to continue the relation of landlord and tenant*, as to pay rent; 1 Dougl. 183; 2 Rawle 159; 1 Wash. C. C. 375; to do suit to the lessor's mill; 5 Co. 18; 1 B. & C. 410; to grind the tenant's corn; 2 Yeates 74; for the renewal of leases; Moore 159; or *to protect the tenant in his enjoyment of the premises*, as to warrant and defend, never to claim or assert title; 7 Me. 97; 3 Metc. 121; to release suit and service; Co. Litt. 384 *b*; to produce title-deeds in defence of the grantee's title; Dig. tit. xxxii. c. 27, § 99; 1 S. & S. 449; to supply water to the premises; 4 B. & Ald. 266; to draw water off from a mill-pond; 19 Pick. 449; not to establish another mill on the same stream; 17 Wend. 136; not to erect buildings on adjacent land; 4 Paige, Ch. 510; to use the land in a specified manner; 13 Sim. 228; generally to create or preserve easements for the benefit of the land

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granted: 4 E. D. Sm. 122; 1 Bradf. 40. See 2 Greenl. Ev. § 240; 2 Washb. R. P. 648; Spencer's Case, 1 Sm. L. C. 115.

**REAL EFFECTS.** Real property. 1 Cowp. 307. See EFFECTS; REAL PROPERTY.

**REAL ESTATE.** Landed property. See LAND; REAL PROPERTY.

**REAL ESTATE BROKER.** One who engages in the purchase and sale of real estate as a business, and holds himself out to the public in that character and capacity. 26 Pa. 138.

**REAL EVIDENCE.** Evidence of which any object belonging to the class of *things* is the source, *persons* also being included in respect of such properties as belong to them in common with things. This sort of evidence may be either *immediate*, where the thing comes under the cognizance of our senses; or *reported*, where its existence is related to us by others. Chamb. Best, Ev. 16.

**REAL LAW. At Common Law.** A popular term used to denote such parts of the system of common law as concern or relate to real property.

**In Civil Law.** A law which relates to specific property, whether movable or immovable.

If real law in any given case relate to immovable property, it is limited in its operation to the territory within which that property is situate, real estate being, both by the common and continental laws, subject exclusively to the laws of the government within whose territory it is situate; Story, Confl. L. 426. See LEX REI SITÆ.

**REAL PROPERTY.** Land, and generally whatever is erected or growing upon or affixed to land. 9 Day 374; 37 Minn. 4; also rights issuing out of, annexed to, and exercisable within or about the same. Annexations made by a stranger to the soil of another without his consent become the property of the owner of the soil; Britton, bk. 2, ch. 2, sec. 6, p. 856; 2 Kent 334; 15 Ill. 397; 16 Mass. 449; 105 *id.* 414; 82 Fed. Rep. 857. When annexations are made by the owner of the soil with the materials of another, so long as the identity of the original materials can be proved, the right of the original owner is not lost; 25 Vt. 620; 57 N. H. 514. Such property has the quality of passing on the death of the owner to the heir and not the executor. It may either be corporeal or incorporeal. See Will. Real P. 12.

In respect to property, *real* and *personal* correspond very nearly with *immovables* and *movables* of the civil law. By the latter "biens" is a general term for property; and these are classified into movable and immovable, and the latter are subdivided into corporeal and incorporeal. Guyot, *Répert. Biens.*

By immovables the civil law intended property which could not be removed at all, or not without destroying the same, together with such movables as are fixed to the freehold, or have been so fixed and are intended to be again united with it, although at the time severed therefrom. Taylor, Civ. L. 475.

Real property includes also some things not strictly land or rights exercised or engaged in reference thereto—such are offices and dignities, which are so classed because in ancient times such titles were annexed to the ownership of various lands; Wms. R. P. 8. Corodies and annuities are also sometimes classed as real property. Shares of stock in railway and canal companies are in England real property unless made personalty by act of parliament. In the United States the better opinion is that they are personalty independent of statutory enactment; Ang. & A. Corp. § 557; 2 Kent 340, n. Some interests in lands are regarded as personal property, and are governed by the rules relating thereto—such are terms of years of lands. Such interests are known as chattels real; 2 Bla. Com. 386.

Though the term *real*, as applied to property, in distinction from *personal*, is now so familiar, it is one of a somewhat recent introduction. While the feudal law prevailed, the terms in use in its stead were lands, tenements, or hereditaments. These acquired the epithet of *real* from the nature of the remedy applied by law for the recovery of them, as distinguished from that provided in case of injuries, contracts broken, and the like. In the one case the claimant or demandant recovered the *real thing* sued for,—the land itself,—while, ordinarily, in the other he could only recover recompense in the form of pecuniary damages.

The term, it is said, as a means of designation, did not come into general use until after the feudal system had lost its hold, nor till even as late as the commencement of the seventeenth century. One of the earliest cases in which the courts applied the distinctive terms of *real* and *personal* to estates, without any words of explanation, is said to have been that of Wind *v.* Jekyl, 1 P. Wms. 575; Wms. R. P. 66.

Corporeal hereditaments comprise land and whatever is erected or growing upon or affixed thereto, including whatever is beneath or above the surface, "*usque ad orcum*" as well as "*usque ad cœlum*;" 2 Bla. Com. 17–19; Co. Litt. 4 *a*. Houses, trees, growing crops, and other articles fixed to the soil, though usually classed as realty, may under certain circumstances and for certain purposes acquire the character of personalty. Thus if one erect a building on the land of another with the latter's consent, it is the personal estate of the builder and may be levied on by his creditors as such; 6 N. H. 555; 6 Me. 452; 8 Pick. 402; 55 Minn. 211; 39 *id.* 479; see 159 U. S. 483; but if he fail to remove it within a reasonable time after being ejected from the land, it becomes a part of the realty; 57 Minn. 104. If it is sold to the owner of the soil, it becomes real prop-

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erty; 80 Me. 542. So if a nurseryman plant trees upon land leased for the purpose of growing them for the market, the trees are deemed personalty; 1 Met. 27; 4 Taunt. 316, So where the owner of land sells growing trees (not in a nursery to be cut by the vendee), they will be deemed to pass as personalty where the contract gives no right to the vendee to allow them to remain upon the land; 4 Metc. Mass. 580; 9 B. & C. 561. But where there is an understanding, express or implied, that the trees may remain upon the land and be cut at the pleasure of the vendee, then the property in the trees is deemed real; 4 Mass. 266; 7 N. H. 522. So crops, while growing, planted by the owner of the land, are a part of the real estate; but if sold by him when fit for harvesting, they become personalty; 5 B. & C. 829; and a sale of such crops, though not fit for harvest, has been held good as personalty; 4 M. & W. 343; 2 Dana 206; 2 Rawle 161. See 39 Ill. App. 404. A rose-bush in a yard will pass by a deed of the realty; 19 N. Y. S. 881. See EMBLEMENTS; MINES AND MINING.

There are a large number of articles known as fixtures, which, though originally wholly movable and personal in their nature, have acquired, by having been affixed to real estate or applied to use in connection with it, the character of realty. Such articles pass from the vendor to the vendee of the land as realty; 2 Kent 345; 2 Sm. L. C. 228; 20 Wend. 636; even though they may be at the time temporarily disconnected. See FIXTURES.

The intention of the parties immediately concerned, who have agreed that property annexed to the soil shall retain its character as personalty, will prevail except as against innocent purchasers without notice, unless the property be of such a nature that it necessarily becomes incorporated into and a part of the realty by the act and manner of annexation; 117 Ind. 176.

Manure made upon a farm in the usual manner for consumption of its products would be a part of the real estate; while if made from products purchased and brought on to the land by the tenant, as in case of a livery-stable, it would be personal; 21 Pick. 367; 3 N. H. 503; 6 Me. 222; 2 N. Chipm. 115; 11 Conn. 525; 15 Wend. 169; 30 N. H. 558. See MANURE; FIXTURES.

Equity will, in many instances, for the sake of enforcing and preserving the rights of parties interested, regard realty as converted into personalty and personalty as converted into realty, although no such change may actually have taken place. So where realty is devised by a testator to his executors with imperative directions to sell, the devolution of the property, even before actual conversion, will be controlled by the rules relating to personalty; 1 Bro. C. C. 497; 3 Wheat. 563; 72 Pa. 417. So where money is directed to be laid out in lands, it will be deemed realty for purposes of descent even before the purchase; 1 Bro. C. C. 503. But such direction must be imperative, otherwise no such result ensues; 3 Atk. 255; L. R. 7 Eq. 226; 10 Pa. 131. So realty owned by a partnership will be deemed personalty for the purposes of the partnership; 3 Kent 39; 81 Pa. 377; 1 Black 346; 7 Conn. 11. And the moment a corporation has exercised its right to condemn land, conversion takes place, in Pennsylvania. See PARTNERSHIP; CONVERSION; INCORPOREAL HEREDITAMENTS; LAND TRANSFER; REGISTRATION.

**REAL RIGHT. In Scotch Law.** That which entitles him who is vested with it to possess the subject as his own, and, if in the possession of another, to demand from him its actual possession.

It is distinguished from a personal right, which is that of action against a debtor, but without any right in the subject which the debtor is obliged to transfer to him. *Real* rights affect the subject itself; *personal* are founded in obligation. Erskine, Prin. 479.

By analogy, the right which a claimant in an action of replevin seeks to enforce at common law would be a *real* one, while the compensation which the plaintiff seeks in an action of assumpsit or trover, being a pecuniary one, would be *personal*.

**REAL SERVITUDE. In Scotch Law.** A burden imposed upon one tenement in favor of another tenement. Ersk. Prin. 206.

**REAL STATUTES.** Statutes which have property for their principal object, and do not speak of persons, except in relation to property. Sto. Confl. L. § 13.

**REAL THINGS.** Things substantial and immovable, and the rights and profits annexed to or issuing out of them. 1 Steph. Com. 167.

**REALM.** A kingdom; a country. 1 Taunt. 270; 4 Camp. 289; Rose 387.

**REALTY.** A term sometimes used as a collective noun for real property or estate—more generally to imply that that of which it is spoken is of the nature or character of real property or estate. See REAL PROPERTY.

**REAR.** The word has been held not necessarily to mean directly behind. 109 Mass. 82.

**REASON.** That power by which we distinguish truth from falsehood and right from wrong, and by which we are enabled to combine means for the attainment of particular ends. Encyclopédie; Shelf. Lun. Introd. xxvi. *Ratio in jure æquitas integra.*

A man deprived of reason is not, in many cases, criminally responsible for his acts, nor can he enter into any contract.

Reason is called the *soul of the law*; for when the reason ceases the law itself ceases. Co. Litt. 97, 183; 1 Bla. Com. 70; 7 Toullier, n. 566; MAXIMS, *Cessante ratione*, etc.

**REASONABLE.** Conformable or agreeable to reason; just; rational.

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An award must be *reasonable;* for if it be of things nugatory in themselves, and offering no advantage to either of the parties, it cannot be enforced; 3 Bouvier, Inst. n. 2096. See AWARD.

**REASONABLE ACT.** This term signifies such an act as the law requires. When an act is unnecessary, a party will not be required to perform it as a reasonable act; 9 Price 43; Yelv. 44; Platt, Cov. 342, 157.

**REASONABLE AND PROBABLE CAUSE. In Malicious Prosecution.** A reasonable amount of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing that the accused is guilty; but mere suspicion alone is not sufficient. 32 Neb. 444. See MALICIOUS PROSECUTION.

**REASONABLE CARE.** That care and foresight which men of ordinary prudence are accustomed to employ. 6 Duer 646. It is synonymous with ordinary care; 3 S. Dak. 93; see 42 Mo. 95; or due care; 10 Allen 532. See CARE; DUE CARE; NEGLIGENCE; ORDINARY CARE.

**REASONABLE DOUBT.** See DOUBT.

**REASONABLE EXPECTATION.** Within the meaning of the English bankruptcy act of 1883, one who begins business without capital and with a mortgage on all his assets, is held to have contracted his debts without reasonable or probable ground of expectation of being able to pay. 14 Q. B. D. 600.

**REASONABLE FACILITIES.** See FACILITIES.

**REASONABLE PORTION.** A power to charge an estate with reasonable portions or fortunes for younger children and for their maintenance and education is sufficiently certain to be capable of execution, and the word reasonable there is applicable not only to the amount of the portion, but also to the time and occasion on which the child would want it. Beatty 318.

**REASONABLE QUESTION.** See QUESTION.

**REASONABLE RATES.** See INTERSTATE COMMERCE COMMISSION; RATES.

**REASONABLE SKILL.** Such skill as is ordinarily possessed and exercised by persons of common capacity, engaged in the same business or employment. 6 Metc. 26.

**REASONABLE TIME.** The English law, which in this respect has been adopted by us, frequently requires things to be done within a reasonable time; but what a reasonable time is, it does not define: *quam longum debet esse rationabile tempus non definitur in lege, sed pendet ex discretione justiciariorum;* Co. Litt. 50.

The question of reasonable time is left to be fixed by circumstances and the usages of business. A bill of exchange must be presented within a reasonable time; Chitty, Bills 197-202. An abandonment must be made within a reasonable time after advice received of the loss; Marsh. Ins. 589.

The commercial code of France fixes a time in both these cases, which varies in proportion to the distance. See *Code de Com.* l. 1, t. 8, s. 1, § 10, art. 160; *id.* l. 5, t. 10, s. 3, art. 373. See NOTICE OF DISHONOR; PROTEST.

Where the facts are admitted or clearly proved, what is a reasonable time is a question of law for the court depending upon all the circumstances of the case; 6 Sup. Ct. Rep. 1023.

It has been held that where the question of reasonable time is one affected by many different circumstances with respect to which no definite rule of law has been laid down, it is a question for the jury. It is a question for the court when by a series of decisions on the same data it has been rendered certain; 22 U. S. App. 164.

**REASSURANCE.** When an insurer is desirous of lessening his liability, he may procure some other insurer to insure him from loss for the insurance he has made: this is called reassurance.

**RE-ATTACHMENT.** A second attachment of him who has formerly attached and dismissed the court without day, by the not coming of the justices, or some such casualty. Reg. Orig. 85.

**REBATE. In Mercantile Law.** Discount; the abatement of interest in consequence of prompt payment. An allowance by way of discount or drawback.

The allowance of rebates is a common method by which common carriers discriminate between shippers; the practice is unlawful; and a contract to procure rebates from railroad companies for a shipper is void as being in violation of the provisions of the interstate commerce law; 6 Misc. Rep. 570.

There is nothing in the interstate commerce law which, by reason of the allowance of rebates, if actually made, would invalidate a contract of affreightment, or exempt a railroad company from liability on its bills of lading; 151 U. S. 368; in cases where the facts are controverted or doubtful, it is for the jury to determine the facts, and the court to apply the law in determining the question; Wells, Law & Fact 135.

**REBEL.** A citizen or subject who unjustly and unlawfully takes up arms against the constituted authorities of the nation, to deprive them of the supreme power, either by resisting their lawful and constitutional orders in some particular matter or to impose on them conditions. Vattel, *Droit des Gens,* liv. 3, § 328. In another sense, it signifies a refusal to obey a superior or the commands of a court.

**REBELLION. In Criminal Law.** The taking up arms traitorously against the government. The forcible opposition and resistance to the laws and process lawfully issued.

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Insurrection, sedition, rebellion, revolt, and mutiny express action directed against government or authority, while riot has this implication only incidentally, if at all. They express actual and open resistance to authority. Except sedition, which may be secret or open, and often is only of a nature to lead to overt acts. An insurrection goes beyond sedition, in that it is an actual arising against the government. Rebellion goes beyond insurrection in aim, being an attempt actually to overthrow the government, while an insurrection seeks only some change of minor importance. A rebellion is generally on a larger scale than an insurrection. A revolt has generally the same aim as a rebellion, but it is on a smaller scale. A revolt may be against military government, but is generally like insurrection, sedition, and rebellion against civil government. A mutiny is organized resistance to law in an army or navy, and sometimes a similar act by an individual. The success of a rebellion often dignifies it with the name of a revolution. Cent. Dict.

If the rebellion amount to treason, it is punished by the laws of the United States with death. U. S. Rev. Stat. § 5332. If it be a mere resistance of process, it is generally punished by fines and imprisonment. *Id.* § 5336. See Dalloz, Dict.; Code Penal 209.

When a rebellion has broken out in any state, the rebel cruisers may be treated as pirates by the established government, if the rebel government has not been recognized as belligerent by the parent state or by foreign nations; but the right ceases to exist on the recognition of the rebels as belligerents; 2 Black 273; 11 Wall. 268; Boyd's Wheat. Int. Law 169.

**REBELLION, COMMISSION OF. In Old English Practice.** A writ issuing out of chancery to compel the defendant to appear.

**REBOUTER.** To repel or bar. The action of the heir by the warranty of his ancestor is called to rebut or repel.

**REBUT.** To contradict; to do away.

**REBUTTABLE PRESUMPTION.** See PRESUMPTION.

**REBUTTAL.** See REBUTTING EVIDENCE.

**REBUTTER. In Pleading.** The name of the defendant's answer to the plaintiff's surrejoinder. It is governed by the same rules as the rejoinder. Comyns, Dig. *Pleader* (K). See PLEADINGS; Andr. Steph. 51.

**REBUTTING EVIDENCE.** That evidence which is given by a party in the cause to explain, repel, counteract, or disprove facts given in evidence on the other side. The term rebutting evidence is more particularly applied to that evidence given by the plaintiff to explain or repel the evidence given by the defendant.

It is a general rule that anything may be given as rebutting evidence which is a direct reply to that produced on the other side; 2 M'Cord 161; and the proof of circumstances may be offered to rebut the most positive testimony; 1 Pet. C. C. 235. It is within the discretion of the court to allow evidence in rebuttal which should have been offered in chief; 36 N. E. Rep. (Ill.) 1019.

But there are several rules which exclude all rebutting evidence. A party cannot impeach his own witness, though he may disprove, by other witnesses, matters to which he has testified; 3 Litt. 465; nor can he rebut or contradict what a witness has sworn to which is immaterial to the issue; 16 Pick. 153; 2 Bail. 118.

Parties and privies are estopped from contradicting a written instrument by parol proof; but this rule does not apply to strangers; 10 Johns. 229. But the parties may prove that before breach the agreement was abandoned, or annulled by a subsequent agreement not in writing; 4 N. H. 196. And when the writing was made by another, as where the log-book stated a desertion, the party affected by it may prove that the entry was false or made by mistake; 4 Mas. 541. It is within the discretion of a trial court to permit witnesses to be called in rebuttal whose testimony is in support of that given in chief; 4 U. S. App. 563.

**RECALL. In International Law.** To deprive a minister of his functions; to supersede him.

Where a mission to a foreign country is terminated by a formal letter of recall, the minister usually delivers a copy thereof to the minister or secretary of foreign affairs, obtains an audience of the sovereign or chief executive, and delivers or exhibits the original of his recall. If he is recalled at the request of the government to which he is accredited, he would neither ask nor receive an audience of leave. If recalled on account of a misunderstanding between the two governments, it must depend upon circumstances whether a formal letter of recall is to be sent to him or whether he may quit the residence without waiting for it; also as to whether he shall demand or the sovereign shall grant him an audience of leave; 1 Hall. Int. L. 365. See LETTER OF RECALL; MINISTER.

**RECALL A JUDGMENT.** To reverse a judgment on a matter of fact.

**RECAPTION.** The act of a person who has been deprived of the custody of another, to which he is legally entitled, by which he regains the peaceable custody of such person; or of the owner of personal or real property who has been deprived of his possession, by which he retakes possession peaceably.

In each of these cases the law allows the recaption of the person or of the property, provided he can do so without occasioning

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a breach of the peace or an injury to a third person who has not been a party to the wrong. Co. 3d Inst. 134; 2 Rolle, Abr. 565; 3 Bla. Com. 5.

The right of recaption of a person is confined to a husband, in retaking his wife; a parent, his child, of whom he has the custody; a master, his apprentice; and, according to Blackstone, a master, his servant,—but this must be limited to a servant who assents to the recaption: in these cases, the party injured may peaceably enter the house of the wrong-doer, without a demand being first made, the outer door being open, and take and carry away the person wrongfully detained. He may also enter peaceably into the house of a person harboring, who was not concerned in the original abduction; 8 Bingh. 186.

The same principles extend to the right of recaption of personal property. The true owner of goods wrongfully taken may retake them if he can, even from a third party, using (it is said) whatever force is reasonably necessary; Poll. Torts 361; and may enter. for that purpose, on the first taker's land, but not on a third person's land, unless, it is said, the original taking was felonious, or, perhaps, after the goods have been claimed and the occupier of the land has refused to deliver them up; Poll. Torts 361.

In the recaption of real estate, the owner may, in the absence of the occupier, break open the outer door of a house and take possession; but if in regaining his possession the party be guilty of a forcible entry and breach of the peace, he may be indicted; but the wrong-doer, or person who had no right to the possession, cannot sustain any action for such forcible regaining possession merely; 1 Chitty, Pr. 646. See Cooley; Pollock, Torts.

**RECAPTURE.** The recovery from the enemy, by a force friendly to the former owner, of a prize by him captured.

It seems incumbent on fellow-citizens, and it is of course equally the duty of allies, to rescue each other from the enemy when there is a reasonable prospect of success; 3 C. Rob. 224.

By the act of March 3, 1800, in case of recapture of vessels or goods belonging to persons resident within, or under the protection of, the United States, the same, not having been condemned as prize by competent authority before the recapture, shall be restored to the owner upon payment of salvage of one-eighth of the value, if recaptured by a public ship, and one-sixth if recaptured by a private ship; and if the recaptured vessel shall appear to have been set forth and armed as a vessel of war before its capture, or afterwards and before recapture, then the salvage shall be one moiety of the value. If the recaptured vessel belong to the government and be *unarmed*, the salvage is one-sixth, if recaptured by a private ship, and one-twelfth if recaptured by a public ship; if *armed*, the salvage is one moiety, if recaptured by a public ship. In respect to public armed ships, the cargo pays the same rate of salvage as the vessel; as to private ships, the rate of salvage is the same on the cargo whether the vessel be armed or unarmed. See 9 Cra. 244. The valuation of the property is to be made at the place of restitution, not of recapture; Edw. Adm. 210.

Salvage is not generally allowed on the recapture of neutral property, unless there be danger of condemnation, or such injustifiable conduct on the part of the government of the captors as to bring the property into jeopardy; 6 C. Rob. 410; 1 Cra. 102. To entitle a party to salvage there must have been actual or constructive capture; but it is sufficient if the property was completely under the dominion of the enemy; 3 C. Rob. 305; it is a recapture if the prize was actually rescued from the grasp of the hostile captor; *id.*; 3 Phill. Int. L. 638. Where the enemy has captured a ship and then abandoned her and she is recaptured, she is to be restored on payment of salvage, but the rate of salvage is discretionary; 6 C. Rob. 273; but if the abandonment be caused by terror of a hostile fleet, it is a recapture; *id.*

Where a prize is abandoned and brought into court by neutral salvors, a neutral court has jurisdiction to decree salvage, but cannot restore the property to the original owner; neutral nations ought not to inquire into the validity of a capture as between belligerents; 3 Dall. 188.

Recapture can be made by a non-commissioned vessel; 3 C. Rob. 229.

In Great Britain prize statutes were formerly passed at the beginning of every war. The Naval Prize Act, 1864, provides that, as between subjects, the right to recover possession is preserved forever, except where the vessel, after capture, has been fitted out by the enemy for war. The right is subject, when the recapture is by a public ship, to the payment of one-eighth salvage or when the recapture is made under circumstances of special difficulty or danger, more than one-eighth, but not exceeding one-fourth. The French rule is to restore a vessel recaptured by a public vessel on the payment of one-thirtieth of the value, if recaptured within twenty-four hours; if after that the time, the salvage is one-tenth.

If a belligerent captures neutral property, and it is recaptured by the other belligerent, the latter usually restores it without the payment of salvage.

If the prize has been duly condemned and sold to a neutral purchaser by the captors, that title prevails against the original owners and the recaptors, both under the English and American rule. But such condemnation must be in a competent prize court of the belligerents and not one held in neutral territory; 1 C. Rob. 135.

A recaptured vessel may be permitted, under the English act of 1864, to continue her voyage, or be brought in at once for adjudication; in the former case the re-

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captor does not lose his right to salvage. If she does not return to a port of the kingdom within six months, the recaptor may proceed in the admiralty, for his salvage.

See INFRA PRÆSIDIA; NEUTRALITY; POSTLIMINIUM; PRIZE.

**RECEIPT** (Lat. *receptum*, received; through Fr. *receit*). A written acknowledgment of payment of money or delivery of chattels.

It is executed by the person to whom the delivery or payment is made, and may be used as evidence against him, on the general principle which allows the admission or declaration of a party to be given in evidence against himself. As an instrument of evidence, the receipt of one person is, in general, inoperative against another, although often useful as a voucher in the private settlement of accounts; and the statutes of some states make receipts for small payments made by executors, etc., evidence of the payment on a settlement of their accounts. And receipts of public officers are sometimes admissible *per se;* 1 Ill. 45. It is essential to a receipt that it acknowledge the payment or delivery referred to; Russ. & R. 227; 7 C. & P. 549. And under the stamp laws a *delivery* or *payment* must be stated: 1 Camp. 499. Also the receipt must, from the nature of the case, be in writing, and must be delivered to the debtor; for a memorandum of payment made by the creditor in his own books is no receipt; 2 B. & Ald. 501, n.; 1 Spear 53. See 37 Mo. 432.

*Receipts, effect of.* The mere acknowledgment of payment made is not treated in law as binding or conclusive in any high degree. So far as a simple acknowledgment of payment or delivery is concerned, it is presumptive evidence only; Whart. Ev. 1064, 1130, 1365; 1 Pet. C. C. 182; 1 Rich. 32; 1 Harring. 5; 16 Wend. 460; 16 Me. 475; 5 Ark. 61; 11 Mass. 27, 363; 3 McLean 265; 6 B. Monr. 199; 1 Perr. & D. 437; 8 Gill 179; 3 Jones N. C. 501; 18 Colo. 538; 43 Ill. App. 615; 115 U. S. 183; 46 Hun 270; 111 Pa. 562; and is, in general, open to explanation; Tay. Ev. 654, 736, 965; 2 Johns. 378; Add. Contr. 142; 8 Ala. N. S. 59; 4 Vt. 308; 3 McLean 387; 4 Barb. 265; 5 J. J. Marsh. 79; 5 Mich. 171; 32 S. C. 595; 35 Kan. 464; 125 U. S. 90; 68 Ia. 537; being an exception to the general rule that parol evidence cannot be admitted to contradict or vary a written instrument; 5 Johns. 68; 2 Metc. Mass. 283. Thus, a party may always show, in explanation of a receipt limited to such acknowledgment, the actual circumstances under which it was made; 8 Johns. 389; *e. g.* that it was obtained by fraud; Wright Ohio 764; 4 H. & M'H. 219; or given under a mistake; 6 Barb. 58; 3 Dana 427; or that, in point of fact, no money was actually paid as stated in it; 2 Strobh. 390; 3 N. Y. 168; 10 Vt. 96; 34 Mo. App. 189; 82 Ill. 134. But see 1 J. J. Marsh. 583; or that the medium of remittance on which the receipt was based has failed; 51 Neb. 5; or where it is given by a contractor under an assurance that it is only a receipt for moneys then paid, and would not preclude him from making a claim for extra work; 18 App. Div. N. Y. 514. A receipt in full for part of an undisputed claim does not prevent recovery of the balance, though given with knowledge and there was no error or fraud; 19 Misc. Rep. 357. A receipt is an admission only; Greenl. Ev. 1, 212; 3 B. & Ad. 318; 112 Mo. 661; it is but *prima facie* evidence against the creditor; 13 U. S. App. 597; and may be explained, unless executed with the formalities of a deed; Leake, Contr. 901; in law as well as equity; L. R. 6 Ch. 534. As against a stranger thereto, it is incompetent evidence of the payment thereby acknowledged; 50 N. W. Rep. (Neb.) 703. Mere negligence in signing a receipt without reading it will not conclude the signer or preclude explanation of its contents, particularly if the signing were induced by fraud or misrepresentation; 57 Kan. 195.

*Receipts "in full."* When, however, we find a receipt acknowledging payment "in full" of a specified debt, or "in full of all accounts" or of "all demands," the instrument is of a much higher and more conclusive character. It does not, indeed, like a release, operate upon the demand itself, extinguishing it by any force or virtue in the receipt, but it is evidence of a compromise and mutual settlement of the rights of the parties. The law infers from such acknowledgment an adjustment of the amount due, after consideration of the claims of each party, and a payment of the specified sum as a final satisfaction: 10 Vt. 491; 2 Dev. 247; Wright Ohio 764; 21 N. H. 85; 120 N. Y. 190. This compromise thus shown by the receipt will often operate to extinguish a demand, although the creditor may be able to show he did not receive all that he justly ought. Papers showing a receipt of money in full satisfaction of a decree appealed from, cannot be varied or contradicted by parol evidence; 120 U. S. 198. See ACCORD.

If the rights of a party are doubtful, are honestly contested, and time is given to allow him to satisfy himself, a receipt in full, though given for less than his just rights, will not be set aside. Thus, in general, a receipt in full is conclusive when given with a knowledge of the circumstances, and when the party giving it cannot complain of any misapprehension as to the compromise he was making, or of any fraud; 5 Vt. 520; 1 Camp. 392; 2 Strobh. 203; and unless given in ignorance of its purport, or under circumstances constituting duress, it is an acquittance in bar of any further demand; 151 U. S. 483.

But receipts of this character are not wholly exempt from explanation; fraud or misrepresentation may be proved, and so may such mistake as enters into and vitiates the compromise of the demand admitted; Bravt. 75; 1 Camp. 394; Coxe N. J. 48; 2 Brev. 223; 4 H. & M'H. 219; 4

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Barb. 265; 2 Harring. 392; 2 C. & P. 44. See 73 Mich. 138; 141 U. S. 564. The evidence in explanation must be clear and full, and addressed to the point that there was not in fact an intended and valid compromise of the demand. For if the compromise was not binding, the receipt in full will not aid it. The receipt only operates as evidence of a compromise which extinguished the claim; 26 Me. 88; 4 Denio 166; 2 M'Cord 320; 4 Wash. C. C. 562.

A receipt for a specified amount of money and designated notes executed by a defendant to the plaintiff's intestate may be used as evidence that it was a deposit with the latter and not a payment to him where there is other evidence to the same effect; 114 Cal. 612.

Though a receipt in full is presumed to be in full settlement the presumption is not conclusive; 32 S. W. Rep. (Ky.) 623; and where it is given for work and labor, a receipt in full for the bill rendered is not conclusive evidence of a final settlement unless it purports to be so; 91 Hun 639. Where the question is raised whether the purchase price of an article has been paid notwithstanding a receipt, and there is evidence to the contrary, the question is for the jury; 2 App. Div. N. Y. 93; and a jury is not precluded from finding that a receipt in full was not intended to be such by the fact that he who signed it gave no explanation for doing so; 87 Me. 429.

*Receipts in deeds.* The effect to be given to a receipt for the consideration-money, so frequently inserted in a deed of real property, has been the subject of numerous and conflicting adjudications. The general principle settled by weight of authority is that for the purpose of sustaining the conveyance as against the vendor and his privies the receipt is conclusive: they are estopped to deny that a consideration was paid sufficient to sustain the conveyance; 1 Binn. 502; 26 Mo. 56; 4 Hill N. Y. 643. But in a subsequent action for the purchase-money or upon any collateral demand, *e. g.* in an action to recover a debt which was in fact paid by the conveyance, or in an action for damages for breach of a covenant in the deed, and the like, the grantor may show that the consideration was not in fact paid—that an additional consideration to that mentioned was agreed for, etc.; 16 Wend. 460; 10 Vt. 96; 4 N. H. 229, 397; 1 M'Cord 514; 7 Pick. 533; 1 Rand. 219; 4 Dev. 355; 6 Me. 364; 5 B. & Ald. 606; 5 Ala. 224; 2 Harring. Del. 354; 13 Miss. 238; 5 Conn. 113; 1 Harr. & G. 139; 2 Humphr. 584; 1 J. J. Marsh. 387; 3 Ind. 212; 15 Ill. 230; 1 Stockt. Ch. 492. See 30 Mo. App. 258. But there are many contrary cases. See 1 Me. 2; 7 Johns. 341; 3 M'Cord 552; 1 Harr. & J. 252; 1 Hawks 64; 4 Hen. & M. 113; 2 Ohio 182; 1 B. & C. 704. And when the deed is attacked for fraud, or is impeached by creditors as voluntary and therefore void, or when the object is to show the conveyance illegal, the receipt may be explained or contradicted; 3 Zabr. 465; 3 Md. Ch. Dec. 461; 21 Pa. 480; 20 Pick. 247; 12 N. H. 248. See ASSUMPSIT; DEED; RECITAL.

With this exception of receipts inserted in a sealed instrument having some other purpose to which the receipt is collateral, a receipt under seal works an absolute estoppel, on the same principles and to the same general extent as other specialties; Ware 496; 4 Hawks 22. Thus, where an assignment of seamen's wages bore a sealed receipt for the consideration money, even though the attesting witness testified that no money was paid at the execution of the papers, and defendant offered no evidence of any payment ever having been made, and refused to produce his account with the plaintiff (the assignor), on the trial, it was held that the receipt was conclusive; 2 Taunt. 141. See SEAL; SPECIALTY.

*Receipt embodying contract.* A receipt may embody a contract; and in this case it is not open to the explanation or contradiction permitted in the case of a simple receipt; 4 Gray 186; 44 Minn. 471. An agreement in a receipt is as conclusive as any other paper executed between the parties; 125 U. S. 90. The fact that it embodies an agreement brings it within the rule that all matters resting in parol are merged in the writing. See EVIDENCE. Thus, a receipt which contains a clause amounting to an agreement as to the application to be made of the money paid—as when it is advanced on account of future transactions—is not open to parol evidence inconsistent with it; 5 Ind. 109; 14 Wend. 116; 12 Pick. 40, 562. A bill of parcels with prices affixed, rendered by a seller of goods to a purchaser, with a receipt of payment executed at the foot, was held in one case to amount to a contract of sale of the goods, and therefore not open to parol explanation; while in another case a similar bill was held merely a receipt, the bill at the head being deemed only a memorandum to show to what the receipt applied; 3 Cra. 311; 1 Bibb 271. A bill of lading, which usually contains words of receipt stating the character, quantity, and condition of the goods as delivered to the carrier, is the subject of a somewhat peculiar rule. It is held that so far as the receipt is concerned it may be explained by parol; 6 Mass. 422; 7 *id.* 297; 8 N. Y. 321; 10 *id.* 529; 1 Abb. Adm. 209, 397; 39 Ill. App. 17. But see 1 Bail. 174.

A receipt for rent given to a tenant after notice to quit where the person signing it is not shown to have been authorized by the landlord to receive the rent, is not admissible in an action by the latter to recover possession; 19 Misc. Rep. 56; and in such action receipts given by the same landlord to another tenant are not admissible to show the character of the tenancy by a difference in the form of receipts, the receipt being in the one case for one month only and in the other not specifying the time, and the effort being to establish a monthly tenancy; *id.*

But as respects the agreement to carry and deliver, the bill is a contract, to be con-



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strued, like all other contracts, according to the legal import of its terms, and cannot be varied by parol; 3 Sandf. 7. In this connection may also be mentioned the receipt customarily given in the New England states, more particularly for goods on which an attachment has been levied. The officer taking the goods often, instead of retaining them in his own manual control, delivers them to some third person, termed the "receiptor," who gives his receipt for them, undertaking to redeliver upon demand. This receipt has in some respects a peculiar force. The receiptor having acknowledged that the goods have been attached cannot afterwards object that no attachment was actually made, or that it was insufficient or illegal; 11 Mass. 219, 317; 24 Pick. 196. Nor can he deny that the property was that of the debtor, except in mitigation of damages or after redelivery; 12 Pick. 562; 15 *id.* 40. And in the absence of fraud, the value of the chattels stated in the receipt is conclusive upon the receiptor; 12 Pick. 362.

Where the payment is made in some particular currency or medium, as doubtful bank bills, a promissory note of another person, etc., clauses are often inserted in the receipts specifying the condition in which such mode of payment is accepted. In most states negotiable paper given in payment is presumed to have been accepted on the condition that it shall not work a discharge of the demand unless the paper shall ultimately produce satisfaction; and if an intent to accept it absolutely does not affirmatively appear, the creditor is entitled, in case the paper turned out to him is dishonored, to return it and claim to be paid anew. See PAYMENT. If the receipt is silent on that subject, it is open to explanation, and the creditor may rebut it by proof that the payment admitted was in fact made by a note, bill, check, bank-notes afterwards ascertained to be counterfeit, or notes of a bank in fact insolvent though not known to be so to the parties, etc.; 1 Wash. C. C. 338; 1 W. & S. 521; 2 Johns. Cas. 438; 13 Wend. 101; 3 McLean 265; 5 J. J. Marsh. 78. But see 3 Caines, Cas. 14; 1 Munf. 460; 1 Metc. Mass. 156. But if the agreement of the parties is specified in the receipt, the clause which contains it will bind the parties, as being in the nature of a contract; 5 Vt. 555; 1 Rich. 111; 16 Johns. 277; 23 Wend. 345; 2 Gill & J. 493; 3 B. Monr. 353. A receipt for a note taken in payment of an account will not, in general, constitute a defence to an action on the account, unless it appears by proof that the creditor agreed to receive the note as payment and take the risk of its being paid; 10 Md. 27.

*Receipts, uses of.* A receipt is often useful as evidence of facts collateral to those stated in it. It proves the payment; and whatever inference may be legally drawn from the fact of the payment described will be supported by the receipt. Thus, receipts for rent for a given term have been held *prima facie* evidence of the payment of all rent previously accrued; 15 Johns. 479; 1 Pick. 332. And they have been admitted on trial of a writ of right, as showing acts of ownership on the part of him who gave them; 7 C. B. 21. A receipt given by A to B for the price of a horse, afterwards levied on as property of A, but claimed by B, has been admitted as evidence of ownership against the attaching creditor; 2 Harr. N. J. 78. A receipt "in full of all accounts," the amount being less than that called for by the accounts of the party giving it, was held in his favor evidence of a mutual settlement of accounts on both sides, and of payment of the balance ascertained to be due after setting off one account against the other; 9 Wend. 332. A receipt given by an attorney for securities he was to collect and account for has been held presumptive evidence of the genuineness and justness of the securities; 14 Ala. 500. And a general receipt by an attorney for an evidence of debt then due, is presumed to have been received by him as attorney, for collection; and he must show the contrary to avoid an action for neglect in not collecting: 3 Johns. 185.

A receipt signed in the name of a certain person by another person, constitutes no evidence of the receipt of the money by the latter; 74 Mich. 220.

*Receipts, larceny and forgery of.* A receipt may be the subject of larceny; 2 Abb. Pr. 211; or of forgery; Russ. & R. 227; 7 C. & P. 459. Punched railroad tickets shown to be receipts to the conductor and vouchers to him for the amount of fare between stations, are receipts within a statute making it larceny to steal any receipt; 95 Ia. 341.

And it is a sufficient "uttering" of a forged receipt to place it in the hands of a person for inspection with intent fraudulently to induce him to make an advance on the faith that the payment mentioned in the spurious receipt has been made; 14 E. L. & Eq. 556. See FORGERY.

**RECEIPTOR. In Practice.** A name given to the person who, on a trustee process being issued and goods attached, becomes surety to the sheriff to have them forthcoming on demand, or in time to respond to the judgment, when the execution shall be issued; upon which the goods are bailed to him. Story, Bailm. § 124. The term is used in New York and New Hampshire; 11 N. H. 557; and Maine; 14 Me. 414. See ATTACHMENT; RECEIPT.

As to whether a receiptor is estopped to show property in himself, see 31 Am. Dec. 62; s. c. 14 Me. 414; 25 Am. Dec. 426, n.; 116 Mass. 454; 28 Am. Dec. 695; 24 Am. Dec. 108. He may defend by showing that the property has been taken from him; 11 N. H. 570.

**RECEIVABLE.** In a legacy, payable; vested. 29 L. J. Ch. 822; L. R. 6 Eq. 59.

**RECEIVER.** One who receives money to the use of another to render an account.

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Story, Eq. Jur. § 446. Receivers were at common law liable to the action of account-render for failure in the latter portion of their duties.

**In Equity.** A person appointed by a court possessing chancery jurisdiction, to receive the rents and profits of land, or the profits or produce of other property in dispute.

A receiver is an indifferent person between the parties appointed by the court to collect and receive the rents, issues, and profits of land, or the produce of personal estate, or other things, which it does not seem reasonable to the court that either party should do; or where a party is incompetent to do so, as in the case of an infant. The remedy of the appointment of a receiver is one of the very oldest in the court of chancery, and is founded on the inadequacy of the remedy to be obtained in the courts of ordinary jurisdiction; Bisph. Eq. 606.

He is a ministerial officer of the court. 2 S. & S. 98; 1 Cox, Ch. 422; 9 Ves. 335; 11 Ga. 413; 2 Tex. Civ. App. 88; with no powers but those conferred by his order of appointment and the practice of the court; 6 Barb. 589; 2 Paige, Ch. 452; which do not extend beyond the jurisdiction of the court which appoints him; 17 How. 322 (but see *infra*); appointed on behalf of all parties who may establish rights in the cause; 8 U. S. App. 597, 610; he stands in the shoes of the company; 59 Fed. Rep. 523; 3 Atk. 564; 2 Md. Ch. Dec. 278; 4 Madd. 80; 4 Sandf. Ch. 417; and after his appointment neither the owner nor any other party can exercise any acts of ownership over the property; 2 S. & S. 96. Neither party is responsible for his acts; 2 Wall. 519. His custody is that of the court, and leaves the right of the parties concerned to be controlled by the ultimate decree of the court; 10 Bank. Reg. 517.

The appointment of a receiver does not change the title or right of possession of the property, but puts it into his custody for the benefit of the party ultimately entitled; 136 U. S. 223; nor does it work a dissolution of the corporation, but only suspends the function of its officers as far as provided in the decree; 11 Colo. 464; 115 Ind. 466.

A court will protect its receiver in the possession and use of franchises and property committed to him; 53 Fed. Rep. 687.

The rule that property in the hands of a receiver is in *custodia legis*, and that interference with such possession without leave of the court is a contempt, is as applicable in the seizure thereof to enforce payment of taxes due the state as in any other case; 149 U. S. 164; *id.* 191.

A receiver is an officer of the court which appointed him, and a judgment in another court in a suit affecting the receiver's right of possession, begun without the permission of the court appointing him, is void; 22 U. S. App. 313. A receiver is not the agent of the corporation nor a substitute for the board of directors. He is but the hand of the court appointing him. His acts are not the acts of the corporation, and his servants are not the servants of the corporation; 31 U. S. App. 644. A decree appointing a receiver is an act of such notoriety that all persons have constructive notice thereof; 31 U. S. App. 644. A receivership is not personal, but continuous, and claims arising against different successive receivers stand on the same footing; 84 Fed. Rep. 67; 62 *id.* 771; he is analogous to a corporation sole; *id.*

A receiver is appointed only in those cases where in the exercise of a sound discretion it appears necessary that some indifferent person should have charge of the property; 1 Johns. Ch. 56; 25 Ala. N. S. 81; only during the pendency of a suit; 1 Atk. 578; 2 Du. 632; except in extreme cases; 2 Atk. 315; 2 Dick. Ch. 580; as when a fund in litigation is in peril; 2 Blatch. 78; and *ex parte;* 14 Beav. 423; 8 Paige, Ch. 373; or before answer; 13 Ves. 266; 4 Price 346; 4 Paige, Ch. 574; 2 Swanst. 146; in special cases only; and, generally, not till all the parties are before the court; 2 Russ. Ch. 145; 1 Hog. Ir. 93. Ordinarily a receiver will not be appointed on an *ex parte* application; 59 Ia. 307. The action of the court in the appointment of a receiver is not reviewable on appeal; 1 Bond. 422; 1 Biss. 198. But by act of Feb. 9, 1893, an appeal from such an order in the supreme court of the District of Columbia may be taken to the court of appeals; R. S. 2 Supp. 79.

The appointment of a receiver is authorized when the party seeking the appointment shows *prima facie* a title reasonably free from doubt, or a lien upon the subject-matter of controversy to which he has a right to resort for the satisfaction of his claim, and that it is in danger of loss from waste, misconduct, or insolvency if the defendant is permitted to retain the possession; 86 Ala. 370; 41 Kan. 475; 97 N. C. 367.

One will not be appointed, except under special circumstances making a strong case, *where a party is already in possession of the property under a legal title;* 19 Ves. 59; 1 Ambl. 311; 2 Y. & C. 351; as a trustee; 2 Bro. C. C. 158; 1 V. & B. 183; 1 My. & C. 163; 16 Ga. 406; 2 J. & W. 294; an executor; 13 Ves. 266; tenant in common; 2 Dick. Ch. 800; 4 Bro. C. C. 414; 2 S. & S. 142; a mortgagee; 4 Abb. Pr. 235; 13 Ves. 377; 1 J. & W. 176, 627; 1 Hog. Ir. 179; or a mortgagor when the debt is not wholly due; 5 Paige, Ch. 38; a director of a corporation in a suit by a stockholder; 2 Halst. Ch. 374; *where the property is or should be already in the possession of some court*, as during the contestation of a will in the proper court; 2 Atk. 378; 6 Ves. 172; 2 V. & B. 85, 95; 7 Sim. 512; 1 My. & C. 97; but see 3 Md. Ch. Dec. 278; when admiralty is the proper forum; 5 Barb. 209; or where there is already a receiver; 1 Hog. Ir. 199; 10 Paige, Ch. 43; 1 Ired. Eq. 210; 11 *id.* 607; nor, on somewhat similar grounds, where salaries of public

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officers are in question; 2 Sim. 560; 10 Beav. 602; 2 Paige, Ch. 388; or where a public office is in litigation; 9 Paige, Ch. 507; *where the equitable title of the party asking a receiver is incomplete as made out*, as where he has delayed asking for one; 1 Hog. Ir. 118; 1 Donn. Min. Cas. 71; *or where the necessity is not very apparent*, as on account merely of the poverty of an executor; 12 Ves. 4; 1 Madd. 142; 18 Beav. 161; see 4 Price 346; pending the removal of a trustee; 16 Ga. 406; where a trustee mixes trust-money with his own; 1 Hopk. Ch. 429.

A person holding an unliquidated claim against a corporation is not entitled to the appointment of a receiver, which would be a denial of trial by jury; 148 U. S. 604; 150 *id.* 385; mere insolvency of a corporation does not authorize the appointment of a receiver at the suit of general creditors, but one will be appointed where it is no longer able to proceed with its business; 64 Fed. Rep. 928.

A receiver will not be appointed without the consent of the corporation on the application of a mere contract creditor, and especially where he cannot claim a definite sum as due; 82 Fed. Rep. 775.

Where the only indebtedness of an insolvent corporation is to the party bringing the creditor's bill, a receiver is unnecessary; 8 U. S. App. 340.

Where the business of a corporation is being mismanaged, a receiver will be appointed at the suit of a stockholder; 103 Ill. 472.

Where a partnership has been dissolved, a receiver will usually be appointed if the property is unsafe in the hands of the partners; 125 N. Y. 688; 104 Ind. 53. On a bill for dissolution on account of improper conduct of partners, a receiver is almost a matter of course; but where a partnership has expired by limitation and there is no special ground for a receiver one will not ordinarily be appointed; 104 Ind. 53. A receiver will not be appointed to continue the business, except temporarily; 6 Fla. 164.

A receiver will be appointed if there is fraud or mismanagement on the part of one partner; or a disagreement between them; or an appropriation of firm property to individual use; or one partner is excluded from the management; or where a liquidating partner is insolvent; Smith, Rec. § 191.

Receivers will be appointed to take charge of trust property when it is in danger, and such appointment is necessary for its preservation; 66 Ga. 66; as where the trustee is not responsible; 92 N. C. 519; or neglects his duties; 4 D. & W. 117; or uses the trust funds on his own account; 91 N. C. 220; or refuses to collect a debt belonging to the estate; L. R. 8 Ch. App. 597; or has failed to obey an order to pay over money of the trust; 54 L. J. Ch. 1130; but ordinarily the remedy will be by the removal of the trustee. The jurisdiction to appoint a receiver exists, but will usually be exercised only in very special cases.

Where a sole trustee is insolvent, a receiver will be appointed; L. R. 1 Ch. App. 325; or where the trustee is poor and of bad habits; 12 Sim. 363.

Equity will appoint a receiver as between co-tenants of real estate in cases of necessity; 17 N. J. Eq. 151; though the cases are rare; as in case of partition suits; 56 Cal. 32; and where one tenant excludes the other from possession; or is insolvent and refuses to account; or refuses to execute the necessary leases or interferes with the collection of rent; Smith, Rec. § 317.

It is said that equity will more willingly appoint a receiver of a mining property, than of ordinary property; 22 Cow. 194.

A receiver will be appointed for good cause in a suit for specific performance; 142 Ind. 324; 91 Hun 304; but see 4 Lea 597. Under special and urgent circumstances, a receiver may be appointed as between lessor and lessee; 57 Pa. 83.

In 2 Daly 425, the income of property of the defendant in divorce proceedings was placed in the hands of a receiver to provide for the wants of his family during the divorce litigation and after its termination; so in case of a decree for alimony; 28 Wis. 367.

A receiver will be appointed to take charge of the estate of a decedent, but "a strong case must be made out to induce the court to dispossess a trustee or executor who is willing to act"; 1 Woods 262, affirmed in 91 U. S. 254. Pending probate proceedings the property will in some cases be protected by the appointment of a receiver; 3 Md. Ch. 279. In 60 Pa. 172, where a will had been admitted to probate and an appeal was pending on an issue to try the validity of the will, a bill for the appointment of a receiver was refused.

A receiver may be appointed in lieu of an executor or administrator, where there has been waste or misappropriation; or such a result is probable; or the executor is insolvent and this is coupled with misapplication; 57 N. C. 390; but not for poverty alone; *id.*; or where an executor is dead or refuses to act; or where the executor is a non-resident; Smith, Rec. § 301.

A receiver will be appointed as between the vendee and vendor of realty where there is a contract of sale under which possession has been delivered and there is a default in payments, the vendee not being responsible; Smith, Rec. § 315.

The comptroller of the currency has power to appoint a receiver of a national bank, to take possession of its assets, collect its debts, and enforce the personal liability of the stockholders. In cases not within the national bank act, equity has jurisdiction to appoint receivers as in case of other corporations.

A receiver of a national bank is an officer and agent of the United States within R. S. § 380, requiring the district attorney

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to conduct all suits relating to national banks in which the United States or any of its officers or agents are parties; 150 U. S. 342. The closing of a national bank and the appointment of a receiver transfers the assets of the bank to him; 146 U. S. 499; he has a reasonable time to elect whether he will take property leased with an option to purchase or return it; 142 U. S. 313.

Generally any stranger to the suit may be appointed receiver. The court will not appoint attorneys and solicitors in the cause; 1 Hog. Ir. 322; masters in chancery; 6 Ves. 427; an officer of the corporation; 28 N. J. Eq. 166; 1 Paige, Ch. 517; though it is sometimes done especially in the case of large railroad systems. There is no general rule about appointing officers of the company as receivers: generally the courts refuse to do so; 65 Fed. Rep. 557. Counsel for an adverse party cannot act as receiver's counsel, and if he do he will not be paid out of the funds; 44 N. E. Rep. (Ill.) 871; a public officer charged with the duty of winding up an insolvent corporation may be appointed; 8 Fed. Rep. 465; so also a mortgagee; 2 Term 238; 9 Ves. 271; a trustee; 3 Ves. 516; 8 *id.* 72; but not ordinarily a party in the cause; 62 Ill. 408.

A receiver may be appointed without notice to the adverse party, though generally this should not be done; 41 Kan. 475. It will be done only where the defendant cannot be found or where there is danger of loss or irreparable injury; Smith, Rec. § 5. The appointment and retention of a receiver cannot be collaterally attacked; 52 Kan. 109.

A receiver has no power without the previous direction of the court to incur any expenses, except those absolutely necessary for the preservation and use of the property; 93 U. S. 352.

He is responsible for good faith and reasonable diligence. When the property is lost or injured by any negligence or dishonest execution of the trust, he is liable in damages; but he is not as of course responsible because there has been an embezzlement or theft. He is bound to such ordinary diligence as belongs to a prudent and honest discharge of his duties, and such as is required of all persons who receive compensation for their services; Story, Bailm. §§ 620, 621; see 80 N. Y. 458; but he is not the agent of an insolvent railroad company, and hence the company is not liable for damages occasioned by his negligence in operating the road; 58 N. Y. 61; nor is he personally liable; 63 N. Y. 281; but he is liable as receiver for loss as a carrier of goods; 99 Mass. 395. It is held that where an injury results from the fault or misconduct of a receiver appointed by a court of equity, the court may in its discretion either take cognizance of the question of the receiver's liability, and determine it, or permit the aggrieved party to sue at law; 11 C. E. Green 474; 4 Hun 378; 12 Am. Law Rev. 660.

In a railroad receivership the court will not order the receiver to pay the rental of a leased portion of the road, when he has not received therefrom sufficient to pay such rental, over and above operating expenses, and when the trustee of the leased property has asked the court for its surrender, but has permitted it to remain in the receiver's hands and has not taken possession of it under an order granted by the court: 145 U. S. 82.

Receivers are not assignees and are not bound to adopt a lease, but have an option to do so or not: 58 Fed. Rep. 280; 60 *id.* 966. A receiver is not compelled to adopt the contracts or leases of the railroad company, but is entitled to a reasonable time to elect, and a court will not order him to pay rental when the income is not sufficient to pay running expenses; 150 U. S. 287, 310. A receiver of an insolvent corporation, who takes possession of a leasehold estate held by the corporation, does not thereby become an assignee of the term, nor liable on the covenants of the lease, but is liable only for a reasonable rent while in possession; 40 N. E. Rep. (Mass.) 857; and in some cases for the rental specified in the lease; 163 Ill. 126. See LEASE.

A receiver is entitled to a reasonable time in which to elect whether or not to retain rolling stock formerly obtained by the company on periodical payments. If he retains it, he must pay the contract price; if he retains it for a time and then releases it, he must pay a fair price for its use, which is usually based on the mileage of the cars and is not the stipulated "rental" under the contract; 42 Fed. Rep. 6.

The receiver of a railroad is not liable for his refusal to carry the plaintiff on a ticket issued by the company before his appointment. The plaintiff has only the right to come in as a general creditor for the price of the ticket; 48 Pac. Rep. (Wash.) 53.

Freight money paid to a company before the appointment of a receiver does not entitle the company to sue the receiver for refusal to carry the goods; 51 Fed. Rep. 15.

Damages accruing during the time a railroad is in the hands of a receiver are part of the operating expenses, payable out of the income, if there is any; if not, out of the *corpus* of the property; 86 Fed. Rep. 1; 31 U. S. App. 644.

An act in South Carolina by which a judgment for personal injuries recovered in an action commenced twelve months from the time the injury was sustained, takes precedence of any mortgage deed or trust given to secure the payment of bonds, is an amendment of the charters of all railroad corporations theretofore created in that state, and any existing mortgagee must be taken to have given his assent to this provision.

Equity may order a receiver to buy rolling stock when necessary for the continued operation of the road and charge the price as a first lien on the property; 117 U. S. 434; 97 *id.* 146.

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Separate receivers will not be appointed in two suits against the same railroad company. The existing receivership should be extended; 65 Fed. Rep. 351.

A receiver appointed in a federal court is required to manage the property in accordance with the laws of the state wherein it is situate; 2 Supp. R. S. 613.

Where a receiver has been discharged and a railroad turned over to the company, it was held that the company was liable to an action by one who had suffered personal injury by the negligence of the employes while the road was in the hands of the receiver; 23 U. S. App. 143.

A mortgagee plaintiff at whose instance a receiver has been appointed for a railway cannot be compelled, if expenses of operation and management exceed the value of the property, to make good a deficit, unless the order of appointment was made on that condition, and he is not liable to the employes of the receiver for their wages; 47 Pac. Rep. (Ore.) 706.

Equity in appointing a receiver for a corporate property may, in its discretion, require mortgage bondholders to do equity by providing for the payment of claims for labor and supplies as a condition of the appointment; 99 U. S. 235. Orders appointing a receiver usually direct the payment of such preferred claims of this class as the master shall find to be equitably entitled; 22 Fed. Rep. 471; and it is the better practice to make the order then; 41 Fed. Rep. 551; they will be paid even if not provided for in the original decree; 106 U. S. 286; the order can be made afterwards; 41 Fed. Rep. 551. It has been held that there can be no preference as to the *corpus* of the property where payment was not provided for in the original record; 61 Fed. Rep. 150; nor *any* preference whatever; 69 Fed. Rep. 295; but it is also held that where the earnings have been diverted to the payment of interest or permanent improvements, preferred debts will be charged on the *corpus* if the current income is not sufficient to pay them; 107 U. S. 59; 111 *id.* 776; 125 *id.* 268; and sometimes even without showing a diversion of earnings; 106 U. S. 286.

Where a receiver is in under forclosure proceedings of a general mortgage on a system of railroads, preferred debts will be charged on the earnings of the entire system; 30 Fed. Rep. 332.

As to the classes of preferred debts, they are said to be those "which, when incurred, operated in a direct way to the advantage of the bondholder;" 38 Fed. Rep. 12; or which were "made to preserve the estate;" 88 Tenn. 138; or were payments "necessary in the ordinary administration of the affairs of the corporation;" 23 Fed. Rep. 521; or were reasonably "necessary to incur in order to keep the road in operation;" Short, Ry. Bonds § 624.

They include: Debts for freight and ticket balances; 106 U. S. 280; wages; 99 *id.* 235; 106 *id.* 286; wages and salaries of employes of every grade; 33 Fed. Rep. 778; counsel; 8 Fed. Rep. 579; 23 *id.* 521 (but not one employed for a special purpose; 138 U. S. 501; nor an attorney's fee for services rendered a year and a half before the receivership; 51 Fed. Rep. 58; but the annual salary of a regular counsel for a short time before receivership will be preferred; 23 Fed. Rep. 521; not a secretary of the company; 69 Fed. Rep. 295; nor a claim for legal services in advising parties who lent money to keep the road in operation; 138 U. S. 501); supplies and material for equipping, operating, and repairing the road; 99 U. S. 252; 69 Fed. Rep. 23; but not when furnished on credit payable at some definite period, in the future; 58 Fed. Rep. 473; 46 *id.* 101. The vendor of rolling stock under a car trust is not preferred as to the balance of payments due him; 99 U. S. 258. The rental of cars used by the receiver is held to be chargeable to the proceeds of the sale of the property as one of the expenses of the administration; 96 Ga. 630; as is also the unpaid rental during their use by the company before the receiver was appointed, and compensation for the ordinary wear and tear and the expense of returning the cars to the owner; *id.*; *contra*, as to rentals accruing before the receivership; 136 U. S. 89; 117 *id.* 479.

Rentals on a leased line will not be preferred; 58 Fed. Rep. 268; debts contracted for original construction will not be preferred; 134 U. S. 296; nor the price of a locomotive bought six months before the receivership; 44 Minn. 115; nor will claims for damages for breach of contract; 32 Fed. Rep. 566; nor those caused by the operation of the road before the appointment of the receiver; 14 *id.* 141; 28 *id.* 871; but see 20 *id.* 260, a case said to be of doubtful authority; Short, Ry. Bonds § 626.

A bondholder who pays taxes will be subrogated to the lien of the state; 100 Ill. 511.

The ordinary period within which such claims are allowed is six months; 6 Biss. 535; but claims have been awarded a preference after eight months; 8 Hughes 320; eleven months; 111 U. S. 776; nearly two years; 41 Fed. Rep. 551; two years; 83 *id.* 605; three years; 99 U. S. 389. There is no fixed time within which a loan priority can be given; it is a question of reasonable time; 70 Fed. Rep. 741.

Preferred debts do not come in before mortgage debts because they have a lien; 75 Va. 701.

The doctrine of Fosdick *v.* Schall, 99 U. S. 252 (first suggested by Judge Dillon), is that the income of a railroad company, out of which a mortgage is to be paid, is the net income obtained by deducting from gross earnings what is required for operating expenses, proper equipment, and useful improvements. Every mortgagee impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim on the income. Also, that when

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there is a diversion of income from the payment of current debts to pay fixed charges, thus increasing the security of the latter, this must be returned to the current debt fund before the mortgagee is paid. This was followed in 111 U. S. 781, where it was held that a supply claim incurred prior to the receivership was a charge on the income coming into the receiver's hands, as well as that received before his appointment. Such a claim is payable out of the receiver's surplus earnings, whether or not, during the company's operation of the road, there was a diversion of income, either in paying interest or in betterments; and even where the company has misappropriated such income to purposes not beneficial to the mortgagee; 170 U. S. 355. See 106 *id.* 286.

The dominant feature of the doctrine, as applied in 111 U. S. 776, is said to be that where expenditures were made which were essentially necessary to enable the road to be operated as a continuing business, and it was the expectation of the creditors that the indebtedness would be paid out of current earnings, a superior equity arises in favor of the materialman as against the mortgage bonds in the income arising both before and after the appointment of a receiver; 170 U. S. 355. This equity arises upon the tacit or express understanding that the current earnings would be appropriated for the payment of the debt. Even though the mortgage provides for a sequestration of income for the benefit of the bondholders, that income, until strict foreclosure or a sale of the road, is charged with the prior equity of unpaid supply claims; *id.* Equity will confine itself within very restricted limits in the application of this doctrine; 136 U. S. 89; 149 U. S. 95; in both of which cases it was not, under special circumstances, applied to car trust rentals prior to the suit for foreclosure. To the same effect, 48 Am. & E. R. Cas. (Tex.) 656.

A receiver of a railroad on coming into possession of earnings should pay out of the same all debts for supplies contracted within a reasonable time before the receivership, before making any expenditure for betterments or interest on mortgages; 76 Fed. Rep. 502.

The court may authorize receivers, in their discretion, to pay the current payrolls and supply accounts incurred in the operation of the road within four months before their appointment; 75 Fed. Rep. 54. Current operating expenses for a limited time before the appointment of a receiver under a foreclosure bill may be charged on the income earned during the receivership or upon the *corpus* of the property, in preference to the liens of the mortgage; 74 Fed. Rep. 335. A receiver of a railroad is properly authorized to pay all balances due to other carriers and connecting lines, and should be allowed to pay, from the proceeds of the sale of receiver's certificates, charges for freight on cars, coal, oil, etc., consigned to the insolvent company and due before the appointment of a temporary receiver; 8 U. S. App. 547.

Mileage due under a contract for the use of Pullman cars is not distinguishable from car rentals, and cannot be made a preferred claim on the appointment of a receiver; 84 Fed. Rep. 18; 149 U. S. 95.

A cable for a cable railway, if necessary, is entitled to a preference, though no diversion of income is shown; and the lapse of two years will not bar the claim; 83 Fed. Rep. 365.

The payment of unpaid debts for operating expenses accrued within ninety days, and of ticket and freight balances due, are necessary for the preservation of the mortgaged property, in order to keep it a going concern; 117 U. S. 456.

The doctrine has in some courts been extended with great freedom, and the granting of preferences and the issue of receiver's certificates carried to such an extent as to give rise in the public mind to an erroneous view of the powers of courts of equity in this regard. In 80 Fed. Rep. 624, the circuit court of appeals remarks that "the liberality with which this equity was extended by some of the circuit courts in favor of general creditors, induced the supreme court in Kneeland *v.* Trust Co., 136 U. S. 89, to call attention to the necessity of preserving the general priority of contract liens over all but a limited class of claims. Through Mr. Justice Brewer, the court said: 'The appointment of a receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens. Because, in a few specified and limited cases, this court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver acquire power to give such preference to any general and unsecured claims. It has been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. . . . It is the exception, and not the rule, that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens, for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable power, has unlimited discretion in this matter of the displacement of vested liens.'" While the court appointing an ancillary receiver will protect local creditors having prior rights or liens, it will recognize no distinction between foreign and domestic creditors whose claims stand on equal footing, and it rests in the court's discretion whether it will distribute the assets or transmit them to a primary receiver; 88 Fed. Rep. 130.

The rule has heen held to apply only to railroads; 128 U. S. 416; not to manufacturing corporations; 35 Fed. Rep. 436; 42 *id.* 372; nor to street railways; 84 Fed. Rep. 257; nor to steamship lines; 50 Fed. Rep. 312; nor to a hotel company; 106 N.

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Y. 423; it is held applicable to street railways; 8 Utah 15; 87 Fed. Rep. 269. In a recent Alabama case it has been held applicable to all public corporations; 39 L. R. A. 628.

See MORTGAGE,

*Suits.* A receiver must ordinarily obtain leave of the appointing court before instituting a suit; but not where he sues for debt due him in his official capacity; L. R. 12 Eq. 614; or sues in the appointing court with its sanction; Smith, Rec. § 69; 86 Mo. 505.

It was formerly held that a receiver had no standing in a foreign court; Smith, Rec. § 73; but it is said to be now "well established that a receiver may invoke the aid of a foreign court in obtaining possession of property or funds within its jurisdiction to which he is entitled," but not against the creditors of a non-resident debtor who are seeking to subject property to the payment of their debts; 123 Ind. 477; and this is a matter of comity; 33 N. J. Eq. 155.

Late cases hold that a receiver appointed in one state can sue in another by comity, in respect of property rights in the latter state, provided the domestic creditors are protected; 123 N. Y. 37; 55 How. Pr. 52; 18 N. Y. L. J. 1059 (App. Div.).

It is held that an Illinois receiver appointed at the suit of a non-resident creditor may hold the assets against an Illinois creditor; 39 N. E. Rep. (Ill.) 1091. It is the safer course in important cases to secure an ancillary receivership in the foreign state, and such is a common practice.

In 161 Mass. 224, it was held that the ancillary receiver should remit the fund to the home receiver for distribution, if it should appear that Massachusetts claimants would there be placed on an equality with home claimants. This case is said to have gone to the limits of comity; Smith, Rec. § 73. Where a receiver takes property to a foreign state his possession will be protected; 75 Pa. 112; 108 Mo. 317; *contra*, 81 Cal. 551.

One who has a legal cause of action sounding merely in tort against a receiver appointed by a court of chancery has a right to pursue his redress by an action at law. Such action cannot be brought without the chancellor's permission, but this cannot be refused, unless the claim preferred be manifestly unfounded; 16 Wall. 218. See 25 Alb. L. J. 46.

A receiver cannot be sued without the consent of the appointing court; 2 Idaho 590; 149 U. S. 473; 134 Ind. 672; but there are exceptions to this rule: By act of congress, March 3d, 1889, every receiver appointed by a federal court may be sued without leave of court, but subject to the general equity jurisdiction of the court which appointed him. This act extends to any court of competent jurisdiction, state or federal, and not merely to the appointing court; 141 U. S. 327; 73 Tex. 47. It applies to actions for personal injuries to passengers; 121 Mo. 1; suits on patents may be brought without leave; 66 Fed. Rep. 788. Receivers operating a railroad in another state are liable to action there; 99 Mass. 395; property in another state, in the hands of a receiver, may be garnisheed there; 5 Colo. 14; where a receiver has taken possession of property not specified in the decree appointing him; 111 Mass. 508.

It is held that suing without leave is mere contempt of court and does not affect the jurisdiction of the court in which the suit is brought; 5 Colo. 14; and that the proceedings are regular till the appointing court interferes; 60 N. Y. 88; other cases hold that there is no jurisdiction till leave is granted; 104 U. S. 126; 96 Ind. 69; 14 How. 52. Leave to sue rests in the discretion of the appointing court; 68 Wis. 44; ordinarily leave will be granted to sue only in the appointing court; 21 Fed. Rep. 354.

Under the strict common law, a receiver must sue in the name of the corporation or firm of which he is receiver; 115 U. S. 499; but in states having codes of procedure he may sue in his own name, as having the beneficial interest; 5 Thomps. Corp. § 6979.

Suit should be brought against the company, but service made on the receiver; 141 U. S. 327. The receiver brings suit in the company's name but for his own use; 44 Pa. 294; but he sues in his own name on his own contracts; 75 Pa. 112; an attachment execution should be served on him; 167 Pa. 589.

The receiver of a corporation appointed by a court of equity cannot sue in his own name to recover property of the corporation which has never been in his possession nor been assigned to him, where authority to bring such suit has not been conferred on him by statute or by decree of court; 157 Mass. 77. Actions against the receiver are, in law, actions against the receivership, or the funds in the hands of the receiver, and his contracts, misfeasances, negligences, and liabilities are official and not personal; and judgments against him as receiver are payable only out of the funds in his hands; 141 U. S. 327. The corporation is not liable for the receiver's contracts; 58 Ill. 61.

The court can, by summary proceedings, compel payment by a purchaser from a receiver of the price of goods sold and delivered; 36 Atl. Rep. (N. J. Ch.) 937.

Where a circuit court has appointed a receiver of a steamer and all other property of a railroad company, and the steamer came into collision with another vessel and was libelled in admiralty, it was held that the circuit court did not err in declining to issue an injunction against the admiralty proceedings; 21 U. S. App. 466.

Where property is in the hands of a receiver, an independent suit cannot be brought to foreclose a mortgage on it, even in the same court; 86 Fed. Rep. 390.

Judgment against a corporation obtained

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between the entry of an order appointing a receiver therefor and the approval of his bond creates no lien on the property; 80 Fed. Rep. 441.

Where a receiver has been guilty of a public nuisance, the court will enjoin him therefrom; 22 U. S. App. 154.

A purchaser of a claim against a railroad company which is in the hands of a receiver is not estopped to attack the validity of an order appointing the receiver made before he became a party to the action; 47 Pac. Rep. (Cal.) 872.

It is not inconsistent with the relations between a receiver and the court appointing him that he should appeal from an order of such court granting an injunction against him; 22 U. S. App. 154.

The appointment of a receiver of a corporation fixes the status and priorities of its creditors; 184 Pa. 1.

A circuit court of the United States has no power to appoint a receiver of property already in the possession of a receiver duly and previously appointed by a state court; 157 U. S. 169.

A receiver appointed for one corporation cannot act for another; 24 U. S. App. 341.

An order fixing the compensation of a receiver, and taxed as such in the costs, is a final judgment upon a collateral matter arising out of the action and appealable by any party interested in the fund; 47 Pac. Rep. (Cal.) 872. As to a receiver's compensation, see 32 A. & E. Corp. Cas. 532.

The appointment of a receiver does not abate personal actions against the debtor, and the receiver has no status in court thereunder until he is made a party thereto on his own application. The plaintiff may proceed to final judgment without him; 87 Fed. Rep. 843.

In Smith, Receiverships, will be found references to state legislation relating to the appointment of receivers.

See Smith, Receiverships; High; Gluck & Becker, Receivers; ROLLING STOCK; MORTGAGE; LEASE; MERGER; RECEIVERS' CERTIFICATES; REORGANIZATION.

**RECEIVER GENERAL OF THE DUCHY OF LANCASTER.** An officer of the Duchy court, who collects all the revenues, fines, forfeitures, and assessments within the duchy.

**RECEIVER GENERAL OF THE PUBLIC REVENUE.** An officer appointed in every county in England to receive the taxes granted by parliament, and remit the money to the treasury.

**RECEIVER OF STOLEN GOODS, In Criminal Law.** By statutory provision, the receiver of stolen goods, knowing them to have been stolen, may be punished as the principal, in perhaps all the United States.

To make this offence complete, the goods received must have been stolen, they must have been received by the defendant, and the receiver must know that they had been stolen.

A boy stole a chattel from his master, and after it had been taken from him in his master's presence, it was, with the master's consent, restored to him again, in order that he might sell it to the defendant, to whom he had been in the habit of selling similar stolen articles. He accordingly sold it to the defendant, who, being indicted for feloniously receiving it of an evil-disposed person, knowing it to be stolen, was convicted, and, notwithstanding objection made, sentenced; Car. & M. 217. But this case has since been held not to be law, and a defendant not to be liable to conviction under such circumstances, inasmuch as at the time of the receipt the goods were not *stolen goods*; Dearsl. 468.

The goods stolen must have been received by the defendant. *Prima facie*, if stolen goods are found in a man's house, he, not being the thief, is a receiver; 1 Den. Cr. Cas. 601. And though there is proof of a criminal intent to receive, and a knowledge that the goods were stolen, if the *exclusive* possession still remains in the thief, a conviction for receiving cannot be sustained; 2 *id.* 37. So a principal in the first degree, *particeps criminis*, cannot at the same time be treated as a receiver; 2 *id.* 459. Where a prisoner is charged in two counts with stealing and receiving, the jury may return a verdict of guilty on the latter count, if warranted by the evidence, although the evidence is also consistent with the prisoner having been a principal in the second degree in the stealing; Bell, Cr. Cas. 20. See 48 Ohio St. 220. But a person having a *joint* possession with the thief may be convicted as a receiver; Dearsl. 494. The actual manual possession or touch of the goods by the defendant, however, is not necessary to the completion of the offence of receiving; it is sufficient if they are in the actual possession of a person over whom the defendant has a control, so that they would be forthcoming if he ordered it; *id.* 494. Husband and wife were indicted jointly for receiving. The jury found both guilty, and found, also, that the wife received the goods without the control or knowledge of the husband, and apart from him, and that "he afterwards adopted his wife's receipt." It was held that this finding did not warrant the conviction of the husband; Dearsl. & B. 329.

The offence of receiving stolen property involves a criminal intent as a material element, such as an intent to aid the thief, of obtaining a reward for restoring it to the owner, or in some way to derive profit from the act; 27 Tex. App. 193. See 58 Ark. 513.

It is almost always difficult to prove guilty knowledge; and that must, in general, be collected from circumstances. If such circumstances are proved which to a person of common understanding and prudence, and situated as the prisoner was, must have satisfied him that they were stolen, this is sufficient. For example, the receipt of watches, jewelry, large quantities of money, bundles of clothes of various

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kinds, or personal property of any sort, to a considerable value, from boys or persons destitute of property and without any lawful means of acquiring them, and specially if bought at untimely hours, the mind can arrive at no other conclusion than that they were stolen. This is further confirmed if they have been bought at an under-value, concealed, the marks defaced, and falsehood resorted to in accounting for the possession of them; Alison, Cr. Law 330; 2 Russ. Cr. 253; 1 Fost. & F. 51; Whart. Cr. L. 983, 986. See 135 Ill. 243.

Evidence that other stolen goods were found in defendant's possession is admissible to show guilty knowledge; 38 S. C. 330.

In order to sustain a prosecution for receiving stolen property, it is necessary to prove that defendant knew it was stolen, but such knowledge need not be personal or actual; 50 Mo. App. 186.

At common law, receiving stolen goods, knowing them to have been stolen, is a misdemeanor; 2 Russ. Cr. 253. But in Massachusetts it has been held to partake so far of the nature of felony that if a constable has reasonable grounds to suspect one of the crime of receiving or aiding in the concealment of stolen goods, knowing them to be stolen, he may without warrant arrest the supposed offender; 5 Cush. 281. See [1892] 2 Q. B. 597; RECENT POSSESSION, etc.

**RECEIVERS' CERTIFICATES.** Acknowledgments of indebtedness issued by a receiver under the order of the court by which he was appointed, either directly in discharge of obligations incurred in the management of the property, or for borrowing money for the maintenance and operation of the property, and redeemable out of its proceeds. They may be made a lien on the property when that is necessary for its proper management and operation in the interest of all who may be concerned in it, as directed in the order under which they are issued, and are usually made a first charge on the fund in the receiver's hands, after payment of the operating expenses.

In the case of property such as a railroad, which is of a character to give the public a right to its continued operation and use, the court in a proper case may impose the expenses and obligations of operation upon the property regardless of the question of who may be the ultimate owner of the property; 115 Cal. 285. A court of equity has power to appoint a receiver for a railroad and to authorize the issue of certificates for raising money necessary for the management and preservation of the road, and make the debt thereby created a first lien; 97 U. S. 146; 117 *id.* 434. But a court of equity cannot order the issue of certificates, to be a paramount lien, by the receiver of an insolvent private corporation, where the business is affected with no public interest, unless such issue is essential to preserve the property or franchises; 68 Fed. Rep. 623; as against lienors who have not assented to their issue; 78 *id.* 62.

In the case of a mining company the court cannot, against the objection of even a small minority of the mortgage bondholders, authorize the issue of certificates to be a first lien, to enable a continuance of the operation of the mines; 50 Fed. Rep. 481; nor can such certificates be issued for payment of taxes in the case of the foreclosure of the second mortgage of a private corporation, to be a paramount lien, against the consent of the first mortgagee; 70 Fed. Rep. 2; or in the like case for carrying out contracts for improvements made with purchasers of the company's land; *id.*; S. C. 36 U. S. App. 61. In the case of a railroad such certificates cannot be issued and given a first lien, on an application *ex parte* without notice to lienholders, the proceeds to be used for the maintenance of the road; 45 S. C. 464.

Where a mine and railroad were operated in connection with each other by the same company, certificates were issued as a charge upon both properties; 86 Va. 754.

If the order authorizing certificates for borrowing money to carry on the business does not limit their payment to any particular fund, the right of *bona fide* holders for value to resort to the general assets as against general creditors will not be qualified by a *quasi*-limitation apparent on the face of the certificates; 22 W. N. C. Pa. 31; S. C. 12 Atl. Rep. (Pa.) 271.

When the receiver is appointed on petition of a stockholder, and earnings have been used to pay interest on the bonds, there is no equity which requires payment of past due claims for labor and materials by the issue of receivers' certificates therefor, payable out of the *corpus* of the property; there is an equity to pay out of net earnings for labor necessary to keep the property in actual operation, but such earnings cannot be anticipated by the issue of receivers' certificates unless by agreement of parties; 59 Fed. Rep. 25; nor can such certificates be issued against the opposition of first mortgage bondholders for new equipment and construction of a narrow gauge road of which new owners would manifestly change the gauge to the standard, so that the proposed improvements would be useless; *id.* Except under extraordinary circumstances, a court ought not to order the issue of receivers' certificates, with a prior lien, to complete an unfinished railroad; 100 U. S. 605. Such an order was made in 2 Dill. 448, where it was necessary to complete the road in order to secure a land grant; and in 2 Woods 506, to preserve a railroad and complete some inconsiderable portion of it.

Certificates issued, under an order made without notice to creditors, for debts prior to the receivership, give the holders no preference over other creditors; 64 Fed. Rep. 25. They cannot be issued, with priority over existing mortgages, for wages accrued before the appointment of the receiver or for deficiency of supplies; 1 Wall.

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254; 94 *id.* 734; 97 *id.* 146; 107 *id.* 592; 96 N. Y. 49; 95 Ill. 134. Certificates issued, not to preserve the property, but to pay unsecured claims, cannot be given priority over an antecedent mortgage; 81 Mo. 559; when in excess of the amount authorized by the court they cannot be enforced against the property unless the proceeds were used for its benefit; 77 Hun 144. They cannot be issued to pay interest on bonds; 76 Fed. Rep. 418.

Allowances to receivers and their counsel as compensation for services are taxable as costs, and have priority over receivers' certificates; 70 Fed. Rep. 643; and certificates issued under an order not giving them priority over other claims, are not entitled to preference over debts of the receiver contracted in carrying on the business; 27 Pittsb. L. J. Pa. N. S. 396; and persons taking such certificates in exchange for certificates before issued under an order giving them a preference, are not entitled to priority even under the first order; *id.*

The holder of certificates is put upon inquiry as to the whole course of the proceedings of a litigation in which they were issued, and is charged with notice thereof; 58 Fed. Rep. 6; and when the order for the issue was *ex parte*, and the proceeds were improperly applied, a holder who made no demand for three years and until the foreclosure sale was confirmed and a decree of distribution entered, was guilty of gross laches and estopped by the decree from asserting his claim; *id.* Where defendants held receivers' certificates for a right of way and agreed that they should be postponed to other certificates to be issued to plaintiffs, but on a sale defendants were paid for the right of way and plaintiffs' certificates were not paid in full, the latter were entitled to recover from the defendants the amount so paid them; 137 Ind. 159.

Holders of certificates cannot enjoin a sale under a decree in favor of an intervening mechanics' lien creditor whose claim was prosecuted before the certificates were authorized; 62 Fed. Rep. 686.

It has been held that a chancellor cannot authorize a receiver to borrow money by selling interest-bearing receivers' certificates of indebtedness at less than their face value; 53 Ala. 237; but see 2 Woods 506.

They are not negotiable, and in fact lack almost every characteristic of negotiable paper; Gluck & Beck. Rec. § 95.

Purchasers of certificates are not bound to see to the application of the purchase money; *id.*; 117 U. S. 434. See RECEIVERS; ROLLING STOCK; MORTGAGE.

**RECEIVING.** Taking or having. 23 Atl. Rep. (Neb.) 735.

**RECENT POSSESSION OF STOLEN PROPERTY. In Criminal Law.** Possession of the fruits of crime recently after its commission is *prima facie* evidence of guilty possession; and if unexplained, either by direct evidence, or by the attending circumstances, or by the character and habits of life of the possessor, or otherwise, it is usually regarded by the jury as conclusive. 1 Tayl. Ev. § 122. See 1 Greenl. Ev. § 34; 162 U. S. 615.

It is manifest that the force of this rule of presumption depends upon the *recency* of the possession as related to the crime, and upon the *exclusiveness* of such possession.

If the interval of time between the loss and the finding be considerable, the presumption, as it affects the party in possession of the stolen property, is much weakened, and the more especially so if the goods are of such a nature as, in the ordinary course of things, frequently to change hands. From the nature of the case, it is not possible to fix any precise period within which the effect of this rule of presumption can be limited; it must depend not only upon the mere lapse of time, but upon the nature of the property and the concomitant circumstances of each particular case. Thus, where two ends of woollen cloth in an unfinished state, consisting of about twenty yards each, were found in the possession of the prisoner two months after they had been stolen, it was held that the prisoner should explain how he came by the property; 7 C. & P. 551. But where the only evidence against a prisoner was that certain tools had been traced to his possession three months after their loss, an acquittal was decided; 3 C. & P. 600. And so, on an indictment for horse-stealing, where it appeared that the horse was not discovered in the custody of the accused until after six months from the date of the robbery; 3 C. & K. 318; and where goods lost sixteen months before were found in the prisoner's house, and no other evidence was adduced against him, he was not called upon for his defence; 2 C. & P. 459.

It is obviously essential to the just application of this rule of presumption that the house or other place in which the stolen property is found, be in the exclusive possession of the prisoner. Where they are found in the apartments of a lodger, for instance, the presumption may be stronger or weaker according as the evidence does or does not show an exclusive possession. Indeed, the finding of stolen property in the house of the accused, provided there were other inmates capable of committing the larceny, will of itself be insufficient to prove his possession, however recently the theft may have been effected, though, if coupled with proof of other suspicious circumstances, it may warrant the prisoner's conviction even though the property is not found in his house until after his apprehension; 3 Dowl. & R. 572; 2 Stark. 139. The force of this presumption is greatly increased if the fruits of a series of thefts be found in the prisoner's possession, or if the property stolen consist of a multiplicity of miscellaneous articles, or be of an uncommon kind, or, from its value or other circumstances, be unsuited to the station of the party.

Such possession of stolen goods may be

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indicative of any more aggravated crime which has been connected with theft. Upon an indictment for arson, proof that property which was in the house at the time it was burnt was soon afterwards found in the possession of the prisoner was held to raise a probable presumption that he was present and concerned in the offence; 2 East, Pl. Cr. 1035. A like inference has been raised in the case of murder accompanied by robbery; Wills, Circ. Ev. 72, 241; in the cases of burglary and shopbreaking; 4 B. & Ald. 122; 9 C. & P. 364; 1 Mass. 106; and in the case of the possession of a quantity of counterfeit money; Russ. & R. 308; Dearsl. 552; but the recent possession of stolen property by one charged with receiving it, knowing it to be stolen, raises no presumption that he knew that it had been stolen; 89 Mo. 595.

Upon the principle of this presumption, a sudden and otherwise inexplicable transition from a state of indigence, and a consequent change of habits, is sometimes a circumstance extremely unfavorable to the supposition of innocence; 11 Metc. 534. See 1 Gray 101.

But this rule of presumption must be applied with caution and discrimination; for the bare possession of stolen property, though recently stolen, uncorroborated by other evidence, is sometimes fallacious and dangerous as a criterion of guilt; 2 Hale, Pl. Cr. 289, where it is said: "If a horse be stolen from A, and the same day B be found upon him, it is a strong presumption that B stole him; yet," adds that excellent lawyer, "I do remember before a learned and very wary judge, in such an instance, B was condemned and executed at Oxford assizes, and yet, within two assizes after, C being apprehended for another robbery, and convicted, upon his judgment and execution confessed he was the man that stole the horse, and, being closely pursued, desired B a stranger, to walk his horse for him while he turned aside upon a necessary occasion, and escaped; and B was apprehended with the horse, and died innocently."

The rule is occasionally attended with uncertainty in its application, from the difficulty attendant upon the positive identification of articles of property alleged to have been stolen; and it clearly ought never to be applied where there is reasonable ground to conclude that the witnesses may be mistaken, or where, from any other cause, identity is not satisfactorily established. But the rule is nevertheless properly applied in peculiar circumstances, where, though positive identification is impossible, the possession of the property cannot but be considered of a guilty character: as in the case of persons employed in carrying sugar and other articles from ships and wharves. Cases have frequently occurred of convictions of larceny, in such circumstances, upon evidence that the parties were detected with property of the same kind upon them recently after coming from such places, although the identity of the property as belonging to any particular person could not otherwise be proved.

It is seldom, however, that juries are required to determine upon the effect of evidence of the mere recent possession of stolen property: from the very nature of the case, the fact is generally accompanied by other corroborative or explanatory circumstances of presumption. If the party have secreted the property; if he deny it is in his possession, and such denial is discovered to be false; if he cannot show how he became possessed of it; if he give false, incredible, or inconsistent accounts of the manner in which he acquired it, as that he had found it, or that it had been given or sold to him by a stranger or left at his house; if he has disposed of or attempted to dispose of it at an unreasonably low price; if he has absconded or endeavored to escape from justice; if other stolen property, or picklock keys, or other instruments of crime, be found in his possession; if he were seen near the spot at or about the time when the act was committed, or if any article belonging to him be found at the place or in the locality where the theft was committed, at or about the time of the commission of the offence: if the impression of his shoes or other articles of apparel correspond with marks left by the thieves; if he has attempted to obliterate from the articles in question marks of identity, or to tamper with the parties or the officers of justice: these and all like circumstances are justly considered as throwing light upon and explaining the fact of possession; and render it morally certain that such possession can be referable only to a criminal origin, and cannot otherwise be rationally accounted for; 1 Benn. & H. Lead. Cr. Cas. 371, where this subject is fully considered.

**RECEPTUS** (Lat.). **In Civil Law.** The name sometimes given to an arbitrator, because he had been received or chosen to settle the differences between the parties. Dig. 4, 8; Code 2, 56.

**RECESSES.** The time in which the court is not actually engaged in business. 69 Cal. 55.

**RECESSION.** A re-grant; the act of returning the title of a country to a government which formerly held it, by one which has it at the time; as, the recession of Louisiana, which took place by the treaty between France and Spain, of October 1, 1800. See 2 White, N. Rec. 516.

**RECIDIVE. In French Law.** The state of an individual who commits a crime or misdemeanor, after having once been condemned for a crime or misdemeanor; a relapse.

Many statutes provide that for a second offence punishment shall be increased: in those cases the indictment should set forth the crime or misdemeanor as a second offence.

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The second offence must have been committed after the conviction for the first; a defendant could not be convicted of a second offence, as such, until after he had suffered a punishment for the first; Dalloz, Dict.

**RECIDIVIST.** A habitual criminal. One who makes a trade of crime. Reformation in such cases is rare. Such criminals generally either succumb to tuberculosis or heart disease in prison or end in an asylum. Sometimes attacks of acute mania or melancholia have a good influence upon such persons, but generally after an attack of acute insanity they are found to be still subject to their criminal tendencies. McDonald, Criminology, ch. viii. As to cases of innate tendency to particular crimes or special propensities, see *id.* pt. ii. ch. i.–ii.

**RECIPROCAL CONTRACT. In Civil Law.** One by which the parties enter into mutual engagements.

They are divided into perfect and imperfect. When they are perfectly reciprocal, the obligation of each of the parties is equally a principal part of the contract, such as sale, partnership, etc. Contracts imperfectly reciprocal are those in which the obligation of one of the parties only is a principal obligation of the contract: as, mandate, deposit, loan for use, and the like. In all reciprocal contracts the consent of the parties must be expressed. Pothier, Obl. n. 9; La. Civ Code, art. 1758, 1759. See CONTRACT; MUTUAL CONSENT.

**RECIPROCITY.** Mutuality; state, quality, or character of that which is reciprocal.

The states of the Union are bound to many acts of reciprocity. The constitution requires that they shall deliver to each other fugitives from justice; that the records of one state, properly authenticated, shall have full credit in the other states; that the citizens of one state shall be citizens of any state into which they may remove. In some of the states, as in Pennsylvania, the rules with regard to the effect of a discharge under the insolvent laws of another state are reciprocated; the discharges of those courts which respect the discharges of the courts of Pennsylvania are respected in that state.

*Between nations.* Mutual concessions made by nations in favor of the importation of the products and manufactures of each other.

The president of the United States has been authorized by various tariff acts to enter into reciprocal agreements with foreign countries, concerning the mutual importation of manufactures and products, and to suspend certain provisions of the tariff laws, accordingly. By act of July 24, 1897, he may enter into such agreements with the governments of countries exporting certain specified products, and by proclamation reduce the tariff rates thereon during such agreement, to a lower schedule than specified in the act. He may, also, within two years of the passage of the act, with the consent of the senate, enter into treaties with foreign governments for a specified period of not exceeding five years, which will provide for a reduction of not over twenty per cent. on the tariff rates imposed by the act upon certain articles and for the addition of any such articles to the free list.

**RECITAL.** The repetition of some former writing, or the statement of something which has been done. It is useful to explain matters of fact which are necessary to make the transaction intelligible. 2 Bla. Com. 298; Big. Estop. 365.

IN CONTRACTS. The party who executes a deed is bound by the recitals of essential facts contained therein; Com. Dig. *Estoppel* (A 2); 2 Co. 33; 8 Mod. 311. The amount of consideration received is held an essential fact under this rule, in England; 2 Taunt. 141; 5 B. & Ald. 606; 1 B. & C. 704; 2 B. & Ad. 544; otherwise in the United States; 5 Cush. 431; 6 Me. 364; 10 Vt. 96; 4 N. H. 229, 397; 8 Conn. 304; 14 Johns. 210; 7 S. & R. 311; 1 Harr. & G. 139; 1 M'Cord 514; 15 Ala. 498; 10 Yerg. 160; 7 Monr. 291. But see 1 Hawks 64; 11 La. 416; 2 Ohio 350; 3 Mas. 347.

IN DEEDS. The recitals in a deed of conveyance bind parties and privies thereto, whether in blood, estate, or law; Whart. Ev. 1039; 1 Greenl. Ev. § 23; Tayl. Ev. 119; and see 3 Ad. & E. 265; 4 Pet. 1. See ESTOPPEL. Recitals in a deed bind parties and claimants under them, but not strangers claiming by an adverse title, or those who claim by title anterior or paramount to the deed; 124 U. S. 261. Recitals of preliminary proceedings in tax deeds are not evidence of the facts recited; 61 Vt. 530; 101 N. C. 35; 69 Tex. 103.

Recitals are deemed to be made upon suggestion of the grantee; 4 Pet. 87; and are part of the title; 4 Binn. 231; they are evidence against the grantee; 58 Pa. 304; and parol evidence is not admissible to contradict them.

If the recitals of a patent nullify its granting clause, the grant falls; 104 U. S. 644. See 39 Fed. Rep. 70. If the operative parts of a deed are ambiguous, the recitals may be referred to as a key to the intention of the parties; 5 Russ. 344; but not if the operative parts are clear; 19 L. J. Q. B. 462; and the same rule applies to statutes; 4 Ch. D. 592. If they are at variance, the operative parts must be effective and the recitals ineffective, but the latter may explain ambiguities; L. R. 1 Eq. 183; in such case, in a conveyance, if the recital is clear as to what is meant and the operative parts go beyond the recitals, the conveyance must be restricted; L. R. 1 Eq. 361; 29 Ch. D. 514. See, also, 17 Q. B. D. 286. A misrecital in a deed may influence its construction; Elphins. Interpr. of Deeds 139.

The recital of the payment of the consideration money is evidence of payment against subsequent purchasers from the same grantor; 54 Pa. 19; but not against third parties, when it is necessary for the party claiming under the deed to show full payment before receiving notice of an adverse equity; 28 Pa. 425. A deed of de-

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feasance which professes to recite the principal deed must do so truly; Cruise, Dig. tit. 32, c. 7, § 28. See 3 Pa. 425; 3 Ch. Cas. 101; Co. Litt. 352; Com. Dig. *Fait* (E 1).

In Statutes. A mere recital in an act, whether of fact or of law, is not conclusive, unless it is clear that the legislature intended that the recital should be accepted as a fact in the case; 150 U. S. 483.

In Bonds. The recitals in corporate bonds may constitute notice to holders of facts which will affect their rights. See 99 U. S. 434; 175 Pa. 318. One who buys bonds which recite that they are for the principal and interest of other bonds, is chargeable with notice that the former indebtedness was overdue; 154 Ill. 301. It has been held by the supreme court of the United States that recitals in county bonds prescribed by statute and subject to the determination of county officers, have been complied with; 170 U. S. 593. In that case, the court said:—"By a long series of decisions such recitals are held conclusive, in favor of a *bona fide* holder of bonds, that precedent conditions, prescribed by statute and subject to the determination of those county officers, have been fully complied with. For instance, whether an election has been held, whether at such an election a majority voted in favor of the issue of bonds, whether the terms of the subscription have been complied with, and matters of a kindred nature which either expressly or by necessary implication are to be determined in the first instance by the officers of the county, will in favor of a *bona fide* holder be conclusively presumed to have been fully performed, provided the bonds contain recitals similar to these in the bonds before us." The court applied the doctrine of the conclusive effect of such recitals not only to matters transpiring before the placing of the bonds in the hands of the trustee, such as the election, etc., but also to conditions which it was urged were to be performed subsequently to the execution, such as that the bonds should not be binding until the railway should have been so completed through the county, that a train of cars had passed over it. See, also, 92 U. S. 484; 97 *id.* 96; 102 *id.* 278; 110 *id.* 608; 133 *id.* 523; 156 *id.* 692; 158 *id.* 312; Bonds; Municipal Bonds.

In Judicial Records. A recital in the record of a court imports absolute verity, and all parties thereto are estopped from denying its truth; 15 So. Rep. [Ala.] 450; and the recitals of the record of a trial court are conclusive on the parties as to the term at which a decree was rendered; and if the record is incorrect, the remedy is by a proper proceeding in the trial court to secure a correction; 35 Neb. 822.

In Pleading. *In Equity.* The decree formerly contained a recital of the pleadings. This usage is now mostly abolished, though it obtains largely in New Jersey.

*At Law.* Recitals of deeds or specialties bind the parties to prove them as recited; Com. Dig. *Pleader* (2 W. 18); 4 East 585; 3 Den. 356; 9 Pa. 407; Hempst. 294; 13 Md. 117; see 6 Gratt. 130; and a variance in an essential matter will be fatal; 18 Conn. 395; even though the variance be trivial; Hempst. 294; 1 Chitty, Pl. 424. The rule applies to all written instruments; 7 Pa. 401; 11 Ala. N. S. 529; 1 Ind. 209; 32 Me. 283; 6 Cush. 508; 24 N. J. L. 218; 16 Ill. 495; 36 N. H. 252; not, it seems, where it is merely brought forward as evidence, and is not made the ground of action in any way; 11 Ill. 40. See 31 Me. 290.

Recitals of public statutes need not be made in an indictment or information; Dy. 155 *a*, 346 *b*; Cro. 187; 1 Wms. Saund. 135; nor in a civil action; 6 Ala. N. S. 289; 16 Me. 69; 3 N. Y. 188; but, if made, a variance in a material point will be fatal; 4 Co. 48; Cro. Car. 135; 5 Blackf. 548; Bac. Abr. *Indictment* ix.

Recitals of private statutes must be made; 10 Wend. 75; 1 Mo. 593; and the statutes proved by an exemplified copy unless admitted by the opposite party; Steph. Pl. 347; 10 Mass. 91; but not if a clause be inserted that it shall be taken notice of as a public act; 1 Cr. M. & R. 44, 47; 5 Blackf. 170; *contra*, 1 Mood & M. 421. Pleading a statute is merely stating the facts which bring a case within it, without making any mention, or taking any notice of the statute itself; 6 Ired. 352; 7 Blackf. 359. Counting upon a statute consists in making express reference to it, as by the words "against the form of the statute [or "by force of the statute"] in such case made and provided." Reciting a statute is quoting or stating its contents; Steph. Pl. 347; Gould, Pl. 46.

Recital of a record on which the action is based must be correct, and a variance in a material point will be fatal; 9 Mo. 742; 2 Paine 209; 29 Ala. N. S. 112; 30 Miss. 126; 17 Ark. 371; 19 Ill. 637; otherwise where it is offered in evidence merely; 12 Ark. 760, 766, 768.

**RECITE.** In a statute requiring that a sheriff's deed recite the execution, names of the parties, etc., it was held that the word *recite* does not mean to copy or repeat *verbatim*, but only to state the substance of the execution. 12 Kan. 282; 8 Ohio 128; 10 *id.* 433.

**RECKLESS.** Heedless, careless, rash, indifferent to consequences. 95 Ala. 412. It implies heedlessness and indifference. 139 Ill. 596.

**RECKLESSNESS.** An indifference whether wrong is done or not. An indifference to the rights of others. Recklessness and wantonness are stronger terms than mere or ordinary negligence. 39 Kan. 531.

**RECLAIM.** To demand again; to insist upon a right; as, when a defendant for a consideration received from the plaintiff has covenanted to do an act, and fails to do it, the plaintiff may bring covenant

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for the breach, or assumpsit to *reclaim* the consideration. 1 Caines 47.

**RECLAIMING BILL. In Scotch Law.** A petition for review of an interlocutor, pronounced in a sheriff's or other inferior court. It recites *verbatim* the interlocutor, and, after a written argument, ends with a prayer for the recall or alteration of the interlocutor, in whole or in part. Bell, Dict. *Reclaiming Petition;* Shaw, Dig. 394.

**RECOGNITION.** An acknowledgment that something which has been done by one man in the name of another was done by authority of the latter. See AGENCY; RATIFICATION.

As a general rule international law is not concerned with internal changes within a sovereign state. The government may change from a democracy to a republic or monarchy without any change in the identity of the state in the family of nations. But the ruler of an independent state may call upon other states and nations to recognize a new title he has assumed or new territory which he has acquired by conquest and wishes to have recognized as part of his domain, and often part of a nation separates itself from the rest by revolution and claims to be recognized as a new member of the family of nations. In the latter case the new state is never recognized until the mother country has ceased military operations against it and its government has the appearance of stability; Snow, Lect. Int. L. 23. The recognition of the independence of a revolted state is lawful only when its independence has been *de facto* established. See 1 Kent 25. As to recognition of belligerency, see NEUTRALITY; BELLIGERENCY; INSURGENCY.

**RECOGNITORS. In English Law.** The name by which the jurors impanelled on an assize were known. 17 S. & R. 174.

**RECOGNIZANCE.** An obligation of record, entered into before a court or officer duly authorized for that purpose, with a condition to do some act required by law which is therein specified. 2 Bla. Com. 341. See 49 Fed. Rep. 776; Troub. & H. Pr. 2028.

The liability of bail above in civil cases, and of the bail in all cases in criminal matters, must be evidenced by a recognizance, as the sheriff has no power to discharge upon a bail-bond being given to him in these cases. See 4 Bla. Com. 297.

The object of a recognizance is to secure the presence of the defendant to perform or suffer the judgment of the court. In some of the United States, however, this distinction is not observed, but bail in the form of a bail-bond is filed with the officer, which is at once bail below and above, being conditioned that the party shall appear and answer to the plaintiff in the suit, and abide the judgment of the court.

In civil cases they are entered into by bail, conditioned that they will pay the debt, interest, and costs recovered by the plaintiff under certain contingencies, and for other purposes under statutes.

In criminal cases they are either that the party shall appear before the proper court to answer to such charges as are or shall be made against him, that he shall keep the peace or be of good behavior. The presence of witnesses may also be secured in the same manner; 6 Hill 506.

*Who may take.* In *civil* cases recognizances are generally taken by the court; 15 Vt. 9; 7 Blackf. 221; or by some judge of the court in chambers, though other magistrates may be authorized therefor by statute, and are in many of the states; 6 Whart. 359; 4 Humphr. 213. See 2 Dev. 555; 3 Gratt. 82.

In *criminal* cases the judges of the various courts of criminal jurisdiction and justices of the peace may take recognizances; 6 Ohio 251; 19 Pick. 127; 14 Conn. 206; 6 Blackf. 284, 315; 18 Miss. 626; 26 Ala. N. S. 81; 8 Mich. 42; see 2 Curt. C. C. 41; 44 La. Ann. 905; the sheriff, in some cases; 5 Ark. 265; 11 Ala. 676; but in case of capital crimes the power is restricted usually to the court of supreme jurisdiction. See BAIL.

In cases where a magistrate has the power to take recognizances it is his duty to do so, exercising a judicial discretion, however; 7 Blackf. 611. In form it is a short memorandum on the record, made by the court, judge, or magistrate having authority, which need not be signed by the party to be found; 5 S. & R. 147; 9 Mass. 520; 4 Vt. 488; 1 Dana 523; 6 Ala. 465; 2 Wash. C. C. 422; 6 Yerg. 354. It is to be returned to the court having jurisdiction of the offence charged, in all cases; 7 Leigh 371; 9 Conn. 350; 4 Wend. 387; 14 Vt. 64. See 27 Me. 179.

*Discharge and excuse under.* A surrender of the defendant at any time anterior to a fixed period after the sheriff's return of *non est* to a *ca. sa.*, or taking the defendant on a *ca. sa.;* 1 Hawks 51; 6 Johns. 97; discharges the bail (see FIXING BAIL); Arch. Cr. P. by Pom. 184; as does the death of the defendant before the return of *non est;* Bish. Cr. Proc. 264; 1 N. & M'C. 251; 3 Conn. 84; see 14 Daly 333; or a loss of custody and control by act of government or of law without fault of the bail prior to being fixed; 3 Dev. 157; 18 Johns. 335; 5 Metc. Mass. 380; 2 Ga. 33; 14 Gratt. 698; see 8 Mass. 264; 5 Sneed 623; 2 Wash. C. C. 464; including imprisonment for life or for a long term of years in another state; 18 Johns. 35; 6 Cow. 599; but not voluntary enlistment; 11 Mass. 146, 234; or long delay in proceeding against bail; 2 Mass. 485; 1 Root 428; see 4 Johns. 478; or a discharge of the principal under the bankrupt or insolvent laws of the state; 2 Bail. 492; 1 Harr. & J. 101, 156; 21 Wend. 670; 1 Mass. 292; 1 Harr. Del. 367, 466; 1 McLean 226; 1 Gill 259; and see, also, 2 Pa. 492; and, of course, performance of the conditions of the recognizance by the defendant, discharges the bail. And see BAIL-BOND; FIXING BAIL.

The formal mode of noting a discharge

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is by entering an exoneration; 5 Binn. 332; 1 Johns. Cas. 329; 2 *id.* 101, 220; 7 Conn. 439; 1 Gill 529; 2 Ga. 331. A culprit giving a recognizance to appear to an indictment, and not to depart from the court without leave, is not discharged from his obligation, nor is his surety thereon, by the quashing of the indictment; 54 N. J. L. 393.

The remedy upon a recognizance is by means of a *scire facias* against the bail; 1 H. & G. Md. 154; 1 Ala. 34; 7 T. B. Monr. 130; 4 Bibb Ky. 181; 7 Leigh 371; 4 Ia. 289; 3 Blackf. 344; 6 Halst. 124; 19 Pick. 127; 2 Harr. N. J. 446; or by suit, in some cases; 13 Wend. 33; 5 Ark. 691; 14 Conn. 329. A surety on a recognizance may defend by showing the invalidity of the indictment against his principal; 78 Ga. 188; *contra*, 25 Tex. App. 331.

Without notice to the principal, a recognizance cannot be legally amended against objection of the sureties; 28 Tex. App. 28.

It is indispensable to a legal default and declaration of forfeiture of a recognizance, that the principal in the recognizance should have been regularly called, and, upon such call, failed to appear; 24 Ill. App. 72. See SURETYSHIP; SUBROGATION.

**RECOGNIZE.** To try; to examine in order to determine the truth of a matter. 3 Sharsw. Bla. Com. App. No. III. § 4; Bracton 179.

To enter into a recognizance.

**RECOGNIZEE.** He for whose use a recognizance has been taken.

**RECOGNIZOR.** He who enters into a recognizance.

**RECOLEMENT. In French Law.** The reading and re-examination by a witness of a deposition, and his persistence in the same, or his making such alteration as his better *recollection* may enable him to do after having read his deposition. Without such re-examination the deposition is void. Pothier, *Procéd. Cr.* s. 4, art. 4.

**RECOMMENDATION.** The giving to a person a favorable character of another.

When the party giving the character has acted in good faith, he is not responsible for the injury which a third person, to whom such recommendation was given, may have sustained in consequence of it, although he was mistaken.

But when the recommendation is knowingly untrue, and an injury is sustained, the party recommending is civilly responsible for damages; 3 Term 51; 7 Cra. 69; 7 Wend. 1; 14 *id.* 126; 6 Pa. 310; whether it was done merely for the purpose of benefiting the party recommended or the party who gives the recommendation. See PRIVILEGED COMMUNICATIONS.

And in case the party recommended was a debtor to the one recommending, and it was agreed, prior to the transaction, that the former should, out of the property to be obtained by the recommendation, be paid, or in case of any other species of collusion to cheat the person to whom the credit is given, they may both be criminally prosecuted for the conspiracy. See CHARACTER; Fell, Guar. c. 8; 6 Johns. 181; 13 *id.* 224; 1 Day 22; 5 Mart. La. N. S. 443.

**RECOMPENSATION. In Scotch Law.** An allegation by the plaintiff of compensation on his part made in answer to a compensation or set-off pleaded by the defendant in answer to the plaintiff's demand.

**RECOMPENSE.** A reward for services; remuneration for goods or other property.

In maritime law there is a distinction between *recompense* and *restitution*. When goods have been lost by jettison, if at any subsequent period of the voyage the remainder of the cargo be lost, the owner of the goods lost by jettison cannot claim restitution from the owners of the other goods; but in the case of expenses incurred with a view to the general benefit, it is clear that they ought to be made good to the party, whether he be an agent employed by the master in a foreign port, or the ship-owner himself.

**RECOMPENSE OF RECOVERY IN VALUE.** A phrase applied to the matter recovered in a common recovery, after the vouchee has disappeared and judgment is given for the demandant. 2 Bouvier, Inst. n. 2093.

**RECONCILE.** While etymologically not synonymous with "harmonize," reconcile is so nearly equivalent as not to mislead a jury instructed as to the reconciliation of conflicting testimony. 3 S. Dak. 134.

**RECONCILIATION.** The act of bringing persons to agree together, who before had had some difference.

A renewal of cohabitation between husband and wife is proof of reconciliation; and such reconciliation destroys the effect of a deed of separation; 4 Eccl. 238. See Bish. Mar. & D. § 1707.

**RECONDUCTION. In Civil Law.** A renewing of a former lease; relocation. Dig. 19. 2. 13. 11; Code, Nap. art. 1737–1740.

**RECONSTRUCTION.** This term has been widely used to describe the measures adopted by congress, at the close of the civil war in the United States, to regulate the admission of the representatives from the Southern states, the re-establishment of the federal authority within their borders, and the changes in their internal government, in order to adapt them to the condition of affairs brought about by the war. See 1 Am. L. Rev. 238.

**RECONVENTION. In Civil Law.** An action brought by a party who is defendant against the plaintiff before the same judge. 4 Mart. La. N. S. 439. To entitle the defendant to institute a demand

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in reconvention, it is requisite that such demand, though different from the main action, be nevertheless necessarily connected with it and incidental to the same. La. Code of Pr. art. 375; 11 La. 309; 7 Mart. La. N. S. 282. The reconvention of the civil law was a species of cross-bill. Story, Eq. Pl. § 402. See RECOUPMENT.

**RECORD.** A written memorial made by a public officer authorized by law to perform that function, and intended to serve as evidence of something written, said, or done. 6 Call 78; 1 Dana 595.

Records may be either of legislative or judicial acts. Memorials of other acts are sometimes made by statutory provisions.

*Legislative acts.* The federal and state constitutions, acts of congress and of the several legislatures are the highest kind of records. The printed journals of congress have been so considered. See Dougl. 598; Cowp. 17. And public documents transmitted to congress by the president are at least records so far that copies of them printed by the public printer are evidence; 7 Johns. 38.

A record in *judicial proceedings* is a precise statement of the suit from its commencement to its termination, including the conclusion of law thereon, drawn up by the proper officer, for the purpose of perpetuating the exact state of facts; or in the language of Lord Coke, "records are memorials or remembrances, in rolls of parchment, of the proceedings and acts of a court of justice, which hath power to hold plea according to the course of the common law." See 13 Conn. 216.

The proceedings of the courts of common law are records. But every minute made by a clerk of a court for his own future guidance in making up his record is not a record; 4 Wash. C. C. 698. See 10 Pa. 157; 2 Pick. 448; 4 N. H. 450; 5 Ohio St. 545; 3 Wend. 267; 2 Vt. 573; 5 Day 363; 3 T. B. Monr. 63; 146 Ill. 189; 57 Me. 107; 115 Mass. 201.

Proceedings in courts of chancery are said not to be, strictly speaking, records; but they are so considered; Gresl. Ev. 101. And see 8 Mart. La. N. S. 303; 1 Rawle 381; 8 Yerg. 142; 1 Pet. C. C. 352.

It is within the power of any court of general jurisdiction to restore its lost records or to expunge false or fraudulent interpolations therein; 61 Ill. App. 454; 69 Mo. App. 504; 49 La. Ann. 1012; or where the record is silent, or, where it suggests as a fact something contrary to the fact, to correct the record by an order *nunc pro tunc*; 70 Ga. 155. See 134 U. S. 136. The power of a court to amend its own records is limited to the correction of actual mistakes and omissions; 65 Hun 619. A court may always, after the expiration of the term, amend the record *nunc pro tunc* to conform to the facts, where there are sufficient data; 8 N. Mex. 446. If there has been a failure to file a record within the time required, a subsequent filing cures this defect; provided no motion to docket and dismiss has been made; 24 U. S. App. 527.

In criminal proceedings all parts of the record must be interpreted together, and a deficiency in one part may be supplied by what appears elsewhere therein; 154 U. S. 134.

Altering records of a court is a crime punishable at common law; 2 East, P. C. 865, 866. See 38 Mich. 218; 30 Me. 484. See 1 Bish. Cr. L. § 468 (6).

A form of entry signed by the judge, and intended to be entered in the journal of the court, is not a public record, the mutilation or changing of which is prohibited by Cr. Code § 1853; 43 Pac. Rep. (Ore.) 717.

An attorney may be disbarred for alteration of the record by falsifying the stenographer's transcript of the evidence to deceive an appellate court; 129 Mo. 291; and the proceedings for that purpose may be properly instituted in the appellate court on relation of the attorney-general; *id.*; but it was held that the senior counsel who was not connected with the mutilation of the record, would not be disbarred for arguing the appeal from the record as filed; *id.* 231.

The fact of an instrument being recorded is held to operate as a constructive notice to all subsequent purchasers of any estate, legal or equitable, in the same property; 1 Johns. Ch. 394. And even if not recorded, if it has been filed for record and its existence is necessarily implied from the existence of another instrument already of record, purchasers will be deemed to have had notice of its existence; 14 Cent. L. J. 374.

But all conveyances and deeds which may be *de facto* recorded are not to be considered as giving notice: in order to have this effect, the instruments must be such as are authorized to be recorded, and the registry must have been made in compliance with the law, otherwise the registry is to be treated as a mere nullity, and it will not affect a subsequent purchaser or incumbrancer unless he has actual notice; 2 Sch. & L. 68; 4 Wheat. 466; 1 Johns. Ch. 300; 1 Story, Eq. Jur. § 403; 5 Me. 272; but where a statute makes it discretionary to record an instrument, the effect of recording is in no wise lessened, but is deemed a constructive notice the same as if the recording had been required; 77 Pa. 373. The record of a deed is not constructive notice of its contents when it is not entitled to be recorded under the recording acts; 7 C. C. App. 293. Where a proper book is kept for the purpose of showing when an instrument is left for record, delay or negligence in entering it in other books will not affect it as a lien upon the property: 82 Pa. 116. See, as to recording acts, 3 Law Mag. & Rev., 4th sec. 412; Judge Cooley's Paper in 4th Rep. Am. Bar Asso. (1881); Lecture of W. H. Rawle before the Law Dept. Univ. of Pa., 1881; as to mortgages, see MORTGAGE; as to courts of record see that title; as to falsification of a record see FORGERY.



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As to giving full faith and credit to judicial proceedings, under the United States constitution, see FOREIGN JUDGMENT. The constitutional provision applies in terms to public acts, records, and judicial proceedings, and it is held that the term records in the Judiciary Act of May 26, 1790, which provides how they shall be proved and admitted in evidence, includes all acts, legislative, executive, judicial, and ministerial, composing the public records of the state; 20 How. 250; 16 Tex. 509.

Questions as to what is or is not a part of the record have arisen, principally on *writ of error or appeal*, as to what parts of the record and proceedings of the court below are to be considered as parts of the record before the appellate court. In many of these cases matters which were actually a part of the record below are only such in the court above when made so by being embodied in the bill of exceptions. Among the matters and things which have been held not to be a part of the record, but to be considered with reference to the foregoing qualification, are: Trial list; 1 Pa. 129; bond for costs; 5 Ark. 264; 8 Mich. 81; writing sued on; 7 Humphr. 255; 2 Ark. 109 (unless made so by oyer or otherwise; 4 Ark. 202); an affidavit made to supply a part of the record which has been lost; 4 Ill. 119, 259; papers presented to a court and acted upon merely as matters of evidence; 16 Me. 81; the registry of a mechanic's lien; 1 W. & S. 240; the statement of demand, in the court for the trial of small causes; 3 Green N. J. 224; a warrant of attorney to confess judgment and an affidavit showing the death of one of the signers of it; 12 Ill. 379; instructions to the jury; 1 Ia. 226; 11 *id.* 454 (*contra*, where they were signed by the judge and filed; 16 Ind. 416); letters copied into the transcripts as exhibits; 28 Ala. 416; papers filed after an appeal prayed, taken, and signed by the judge; 1 Ark. 557; a plea stricken from the files; 5 *id.* 166, 223; 29 Ind. 120; minutes of the court taken at the trial; 23 Cal. 103; or clerk's minutes; 33 *id.* 171; a bill of particulars; 24 Ill. 262; a summons or other writ; 1 Morr. 439 (otherwise where there was no appearance; 19 Ind. 273).

The following have been held to be parts of the record: A stipulation as to sale of mortgaged premises and solicitor's fee; 15 Wis. 211; depositions in a probate court; 38 Miss. 476; affidavits filed in opposition to an application for an injunction; 22 Cal. 362; motions, notices, and rulings of court; 4 Greene (Ia.) 123; a finding of the court; 20 Wis. 350; 21 Mo. 157; 11 Ind. 314; a submission and award filed; 27 Ill. 374; a bill of exceptions settled on an appeal from an order; 20 Wis. 518; an instrument of which oyer is craved; 5 Ark. 116. The opinion of the trial court as to the facts was held a part of the record; 96 Ia. 501; but in Pennsylvania it is said to be not a good principle so to treat the opinion; 183 Pa. 155.

*Under recording acts.* Statutes of the several states have required enrolment of certain deeds, mortgages, and other instruments, and declared that the copies thus made should have the effect of records. An instrument lodged for record is considered as recorded from that time, whether it was actually copied in the book or not, or in the proper book or not; 172 Pa. 234.

**Inspection of Records.** At common law, there was no general right of inspection, but the right depended entirely upon the question whether the party seeking to exercise it had an interest. If he had, he was entitled to exercise the right upon the payment of the usual fees; 7 Mod. 127; 1 Stra. 304; 2 *id.* 260, 954, 1005; but a mere stranger who had no such interest had no right of inspection at common law; 8 Term 390; and the custodian might permit or refuse the inspection at his discretion without any control by a court; 6 Ad. & El. 84; 9 Cent. L. J. 425. At a comparatively early period, this distinction between those who had and those who had not an interest became obliterated; 1 Wils. 297; 47 Barb. 329. The effect of modern recording acts making the public records notice, has aided to accomplish this result, and, indeed, makes the right of inspection and of enforcing the privilege an essential one; 4 D. & R. 820; 61 Ala. 310; 71 *id.* 299; 45 Ill. 224; 66 Me. 305; 90 Mich. 643. It does not extend in England to merely *quasi*-public records, such as court rolls of a manor; Bunb. 269; or to records of a justice of the peace; 66 Vt. 485; or to a marriage license docket; 4 D. R. (Pa.) 284; *contra*, *id.* 162.

The right of inspection will not exist as to the record of private suits, at least before trial, where it is sought only to gratify malice or curiosity, or to make profit by disclosing private affairs and making public scandalous matters; 72 Mich. 560; 85 *id.* 1; nor does it extend to records required by law to be kept secret, as, the proceedings of a county electrical board; 25 S. E. Rep. (Va.) 552. The right of inspection is secured by statute in most of the states, and is not dependent on interest, though in some cases it is denied if detrimental to public policy or is sought by a citizen of another state; 51 Mich. 145; 61 Ala. 310. In case of refusal, the right may be enforced; 44 Fed. Rep. 786; 39 N. J. L. 287; 37 W. Va. 266; even though the rules of the office require the records to be kept secret. The right when denied is enforced by mandamus; 53 N. J. Eq. 158, reversing 49 *id.* 474; 71 Ala. 299; 90 Mich. 643; 66 Me. 305. Injunction is usually held not to be a proper remedy; 73 Md. 289; 51 Ga. 391; 51 Mich. 145; 27 Ill. App. 36; 53 N. J. Eq. 158. The right of inspection is very much drawn into question in cases where the right is sought to be exercised by abstract and title insurance companies. Objections to the use of public offices by the agents of such companies are made upon the ground of interference with the legitimate fees of the public officers, with the business of the office, and of possible

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injuries to the records. The right has been sustained in 44 Fed. Rep. 786; 17 Colo. 248; 17 *id.* 546; 38 Hun 429; 99 N. Y. 620; 12 W. N. C. (Pa.) 291; and, after some fluctuation, in 53 N. J. Eq. 158; 78 Mich. 363; 102 *id.* 55; 17 Colo. 248; 76 Ala. 49; 82 Ala. 527; 7 Colo. 200; 51 Ga. 391; 73 Md. 289 (the statute having been passed as a result of a previous decision otherwise).

Where the right is permitted, the custodian may make reasonable rules; 99 N. Y. 620; 96 Mich. 600; 17 Colo. 546; and charge reasonable fees; 102 Mich. 55. The right to inspect has been held to include the right to copy; 69 Wis. 538; 37 Minn. 372; *contra*, 39 Kan. 301; 82 Ala. 527.

See, generally, 29 Am. Law Reg. N. S. 60; 10 L. R. A. 212; 27 *id.* 82; 37 Cent. L. J. 395; PATENT.

As to parish and church registers and records, see REGISTER.

**RECORD, CONTRACT OF.** See CONTRACT.

**RECORD, CONVEYANCES BY.** Extraordinary assurances, as private acts of parliament and royal grants.

**RECORD OF NISI PRIUS. In English Law.** A transcript from the issue-roll: it contains a copy of the pleadings and issue. Steph. Pl. 105.

**RECORDARE.** A writ to bring up judgments of justices of the peace. 3 Jones N. C. 491.

**RECORDARI FACIAS LOQUELAM. In English Practice.** A writ commanding the sheriff that he cause the plaint to be recorded which is in his county, without writ, between the parties there named, of the cattle, goods, and chattels of the complainant taken and unjustly distrained as it is said, and that he have the said record before the court on a day therein named, and that he prefix the same day to the parties, that then they may be there ready to proceed in the same plaint. 2 Sell. Pr. 166. Now obsolete.

**RECORDATUR** (Lat.). An order or allowance that the verdict returned on the *nisi prius* roll be recorded. Bacon, Abr. *Arbitration, etc.* (D).

**RECORDER.** A judicial officer of some cities, possessing generally the powers and authority of a judge. 3 Yeates 300; 4 Dall. 299. See 1 Const. S. C. 45.

Anciently, *recorder* signified to recite or testify on recollection, as occasion might require, what had previously passed in court; and this was the duty of the judges, thence called *recordeurs*. Steph. Pl. note 11.

An officer appointed to make record or enrolment of deeds and other legal instruments authorized by law to be recorded.

**RECORDER OF LONDON.** One of the justices of oyer and terminer, and a justice of the peace of the *quorum* for putting the laws in execution for the preservation of the peace and government of the city. Whart. Law Lex.

**RECORDING ACTS.** Statutes which regulate the official recording of conveyances, mortgages, bills of sale, hypothecations, assignments for the benefit of creditors, articles of agreement, and other instruments, for the purpose of informing the public, creditors and purchasers, of transactions affecting the ownership of property and the pecuniary responsibility of individual persons. See RECORD.

**RECORDUM.** A record: a judicial record. It is used in the phrase *prout patet per recordum*, which is a formula employed, in pleading, for reference to a record, signifying as it appears from the record. 1 Chit. Pl. 385; 10 Me. 127.

**RECOUPMENT** (Fr. *recouper*, to cut again). The act of abating or recouping a part of a claim upon which one is sued by reason of a legal or equitable right resulting from a counter-claim arising out of the same transaction. The right of the defendant, in the same action, to claim damages from the plaintiff, either because he has not complied with some cross-obligation of the contract upon which he sues, or because he has violated some duty which the law imposed upon him in the making or performance of that contract. 4 Wend. 483; 22 *id.* 155; 10 Barb. 55; 13 N. Y. 151; 3 Ind. 72, 265; 9 *id.* 470; 7 Ala. N. S. 753; 27 *id.* 574; 12 Ark. 699; 17 *id.* 270; 6 B. Monr. 528; 15 *id.* 454; 3 Mich. 281; 39 Me. 382; 16 Ill. 495; 11 Mo. 415; 25 *id.* 430; 83 Ga. 212.

Recoupment is the right to set off unliquidated damages, while the right of set-off, as distinguished from recoupment, comprehends only liquidated demands, or those capable of being ascertained by calculation; 32 N. J. Eq. 225. Both these terms have a technical meaning and both are included in the same general term, counter-claim, which see.

This is not a new title in the law, the term occurring from the 14th to the 16th centuries, although it seems of late years to have assumed a new signification, and the present doctrine is said to be still in its infancy; 7 Am. L. Rev. 389. Originally it implied a mere deduction from the claim of the plaintiff, on account of payment in whole or in part, or a former recovery, or some analogous fact; 3 Co. 65; 4 *id.* 94; 5 *id.* 2, 31; 11 *id.* 51, 52. See note to Icily *v.* Grew, 6 Nev. & M. 467; Viner, Abr. *Discount*, pl. 3, 4, 9, 10; 28 Vt. 413. This meaning has been retained in many modern cases, but under the name of deduction or reduction of damages; 11 East 232; 1 Maule & S. 318, 323; 2 M. & G. 241; 7 M. & W. 314; 12 *id.* 772; 20 Conn. 204; 21 Wend. 610; 3 Dana 489; 14 Pick. 356. The word recoupment has also been applied to cases very similar to the above; 4 Den. 227; 20 Wend. 267. See 7 Am. L. Rev. 389, where *recoupment* is fully treated.

Recoupment as now understood seems to correspond with the *Reconvention* of the civil law, sometimes termed *demands incidentes* by the French writers, in which the *reus*, or defendant, was permitted to exhibit his claim against the plaintiff for allowance, provided it rose out of, or was incidental to, the plaintiff's cause of action. *Œuvres de Pothier*, vol. 9, p. 89; 1 White, New Rec. 285; Voet, tit. *de Judiciis*, n. 78; La. Code Pr. art. 375; 4 Mart. N. S. 439; 5 *id.* 671; 12 La. Ann. 114, 170; 6 Tex. 406.

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In England, as well as in some of the United States, the principles of recoupement as defined above have been recognized only in a restricted form. Under the name of reduction of damages, the defendant is allowed to show all such violations of his contract by the plaintiff as go to render the consideration less valuable, but he is compelled to resort to an independent action for any immediate or consequential damages affecting him in other respects; 8 M. & W. 858; 3 Camph. 450; 1 C. & P. 384; 6 Barb. 387; 6 B. Monr. 528; 12 Conn. 129; 11 Johns. 547; 12 Pick. 330; 8 Humphr. 678; 9 How. 231. See 84 Ala. 496; 65 Miss. 315. But these restrictions are all gradually disappearing, and the law is assuming the form expressed in the cases cited under the definition of modern recoupment, the main reason upon which the doctrine now rests being the avoidance of circuity of action.

In Pennsylvania a defendant may avail himself, by way of recoupment or equitable defence, of a breach of warranty or of a fraudulent representation, and show that the goods sold were worth less than they would have been if they were such as they were wrranted or represented to be; 120 U. S. 648.

There are some limitations and qualifications to the law of recoupment, as thus established. Thus, it has been held that the defendant is not entitled to any judgment for the excess his damages in recoupment may have over the plaintiff's claim, nor shall he be allowed to bring an independent action for that excess; 6 N. H. 481; 14 Ill. 424; 3 Mich. 281; 12 Ala. N. S. 643; 3 Hill N. Y. 171; 17 Ark. 270. See 83 Ala. 333. If recoupment is put upon the ground of a cross-action and not a mere defence for the reduction of damages, there is no reason why he should not have judgment to the extent of his injury. Such seems to be the practice in Louisiana, under the name of *reconvention;* 12 La. Ann. 170; and such will probably be the practice under those systems of pleading which authorize the court, in any action which requires it, to grant the defendant affirmative relief; 2 E. D. Sm. 317. See, also, 3 W. & S. 472; 17 S. & R. 385; 12 How. Pr. 310.

The damages recouped must be for a breach of the same contract upon which suit is brought; 3 Hill N. Y. 171; 4 Sandf. 147; 10 Ind. 329; 74 Mich. 424. See 77 Mo. 345; 95 Ill. 476; 54 Miss. 563. For example, when chattels have been sold with an express or implied warranty, and there were latent defects unknown to the purchaser, he may retain the goods without notifying the vendor, and either sue for his damages or recoup the same in an action against him for the price; 67 Wis. 129; 13 Ohio C. C. 99; even if the sale were on approval, but the contract did not limit the purchaser to the return of the property, if unsatisfactory; 56 Conn. 489; or one who has pledged stocks as collateral to a note, if sued on the note, may recoup the damages resulting from wrongful appropriation of the stocks by the pledgee; 36 U. S. App. 248; s. c. 71 Fed. Rep. 102. The surety on a note, in an action by the payee, may set up, by way of recoupment, the breach of warranty of the property sold to the maker for which the note was given; 15 App. Div. N. Y. 498; but if a surety is sued alone, he cannot recoup for a warranty in favor of his principal, without the consent of the latter; 40 S. W. Rep. (Tenn.) 482. It may be for a tort; but it seems that the tort must be a violation of the contract, and it is to be measured by the extent of this violation, and no allowance taken of malice; 10 Barb. 55; 17 Ill. 38; 4 S. & R. 249. The language of some cases would seem to imply that recoupment may be had for damages connected with the subject-matter or transaction upon which the suit is brought, but which do not constitute a violation of any obligation imposed by the contract, or of any duty imposed by the law in the making or performance of the contract; 14 Ill. 424; 17 *id.* 38. But these cases will be found to be decided with reference to statutes of counter-claim. And even in the construction of such statutes it has been doubted whether it is not better to confine the damages to violations of the contract; 8 Ind. 399; 2 Sandf. 120.

It is well established, in the absence of statutory provisions, that it is optional with the defendant whether he shall plead his cross-claim by way of recoupment, or resort to an independent action; 14 Johns. 379; 13 Wend. 277; 12 Ala. N. S. 643; 3 Ind. 59; 21 Mo. 415. Nor does the fact of a suit pending for the same damages estop him from pleading them in recoupment, although he may be compelled to choose upon which action he shall proceed; 3 E. D. Sm. 135; 5 Watts 116. Payment after action brought, although never pleadable in answer to the action, was usually admitted in reduction of damages; 4 N. H. 557; 6 Ind. 26; 2 Bingh. N. C. 88; 7 C. & P. 1; 1 M. & W. 463. But the defendant can never recoup for damages accruing since action brought; 20 E. L. & E. 277; 4 Barb. 256; 2 Binn. 287.

The right of recoupment will usually be allowed to sureties and indorsers in cases where it would be permitted for the benefit of the principal debtor, as, for example, a successful recoupment by the maker of a note will enure to the benefit of the indorser when sued with the maker; 21 Misc. 86.

It has been maintained by some courts that the law of recoupment is not applicable to real estate. Accordingly, they have denied the defendant the right, when sued for the purchase-money, to recoup for a partial failure of title; 11 Johns. 50; 2 Wheat. 13; 12 Ark. 709; 17 *id.* 254. But most of these cases will be found denying him that right only before eviction. A confusion has been introduced by regarding failure of title and failure of consideration as convertible terms. The consideration of a deed without covenants is the mere delivery of the instrument; Rawle,

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Cov. 588. A failure of title in such case is not a failure of consideration, and it therefore affords no ground for recoupment. The consideration of a deed with covenants does not fail till the covenantee has suffered damages on the covenants, which in most cases does not happen till eviction, either actual or constructive. After this has happened, his right to recoup is now pretty generally admitted. This is nothing more than allowing him to recoup as soon as he can sue upon the covenants; 21 Wend. 131; 13 N. Y. 151; 3 Pick. 459; 14 *id.* 293; 6 Gratt. 305; Dart, Vend. 381; Rawle, Cov. 583.

It has been more generally admitted that where there is a failure of the consideration as to the quantity or quality of the land, the purchaser may recoup upon his covenants; 12 Ark. 699; 17 *id.* 254; 2 Kent 470; 18 Mo. 368; 20 *id.* 443; 71 Wis. 54.

Under the common-law system of pleading, the evidence of a recoupment, if going to a total failure of consideration, might be given under the general issue without notice, but if it went only to a partial failure, notice was required to prevent surprise; 6 Barb. 386; 2 N. Y. 157; 6 N. H. 497; 3 Ind. 265. This is the only way it could be admitted, for it could not be pleaded, a partial defence constituting neither a plea in bar nor in abatement. Under a notice it was admitted to aid in sustaining the general denial.

But under the new systems of practice there being no general issue to which the notice was subsidiary, the defendant is required to plead his defence whether it is in answer of the whole demand or only in reduction of damages; 6 How. Pr. 433; 11 N. Y. 352; 12 Wend. 246; 18 Mo. 368.

The effect to be given to the law of recoupment will depend, in many of the states, upon the statutes of counter-claim and offset in force. In Missouri, for instance, it is provided that if any two or more persons are mutually indebted in any manner whatever, and one of them commence an action against the other, one debt may be set against the other, although such debts are of a different nature; 1 R. S. § 3867. The term *counter-claim* under this statute is held to include both set-off and recoupment; 49 Mo. 570; the distinction between the two terms being important only from the fact that the former must arise from contract, and can only be used in an action founded on contract; while the latter may spring from a wrong, provided it arose out of the transaction set forth in the petition, or was connected with the subject of the action; *id.* In the case of actions arising out of contracts it has been held that nothing would be allowed by way of recoupment unless it worked a violation of some obligation imposed by the contract, or some duty imposed by the law in the making or performance of it; 2 Sandf. 120; 8 Ind. 399.

See, generally, Waterman, Set-off, Recoupment and Counter-claim: 27 Myers, Fed. Dec. 894; 10 L. R. A. 378, note; 7 Am. L. Rev. 389; 9 Am. L. Reg. 330; 8 Am. St. Rep. 63.

**RECOURSE.** To recur. As to indorsement without recourse, see INDORSEMENT.

**RECOVERER.** The demandant in a common recovery, after judgment has been given in his favor, assumes the name of recoverer.

**RECOVERY.** The restoration of a former right, by the solemn judgment of a court of justice. 3 Murph. 169. See 28 L. J. C. P. 312; 8 Q. B. D. 470.

In its general use, recovery signifies a collection of a debt by process and course of law. 76 Cal. 269.

The phrase *right of recovery* is used to express the possession of a right of action under the existing facts.

A *common recovery* is a judgment obtained in a fictitious suit, brought against the tenant of the freehold, in consequence of a default made by the person who is last vouched to warranty in such suit. Bacon, Tracts 148.

A *true recovery*, usually known by the name of recovery simply, is the procuring a former right by the judgment of a court of competent jurisdiction: as, for example, when judgment is given in favor of the plaintiff when he seeks to recover a thing or a right.

Common recoveries are considered as mere forms of conveyance or common assurances: although a common recovery is a fictitious suit, yet the same mode of proceeding must be pursued, and all the forms strictly adhered to, which are necessary to be observed in an adversary suit. The first thing, therefore, necessary to be done in suffering a common recovery is that the person who is to be the demandant, and to whom the lands are to be adjudged, should sue out a writ or *præcipe* against the tenant of the freehold; whence such tenant is usually called the tenant to the *præcipe*. In obedience to this writ the tenant appears in court, either in person or by his attorney; but, instead of defending the title to the land himself, he calls on some other person, who upon the original purchase is supposed to have warranted the title, and prays that the person may be called in to defend the title which he warranted, or otherwise to give the tenant lands of equal value to those he shall lose by the defect of his warranty. This is called the voucher, *vocatio*, or calling to warranty. The person thus called to warrant, who is usually called the vouchee, appears in court, is impleaded, and enters into the warranty, by which means he takes upon himself the defence of the land. The defendant then desires leave of the court to imparl, or confer with the vouchee in private, which is granted of course. Soon after the demandant returns into court, but the vouchee disappears or makes default, in consequence of which it is presumed by the court that he has no title to the lands demanded in the writ, and therefore cannot defend them; whereupon judgment is given for the demandant, now called the recoverer, to recover the lands in question against the tenant, and for the tenant to recover against the vouchee lands of equal value in recompense for those so warranted by him, and now lost by his default. This is called the recompense of recovery in value; but as it is customary for the crier of the court to act, who is hence called the common vouchee, the tenant can only have a nominal and not a real recompense for the land thus recovered against him by the demandant. A writ of *habere facias* is then sued out directed to the sheriff of the county in which the lands thus recovered are situated: and on the execution and return of the writ the recovery is completed. The recovery here described is with single voucher; but a recovery may be, and is frequently, suffered

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with double, treble, or further voucher, as the exigency of the case may require, in which case there are several judgments against the several vouchees.

Common recoveries were invented by the ecclesiastics in order to evade the statute of mortmain, by which they were prohibited from purchasing, or receiving under the pretence of a free gift, any land or tenements whatever. They have been used in some states for the purpose of breaking the entail of estates. See, generally, Cruise, Digest, tit. 36; 2 Wms. Saund. 42, n. 7; 4 Kent 487; Pigot, Comm. Rec. *passim*. See Chall. Real P. 270; Big. Estop. 418.

All the learning in relation to common recoveries is nearly obsolete, as they are out of use. Rey, a French writer, in his work *Des Institutions Judiciaires de l'Angleterre*, tom. ii. p. 221, points out what appears to him the absurdity of a common recovery. As to common recoveries, see 3 S. & R. 435; 9 *id.* 330; 1 Yeates 244; 4 *id.* 413; 1 Whart. 139, 151; 2 Rawle 168; 6 Pa. 45; 2 Halst. 47; 5 Mass. 438; 6 *id.* 328; 8 *id.* 34; 3 Harr. & J. 292.

**RECREANT.** A coward; a poltroon. 3 Bla. Com. 340.

**RECRIMINATION. In Criminal Law.** An accusation made by a person accused against his accuser, either of having committed the same offence or another.

In general, recrimination does not excuse the person accused nor diminish his punishment, because the guilt of another can never excuse him. But in applications for divorce on the ground of adultery, if the party defendant can prove that the plaintiff or complainant has been guilty of the same offence, the divorce will not be granted; 2 Bish. Mar. & D. 340; 1 Hagg. Cons. 144; 4 Eccl. 360. The laws of Pennsylvania contain a provision to the same effect. See 1 Hagg. Eccl. 790; 3 *id.* 77; 1 Hagg. Cons. 147; Dig. 24. 3. 39; 48. 3. 13. 5; 1 Add. Eccl. 411; 2 Colo. App. 8; COMPENSATION; CONDONATION; DIVORCE.

**RECTIFIER.** As used in the internal revenue laws, this term is not confined to a person who runs spirits through charcoal; but is applied to any one who rectifies or purifies spirits in any manner whatever, or who makes a mixture of spirits with anything else, and sells it under any name. 3 Ben. 73; s. c. 2 Am. L. T. Rep. 23.

**RECTOR. In Ecclesiastical Law.** One who rules or governs: a name given to certain officers of the Roman church. Dict. Canonique.

**In English Law.** He that hath full possession of a parochial church. A rector (or parson) has for the most part the whole right to all the ecclesiastical dues in his parish; where, as in theory of law, a vicar has an appropriator over him, entitled to the best part of the profits, to whom the vicar is, as it were, perpetual curate, with a standing salary. Cowell; 1 Bla. Com. 384; 2 Steph. Com. 677.

**RECTORY. In English Law.** Corporeal real property, consisting of a church, glebe-lands, and tithes. 1 Chitty, Pr. 163.

**RECTUM** (Lat.). Right. *Breve de recto*, writ of right.

**RECTUS IN CURIA** (Lat. right in court). The condition of one who stands at the bar, against whom no one objects any offence or prefers any charge.

When a person outlawed has reversed his outlawry, so that he can have the benefit of the law, he is said to be *rectus in curia*. Jacob, Law Dict.

**RECUPERATORES** (Lat.). **In Roman Law.** A species of judges originally established, it is supposed, to decide controversies between Roman citizens and strangers concerning the right to the possession of property requiring speedy remedy, but gradually extended to questions which might be brought before ordinary judges.

After the enlargement of their powers, the difference between them and judges, it is supposed, was simply this:—if the prætor named three judges, he called them *recuperatores;* if one, he called him *judex*. But opinions on this subject are very various. Colman, *De Romano judicio recuperatorio*. Cicero's oration *pro Cæcin.* 1, 3, was addressed to *recuperatores*.

The result of the latest investigation of this subject is that, while ordinary cases were referred to the college of *centumviri*, in cases where the *prætor* wished to obtain a speedy decision he had power to appoint an extraordinary college of three or five *recuperatores* whose instructions required them to find a verdict within a designated time. Such a course was often required in cases involving personal liberty, and the result was that the jurisdiction of the *decemviri* over all such actions became displaced by the court of *recuperatores*. The latter were also appointed in cases to which aliens were parties. Like the *judices* the *recuperatores* were private persons; Sohm, Inst. Rom. L. 150, n. 3.

**RECUSABLE.** See IRRECUSABLE; CONTRACTUAL OBLIGATION.

**RECUSANTS. In English Law.** Persons who wilfully absent themselves from their parish church, and on whom penalties were imposed by various statutes passed during the reigns of Elizabeth and James I. Whart. Dict.

Those persons who separate from the church established by law. *Termes de la Ley.*

**RECUSATION. In Civil Law.** A plea or exception by which the defendant requires that the judge having jurisdiction of the cause should abstain from deciding, upon the ground of interest, or for a legal objection to his prejudice.

A recusation is not a plea to the jurisdiction of the court, but simply to the person of the judge. It may, however, extend to all the judges, as when the party has a suit against the whole court. Pothier, *Procéd. Civ.* 1ère *part.* ch. 2, s. 5. It is a personal challenge of the judge for cause. See 2 La. 390; 6 *id.* 134.

The challenge of jurors. La. Code Pract. art. 499, 500. An act, of what nature soever it may be, by which a strange heir, by deeds or words, declares he will not be heir. Dig. 29. 2. 95. See, generally, 1 Hopk. Ch. 1; 5 Mart. La. 292.

**RED BOOK OF THE EXCHEQUER.** An ancient record, wherein are registered the holders of lands *per baroniam* in the time of Henry III., the number of hides of land in certain counties before the conquest, and the ceremonies on the

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coronation of Eleanor, wife of Henry III., compiled by Alexander de Swenford, archdeacon of Salop and treasurer of St. Paul's, who died in 1246. 31 Hen. III.; Jacob, Law Dict.; Cowell.

**RED TAPE.** In a derivative sense, order carried to fastidious excess; system run out into trivial extremes. 55 Ga. 434.

**REDDENDO SINGULA SINGULIS** (Lat.). Referring particular things to particular persons. For example: when two descriptions of property are given together in one mass, both the next of kin and the heir cannot take, unless in cases where a construction can be made *reddendo singula singulis*, that the next of kin shall take the personal estate, and the heir-at-law the real estate. 14 Ves. 490. See 11 East 513, n.; Bac. Abr. *Conditions* (L).

**REDDENDUM** (Lat.). That clause in a deed by which the grantor reserves something new to himself out of that which he granted before. It usually follows the *tenendum*, and is generally in these words, "yielding and paying." In every good *reddendum* or reservation these things must concur: namely, it must be in apt words; it must be of some other thing issuing or coming out of the thing granted, and not a part of the thing itself nor of something issuing out of another thing; it must be of a thing on which the grantor may resort to distrain; it must be made to one of the grantors, and not to a stranger to the deed. See 2 Bla. Com. 299; Co. Litt. 47; Shepp. Touchst. 80; Cruise, Dig. tit. 32, c. 24, s. 1; Dane. Abr. Index.

**REDDIDIT SE** (Lat. he has rendered himself). **In English Practice.** An indorsement made on the bail-piece when a certificate has been made by the proper officer that the defendant is in custody. Com. Dig. *Bail* (Q 4).

**REDDITION.** A surrendering or restoring; also, a judicial acknowledgment that the thing in demand belongs to the demandant, and not to the person surrendering. Cowell.

**REDEEM.** To purchase back; to regain, as mortgaged property by paying what is due; to receive back by paying the obligation. 47 Ohio St. 156. See 47 N. J. Eq. 170.

**REDEMPTION** (Lat. *re*, back, *emptio*, a purchase).

A purchase back by the seller from the buyer. It is applied to denote the performance of the conditions upon performance of which a conditional sale is to become ineffective as a transfer of title, or, more strictly, a right to demand a reconveyance becomes vested in the seller. In the case of mortgages, this right is a legal right until a breach of conditions, when it becomes an equitable right, and is called the equity of redemption. See MORTGAGE; EQUITY OF REDEMPTION.

**REDEMPTIONES** (Lat.). Heavy fines. Distinguished from Misericordia, which see.

**REDHIBITION.** **In Civil Law.** The avoidance of a sale on account of some vice or defect in the thing sold, which renders its use impossible or so inconvenient and imperfect that it must be supposed that the buyer would not have purchased it had he known of the vice. La. Civ. Code, art. 2496.

This is essentially a civil-law right. The effect of the rule expressed by the maxim *caveat emptor* is to prevent any such right at common law, except in cases of express warranty. 2 Kent 374; Sugd. Vend. 222.

**REDHIBITORY ACTION.** **In Civil Law.** An action instituted to avoid a sale on account of some vice or defect in the thing sold which renders its use impossible or so inconvenient and imperfect that it must be supposed the buyer would not have purchased it had he known of the vice. La. Civ. Code 2496.

**REDISSEISOR.** See DISSEISIN.

**REDITUS ALBI** (Lat.). A rent payable in money; sometimes called white rent, or blanche farm. See ALBA FIRMA.

**REDITUS NIGRI** (Lat.). A rent payable in grain, work, and the like: it was also called black mail. This name was given to it to distinguish it from *reditus albi*, which was payable in money.

**REDITUS QUIETI.** Quit rents. 1 Steph. Com. 676.

**REDMANS, or RADMANS.** Men who, by the tenure or custom of their lands, were to ride with or for the lord of the manor, about his business. Domesd.

**REDOBATORES** (L. Lat.). Those that buy stolen cloth and turn it into some other color or fashion, that it may not be recognized. Redubbers, *q. v.* Barrington, Stat., 2d ed. 87, n.; Co. 3d Inst. 134; Britton, c. 29.

**REDRAFT.** **In Commercial Law.** A bill of exchange drawn at the place where another bill was made payable and where it was protested, upon the place where the first bill was drawn, or, when there is no regular commercial intercourse rendering that practicable, then in the next best or most direct practicable course. 1 Bell, Com. 406. See RE-EXCHANGE.

**REDRESS.** The act of receiving satisfaction for an injury sustained. For the mode of obtaining redress, see REMEDIES; 1 Chitty, Pr. Anal. Table.

**REDUBBERS.** **In Criminal Law.** Those who bought stolen cloth and dyed it of another color to prevent its being identified, were anciently so called. Co. 3d Inst. 134. See REDOBATORES.

**REDUCTION.** **In Scotch Law.** An action for the purpose of setting aside or

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rendering null and void some deed, will, right, etc. Bell, Dict.

**REDUNDANCY.** Matter introduced in an answer or pleading which is foreign to the bill or article.

The respondent is not to insert in his answer any matter foreign to the articles he is called upon to answer, although such matter may be admissible in a plea; but he may, in his answer, plead matter by way of explanation pertinent to the articles, even if such matter shall be solely in his own knowledge, and to such extent incapable of proof; or he may state matter which can be substantiated by witnesses; but in this latter instance, if such matter be introduced into the answer, and not afterwards put in the plea, or proved, the court will give no weight or credence to such part of the answer. Per Lushington, 3 Curt. Eccl. 543.

A material distinction is to be observed between redundancy in the allegation and redundancy in the proof. In the former case, a variance between the allegation and the proof will be fatal, if the redundant allegations are descriptive of that which is essential. But in the latter case, redundancy cannot vitiate because more is proved than is alleged, unless the matter superfluously proved goes to contradict some essential part of the allegation; 1 Greenl. Ev. § 67; 1 Stark. Ev. 401.

**RE-ENTRY.** The act of resuming the possession of lands or tenements in pursuance of a right which the party exercising it reserved to himself when he quit his former possession.

Conveyances in fee reserving a ground-rent, and leases for a term of years, usually contain a clause authorizing the proprietor to re-enter in case of the non-payment of rent, or of the breach of some covenant in the lease, which forfeits the estate. Without such reservation he would have no right to re-enter for the mere breach of a covenant, although he may do so upon the breach of a condition which, by its terms, is to defeat the estate granted; 2 Bingh. 13; 1 M. & Ry. 694; Tayl. Landl. & T. § 290; Woodf. Landl. & T. 310.

When a landlord is about to enforce his right to re-enter for the non-payment of rent, he must make a specific demand of payment, and be refused, before the forfeiture is complete, unless such demand has been dispensed with by an express agreement of the parties; 18 Johns. 451; 6 S. & R. 151; 6 Halst. 270; 7 Term 117; 5 Co. 41. In the latter case, a mere failure to pay, without any demand, constitutes a sufficient breach, upon which an entry may at any time subsequently be made; 2 N. Y. 147; 2 N. H. 164; 2 Dougl. 477; 2 B. & C. 490. The demand may be in the form of a notice to quit; 35 Neb. 766.

The requisites of a demand upon which to predicate a forfeiture for the non-payment of rent, at common law, are very strict. It must be for the payment of the precise sum due upon the day when, by the terms of the lease, it becomes payable; if any days of grace are allowed for payment, then upon the last day of grace; Co. Litt. 203; 7 Term 117; 2 N. Y. 147; see 55 N. J. L. 217; at a convenient time before sunset, while there is light enough to see to count the money; 17 Johns. 66; 1 Saund. 287; at the place appointed for payment, or if no particular place has been specified in the lease, then at the most public place on the land, which, if there be a dwelling-house, is the front door; 4 Wend. 313; 18 Johns. 450; 1 How. 211; Co. Litt. 202 *a*; notwithstanding there be no person on the land to pay it; Bac. Abr. *Rent* (I); and if the re-entry clause is coupled with the condition *that no sufficient distress be found upon the premises*, the landlord must search the premises to see that no such distress can be found; 15 East 286; 6 S. & R. 151; 8 Watts 51.

A re-entry, at common law, for condition forfeited in a lease, is void unless the evidence shows that the common-law forms have been complied with. A mere taking possession of the premises, when unoccupied, is not sufficient; 15 Wall. 475.

But the statutes of most of the states, following 4 Geo. II. c. 28, now dispense with the formalities of a common-law demand, by providing that an action of ejectment may be brought as substitute for such a demand in all cases where no sufficient distress can be found upon the premises. And this latter restriction disappears entirely from the statutes of such of the states as have abolished distress for rent.

The clause of re-entry for non-payment of rent operates only as a security for rent; for at any time before judgment is entered in the action to recover possession the tenant may either tender to the landlord, or bring into the court where the action is pending, all the rent in arrear at the time of such payment, and all costs and charges incurred by the landlord, and in such case all further proceedings will cease. And in some states, even after the landlord has recovered possession, the tenant may in certain cases be reinstated upon the terms of the original lease, by paying up all arrearages and costs; Tayl. Landl. & T. 302. See, generally, Wms. R. P. 285.

The acceptance by a landlord, after his right of possession is fixed, of property from the tenant in payment of rent that had accrued, is no waiver of his right to enter; 44 Ill. App. 61; but the acceptance of rent accruing after breach of a condition in a lease, with full knowledge of the breach, is a waiver of the right to declare a forfeiture and re-enter; 12 So. Rep. (Ala.) 61. See 6 Misc. Rep. 408.

But the courts will not relieve against a forfeiture which has been wilfully incurred by a tenant who assigns his lease, or neglects to repair or to insure, contrary to his express agreement, or if he exercises a forbidden trade, or cultivates the land in a manner prohibited by the lease; for in all such cases the landlord, if he has re-

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served a right to re-enter, may at once resume his former possession and avoid the lease; 2 Price 206, n.; 2 Mer. 459; 9 C. & P. 706; 1 Dall. 210; 9 Mod. 112; 3 V. & B. 29; 12 Ves. 291.

Where the landlord is justified in re-entering and taking possession of the premises, the lessee can recover no damages for the loss of the portion of the term, or for injury to the business, but may recover for property destroyed or any unnecessary damage thereto; 72 Wis. 559.

**REEVE.** An ancient English officer of justice, inferior in rank to an alderman.

He was a ministerial officer appointed to execute process, keep the king's peace, and put the laws in execution. He witnessed all contracts and bargains, brought offenders to justice and delivered them to punishment, took bail for such as were to appear at the county court, and presided at the court or folcmote. He was also called *gerefa*.

There were several kinds of reeves: as, the *shire-gerefa*, shire-reeve or sheriff; the *heh-gerefa*, or high-sheriff; *tithing-reeve*, burghor or borough-reeve.

**RE-EXAMINATION.** A second examination of a thing. A witness may be re-examined, in a trial at law, in the discretion of the court; and this is seldom refused. In equity, it is a general rule that there can be no re-examination of a witness after he has once signed his name to the deposition and turned his back upon the commissioner or examiner. The reason of this is that he may be tampered with, or induced to retract or qualify what he has sworn to; 1 Mer. 130.

**RE-EXCHANGE.** The expense incurred by a bill being dishonored in a foreign country where it is made payable and returned to that country in which it was made or indorsed and there taken up. 11 East 265; 2 Campb. 65. 1 Pars. Notes & B. 648. See Danl. Neg. Inst. 1445.

The loss resulting from the dishonor of a bill of exchange in a country different from that in which it was drawn or indorsed.

It is ascertained by proof of the sum for which a sight bill (drawn at the time and place of dishonor at the then rate of exchange at the place where the drawer or indorser sought to be charged resides) must be drawn in order to realize at the place of dishonor the amount of the dishonored bill and the expenses consequent on its dishonor. The holder may draw a sight bill for such sum on either the drawer or one of the indorsers. Such bill is a "redraft"; Benj. Chalm. Bills, art. 221. See L. R. 3 App. Cas. 146; Byles, Bills 444.

The drawer of a bill is liable for the whole amount of re-exchange occasioned by the circuitous mode of returning the bill through the various countries in which it has been negotiated, as much as for that occasioned by a direct return; 11 East 265; 3 B. & P. 385. And see 10 La. 562; 24 Mo. 65; 8 Watts 545; 10 Metc. 375; 7 Cra. 500; 4 Wash. C. C. 310; 2 How. 711, 764; 3 Exch. 25; 6 Moo. P. C. 314.

In some states legislative enactments have been made which regulate damages on re-exchange. These damages are different in the several states; and this want of uniformity, if it does not create injustice, must be admitted to be a serious evil. See 23 Pa. 137; 4 Johns. 119; 4 Cal. 395; 3 Ind. 53; 8 Ohio 292; MEASURE OF DAMAGES.

**RE-EXTENT.** A second extent on lands or tenements, on complaint that the former was partially made, etc. Cowell.

**REFALO.** A word composed of the three syllables re. fa. lo., for *recordari facias loquelam*. 2 Sell. Pr. 160; 8 Dowl. 514.

**REFARE.** To bereave, take away, or rob. Cowell.

**REFECTION** (Lat. *re*, again, *facio*, to make). **In Civil Law.** Reparation; re-establishment of a building. Dig. 19. 1. 6. 1.

**REFEREE.** A person to whom has been referred a matter in dispute, in order that he may settle it. His judgment is called an award. See ARBITRATOR; REFERENCE.

**REFEREES, COURT OF.** In the passage of private bills through the house of commons, the practice was adopted in 1864 of the appointment of referees on such bills, consisting of the chairman of ways and means and not less than three other persons to be appointed by the speaker. The referees were formed into one or more courts, three at least being required to constitute each court, a member in every case being chairman, but receiving no salary. The referees inquired into the proposed works, etc., and reported to the house. The committees of the house on any bill might also refer any question to the referees for their decision. It was also ordered in 1864 that the referees should decide on all petitions as to the right of the petitioner to be heard, *i. e.* his *locus standi*. A court of referees was specially constituted for the adjudication of this right, called *locus standi*. A series of reports of the court of referees on private bills in parliament, called *Locus Standi* reports, has been published since 1867.

**REFERENCE. In Contracts.** An agreement to submit to certain arbitrators matters in dispute between two or more parties, for their decision and judgment.

**In Mercantile Law.** A direction or request by a party who asks a credit to the person from whom he expects it, to call on some other person named, in order to ascertain the character or mercantile standing of the former. See PRIVILEGED COMMUNICATIONS.

**In Practice.** The act of sending any matter by a court of chancery, or one exercising equitable powers, to a master or other officer, in order that he may ascertain facts and report to the court.

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That part of an instrument of writing where it points to another for the matters therein contained. For the effect of such reference, see 1 Pick. 27; 15 *id.* 66; 17 Mass. 443; 7 Halst. 25; 14 Wend. 619; 10 Conn. 422; 3 Me. 393; 4 *id.* 14, 471. The thing referred to is also called a reference.

**REFERENDARIUS** (Lat.). An officer by whom the order of causes was laid before the Roman emperor, the desires of petitioners made known, and answers returned to them. Vicat, Voc. Jur.; Calvinus, Lex.

A king's chancellor at the time of the conquest. 1 Social England 136. See CANCELLARIUS.

**REFERENDUM** (Lat.). **In International Law.** A note addressed by an ambassador to his government, submitting to its consideration propositions made to him touching an object over which he has no sufficient power and is without instructions. When such a proposition is made to an ambassador, he accepts it *ad referendum;* that is, under the condition that it shall be acted upon by his government, to which it is referred.

**In Municipal Law.** The submission of a proposed law to the voting citizens of a country for their ratification or rejection. A mode of appealing from an elected body to the whole body of voters.

The laws are first passed upon by the legislature and then referred to the people for their final ratification.

This method of government is supposed to have originated in Switzerland; but it has in effect been employed in the United States since the revolution, in country, city, township, and school district governments, especially in New England. It has also, during the same time, been the practice in the United States for new state constitutions to be submitted to popular vote after they have been prepared by a convention of delegates elected by the people.

The referendum has been introduced in some local communities in Belgium, and is advocated by some of the minor political parties in the United States and in England. The system of submitting liquor laws to the decision of the people concerned, which has long been practised in the United States, is steadily extending and is usually held to be constitutional by the courts; 42 Conn. 364; 54 Ga. 317; 8 La. Ann. 341; 108 Mass. 27; 4 Cal. 385; 72 Pa. 491; 7 Cra. 382.

A correlative of the referendum is known as the *initiative*, which is an authority given to the people to propose legislation.

An act has recently been passed in Nebraska which enables the voters of cities and towns to adopt the referendum and also the initiative under the following principles: Fifteen per cent. of the voters may propose ordinances by petition, and twenty per cent. of the voters may compel the city council and mayor to submit proposed ordinances to a popular vote. As for ordinances passed by the city council, of its own initiative, they are not to go into effect for thirty days, and if, meantime, five per cent. of the voters petition for the submission of any ordinance so passed to the people, the same must be so submitted and must receive the approval of a majority of the voters before going into effect. A petition from ten per cent. of the voters obliges the city government to submit the proposed ordinance at a special election held within twenty days. Only ordinances relating to the immediate preservation of the public peace and health, and items of appropriations for current expenditures, are excepted from the provisions of the referendum law. 56 Alb. L. J. 33.

See Oberholtzer, The Referendum in America; LOCAL OPTION; DELEGATION; LEGISLATIVE POWER.

**REFORM.** To reorganize; to rearrange. Thus, the jury "shall be reformed by putting to and taking out of the persons so impannelled." Stat. 3 Hen. VIII. c. 12: Bacon, Abr. *Juries* (A).

*To reform an instrument in equity* is to make a decree that a deed or other agreement shall be made or construed as it was originally intended by the parties, when an error or mistake as to a fact has been committed. A contract has been reformed although the party applying to the court was in the legal profession and he himself drew the contract, it appearing clear that it was framed so as to admit of a construction inconsistent with the true agreement of the parties; 1 S. & S. 210; 3 Russ. 424. But a contract will not be reformed in consequence of an error of law; see 1 Story, Eq. Jur. 109; 1 Russ. & M. 418; 1 Chitty, Pr. 124; 159 Pa. 531; nor unless the mistake is mutual; 49 Mo. App. 255; see 142 U. S. 417; and only as between the original parties, or those claiming under them in priority, including purchasers with notice; 81 Me. 525. Equity will not reform instruments which express an intention of the parties at the time they are made, based on the knowledge then possessed by them, though their intention would have been different if they had been better informed; 69 Miss. 891.

A person who seeks to rectify a deed on the ground of mistake must establish in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all the parties down to the time of its execution; and also must be able to show exactly and precisely the form to which the deed ought to be brought: 4 De G. & J. 265; 68 Hun 299; 16 Or. 412; 142 U. S. 417. See 50 Ark. 179; 31 Fla. 73; 78 Hun 462. Before commencing an action to reform a deed a demand must be made on the grantee: 133 Ind. 19; 77 *id.* 74. Where the mistake has been on one side only, the utmost that the party desiring relief can obtain is rescission, not reformation: Ad. Eq. 171: 14 N. H. 175. But if there is mistake on one side and fraud on the other, there is a case

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for reformation; 44 N. Y. 325; Bisph. Eq. § 469; 142 U. S. 417.

A lease will not be reformed in equity, so as to make it conform to another lease, where both leases have the same legal effect, as judicially construed; 159 Pa. 350.

Where a deed does not express the intention of the parties at the time of its execution, equity will afford relief and decree a reformation; 39 U. S. App. 162.

A clerical mistake by one party at the time of executing the contract, unknown to the other, for which the latter is not responsible, will be sufficient ground for such relief and decree; 80 Fed. Rep. 46.

Where a policy of insurance was issued to a receiver of property, there being a contest as to the title to the property held by the receiver, the real owner, having established his title, may have the policy reformed, or, if the intent of the parties appears on its face, no reformation is necessary in order to enable the real owner to maintain an action on it; 7 U. S. App. 325.

The correction of a written instrument for fraud or mistake in its execution requires clear, unequivocal, and convincing evidence; 144 U. S. 154.

Reformation will not be decreed against *bona fide* purchasers for value; 15 U. S. App. 79.

Where a bid for certain public work contained an error in the amount for which it was offered to do the work, and the bidder sought to rescind his offer, it was held that equity would not reform a written contract unless a mistake is proved to be the mistake of both parties, but may rescind and cancel a contract upon the ground of a mistake of one party as to facts material to the contract; 82 Fed. Rep. 255.

See MISTAKE.

**REFORMATORY.** An institution or place in which efforts are made, either to cultivate the intellect or instruct the conscience or improve the conduct where the inmates voluntarily submit themselves to its instruction or discipline or are forcibly detained therein. 49 Conn. 34. See PRISONER.

The most famous reformatory is at Elmira, New York, under the control, for years, of Z. R. Brockway. Its annual reports contain much valuable matter on the subject of criminology.

**REFRESHING THE MEMORY.** To revive the knowledge of a subject by having a reference to something connected with it.

In the ascertainment of facts of which judges are bound to take judicial notice, as in the decision of matters of law which it is their office to know, they may refresh their memory and inform their conscience from such sources as they deem most trustworthy; 137 U. S. 216; Gresley, Eq. Ev. pt. 3, c. 1; 17 How. 557; 91 U. S. 37; 61 Me. 178.

As to witnesses, see MEMORANDUM.

**REFUND.** To pay back by the party who has received it, to the party who has paid it, money which ought not to have been paid.

On a deficiency of assets, executors and administrators *cum testamento annexo* are entitled to have refunded to them legacies which they may have paid, or so much as may be necessary to pay the debts of the testator; and in order to insure this they are generally authorized to require a refunding bond. See Bac. Abr. *Legacies* (H).

**REFUNDING BOND.** See REFUND.

**REFUSAL.** The act of declining to receive or to do something.

A grantee may refuse a title, see ASSENT; one appointed executor may refuse to act as such. In some cases, a neglect to perform a duty which the party is required by law or his agreement to do will amount to a refusal.

The word is often used to indicate an option: as, the refusal of a house. See OFFER; CONTRACT.

**REFUSE.** To deny a request or demand. 113 Ind. 206.

**REFUSE MATTER.** That which is in fact noisome and has been refused or rejected by the owner as worthless. 68 Conn. 101.

**REGALIA.** A privilege, prerogative, or right of property pertaining to a sovereign. The regalia includes the power of judicature of life and death, of war and peace, of masterless goods as estrays; of assessments, and of minting money.

In England the term was sometimes applied to things, as the crown and sceptre, etc., and sometimes to the dignity, power, and pecuniary rights of the king. The term differs from sovereignty as being applicable to both things and to rights to things, and also as not being inherent in or inseparable from the sovereign power, for regalia may be alienated, either with or without the consent of parliament. 1 Hall. Int. Law 150.

Upon the breaking up of the Roman Empire, the princes and cities which declared themselves independent appropriated to themselves those parts in which nature, most rich and liberal, yields extraordinary products. These portions or reserved rights were called *regalia*. *Id.*

**REGARD, COURT OF.** See COURT OF REGARD.

**REGARDANT** (French, *regardant*, seeing or vigilant). A villein regardant was one who had the charge to do all base services within the manor, and to see the same freed of annoyances. Co. Litt. 120; 2 Bla. Com. 93.

**REGE INCONSULTO.** A writ issued from the sovereign to the judges not to proceed in a cause which may prejudice the crown, until advised. Jenk. Cent. 97.

**REGENCY.** The authority of the person in monarchical countries invested with the right of governing the state, in

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the name of the monarch, during his minority, absence, sickness, or other inability.

**REGENT.** A ruler; a governor. The term is usually applied to one who governs a regency, or rules in the place of another.

In the canon law, it signifies a master or professor of a college. *Dict. du Dr. Can.*

It sometimes means simply a ruler, director, or superintendent; as in New York, where the board who have the superintendence of all the colleges, academies, and schools are called the regents of the University of the state of New York.

**REGIAM MAJESTATEM** (Lat.). An ancient book purporting to contain the law of Scotland, and said to have been compiled by king David, who reigned 1124–1153. It is not part of the law of Scotland, though it was ordered to be revised with other ancient laws of Scotland by parliaments of 1405 and 1407. Stair, Inst. 12, 508. So Craig, Inst. 1. 8. 11; Scott, Border Antiq. prose works 7, 30; but Erskine, Inst. b. 1, tit. 1, § 13, and Ross 60, maintain its authenticity. It is cited in some modern Scotch cases. 2 Swint. 409; 3 Bell, Hou. L. It is, according to Dr. Robertson, a servile copy of Glanville. Robertson, Hist. Charles V. 262.

**REGICIDE** (Lat. *rex*, king, *cædere*, to kill, slay). The killing of a king, and, by extension, of a queen. *Théorie des Lois Criminelles*, vol. 1, p. 300.

**REGIDOR. In Spanish Law.** One of a body, never exceeding twelve, who formed a part of the *ayuntamiento*, or municipal council, in every capital of a jurisdiction in the colonies of the Indies. The office of a regidor was held for life; that is to say, during the pleasure of the supreme authority. In most places the office was purchased; in some cities, however, they were elected by persons of the district, called *capitulares*. 12 Pet. 442, note.

**REGIME DOTAL.** See DOTAL PROPERTY.

**REGIMIENTO. In Spanish Law.** The body of regidores, who never exceeded twelve, forming a part of the municipal council, or *ayuntamiento*, in every capital of a jurisdiction. 12 Pet. 442, note.

**REGIO ASSENSU.** A writ whereby the sovereign gives his assent to the election of a bishop. Reg. Orig. 294.

**REGISTER.** A book containing a record of facts as they occur, kept by public authority; a register of births, marriages, and burials.

In England, where there is a state church, which has authority to legislate with respect to parish records, parish records are by law invested with the characteristics of public records: 1 Salk. 281; Stark. Ev., 4th ed. 299. But in the United States where there is no religion established by law, church registers, in the absence of statutory provisions, are not regarded as public records; 10 Allen 161; 16 Mo. 24; 47 *id.* 521; 12 How. 472.

Entries in the baptismal register of a church, made by a clergyman in the regular discharge of his duties, are admissible in evidence after his death, though there is no law requiring such records to be kept. Ordinarily such entries are admissible only for the purpose of proving the fact and date of baptism, and not of other matters therein stated, such as the date of the birth of the child; 52 Md. 708; 92 Mass. 161; 3 Wall. 175.

These registers, when admissible, are not, in general, evidence of any fact not required to be recorded in them; 37 Kan. 298; 47 Mo. 521; 51 Hun 639; 61 Mich. 471; 8 Me. 75; 3 Wall. 175. They have sometimes been admitted in evidence as being made by a third person in the discharge of an official duty; 92 Mass. 161; 115 Mass. 167; 52 Md. 708; 3 Wall. 75. See DECLARATIONS.

Statutes have been enacted in several states which give to such records, in a measure, their common-law importance. See 5 Pet. 475; 74 Wis. 349; 37 Kan. 298; 47 Md. 521; 133 Mass. 242.

In Pennsylvania, the registry of births, etc., made by any religious society in the state is evidence, by act of assembly, but it must be proved as at common law; 6 Binn. 416. A copy of the register of births and deaths of the Society of Friends in England, proved before the lord mayor of London by an *ex parte* affidavit, was allowed to be given in evidence to prove the death of a person; 1 Dall. 2; and a copy of a parish register in Barbadoes, certified to be a true copy by the rector, proved by the oath of a witness, taken before the deputy secretary of the island and notary public, under his hand and seal, was held admissible to prove pedigree, the handwriting and office of the secretary being proved; 10 S. & R. 383. In North Carolina, a parish register of births, marriages, and deaths, kept pursuant to the statute of that state, is evidence of pedigree: 2 Murph. 47. In Connecticut, a parish register has been received in evidence: 2 Root 99. See 15 Johns. 226; 1 Phill. Ev. 305; 1 Curt. 755; 6 Eccl. 452.

The certificate of registry granted to the person or persons entitled thereto, by the collector of the district, comprehending the port to which any ship or vessel shall belong; more properly, the registry itself. For the form, requisites, etc., of certificate of registry, see Acts of Cong. Dec. 31, 1792, 1 Stat. at L. 287, § 9; May 6, 1864, 13 Stat. at L. 69, § 4; Desty, Com. & Nav. § 4155; 3 Kent 141. See 1 Cra. 158; 9 Pet. 682; 19 How. 76; 3 Wheat. 601; 1 Newb. 309; 1 Wash. C. C. 125; 1 Mas. 306; 1 Blatch. & H. 52.

**REGISTER, REGISTRAR.** An officer authorized by law to keep a record called a register or registry: as, the register for the probate of wills.

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**REGISTER GENERAL.** An officer appointed by the sovereign of England to whom, subject to such regulations as shall be made by a principal secretary of state, the general superintendence of the whole system of registration of births, deaths, and marriages is entrusted. 3 Steph. Com. 234.

**REGISTER OF SHIPS.** A register kept by the collectors of customs, in which the names, ownership, and other facts relative to the merchant vessels are required by law to be entered. The register is evidence of the nationality and privileges of an American ship. Rap. & L. Law Dict.

The purpose of a registry is to declare the nationality of a vessel engaged in trade with foreign nations, and to enable her to assert that nationality wherever found ; 3 Wall. 566.

A certificate of a vessel's registry and proof that she carried the flag of the United States establish a *prima facie* case of proper registry under the laws of the United States, and of the nationality of the vessel and its owners ; 154 U. S. 134.

**REGISTER OF WRITS.** A book preserved in the English court of chancery, in which were entered, from time to time, all forms of writs once issued. Stat. Westm. 2, c. 25.

It is spoken of as one of the most ancient books of the common law. Co. Litt. 159 ; Co. 4th Inst. 150 ; 8 Co. Pref. ; 3 Shars. Bla. Com. 183*. It was first printed and published in the reign of Hen. VIII. This book is still an authority, as containing, in general, an accurate transcript of the forms of all writs as then framed, and as they ought still to be framed in modern practice,

But many of the writs now in use are not contained in it. And a variation from the register is not conclusive against the propriety of a form, if other sufficient authority can be adduced to prove its correctness. Steph. Pl. 7, 8.

**REGISTERED BOND.** One whose negotiability is temporarily withdrawn by a writing thereon that it belongs to a specific person, and by a registry to that effect at a specified office. Cook, St. & Stockh. § 15.

**REGISTERED LETTER.** A letter is not registered so as to complete service of notice by registered letter until it is numbered as required by the postal laws, although the postmaster has received it properly addressed and given a receipt therefor. 34 L. R. A. (Ia.) 466. A registered letter must be delivered by the carrier to the person to whom it is addressed ; 4 *id.* (Neb.) 457.

**REGISTER'S COURT. In American Law.** A court in the state of Pennsylvania which had jurisdiction in matters of probate.

**REGISTRARIUS** (Lat.). An ancient name given to a notary. In England this name is confined to designate the officer of some court the records or archives of which are in his custody.

**REGISTRATION.** The word "registration," used in the U. S. Rev. Stat. § 2011, has a general, not a technical, meaning, and indicates any list or schedule containing a list of voters, the being upon which constitutes a prerequisite to vote, unless there is a system of registration described by act of congress, and applied by the act as the only registration of voters under the law. The Delaware assessment lists, made primarily by the assessors of the different hundreds, and completed by the levy courts of the different counties, are such lists, though they contain not only a list of voters, but of other persons besides. The registration of voters intended by the act of congress need not be conclusive evidence that the person registered is qualified to vote ; 1 Fed. Rep. 1. This decision was prior to the existence in Delaware of a registration act *eo nomine*.

In the United States circuit court for South Carolina it was held that the registration laws of that state were null and void as being an unreasonable restriction of the right of suffrage, evidently intended to exclude ignorant persons, especially of the African race, and a violation both of the constitution of the state and of the fourteenth and fifteenth amendments to the constitution of the United States ; 67 Fed. Rep. 818. In that case it appeared that in 1882 an act was passed providing that in that year a registration of voters should be made and the books closed to be opened thereafter once a month after the general election in each year until the first of July preceding the general election in November following ; but that after the closing of the books each year persons coming of age before election might be registered. Voters receive certificates of registration which must be produced in order to vote and were transferred under different conditions upon removal into another county.

The registration of voters under the Delaware act was held to be so far judicial and not ministerial that a mandamus was refused to restore to the voting list the name of a person stricken off by the board of registration ; 1 Marvel 450.

A land registration act went into effect in Massachusetts October 1, 1898. It provides for a court of registration consisting of two judges sitting in Boston, with a right to adjourn to such other place as convenience may require. Examiners of title may be appointed by the judge of registration in each county. Only estates in fee simple can be registered. The act provides for the form of application and the form of notice to be given to the occupants of the land and to adjoining owners, which may be given by mail and by publication. The decree of the court confirming title and ordering registration binds the land and quiets the title thereto. It cannot be opened

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except within one year in case the registration is obtained by fraud, and not for that reason if an innocent purchaser for value has acquired an interest. The decree is registered in the county. A certificate of registration constitutes the owner's evidence of title. After registration the owner may convey it, etc., as at present, but no voluntary instrument of transfer except a will and a lease for not over seven years binds the land, but operates only as a contract between the parties and as authority for registration. Upon re-registration this certificate is surrendered and a new one issued. The act was drawn by Alfred Hemenway, under an appointment by act of 1897.

See LAND TRANSFER; TORRENS SYSTEM.

**REGISTRATION OF BIRTHS, MARRIAGES, AND DEATHS.** In most states acts have been passed requiring physicians, clergymen, etc., to register all such events with the proper county officer. The validity of these laws has been sustained under the police power; 14 N. W. Rep. (Ia.) 202. See REGISTER.

**REGISTRUM BREVIUM** (Lat.). The name of an ancient book which was a collection of writs. See REGISTER OF WRITS.

**REGISTRY.** A book, authorized by law, in which writings are registered or recorded.

**REGNAL YEARS.** The years in which a sovereign has reigned.

The following table of the reigns of English and British kings and queens is added, to assist the student in many points of chronology:—

| | Accession. |
|---|---|
| Egbert | 827 |
| Ethelwulf | 839 |
| Ethelbald | 858 |
| Ethelbert | 858 |
| Ethelred | 866 |
| Alfred | 871 |
| Edward the Elder | 901 |
| Athelstan | 925 |
| Edmund | 940 |
| Edred | 946 |
| Edwy | 955 |
| Edgar | 958 |
| Edward the Martyr | 975 |
| Ethelred II. | 979 |
| Edmund Ironside | 1016 |
| Canute | 1017 |
| Harold I. | 1035 |
| Hardicanute | 1040 |
| Edward Confessor | 1042 |
| Harold II. | 1066 |
| William I. | 1066 |
| William II. | 1087 |
| Henry I. | 1100 |
| Stephen | 1135 |
| Henry II. | 1154 |
| Richard I. | 1189 |
| John | 1199 |
| Henry III. | 1216 |
| Edward I. | 1272 |
| Edward II. | 1307 |
| Edward III. | 1326 |
| Richard II. | 1377 |
| Henry IV. | 1399 |
| Henry V. | 1413 |
| Henry VI. | 1422 |
| Edward IV. | 1461 |
| Edward V. | 1483 |
| Richard III. | 1483 |
| Henry VII. | 1485 |
| Henry VIII. | 1509 |
| Edward VI. | 1547 |
| Mary *. | 1553 |
| Elizabeth. | 1558 |
| James I. | 1603 |
| Charles I. | 1625 |
| Commonwealth | 1649 |
| Charles II.† | 1649 |
| James II. | 1685 |
| William and Mary | 1689 |
| William III. | 1695 |
| Anne | 1702 |
| George I. | 1714 |
| George II. | 1727 |
| George III. | 1760 |
| George IV. | 1820 |
| William IV. | 1830 |
| Victoria | 1837 |

**REGNANT.** One having authority as a king; one in the exercise of royal authority.

**REGRATING. In Criminal Law.** Every practice or device, by act, conspiracy, words, or news, to enhance the price of victuals or other merchandise, is so denominated. Co. 3d Inst. 196; 1 Russell, Cr. 169. Whart. Cr. Law 1849. See RESTRAINT OF TRADE.

**REGULA.** See MAXIMS.

**REGULAR CLERGY.** Monks who lived according to the rules of their respective houses or societies, in contradistinction to the parochial clergy, who did their duties "*in seculo*," and hence were called secular clergy. 1 Sharsw. Bla. Com. 387, n.

**REGULAR PROCESS.** Regular process is that which has been lawfully issued by a court or magistrate having competent jurisdiction.

When the process is *regular*, and the defendant has been damnified, as in the case of a malicious arrest, his remedy is by an action on the case, and not trespass; when it is *irregular* the remedy is by action of trespass.

If the process be *wholly* illegal or *misapplied* as to the *person* intended to be arrested, without regard to any question of fact, or whether innocent or guilty, or the existence of any debt, then the party imprisoned may legally resist the arrest

* References in legal works to reign of Mary couple the name of Philip, her husband, with her.

† The Restoration of Charles II. did not take place till 1660, but the regnal year of his reign is always computed from the death of Charles I., disregarding the Commonwealth.

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and imprisonment, and may escape, be rescued, or even break prison; but if the process and imprisonment were in form legal, each of these acts would be punishable, however innocent the defendant might be, for he ought to submit to legal process and obtain his release by due course of law; 1 Chitty, Pr. 637; 5 East 304, 308; 2 Wils. 47; 1 East, Pl. Cr. 310. See ESCAPE; ARREST; ASSAULT; FALSE IMPRISONMENT; MALICIOUS PROSECUTION.

**REGULATE.** To adjust by rule, method, or established mode; to direct by rule or restriction; to subject to governing principles or laws. 16 Neb. 683.

**REGULATION OF COMMERCE.** It is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged. 114 U. S. 203. As used in the constitution, transportation being essential to commerce, every obstacle to it, or burden laid upon it, by legislative authority, is regulation; 95 U. S. 470; 109 N. C. 279. See COMMERCE.

**REHABERE FACIAS SEISINAM** (Lat. do you cause to regain seisin). When a sheriff in the "*habere facias seisinam*" had delivered seisin of more than he ought, this judicial writ lay to make him restore seisin of the excess. Reg. Jud. 13, 51, 54.

**REHABILITATION.** The act by which a man is restored to his former ability, of which he had been deprived by a conviction, sentence, or judgment of a competent tribunal.

**REHEARING.** A second consideration which the court gave to a cause on a second argument.

In England a case heard by the Chancellor on appeal from the Master of the Rolls, etc., is a *rehearing;* 1 W. & M. 21.

A rehearing cannot be granted by the supreme court after the record has been remitted to the court below; 7 Wheat. 58.

Where any judge, who concurred in the decision, thinks proper to have a rehearing, the motion for one will be considered, otherwise it will be denied as of course; 16 U. S. App. 713.

Where the grounds for a rehearing were not brought to the attention of the court at the argument or by brief, permission to reargue will be granted only in extreme cases; 21 U. S. App. 426; and not where the questions have already been fully considered; 27 U. S. App. 290; and not when the ground was not overlooked at the former trial: 34 U. S. App. 45. That a judgment of affirmance was by an equal decision of the judges merely, affords no ground for granting a rehearing; 25 Wend. 256. See PRECEDENT.

The practice in the federal courts is to file a petition for a rehearing which, with the argument in its support, is submitted, without oral argument, for the consideration of the court, which decides whether to have the case reargued or not.

In the federal courts a petition for rehearing must be signed by counsel, and the accompanying affidavits should, by distinct and positive allegation, be made a part of the petition. Neither the petition nor affidavits should be verified before a notary public who is also counsel for petitioner; 85 Fed. Rep. 481.

When a motion for a new trial of an action at law and a petition for rehearing have been denied, equity will not entertain a bill to set the judgment aside on the same grounds alleged in the motion and petition; *id.* 508.

The refusal of the circuit court to grant a rehearing is not the subject of review; 113 U. S. 697.

Courts, especially in cases of general interest, order a reargument where they are in doubt or where the case was not argued before a full bench. In 71 Pa. 81, eminent counsel not connected with the cause petitioned the court for a reargument on the ground that the judgment was not well considered and that it would unsettle titles to real estate. A reargument was ordered and the former decision was reversed. See REOPENING CASE.

**REHYPOTHECATION.** See PLEDGE.

**REI INTERVENTUS** (Lat.). When a party is imperfectly bound in an obligation, he may, in general, annul such imperfect obligation; but when he has permitted the opposite party to act as if his obligation or agreement were complete, such *things have intervened* as to deprive him of the right to rescind such obligation: these circumstances are the *rei interventus;* 1 Bell, Com., 5th ed. 328, 329; Burton, Man. 128.

**REIMBURSE.** To pay back. 83 Pa. 264.

**REINSCRIPTION.** The law of Louisiana requires a mortgage to be periodically reinscribed in order to preserve its priority. When ten years have elapsed from the date of inscription without reinscription the mortgage is without effect as to all persons whatsoever who are not parties to it; 29 La. Ann. 315. A failure to reinscribe a mortgage within the statutory limits is not remedied or supplied by the pendency of a suit to foreclose it; 30 La. Ann. 1. See 103 U. S. 281; 34 La. Ann. 797; 149 U. S. 505; MORTGAGE.

**REINSTATE.** To restore to a state from which one has been removed. 86 Ky. 190.

**REINSTATEMENT.** This term in the law of insurance implies placing the

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insured in the same condition that he occupied and sustained towards the insurer next before the forfeiture was incurred, and does not imply reinsurance or the making of a new contract or policy of insurance. 110 N. C. 93.

**REINSURANCE.** Insurance effected by an underwriter upon a subject against certain risks, with another underwriter, on the same subject, against all or a part of the same risks, not exceeding the same amount. In the original insurance, he is the insurer; in the second, the assured. His object in reinsurance is to protect himself against the risks which he has assumed. There is no privity of contract between the original assured and the reinsurer, and the reinsurer is under no liability to such original assured; 3 Kent 227; 1 Phill. Ins. § 78 *a*, 404; 20 Barb. 468; 28 Pa. 250; 9 Ind. 443; 13 La. Ann. 246. See Beach, Ins. 1283; Pars. Mari. Ins. 301.

In the absence of any usage to the contrary, and of any specific stipulation in the policy, the original insurer may protect himself by reinsurance to the whole extent of his liability; 140 U. S. 565.

**REISSUABLE NOTES.** Bank-notes which, after having been once paid, may again be put into circulation.

They cannot properly be called valuable securities while in the hands of the maker, but in an indictment may properly be called goods and chattels; Ry. & M. 218. See 5 Mas. 537; 2 Russ. Cr. 147. And such notes would fall within the description of *promissory* notes; 2 Leach 1090, 1093.

**REISSUE; REISSUED PATENT.** See PATENT.

**REJOINDER. In Pleading.** The defendant's answer to the plaintiff's replication. Andr. Steph. Pl. 151.

It must conform to the plea; 16 Mass. 1; 2 Mod. 343; be triable, certain, direct, and positive, and not by way of recital, or argumentative; 1 H. & M'H. 159; must answer every material averment of the declaration; 23 N. H. 198. It must not be double; 6 Blackf. 421; 3 McLean 163; and there may not be several rejoinders to the same replication; 1 How. Miss. 139; 1 Wms. Saund. 337, n.; nor repugnant or insensible. See Co. Litt. 304; Archb. Civ. Pl. 278; Comyns, Dig. *Pleader* (H).

**REJOINING GRATIS.** Rejoining within four days from the delivery of the replication, without a notice to rejoin or demand of rejoinder. 1 Archb. Pr. 280, 317; 10 M. & W. 12. But judgment cannot be signed without demanding; 3 Dowl. 537.

**RELATION** (Lat. *re*, back, *fero*, to bear). **In Civil Law.** The report which the judges made of the proceedings in certain suits to the prince were so called.

These relations took place when the judge had no law to direct him, or when the laws were susceptible of difficulties; it was then referred to the prince, who was the author of the law, to give the interpretation. They were made in writing, and contained the pleadings of the parties and all the proceedings, together with the judge's opinion, and prayed the emperor to order what should be done. This ordinance of the prince thus required was called a rescript. Their use was abolished by Justinian, Nov. 125.

**In Contracts.** When an act is done at one time, and it operates upon the thing as if done at another time, it is said to do so by relation: as, if a man deliver a deed as an escrow, to be delivered, by the party holding it, to the grantor, on the performance of some act, the delivery to the latter will have relation back to the first delivery. *Termes de la Ley.* Again, if a partner be adjudged a bankrupt, the partnership is dissolved, and such dissolution relates back to the time when the commission issued; 3 Kent 33. See Litt. 462; 2 Johns. 510; 15 *id.* 309; 2 Harr. & J. 151; FICTION.

**RELATIONS.** A term which, in its widest sense, includes all the kindred of the person spoken of. It has long been settled that in the construction of wills it includes those persons who are entitled as next of kin under the statute of distribution; 2 Jarm. Wills 661; 54 Me. 291; L. R. 20 Eq. 410; [1894] 3 Ch. 565; 132 N. Y. 338; in the interpretation of a statute, the term was held not to include a stepson; 108 Mass. 382; or a wife; 101 *id.* 36; 10 Wash. 533; or a brother-in-law; 162 Mass. 448.

A legacy to "relations" generally, or to "relations by blood or marriage," without enumerating any of them, will, therefore, entitle to a share such of the testator's relatives as would be entitled under the statute of distributions in the event of intestacy; 1 Madd. 45; 1 Bro. C. C. 33. The same rule extends to devises of real estate; 1 Taunt. 263. See LEGACY; KINDRED.

Relations to either of the parties, even beyond the ninth degree, have been holden incapable to serve on juries; 3 Chitty, Pr. 795, note *c*. As to the disqualification of a judge by reason of relationship, see JUDGE. Relationship or affinity is no objection to a witness, unless in the case of husband and wife. See WITNESS.

**RELATIVE.** See RELATIONS.

**RELATIVE FACT.** A fact having relation to another fact; a minor fact; a circumstance. Burril, Circ. Ev. 121. See RELEVANCY.

**RELATIVE POWERS.** Those which relate to land; so called to distinguish them from those which are collateral to it.

These powers are *appendant*: as, where a tenant for life has a power of making leases in possession. They are *in gross* when a person has an estate in the land, with a power of appointment, the execution of which falls out of the compass of his estate, but notwithstanding, is annexed in privity to it, and takes effect in the appointee out of an interest appointed in the appointer. 2 Bouvier, Inst. n. 1930.

**RELATIVE RIGHTS.** Those to which a person is entitled in consequence of his relation with others; such as the

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rights of a husband in relation to his wife; of a father as to his children; of a master as to his servant; of a guardian as to his ward.

In general, the superior may maintain an action for an injury committed against his relative rights. See 2 Bouvier, Inst. nn. 2277-2296; 3 *id.* n. 3401; 4 *id.* nn. 3615-3618; ACTION.

**RELATOR.** A rehearser or teller. One who, by leave of court, brings an information in the nature of a *quo warranto*.

At common law, strictly speaking, no such person as a relator to an information is known, he being a creature of the statute of Anne, c. 20. In this country, even where no statute similar to that of Anne prevails, informations are allowed to be filed by private persons desirous to try their rights, in the name of the attorney-general, and these are commonly called relators; though no judgment for costs can be rendered for or against them; 5 Mass. 231; 3 S. & R. 52; 15 *id.* 127; Ang. Corp. 470. In chancery, the relator is responsible for costs; 4 Bouvier, Inst. n. 4022.

**RELAXATION, LETTERS OF.** Letters which a debtor might procure and which had the effect to restore him to his former state. Ersk. Prin. 156.

**RELEASE.** The giving up or abandoning a claim or right to the person against whom the claim exists or the right is to be exercised or enforced.

Releases may either give up, discharge, or abandon a right of action, or convey a man's interest or right to another who has possession of it or some estate in the same. Shepp. Touchst. 320; Littleton 444; Bac. Abr.; Viner, Abr.; Rolle, Abr. In the former class a mere right is surrendered; in the other not only a right is given up, but an interest in the estate is conveyed and becomes vested in the release.

An *express* release is one directly made in terms by deed or other suitable means.

An *implied* release is one which arises from acts of the creditor or owner, without any express agreement. See Pothier, Obl. nn. 608, 609.

A *release by operation of law* is one which, though not expressly made, the law presumes in consequence of some act of the releasor; for instance, when one of several joint obligors is expressly released, the others are also released by operation of law; 3 Salk. 298; Hob. 10, 66; 4 Mod. 380; 7 Johns. 207.

Releases of claims which constitute a cause of action acquit the releasee, and remove incompetency as a witness resulting from interest.

Littleton says a release of all *demands* is the best and strongest release; sect. 508. Lord Coke, on the contrary, says *claims* is a stronger word; Co. Litt. 291 *b*.

In general, the words of a release will be restrained by the particular occasion of giving it; 1 Lev. 235; T. Raym. 399. It cannot apply to circumstances of which the party had no knowledge at the time he executed it; and if it be so general as to include matters never contemplated, the party will be entitled to relief; 6 H. & N. 347.

The general words in a release are limited always to the things which were in the contemplation of the parties when the release was given; L. R. 4 H. L. 623.

The word release in an assignment for the benefit of creditors, requiring creditors accepting its terms to execute releases of their claims, was held to include any instrument sufficient to secure the absolute discharge of the debtor as to creditors accepting the terms of the assignment; 17 S. E. Rep. (S. C.) 56. See PREFERENCE.

The reader is referred to the following cases where a construction has been given to the expressions mentioned. A release of "all actions, suits, and demands;" 3 Mod. 277; "all actions, debts, duties, and demands;" *id.* 1, 64; 8 Co. 150 *b*; 2 Saund. 6 *a*; "all demands;" 5 Co. 70 *b*; 1 Lev. 99; Salk. 578; 2 Rolle 20; 2 Conn. 120; "all actions, quarrels, trespasses;" Dy. 2171, pl. 2; Cro. Jac. 487; "all errors, and all actions, suits, and writs of error whatsoever;" T. Raym. 399; "all suits;" 8 Co. 150; "of covenants;" 5 Co. 70 *b*.

Where a creditor promised to sign a release of his claim, but afterwards refuses to execute it, the debtor is not released from liability; 153 Pa. 281.

A parol agreement to release a party from liability on a note, unsupported by any consideration, cannot be enforced; 96 Ala. 454. The voluntary payment by a third person of the amount then due on a contract is a sufficient consideration to support a release of the contract; 120 U. S. 256. A release of plaintiff's cause of action, under seal and for a money consideration, is a bar to an action, though fraud in obtaining it be alleged, unless it be shown that the consideration was tendered back before the action was commenced, or that defendant was *non compos mentis* when he executed the release, and his mental unsoundness prevented him from understanding the transaction; 53 Fed. Rep. 569. Where it is claimed that a release is not effective because of the mental condition of the person who signed it, it raises a question of fact for the jury, as where in an action against a railroad company for injury by reason of negligence, a written release of damages was set up in bar of the action, it was held to be for the jury to say whether he executed it under the influence of great suffering through his injury and in a state approaching unconsciousness caused thereby and by the use of morphine; 158 U. S. 326.

Where one has a right of action against two or more, and covenants with one of them not to sue him, it does not operate as a release of the others, though an express release to him would have that effect: 6 Taunt. 289; L. R. 8 Ex. 81; 4 Ch. App. 208.

A release by a witness where he has an interest in the matter which is the subject of the suit, or release by the party on



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whose side he is interested, renders him competent; 1 Phill. Ev. 102, and the cases cited in n. *a*. See Chitty, Bail. 329; 1 Dowl. & R. 361.

The release of one of the joint makers of a note constitutes a release of the other also; 37 W. Va. 15; 17 Mass. 581; but a covenant not to sue one of two joint tort feasors does not operate as a release of the other from liability; [1892] 2 Q. B. 511.

**In Estates.** The conveyance of a man's interest or right which he hath unto a thing to another that hath the possession thereof or some estate therein. Shepp. Touchst. 320. The relinquishment of some right or benefit to a person who has already some interest in the tenement, and such interest as qualifies him for receiving or availing himself of the right or benefit so relinquished. Burton, R. P. 15*.

The words generally used in such conveyance are "remised, released, and forever quit-claimed." Littleton § 445.

Releases of land are, in respect of their operation, divided into five sorts: releases that enure by way of passing the estate, or *mitter l'estate* (*q. v.*), *e. g.* a release by joint-tenant to co-joint-tenant, which conveyance will pass a fee without words of limitation. Releases that enure by way of passing the right, or *mitter le droit*, *e. g.* by disseisee to disseisor. Releases that enure by enlargement of the estate. A release to the tenant in possession, by him who hath the reversion or inheritance, is said to *enlarge* his estate and to be equal to an entry and feoffment and to amount to a grant and attornment. The law requires privity of estate, that the releasor have a right, and the releasee such a possession as will make him capable of taking an estate; Bac. Abr. *Release* (C) 4.

Releases that enure by way of extinguishment: *e. g.* a lord releasing his seignorial rights to his tenant.

Releases that enure by way of feoffment and entry: *e. g.* if there are two disseisors, a release to one will give him a sole estate, as if the disseisee had regained seisin by entry and enfeoffed him. 2 Sharsw. Bla. Com. 325*. See 4 Cruise, Dig. 71; Gilb. Ten. 82; Co. Litt. 264; 3 Brock. 185; 2 Sumn. 487; 8 Pick. 143; 5 Harr. & J. 158; 2 N. H. 402; 10 Johns. 456.

The technicalities of English law as to releases are not generally applicable in the United States. The corresponding conveyance is a quit-claim deed. 21 Ala. N. S. 125.

**RELEASEE.** A person to whom a release is made.

**RELEASOR.** He who makes a release.

**RELEGATIO** (Lat.). A kind of banishment known to the civil law, which did not take away the rights of citizenship, which *deportatio* did.

Some say that *relegatio* was temporary, *deportatio* perpetual; that *relegatio* did not take away the property of the exile, and that *deportatio* did: but these distinctions do not seem always to exist. There was one sort of *relegatio* for slaves, viz. *in agros;* another for freemen, viz. *in provincias*. *Relegatio* only exiled from certain limits; *deportatio* confined to a particular place (*locus pœnæ*). Calvinus, Lex.

**RELEGATION.** The temporary banishment or exile by special act of parliament. Co. Litt. 133 *a*.

**RELEVANCY.** Applicability to the issue joined. That quality of evidence which renders it properly applicable in determining the truth and falsity of the matters in issue between the parties to a suit. See 1 Greenl. Ev. § 49. Two facts are said to be relevant to each other when so related "that according to the common course of events, one either taken by itself or in connection with other facts, proves or renders probable the past, present, or future existence or non-existence of the other." Steph. Dig. Ev. art. 1. This is relevancy in a logical sense. Legal relevancy requires a higher standard of evidentiary force. It includes logical relevancy and demands a close connection between the fact to be proved and the fact offered to prove it. The fact, however, that it is logically relevant does not insure admissibility; it must also be legally relevant; 92 U. S. 281; it is, however, the tendency of modern jurisprudence to admit most evidence logically relevant. Chamb. Best. Ev. 251, n.

**RELICTA VERIFICATIONE** (Lat. his pleading being abandoned).

**In Pleading.** A confession of judgment made after plea pleaded: viz. a *cognovit actionem* accompanied by a withdrawal of the plea.

**RELICTION** (Lat. *relinquo*, to leave behind). An increase of the land by the retreat or recession of the sea or a river.

Where the sea cut off the sea front of the main land between certain points and afterwards a beach was reformed outside the main land, and divided from it by a bay of navigable water, it was held that the title to the new formation was in the owners of the part cut off. 61 How. Pr. 197.

See AVULSION; ALLUVION; LAKE; RIVER; WATERS.

**RELIEF.** A sum payable by a new tenant, the duty being incident to every feudal tenure, by way of fine or composition with the lord for taking up the estate which was lapsed or fallen in by the death of the last tenant. At one time the amount was arbitrary; but afterwards the relief of a knight's fee became fixed at one hundred shillings. 2 Bla. Com. 65.

**RELIEF ASSOCIATION.** See RAILROAD RELIEF.

**RELIGION** (Lat. *re*, back, *ligo*, to bind). Real piety in practice, consisting in the performance of all known duties to God and our fellow-men. It has been held to include the principle of gratitude to an active power who can confer blessings. 38 L. J. M. C. 5.

The constitution of the United States

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provides that "congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." See Story, Const. 1870; Miller, Const. 645. Congress cannot pass a law for the government of a territory which prohibits the free exercise of religion; 98 U. S. 162; religion is not defined in the constitution, its meaning there must be ascertained elsewhere. Jefferson was the leader of the movement for placing this clause in the constitution; *id.* See 12 Hening's Stat. 84; 1 Jeff. Works 45, 79; 2 *id.* 355; 8 *id.* 113. This provision and that relating to religious tests (*q. v.*) are limitations upon the power of congress only; Cooley, Const. 205; perhaps the fourteenth amendment may give additional securities if needful; *id.* By establishment of religion is meant the setting up of a state church, or at least the conferring upon one church of special favors which are denied to others; 1 Tuck. Bla. Com. App. 296; 2 *id.* App. n. G. The Christian religion is, of course, recognized by the government, yet not so as to draw invidious distinctions between different religious beliefs, etc.; Cooley, Const. 206. With the exception of these provisions, the preservation of religious liberty is left to the states. The various state guarantees have been summed up by Judge Cooley, who says that under American constitutions the following things are unlawful: 1. Any law respecting the establishment of religion. 2. Compulsory support by taxation or otherwise of religious instruction. 3. Compulsory attendance upon religious worship. 4. Restraints upon the free exercise of religion according to the dictates of conscience. 5. Restraints upon the expression of religious belief. Const. Lim. 575.

The constitutions of most of the states forbid any religious test for holding office; but those of Arkansas, Mississippi, North Carolina, South Carolina, and Texas provide that any one who denies the existence of God is ineligible to office. In Maryland, Kentucky, and Tennessee, by constitution, clergymen are ineligible to civil office. The constitution of New Hampshire permits the legislature to authorize the towns to make adequate provision for the support and maintenance of public Protestant teachers of religion.

A person's religious belief cannot be accepted as a justification for his committing an overt act, made criminal by the law of the land (polygamy); 98 U. S. 145. By the constitution "congress is deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order;" *id.* 164. Where the parents of a sick child omitted to call in medical attendance because of their religious belief that what they did would be effective, they were held not guilty of manslaughter; 10 Cox, Cr. Cas. 531; otherwise, if they had actively starved it to death under like religious belief; *id.* See 98 U. S. 167.

Where congress appropriated money for a building to be erected on the grounds of a hospital in the District of Columbia, at the discretion of the commissioners, they were restrained from placing it on the grounds of a Roman Catholic institution; 26 Wash. Law Rev. 84; s. c. 11 Harv. Law Rev. 542.

See Cooley, Const. Lim. ch. 13; 32 Am. L. Rev. 541; 29 Am. L. Reg. N. S. 273, 321; Spear, Religion and the State; 5 *Revue Lég.* 569; 4 Alb. L. J. 221; 10 *id.* 17.

As to reading the Bible in schools, see SCHOOLS.

See CHARITIES; CHARITABLE USES; POLYGAMY; RELIGIOUS TEST; RELIGIOUS EDUCATION; CHRISTIANITY.

**RELIGIOUS BOOKS.** Those which tend to promote the religion taught by the Christian dispensation, unless by associated words the meaning is so limited to show that some other form of worship is referred to. 72 Me. 500.

**RELIGIOUS CORPORATION.** See RELIGIOUS SOCIETY.

**RELIGIOUS EDUCATION.** Questions respecting the religious education of children arise not infrequently by reason of applications to the courts for either restraining or mandatory process intended to control the religious education of children where differences exist between the parents or where the relations of a deceased parent seek to control the direction given to the mind of the child.

Where the husband was a Roman Catholic and the wife a Protestant, and by an antenuptial agreement the children were to be brought up as Roman Catholics, but they had been educated as Protestants, and it appeared that the father gave way to drink and two girls of fifteen and eleven were before the court on the application of the father, who had reformed, to restore them to his charge and educate them at a Papist school, it was held that the children should remain at the Protestant school where they then were; [96] 1 Ch. 740.

Courts or those who have the guardianship of a child after the father's death should have a sacred regard to the religion of the father and, unless under very special circumstances, should see that the child is brought up in his religious faith; L. R. 6 Ch. 539.

Where both father and mother were Roman Catholics and, after the death of the father, a posthumous child was born, and five years after the father's death, the mother became a Protestant and, until the child was about nine years of age, educated it in that faith, the court refused to order the child to be brought up in the father's belief; 8 D. M. & G. 760.

Where no abandonment by the father is shown, the mere fact that a child will be better off or more contented under other people's care will not justify his instruction in a creed other than the father's; but when abandonment is proved, the

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question turns upon the welfare of the child; L. R. 8 Ch. 622. See 24 Ch. Div. 317. The pecuniary welfare of the child will be weighed together with its moral welfare, but the danger of making the former all important must be guarded against; 4 My. & Cr. 688.

The practice of the courts of having interviews with the children is discouraged as tending to encourage controversial opinions in their tender minds, and because the child is often so nervous that the court can form no useful opinion in that way; [93] 1 Ch. 143. See FATHER; INFANT.

As to reading the Bible in schools, see SCHOOLS.

**RELIGIOUS IMPOSTORS.** Those who falsely pretend an extraordinary commission from heaven, or terrify and abuse the people with false denunciations of judgment; punishable with fine, imprisonment, and infamous corporal punishment. 4 Br. & H. Com. 71.

**RELIGIOUS MEN.** Such as entered into some monastery or convent. In old English deeds, the vendee was often restrained from aliening to "Jews or religious men," lest the lands should fall into mortmain. Religious men were civilly dead. Blount.

**RELIGIOUS SOCIETY.** A body of persons associated together for the purpose of maintaining religious worship. In this country they are not ecclesiastical corporations in the English sense, but ordinary private, civil corporations, and as such subject to the ordinary civil jurisdiction; 13 Wall. 679; 36 N. Y. 161; 18 Vt. 511.

The religious corporation and the church are distinct bodies, independent of each other, though one may exist within the other. When a church and society are united, the society commonly owns the property and makes the pecuniary contract with the clergyman, but in many instances a society exists without a church and a church without a society; 16 Gray 329; 9 Cush. 186. Membership in the church is not ordinarily a prerequisite to membership in the corporation, and the excommunication of a member who was trustee of a religious society did not disqualify him from holding that office; 15 Wall. 131. This distinction between the church and the society has been stated by Judge Cooley, who said that the statute under consideration contemplates a church connected with the corporation, though that may not be essential. The church is not incorporated and does not control the property or the membership of the society, while the corporation has nothing to do with the church except to provide for its temporal wants; 51 Mich. 137. The unincorporated ecclesiastical body has power to control and discipline its membership, but the religious corporation has no power to try or disfranchise a corporator for moral delinquency, and in case of an attempt to do so, he has his remedy at law; 53 N. Y. 103.

Their powers, like those of other corporations, are construed with reference to the object of their corporate existence and extend so far, and so far only, as necessary to effectuate them. It has been held that a church corporation the object of whose incorporation was "the more efficient worship of God, the preservation and perpetuation of said church, and the better control and regulation of the property thereof," had no power to charter a steamboat, manage a public excursion, and sell tickets therefor, in order to raise money to pay debts of the church; 63 Ga. 186. In this case the steamboat company had refused to proceed because of an attempt to overload the boat, and it was held that no action would lie against it for breach of contract.

Where there is a dispute over the rights of contending factions of an unincorporated church to the use of the church property, an injunction will lie at the suit of the faction entitled to the property to restrain trespasses thereon by the other faction; 34 S. W. Rep. (Mo.) 875.

Even where the corporation is defective, yet where land has been acquired for the use of a religious society, equity will enforce that use no matter where the legal title is vested or though it be in an individual. So the corporation itself will be compelled by the courts to administer the property upon the trusts attached to it in the grant or donation. "The corporation or society are trustees and can no more divert the property from the use to which it was originally dedicated than any other trustee. If they should undertake to divert the funds, equity will raise some other trustee to administer them and apply them according to the intention of the original donors or subscribers." Sharswood, J., in 67 Pa. 138.

The effect of church divisions upon such trusts is discussed by Mr. Justice Miller in the leading case of Watson *v.* Jones, 13 Wall. 679. He classifies the cases under three heads. 1. Where the property is devoted to some specific form of religious doctrine. 2. Where it is held by a congregation strictly independent of ecclesiastical associations. 3. Where it is merely a subordinate member of some general church organization. Trusts of the first class are enforced in some states, but mainly in jurisdictions which sustain charitable uses. And in such case the limitation must be express and not ambiguous. Kynett, Rel. Corp. 96. Such conveyance might be sustained in New York where the trust is put in the form of a condition which can only be enforced by the grantor; *id.* See 21 N. Y. 267. Such trusts have been held invalid in several states: 31 Minn. 173; 41 Mich. 730; 64 Md. 333; *contra*, 2 W. Va. 310; 9 Kan. 592.

In the second class of cases referred to in Watson *v.* Jones, it was there said that the ordinary rules governing voluntary associations must be applied, and in case of schism, the right to the property must

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be determined by the principles regulating the government of the association. This view is said to have been uniformly adopted; Kynett, Rel. Corp. 100, and cases cited in note.

As to the third class of societies, the denominational relations are considered by the court, and it is quite settled that if the doctrines of the denomination are abandoned by the majority, they forfeit the right to retain and use the property; *id.* 100–104, where the cases are collected.

In questions relating to church property, the decision of ecclesiastical tribunals, while accorded great weight, are not binding upon the civil courts, but they will be respected by the latter in all matters of purely ecclesiastical concern, such as the decision of questions of faith within the association, and the government of its individual members; *id.* 105.

Where land was bought and the title was taken by a bishop, and money was raised by the members of his church to purchase land and build a temple, and the land was dedicated by religious services by the head of the order, and when the bishop left the state he executed a declaration of trust in favor of the church, it was held that the grant was impressed with a trust in favor of the church; 60 Fed. Rep. 937.

In some states, as Illinois, Maryland, and Massachusetts, statutes provide that the appropriate Roman Catholic archbishop shall be and may become a corporation sole.

An allegation that by the regulations of the Catholic Church the bishop of the diocese holds all its property in his own name as trustee, for its benefit, and that each priest assigned to duty is entitled to hold the bishop individually liable for his salary, is not sufficient to sustain an action for salary brought by a priest against his bishop. A trust created by the rules of a church which is not shown to be capable of making contracts, accepting benefits, and compelling performance, is not recognized by law. The courts will not take judicial notice of the nature and powers of a church, so far as its civil rights and duties are concerned, in the absence of averment or proof upon the subject. Where such a question has been submitted to an ecclesiastical tribunal in the church, its decision, adverse to the claim, is a bar to an action therefor; 18 N. Y. L. J. 1613 (C. of App. N. Y., March 1, 1898).

A bishop is not liable to a priest for his salary; both are fellow-servants of the same church; 46 Mich. 457. Those who deal with an unincorporated church must trust the performance of civil obligations to the honor and good faith of its members; 41 Mich. 737.

The decision of an ecclesiastical tribunal is conclusive as to matters of discipline; and as to property rights it is said that the courts will treat the determination of the highest tribunal in the church as controlling; 13 Wall. 679; 54 N. Y. 551.

A priest necessarily subjects his conduct, in that capacity, to the laws and customs of his church; and in that respect, when his case has been heard according to the prescribed forms, the decision of the tribunals of the church will be respected by the courts; 149 N. Y. 401, 414; 98 Pa. 213; 58 Ill. 509.

In religious bodies all matters of faith and internal government will be left to the decision of the bodies themselves; 104 Pa. 493; 42 Minn. 503; 5 Del. Ch. 573; 156 Pa. 119; 146 Ill. 428. But where these decisions violate the law of the land, or their own law; 89 Pa. 477; courts will examine them; 36 Neb. 564; after the ecclesiastical remedies have been exhausted; 58 N. W. Rep. (Mich.) 834.

If property rights are involved, courts will assume jurisdiction; 162 Pa. 280; 33 N. J. L. 162; L. R. 1 Sc. & Div. App. 568; and the office of priest; 90 Pa. 477; or vestryman; 68 Cal. 248; involves a property right.

**RELIGIOUS TEST.** The constitution of the United States declares that "no religious test shall ever be required as a qualification to any office or public trust under the United States." This clause was introduced for the double purpose of satisfying the scruples of many persons who feel an invincible repugnance to any religious test or affirmation, and to cut off forever every pretence of any alliance between church and state in the national government. Story, Const. § 1841. See RELIGION.

**RELIGIOUS USE.** See CHARITABLE USES.

**RELINQUISHMENT. In Practice.** A forsaking, abandoning, or giving over a right: for example, a plaintiff may relinquish a bad count in a declaration, and proceed on a good; a man may relinquish a part of his claim in order to give a court jurisdiction.

**RELIQUA.** The remainder or debt left upon balancing an account.

**RELOCATIO** (Lat.). **In Civil Law.** A renewal of a lease on its determination on like terms as before. It may be either express or tacit; the latter is when the tenant holds over with the knowledge and without objection of the landlord. Mackeldey, Civ. Law § 379.

**REMAINDER.** The remnant of an estate in land, depending upon a particular prior estate created at the same time and by the same instrument and limited to arise immediately on the determination of that estate and not in abridgment of it. 4 Kent 197. See Will. Real P. 282; Chall. Real P. 69.

A *contingent* remainder is one which is limited to an uncertain or dubious person, or which is to take effect on an event or condition which may never happen or be performed, or which may not happen or be

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performed till after the determination of the preceding particular estate.

A *vested* remainder is one by which a present interest passes to the party, though perhaps to be enjoyed in future, and by which the estate is invariably fixed to remain to a determinate person after the particular estate has been spent.

There are four classes of contingent remainders. 1. Where the remainder depends on a contingent determination of the preceding estate, and it remains uncertain whether the use or estate limited *in future* will ever vest. 2. Where the contingency on which the remainder is to take effect is independent of the determination of the preceding estate and must precede the remainder. 3. Where the condition upon which the remainder is limited is certain in event, but the determination of the particular estate may happen before it. 4. Where the person to whom the remainder is limited is not ascertained or not in being. 4 Kent 207, quoting Fearne, Cont. Rem.

They are divided by Blackstone into two kinds. 1. Remainders limited to take effect to a dubious and uncertain person, or 2. Upon a dubious or uncertain event; and by Lord Ch. J. Willes into, 1. Where the person to whom the remainder was limited is not *in esse*. 2. Where the commencement of the remainder depended on some matter collateral to the determination of the particular estate; Willes 327; 4 Kent 207, and note, where the classification of Blackstone is approved.

There are exceptions to the third and fourth classes of contingent remainders, as enumerated by Fearne, as, a limitation for a long term of years with remainder over gives a vested remainder; and where one takes an estate of freehold and an immediate remainder is limited thereon in the same instrument to his heirs in fee or in tail, the remainder is immediately executed in possession and he becomes seised in fee or in tail. 4 Kent 209. See SHELLEY'S CASE, RULE IN.

The rule that where there is a possibility upon a possibility, the remainder is void; 2 Co. 51; is said to be obsolete; 4 Kent 206, n.; 2 H. L. Cas. 186.

See CONTINGENT REMAINDER; CROSS-REMAINDER; EXECUTORY DEVISE; LIMITATION; REVERSION.

**REMAINDER-MAN.** One who is entitled to the remainder of the estate after a particular estate carved out of it has expired. Will. Real P. 290.

**REMAND.** When a prisoner is brought before a judge on a *habeas corpus*, for the purpose of obtaining his liberty, the judge hears the case, and either discharges him or not: when there is cause for his detention, he remands him.

**REMANDING A CAUSE.** The sending it back to the same court out of which it came, for the purpose of having some action on it there. March 100.

**REMANENT PRO DEFECTU EMPTORUM** (Lat. *remanent*, they remain, *pro defectu*, through lack, *emptorum*, of buyers). The return made by the sheriff to a writ of execution when he has not been able to sell the property seized, that the same *remains unsold for want of buyers;* in that case the plaintiff is entitled to a *venditioni exponas*. Com. Dig. *Execution* (C 8).

**REMANET** (Lat.). **In Practice.** The causes which are entered for trial, and which cannot be tried during the term, are *remanets*. 1 Sell. Pr. 434; 1 Phillipps, Ev. 4.

**REMEDIAL.** That which affords a remedy: as, a remedial statute, or one which is made to supply some defects or abridge some superfluities of the common law. 1 Bla. Com. 86. The term remedial statute is also applied to those acts which give a new remedy. Esp. Pen. Act. 1. See Wilberf. Stat. L. 231.

**REMEDY.** The means employed to enforce a right or redress an injury.

Remedies for *non-fulfilment* of contracts are generally by action; see ACTION; ASSUMPSIT; COVENANT; DEBT; DETINUE; or in equity, in some cases, by bill for specific performance. Remedies for the redress of injuries are either public, by indictment, when the injury to the individual or to his property affects the public, or private, when the tort is only injurious to the individual. See INDICTMENT; FELONY; MERGER; TORTS; CIVIL REMEDY.

Remedies are *preventive* which seek *compensation*, or which have for their object *punishment*. The *preventive*, or *removing*, or *abating* remedies may be by acts of the party aggrieved or by the intervention of legal proceedings: as in the case of injuries to the person or to personal or real property, *defence*, *resistance*, *recaption*, *abatement of nuisance*, and *surety of the peace*, or *injunction* in equity, and perhaps some others. Remedies *for compensation* may be either by the *acts of the party aggrieved*, or *summarily* before justices, or by *arbitration*, or *action*, or *suit* at law or in equity. Remedies which have for their object *punishments* or compensation and punishments are either *summary proceedings* before magistrates, or *indictment*, etc.

Remedies are *specific* or *cumulative:* the former are those which can alone be applied to restore a right or punish a crime: for example, where a statute makes unlawful what was lawful before, and gives a particular remedy, that is specific, and must be pursued, and no other; Cro. Jac. 644; 1 Salk. 45; 2 Burr. 803. But when an offence was antecedently punishable by a common-law proceeding, as by indictment, and a statute prescribes a particular remedy, there such particular remedy is cumulative, and proceedings may be had at common law or under the statute; 1 Saund. 134, n. 4.

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In a very large number of cases there are concurrent remedies the resort to one of which does not bar the other. This is particularly true where there is a legal and an equitable remedy with respect to the same subject-matter. For example, a bill in equity against the holder of a note to recover possession of it, and against makers for the balance due on it, may be maintained, pending an action at law against the holders and makers to recover from the latter the balance due; and where the action at law failed on the ground that the plaintiffs were not in possession, the judgment did not bar the proceeding in equity; 166 Mass. 46.

The maxim *ubi jus ibi remedium* has been considered so valuable that it gave occasion to the first invention of that form of action called an action on the case; 1 Sm. Lead. Cas. 472. The novelty of the particular complaint alleged in an action on the case is no objection, provided there appears to have been an injury to the plaintiff cognizable by law; 2 Wils. 146; 3 Term 63; Willes 577; 2 M. & W. 519.

There is an important distinction to be considered in connection with the construction and effect of statutes, between those which create rights, and those which afford remedies. This distinction has an important effect upon the legislative power, with respect to many subjects constantly involved in the question whether an act is obnoxious to the provision of the federal constitution against impairing the obligation of contracts, under which title the subject is discussed and to which reference should be made. The distinction is also important in many questions merely of state legislation. "The remedies which one legislature may have prescribed for the redress of private wrongs, a subsequent legislature can change or modify at pleasure, and make the new remedy applicable to pending controversies, provided a substantial or adequate remedy is left, and provided, further, that the legislature is not prohibited from making the new remedy applicable to pending suits by some provision of the organic law. . . . It is true that the courts have, on some occasions, refused to apply statutes which dealt with the remedy for the redress of private grievances to existing controversies, and have held them solely applicable to actions thereafter brought. But it will be found, we think, on an examination of most of this class of cases, that the refusal to apply to existing suits statutes which were plainly applicable thereto, and which merely changed or modified the course of procedure, was based either on the ground that, if so applied, they would operate unfairly, and cause loss or inconvenience to the parties, or on the ground that the right involved had become so far established by acts done and performed in reliance on the prior law, and its continuance in force, that it would savor of injustice to take away such right by making the new law applicable to the pending controversy;" 83 Fed. Rep. 643, where it was held that a statute giving two new trials as of right in ejectment suits conferred not a vested right protected by constitutional guaranties, but a mere privilege pertaining to the remedy, which may be legally taken away by the legislature, as to pending suits, except in cases wherein a verdict is standing which a party is entitled to have set aside when the act takes effect. See, also, 4 Colo. 162; 4 Ore. 119; 23 Wend. 482; 68 Tex. 37; RETROSPECTIVE; EX POST FACTO LAW.

**REMEMBRANCERS. In English Law.** Officers of the exchequer, whose duty it is to remind the lord-treasurer and the justices of that court of such things as are to be called and attended to for the benefit of the crown.

**REMISE, RELEASE, AND QUIT-CLAIM.** The ordinary effective words in a release. These words are, in this country, sufficient to pass the estate in a primary conveyance; 7 Conn. 250; 24 N. H. 460; 21 Ala. N. S. 125; 7 N. Y. 422. Remise is a French word synonymous with release. See QUIT-CLAIM.

**REMISSION** (Lat. *re*, back, *mitto*, to send).

**In Civil Law.** A release of a debt.

It is *conventional* when it is expressly granted to the debtor by a creditor having a capacity to alienate; or tacit, when the creditor voluntarily surrenders to his debtor the original title, under private signature constituting the obligation. La. Civ. Code, art. 2195.

Forgiveness or pardon of an offence.

It has the effect of putting back the offender into the same situation he was before the commission of the offence. Remission is generally granted in cases where the offence was involuntary or committed in self-defence. Pothier, Pr. Civ. sect. 7, art. 2, § 2.

**At Common Law.** The act by which a forfeiture or penalty is forgiven. 10 Wheat. 246.

**REMIT.** To annul a fine or forfeiture.

This is generally done by the courts where they have a discretion by law: as, for example, when a juror is fined for non-attendance in court, after being duly summoned, and, on appearing, he produces evidence to the courts that he was sick and unable to attend, the fine will be remitted by the court.

**In Commercial Law.** To send money, bills, or something which will answer the purpose of money.

To send back, as to remit a check. 66 Hun 543.

**REMITTANCE. In Commercial Law.** Money sent by one merchant to another, either in specie, bill of exchange, draft, or otherwise.

**REMITTEE.** A person to whom a remittance is made. Story, Bailm. § 75.

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**REMITTER.** To be placed back in possession.

When one having a right to lands is out of possession, and afterwards the freehold is cast upon him by some defective title, and he enters by virtue of that title, the law *remits* him to his ancient and more certain right, and, by an equitable fiction, supposes him to have gained possession under it; 3 Bla. Com. 190; Com. Dig. *Remitter*.

**REMITTIT DAMNA** (Lat. he releases damages). An entry on the record by which the plaintiff declares that he remits the damages or a part of the damages which have been awarded him by the jury.

In some cases a misjoinder of action may be cured by the entry of a *remittit damna*; Chitty, Pl. 207.

**REMITTITUR DAMNUM.** The act of the plaintiff upon the record, whereby he abates the excess of damages found by the jury beyond the sum laid in the declaration. See 1 Saund. 285, n. 6; 4 Conn. 109. It cannot be filed by one of several plaintiffs, and where the widow of one killed by the negligence of a railroad company brought an action for damages on behalf of herself and her children and the parents of the deceased, a *remittitur* filed by the widow, reducing the judgment on behalf of each claimant, was held to be invalid and a new trial was ordered; 163 U. S. 369.

**REMITTITUR OF RECORD.** After a record has been removed to the supreme court and a judgment has been rendered, it is to be remitted or sent back to the court below, for the purpose of re-trying the cause, when the judgment has been reversed, or of issuing an execution when it has been affirmed. The act of so returning the record, and the writ issued for that purpose, bear the name of remittitur.

**REMITTOR.** A person who makes a remittance to another.

**REMONSTRANCE.** A petition to a court or deliberative or legislative body, in which those who have signed it request that something which is in contemplation to perform shall not be done.

**REMOTE.** At a distance; afar off. See CAUSA PROXIMA; MEASURE OF DAMAGES.

**REMOVAL FROM OFFICE.** A deprivation of office by the act of a competent officer or of the legislature. It may be express, that is, by a notification that the officer has been removed, or implied, by the appointment of another person to the same office; Wall. Jr. 118. See 13 Pet. 130; 1 Cra. 137. See OFFICER.

**REMOVAL OF CAUSES.** Under what are known as the removal acts, provision is made by federal statutes for the removal of causes in the state courts to the federal courts in certain cases.

The legislation on the subject begins with the Judiciary Act of 1789, which provided for the removal of suits commenced in the state courts against aliens, or citizens of other states, where the matter in dispute exceeded $500; 1 Stat. L. 73. This act continued in force, being substantially included in the revised statutes (§ 639), until 1875, when the jurisdiction was greatly enlarged; 18 Stat. L. 470; 3 Woods 397. The same section also provided for the removal of suits between citizens of one state claiming lands under grants of different states; 1 Stat. L. 73; and this act was also substantially included in the revised statutes (§ 647), and also in the act of 1887, with changes as to the jurisdictional limit, the party who might petition for removal, and the state from which the grant must be derived.

The act of 1833, occasioned by the nullification laws in South Carolina, provided for the removal of proceedings against federal revenue officers; 4 Stat. L. 633. This act was included in the revised statutes (§ 643), and with some extension of its scope is still in force, not having been repealed expressly or by implication by the act of 1875; 105 U. S. 636; and being excepted from repeal by the act of 1887; 25 Stat. L. 433. The act of 1863 related in terms to certain cases arising out of the civil war and has no subsequent force or effect. Several acts were passed during the reconstruction period, which were consolidated in the revised statutes, §§ 641, 642, relating to the removal of causes in which there was a denial of civil rights either by the action or non-action of the judicial tribunals of the state. This act is expressly saved from repeal by the act of 1887. The act of 1866 was one relating to procedure merely, and authorized the removal of a separable part of a cause by one non-resident defendant joined with a resident; 14 Stat. L. 306. This was substantially covered by Rev. St. § 639, but was repealed by the act of 1875 and not revived by that of 1887. The act of 1876 (14 Stat. L. 558), subsequently included in Rev. St. § 639, authorized the removal of causes upon an affidavit of prejudice or local influence. This was not repealed by the act of 1875 (113 U. S. 73), but was repealed and supplied by that of 1887; 142 *id.* 459. See *infra*. The act of 1868 authorized the removal of suits against federal corporations other than banks; 15 Stat. L. 227; Rev. St. § 640; but this was repealed by the act of 1887. The act of 1872 authorized the removal of personal actions brought by an alien against civil officers of the United States; 17 Stat. L. 44; Rev. St. § 644. Subject to the change in the jurisdictional amount, this act is not expressly, and probably not impliedly, repealed by the act of 1887.

The general act of 1875 was one largely extending the federal jurisdiction and the right of removal: 18 Stat. L. 470; and the result of it was such an overcrowding of the dockets of the federal courts as to induce the passage of the very restrictive act of 1887, which is now in force. The act of 1887 is generally considered to have been framed for the purpose of reorganiz-

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ing the circuit courts of the United States and its operation is practically to repeal prior legislation on the subject, except some special acts of limited scope, and to substitute this act for pre-existing legislation as to the federal law on the subject of the removal of causes. The act of 1887 was supplemented by the act of August 13, 1888; 25 Stat. L. 433, which was passed for the purpose of correcting many errors and ambiguities in the act of 1887. As thus amended, the act gives to the circuit courts of the United States original concurrent jurisdiction of all civil suits where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000. In certain classes of cases there is a right to remove independently of amount; such as criminal cases and those civil actions touching matters not capable of a reduction to a pecuniary basis.

In determining whether an amount in dispute exceeds $2,000, the plaintiff's demand, unless colorable, must furnish the rule, but where the law does give the rule, the legal cause of action, and not the plaintiff's demand, must be regarded; 85 Fed. Rep. 4. See JURISDICTION.

Where the main controversy is removed the ancillary proceedings go with it, without respect to the amount involved; 79 Fed. Rep. 657; 137 U. S. 366.

The act of 1887 authorizes the removal from the state courts of the following classes of suits:

1. Suits at law or in equity arising under the constitution or laws or treaties of the United States.

2. Any other suits of which the circuit courts of the United States have jurisdiction under the act.

3. Any suits in which there is a controversy wholly between citizens of different states, and which can be fully determined as between them.

4. Any suit pending in a state court in which the defendant, being a citizen of another state, shall make it appear to the circuit court that from prejudice or local influence he will not be able to obtain justice in the state court.

In all these cases the jurisdictional limit of $2,000 is applicable. It was at first doubted whether this was so in cases removed on the ground of prejudice or local influence, and there were decisions to the effect that the limitation of amount did not apply in those cases; 32 Fed. Rep. 673; 38 Fed. Rep. 529; 41 Fed. Rep. 449; but it was finally settled by the supreme court that the limitation applies in this as in other cases; 137 U. S. 451. See 22 U. S. App. 707; 42 Fed. Rep. 420.

The proceeding for removal is by petition filed in the state court, upon which an order is made, if the case is within the act, directing the removal, upon the filing of a bond, with surety, for entering a copy of the record in the circuit court, where the case proceeds as if originally commenced therein; if improperly removed it may be remanded to the state court and there proceeded with. The proceedings under the act of 1887 are generally of the same character as those under the preceding acts, and, as a rule, the decisions under the latter are applicable, with the exception, of course, of cases relating to the construction of acts repealed and not supplied by subsequent legislation.

The removal acts are not penal and therefore not subject to any rule of strict construction; they are not in derogation of any right to a trial in a state court, as there is no such right; the rule of construction is that applied to other statutes giving jurisdiction; 8 Fed. Rep. 650; but the act of 1887 is to be construed with reference to its evident restrictive intent, and more strongly against one seeking to avoid its requirements; 32 *id.* 497. The right to remove is no more a vested right than the right to trial in the state court, and may therefore be taken away at will by congress; *id.* 708.

The cognizance over cases removed to the federal court has been referred to the appellate jurisdiction; on the ground that the suit is not instituted in that court by original process; 1 Wheat. 304; but this jurisdiction has been more accurately characterized as "original jurisdiction acquired indirectly by a removal from the state court;" 5 Blatchf. 336; 6 *id.* 362. The validity of the legislation on this subject has been repeatedly affirmed; 92 U. S. 10; 100 *id.* 257, 303; 77 N. C. 530; 28 Ohio St. 208. And it has been further decided that when the terms upon which the right is given have been complied with, the right of removal cannot be defeated by state legislation; 20 Wall. 445. It has been said that a state has the right to impose conditions, not in conflict with the constitution or the laws of the United States, on the transaction of business within its territory by a foreign corporation, or having given a license, to revoke it with or without cause; and that it may therefore require foreign corporations to forego their right of removal, or cease to do business within the state; 94 U. S. 535; 40 Wis. 220.

But in 121 U. S. 186, it was said that the point decided in 94 *id.* 435, was expressly limited to the principle that an injunction would not be granted to restrain the action of state officers in such case; and it is settled that any legislation by the states intended to defeat the right of removal or to require from foreign corporations a stipulation in advance that they will not exercise it, is unconstitutional and void; *id.*; 146 *id.* 202; 97 Ky. 238; 32 Ohio St. 468; or by a state law providing a special remedy in its own courts; 3 Wall. Jr. 252; nor can the right of removal be defeated by agreement of parties; 6 Pet. 41; 10 Wall. 415; Fed. Cas. No. 12, 90; 6 Gray 192; 56 Me. 521. See JURISDICTION.

Formerly the right of removal was given to either party without regard to the position occupied as plaintiff or defendant; 100 U. S. 457; but under the act of 1887

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this right is in most cases given to the defendant only, the exception being where citizens of the same state claim land under grants from different states and the defendant must be a non-resident; 148 U. S. 663; but a case is not removable from the state court on the ground of citizenship, unless both at the commencement of the action, and also when the removal is asked, the defendants are citizens of a state other than the one of which the plaintiff is a citizen; 130 U. S. 230; 144 *id.* 568; 132 *id.* 267. Some question has arisen as to which party is to be considered the plaintiff in proceedings for the exercise of the right of eminent domain, and if, by local practice, the landowner is the plaintiff, he cannot remove; 50 Fed. Rep. 637; 54 *id.* 545.

Where several are sued as partners and only one has been served, he is not precluded from removal by the non-joinder of the others in the removal proceedings; 84 *id.* 413. Where one may sue either one of two parties and he chooses to sue both, he may do so, though his motive in joining them is to prevent a removal to a federal court; 85 Fed. Rep. 876.

A suit between a state and citizens of another state cannot be removed on the ground of citizenship: 117 U. S. 430; 155 *id.* 482; 65 N. C. 714; 9 Ohio C. C. 21; 85 Fed. Rep. 870. Corporations existing by virtue of acts of congress may remove to the federal courts actions brought against them in the state courts, on the ground that they are "suits arising under the laws of the United States;" 76 Fed. Rep. 468.

The diversity of citizenship at the commencement of the action must appear from the petition; 130 U. S. 230; 137 U. S. 61.

Application for removal must be before the plea is due; and this means at or before the time when the defendant is required by the laws of the state to answer or plead to the merits; 82 Fed. Rep. 15; and the time is not extended by delay in taking judgment or default for want of plea: 138 U. S. 298; nor can it be by stipulation of the parties or by the discretionary action of the judge in a particular case; 80 Fed. Rep. 945.

All the facts essential to federal jurisdiction must appear on the record; 22 U. S. App. 707. They must appear from the plaintiff's statement where that is the ground of removal, and cannot be supplied by statement in the petition for removal or subsequent pleadings; 155 U. S. 482, 488; 162 *id.* 490.

If a cause removed is not remanded when it might be, and proceeds without objection to judgment, the latter remains in force until vacated; 123 U. S. 552. One who petitions for or consents to removal cannot afterwards object to it as not asked for in time; 156 U. S. 335. If a cause is removed and the circuit court decides it has no jurisdiction, it *remands* and does not *dismiss;* 149 U. S. 452.

Where the state court denies the motion for removal but the record is nevertheless filed in the circuit court, which proceeds to a hearing and then remands, the order refusing removal works no prejudice, and the error, if any, is immaterial; 160 U. S. 556.

Actual removal subjects the defendants to the jurisdiction of the federal court and is a waiver of privileges claimed by pleas in abatement, but the mere filing a petition in the state court is not a waiver of exception to its jurisdiction; 13 U. S. App. 222.

An order of the circuit court remanding a case to a state court is not reviewable by the supreme court by any direct proceeding; 140 U. S. 117; 169 U. S. 92; 160 *id.* 556. The act of 1887 takes away the power of the supreme court to relieve by mandamus when a case removed is improperly remanded; 137 U. S. 451; and when the state court asserts jurisdiction after a proper application for removal, the question is not waived by the party entitled to the removal by reason of his appearing and contesting the matter in dispute; 19 Wall. 214; 100 U. S. 457; 106 *id.* 118; 112 *id.* 12. He may take an appeal, should the decision be against him, to the highest court of the state, save the question of removal on the record, and failing there, to the supreme court of the United States; 118 U. S. 43; 104 *id.* 5. In the event of his obtaining a decision in favor of removal there, the judgment of the state court will be reversed and an order made to transfer the case to the circuit court for trial on the merits; 92 U. S. 10. If a cause be improperly removed and the circuit court entertains jurisdiction improperly, its judgment will be reversed by the supreme court with directions to the circuit court to remand the same to the state court; 20 Wall. 117.

The denial by a state court of an application to amend a petition for removal is not a denial of a right secured by the constitution of the United States; 157 U. S. 370.

When a suit over which a state court has full jurisdiction in equity is removed to a circuit court of the United States on the ground of diverse citizenship, and it appears that the courts of the United States have no jurisdiction in equity over such a controversy, the cause should be remanded to the state court, instead of dismissing it for want of jurisdiction; 149 U. S. 451.

A bill in equity to reach partnership property and set aside judgments confessed by fraud, presented a single controversy as to all defendants and could not be removed by one for diversity of citizenship; 132 U. S. 571; so also of a bill to prevent the payment of county bonds alleged to be invalid where some bondholders were citizens of the same state with the plaintiffs and others who sought to remove of a different state; 138 U. S. 571; so of a bill to recover possession of town bonds where the bailee is a necessary party and a citizen of the same state; 151 U. S. 56. One of two corporations sued jointly in a state court for tort, though pleading severally, cannot remove the case on the ground of a separable controversy; 132 U. S. 599; so

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of a complaint against a corporation and its agents individually for damages for polluting a stream, and seeking a remedy against them jointly, though they answer separately with separate defences; 118 U. S. 264. To remove upon the ground of separable controversy, the case must be capable of separation into two or more independent suits, one of which is wholly between citizens of different states in the sense that it may be fully determined as between them without the presence of the other parties to the record; 19 U. S. App. 646; 140 U. S. 406; see 151 *id.* 368; but separate defences do not create separate controversies within the meaning of the removal act; 132 U. S. 571; 118 *id.* 596; and a defendant cannot make an action several which plaintiff elects to make joint; 118 U.S. 596; 144 *id.* 527.

The right of removal under R. S. § 641, *supra*, is authorized only upon petition setting forth infractions of the 14th amendment to the constitution previous to the trial and final hearing of the cause, and has no applicability to those occurring after the trial or final hearing has commenced. This section was drawn only with reference to state action, and has no reference to individual violations of rights; 100 U. S. 313. The right of removal under section 641 of the revised statutes exists only in the special cases mentioned in it, and in the absence of the denial or inability to enforce in the judicial tribunals of the state the equal civil rights of citizens, does not embrace cases in which a right is denied by judicial action during trial, or in the sentence or mode of its execution; 162 U. S. 565, where it was held, following 103 *id.* 370, that a removal was not authorized by the exclusion of negroes *because of their race* from service on grand juries.

A suit cannot be removed on the ground of prejudice or local influence, unless all the opposing parties are citizens of the state in which suit was brought, which state must also be other than that of which the petitioners are citizens; 118 U. S. 54; 119 *id.* 586; or under the act of 1887, where there is no separable controversy, and in such case the petition and affidavit must show facts, not mere conclusions; 19 U. S. App. 300. If the petition is filed by the final hearing it is in time; 129 U. S. 688. The motion cannot be made *ex parte*; 59 Fed. Rep. 209; 112 N. C. 396. The application is too late after a third trial in the state court; 142 U. S. 459; it may be at any time before the first trial; 58 Fed. Rep. 980; 54 *id.* 7. The matter in dispute in a case removed for prejudice, etc., must exceed $2,000; 137 U. S. 451; 22 U. S. App. 707; 30 Neb. 161; though it was at first a matter of some controversy whether the jurisdictional limit of amount applied to these cases, and there were decisions that it did not; 32 Fed. Rep. 673; 38 *id.* 529; 41 *id.* 449. In such case the defendant should obtain an order from the federal court for the removal, file that order in the state court, and take from it a transcript which should be filed in the federal court; 148 U. S. 255. All issues of fact upon petition for removal for prejudice or local influence must be tried in the circuit court; 122 U. S. 513.

In cases under Rev. St. § 643, the jurisdiction of the state court is taken away only after the petition for removal is filed in the circuit court and a writ of *certiorari* or of *habeas corpus cum causa* issued and served; 148 U. S. 107.

A *motion* under a state statute as to corporations, for executions against a stockholder, cannot be removed; 5 Dill. 223. Nor can an appeal under a state law from assessment of taxes; 135 U. S. 467; or a writ of *habeas corpus* (under act of 1875); 115 U. S. 487.

Proceedings in a probate court to determine whether the property of a deceased person is separate or community property, cannot be removed to a federal court, though the opposing parties are citizens of different states. The federal courts will not interfere with the custody of the estate of a deceased person by the state probate court in which proceedings are pending for administration; 80 Fed. Rep. 949. A proceeding by mandamus to compel the register of the transfer of stock may be removed; *id.* 489; but not one on a plea which raises the issue of title to an office; 29 La. Ann. 399; nor an action in the nature of *quo warranto* to determine the title to office of presidential electors; 8 S. C. 382. Suits by attachment may be removed; 5 Blatchf. 107; 2 Curt. C. C. 212; ejectment suits; 3 Wall. Jr. 258, 263; a bill in equity to reform an insurance policy; 6 Blatchf. 208; a suit to annul a will; 92 U. S. 10; a railway foreclosure suit; 6 Biss. 529. A condemnation proceeding; 124 U. S. 197; suit against a marshal for trespass for goods taken on attachment; 139 U. S. 628; where the controversy involved the authority of the land department to grant a patent; 140 U. S. 406. An action of tort against several defendants for a conspiracy cannot be removed by a part of them; 40 Ala. 639. Where the suit is in its nature an equitable proceeding, it must proceed as such in the federal court, and in accordance with the rules governing equity cases in such court without regard to the system in the state court; 13 How. 268; 23 *id.* 484. Where the suit unites legal and equitable questions of relief or defence, a repleader is necessary after removal; 1 Dill. 290; 8 Blatchf. 299; 15 *id.* 432; 15 Wall. 573. The circuit court may issue a *certiorari* to bring in the record from the state courts. This was provided by the act of 1875 (18 Stat. L. 470) and not repealed by the act of 1887; but a *certiorari* is not an essential part of the proceeding and need only be resorted to if necessary to procure the record; 6 Biss. 529. So the circuit court may enjoin further proceedings in the state court; 17 Blatchf. 332; 56 Fed. Rep. 329; 22 Wall. 250, where it was held that the prohibition against injunctions by federal courts touching proceed-

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ings in the state courts has no application to such cases.

See Dillon, Removal of Causes (Black's ed.); UNITED STATES COURTS.

**REMOVE.** To move away from the position occupied; to displace. 86 Ky. 190. To change place in any manner; to go from one place to another. 12 Conn. 186.

**REMOVER. In Practice.** A transfer of a suit or cause out of one court into another, which is effected by writ of error, *certiorari*, and the like. 11 Co. 41.

**REMUNERATION.** Reward; recompense; salary. Dig. 17. 1. 7. See 1 Q. B. Div. 663.

**RENDER.** To yield; to return; to give again: it is the reverse of *prender*. See 77 Ia. 387.

A judgment is "rendered" when the court makes an order therefor; 12 Mont. 11.

**RENDEZVOUS.** A place appointed for meeting. Especially used of places appointed for the meeting of ships and their convoy, and for the meeting of soldiers.

**RENDITION.** See FUGITIVE FROM JUSTICE; EXTRADITION.

**RENEGADE.** One who has changed his profession of faith or opinion. Whart.

**RENEW.** To make again; as, to renew a treaty or a covenant. 124 Mass. 151.

**RENEWAL.** A change of something old for something new; as, the renewal of a note; the renewal of a lease. See NOVATION; 1 Bouvier, Inst. n. 800.

**RENOUNCE.** To give up a right; for example, an executor may renounce the right of administering the estate of the testator; a widow, the right to administer to her intestate husband's estate.

**RENOUNCING PROBATE.** Giving up the right to be executor of a will, wherein he has been appointed to that office, by refusing to take out probate of such will. 1 Will. Exec. 230, 231. It is usually done by writing filed in the probate office.

**RENOVANT.** Renewing. Cowel.

**RENT** (Lat. *reditus*, a return). A return or compensation for the possession of some corporeal inheritance. A certain profit, either in money, provisions, or labor, issuing out of lands and tenements, in return for their use.

The compensation, either in money, provisions, chattels, or labor, received by the owner of the soil from the occupant thereof. Jacks. & Gross, Landl. & T. § 38; Woodf. Landl. & T. 375.

It has been held that a rent may issue out of lands and tenements corporeal, *and also*, out of them and their furniture, in this case a dairy farm with its stock and utensils; 31 Pa. 20; 99 *id.* 52. See, as to furnished lodgings, 5 B. & P. 224; 5 Co. 16 *b*.

Some of its common-law properties are that it must be a profit to the proprietor, certain in its character, or capable of being reduced to a certainty, issuing yearly, that is, periodically, out of the thing granted, and not be part of the land or thing itself; Co. Litt. 47; 2 Bla. Com. 41.

At common law there were three species of rent: rent *service*, where the tenant held his land by fealty, homage, or other corporal service and a certain rent to which the right of distress was necessarily incident; 3 Kent *461; 9 Watts 258; rent *charge*, which was a reservation of rent, with a clause authorizing its collection by distress; and rent *seck*, where there was no such clause, but the rent could only be collected by an ordinary action at law as by a writ of annuity or writ of assize. These distinctions, however, for all practical purposes, have become obsolete, in consequence of various statutes both in England and in this country, allowing every kind of rent to be distrained for without distinction. See Tayl. Landl. & T. § 370; FEUDAL LAW.

The payment of rent is incident to every tenancy where the relation of landlord and tenant subsists, except as to mere tenancies at will or by sufferance, where this relation cannot be said to exist. And no tenant can resist a demand for rent unless he shows that he has been evicted or become otherwise entitled to quit the premises, and has actually done so, before the rent in question became due. By the strictness of the common law, when a tenant has once made an agreement to pay rent, nothing will excuse him from continuing to pay, although the premises should be reduced to a ruinous condition by some unavoidable accident of fire, flood, or tempest; 6 Mass. 63; 4 Harr. & J. 564; 72 Pa. 285; 39 Cal. 151; 3 Johns. 44; 1 Term 310; 9 Price 294; 85 Ala. 99; 37 Ill. App. 542. See 72 Mich. 438.

But this severity of the ancient law has been somewhat abated in this country, and in this respect conforms to the more reasonable provisions of the Code Napoléon, art. 1722, which declares that if the thing hired is destroyed by fortuitous events, during the continuance of the lease, the contract of hiring is rescinded, but if it be only destroyed in part, the lessee may, according to circumstances, demand either a diminution of the rent or a rescission of the contract itself. The same provision is to be found substantially in the Code of Louisiana, art. 2667, and in the act of the legislature of New York of 1860, c. 345, § 1. A somewhat similar provision is found in the laws of Minnesota; Laws 1883, c. 100; 47 Minn. 291. In South Carolina and Pennsylvania it was decided that a tenant who had been dispossessed by a public enemy ought not to pay rent for the time the possession was withheld from him; and in Maryland it has been held that where a hurricane rendered a house untenantable it was a good defence to an action for rent. But these cases are evidently exceptions to the general rule of law above stated; 1 Bay 499; 5 Watts 517; 1 M'Cord 447. A

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tenant is not compelled to keep and pay rent for a house which, from defects in its construction, becomes untenantable and unfit for habitation; 73 Mich. 577. Where land has been swept away or gained upon by the sea, the lessee is no longer liable for rent; Bac. Abr. 63; Rolle, Abr. 236.

The right of the lessor to terminate a lease for non-payment of rent will not give the lessee any right to avoid the lease or his liability for agreed rent; 150 U. S. 665.

The quiet enjoyment of the premises, unmolested by the landlord, is an implied condition to the payment of rent. If, therefore, he ousts the tenant from any considerable portion of the premises, or erects a nuisance of any description upon or so near to them as to oblige the tenant to remove, or if the possession of the land should be recovered by a third person, by a title superior to that of the landlord, the dispossession in either case amounts to an eviction, and discharges the obligation to pay rent; 2 Ired. 350; 3 Harr. N. J. 364; 4 Leigh 484; 4 N. Y. 217; 1 M. & W. 747; 91 Pa. 322; 106 Mass. 201; 54 N. H. 426; 49 Vt. 109; 31 Ala. 412; 44 Mo. App. 279; 1 App. D. C. 447. By retaining possession of premises in spite of such acts of his landlord as would otherwise amount to an eviction, a tenant waives his right to withhold the rent; 112 Mass. 8; 20 N. Y. 32. The entry of a landlord upon demised premises for the purpose of rebuilding does not operate as an eviction, where it was with the tenant's assent, and not to his entire exclusion; 151 Pa. 101.

A tenant's liability for rent is not affected by condemnation of part of the leased premises; 136 Ill. 37; 144 *id.* 537; but where the estate of both landlord and tenant in the entire premises is extinguished by condemnation, the obligation to pay rent ceases; 144 Ill. 537.

As rent issues out of the land, it is said to be incident to the reversion, and the right to demand it necessarily attaches itself to the ownership, and follows a transfer of the premises, and the several parts thereof, without the consent of the occupant. Every occupant is chargeable with rent by virtue of his occupation, whether he be the tenant or an assignee of the tenant. The original tenant cannot avoid his liability by transferring his lease to another, but his assignee is only liable so long as he remains in possession, and may discharge himself by the simple act of assigning over to some one else; 14 Wend. 63; 1 N. & M'C. 104; 12 Pick. 460; 4 Leigh 69; 2 Ohio 221; 1 Wash. C. C. 375; 1 Rawle 155; 3 B. & Ald. 396; 11 Ad. & E. 403; Cro. Eliz. 256; Co. Litt. 46 *b*. When rent will be apportioned, see APPORTIONMENT; LANDLORD AND TENANT.

The day of payment depends, in the first instance, upon the contract; if this is silent in that respect, rent is payable quarterly or half-yearly, according to the custom of the country; but if there be no usage governing the case, it is not due until the end of the term. Formerly it was payable before sunset of the day whereon it was to be paid, on the reasonable ground that sufficient light should remain to enable the parties to count the money; but now it is not considered due until midnight or the last minute of the natural day on which it is made payable; 36 Pa. 272. This rule, however, may be varied by the custom of different places; Co. Litt. 202 *a*; 15 Pick. 147; 5 S. & R. 432. Under a lease requiring rent to be paid annually on a certain day for a year in advance, a tenant continuing in possession three months after that day is liable for the year's rent: 17 Atl. Rep. (Vt.) 719. See FORFEITURE; RE-ENTRY; PAYMENT.

Interest accrues on rent from the time it is due, but cannot be included in a distress; 17 S. & R. 390.

When rent is payable in money, it must strictly be paid in legal-tender money; with respect to foreign coin, the lessor may decline to receive it except by its true weight and value. Bank-notes constitute part of the currency of the country, and ordinarily pass as money, and are a good tender, unless specially objected to by the creditor at the time of the offer; 10 Wheat. 347. Payment may be made in commodities, when so reserved. If the contract specifies a place of payment, a tender of rent, whether in money or in kind, must be made at that place; but, if no place is specified, a tender of either on the land will be sufficient to prevent a forfeiture; 16 Term 222; 10 N. Y. 80; 4 Taunt. 555.

Under an income-tax statute, rent is to be treated as identical with land; 158 U. S. 601. An assignment of rent must be in writing under the statute of frauds; 23 N. Y. 521.

See DISTRESS; RE-ENTRY; GROUND-RENT; REPLEVIN; PAYMENT.

**RENT CHARGE.** A rent reserved with a power of enforcing its payment by distress. See RENT.

**RENT ROLL.** A list of rents payable to a particular person or public body. See RENT.

**RENT SECK.** A rent collectable only by action at law in case of non-payment. See RENT.

**RENT SERVICE.** A rent embracing some corporal service attendant upon the tenure of the land. Distress was necessarily incident to such a rent. See RENT; GROUND-RENT; FEUDAL SYSTEM.

**RENTAL.** A roll or list of the rents of an estate, containing the description of the lands let, the names of the tenants, and other particulars connected with such estate. This is the same as *rent roll*, from which it is said to be corrupted.

It is commonly used as synonymous with rent.

**RENTAL ROLLS.** Tiend bolls, due the parson as tithes. Ersk. Prin. 2. 10. 6.

**RENTE. In French Law.** A word

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nearly synonymous with our word annuity. *Rentes:* Public funds.

**RENTE FONCIERE. In French Law.** A rent which issues out of land; and it is of its essence that it be perpetual, for if it be made but for a limited time it is a lease. It may, however, be extinguished. La. Civ. Code, art. 2750, 2759; Pothier. See GROUND-RENT.

**RENTE VIAGERE. In French Law.** An annuity for life. La. Civ. Code, art. 2764; Pothier, *Rente*, n. 215.

**RENTS, ISSUES, AND PROFITS.** The profits arising from property generally. This phrase in the Vermont statute has been held not to cover "yearly profits." 26 Vt. 741.

**RENTS OF ASSIZE.** The certain and determined rents of the freeholders and ancient copyholders of manors. Brown.

**RENUNCIATION.** The act of giving up a right.

It is a rule of law that any one may renounce a right which the law has established in his favor. To this maxim there are many limitations. A party may always renounce an acquired right; as, for example, to take lands by descent; but one cannot always give up a future right before it has accrued, nor the benefit conferred by law, although such advantage may be introduced only for the benefit of individuals.

For example, the power of making a will, the right of annulling a future contract on the ground of fraud, and the right of pleading the act of limitations cannot be renounced. The first, because the party must be left free to make a will or not; and the latter two, because the right has not yet accrued.

This term is usually employed to signify the abdication or giving up of one's country at the time of choosing another. The act of congress requires from a foreigner who applies to become naturalized a renunciation of all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty whereof such alien may at the time be a citizen or subject. See Morse, Citizenship; CITIZEN; EXPATRIATION; NATURALIZATION.

**REOPENING A CASE.** A court of equity, in the exercise of a sound discretion, has full power to reopen a case, and allow the correction of mistakes in testimony. To reopen a case is to permit the introduction of new evidence and, practically, try it anew; to rehear a case is to hear it again upon the same proofs and allegations. Such applications are not favored, however, and, when granted, must be based upon strong circumstances to justify a deviation from the general rule; 93 Pa. 214; Adams, Eq. 372; 8 Phila. 380; 11 Fed. Rep. 425; 3 *id.* 95. An application to reopen a case and take further proofs has been granted on condition that the moving party pay his opponent's counsel fee for the previous argument, where the new testimony appeared to be newly discovered, material, and not cumulative, and there was no great laches; 44 Fed. Rep. 283. But an application to reopen and admit a newly discovered defence, after final hearing, will only be granted when it appears that such defence, if made at the final hearing, would have been effectual; 7 *id.* 920.

Reopening patent cases is to be discouraged when the grounds offered therefor pertain to matters of evidence which could as well have been produced at the hearing; 20 *id.* 111; 31 *id.* 918. See REHEARING; NEW TRIAL; BILL OF REVIEW.

**REORGANIZATION.** A term in common use to denote the carrying out, by proper agreements and legal proceedings, of a business plan or scheme for winding up the affairs of, or foreclosing a mortgage or mortgages upon the property of, insolvent corporations, more frequently railroad companies. It is usually by the judicial sale of the corporate property and franchises, and the formation, by the purchasers of a new corporation, in which the property and franchises are thereupon vested, and the stock and bonds of which are divided among such of the parties interested in the old company as are parties to the reorganization plan.

In most of the states, statutes have been passed to regulate the purchase of corporate properties and franchises at judicial sales. A list of them is given in Short, Ry. Bonds 842. They usually provide that the purchasers shall be, or become, or may organize a new corporation in taking over the assets and franchises purchased, and have and enjoy the corporate rights and franchises of the former company.

Usually some of the security holders name a committee who formulate a plan of reorganization providing for the deposit of securities with the committee as agents or trustees for the owners; for the purchase of the property at the sale; and the organization of a new company upon the basis of a specified scheme of distribution of the new securities among those who assent to the plan. The securities are generally deposited with the committee with very full powers of control, under the plan, and usually with a certain power of modification of the plan, under specified circumstances. When the new company has been formed, the new securities are issued to the assenting parties in accordance with the terms of the plan.

Where a reorganization is the only feasible method of protecting the relative rights of all parties interested in a large enterprise, and it can be done only by co-operation, courts of equity, in the absence of fraud or oppression, are disposed to aid rather than to thwart such schemes of reorganization; 56 Fed. Rep. 7. Such arrangements are to be promoted, because they are necessary to prevent great sacrifice and loss; 28 *id.* 340; 22 *id.* 138.

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The creditors of a mortgagor railroad company may fairly combine to purchase the property at a mortgage sale, and other creditors are not, by such combination, deprived of the right to bid at such sale; 2 *id.* 302. Courts will endeavor to carry into effect a fair plan of reorganization and will overlook merely technical defects in it; 11 Ch. D. 605. Such an agreement is not a fraud on non-assenting creditors and does not entitle them to claim their debts against the new company; 101 Pa. 576.

Where a railroad company has issued several series of mortgage bonds, some covering all the property and some only a part, and become insolvent, and the principal of some of the mortgages was due and the company had a large floating debt, it was held that a decree foreclosing all the mortgages, entered by consent of the bondholders, would not be set aside on the petition of some of the stockholders on the ground that some of the mortgages were not yet due, as it was in the interest of the company to effect a reorganization which would secure and extend its bonded debt and reduce the rate of interest thereon and provide the necessary means to satisfy the floating debt; 45 Fed. Rep. 438.

Reorganization agreements must be carried out according to their terms. If they are not, the subscribers to them are not bound; 40 Vt. 399; and the assenting security holders must also comply strictly with the agreement to which they have assented; Short, Ry. Bonds 857.

Where there was a compromise in which stockholders of a company were given the right to subscribe for stock in the reorganized company, upon terms specified in a circular addressed to the old stockholders, it was held, on proceedings by a stockholder who averred want of notice of the circular, that he had no right of action against the company, because the agreement was not made by the company or on its behalf, and that he could not complain of the terms of the agreement, as he was not a party to it; 81 N. Y. 462. A reorganization committee is not a trustee for non-assenting bondholders; 78 Fed. Rep. 49.

Creditors who do not assent to a reorganization agreement are entitled to enforce payment of the purchase price paid at a foreclosure sale by the reorganization committee, for the purpose of discharging their claims. Creditors coming in under the plan thereby release their rights against the old company; 80 Fed. Rep. 569.

Where a reorganization agreement provided that if stockholders neglected to pay the assessments within the period limited, the privilege of receiving the shares allotted to them should be ratably distributed among those who did pay their assessments, it was held that as soon as the default occurred on the part of a non-assenting stockholder, his interest became a vested right in the assenting stockholders under the plan. Likewise that an assenting bondholder who fails to deliver his bonds to the trustee under the agreement is debarred from any benefit therein; 44 Barb. 75.

In an action against a reorganized railroad company for failure to deliver its stock in amount equal to the bonds and coupons of the old company held by the plaintiff, it was held that, as the plaintiff had not exercised his option to come into the plan prior to the execution of the deed of the property to the new company, he was not entitled to the stock, and his only right was to take his share of the proceeds of the sale; 133 Pa. 579. The right to participate ceases when the property has passed to the new corporation; the rights of the security holders thereby become fixed, and a majority of certificate holders cannot then modify them; 14 N. Y. Supp. 558.

Where a statute required the consent of bondholders for foreclosure proceedings of a railroad property and such consent was given, it was held that outstanding bondholders would be regarded as consenting by reason of their silence during a protracted litigation; 122 U. S. 1.

A majority of bondholders cannot compel a minority, however small, to enter into a joint agreement with them; 109 U. S. 535; but it is said by an able writer that the relations of corporate bondholders are peculiar, and that the courts, in foreclosure proceedings, have sometimes considered them as analogous to those which exist among stockholders; Short, Ry. Bonds § 27; and that this is especially true in carrying out reorganization schemes; *id.* See 100 U. S. 605. An act for the reorganization of an embarrassed corporation which provides that all mortgage bondholders who do not, within a given time, expressly dissent from the plan of reorganization, shall be deemed to have assented to it, is valid; 109 U. S. 401; and so is an act which provides that a majority of the bondholders, with equal opportunities to all, may reorganize a new corporation; 53 Conn. 333. The theory is that railroad property is pledged to public use and that this consideration is superior to the property rights of corporators, stockholders, and bondholders. See 109 U. S. 535. Acts relating to reorganization are for the good of all, and are a species of bankruptcy acts; unless forbidden, as in the United States, there is no good reason why they should not be passed in respect of existing obligations; *id.*

Where a corporation mortgage vests certain powers of control in a majority of the bondholders, as to sanction a modification of a deed of trust; 55 L. T. N. S. 347; 74 Fed. Rep. 110; [1893] 1 Ch. 477, 484; to direct the trustee to purchase the mortgaged property at a foreclosure sale and to reorganize a new company; 99 U. S. 334; or to control the mortgagee trustee in beginning or discontinuing foreclosure proceedings; 134 U. S. 500; the courts will carry into effect the action of such majority.

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In 13 Fed. Rep. 242, Treat, J., criticised the decree of foreclosure then before the court, for the omission of what he considered the *usual* clause in foreclosure decrees, viz., one permitting the minority bondholders to come in, after purchase, within a limited time, on equal terms with purchasing bondholders.

A sale under foreclosure of an insolvent railroad company under an agreement by which the bondholders, according to their priorities, got more or less of their debt (100 to 30 per cent.), and the stockholders of the company the residue of the proceeds (16 per cent. of the par of their stock), was held fraudulent as against general creditors, although the road was mortgaged far above its value; 7 Wall. 392. But where the plan gives stockholders an interest but does not include general creditors, it is not invalid unless the scheme is to give the stockholders that which should go to creditors; 85 Fed. Rep. 838.

The holders of preferred stock may not use it to make up the amount of their bid on foreclosure sale of the property; 86 Fed. Rep. 930.

Where the local managers and officers of an insolvent railroad company, holding a small portion of its bonds, of which a much greater portion was held by non-residents, got an order of sale and proceeded in a hasty and rather secret way to sell and buy it in at the lowest value for themselves, the proceedings were held invalid as against the bondholders, generally, and the stockholders; 21 Wall. 616.

In England, if some of the majority of bondholders are not acting in good faith, a reorganization agreement will not be sanctioned; 44 Ch. Div. 403. Secured creditors of a railroad company, after bringing the property within the jurisdiction of the court, will not be permitted, by any private arrangement with the company or otherwise, so to dispose of the property as seriously and unnecessarily to prejudice the unsecured creditors. They may not, for their own benefit or for the common interest of themselves and the debtor, place the surplus which may exist after the satisfaction of their own claims beyond the reach of the latter; 21 Fed. Rep. 264.

On proceedings by an unsecured creditor praying that the stock of a reorganized company, set aside in the reorganization agreement for the stockholders of the old company, should be sold and the proceeds paid to the holders of the floating debt, it appearing that the plan showed a due regard for the interests of all classes of creditors and stockholders, and that the bill did not show any injustice intended or done to the complainant, the bill was dismissed; 9 Fed. Rep. 738.

Bondholders who decline, on request, to assent, and take no steps to protect themselves, have no standing in equity to set aside a foreclosure sale, if the transaction was fair; 8 Fed. Rep. 177. And a bill praying that a reorganization of a railroad company be set aside and a new plan formulated, and for a receiver, was dismissed, it appearing that the plaintiff had her representative on the new board and had attempted to buy more of the new issue of bonds, although it was alleged that the new company was illegally organized, which fact was, however, known to the plaintiff; 15 Fed. Rep. 691.

Where a reorganization of an English mining company, whose property was all in the United States, was carried on in England by the voluntary act of the English stockholders and not by the British courts, and was found to have been in flagrant violation and disregard of the rights of the American stockholders, it was held that no principle of international comity required that it should be sustained; 55 Fed. Rep. 7.

In 112 U. S. 609, it was held that a mortgage on a charter of a corporation made in the exercise of a power given by a statute, confers no right upon purchasers at a foreclosure sale to exist as the same corporation; if it confers any right of corporate existence upon them, it is only a right to reorganize as a corporation, subject to the laws existing at the time of the reorganization. The court said: "The real transaction, in legal effect, is nothing more or less, and nothing other, than a surrender or abandonment of the old charter by the corporators, and a grant *de novo* of a similar charter to the so-called transferees or purchasers. To look upon it in any other light, and to regard the transaction as a literal transfer or sale of the charter, is to be deceived by a mere figure of speech. The vital part of the transaction, and that without which it would be a nullity, is the law under which the transfer is made. The statute authorizing the transfer and declaring its effect is the grant of a new charter couched in a few words, and to take effect upon condition of the surrender or abandonment of the old charter, and the deed of transfer is to be regarded as mere evidence of the surrender or abandonment."

In Pennsylvania, under the act of April, 1861, the sale of a railroad does not extinguish the corporation, but creates the purchaser a body corporate, with all the rights, etc., of the old corporation. Irregularities in the organization are not necessarily fatal to the being of the new corporation, and will, at the most, enable the commonwealth to retake the franchise. It cannot be said that the franchises do not exist; 52 Pa. 506.

Where foreclosure was brought on a railroad mortgage containing the usual clause that the trustee on request of a majority of the bondholders should bid at the sale, and reorganize on their account, it was held that the agreement enured equally for the benefit of the bondholders, and that each held his interest subject to the controlling power given to the majority: that, upon proper request from the bondholders, the court might direct the trustee to bid at the sale the amount of the principal and interest due on the first mortgage bonds and to proceed to execute the trust; 99 U. S. 334.

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The pendency of a reorganization plan for the preservation of an entire railroad system may sometimes be reason for refusing temporarily an application on the part of the trustees of a divisional mortgage to be put in possession of the property covered by the mortgage to them; Short, Ry. Bonds 854.

In reorganization proceedings it is not necessary that notice of the terms of the plan nor of the legal proceedings be given to the stockholders in order to bar their rights if they do not assent; 96 N. Y. 49.

Where a Canadian act provides for the reorganization of a Canadian railroad company, and the settlement is accepted by a large majority of the shareholders and goes into effect, United States bondholders are bound by it, if they could participate on the same terms as Canadian bondholders; 109 U. S. 527.

Where the stockholders of an insolvent company formed a new company, under the laws of another state, which took a lease of the property of the old company and paid off its debts, and then in its turn became insolvent, it was held to be, as to third persons, substantially the same company and the property remained charged with a mechanic's lien for labor and materials furnished to the new company; 75 Fed. Rep. 368.

See MERGER; MORTGAGE; NEWSPAPER; RAILROAD; RECEIVER; LEASE.

Modern systems of railroad reorganization are severely criticised by Moorfield Storey in Am. Bar Asso. Rep. 1896.

Reorganization agreements frequently contain provisions conferring a control by means of a voting trust, which see.

**REPAIRS.** That work which is done to property to keep it in good order.

Repair is held to mean to restore to a sound state after decay, injury, dilapidation, or partial injury; 85 Mo. 263; to be synonymous with "make and keep up"; 23 Ind. 281; and sometimes to mean *replace;* 2 N. Y. 93.

*Tenantable repairs.* Decorative repair is not included. But papering always, and painting, unless intended for the protection of the property, are decorative repairs. The obligation does not extend to repairing or restoring what is worn out by age, but voluntary waste is a breach of the obligation. 36 W. R. 54; 59 L. J. Q. B. 129.

What a party is bound to do, when the law imposes upon him the duty to make necessary repairs, does not appear to be very accurately defined. Natural and unavoidable decay in the buildings must always be allowed for, when there is no express covenant to the contrary; and it seems the lessee will satisfy the obligation the law imposes on him by delivering the premises at the expiration of his tenancy in a habitable state. Questions in relation to repairs most frequently arise between the landlord and tenant.

In determining whether there has been a breach of a covenant to repair, regard must be had to the age and character of the premises at the date of the demise; and if the premises through their own inherent defects fall in the course of the tenancy into a particular condition, the result of their being in that condition are not breaches of a covenant to repair, however wide that covenant may be; [1893] 2 Q. B. 212.

When there is no express agreement between the parties the tenant is always required to do the necessary repairs; Woodf. Landl. & T. 244; 6 Cow. 475. He is, therefore, bound to put in windows or doors that have been broken by him, so as to prevent any decay of the premises; but he is not required to put a new roof on an old worn-out house; 2 Esp. 590. The landlord is under no implied obligation to make ordinary repairs; 161 Pa. 87.

An express covenant on the part of the lessee to keep a house in repair, and leave it in as good a plight as it was when the lease was made, does not bind him to repair the ordinary and natural decay; Woodf. Landl. & T. 256. See 7 Gray 550. And it has been held that such a covenant does not bind him to rebuild a house which had been destroyed by a public enemy; 1 Dall. 210; but where in a lease there is an express and unconditional agreement to repair and keep in repair, the tenant is bound to do so, though the premises be destroyed by fire or accident; 91 Pa. 88; 2 Wall. 1; 49 Barb. 554.

Repair means to restore to its former condition, not to change either the form or material of a building; 63 Pa. 162. When a landlord covenants to repair, he is bound only to restore to a sound state either what has become decayed or dilapidated, or better, what has been partially destroyed; his covenant does not extend to improvements, nor to new buildings erected by the tenant; 4 Pa. 364. See 1 Dy. 33 *a*.

In order to entitle a tenant to recover from his landlord for repairs made by the tenant upon the premises, he must show a contract with the landlord, express or implied, to pay for them; 38 Neb. 157.

As to the time when the repairs are to be made, it would seem reasonable that when the lessor is bound to make them he should have the right to enter and make them, when a delay until after the expiration of the lease would be injurious to the estate; but when no such damage exists, the landlord should have no right to enter without the consent of the tenant. See 18 Toullier, n. 297. A general covenant by a lessor to repair is construed to mean within a reasonable time after notice; 76 Cal. 173. When a house has been destroyed by accidental fire, neither the tenant nor the landlord is bound to rebuild, unless obliged by some agreement so to do; 4 Paige, Ch. 355; 1 Term 708. See LANDLORD AND TENANT; RENT; 4 Camp. 275; Co. Litt. 27 *a*; 3 Johns. 44; 6 Mass. 63; Platt. Co. 266; 1 Saund. 322, n. 1, 323, n. 7; 2 *id.* 158 *b*, n. 7 & 10.



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**REPARATION.** The redress of an injury; amends for a tort inflicted. See REMEDY.

**REPARATIONE FACIENDA, WRIT DE** (Lat.). The name of an ancient writ which lies by one or more joint tenants against the other joint tenants, or by a person owning a house or building against the owner of the adjoining building, to compel the reparation of such joint property. Fitzherbert, Nat. Brev. 295.

**REPATRIATION.** The regaining nationality after expatriation.

**REPAY.** Repay does not necessarily mean to pay money. It has also the meaning of return, restore, etc.; 19 Kan. 390.

**REPEAL.** The abrogation or destruction of a law by a legislative act.

A repeal is *express*, as, when it is literally declared by a subsequent law, or *implied*, when the new law contains provisions contrary to or irreconcilable with those of the former law.

The power to revoke or annul a statute or ordinance is equivalent to the power to repeal it; and in either case the power is legislative and not judicial in its character; 30 W. Va. 479.

A statute is not to be deemed repealed merely by the enactment of another statute on the same subject. There must be a positive repugnancy between the provisions of the new law and the old, to work a repeal by implication; and even then the old law is repealed only to the extent of such repugnancy; 16 Pet. 342; 51 N. J. Eq. 382; 137 U. S. 682. This rule is supported in a vast variety of cases.

A law may be repealed by implication, by an affirmative as well as by a negative statute, if the substance is inconsistent with the old statute; 1 Ohio 10; 2 Bibb 96; Harp. 101; 4 Wash. C. C. 691; and a repeal by implication has been effected even where two inconsistent enactments have been passed in the same session; 2 B. & Ald. 818; or where two parts of the same act have proved repugnant to each other; 4 C. P. Div. 29; but this will be presumed only in extreme cases; 13 C. B. 461. A repeal by implication is not favored, the leaning of the courts is against the doctrine, if it be possible to reconcile the two acts; 1 Black 470; 137 U. S. 682; 146 Ill. 268; 57 Mich. 407; 73 Cal. 360; 78 Ia. 88; 50 Ark. 132; 9 Q. B. D. 58; [1892] 1 Q. B. 654; see 76 Ga. 181; 100 N. C. 474; and a general law is not to be held as repealing a prior special law unless it clearly manifests such intention; 98 Mo. 426; 85 Ky. 265; 45 La. Ann. 227; 146 Ill. 268; 12 U. S. App. 574. General legislation must give way to special legislation on the same subject; *id.* 267. But where the constitution directs the legislature to pass general legislation, and a law is passed, which is complete and does evidently intend to provide a uniform system, no words of repeal are necessary; 176 Pa. 67.

The later of two clearly inconsistent and repugnant acts must prevail; 104 N. Y. 218; 28 Neb. 618; and is an implied repeal of the earlier; 29 Ch. D. 15; but not unless their provisions are clearly inconsistent; 12 U. S. App. 574; and where they can be read together without repugnancy, both should stand; 50 L. J. M. C. 6; 157 U. S. 46; and the burden is on the one who asserts that there is an implied repeal; 29 Ch. D. 15.

An earlier statute is repealed by a subsequent one only in those particulars wherein it is clearly inconsistent and irreconcilable with the later enactment. The leaning of all courts is against repealing the positive provisions of former statutes by construction, unless there be such a manifest and total repugnance between the two enactments that they cannot both stand. It is not enough that there is a discrepancy between different parts of a system of legislation on the same general subject; there must be a conflict between different acts on the same specific subject; 177 Pa. 112. Where the repealing act is unconstitutional and void, it will not work a repeal; 26 Ala. 165; 8 Gray 476; 14 Mich. 276; 1 Wash. 382; *contra*, 11 Ind. 489.

Special legislation is not necessarily repealed by subsequent general legislation without words of repeal; 91 N. Y. 231; 152 Pa. 244; 146 Ill. 268; L. R. 10 A. C. 68. To have that effect there must be express reference or necessary implication; 2 J. & H. 53; 10 App. Cas. 68. Where a statute amends a former statute "so as to read as follows" and restates it at length the prior act is not repealed and re-enacted but is continued; 143 Mass. 418; inconsistent provisions in the former, omitted in the later, act are repealed; 136 N. Y. 347.

Where there is a general revision of statutes, clearly intended to be complete, it repeals prior legislation, though not repugnant and though the revision contains no words of repeal; 82 Ky. 256; 12 Mass. 537, 545; 9 Pick. 97; 42 Me. 53; 121 N. Y. 234; 37 N. H. 295; 30 Vt. 344; 8 Tex. 62; 14 Ill. 334; 6 B. Monr. 146; but only where the intent to repeal plainly appears; 62 Vt. 442. See 9 Ind. 337; 10 *id.* 566.

There can be no repeal by non-user; 2 Term 274. It was otherwise in the civil law, and it is said to be otherwise in Scotland; 1 Kent 466.

A statute purporting to cover an entire subject repeals all former statutes on the same subject, either with or without a repealing clause and notwithstanding it may omit material provisions of the earlier statutes; 86 Tenn. 523; 85 *id.* 495; 86 Ky. 170; 73 Ia. 619; 20 Oreg. 345.

A statute will not repeal a prior statute merely because it repeals some of its provisions and omits others, or adds new provisions; the later act operates as a repeal only when it plainly appears that it was intended as a substitute for the first act; 127 U. S. 406; and a previous

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statute will be held to be modified by a subsequent one, if the latter was plainly intended to cover the whole subject embraced by both, and prescribes the only rules in respect to that subject that are to govern; 134 U. S. 206.

Where a new statute expressly repeals the former statute, and the new and the repeal of the old are to take effect at the same time, a provision in the old statute which is embodied in the new is deemed to have continued in force without suspension; 3 Wisc. 667; 15 Ill. 595. But it has been held that where the new law does not go into effect until a time subsequent to that at which the repeal takes effect, such a provision is to be deemed repealed meantime; 12 La. Ann. 593. But see 1 Pick. 33.

As to what force should be given to portions of a statute excepted from repeal, see Endlich, Interpr. Stat.; 3 Wall. 495; 109 U. S. 556.

A difference in the punctuation of similar statutes does not in all cases warrant a different construction, particularly when the printer is responsible for it, and not the legislature; 39 Pac. Rep. (Idaho) 548. See 34 Cent. L. J. 253.

Where an amendment changes the phraseology of a former act, it will be presumed that it was the intention to make a corresponding change in its meaning; 50 Fed. Rep. 749. Where a section of a statute is amended and afterwards such section "as amended" is repealed, the original section, and not the amendment merely, is repealed; 80 Ia. 661. The amendment of a statute does not repeal it so that a subsequent statute, which professes to amend the original act, is invalid; 45 Neb. 724. See 1 Am. L. Reg. N. S. 566.

It is a general rule that when a penal statute punishes an offence by a certain penalty, and a new statute is passed imposing a greater or a lesser penalty for the same offence, the former statute is repealed by implication; 5 Pick. 168; 3 Halst. 48; 3 A. K. Marsh. 70; see 1 Binn. 601; Bacon, Abr. *Statute* (D); but subsequent statutes which add accumulative penalties do not repeal former statutes; 1 Cowp. 297; 6 Mod. 141.

At common law the repeal of a repealing act revived the former act; 6 Co. 199; 1 Gray 163; 7 W. & S. 263; 2 Blackf. 32; 54 N. J. L. J. 175; and it has been held in the supreme court to have this effect, unless the language of the repealing statute or some general statute provides otherwise; 120 U. S. 52; but this rule is now altered in England by an act passed in 1880 and amended in 1889, and in many states this rule has been changed, as in Ohio and Louisiana; La. Civ. Code, art. 23. And in some states, as Tennessee and Georgia, the substance of an act repealed or revived must be stated in the caption or otherwise, and in others, as Connecticut and Arkansas, a repealing or amending act must recite the law so amended sufficiently to show the effect of the amendment or repeal. For a summary of statutes on the subject of repeals, see Stimson, Am. Stat. L. §§ 1042–3.

It has been held that when the repealing clause in an unconstitutional statute repeals all inconsistent acts, the repealing clause is to stand and have effect, notwithstanding the invalidity of the act; 11 Ind. 489. But other cases hold that such repealing clause is to be understood as designed to repeal all conflicting provisions, in order that those of the new statute can have effect, and that if the statute is invalid, nothing can conflict with it, and therefore nothing is repealed; 6 Wis. 605; 35 Barb. 264; Cooley, Const. Lim. 186.

A repealed statute is as if it had never existed, except as to transactions which are past and closed before the repeal; 4 De G. & J. 557; but the repeal leaves all the civil rights of the parties acquired under the law unaffected; 3 La. 337; 2 South. 689; Breese 29; 2 Stew. Ala. 160; 2 Wall. 450. An action for penalties cannot be sustained when the statute inflicting them has been repealed before judgment; 13 How. 429; nor an action for the recovery of money paid in violation of law, under similar circumstances; 5 Blatch. 229.

When a penal statute is repealed or so modified as to exempt a class from its operation, violations committed before the repeal are also exempted, unless specifically reserved, or unless there has been some private right vested by it; 2 Dana 330; 4 Yeates 392; 5 Rand. 657; 1 Wash. C. C. 84; 2 Va. Cas. 382.

See, generally, Dwarris; Wilberforce; Endlich, Statutes; PATENT; REPUGNANCY; CONSTRUCTION; OBSOLETE; INTERPRETATION; STATUTE; REVISED STATUTES.

**REPERTORY. In French Law.** A word used to donate the inventory or minutes which notaries are required to make of all contracts which take place before them. Dalloz, Dict.

**REPETITION. In Civil Law.** The act by which a person demands and seeks to recover what he has paid by mistake or delivered on a condition which has not been performed. Dig. 12. 4. 5.

The name of an action which lies to recover the payment which has been made by mistake when nothing was due.

Repetition is never admitted in relation to natural obligations which have been voluntarily acquitted, if the debtor had capacity to give his consent. 6 Toullier 386.

In order to entitle the payer to recover back money paid by mistake, it must have been paid by him to a person to whom he did not owe it, for otherwise he cannot recover it back,—the creditor having, in such case, the just right to retain the money. *Repetitio nulla est ab eo qui suum recepit.*

How far money paid under a mistake of law is liable to repetition has been discussed by civilians; and opinions on this subject are divided. 2 Pothier, Obl., Evans

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ed. 869, 408–437; 1 Story, Eq. Pl. § 111, note 2.

**In Scotch Law.** The act of reading over a witness's deposition, in order that he may adhere to it or correct it, at his choice. The same as *recolement* (*q. v.*) in the French law. 2 Benth. Ev. 239.

**REPLEADER. In Pleading.** Making a new series of pleadings.

Judgment of repleaders differs from a judgment *non obstante veredicto* in this: that it is allowed by the court to do justice between the parties where the defect is in the form or manner of stating the right, and the issue joined is on an immaterial point, so that it cannot tell for whom to give judgment; 8 Pick. 124; 19 *id.* 419; while judgment *non obstante* is given only where it is clearly apparent to the court that the party who has succeeded has, upon his own showing, no merits, and cannot have by any manner of statement; 1 Chitty, Pl. 568. See 19 Ark. 194.

It may be ordered by the court for the purpose of obtaining a better issue, if it will effect substantial justice where issue has been reached on an immaterial point; 3 B. & P. 353; 2 Johns. 388; 3 Hen. & M. 118, 161; Gould, Pl. 473; as a plea of payment on a given day to an action on a bond conditioned to pay *on or before* that day; 2 Stra. 994. It is not to be allowed till after trial for a defect which is aided by verdict; 2 Saund. 319 *b*; Bac. Abr. *Pleas.* If granted or denied where it should not be, it is error; 2 Salk. 579. See 9 Ala. N. S. 198.

The judgment is general, and the parties must begin at the first fault which occasioned the immaterial issue; 1 Ld. Raym. 169; entirely anew, if the declaration is imperfect; 1 Chitty, Pl. 568; that the action must be dismissed in such case; 1 Wash. Va. 135; with the replication, if that be faulty and the bar be good; 3 Keb. 664; 1 Wash. Va. 155. No costs are allowed to either side; 6 Term 131; 2 B. & P. 376.

It cannot be awarded after a default at *nisi prius*; 1 Chitty, Pl. 568; nor where the court can give judgment on the whole record; Willes 532; nor after demurrer; 2 Mass. 81; unless, perhaps, where the bar and replication are bad; Cro. Eliz. 318; 7 Me. 302; nor after writ of error, without the consent of the parties; 3 Salk. 306; nor at any time in favor of the person who made the first fault; 1 Ld. Raym. 170; 1 Hempst. 268; 1 Humphr. 85; 6 Blackf. 375; see 3 Hen. & M. 388; nor after judgment; 1 Tyl. Vt. 146. The same end is secured in many of the states by statutes allowing amendments. See, generally, Tidd, Pr. 813, 814; Com. Dig. *Pleader* (R 18); Bac. Abr. *Pleas* (M).

**REPLEGIARE** (Lat.). To replevy; to redeem a thing detained or taken by another, by putting in legal sureties.

**REPLEGIARE DE AVERIIS** (Lat.). A writ brought by one whose cattle are impounded or distrained, upon security given to the sheriff to pursue or answer the action at law. 7 Hen. VIII. c. 4; Fitzh. N. B. 68; New Book of Entries, *Replevin*; Dy. 173; Reg. Orig. 81.

**REPLEGIARE FACIAS** (Lat.). A writ of replevin, which issued out of chancery, commanding the sheriff to deliver the distress to the owner, and afterwards to do justice in regard to the matter in his own county court. It was abolished by statute of Marlbridge (*q. v.*), which provided a shorter process. 3 Sharsw. Bla. Com. 147*; Andr. Steph. Pl. 92.

**REPLEVIN. In Practice.** A form of action which lies to regain the possession of personal chattels which have been taken from the plaintiff unlawfully.

The action originally lay for the purpose of recovering chattels taken as a distress, but has acquired a much more extended use. In England and most of the states of the United States it extends to all cases of illegal taking, and in some of the states it may be brought wherever a person wishes to recover specific goods to which he alleges title. See *infra.*

A general use of this remedy seems to date from the latter part of the 13th century, referring to the fact that at that period the remedy known as *vetitum namium* (*q. v.*) was falling into desuetude. It is said that at that time, "under the name of *Replegiare*, or Replevin, an action was being developed which was proving itself to be convenient action for the settlement of disputes between landlord and tenant; but it seems to have owed its vigor, its rapidity, and therefore its convenience, to the supposition that a serious offence had been committed against the king." 2 Poll. & Maitl. 576.

By virtue of the writ, the sheriff proceeds at once to take possession of the property therein described and transfer it to the plaintiff, upon his giving pledges which are satisfactory to the sheriff to prove his title, or return the chattels taken if he fail so to do. It is said to have laid formerly in the *detinuit*, which is the only form now found at common law, and also in the *detinet*, where the defendant retained possession, and the sheriff proceeded to take possession and deliver the property to the plaintiff after the trial and proof of title; Bull. N. P. 52; Chitty, Pl. 145; 3 Bla. Com. 146; DETINET; DETINUIT.

It differs from *detinue* in this: that it requires an unlawful taking as the foundation of the action; and from all other personal actions in that it is brought to recover the possession of the specific property claimed to have been unlawfully taken.

The action lies to recover personal property; 19 Pa. 71; including parish records; 11 Pick. 492; trees after they had been cut down; 2 Barb. 613; 9 Mo. 259; 13 Ill. 192; records of a corporation; 5 Ind. 165; articles which can be *specifically* distinguished from all other chattels of the same kind by indicia or ear-marks; 18 Ill. 286; including

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money tied up in a bag and taken in that state; 2 Mod. 61; a promissory note; 155 Mass. 339; trees cut into boards; 30 Me. 370; 13 Ill. 192; a house which is being moved from the land on which it was built; 84 Me. 133; see 81 Wis. 341; 93 Mich. 49; but *does not lie* for injuries to things annexed to the realty; 4 Term 504; 2 M'Cord 329; 17 Johns. 116; 10 B. Monr. 72; nor to recover such things, if dissevered and removed as part of the same act; 3 S. & R. 509; 6 Me. 427; 8 Cow. 220; nor for writings concerning the realty; 1 Brownl. 168.

Replevin lies in Massachusetts wherever detinue does, *e. g.* for deeds which attend the inheritance; Holmes, Com. L. 352.

A general property with the right to immediate possession gives the plaintiff sufficient title to maintain it; 3 Wend. 280; 15 Pick. 63; 9 Gill & J. 220; 2 Ark. 315; 4 Blackf. 304; 8 Dana 268; 27 Miss. 198; 2 Swan 358; 60 Vt. 624; as do a special property and actual possession; 2 Watts 110; 2 Ark. 315; 4 Blackf. 304; 10 Mo. 277; 9 Humphr. 739; 2 Ohio St. 82; and the bare possession of property, though wrongfully obtained, is sufficient title to maintain it against a mere stranger; 51 Minn. 294.

A joint owner of personal property can maintain replevin in his own name to recover it, against one whose right is not superior to his; 60 Vt. 718.

It will not lie for the defendant in another action to recover goods belonging to him and taken on attachment; 5 Co. 99; 20 Johns. 470; 2 N. H. 412; 2 B. Monr. 18; 3 Md. 54; nor, generally, for goods properly in the custody of the law; 2 N. & M'C. 456; 3 Md. 54; 7 Watts 173; 4 Ark. 525; 8 Ired. 387; 16 How. 622; 3 Mich. 163; Hempst. 10; 2 Wisc. 92; 1 Sneed 390; 72 Hun 633; but this rule does not prevent a third person, whose goods have been improperly attached in such suit, from bringing this action; 4 Pick. 167; 14 Johns. 84; 6 Halst. 370; 2 Blackf. 172; 7 Ohio 133; 19 Me. 255; 9 Gill & J. 220; 24 Vt. 371.

As to the rights of co-tenants to bring this action as against each other, see 1 Harr. & G. 308; 12 Conn. 331; 15 Pick. 71; 36 Neb. 621; as against strangers, see 4 Mas. 515; 12 Wend. 131; 15 Me. 245; 2 N. J. L. 552; 27 N. H. 220; 6 Ind. 414.

The action lies, in England and most of the United States, wherever there has been an illegal taking; 18 E. L. & E. 230; 7 Johns. 140; 5 Mass. 283; 3 S. & R. 562; 1 Mas. 319; 11 Me. 28; 2 Blackf. 415; 1 Const. 401; 3 N. H. 36; 6 Halst. 370; 1 Ill. 130; 1 Mo. 345; 6 T. B. Monr. 421; 6 Ark. 18; 4 Harr. Del. 327; and in some states wherever a person claims title to specific chattels in another's possessions; 2 Harr. & J. 429; 4 Me. 306; 1 Pa. 238; 4 Harr. N. J. 160; 4 Mo. 93; 8 Blackf. 244; Hempst. 10; 4 R. I. 539; 121 Mass. 107; 54 Me. 447; 48 Miss. 357; while in others it is restricted to a few cases of illegal seizure; 9 Conn. 140; 3 Rand. 448; 16 Miss. 279; 4 Mich. 295. The object of the action is to recover possession; and it will not lie where the property has been restored. And when brought in the *detinet* the destruction of the articles by the defendant is no answer to the action; 3 Bla. Com. 147.

The *declaration* must describe the place of taking. Great accuracy was formerly required in this respect; 2 Wms. Saund. 74 *b*; 10 Johns. 53; but now a statement of the county in which it occurred is said to be sufficient; 1 P. A. Bro. 60.

The chattels must be accurately described in the writ; 6 Halst. 179; 1 Harr. & G. 252; 4 Blackf. 70; 1 Mich. 92.

The *plea* of *non cepit* puts in issue the taking, and not the plaintiff's title; 6 Ired. 38; 25 Me. 464; 3 N. Y. 506; 2 Fla. 42; 12 Ill. 378; and the pleas, not guilty; 9 Mo. 256; *cepit in alio loco*, and property in another, are also of frequent occurrence.

An avowry, cognizance, or justification is often used in defence. See those titles.

The *judgment*, when the action is in the *detinuit*, if for the plaintiff, confirms his title, and is also for damages assessed by the jury for the injurious taking and detention; 1 W. & S. 513; 20 Wend. 172; 15 Me. 20; 1 Ark. 557; 5 Ired. 192. In actions of replevin the measure of damages is the real value of the chattel at the time the tortious possession of the defendant began, with damages for its unlawful detention: 54 N. J. L. 597.

The defendant in replevin is not concluded by the value of the property named in the bond of the writ, when he brings an action on the bond, and is not estopped from showing such value to be greater than there stated; 125 U. S. 426.

See JUDGMENT; Morris, Repl.; 6 E. & B. 842; 2 Poll. & Maitl. 3.

**REPLEVY.** To re-deliver goods which have been distrained to the original possessor of them, on his giving pledges in an action of replevin. It signifies also the bailing or liberating a man from prison, on his finding bail to answer. See REPLEVIN.

**REPLIANT.** One who makes a replication.

**REPLICATION** (Lat. *replicare*, to fold back).

The plaintiff's answer to the defendant's plea or answer.

**In Equity.** The plaintiff's avoidance or denial of the answer or defence. Story, Eq. Pl. § 877.

*A general replication* is a general denial of the truth of the defendant's plea or answer, and of the sufficiency of the matter alleged in it to bar the plaintiff's suit, and an assertion of the truth and sufficiency of the bill. Cooper, Eq. Pl. 329, 330. Such a replication is always sufficient to put in issue every material allegation of an answer or amended answer, unless the rules of pleading imperatively require an amendment of the bill: 168 U. S. 1.

*A special replication* was one which introduced new matter to avoid the defendant's answer. It might be followed by re-

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joinder, surrejoinder, and rebutter. Special replications have been superseded by the practice of amending bills; 1 How. Intr. 55; 17 Pet. App. 68. A replication must be made use of where the plaintiff intends to introduce evidence, and a subpœna to the defendant to rejoin must be added, unless he will appear gratis; Story, Eq. Pl. § 879.

A replication may be filed *nunc pro tunc* after witnesses have been examined under leave of court; Story, Eq. Pl. § 881; Mitf. Eq. Pl. by Jeremy 323. If a replication is taken to a plea and issue be found thereon, the bill will not be dismissed, provided the facts contained in the plea are proved; 24 U. S. App. 542.

In the federal courts, after an answer is filed on any rule day, complainant has until the second rule day thereafter to file a general replication; 85 Fed. Rep. 508 (in the 8th Circuit).

**In Admiralty.** No replication to the answer to a libel is now allowed; the libellant, under Adm. Rule 51, is considered as denying new facts set up in the answer.

**At Law.** The plaintiff's reply to the defendant's plea. It contains a statement of matter, consistent with the declaration, which avoids the effect of the defendant's plea or constitutes a joinder in issue thereon. See Andr. Steph. Pl. 151.

It is, in general, governed by the plea, whether dilatory or in bar, and most frequently denies it. When the plea concludes to the country, the plaintiff must generally reply by a similiter. See SIMILITER; Hempst. 67. When it concludes with a verification, the plaintiff may either *conclude* the defendant by matter of estoppel, deny the truth of the plea in whole or in part, *confess and avoid* the plea, or new assign the cause of action in case of an evasive plea. Its character varies with the form of action and the facts of the case. See 1 Chitty, Pl. 519.

*As to the form* of the replication:

*The title* contains the name of the court, and the term of which it is pleaded, and in the margin the names of the plaintiff and defendant. 2 Chitty, Pl. 641.

*The commencement* is that part which immediately follows the title, and contains a general denial of the effect of the defendant's plea. When the plea is to the jurisdiction, it contains a statement that the writ ought not to be quashed, or that the court ought not to be ousted of their jurisdiction. Rastell, Entr. 101. When misnomer is pleaded, no such allegation is required; 1 B. & P. 61.

When matter in estoppel is replied, it is, in general, in the words "and the said plaintiff saith that the said defendant."

When the replication denies or confesses and avoids the plea, it contains a *precludi non*, which see.

*The body* should contain—

*Matter of estoppel*, which should be set forth in the replication if it does not appear from the previous pleadings: as, if the matter has been tried upon a particular issue in trespass and found by the jury; 3 East 346; 4 Mass. 443; 4 Dana 73; *denial of the truth* of the plea, either of *the whole* plea, which may be by a denial of the fact or facts constituting a single point in express words; 12 Barb. 573; 36 N. H. 232; 28 Vt. 279; 1 Humphr. 524; or by the general replication and *injuria, etc.*, according to the form of action; 8 Co. 67; 1 B. & P. 79; 13 Ill. 80; 19 Vt. 329; *or of a part* of the plea, which may be of any *material* fact; 20 Johns. 406; 13 T. B. Monr. 288; and of such only; 20 N. H. 323; 37 E. L. & E. 479; 9 Gill 310; 3 Pet. 31; or of matter of right resulting from facts; 1 Saund. 23 *a*, n. 5; 10 Ark. 147; see 2 Ia. 120; and see TRAVERSE; *a confession and avoidance;* 23 N. H. 535; 2 Denio 97; 10 Mass. 226; see CONFESSION AND AVOIDANCE; *a new assignment*, which see.

*The conclusion* should be to the country when the replication denies the whole of the defendant's plea containing matter of fact; 2 McLean 92; 7 Pick. 117; 1 Johns. 516; as well where the plea is to the jurisdiction; 1 Chitty, Pl. 385; as in bar; 1 Chitty, Pl. 554; but with a verification when new matter is introduced; 1 Saund. 103, n.; 17 Pick. 87; 1 Brev. 11; 11 Johns. 56. See 5 Ind. 264. The conclusions in particular cases are stated in 1 Chitty, Pl. 615; Com. Dig. *Pleader* (F 5). See 1 Saund. 103, n.; 1 Johns. 516; Archb. Civ. Pl. 258; 19 Viner, Abr. 29; Bac. Abr. *Trespass* (I 4).

*As to the qualities* of a replication. It must be responsive to the defendant's plea; 17 Ark. 365; 4 McLean 521; answering all which it professes to answer; 12 Ark. 183; 8 Ala. N. S. 375; and if bad in part, is bad altogether; 1 Saund. 338; 7 Cra. 156; 32 Ala. N. S. 506; *directly;* 10 East 205; see 7 Blackf. 481; without *departing* from the allegations of the declaration in any material matter; 2 Watts 306; 4 Munf. 205; 22 N. H. 303; 5 Blackf. 306; 1 Ill. 26; see DEPARTURE; with *certainty;* 6 Fla. 25; see CERTAINTY; and without *duplicity;* 4 Ill. 423; Daveis 236; 14 N. H. 373; 26 Vt. 397; 4 Wend. 211; see DUPLICITY. Although the replication is a departure from the complaint, yet the defendant cannot avail himself of such a defect in a court of error, where he did not raise the question by demurrer or by motion, but went to trial upon the issues as made up; 148 U. S. 345.

An objection that replications were not filed to the defendant's pleas when the trial commenced, nor before judgment with leave of court, comes too late if made after entry of judgment; 144 U. S. 434.

**REPLY.** In England in public prosecutions for felony or misdemeanor, instituted by the Crown, the law officers have a general right of reply, whether the defendant has introduced evidence or not; but prosecuting counsel in ordinary cases have not this right. See 6 Law Mag. & Rev., 4 Ser. 102. See OPENING AND CLOSING; RIGHT TO BEGIN; BURDEN OF PROOF.

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**REPORT OF COMMITTEE.** That communication which the chairman makes to the house upon the close of the investigation in which the committee has been engaged.

**REPORT OFFICE.** Formerly a department of the English court of chancery. Whart.

**REPORTS.** A printed or written collection of accounts or relations of cases judicially argued and determined.

The value and force of *adjudicated precedents*, which is, to a grepter or less degree, acknowledged in the jurisprudence of all civilized countries, is elsewhere discussed under the titles herein, *judge-made law*, *precedent*, and *stare decisis*. The greater weight given to precedent, however, in England and America, makes the subject of law reporting one of the utmost interest and importance. The multiplication of reports has given rise to much discussion on the subject.

In an able report to the American Bar Association, 1898, presented by Edward Q. Keasbey, it was suggested that the evils of excessive reports would be lessened if the court could be induced to write shorter opinions, especially when passing upon well-settled principles of law, and if the dissenting opinions were brief. The committee thought that dissenting opinions should be published. Only the important cases should be reported, omitting those which decide only questions of fact, or reaffirm settled principles of law, the selection to be made by the reporter. In preparing the syllabus all *dicta* should be omitted, and also propositions of law made by the court which were only *arguendo*. The reporter should state the facts even though they are stated by the court; an abstract of the arguments should be printed only in novel and important cases; Rep. Am. Bar Ass'n, 1898.

Prior to the year 1800, there were only one or two American Reports. In England, however, there were very many, but before the period of official reporting, and particularly among the early reports, there is a great difference in the value of the reports published by volunteer reporters. While some of them are of the highest authority, both in England and America, others are of little or, in many cases, of no authority whatever, and it is of the highest importance that a lawyer in citing them should know the character of the volume cited.

They are often mere *note-books* of lawyers or of students, or copies hastily and very inaccurately made from genuine manuscripts. In some instances one part of the book is *good*, when another is perfectly worthless. This is especially true of the early Chancery Reports, which were generally printed as booksellers' "jobs."

The failure to give due attention to the character of the old reports has led to grave judicial errors. Mr. Wallace, in "The Reporters," calls attention to the fact that the opinion of Chief Justice Marshall, which "had the effect of almost totally subverting in two states of our Union the entire law of charitable uses," relied upon the authority, which, twenty-five years afterwards, under the critical examination of Mr. Binney, was shown to be no authority, and the opinion passed upon it was overruled. The necessity of attention to the apparent value of the old reports is enhanced by the fact that even in books of the worst authority, there are occasional cases well reported, and different parts of the same book are of very different value. The most thorough and satisfactory source of information on this subject is "The Reporters," the author of which made the most exhaustive investigations in London, and his work received the highest commendation from English judges; 5 C. B. N. S. 854, where the book was characterized "as highly valuable and interesting," and one to which "they could not refrain from referring" on a question involving the reputation of one of the early English reporters."

Although want of space requires the omission in this revision of the detailed list of reports, a few of the comments upon the older reporters are given here in view of the fact that some of the sources from which they were drawn are out of print.

For a history of the "Law Reports" in England, with much information on reporting, see Daniel, History of the Origin of the Law Reports, 1884.

See 1 Abbott's National Digest x, for much information as to the Federal Reports, other than those in supreme court. All of the federal cases (except in the Supreme Court) have been reprinted in a very valuable series, in thirty volumes, under the name of "Federal Cases."

See, generally, 1 Kent, 14th ed. 471; 9 L. Quart. Rev. 179; 1 *id.* 137; Wambaugh, Study of Cases, *passim*; 2 Jurid. Soc. Papers 745, "The Expediency of Digesting the Precedents of the Common Law, and Regulating the Publication of Reports."

For a list of reports, see Soule, Lawyers' Reference Manual, which gives the chronology of all reports.

Among the English reporters the following possess little authority: Noy, Godbolt, Owen, Popham, Winch, March, Hutton, Ley, Lane, Hetley, Carter, J. Bridgman, Keble, Siderfin, Latch, several volumes of the "Modern" Reports, 3d Salkeld, Gilbert's Cases in Law and Equity, the 1st and 2d parts of "Reports in Chancery," Chancery Cases, Reports *temp.* Finch, "Gilbert's Reports," 8th Taunton, Peake's Nisi Prius Reports.

Prof. Wambaugh (Study of Cases) speaks of the "many cases excellently reported by Dyer, Plowden, Coke, Croke, Yelverton, Hobart, and Saunders." The first reporter to make orderly and condensed reports in full harmony with modern ideas was Sir James Burrow (1756–1772, K. B.); *id.*

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Aleyn (John). K. B., 1646–48. 1 vol. These are reports of cases in the time of the civil wars of Charles I., and do not possess much authority, though containing reports of Rolle's decisions.

Ambler (Charles). Cases in the High Court of Ch. 1737–83. Second edition by J. E. Blunt. 2 vols. As originally published of very little authority, but much improved by Mr. Blunt, whose edition was published in 1828.

Barnardiston (Thomas). High Ct. of Ch., 1740–41. 1 vol. Lord Mansfield (2 Burr. 1142) forbade the citing of this book as it would be only misleading the students to put them upon reading it. He said it was marvellous, however, to those who knew the sergeant, and his manner of taking notes, that he should so often stumble upon what was right; but that there was not one case in his book which was so throughout. Lord Eldon, however, in 1 Bligh, N. R. 538, says, "in that book there are reports of very great authority."

Barnardiston (Thomas). K. B., 1726–34. 2 vols. A book which for many years was very little esteemed, the author having been reputed a careless fellow who let the wags scribble what they liked in his note-book while he was asleep. However, where his accuracy has been tested, as it has been of later times, it has come out pretty fairly; and now both the K. B. and Ch. reports of Barnardiston are reasonably respected. See Wallace, Report. 423.

Bendloes (Guilelme). All the Courts, 1531–1628. 1 vol. Properly cited as New Benloe, but sometimes as old Benloe.

Benloe (Gulielme) & Dalison (Gulielme). C. P. Benloe contains cases from 1532 to 1579, and Dalison from 1546 to 1574. 1 vol. of each, bound together. There is very great confusion in the citations of the reports of Benloe and Dalison. Some cases of Benloe's are given at the end of Keilway's Reports and of Ashe's Tables. It is supposed that the title New Benloe was given to the volume here given as Bendloes to distinguish it from the cases in Keilway and Ashe. The volume given as Benloe & Dalison consists in reality of two separate series of reports, paged independently, although bound together, and the modes of reference are very various, being sometimes to Dalison when Benloe is intended, and *vice versa*. A full account is given in Wallace's Report. 80–85, 93, of these reports, and of the various mistakes made in citation.

Blackstone (William). K. B., C. P., and Exch. Chamber, 1746–79. 2 vols. Lord Mansfield said (Dougl. 92, n.): "We must not always rely on the words of reports, though under great names. Mr. Justice Blackstone's reports are not very accurate," but of late they have been well edited, and are more esteemed.

Bosanquet (J. B.) & Puller (C.). New Reports, C. P., Exch. Chamb., and House of Lords, 1804–07. 3 vols. The volumes of Bosanquet & Puller are generally cited from 1 to 5 in American books. In English books the latter series is frequently cited as New Reports.

Brooke (Robert). New Cases. Called also Petit Brooke, Little Brooke and Bellewe's Cases, *temp.* Henry VIII. A selection of cases in the K. B., C. P., and Exch., 1515–58. These cases were selected out of Brooke's Abridgment by Richard Bellewe.

Burrow (James). K. B., 1756–71. 5 vols. A full, excellent, and accurate reporter, who holds in a legal point of view the same relation to Lord Mansfield that in a literary and historical one Boswell does to Dr. Johnson.

Carthew (Thomas). King's Bench, 3 Jac. II.–12 Will. III. 1 vol. Lord Thurlow said, "Carthew and his book were equally bad authority," but Lord Kenyon, in 3 Term 776, says that Carthew is in general a good reporter. See also Willes 182.

Cary (George). Ch., 1557–1604. 1 vol. Frequently mere transcripts from the Registrar's books.

Cases in B. R. *temp.* Holt. Cases and Resolutions in the Court of K. B., 1714–29. 1 vol. This must not be mistaken for "Reports *temp.* Holt," for which see "Holt."

Cases in Chancery. Two parts in 1 vol.; with this is usually bound "Select Cases in the High Ct. of Ch.," which contains the cases of the Duke of Norfolk and of the Earls of Bath & Montagu; it is cited as 1st, 2d, & 3d "Chancery Cases."

Cases *tempore* Hardwicke. K. B. at Westminster during the time of Hardwicke, usually cited as Hardwicke's Cases, which see; see also Ridgway.

Cases *tempore* Talbot. K. B., C. P., and Ch., 1734–38. 1 vol. By Alex. Forrester to page 217, and from there to the end, by Hawkins. A book of highly respectable authority, though not a monument worthy of Lord Talbot's transcendent virtue. Wallace, Report. 506.

Cases *tempore* William III. King's Bench, 1690–1702. 1 vol. See Modern, vol. 12. Buller said in Dougl. 83, "12th Modern is not a book of any authority."

Choyce Chancery Cases. 1557–1606. 1 vol. A very good little book, so far as it goes. See Wallace, Report. 470, where curious extracts are given from the volume. Reprinted, 1870.

Coke (Edward). King's Bench, Common Pleas, Exchequer; and Chancery, 1572–1618. 13 parts or volumes. Lord Coke's reports are very voluminous. They have been severely criticised by Sir Edward Sugden, Lord Redesdale, and others, and Coke charged with "telling untruths" in them: but all the charges made against him have been examined by Mr. Wallace (Reporters, p. 165), and Lord

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Coke's integrity vindicated from the imputations of his countrymen.

Comberbach (Roger). K. B., 1685–99. It is said by Lord Thurlow (1 Bro. C. C. 97) to be bad authority, though a *few* cases are better reported than in any other place. Its chief use is for comparison with other reports of the same cases. Wallace, Report. 396.

Cox (Edward W.). Criminal Cas. in all the Cts. in England and Ireland, 1843–81. 14 vols. These reports, which are edited by Mr. Cox, are prepared by a large number of reporters.

Croke (Sir George). Ch., K. B., and C. P., 1582–1641. 4 vols. The reports in Croke are generally short, and, as the books consist of four closely-printed volumes, the cases are, of course, very numerous. Occasionally cases are misreported: but taken as a *whole*, Croke has enjoyed from early times a high reputation, and even now is constantly cited. Wallace, Report. 198. The Chancery cases in the time of Elizabeth are Sir Harbottle Grimston's. The reports are commonly cited by the name of the author and the reigning sovereign: vol. 1 as Croke Car., vols. 2 & 3 Croke Eliz., and vol. 4 Croke Jac.

Davies, or Davis, or Davy (Sir John). K. B., C. P., and Exch. in Ireland, 1604–12. 1 vol. Davies, who was chief-justice of Ireland, and died on the night of the day on which he had been appointed chief-justice of England, was a man of great genius and accomplishments. For an account of these reports, see Wallace, Report. 229.

Dickens (John). High Ct. of Ch., 1559–1798. 2 vols. Mr. Dickens was a very attentive and diligent register; but his notes, being rather loose, are not to be considered as of very high authority. Lord *Redesdale*, 1 Sch. & L. 240. See, also, Sugd. Vend. 146. A few cases, where the opinions are printed from manuscripts prepared for publication, are valuable. Wallace, Report. 476.

Dyer (Sir James). K. B. and C. P. Exch. and Ch., 1513–82. 3 vols. Short notes, never intended by Dyer to have been published; always regarded, however, as among the best of the old reports. Wallace, Report. 126.

Ellis (Thomas F.) & Blackburn (Colm). Q. B., 1852–58. 8 vols. Among modern reports few are more valued for the success with which extraneous matter is stripped off and nothing but the essence of the case presented to the reader. 9 Lond. Law Mag. 339.

Equity Cases Abridged. Cases in the High Court of Ch., 1667–1744. 3 vols. This work is a digest, rather than reports, and is frequently cited. The first volume, which is attributed to Pooley, is of excellent authority; the second, much less so.

Fortesque (John). Select cases in all the courts of Westminster Hall, *tempore* Will. III., Anne, Geo. I., and Geo. II.; also the Opinion of all the Judges of England relative to the Grandest Prerogatives of the royal family, and some observations relating to the Prerogative of a Queen-Consort. 1 vol.

Freeman (Richard). K. B. and C. P., 1670–1704. 1 vol. Freeman's note-book having been stolen by a student, and these reports published surreptitiously, they were for a long time but little esteemed. Of late, however, they have been re-edited, and enjoy a higher reputation than they formerly did. Lord Mansfield said, in Cowp. 16, "Some of the cases in Freeman are very well reported." Wallace, Report. 390.

Gilbert (J.). Cases in Law and Eq., 1713–15. 1 vol. A posthumous work, containing one or two cases well reported, but generally consisting of loose notes very badly edited. Wallace, Report. 251. Commonly cited as Gilbert's Cases.

Hardwicke's Cases. Court of King's Bench at Westminster, 7th to 10th Geo. II., during which time Hardwicke presided in that court, to which are added some cases decided by Lee and two Equity cases by Hardwicke.

Hetley (Sir Thomas). C. P., 1627–31. 1 vol. Not marked by any peculiar skill, accuracy, or information. Dougl. ix. Not valued. 2 Jurid. Soc. Papers 577.

Hobart (Sir Henry). C. P. and Ch., 1–23 Jac. I. Hobart was a great judge; and these reports, which are by himself, have always been esteemed. Wallace (Report. p. 163) cites from Judge Jenkins a splendid tribute to his character.

Holt. Reports *tempore* Holt. K. B., C. P., Exch., and Ch., 1688–1710. 1 vol., by Giles Jacob. (Taken from a MS. of Thomas Farresley.) In Rex *v.* Bishop of London, Lee, C. J., said this was a book of no authority.

Howell (Thomas B.) & (Thomas J.). State Trials and Proceedings for High Treason and other Crimes and Misdemeanors, 1163–1820. 33 vols., and Index.
Vol. 1–21, 1163–1783. T. B. Howell.
22–33, 1783–1820. T. J. Howell.
This is an immense collection of cases, brought together by hunting through every collection in England, and, therefore, having very different degrees of merit. For a full account of its character and value, see Wallace's Report. 64.

Hutton (Sir Richard). C. P., 1612–38. 1 vol. This book, says Mr. Wallace, seems to belong to that class of literary productions which do not obtain notoriety enough to be abused. Wallace, Report. 246.

Jenkins (David). Exchequer, 1220–1623. 1 vol. Eight centuries, or eight hundred cases. See an interesting account of Jenkins, who was a Welsh judge, by Mr. D'Israeli, given in Wallace's Report. 71.

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The reports of Jenkins were prepared in prison, where Jenkins was put for his loyalty to Charles I. and kept for fifteen years. The book is of excellent authority.

Jones (Sir William). K. B. and C. P., House of Lords, and Exch. Chamb., 1620–41. It is a book of good authority. It is sometimes cited as 1st Jones, to distinguish it from Sir Thomas Jones, which is then correspondingly cited as 2d Jones.

Keble (Joseph). K. B., 12–20 Car. II. 3 vols., an inaccurate reporter, yet a tolerable historian of the law; 3 Wils. 330. Not a satisfactory reporter, but a pretty good register, and more esteemed of late, perhaps, than formerly. Wallace, Report. 315.

Keilwey (Robert). K. B. and C. P. It also contains some cases *incerti temporis*, and some *temp.* Edw. III. The volume, having been edited by John Croke, is sometimes cited as Croke's Reports. See Wallace, Report. 119.

Leonard (William). K. B., C. P., and Exch., 1540–1615. A very good and much-esteemed reporter; one of the best, indeed, of the old books. See Wallace, Report. 142, citing Sugden, Lord Nottingham, and Sir George Treby.

Ley (Sir James). King's Bench, C. P., Ex., and Court of Wards, and Star Chamber, 1608–29. 1 vol. The book is seldom cited. Wallace, Report. 241. It is sometimes cited as Leigh; *id.* 244.

Lofft (Capel). K. B., C. P., and Ch., 1772–74. 1 vol. Not a very highly esteemed reporter, but the only volume giving an account of the great case of the negro Somerset.

Meeson (R.) & Welsby (W. N.). Exch. and Exch. Chamb., 1836–47. 16 vols. Among the most useful and best reported of the modern English reports.

Modern Cases in Law and Equity. See Modern Reports, parts 8 & 9; in 1 Burr. 386, it is observed, that it is a miserable, bad book, and in 3 Burr. 1326, the court said they treated it with the contempt it deserved.

Modern Reports. Select Cases in the K. B., C. P., Ch., and Exch., 1669–1755. 12 vols. By various hands, and of various degrees of excellence; some are very inferior. See much learning on the subject in Wallace, Report. 347–390. See Modern Cases in Law and Equity.

Moore (Edmund F.). Cases in Privy Council. New Series, 1862–73. 9 vols. Vol. 3, p. 347 to the end, and vols. 4–9 are identical word for word with 1–4 Law Reports, Privy Council.

Moore (Francis). K. B., C. P., Exch., and Ch., 1512–1612. 1 vol. Moore's Reports are printed from a genuine manuscript, and are esteemed valuable and accurate.

Mosely (William). High Court of Ch., time of King, 1726–30. 1 vol. Condemned by Lord Mansfield, but perhaps on insufficient ground. Lord Eldon, a better judge of the merits of a Chancery Reporter, spoke well of it (19 Ves. 488, n.), as did also Mr. Hargrave. Wallace, Report. 504.

New Reports. See Bosanquet & Puller.

Noy (William). K. B. and C. P., 1559–1649. 1 vol. This is an abridgment by Serjeant Size, who when a student borrowed Noy's Reports and abridged them for his own use. *Vide* Ventr. 81; 2 Keb. 652; for a full account see Wallace, Report. 154.

Plowden (Edmund). K. B., C. P., and Exch., 1550–80. 1 vol. Probably the most full, finished, and thoroughly accurate of the old reporters; always highly esteemed. For an amusing illustration of subtle argumentation, see the case of Hales *v.* Petit, as quoted by Wallace, Report. 147, where he shows it to be the original of the grave-digger's scene in Hamlet.

Raymond (Lord Robert). K. B. and C. P., 1694–1734. 3 vols. Some of the earlier cases in Lord Raymond, having been taken when he was a young man, or copied from the papers of his different young friends, have not been so highly esteemed, perhaps, as his other cases, which are, generally speaking, his own. As a whole, his reports are highly respected, and often cited, even in this day and country. Wallace, Report. 401.

Ridgeway (William). K. B. and Ch., at the time Lord Hardwicke presided in those courts. King's Bench, 1736, Chancery, 1744–45.

Salkeld (William). K. B., Ch., C. P., and Exch., 1 Will. III. to 10 Anne. 3 vols. The third volume having been published from notes less carefully prepared than the first two, is not accounted as of the highest authority.

Saville (Sir John). C. P. and Exch., 1580–94. This book, says Wallace (Report. 197), appears to be in the condition of Pope's "most women," and to have no character at all. I have not found a word upon it, either of censure or of praise.

Sayer (Joseph). K. B., 1751–56. 1 vol. "An inaccurate reporter." 1 Sugd. Vend. 80.

Select Chancery Cases. High Court of Ch. Containing the great cases of the Duke of Norfolk, and of the Earls of Bath and Montague. (This is part 3 of Chancery Cases, and is usually bound with parts 1 & 2.)

Strange (Sir John). Ch., K. B., C. P., and Exch. 2 vols. Authoritative, though too brief in the style of reporting. Mr. Nolan, in 1795, published a new edition, which has rendered Strange more valuable than he was. Wallace, Report. 420.

Style (William). K. B., "now Upper Bench," 1646–1655. Printed from a genuine manuscript, and esteemed.

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Taunton (William P.). C. P. and other Cts., 1807–19. 8 vols. The eighth volume of Taunton is not very highly esteemed, having been made up from his notes and not supervised by him. Wallace, Report. 533, note; 9 Lond. Law Mag. 339.

Vaughan (Sir J.). C. P., 1665–74. 1 vol. Edited by Edward Vaughan. Containing some cases from his own perfected manuscript, very well reported, but some others not fully prepared, and not so much esteemed. Vaughan was an interesting character, upon whose merits the author of The Reporters dwells with interest. See page 334.

Vernon (Thomas). High Ct. of Ch., 1680–1719. 2 vols. Vernon was a very eminent chancery lawyer; but his reports were posthumously published from notes found in his study after his death. They were loose, and on that account unsatisfactory and inaccurate. A very highly improved edition was published in 1806, 1807, by Mr. Raithby, under the auspices of Lord Eldon. The manuscript reports of Vernon were the subject of an entertaining chancery suit between his widow, his heir-at-law, and his residuary legatee. No one of the parties, however, succeeded; and the case was ended by the lord chancellor's keeping the manuscript himself. See Wallace, Report. 493.

West (Martin, J.). High Court of Ch., 1736–39. 1 vol. A book published only of recent time, though from ancient and genuine manuscripts. It is a good work so far as it goes, but, unfortunately, includes but a short term of Lord Hardwicke's administration in Chancery.

Willes (John). C. P., Exch. Chamb., Ch., and House of Lords, 1737–58. 1 vol. Edited by Charles Durnford. Posthumously published, but quite authoritative and useful.

Year-Books. Cases in different Courts, 1307–1537. 11 vols. See YEAR-BOOKS.

Year-Books of Edward I. K. B., 1292–1307. 5 vols. Edited and translated by A. J. Horwood. Published by the authority of the Lords Commissioners of the Treasury, under the direction of the Master of the Rolls.

Yelverton (Sir Henry). K. B., 1603–13. 1 vol. Excellent reports of a first-rate old-school English lawyer, and admirably edited in America by Judge Metcalf. See Wallace, Report. 211, where a full biographical sketch of the gifted and unfortunate reporter is given.

**REPRESENT.** To exhibit, to expose before the eyes. To represent a thing is to produce it publicly. Dig. 10. 4. 2. 3.

**REPRESENTATION. In Insurance.** The stating of facts by either of the parties to a policy of insurance, to the other, whether in writing or orally, expressly or by plain implication, preliminary and in reference to making the insurance, obviously tending to influence the other as to entering into the contract. 12 Md. 348; 11 Cush. 324; 2 N. H. 551; 6 Gray 221.

A statement incidental to the contract, relative to some fact having reference thereto, and upon the faith of which the contract is made. May, Ins. 190. It may be *affirmative* or *promissory*.

The distinction between representation and warranty must be carefully observed; the latter is a part of the contract, the former is but a statement incidental thereto. In an action on the policy the plaintiff must show facts sufficient to bring him within the terms of the warranty, while the burden of proving the untruthfulness of representations, if any, is on the defendant. Further, representations need not be literally complied with; 49 Neb. 811; but only in *material* points; while in cases of warranty, the question of materiality does not arise; May, Ins. § 183. All reasonable doubts as to whether statements inserted in or referred to in an insurance policy are warranties or representations should be resolved in favor of the assured; 58 Ark. 528. Representations in writing are, *ipso facto*, material; 4 H. L. C. 484; 98 Mass. 381; 31 Ia. 216. Representations are material though the fact represented may not relate directly to the risk; 20 N. Y. 32.

Doctrines respecting representation and concealment usually have reference to those by the assured, upon whose knowledge and statement of facts the insurance is usually made; but the doctrine on the subject is equally applied to the underwriter, so far as facts are known to him; 3 Burr. 1905.

In the absence of fraud, deceit, or misrepresentation, the assured cannot be protected by claims of ignorance of the contents of the application, since it is his duty to inform himself of its contents before signing; 45 Mo. App. 426; and it is the duty of the assured to communicate all material facts, and he cannot urge as an excuse for his omission to do so that they were actually known to the underwriters, unless the knowledge of the latter was as full and particular as his own information; 107 U. S. 485.

A misrepresentation though made unintentionally, or through mistake, makes the insurance void, notwithstanding its being free from fraud; 1 Du. 747; 18 Eng. L. & Eq. 427. See 87 Ky. 541.

The material falsity of an oral promissory representation, without fraud, is no defence in an action on a policy. If made with the intent to deceive, the policy may be thereby avoided. Promissory representations, reduced to writing and made a part of the contract, become substantial warranties; May, Ins. § 182. See 9 Allen 540.

A substantial compliance with a representation is sufficient,—the rule being less strict than in case of a warranty; 3 Metc. Mass. 114; 4 Mas. 439; 31 Ia. 216; 34 Md. 582. See 98 Mass. 381. The validity of the

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policy does not depend on the literal truth of the assertion; 49 Neb. 811. The substantial truth of the statement is for the jury, but not its *materiality;* May, Ins. § 187.

Insurance against fire and on life rests upon the same general conditions of good faith as marine insurance; but in the first two classes the contract is usually based mainly upon statements by the applicant in written replies to numerous inquiries expressly referred to in the policy, which answers are thus made express warranties and must, accordingly, be strictly true whether their being so is or is not material to the risk. The inquiries are intended to cover all material circumstances, subject, however, to the principle, applicable to all contracts, that fraud by either party will exonerate the other from his obligations, if he so elects; 7 Barb. 570; 10 Pick. 535; 6 Gray 288; 2 Rob. La. 266; 24 Pa. 320; 3 Md. 341; 2 Ohio 452; 21 Conn. 19; 6 Humphr. 176; 6 McLean 324; 8 How. 235; 2 M. & W. 505. 36 Fed. Rep. 118; 119 Ill. 482; 80 Ala. 470. See 10 L. R. A. 666; CONCEALMENT; INSURANCE; MISREPRESENTATION; WARRANTY.

**In Scotch Law.** The name of a plea or statement presented to a lord-ordinary of the court of session, when his judgment is brought under review.

**REPRESENTATION OF PERSONS.** A fiction of the law, the effect of which is to put the representative in the place, degree, or right of the person represented.

The heir represents his ancestor; Bac. Abr. *Heir and Ancestor* (A); the devisee, his testator; the executor, his testator; the administrator, his intestate; the successor in corporations, his predecessor; and, generally speaking, they are entitled to the rights of the persons whom they represent, and bound to fulfil the duties and obligations which were binding upon them in those characters.

Representation was unknown to the Romans, and was invented by the commentators and doctors of the civil law. Toullier, *Dr. Civ. Fr.* liv. 3, t. 1, c. 3, n. 180. See Ayliffe, Pand. 397; Dalloz, Dict. *Succession*, art. 4, § 2.

**REPRESENTATIVE.** One who represents or is in the place of another.

In the law of decedents' estates any person who has succeeded to the rights of the decedent, whether by purchase descent, or operation of law. 67 N. W. Rep. (Neb.) 771.

A representative of a deceased person, sometimes called a "personal representative," or "legal personal representative," is one who is executor or administrator of the person described. 6 Madd. 159; 5 Ves. 402. See 118 Mass. 200; 139 *id.* 504.

A gift in a will to the "representative" of a person is a gift to his legal personal representatives, in the absence of any context in the will showing that the word is to have a different meaning; 45 Ch. Div. 269.

See PERSONAL REPRESENTATIVES; LEGAL PERSONAL REPRESENTATIVE.

In *legislation*, it signifies one who has been elected a member of that branch of the legislature called the house of representatives.

The securing of fair apportionment of representatives in legislative bodies is one of the most serious problems in modern constitutional law, there being no subject as to which the legislation is more frequently affected by partisan bias. In many of the states there has been an effort to control the matter by constitutional provisions under which it is usually required that the districts shall be formed of contiguous territory and contain as nearly as possible an equal number of inhabitants. These are the principal provisions in the constitution of Illinois, in which state it was held that an apportionment act was valid which was a substantial compliance with the constitution, though the rule of compactness was only applied to a limited extent; 155 Ill. 451. The subject has been very carefully considered in Indiana. Among the conclusions reached there are: that under the state constitution requiring a sexennial enumeration of the male inhabitants over twenty-one years and an apportionment at the next legislative session thereafter, the legislature, having once made a valid apportionment after an enumeration, is prohibited from making a reapportionment and from repealing such valid apportionment during the enumeration period; that if the first apportionment is invalid, even before it has been declared so by the courts, a second may be passed; that the question of the validity of such a law is not a political one, to be determined only at the discretion of the legislature, but that it is entirely within the jurisdiction of the courts to determine its constitutionality; that where the question of constitutionality has been determined by a lower court in an action between the citizens, and an appeal is dismissed, the subject is not *res judicata* as against the state; and that the state is not estopped from objecting to the constitutionality of an apportionment by the fact that a legislature has been elected under an unconstitutional act; 144 Ind. 593.

In New Jersey it was held that the constitutionality of such acts is a subject of judicial inquiry and not a mere political question, but that the courts cannot overturn a law passed within constitutional limitations on the ground that it is unwise, impolitic, unjust, or oppressive, or even that it was procured by corporate means; 56 N. J. L. 126, where it was held that mandamus to compel officers to proceed under prior laws in respect to elections instead of following an unconstitutional statute is not premature because no demand and refusal has been made or the time arrived when it is the duty of the officers to act.

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In a Virginia case it was said that the laying off and defining of districts under a constitutional requirement that they should be of contiguous counties, etc., compact, and, as nearly as may be, equal in population, was an exercise of political and discretionary power of the legislature for which they are amenable to the people; 79 Va. 269; but this, it is remarked, "was a mere declaration of the court without discussion of the question and without any facts reported which show any attempt at a gerrymander"; 15 L. R. A. 561, note.

Any clear violation of the constitutional provisions will make an apportionment invalid; as, the division of a county or district where the constitution forbids it; 81 Wis. 440; or the allotment of a greater number of representatives than the constitution directs; 26 Kan. 724; and glaring inequalities either of representation or of population in the districts will be considered a sufficient indication that the legislature has exceeded its discretion; 83 Wis. 90; 93 Mich. 1; 2 Idaho 1208; 78 N. C. 198; 133 Ind. 178; *contra*, 135 N. Y. 473, as to which see 31 Am. Law Reg. 851. The opinion by Peckham, J., in the New York case takes a radically different view of the nature of the power involved in the apportionment of a state for representatives from that expressed in the other cases cited, particularly those from Indiana and New Jersey. He says: "From the formation of government under written constitutions in this country the question of the basis of representation in the legislative branch of the government has been one of the most important and most frequently debated. It is not true that equality of members in representation has been the leading idea at all times in regard to republican institutions. . . . . The power to readjust the political divisions of a sovereignty with the view of representation of those divisions or of the inhabitants thereof, in the legislature, resides, of course, in the first instance, with the people, who in this country are the source of all political power. The essential nature of the power itself is not, however, altered by that fact. In its nature it is political as distinguished from legislative or judicial."

If the discretion of the legislature is fairly exercised, the apportionment will be sustained even if not mathematically correct; 48 Ohio St. 438; 11 Kan. 235, per Brewer, J.; 18 Me. 458; but there can be no legislative discretion to give a county of less population than another greater representation under a constitution requiring representative districts to contain "as nearly as may be" an equal number of inhabitants; 92 Mich. 638.

These principles have been also applied to apportionments made by minor administrative bodies to which the power is granted; 142 N. Y. 523, 531; 138 *id.* 95. In the case last cited a distinction was made by Peckham, J., between the legislative power of apportionment and that confided to an inferior body. The former, it was said, might reasonably be considered a power to divide according to the legislative discretion, "but in the case of inferior bodies, like boards of supervisors, who have no legislative power excepting what is specifically granted, the power to divide being given, the implication would be strong that it was only a power to divide equally." Nevertheless, as some discretion was necessarily involved, it must be an honest and a fair discretion arising out of the circumstances of the case and reasonably effecting the exercise of the power of equal division. But it was not to be considered "that every trifling deviation from equality of population would justify or warrant an application to a court for redress. . . . It must be a grave, palpable, and unreasonable deviation from the standard," making it apparent "that very great and wholly unnecessary inequality has been intentionally provided for." 138 N. Y. 95.

As to the apportionment of representatives in congress among the states, see APPORTIONMENT; and see, generally, JUDICIAL POWER; LEGISLATIVE POWER.

**REPRESENTATIVE DEMOCRACY.** A form of government where the powers of the sovereignty are delegated to a body of men, elected from time to time, who exercise them for the benefit of the whole nation. 1 Bouvier, Inst. n. 31.

**REPRESENTATIVE PEERS.** See PEERS.

**REPRIEVE** (from Fr. *reprendre*, to take back). **In Criminal Practice.** The withdrawing of a sentence for an interval of time, which operates in delay of execution. 4 Bla. Com. 394.

It is granted by the favor of the pardoning power, or by the court who tried the prisoner. Reprieves are sometimes granted *ex necessitate legis;* for example, when a woman is convicted of a capital offence, after judgment she may allege pregnancy in delay of execution. In order, however, to render this plea available, she must be *quick with child* (*q. v.*), the law presuming —perhaps wrongly enough—that before that period life does not commence in the fœtus; Co. 3d Inst. 17; 1 Hale, Pl. Cr. 368; 2 *id.* 413; 4 Bla. Com. 395. See JURY OF WOMEN.

The judge is also bound to grant a reprieve when the prisoner becomes insane; 4 Hargr. St. Tr. 205, 206; Co. 3d Inst. 4.

The president, under the constitution, Art. II. § 2, has the power to grant reprieves. A reprieve is said to be a withdrawal or withholding of punishment for a time after conviction and sentence, in the nature of a stay of execution. Cooley, Const., 2d ed. 104. See Bish. Cr. Proc. 1299. When a reprieve is granted in a capital case to a day certain, the warden should execute the sentence on the day the reprieve expires, and the time of execution need not be again fixed by the court: 40 N. E. Rep. (N. Y.) 883. See 29 Ohio St. 457; 13 Wend. 159; PARDON.

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**REPRIMAND.** The censure which in some cases a public officer pronounces against an offender.

This species of punishment is used by legislative bodies to punish their members or others who have been guilty of some impropriety of conduct towards them. The reprimand is usually pronounced by the speaker.

**REPRISALS.** The forcibly taking a thing by one nation which belonged to another, in return or satisfaction for an injury committed by the latter on the former. Vattel, b. 2, c. 18, s. 342; 1 Bla. Com. c. 7.

*General* reprisals take place by virtue of commissions delivered to officers and citizens of the aggrieved state, directing them to take the persons and property belonging to the offending state wherever found.

*Negative* reprisals take place when a nation refuses to fulfil a perfect obligation which it has contracted, or to permit another state to enjoy a right which it justly claims.

*Positive* reprisals consist in seizing the persons and effects belonging to the other nation, in order to obtain satisfaction.

*Special* reprisals are such as are granted in times of peace to particular individuals who have suffered an injury from the citizens or subjects of the other nation.

Reprisals are used between nation and nation to do themselves justice, when they cannot otherwise obtain it.

Where an individual is injured by a foreign state he must first apply to its courts, if possible, and it is only when refused redress there that his own government can claim to interfere. Similarly where the injury is to a state, compensation should be demanded before recourse is had to reprisal. Risley, Law of War 57. An instance of reprisal occurred in December, 1897, when Germany threatened bombardment at Hayti unless the government within eight hours saluted the German flag and made compensation to an injured German subject. See LETTERS OF MARQUE.

Reprisals are made in two ways, either by embargo, in which case the act is that of the state, or by letters of marque and reprisals, in which case the act is that of the citizen, authorized by the government. See 2 Brown, Civ. Law 334. Such letters are generally granted for a refusal to pay debts, for an unwarrantable suspension of treaty obligations, denial of evident justice, or a refusal to pay indemnity for losses. One of the last instances of a letter of reprisal was in 1778 when the King of France gave authority of reprisal to certain people whose vessels had been seized by the British government for carrying contraband of war; Snow, Int. Law 76. Congress has the power to grant letters of marque and reprisal. U. S. Const. art. 1, s. 8, cl. 11.

The property seized in making reprisals is preserved while there is any hope of obtaining satisfaction or justice; as soon as that hope disappears, it is confiscated, and then the reprisal is complete; Vattel, b. 2, c. 18, § 342. See Boyd's Wheat. Int. Law.

**REPRISES.** The deductions and payments out of lands, annuities, and the like are called reprises, because they are *taken back;* when we speak of the clear yearly value of an estate, we say it is worth so much a year *ultra reprises*, besides all reprises.

In Pennsylvania, lands are not to be sold under an execution when the rents can pay the debt and interest and costs in seven years, beyond all reprises.

**REPROBATION. In Ecclesiastical Law.** The propounding exceptions either against facts, persons, or things; as, to allege that certain deeds or instruments have not been duly and lawfully executed; or that certain persons are such that they are incompetent as witnesses; or that certain things ought not, for legal reasons, to be admitted.

**REPROBATUR, ACTION OF.** An action in Scotch law for the purpose of convicting a witness of perjury. Bell.

**REPUBLIC.** A commonwealth; that form of government in which the administration of affairs is open to all the citizens, In another sense, it signifies the state, independently of its form of government. 1 Toullier 28 and n., 202, note.

**REPUBLICAN GOVERNMENT.** A government in the republican form; a government of the people; a government by representatives chosen by the people. Cooley, Const. 194. It is usually put in opposition to a monarchical or aristocratic government. But it is said to be, strictly speaking, by no means inconsistent with monarchical forms; Cooley, Const. 194; there can be no doubt that in the light of the fact that the Revolution was intended to throw off monarchical forms, a republican form of government in the constitution means a government in which the people choose, directly or indirectly, the executive.

The fourth section of the fourth article of the constitution directs that "the United States shall guarantee to every state in the Union a republican form of government." Mill. Const. U. S. 640. The form of government is to be *guaranteed*, which supposes a form already *established:* and this is the republican form of government the United States have undertaken to protect. See Story, Const. § 1807.

A republican government, once established, may be endangered so as to call for the action of congress: 1. By the hostile action of some foreign power, and taking possession of the territory of some state, and setting up a government therein not established by the people. 2. By the revolutionary action of the people themselves in forcibly rising against the constituted authorities and setting the government aside, or attempting to do so, for some other.

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In either of the above cases, it will be the duty of the federal government to protect the people of the state by the employment of military force. Cooley, Const., 2d ed. 202; see 7 Wall. 700: 7 How. 1, 3. Even in strict accordance with the forms prescribed for amending a state constitution, it would be possible for the people of the state to effect such changes as would deprive it of its republican character. It has been suggested that it would then be the duty of congress to intervene. In any case there could probably be no appeal from the decision of congress. Cooley, Const. 196. See GOVERNMENT.

**REPUBLICATION.** An act done by a testator, from which it can be concluded that he intended that an instrument which had been revoked by him should operate as his will. Schoul. Wills 441; or it is the re-execution of a will by the testator, with a view of giving it full force and effect.

The republication is *express* when there has been an actual re-execution of it; 1 Ves. 440; 2 Rand. 192; 9 Johns. 312; it is *implied* when, for example, the testator by a codicil executed according to the statute of frauds, reciting that he had made his will, added, "I hereby ratify and confirm my said will, except in the alterations after mentioned." 3 Bro. P. C. 85. See 30 Neb. 149; 16 Ves. Jr. 167. The will might be at a distance or not in the power of the testator, and it may be thus republished; 1 Ves. Sen. 437; 1 Ves. 486; 4 Bro. C. C. 2.

The republication of a will has the effect —*first*, to give it all the force of a will made at the time of the republication; Beach, Wills 143; if, for example, a testator by his will devise "all his lands in A." then revokes his will, and afterwards buys other lands in A. the republication, made after the purchase, will pass all the testator's lands in A; Cro. Eliz. 493. See 1 P. Wms. 275. *Second*, to set up a will which had been revoked. See, generally, Will. Exec.; Jarm. Wills; Schoul. Ex; Schoul. Wills.

**REPUDIATE.** To express in a sufficient manner a determination not to accept a right, when it is offered.

He who repudiates a right cannot by that act transfer it to another. Repudiation differs from renunciation in this, that by the former he who repudiates simply declares that he will not accept; while he who renounces a right does so in favor of another. Renunciation is, however, sometimes used in the sense of repudiation. See RENOUNCE; RENUNCIATION; Wolff, Inst. § 339.

**REPUDIATION. In Civil Law.** A term used to signify the putting away of a wife or a woman betrothed.

Properly, divorce is used to point out the separation of married persons; repudiation, to denote the separation either of married people, or those who are only affianced. *Divortium est repudium et separatio maritorum; repudium est renunciatio sponsalium, vel etiam est divortium.* Dig. 50. 16. 101.

A determination to have nothing to do with any particular thing: as, a repudiation of a legacy is the abandonment of such legacy, and a renunciation of all right to it.

**In Ecclesiastical Law.** The refusal to accept a benefice which has been conferred upon the party repudiating.

As to repudiation of a contract before the time of performance, see ELECTION OF RIGHTS AND REMEDIES; PERFORMANCE.

**REPUGNANCY** (Lat. *re*, back, against, *pugnare*, to fight). **In Contracts.** A disagreement or inconsistency between two or more clauses of the same instrument. In deeds, and other instruments *inter vivos*, the earlier clause prevails, if the inconsistency be not so great as to avoid the instrument for uncertainty; 2 Taunt. 109; 15 Sim. 118; 2 C. B. 830; 13 M. & W. 534.

In wills, the latter clause prevails, under the same exceptions; Co. Litt. 112 *b*; Plowd. 541; 6 Ves. 100; 2 My. & K. 149; 1 Jarm. Wills 411. See, however, 18 Ch. Div. 17.

Repugnancy in a condition renders it void; 2 Mod. 285; 11 *id.* 191; 1 Hawks 20; 7 J. J. Marsh. 192; 6 Ch. Div. 549. And see, generally, 3 Pick. 272; 4 *id.* 54; 6 Cow. 677; Schoul. Wills 498; Beach, Wills 521.

**In Pleading.** An inconsistency or disagreement between the statements of material facts in a declaration or other pleading: as, where certain timber was said to be for the completion of a house already built; 1 Salk. 213. Repugnancy of immaterial facts, or of redundant and unnecessary matter, if it does not contradict material allegations, will not, in general, vitiate the pleadings; Co. Litt. 303 *b*; 10 East 142; 1 Chitty, Pl. 233. See Steph. Pl. 378; Gould, Pl. § 172.

**REPUTABLE.** Worthy of repute or distinction, held in esteem, honorable, praiseworthy. 123 Ill. 245.

**REPUTATION** (Lat. *reputo*, to consider). The opinion generally entertained in regard to the character or condition of a person by those who know him or his family. The opinion generally entertained by those who may be supposed to be acquainted with a fact.

In general, reputation is evidence to prove a *man's reputation in society;* a *pedigree;* 14 Camp. 416; 1 S. & S. 153; *certain prescriptive or customary rights* and obligations; *matters of public notoriety.* But as such evidence is in its own nature very weak, it must be supported, when it relates to the exercise of a right or privilege, by proof of acts of enjoyment of such right or privilege within the period of living memory; 1 Maule & S. 679; 5 Term 32. Afterwards, evidence of reputation may be given. The fact must be of a public nature; it must be derived from persons likely to know the facts; 9 B. Monr. 88; 4 B. & Ald. 53. Evidence of the reputation of a man for truth and veracity in the neighborhood of his home is equally competent to affect his credibility as a witness, whether it is founded upon a dispassionate judgment, or upon warm admiration for habitual truthfulness or

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natural indignation at habitual falsehood, and whether his neighbors are virtuous or immoral in their own lives; 164 U. S. 221. The facts must be general, and not particular; they must be free from suspicion: 1 Stark. Ev. 54. An existing reputation is a fact to which any one may testify who knows it; he knows it because he hears it, and what he hears constitutes the reputation; 50 Mich. 642.

Formerly, and until the middle of this century, witnesses in England could testify as to their personal knowledge and opinion of a defendant's or witness's *character*. At present the question to be asked is whether the witness knows the witness's *reputation*, what it is, and whether, from such knowledge, he would believe him on oath. Tayl. Ev. § 1324. In America, as to the character of a defendant, reputation is in most states made the exclusive mode of proof; and as to a witness's character, reputation is the sole source of proof. See an interesting article by Prof. John H. Wigmore, in 32 Am. L. Rev. 713.

Injuries to a man's reputation by circulating false accounts in relation thereto are remediable by action and by indictment. See LIBEL; SLANDER; CHARACTER.

**REPUTE.** Character, as distinguished from reputation. 3 Dist. Rep. (Pa.) 271.

**REPUTED.** Accepted by general, or public opinion.

**REPUTED OWNER. In English Practice.** A bankrupt trader who has in his apparent possession goods, which he holds with the consent of the true owner, is called the reputed owner. The Bankruptcy Act of 1869, sec. 15, § 5, provides that such goods in his possession at the commencement of his bankruptcy pass to his trustee; but things in action, other than debts due to him in the course of his trade or business, are not deemed goods and chattels within the meaning of that clause; Whart. Dict.; 2 Steph. Com. 166.

By the English Bankruptcy Act of 1883, the trustee is entitled to such goods as are, at the commencement of the bankruptcy (the date of the earliest act of bankruptcy), in the possession, order, or disposition of the bankrupt, by the consent of the true owner, in such a way that the former is the reputed owner of them; provided they are with the bankrupt in his trade or business. The ownership may be rebutted by showing a custom in the trade to take goods on hire, as in the case of a hotel-keeper having hired furniture; 18 Ch. D. 30; or of pianos; 18 *id.* 601; and perhaps of furniture in general; 41 L. J. Q. B. 20; but see, *contra*, 23 Ch. D. 261.

In mechanic's lien law, where the remedy is usually *in rem*, liens are commonly filed of record against the "owner or reputed owner."

**REQUEST** (Lat. *requiro*, to ask for). Within the provision of the constitution of a religious society providing that a change therein cannot be granted except at the request of two-thirds of the society, a vote was held not a request. 31 Pac. Rep. (Ore.) 216.

**In Contracts.** A notice of a desire on the part of the person making it, that the other party shall do something in relation to a contract. Generally, when a debt is payable immediately, no request need be made; 10 Mass. 230; 3 Day 327; 1 Johns. Cas. 319.

In some cases, the necessity of a request is implied from the nature of the transaction; as, where a horse is sold to A, to be paid for on delivery, A must show a request; 5 Term 409; or impossibility on the part of the vendor to comply, if requested; 5 B. & Ad. 712; previous to bringing an action; and on a promise to marry; 2 Dowl. & R. 55. See DEMAND. And if the contract in terms provides for a request, it must be made; 1 Johns. Cas. 327. It should be in writing, and state distinctly what is required to be done; 1 Chitty, Pr. 497.

**In Pleading.** The statement in the plaintiff's declaration that a demand or request has been made by the plaintiff of the defendant to do some act which he was bound to perform, and for which the action is brought.

A *general request* is that stated in the form "although often requested so to do" (*licet sæpe requisitus*), generally added in the common breach in the money counts. Its omission will not vitiate the declaration; 1 B. & P. 59; 1 Johns. Cas. 100.

A *special request* is one provided for by the contract, expressly or impliedly. Such a request must be averred; 5 Term 409; 3 Camp. 549; 2 B. & C. 685; and proved; 1 Saund. 32, n. 2. It must state time and place of making, and by whom it was made, that the court may judge of its sufficiency; 1 Stra. 89. See Com. Dig. *Pleader* (C 69, 70); 1 Saund. 33, n.; DEMAND.

**REQUEST NOTES. In English Law.** Certain notes or requests from persons amenable to the excise laws, to obtain a permit for removing any excisable goods or articles from one place to another.

**REQUESTS, COURTS OF.** See COURTS OF REQUESTS. Vol. 12 (1898) of the publications of the Selden Society contains Select Cases in this court.

**REQUISITION.** The act of demanding a thing to be done by virtue of some right. See MILITARY OCCUPATION.

The demand made by the governor of one state on the governor of another for a fugitive, under the provision of the United States constitution. See EXTRADITION; FUGITIVE FROM JUSTICE.

**REQUISITIONS OF TITLE.** Written inquiries made by the solicitor of an intending purchaser of land, to the vendor's solicitor, in respect of some apparent insufficiency in the abstract of title. Mos. & W.

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**RERE FIEFS.** Inferior feudatories in Scotland. Whart.

**RES** (Lat. things). The terms Res, Bona, Biens, used by jurists who have written in the Latin and French languages, are intended to include movable or personal, as well as immovable or real, property. 1 Burge, Confl. L. 19. See BIENS; BONA; THINGS; JUS AD REM.

**RES ADJUDICATA.** See RES JUDICATA.

**RES COMMUNES** (Lat.). **In Civil Law.** Those things which, though a separate share of them can be enjoyed and used by every one, cannot be exclusively and wholly appropriated; as, light, air, running water. Mackeldey, Civ. Law § 156; Erskine, Inst. 1. 1. 5. 6.

**RES GESTÆ** (Lat.). Transaction; thing done; the subject-matter.

Those circumstances which are the automatic and undesigned incidents of a particular litigated act, and which are admissible in evidence when illustrative of such act. Whart. Ev.; 96 Cal. 125.

Events speaking for themselves through the instructive words and acts of participants, not the words and acts of participants when narrating the events. 18 Colo. 170.

When it is necessary in the course of a cause to inquire into the nature of a particular act, or the intention of the person who did the act, proof of what the person said at the time of doing it is admissible evidence as a part of the *res gestæ*, for the purpose of showing its true character. On an indictment for a rape, for example, what the girl said so recently after the fact as to exclude the possibility of practising on her, has been held to be admissible evidence as a part of the transaction; 2 Stark. 241; 1 Phill. Ev., 4th Am. ed. 185.

Declarations or acts, accompanying the fact in controversy and tending to illustrate or explain it, as conversations contemporaneous with the facts; 112 Mo. 374; 18 Fed. Rep. 156; 148 Pa. 566; or the complaints of the injured party, both as to bodily suffering and the circumstances of the occurrence; 79 Pa. 493; 95 N. Y. 274; 86 Wis. 518; 24 U. S. App. 364; 116 Ind. 566; 158 U. S. 271; or the declarations and conduct of third persons at the time; 107 Mo. 240; 49 Ohio St. 25; 62 Tex. 318; see 21 How. St. Tr. 514; are admissible; also declarations of a party at the time of taking possession of personal property as to the nature of his possession; 35 Mo. 533; statements made by the parties at the time of the sale of personal property, when such statements bear upon the question of good faith or other fact in issue; 19 N. Y. 464; 36 N. H. 353; statements as to the conditions of an execution sale; 1 Rawle 223; or of an officer or other persons interested at the time of levying on property; *id.*; 47 Barb. 243; of a person at the time of making an entry upon land, when they explain the character and purpose of making such entry; 3 Bla. Com. 174; by a bondsman when signing a bond; 132 Ind. 387; declarations accompanying the payment of money, to show the purpose or application of such payment; 25 Vt. 308; statements of a grantor at the time of making a conveyance; 16 N. H. 168; 33 Barb. 491; 31 Mo. 62. Declarations of a wife showing maltreatment on the part of her husband are part of the *res gestæ* in an action by him for the alienation of her affections; 64 Vt. 432. Declarations made by one officer of a steamboat while engaged in violently removing a passenger from a part of the vessel in which his contract for transportation did not entitle him to be, were admitted as part of the *res gestæ;* 121 U. S. 637.

A mere narrative of a past occurrence is inadmissible as part of the *res gestæ;* 9 Cush. 42; 41 Conn. 55; 70 Miss. 874; the declaration must so harmonize with the fact as to form one transaction; 123 N. Y. 85. In a case frequently criticised, a statement made immediately after the act and whilst running from the room, where her throat had been cut, was held inadmissible; 14 Cox, Cr. C. 341. The length of the interval of time between the main facts and the statements cannot be important if sufficient time elapsed to make the statements, having regard to their form and substance, mere narrative; 71 Ind. 66; and that only a minute elapsed, does not alter the rule; 65 Miss. 576; but see 8 Wall. 397; 3 Cush. 181, where the declarations are considered part of the *res gestæ*, if there is neither time nor motive for misrepresentation or invention; and see 25 Gratt. 921; and if they are voluntary and spontaneous and made within so short a time after the occurrence as to preclude the idea of deliberate design; 35 Cal. 49; 116 Ind. 566; 82 Tex. 657; 77 Va. 681. In an action for personal injury, a physician's written statement concerning the injury made at the time and annexed to his deposition, is not admissible as part of the *res gestæ;* 119 U. S. 99; nor were the declarations of an officer of a corporation that a note on which it had brought suit was indorsed to it only for the purpose of suing on it, where there were no circumstances connected with the declaration which would raise an estoppel; 35 Fed. Rep. 644. In Georgia, it is provided by the code that declarations accompanying the act or so nearly connected therewith in time as to be free from all suspicion of device or afterthought, are admissible in evidence; Georgia Code § 3733. See 14 Am. L. Rev. 817; 15 *id.* 1; 11 Eng. Rul. Cas. 298; Taylor, Evidence; Jones, Evidence; EVIDENCE.

**RES INCORPORALES.** Things incorporeal; fixed relations in which men stand to things or to other men; relations giving them power over things or claims against persons. Inst. 2. 2.



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**RES INTEGRA** (Lat. an entire thing; an entirely new or untouched matter). A term applied to those points of law which have not been decided, which are untouched by dictum or decision. 3 Mer. 269; 1 Burge, Confl. L. 241.

**RES INTER ALIOS ACTA** (Lat.). A technical phrase which signifies acts of others or transactions between others.

Neither the declarations nor any other acts of those who are mere strangers, or, as it is usually expressed any *res inter alios acta*, are admissible in evidence against any one; when the party against whom such acts are offered in evidence was privy to the act, the objection ceases; it is no longer *res inter alios;* 1 Stark. Ev. 52; 3 *id.* 1300; 4 Mann. & G. 282. See 1 Metc. Mass. 55; MAXIM.

**RES IPSA LOQUITUR** (Lat. the thing speaks for itself). A phrase often used in actions for injury by negligence where no proof of negligence is required beyond the accident itself, which is such as necessarily to involve negligence. See 5 Ex. 787. Where contractual relations existed between the parties, and the plaintiff shows actual negligence or conditions so obviously dangerous as to admit of no other inference, the burden thus thrown on the defendant is not that of satisfactorily accounting for the accident, but of showing that he used due care; 184 Pa. 519. See NEGLIGENCE.

For cases in which this doctrine has been applied or considered, see 167 Mass. 388; 9 App. D. C. 60; 78 Fed. Rep. 442; 79 *id.* 125; 90 Me. 110; 56 Alb. L. J. 96; 17 App. Div. N. Y. 402; 18 *id.* 22; 89 Tex. 168.

**RES JUDICATA** (Lat. the matter has been decided). **In Practice.** A legal or equitable issue which has been decided by a court of competent jurisdiction.

When one is barred in any action, real or personal, by judgment, demurrer, confession, or verdict, he is bound as to that or a like action forever; 14 Q. B. D. 146; XII B. L. R. 304.

When a question is necessarily decided in effect though not in express terms between parties to the suit, they cannot raise the same question as between themselves in any other suit in any other form; 3 Atkins 626. This definition of Lord Hardwicke, in Gregory *v.* Molesworth, has been by some writers considered the best.

The doctrine of *res judicata* is plain and intelligible, and amounts simply to this, that a cause of action once finally determined, without appeal, between the parties, on the merits, by a competent tribunal, cannot afterwards be litigated by a new proceeding either before the same or any other tribunal; 100 Mass. 409.

Estoppel rests on equitable principles, while *res judicata* does not rest upon equitable principles, but on the two maxims which were its foundation in the Roman Law (see *infra*); Ind. L. R. VIII. All. 332; it is rather a principle of public policy than the result of equitable considerations. Thus it is also a matter of private right; 34 N. J. Eq. 535.

It is a general principle that a decision by a court of competent jurisdiction, of matters put in issue by the pleadings, is binding and conclusive upon all other courts of concurrent power, and between parties and their privies; 168 U. S. 48, reviewing the federal cases. This principle pervades not only our own, but all other systems of jurisprudence, and has become a rule of universal law, founded on the soundest policy, and is necessary for the repose and peace of society and the maintenance of civil order; *id.* See also 125 *id.* 702; 7 Wall. 107.

It has been characterized as a "fundamental concept in the organization of civil society;" 22 How. 352.

It was derived from Roman law, being founded on the maxims *nemo debet bis vexari pro eadem causa*, and *interest reipublicæ ut sit finis litium.*

It was commonly said by the civilians *res judicata facit ex albo nigrum, ex nigro album, ex curvo rectum, ex recto curvum* (a decision makes white black; black, white; the crooked, straight; the straight, crooked).

It was said by Blackburn, L. J., that the doctrine was not received in England, as it was on the continent, directly from the Roman law; L. R. 2 App. Cas. 530.

But in order to make a matter *res judicata* there must be a concurrence of the four conditions following:

1. *Identity in the thing sued for;* 5 M. & W. 109; 7 Johns. 20; 1 Hen. & M. 449; 1 Dana 434.

2. *Identity of the cause of action;* Whart. Ev. 763; 6 Wheat. 109; 2 Gall. 216; 17 Mass. 237; 2 Leigh 474; 8 Conn. 268; 1 N. & McC. 329; 16 S. & R. 282; 3 Pick. 429; 1 Tex. Civ. App. 611.

An action for breach of covenant of seisin is not a bar to an action for the breach of a covenant in the same deed against incumbrances; the action not being founded on the same cause of action, and the rule prohibiting the splitting of a single cause of action having, therefore, no application; 18 So. Rep. (Ala.) 825. A person who obtains an order from a police magistrate for the delivery of goods improperly detained, is not thereby precluded from subsequently bringing an action for special damage arising out of the same detention. It is not *res judicata*, since the matter of damage was one with which the magistrate had no power to deal; [1893] 2 Q. B. 172.

A judgment against an administrator for moneys due the estate is not a bar to a subsequent action for a further sum not known by the plaintiff at the time of the former action, to be due; 23 S. E. Rep. (N. C.) 259.

But the estoppel arising from a finding in a previous suit between the same parties extends to a decision of the legal rights of the parties on a state of facts

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common to both suits, although the causes of action are different; 55 Fed. Rep. 690.

3. *Identity of persons and of parties* to the action; 7 Cra. 271; 1 Wheat. 6; 14 S. & R. 435; 4 Mass. 441; 2 Yerg. 10; 5 Me. 410; 8 Gratt. 68; 16 Mo. 168; 12 Ga. 271; 21 Ala. N. S. 813; 23 Barb. 464; 83 Va. 862; 82 *id.* 172; 50 Kan. 342.

A judgment in favor of plaintiffs in an action upon notes which they had previously transferred to a bank, is not conclusive that they owned the cause of action at the time of recovery, or that it was due at the commencement of the action as against other creditors of the maker not parties or privies to the action, and does not bar them from asserting their rights to precedence; 95 Wis. 169.

4. *Identity of the quality in the persons* for or against whom the claim is made; 5 Co. 32 *b*; 6 Mann. & G. 164; 4 C. B. 884.

A judgment is only presumptively conclusive against parties in the character in which they sue or are sued; 114 Ind. 303. As a rule it must be a final decision of a cause on the merits to constitute *res judicata*; 92 Mo. 120. The following have been held not to be a bar to a subsequent suit: A final judgment on a third demurrer to the second amended petition; 61 Mo. App. 297; a judgment of dismissal entered upon the plaintiff's failure to appear; 42 Pac. Rep. (Nev.) 11; an order of "judgment reversed," but without an award of a *venire de novo*, entered in the supreme court on a writ of error; 98 Pa. 142; a suit which was dismissed under the rule as to dismissal for want of prosecution and was not heard on the merits; 23 S. E. Rep. (W. Va.) 789; a judgment of peremptory nonsuit against the plaintiff; 66 N. W. Rep. (Wis.) 253. See NONSUIT. The findings of the court do not constitute a bar in a subsequent action between the same parties unless followed by a judgment based thereon; 86 Hun 411.

Cases to which the doctrine of *res judicata* has been applied are: The decision of a referee on a point properly determined by him and reviewable on appeal; 3 East 346; 4 Cow. 559; 14 N. Y. 329; a judgment rendered on a compromise; 39 La. Ann. 809; a decision on *habeas corpus* as to the custody of a child; 99 Mo. 484; a judgment upon the ownership of property where that is the material point in issue; 29 N. Y. St. Rep. 569; judgment by default; 122 U. S. 306; 111 N. Y. 177; or on demurrer; 91 U. S. 526; 124 *id.* 225; 10 Col. 599; or by an equally divided court; 68 Md. 516; a judgment of dismissal entered under an agreement reciting a settlement that nothing is due; 120 U. S. 89; or upon a hearing where the entry is not "expressly without prejudice"; 125 *id.* 698; or a simple dismissal with taxation of costs and award of execution; 30 Fed. Rep. 525; or dismissal for want of prosecution; 81 Va. 709; or dismissal for failure in the proof of execution of a contract for breach of which an action is brought, even where the words, *without prejudice*, are added to the decree; 33 W. Va. 464; judgments in other states; 53 Me. 346; 69 Md. 211; 97 U. S. 331; but where the state is a party it is not estopped from denying the constitutionality of an act which it is claimed was a contract between the state and an individual, where that question was not raised in a previous adjudication of the state court upon the meaning of the statute; 94 U. S. 645.

A judgment on a plea in abatement in an action of attachment for rent is not *res adjudicata* on the trial on the merits; 53 Mo. App. 181; nor is a judgment in another state on *habeas corpus* for the custody of a child conclusive, where there has been a material change of conditions and circumstances; 30 Wkly. Law Bul. 164. A judgment ordering that the cause be filed away for want of prosecution is not final or a bar to a subsequent action; 23 S. W. Rep. (Ky.) 366. A judgment abating an action entered upon a verdict finding that plaintiff's powers as administrator had ceased pending the action, is not a bar to the subsequent revival of the action on plaintiff's reinstatement as administrator; 61 Ark. 203.

The decision of a motion or summary application is not to be regarded in the light of *res judicata*, or as so far conclusive upon the parties as to prevent their drawing the same matter in question again in the more regular form of an action; 128 U. S. 489. An adjudication sustaining a demurrer going to the merits is *res judicata* as to the whole matter in controversy; 117 Mo. 261; 126 Ind. 477; 5 Ind. App. 369.

In determining whether a decision of a court of competent jurisdiction operates as an estoppel, the court in a subsequent case is entitled to consider what facts were before the court in the former case, and to give effect to any fresh facts that subsequently take place; [1894] 2 Q. B. 108. Its conclusiveness does not depend upon the question whether there is the same demand in both cases, but it exists even where there are different demands, if the question upon which the recovery of the second demand depends has, under identical circumstances and conditions, been previously concluded by a judgment between the parties or their privies; 167 U. S. 371. Where the causes of action are different, but the parties the same, the former judgment is conclusive as to matters, in fact, necessarily decided and as to matters which might have been, but which were not, presented and decided; 32 Fed. Rep. 652. A judgment, when introduced in evidence as an estoppel, cannot be explained or varied by parol; 45 Ill. App. 355.

The fact that a court is composed of several divisions does not prevent the judgment of one of the divisions from being *res judicata;* 167 U. S. 371. A change in a person holding an office does not destroy the effect of a judgment against such officer as *res judicata;* 167 U. S. 371.

A judgment in a civil action is not admissible in a criminal proceeding, for the

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reason that the parties "are necessarily different, and the objects and results of the two proceedings are equally diverse;" 69 Conn. 212; 25 *id.* 185; 77 Ala. 202; 35 Vt. 457; *contra*, 88 Ind. 357, where, in a prosecution for the unlawful removal of a fence, a judgment in a civil action between the defendant and the prosecuting witness was admitted in evidence. But this case was criticised in 69 Conn. 212, as founded upon an error which was not relieved by the instruction of the court to the jury that the evidence was not conclusive, but merited serious consideration. The Connecticut court cite a former decision of their own to the effect that, "a judgment is conclusive or is nothing. If not conclusive, there is no rule by which courts can measure and determine its effect;" 51 Conn. 494.

Where there is concurrent jurisdiction at law and in equity, a decision in one court is *res judicata* as to the other; 1 Johns. Ch. 91; 18 Johns. 534; 5 Mass. 207; 70 N. Y. 11. Where there is jurisdiction both of the cause and the parties a judgment of a court of general jurisdiction is conclusive, even though erroneous, until it is reversed upon appeal or vacated; 7 Co. 76; 1 Pet. 340; 9 Cow. 227; 3 Binn. 410; 6 Pick. 435; 4 Johns. Ch. 460; 106 N Y. 604; 81 Va. 677; 82 Ga. 168. See 7 L. R. A. 577; 11 *id.* 155, 308.

A decree on a bill by a stockholder for the benefit of himself and all other stockholders who come in, to enjoin the consummation of an agreement by the corporation, is conclusive in a subsequent suit by another stockholder for the same purpose and involving the same question, in the absence of fraud or collusion; 50 N. J. Eq. 656, citing 15 R. I. 75; 23 Am. Rep. 44; 6 Metc. 546; 60 Vt. 1; 11 Fed. Rep. 97; 123 Ill. 122.

The doctrine of *res judicata* applies even though the amount in controversy in the former suit was so small that the party was not entitled to a review in an appellate court; 152 U. S. 252.

What might be an extension of the doctrine of *res judicata*, though not technically within the definition of the subject, is the rule that obtains among the circuit courts of the United States by which a decision in one circuit court is followed in the other upon like facts although between different parties. This practice is more common in patent litigation. It can hardly be sustained on principle. It is a convenient rule which saves litigation and tends towards unity of decision among the federal courts other than the supreme court; 67 Fed. Rep. 928. Thus, a circuit court should follow the decision of another circuit court upholding a patent, except when new evidence of invalidity is introduced, and in such case, confine its investigation to the new evidence; 53 Fed. Rep. 791; on a motion for a preliminary injunction even greater effect is given to the prior adjudication; the new evidence must be so conclusive as to lead the court to believe that, if introduced before, it must have changed the result; 75 *id.* 609. This is usually spoken of as a rule of comity. While the circuit court should follow the decision in another circuit, the circuit court of appeals will re-examine the whole case anew and not follow the earlier adjudication in the circuit court; 53 *id.* 792.

As analogous to this subject the following may be cited: The decision of the supreme court upon questions of fact in a suit determining the validity of a patent, did not operate strictly as *res judicata* or as a technical estoppel in a subsequent suit in the circuit court, upon the same patent between different parties, but operated merely upon the conscience of the inferior tribunal, and therefore in applying the conclusions of the superior court the circuit court should first inquire what facts are proven in the pending case by independent evidence, and, second, examine the opinions of the superior court and the line of reasoning and conclusion which they exhibited, and from these or otherwise, but not by formal evidence, become satisfied whether or not the proofs of which the latter court took cognizance were substantially the same as those in the case at bar; 55 Fed. Rep. 516.

See, generally, Wells, *Res Judicata*, etc.; Herman, Estoppel and *Res Adjudicata*; Chand, *Res Judicata;* Van Fleet, Former Adjudication; Duchess of Kingston's Case, and notes, 3 Sm. L. Cas., 9th Am. ed. 2008; JUDGMENT; FORMER JUDGMENT; AUTREFOIS ACQUIT.

**RES MANCIPI. In Roman Law.** Those things which might be sold and alienated, or of which the property might be transferred from one person to another.

The division of things into *res mancipi* and *res nec mancipi* was one of ancient origin, and it continued to a late period in the empire. Res mancipi (Ulp. Frag. xix.) are *prædia in italico solo*, both rustic and urban; also, *jura rusticorum prædiorum* or *servitutes*, as *via, iter, aquæductus;* also slaves, and four-footed animals, as oxen, horses, etc., *quæ collo dorsove domantur*. Smith, Dict. Gr. & Rom. Antiq. To this list may be added children of Roman parents, who were, according to the old law, *res mancipi*. The distinction between *res mancipi* and *nec mancipi* was abolished by Justinian in his Code. *Id.;* Cooper, Inst. 442.

**RES NOVA** (Lat.). Something new; something not before decided.

**RES NULLIUS** (Lat.). A thing which has no owner. A thing which has been abandoned by its owner is as much *res nullius* as if it had never belonged to any one.

The first possessor of such a thing becomes the owner; *res nullius fit primi occupantis*. Bowy. Com. 97.

**RES PERIIT DOMINO** (Lat. the thing is lost to the owner). A phrase used to express that when a thing is lost or destroyed it is lost to the person who was the owner of it at the time. For ex-

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ample, an article is sold; if the seller has perfected the title of the buyer so that it is his, and it be destroyed, it is the buyer's loss; but if, on the contrary, the title has not vested in the buyer, then the loss falls on the seller. See SALE.

**RES PRIVATÆ** (Lat.). **In Civil Law.** Things the property of one or more individuals. Mackeldey, Civ. Law § 157.

**RES PUBLICÆ** (Lat.). **In Civil Law.** Things the property of the state. Mackeldey, Civ. Law § 157; Erskine, Inst. 2. 1. 5. 6.

**RES RELIGIOSÆ** (Lat.). **In Civil Law.** Things pertaining to religion. Places where the dead were buried. Thevenot Dessaules, *Dict. du Dig. Chose.*

**RES SACRÆ** (Lat.). **In Civil Law.** Those things which had been publicly consecrated.

**RES SANCTÆ** (Lat.). **In Civil Law.** Those things which were especially protected against injury of man.

**RES UNIVERSITATIS** (Lat.). **In Civil Law.** Those things which belonged to cities or municipal corporations. They belonged so far to the public that they could not be appropriated to private use; such as public squares, market-houses, streets, and the like. Inst. 2. 1. 6.

**RESALE.** A second sale made of an article; as, for example, when A, having sold a horse to B, and the latter, not having paid for him, and refusing to take him away, when by his contract he was bound to do so, again sells the horse to C. The effect of a resale is, in this case, that B would be liable to A for the difference of the price between the sale and resale; 4 Bingh. 722; 4 Mann. & G. 898; Blackb. Sales 463. See SALE.

**RESCEIT, RECEIT.** The admission or receiving of a third person to plead his right in a cause formerly commenced between two other persons: as, when an action is brought against a tenant for life or years, or any other particular tenant, and he makes default, in such case the reversioner may move that he may be received to defend his right and to plead with the demandant. Jacob, Law Dict.; Cowel.

The admittance of a plea when the controversy is between the same two persons. Co. Litt. 192.

**RESCISSION OF CONTRACTS.** The abrogation or annulling of contracts.

It may take place by mutual consent; Ans. Contr. 358; and this consent may be inferred from acts; 4 Mann. & G. 898; 1 Pick. 57; 5 Me. 277; 156 Pa. 276. It may take place as the act of one party, in consequence of *a failure to perform* by the others: 2 C. B. 905; 4 Wend. 285; 2 Pa. 454; 28 N. H. 561; 9 La. Ann. 31; 63 Hun 439; 76 Ga. 3; not so, ordinarily, where the failure is but partial; 4 Ad. & E. 599; 1 M. & W. 231; on account of *fraud*, even though partially executed; 5 Cush. 126; 15 Ohio 200; 23 N. H. 519; 129 U. S. 86. See 25 Alb. L. J. 69. Misrepresentations not a part of the same transaction are no cause for rescinding the contract; 83 Va. 504.

A contract cannot, in general, be rescinded by one party unless both parties can be placed in the same situation and can stand upon the same terms as existed when the contract was made; 2 Y. & J. 278; 4 Mann. & G. 903; 1 M. & W. 231; 3 Me. 30; 1 Denio 69; 22 Pick. 283; 4 Blackf. 515; 2 Watts 433; 10 Ohio 142; 3 Vt. 442; 1 N. H. 17; 73 Ia. 749; 39 Kan. 105; 78 Tex. 619. It must be done at the time specified, if there be such a time: otherwise, within a reasonable time; 2 Camp. 530; 14 Me. 57; 22 Pick. 546; in case of fraud, upon its discovery; 1 Den. 69; 5 M. & W. 83; 141 U. S. 429; 45 N. J. Eq. 186; 37 Fed. Rep. 418; 39 Kan. 105. The right may be waived by mere lapse of time; 3 Story 612; see 6 Cl. & F. 234; or other circumstances; 9 B. & C. 59; 4 Den. 554; 4 Mass. 502; Baldw. 331.

In case of a conditional sale or exchange the party desiring to rescind must return or tender a return of all the property received by him under the terms of the sale or exchange, and within a reasonable time; 1 Marvel Del. 156. In that case it was held that the question as to what is a reasonable time is a question for the court under the circumstances of each case; *id.*; in another case, however, it is said that the question whether the defendants delayed for an unreasonable time in asserting a right to rescind is for the jury; 3 C. C. App. 600.

If a party means to rescind a contract because of the failure of the other party to perform he should give a clear notice of his intention to do so, unless the contract itself dispenses with such notice, or unless notice becomes unnecessary by reason of the conduct of the parties; 137 U. S. 78.

The equity for the rescission and cancellation of agreements, securities, deeds, and other instruments arises when a transaction is vitiated by illegality or fraud, or by reason of its having been carried on in ignorance or mistake of facts material to its operation; Bisp. Eq. 31; 128 U. S. 315. The jurisdiction of the court of equity is exercised upon the principle of *quia timet;* that is, for fear that such agreements, securities, deeds, and other instruments may be vexatiously or injuriously used against the party seeking relief, when the evidence to impeach them may be lost; or that they may throw a cloud or suspicion over his interest or title; or where he has a defence good in equity which cannot be made available at law. The cases in which this relief will be granted on account of misrepresentation and fraud may be divided into four classes: *first*, where there is actual fraud in the party defendant in which the party plaintiff has not participated; 13 Pet. 26; *secondly*, where there is constructive fraud against public policy and the party plaintiff has not participated therein;

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see 4 Munf. 316; *thirdly*, where there is a fraud against public policy and the party plaintiff has participated therein, but public policy would be defeated by allowing it to stand; *fourthly*, where there is a constructive fraud by both parties,—that is, where both parties are *in delicto*, but not *in pari delicto*; see 2 Story, Eq. Jur. § 694; 3 Jones, Eq. 494; 2 Mas. 378; 25 Ga. 89; 1 Pat. & H. 307; Bisph. Eq. § 31. The court will decree that a deed or other solemn instrument shall be delivered up and cancelled, not only when it is avoidable on account of fraud, but also when it is absolutely void, unless its invalidity appears upon the face of it, so that it may be defeated at any time by a defence at law; 2 Story, Eq. Jur., 13th ed. § 698; 6 Du. 597. To cancel an executed contract for alleged false representations, fraud must be made clearly to appear, and it must be shown that the complainant has been injured and deceived thereby; 124 U. S. 173.

The ignorance or mistake which will authorize relief in equity must be an ignorance or mistake of material facts; 1 Stor. 173; 11 Conn. 134; 6 Wend. 77; 6 Harr. & J. 500; 10 Leigh 37; and the mistake must be mutual; 3 Green, Ch. 103; 2 Sumn. 387; 11 Pet. 63; 24 Me. 82; 10 Vt. 570; 6 Mo. 16; 153 Pa. 134; 89 Ga. 619. If the facts are known but the law is mistaken, the same rule applies in equity as at law, that a mere mistake or ignorance of law, where there is no fraud or trust, is immaterial: *ignorantia legis neminem excusat*; Adams, Eq., 8th ed. 188. See 99 N. C. 30; IGNORANCE; MISTAKE.

Instruments may also be rescinded and cancelled when they have been obtained from persons who were at the time under duress or incapacity; 2 Root 216; 8 Ohio 214; 3 Yerg. 537; 36 Miss. 685; or by persons who stood in a confidential relation and took advantage of that relation; 5 Sneed 583; 31 Ala. N. S. 292; 3 Cow. 537; 2 A. K. Marsh. 175; 9 Md. 248; 3 Jones, Eq. 152, 186; 30 Miss. 369; 8 Beav. 437; 151 Pa. 593; 115 Mo. 465; 96 Mich. 562.

Gross inadequacy of consideration; 17 Vt. 9; 22 Ga. 637; 19 How. 303; 82 Va. 394; 119 U. S. 499; fraudulent misrepresentation and concealment; 3 Pet. 210; 2 Ala. N. S. 251; 10 Yerg. 206; 1 A. K. Marsh. 235; 2 Mo. 126; 34 Ala. N. S. 596; 6 Wisc. 295; 74 Ia. 161; 85 Ky. 160; 116 Md. 367; hardship and unfairness; 17 Vt. 542; 2 Root 216; 2 Green, Ch. 357; 2 Harr. & J. 285; 3 Yerg. 537; 8 Ohio 214; 31 Vt. 101; undue influence; 2 Mas. 378; are among the causes for a rescission of contracts in equity.

See, generally, 9 L. R. A. 607; ELECTION OF RIGHTS AND REMEDIES; PERFORMANCE.

**RESCISSORY ACTIONS. In Scotch Law.** Actions which are brought to set aside deeds. Patterson, Comp. 1058, n.

*Proper improbation* is an action brought for declaring writing false or forged.

*Reduction - improbation* is an action whereby a person who may be hurt or affected by a writing insists upon producing or exhibiting it in court, in order to have it set aside, or its effects ascertained under the certification that the writing, if not produced, shall be declared false and forged.

In an action of *simple reduction* the certification is only temporary, declaring the writings called for null until they be produced; so that they recover their full force after their production. Erskine, b. 4, tit. 1, §§ 5, 8.

**RESCOUS.** An old term, synonymous with *rescue*, which see.

**RESCRIPT. In Canon Law.** A term including any form of apostolical letter emanating from the pope. The answer of the pope in writing. *Dict. Droit Can.*

**In Civil Law.** The answer of the prince, at the request of the parties, respecting some matter in dispute between them, or to magistrates, in relation to some doubtful matter submitted to him.

The rescript was differently denominated according to the character of those who sought it. They were called *annotations* or *subnotations*, when the answer was given at the request of private citizens; *letters* or *epistles*, when he answered the consultation of magistrates; *pragmatic sanctions*, when he answered a corporation, the citizens of a province, or a municipality. See CODE.

**At Common Law.** A counterpart.

In Massachusetts it is used to denote the statement of the decision of the supreme judicial court as an appellate tribunal, and the accompanying brief statement of the reasons for the decision sent to the court from which the case was brought.

**RESCRIPTION. In French Law.** A rescription is a letter by which the maker requests some one to pay a certain sum of money, or to account for him to a third person for it. Pothier, *Contr. de Change*, n. 225.

According to this definition, bills of exchange are a species of rescription. The difference appears to be this,—that a bill of exchange is given when there has been a contract of exchange between the drawer and the payee; whereas the rescription is sometimes given in payment of a debt, and at other times it is lent to the payee.

**RESCUE. In Criminal Law.** The forcibly and knowingly freeing another from arrest or imprisonment. 4 Bla. Com. 131.

A deliverance of a prisoner from lawful custody by a third person. 2 Bish. Cr. Law § 1065; 1 Russ. Cr. § 597.

Taking and setting at liberty, against law, a distress taken for rent, services, or damage feasant. Bacon, Abr. *Rescous*.

If the rescued prisoner was arrested for felony, then the rescuer is a felon; if for treason, a traitor; 3 P. Wms. 468; Cro. Car. 583; and if for a trespass, he is liable

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to a fine as if he had committed the original offence; Hawk. Pl. Cr. b. 5, c. 21. See 2 Gall. 313; Russ. & R. 432. If the principal be acquitted, the rescuer may nevertheless be fined for the misdemeanor in the obstruction and contempt of public justice; 1 Hale, Pl. Cr. 598. See T. U. P. Charlt. 13.

In order to render the rescuer criminal, it is necessary he should have knowledge that the person whom he sets at liberty has been apprehended for a criminal offence, if he is in the custody of a private person; but if he be under the care of a public officer, then he is to take notice of it at his peril; 1 Hale, Pl. Cr. 606. See further, 1 Stor. 88; 2 Gall. 313; 1 Car. & M. 299; 1 Ld. Raym. 35, 589.

A departure from an unlawful imprisonment or custody is not an escape, within the meaning of the law; and one who, without violence, assists a person who is confined without authority or process of law to depart from his place of confinement, is not guilty of the crime of assisting a prisoner to escape; 92 Cal. 421; 7 Conn. 452. See BREACH OF PRISON; ESCAPE.

The rescue of cattle and goods distrained by pound-breach is a common-law offence and indictable; 7 C. & P. 233; 5 Pick. 714.

**In Maritime Law.** The retaking by a party captured of a prize made by the enemy. There is still another kind of rescue which partakes of the nature of a recapture: it occurs when the weaker party, before he is overpowered, obtains relief from the arrival of fresh succors, and is thus preserved from the force of the enemy. 1 C. Rob. 224, 271; Halleck, Int. Law cxxxv.

Rescue differs from recapture. The rescuers do not by the rescue become owners of the property, as if it had been a new prize; but the property is restored to the original owners by the right of postliminium.

**RESCUSSOR.** The party making a rescue is sometimes so called; but more properly he is a rescuer.

**RESEALING WRIT.** The second sealing of a writ by a master so as to continue it, or cure it of an irregularity. Whart. Dict.

**RESERVATION.** That part of a deed or instrument which reserves a thing not *in esse* at the time of the grant, but newly created. 2 Hilliard, Abr. 359.

The meaning of a reservation in a contract must be determined in every case by the particular facts of the case, such as the character of the conveyance, the nature and situation of the property conveyed and of the property excepted, and the purpose of such exception; 143 U. S. 596.

The creation of a right or interest which had no prior existence as such in a thing or part of a thing granted, by means of a clause inserted by the grantor in the instrument of conveyance.

A reservation is distinguished from an exception in that it is of a new right or interest: thus, a right of way reserved at the time of conveying an estate, which may have been enjoyed by the grantor as owner of the estate, becomes a new right. 42 Me. 9. An easement may be acquired by the grantor of a deed poll by a clause of reservation; and the technical distinction between reservation and exception will be disregarded, and the language used so construed as to effectuate the intention of the parties; 50 N. J. Eq. 464.

A reservation may be of a life-estate; 28 Vt. 10; 33 N. H. 18; 23 Mo. 373; 3 Md. Ch. Dec. 230; of a right of flowage; 41 Me. 298; right to use water; 41 Me. 177; 9 N. Y. 423; right of way; 25 Conn. 331; 6 Cush. 254; 10 *id.* 313; 10 B. Monr. 463; 5 Wash. St. 509; a ground rent, in Pennsylvania, and of many other rights and interests; 33 N. H. 507; 9 B. Monr. 163; 5 Pa. 317; 29 Ohio 568; 107 Mass. 290.

The public land laws of the United States provide for reservations or "reserves" of government land for certain public purposes; such as Indian reservations (see INDIAN TERRITORY); and those for military posts. The jurisdiction of a circuit court over crimes committed on military reservations extends to the whole of such reservations, whether used for military purposes or not; 146 U. S. 325. See 66 Fed. Rep. 671.

The land department of the United States has authority to withdraw or reserve public lands from sale, etc., and a grant by congress does not operate upon lands theretofore reserved for any purpose whatever. Lands withdrawn from sale by the land department are considered as reserved within the terms of this rule; 34 U. S. App. 66. An act for the sale of desert lands does not embrace alternate sections reserved to the United States along the lines of railroads for the construction of which congress has made grants of lands; 160 U. S. 136. See LANDS, PUBLIC; LAND GRANT.

**RESERVE.** The National Bank Act directs that all national banks in the sixteen largest cities shall at all times have on hand, in lawful money of the United States, an amount equal to at least twenty-five per cent. of the aggregate amount of its notes in circulation and deposits. Fifteen per cent. is required of all other national banks. When the reserve falls below the proper limit, the bank must not increase its liability, otherwise than by discounting or purchasing bills of exchange payable at sight, nor make any dividend, till the limit is reached. On a failure to make good the reserve for thirty days after notice by the comptroller of the currency, the latter may, with the concurrence of the secretary of the treasury, appoint a receiver to wind up the bank. R. S. § 5191.

**In Insurance Law.** Under the statutes of many states insurance companies are required to deposit in each state where

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they do business securities approved by some state officer, usually an insurance commissioner, to an amount specified over and above the capital stock of the company, which is termed the reserve fund. Such statutes usually prescribe rules for its investment and also the percentage at which it shall be accumulated; Biddle, Ins. § 66. They are held not to apply to relief associations where the assessments are purely voluntary; 11 Ins. L. J. N. Y. 859; or mutual insurance companies; 9 Colo. 73. The securities which compose a reserve fund are in the nature of a trust fund for the policy holders, and not a security for the general creditors; 43 Ohio St. 359; 76 Mo. 594; 12 R. I. 259; and a receiver appointed in case of the insolvency of a company is not entitled to control it, but securities are held in trust for distribution by the trustee; 56 Conn. 234. After the policy holders are satisfied, the securities, if the property of the company, may be applied for the benefit of general creditors; 12 R. I. 259.

In many states such fund is required as a prerequisite to permission to a foreign insurance company to do business in the state, and ordinarily the deposits required by such laws are for the benefit of domestic policy holders; 91 Mo. 177; 77 Va. 85; 25 Neb. 834; 17 U. C. Ch. 160.

Another use of the term is its application to a fund sometimes called the safety fund and sometimes a reserve fund in policies issued by companies which provide for an assessment to meet the losses. Such fund is intended for the protection of living members by the use of the income for the payment of dues and assessments; 2 Joyce, Ins. § 1287. Where a reserve fund and the mortuary and benefit fund were to be raised by assessments, the latter being for the payment of death claims only and the former for the exclusive use of members, except that it might be used in payment of death claims when they exceed the experience table of mortality, it was held, upon dissolution, that the reserve fund was to be distributed exclusively among the holders of certificates in force, and that death claims had no right to share in it; 65 N. Y. 867; 131 N. Y. 354. See 92 Hun 592.

In a policy on the Tontine system (see INSURANCE, subtitle, *Tontine*), where, in addition to the provision for the payment of death claims, it was provided that in case the policy holder survived the specified period and the policy remained in force, there should be a payment in cash or annuity bonds from a fund created by a certain class of policy holders consisting of those effecting insurance on the same plan and in the same year, the surplus and profits to be equitably apportioned among survivors of that class, it was held that the policy did not require a separate investment of these funds and that the consent of the assured to placing the dividends in a reserve fund did not extend its obligations in that respect; 101 N. Y. 328.

Where a policy recited that it was upon the "reserve dividend plan," and that if premiums were paid for ten years the company would pay to the person designated his equitable proportion of the "reserve dividend fund," it was held that the meanings of the terms employed must be ascertained by recourse to contemporary insurance literature, and as the only reserve dividend plan then known was the one devised and copyrighted by W. P. Stewart, who was engaged as actuary by the defendant and his plan used by it, the liability must be determined by reference thereto; 37 Fed. Rep. 163.

The term reserve in life insurance is also applied to the fund accumulated out of premiums after the payment of expenses and other charges properly apportioned to each policy, and where a life policy provides that, in case of lapse for non-payment of premium, the net reserve, less indebtedness, shall be applied to the purchase of extended insurance, or, if the assured shall so elect within three months, to the purchase of a paid-up policy, and also that said indebtedness may be paid in cash, and the entire net reserve so applied, such indebtedness must be paid within the three months; 81 Fed. Rep. 935.

For *point reserved*, see that title.

**RESET.** The receiving or harboring an outlawed person. Cowel.

**RESET OF THEFT. In Scotch Law.** The receiving and keeping stolen goods, knowing them to be stolen, with a design of feloniously retaining them from the real owner. Alison, Cr. Law 328.

**RESETTER. In Scotch Law.** A receiver of stolen goods, knowing them to have been stolen.

**RESIANCE.** A man's residence or permanent abode. Such a man is called a resiant. Kitch. 33.

**RESIANT ROLLS.** Those containing the resiants in a tithing, etc., which were called over by the steward on holding courts leet.

**RESIDENCE** (Lat. *residco*). Personal presence in a fixed and permanent abode; 20 Johns. 208; 1 Metc. Mass. 251.

The abode where one actually lives, not the legal domicil. 69 Hun 617.

A residence is different from a domicil, although it is a matter of great importance in determining the place of domicil. The essential distinction between residence and domicil is that the first involves the intent to leave when the purpose for which one has taken up his abode ceases. The other has no such intent; the abiding is *animo manendi*. One may seek a place for the purposes of pleasure, of business, or of health. If his intent be to remain, it becomes his domicil; if his intent be to leave as soon as his purpose is accomplished, it is his residence; 53 Fed. Rep. 311. See 13 Mass. 501; 2 Gray 490; 19 Wend. 11; 11 La. 175; 5 Me. 143; 50 Hun 454; 59 L. J.

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67; DOMICIL. But it has been held synonymous with domicil; 15 Co. Ct. Rep. Pa. 312. It is an element of domicil. See 97 Pa. 74; 21 Wall. 350; Dicey, Dom. 1. Residence and habitancy are usually synonymous; 2 Gray 490; 2 Kent 574, n. Residence indicates permanency of occupation, as distinct from lodging, or boarding, or temporary occupation, but does not include as much as domicil, which requires an intention combined with residence; 19 Me. 293; 2 Kent 576. See 5 Sandf. 44; 16 N. Y. S, 834. In a statute it was held not to mean business residence, but the fixed home of the party; 13 Reptr. 430 (S. C. of Md.). See 15 M. & W. 433; 69 Hun 308.

Residence has been held to be more restricted than domicil as applied to homestead laws; 113 N. C. 421.

An averment of residence is not equivalent to an allegation of citizenship; 21 U. S. App. 45.

It was held that within the meaning of the statute against kidnapping, any place where a child has a right to be is its residence; 147 Ind. 621. See KIDNAPPING; DOMICIL.

See, generally, 105 Mass. 93; 117 N. Y. 159; 24 Q. B. Div. 29; 134 U. S. 351.

**RESIDENT.** One who has his residence in a place.

One is a resident of a place from which his departure is indefinite as to time, definite as to purpose; and for this purpose he has made the place his temporary home; 53 Fed. Rep. 311. See NON-RESIDENT.

**RESIDENT MINISTER. In International Law.** See MINISTER.

**RESIDUARY ACCOUNT. In English Practice.** The account which every executor and administrator, after paying the debts and particular legacies of the deceased, and before paying over the *residuum*, must pass before the Board of Inland Revenue. 2 Steph. Com., 11th ed. 221, n.; Moz. & W.

**RESIDUARY CLAUSE.** The clause in a will by which that part of the property is disposed of which remains after satisfying previous bequests and devises. 4 Kent 541*; 2 Will. Exec., 7th Am. ed. *1316.

**RESIDUARY DEVISEE.** The person to whom the residue of a testator's real estate is devised after satisfying previous devises.

**RESIDUARY ESTATE.** What remains of a testator's estate after deducting the debts and the bequests and devises.

**RESIDUARY LEGATEE.** He to whom the residuum of the estate is devised or bequeathed by will. Rop. Leg.; Powell, Mortg. See LEGACY.

**RESIDUE.** That which remains of something after taking away a part of it: as, the residue of an estate, which is what has not been particularly devised by will. What is left; the rest. 63 Hun 352. What is left after all liabilities are discharged, and the objects of the testator carried into effect. 48 Fed. Rep. 3.

A will bequeathing the general residue of personal property passes to the residuary legatee everything not otherwise effectually disposed of; and it makes no difference whether a legacy falls into the estate by lapse or as void at law, the next of kin is equally excluded; 15 Ves. 416; 2 Mer. 392. See 40 Conn. 264.

Where a *residuary* legacy lapses, there is a *pro tanto* intestacy; 82 Pa. 428. Where the residue is not expressly disposed of and it does not appear by the will that the executors were intended to take it beneficially, they are to be deemed trustees for the next of kin; 8 Beav. 475; though previous to 1830, it was considered in the English courts that if the testator had named in his will an executor, but no residuary legatee, the executor should retain the residue of the personal estate for his own benefit; Schoul. Ex. & Ad. § 494. Under the statutes 2 Geo. IV. and 1 Wm. IV. c. 40, the executor is a trustee for the next of kin, unless it shall appear from the will that he is to take the residue beneficially; L. R. 7 H. L. 606; and he is not entitled to it by implication of law; *id.* See 12 Eng. Rul. Cas. 20; LEGACY. A legacy to the next of kin does not exclude his claim to the residue; Amb. 566; 12 Ves. 298.

**RESIGNATION** (Lat. *resignatio: re*, back, *signo*, to sign). See OFFICER.

**RESIGNATION BOND. In Ecclesiastical Law.** A bond given by an incumbent to resign on a certain contingency. It may be conditioned to resign for good and sufficient reason, and therefore lawful, *e. g.* to resign if he take a second benefice, or on request, if a patron present his son or kinsman when of age to take the living, etc. Cro. Jac. 249, 274. But equity will generally relieve the incumbent; 1 Rolle, Abr. 443.

**RESIGNEE.** One in favor of whom a resignation is made. 1 Bell, Com. 125, n.

**RESIST.** To oppose by direct, active, and *quasi*-forcible means. 37 Wis. 261.

**RESISTANCE** (Lat. *re*, back, *sisto*, to stand, to place). The opposition of force to force. See ARREST; ASSAULT; OFFICER; PROCESS.

**RESOLUTION** (Lat. *re*, again, *solvo*, to loose, to free). A solemn judgment or decision of a court. This word is frequently used in this sense in Coke and some of the more ancient reporters.

An agreement to a law or other thing adopted by a legislature or popular assembly. See *Dict. de Jurisp.*; ORDINANCE; JOINT RESOLUTION.

**In Civil Law.** The act by which a contract which existed and was good is rendered null.

Resolution differs esssentially from re-

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scission. The former presupposes the contract to have been valid, and it is owing to a cause posterior to the agreement that the resolution takes place; while rescission, on the contrary, supposes that some vice or defect annulled the contract from the beginning. Resolution may be by consent of the parties or by the decision of a competent tribunal; rescission must always be by the judgment of a court; 7 Troplong, *de la Vente*, n. 689; 7 Toullier 551.

**RESOLUTIVE CONDITION. In Scotch Law.** A condition of which the obligation comes to an end on the occurrence of the uncertain event. Ersk. Prin. 3. 1. 3,

**RESOLUTORY CONDITION.** One which has for its objects, when accomplished, the revocation of the principal obligation; for example, I will sell you my crop of cotton if my ship America does not arrive in the United States within six months; my ship arrives in one month: my contract with you is revoked. 1 Bouvier, Inst. n. 764.

**RESOURCES.** Money or any property that can be converted into supplies, capabilities of producing wealth, or to supply necessary wants; available means or capabilities of any kind. 3 Mont. 386.

**RESPECTIVE, RESPECTIVELY.** Words of severance. Occurring in a testamentary gift to more persons than one, their effect is to sort out the devisees or legatees so that they take as tenants in common; 31 L. J. Ch. 368. In court or in chambers *respectively*, as used in the Judicature Act, means *either* in court or in chambers; 53 L. J. Q. B. 428; 13 Q. B. D. 218.

**RESPECTU COMPUTI VICECOMITIS HABENDO.** A writ for respiting a sheriff's account addressed to the treasurer and barons of the exchequer. Reg. Orig. 139.

**RESPIRATION** (Lat. *re*, back, *spiro*, to breathe). Breathing, which consists of the drawing into, inhaling, or, more technically, *inspiring*, atmospheric air into the lungs, and then forcing out, expelling, or, technically, *expiring*, from the lungs the air therein. Chitty, Med. Jur. 92, 416, note *n*.

**RESPITE. In Civil Law.** An act by which a debtor who is unable to satisfy his debts at the moment transacts (*i. e.* compromises) with his creditors and obtains from them time or delay for the payment of the sums which he owes to them. La. Code 3051.

A *forced* respite takes place when a part of the creditors refuse to accept the debtor's proposal, and when the latter is obliged to compel them, by judicial authority, to consent to what the others have determined in the cases directed by law.

A *voluntary* respite takes place when all the creditors consent to the proposal of the debtor to pay in a limited time the whole or a part of his debt.

A delay, forbearance, or continuation of time.

**In Criminal Law.** A reprieve. A temporary suspension of the execution of a sentence. See 62 Pa. 60. It differs from a pardon, which is an absolute suspension. See PARDON; REPRIEVE.

**RESPITE OF HOMAGE.** To dispense with the performance of homage by tenants who held their lands in consideration of performing homage to their lords. Cowell.

**RESPONDE BOOK. In Scotch Law.** A book of record of the chancellary, in which are entered all non-entry and relief duties payable by heirs who take precepts from chancery. Stair, Inst. p. 296, § 28; Erskine, Inst. 11. 5. 50.

**RESPONDEAT OUSTER** (that he answer over). See ABATEMENT; JUDGMENT; OUSTER.

**RESPONDEAT SUPERIOR.** A phrase often used to indicate the responsibility of a principal for the acts of his servant or agent. MASTER AND SERVANT; PRINCIPAL; AGENT.

**RESPONDENT.** The party who makes an answer to a bill or other proceeding in chancery.

**In Civil Law.** One who answers or is security for another; a fidejussor. Dig. 2. 8. 6.

**RESPONDENTIA. In Maritime Law.** A loan of money, on maritime interest, on goods laden on board of a ship, upon the condition that if the goods be wholly lost in the course of the voyage, by any of the perils enumerated in the contract, the lender shall lose his money; if not, that the borrower shall pay him the sum borrowed, with the interest agreed upon. See Newb. 514.

The contract is called *respondentia* because the money is lent mainly, or most frequently, on the personal responsibility of the borrower. It differs principally from bottomry, which see, in the following circumstances: bottomry is a loan on the ship; respondentia is a loan upon the goods. 1 Pet. 386. The money is to be repaid to the lender, with maritime interest, upon the arrival of the ship in the one case, and of the goods in the other. In most other respects the contracts are nearly the same, and are governed by the same principles. In the former, the ship and tackle, being hypothecated, are liable, as well as the borrower; in the latter, the lender has, in general, it is said, only the personal security of the borrower; Marsh. Ins. 734.

If any part of the goods arrive safely at the end of the voyage, the lender is entitled to have the proceeds applied to the payment of his debt. If the loan is made to the master, and not to the owners of the

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goods, the necessity for the loan and for the hypothecation of the cargo must be clearly shown, or the owners of the goods, and, consequently, the goods themselves, will not be bound. The ship and freight are always first to be resorted to to raise money for the necessity of the ship or the prosecution of the voyage; and it seems that a bond upon the cargo is considered by implication of law a bond upon the ship and freight also, and that unless the ship be liable in law the cargo cannot be held liable; The Constancia, 4 Notes of Cas. 285, 512, 677; 10 Jur. 845; 2 W. Rob. 83; 14 Jur. 96. See MASTER OF A SHIP.

If the contract clearly contemplates that the goods on which the loan is made are to be sold or exchanged, free from any lien, in the course of the voyage, the lender will have no lien on them, but must rely wholly upon the personal responsibility of the borrower. It has frequently been said by elementary writers, and without qualification, that the lender has no lien; 2 Bla. Com. 458; 3 Kent 354; but the form of bond generally in use in this country expressly hypothecates the goods, and thus, even when there is no express hypothecation, if the goods are still on board at the end of the voyage, it is not doubtful that a court of admiralty will direct the arrest of the goods and enforce against them the maritime lien or privilege conferred by the respondentia contract. There is, perhaps, no common-law lien, but this maritime lien only; but the latter will be enforced by the proper admiralty process. See the authorities cited in note to Abb. Shipp., 13th ed. 152, 154, 175; 4 Wash. C. C. 662; form of respondentia bonds in Conkl. Adm. 263; 1 Pars. Mar. Law 437, and n. 5; Abb. Shipp. 455. See ADMIRALTY; MARITIME CAUSE; LIEN.

**RESPONDERE NON DEBET** (Lat. ought not to reply). **In Pleading.** The prayer of a plea where the defendant insists that he ought not to answer, as when he claims a privilege: for example, as being a member of congress or a foreign ambassador. 1 Chitty, Pl. *433.

**RESPONSA PRUDENTUM** (Lat.). **In Roman Law.** Opinions given by Roman lawyers.

Before the time of Augustus, every lawyer was authorized, *de jure*, to answer questions put to him; and all such answers, *responsa prudentum*, had equal authority—not the force of law, but the opinion of a lawyer. Augustus was the first prince who gave to certain distinguished jurisconsults the particular privilege of answering in his name; and from that period their answers acquired greater authority. Adrian determined in a more precise manner the degree of authority which these answers should have, by enacting that the opinions of such authorized jurisconsults, when unanimously given, should have the force of law (*legis vicem*) and should be followed by the judges, and that when they were divided the judge was allowed to adopt that which to him appeared the most equitable. The opinions of other lawyers held the same place they had before: they were considered merely as the opinions of learned men. Mackeldey, Man. Introd. § 43; Mackeldey, *Hist. du Dr. Rom.* §§ 40, 49; Hugo, *Hist. du Dr. Rom.* § 313; Inst. 1. 2. 8; *Institutes Expliquées*, n. 39.

**RESPONSALIS. In Old English Law.** One who appeared for another.

A person, without restrictions as to character, permitted by the judge to act for a party in his presence. Such a person was sometimes allowed by a justice to act on the appearance of the defendant, which, according to the old writs, was always in proper person. Lord Coke calls special attention to the difference between a responsalis and an attorney; 2 Co. Inst. 249; 22 N. Y. 68, per T. W. Dwight, *arguendo*.

**In Ecclesiastical Law.** A proctor.

**RESPONSIBILITY.** The obligation to answer for an act done and to repair any injury it may have caused.

One person—as, for example, a principal, master, or parent—is frequently responsible, civilly, for the acts of another.

Penal responsibility is always personal; and no one can be punished for the commission of a crime but the person who has committed it, or his accomplice.

**RESPONSIBLE.** Able to pay the sum which may be required of him; able to discharge an obligation. Webst. Dict.; 26 N. H. 527; 55 How. Pr. 119. A promise "to be responsible" for the debt of another is merely a guaranty, and not a suretyship; 9 Phila. 499; 30 Pa. 209.

In an act directing municipal officers to award contracts to the lowest responsible bidder, responsible applies not only to pecuniary ability but also to judgment and skill; 164 Pa. 477. See 160 Ill. 655.

**RESPONSIBLE GOVERNMENT.** A term used in England and her colonial possessions to indicate an obligation to resign, on the part of the ministry, upon the declaration of a want of confidence by vote of the legislative branch of the colonial government. Mills, Col. Const. 27.

**RESSEISER.** The taking of lands into the hands of the crown, where a general livery or *ouster le main* was formerly misused. Whart.

**RESTAUR, or RESTOR.** The remedy or recourse which assurers have against each other, according to the date of their assurances; or against the master, if the loss arise through his default; also the remedy or recourse a person has against his guarantor, or other person, who is to indemnify him from any damage sustained. Whart.

**RESTAURANT.** As currently understood, an eating house. 10 Fed. Rep. 6. See INN; INNKEEPER.

**RESTITUTIO IN INTEGRAM**

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(Lat.). **In Civil Law.** A restoring parties to the condition they were in before entering into a contract or agreement, on account of fraud, infancy, force, honest mistake, etc. Calvinus, Lex. The going into a cause anew from the beginning. *Id.*

**RESTITUTION. In Maritime Law.** The placing back or restoring articles which have been lost by jettison: this is done, when the remainder of the cargo has been saved, at the general charge of the owners of the cargo; but when the remainder of the goods is afterwards lost, there is not any restitution. Stevens, Av. pt. 1, c. 1, s. 1, art. 1, n. 8. As to restitution of captured vessels, see RECAPTURE; Desty, Sh. & Adm. § 446.

**In Practice.** The return of something to the owner of it or to the person entitled to it.

After property has been taken into execution, and the judgment has been reversed or set aside, the party against whom the execution was sued out shall have restitution; and this is enforced by a writ of restitution; Cro. Jac. 698; 13 S. & R. 294. When the thing levied upon under an execution has not been sold, the thing itself shall be restored; when it has been sold, the price for which it is sold is to be restored; Bacon, Abr. *Execution* (Q); 1 Maule & S. 425.

"Pending an appeal from an order of the common pleas striking off the satisfaction of a judgment, the plaintiff in the judgment issued an execution, and the terre-tenant of the land was compelled to pay to the sheriff a large sum of money to prevent a sale of the land; the supreme court subsequently reversed the order striking off the satisfaction of the judgment; *held*, that the terre-tenant was entitled to a writ of restitution." 176 Pa. 170. Whether restitution should be made in the progress of judicial procedure if the interest of the parties defendant are diverse, is a question of fact; 33 U. S. App. 393.

**RESTITUTION EDICT.** An edict issued in 1629, by Emperor Ferdinand II., requiring Protestants to restore to the Roman Catholic authorities all ecclesiastical property which they had appropriated at the peace of Passau in 1552.

**RESTITUTION OF CONJUGAL RIGHTS. In Ecclesiastical Law.** A compulsory renewal of cohabitation between a husband and wife who have been living separately. Unknown in the United States.

A suit may be brought in the divorce and matrimonial court for this purpose whenever either the husband or wife is guilty of the injury of subtraction, or lives separate from the other without sufficient reason, by which the party injured may compel the other to return to cohabitation; 3 Bla. Com. 94; 3 Steph. Com. 11; but a woman cannot take proceedings for the restitution of conjugal rights until she has used reasonable means to induce her husband to take her back; 14 P. Div. 26; and the rule requires a written demand for cohabitation, of a conciliatory character; *id.* A wife whose husband had refused to receive her because she had left her home on account of a disagreement with his children by a former marriage, was held entitled to a decree for the restitution of conjugal rights; [1896] P. 175; 1 Add. Eccl. 305; 3 Hagg. 619. Formerly a deed of separation afforded no bar to this suit, even though it in terms forbade such proceedings. But this rule is now changed, and to one separated spouse chancery will now grant an injunction, to restrain the other from suing for restitution of conjugal rights; Schoul. Hus. & Wife § 482. See CRUELTY.

**RESTITUTION OF MINORS. In Scotch Law.** A minor on attaining majority may obtain relief against a deed previously executed by him, which may be held void or voidable, according to circumstances. This is called restitution of minors. Bell.

**RESTITUTION OF STOLEN GOODS.** At common law there was no restitution of goods upon an indictment, because it was at the suit of the crown only, therefore the party was compelled to bring an appeal of robbery in order to have his goods again; but a writ of restitution was granted by 21 Hen. VIII. c. 11, and it became the practice of the crown to order, without any writ, immediate restitution of such goods. The Larceny Act, 24 & 25 Vict. c. 96, § 100, gives power to the court from time to time to issue writs of restitution for stolen property or to order the restitution thereof in a summary manner upon a conviction of the guilty party upon an indictment on behalf of the owner, and this notwithstanding the guilty party may have sold them for value to an innocent purchaser; but by 30 & 31 Vict. c. 35, § 9, a sum not exceeding the proceeds of such sale out of moneys taken from the guilty party on his apprehension may be delivered to such innocent purchaser. Whart. Lex.

**RESTITUTION, WRIT OF.** A writ which lies, after the reversal of a judgment, to restore a party to all that he has lost by occasion of the judgment. 2 Tidd, Pr. 1186.

**RESTITUTIONE EXTRACTI AB ECCLESIA.** A writ which formerly lay to restore a man to the church, which he had recovered for a sanctuary being suspected of a felony. Reg. Orig.; Cowel.

**RESTITUTIONE TEMPORALIUM.** A writ addressed to the sheriff to restore the temporalities of a bishopric to the bishop elected and confirmed. Fitz. N. B. 169.

**RESTRAINING.** Narrowing down; making less extensive. For example, a *restraining statute* is one by which the common law is narrowed down or made

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less extensive in its operation. *Restraining powers* are the limitations or restrictions upon the use of a power imposed by the donor. *Restraining order* is an order granted on motion or petition, restraining the Bank of England or other public company from allowing any dealing with certain specified stock or shares. Hunt, Eq. pt. iii. c. 3, s. 2.

In the United States a restraining order is an interlocutory order made by a court of equity upon an application for an injunction and as part of the motion for a preliminary injunction, by which the party is restrained pending the hearing of the motion.

**RESTRAINT.** The effect of restraint in the law is to be considered mainly with respect to trade, marriage, princes, and alienation, all of which are herein separately considered. As to restraint upon anticipation, see MARRIED WOMAN; and as to the execution of deeds or other documents under restraint, see DURESS.

**RESTRAINT OF MARRIAGE.** Conditions attached to gifts or bequests to a person who has never been married, in general restraint of marriage, are void; Chit. Const. 619; so is an agreement not to marry any one except a particular person; 4 Burr. 2225. The gift or bequest is good and the condition fails, but if the restraint is partial, with a gift over in case of marrying a Roman Catholic or a particular person or without the consent of a particular person, the condition is good, and so is a condition in restraint of a second marriage. See Allen *v.* Jackson, 1 Ch. D. 399; 1 Q. B. D. 279; 16 Ch. D. 188.

It is said that a condition in restraint of marriage is valid if it is a condition precedent; 2 Dick. 712. In 1 Q. B. D. 279, it was held to be the intention of the testator not to restrain marriage but to make provision for the devisee until marriage. See Poll. Contr. 307.

A limitation until marriage is good; Wats. Comp. Eq. 1139; being construed as a provision until marriage and not a restraint on marriage.

**RESTRAINT OF PRINCES AND RULERS.** A phrase used in the exceptions to bills of lading, importing a limitation upon the liability of a ship-owner under the contract.

The words apply only to the ruling power of a country and not to pirates or any lawless power; 4 Term 783; they apply not only to hostile acts, but to those committed by the government of which the assured is a subject, as the seizure of a vessel for use as a fire-ship; 2 Ld. Raym. 840; or the wrongful seizure of an English ship and cargo by a British ship of war; 2 E. & E. 160; L. R. 5 Q. B. 599; to a temporary embargo by a friendly government; 6 Term 413; 3 B. & S. 163; 32 L. J. Q. B. 50; a detention of a neutral vessel in a blockaded port; 7 L. R. Q. B. 404; or a siege; L. R. 9 C. P. 518. A reasonable apprehension of capture will justify delay under the usual exception of restraint of princes, etc.; L. R. 5 P. C. 301; L. R. 3 A. & E. 435; 1 Maule & S. 852.

It does not include a seizure of the cargo by an armed mob; 4 Term 783, n.; or a remote danger of capture; 10 East 530; nor, it seems, a restraint sanctioned by municipal law of the ship-owner's country; 3 B. & S. 163; nor the process of a court of law; 23 L. T. 251.

Where goods contraband of war were shipped under a bill of lading containing this exception, it was held that the risk of the goods being seized amounted to a restraint of princes; [1896] 2 Q. B. 326.

Enforced obedience to lawfully prescribed quarantine regulations is a restraint of natural liberty of action devised by and proceeding from the people, and detention at quarantine is fairly included within an exception in a charter party which has reference to restraint of princes or rulers and people; 3 U. S. App. 147.

See CHARTER PARTY; PERILS OF THE SEA; QUARANTINE.

**RESTRAINT OF TRADE.** Contracts operating for the restraint of trade are presumptively illegal and void on the ground of the policy of the law favoring freedom of trade; but the presumption of illegality may be rebutted by the occasion and circumstances; 2 Pars. Contr. 870. See 7 C. C. App. 15. Thus in agreements for the sale of the good-will of a firm, or the formation or dissolution of a partnership, provisions operating in restraint of trade are frequently inserted. Their validity depends upon whether the restraint is such only as to afford a fair protection to the interests of the party in whose favor it is imposed; Leake, Contr. 633; 49 N. J. Eq. 217. Whatever restraint is larger than is necessary for the protection of this party is void: therefore, the restraint must be limited in regard to space; 5 M. & W. 562; L. R. 15 Eq. 59. An agreement reasonable in regard to space may be unlimited in regard to the duration of time provided for; but where the question is as to whether the space is unlimited, the duration of the restraint in point of time may become an important matter; Leake, Contr. 634; 2 M. & G. 20. It has been said generally that where a covenant in restraint of trade is general, that is, without qualifications, it is bad, as being unreasonable and contrary to public policy. Where it is partial, that is, subject to some qualification either as to time or space, then the question is whether it is reasonable; and if reasonable, it is good in law; [1892] 3 Ch. 447.

There are cases where an unlimited restraint is justified: *e. g.* the sale of a secret process of manufacture of an article in general demand, which it is agreed shall be communicated for the exclusive benefit of the buyer; see L. R. 9 Eq. 45; 131 U. S. 88; so of the sale of a patent right, the restraint may be unlimited while the patent continues; 1 H. & N. 189.

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Some cases have required the presence of a sufficient and reasonable consideration to support a contract in restraint of trade; 8 Mass. 223; 21 Wend. 158; see 3 Ohio St. 275; but in England a legally valid consideration only is required; 6 A. & E. 438. See, generally, 1 Sm. L. C. 724; 35 Am. Rep. 269.

The decision in Mitchell *v.* Reynolds, 1 P. Wms. 181, may be regarded as the first announcement of the rule in relation to the invalidity of contracts in restraint of trade.

Mitchell *v.* Reynolds contains much more in the way of legal statement than is required for the decision of the precise point involved, which was that a reasonable restraint agreed to for a good consideration is valid, and it was afterwards remarked by Tindal, C. J., that when it was said by Parker, C. J., in Mitchell *v.* Reynolds, that "'a restraint to carry on a trade throughout the kingdom must be void; a restraint to carry it on within a particular place is good,' those are only examples and not limits of the application of the rule which can only be, 'What is a reasonable restraint with reference to the particular case'"; 7 Bing. 735. More than sixty years after this case the English rule is stated in the same terms, and it is said that the true test of validity is whether the contract is or is not reasonable; [1894] App. Cas. 535; and a more comprehensive statement is that a general covenant in restraint of trade, without qualifications, is bad, because unreasonable and contrary to public policy, but if partial, that is, subject to some qualification either as to time or place, then the question is whether it is reasonable, and if it is, it is legally valid; [1892] 3 Ch. 447. In Rousillon *v.* Rousillon, L. R. 14 Ch. Div. 351, the existence of an absolute rule with respect to restraint unlimited as to space, was denied, but that question was left somewhat in doubt by the English court of appeal in 36 *id.* 351; see also 4 App. Cas. 674; so that by way of summing up a review of the English decisions, it is said the question "whether there is an inflexible rule that contracts, the restraint of which extends throughout England, are null and void, is still a mooted one"; Patterson, Restr. of Trade 16. See, also, [1893] 1 Ch. 630; [1898] 1 Ch. 676. In the United States it was early held that a covenant not to pursue an occupation in the state was in total restraint of trade and void; 21 Wend. 157; 10 Barb. 641; 13 Allen 375; 36 Cal. 312; *contra*, 31 Mich. 490; 17 R. I. 3; see 106 N. Y. 473, where it was held that the question as to what is a general restraint of trade does not depend on state lines, and a restraint is not necessarily general which embraces an entire state. The United States supreme court took the view that a restraint co-extensive with the state was not necessarily void; 20 Wall. 64, where the subject was ably discussed by Bradley, J., and in a later case it was said by Fuller, C. J., "The question is whether under the particular circumstances of the case, the nature of the particular contract involved in it, the contract is or is not unreasonable;" 130 U. S. 396. In 2 Ohio St. 519, a covenant not to manufacture candles in the United States was held void, and in 51 Hun 157, a similar contract as to space but limited to ten years in time, for the manufacture of thermometers, was held valid as a reasonable restriction. An agreement in a contract not to engage in the business of manufacturing or dealing in certain articles of commerce for a period of five years, and without any limitation of space, is held to be unlawful; 146 Mass. 469; as was a contract excluding the obligor from engaging in a useful trade everywhere and for all time; 19 Pick. 51; and a contract of sale of fire alarm or police telegraph machines, with a covenant not to enter into competition with the purchaser for ten years without restriction as to place; 160 Mass. 50; see 45 Cal. 152; but a contract unlimited territorially save by the words so far as the law allows, is not void as being in conflict with public policy, nor as being too uncertain to be capable of being enforced; 47 Ia. 137.

"The general rule can then best be stated as follows: Contracts in restraint of trade are in themselves, if nothing more appear to show them reasonable, bad in the eye of the law, but if from the peculiar circumstances of each case they appear to be reasonable and are founded upon a good consideration, they are valid." Patterson, Restr. of Trade 5, and cases cited: 68 Pa. 173.

Contracts in general restraint of trade are void unless natural and not unreasonable for the protection of the parties; 21 Wend. 157; 4 Daly 168; 47 Ia. 137; as such contracts impose too great a restraint on trade and are oppressive to one party without being of benefit to another; 3 G. Green 596; 5 Fed. Rep. 119. Contracts for limited restraint are valid if entered into for good reasons, such as to afford fair protection to the purchaser of a business; 7 Cow. 307; 52 Ia. 241; 39 Ga. 655. A contract not to carry on a trade in a particular town or county is valid: 7 J. J. Marsh. 368. Contracts in restraint of trade held to be valid are: Not to practise medicine within twelve miles of a place: 58 Pa. 51; not to engage in a certain business within sixty miles of a place for ten years; 40 Me. 224; not to run a stage on a certain route; 8 Mass. 223; not to set up the business of an apothecary within twenty miles of a place; 6 Ad. & El. 438. A contract relating to a compound involving a secret in its preparation and based upon a valuable consideration, and limited as to the space within which, though unlimited as to the time for which the restraint is to operate, is reasonable and enforcible; 131 U. S. 88.

An agreement never to engage in a certain trade in the city and county of San Francisco or state of California, was held too extensive in its restriction and there-

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fore void; 40 Cal. 251; as was a covenant not to run a steamboat belonging to a certain corporation or allow its machinery to be used on any other boat in any of the waters of certain states; 1 Wash. 283. But the contract by the owner of a line of vessels running between New York and the West Indies, who had sold the goodwill thereof, to do no business with such ports within any place in the United States east of the Mississippi River, is not an unreasonable restraint of trade; 51 N. Y. Suppl. 572.

The conclusion from the cases is stated to be that the weight of authority in this country as in England is opposed to a fixed limit beyond which the restraint under a contract cannot extend; Patterson, Restr. of Trade 25. That there is no limitation as to time is no objection; 5 M. & W. 548 (where Parke, B., states clearly the reasons for applying a different rule to time from that relating to space); 6 Ind. 200; 47 Conn. 175; 44 Ill. App. 441; 26 Atl. Rep. (N. J.) 977.

An agreement to relinquish a business and not to carry it on thereafter, limited as to place but unlimited as to time, is not void; 61 N. H. 40; 57 Mich. 362; and the limit of space may be according to the nature of the contract; L. R. 1 Ch. 463.

It has been held that no contracts are void as being in general restraint of trade when they operate simply to prevent a party from engaging or competing in the same business; 110 N. Y. 519.

Agreements to restrain rivalry and competition in bidding for public work are void, but an honest co-operation is not within the rule against combinations to stifle competition; 83 Fed. Rep. 372.

The tendency of recent adjudications is now clearly marked in the direction of relaxing the rigor of the doctrine that all contracts in general restraint of trade are void, irrespective of special circumstances; 106 N. Y. 473. It has of late years been denied that a hard and unjust rule of that kind has ever been the law of England; L. R. 14 Ch. D. 251.

Courts will not lend their aid to enforce the performance of a contract which they hold to be in restraint of trade, as contrary to public policy, on the ground that one side has performed the agreement, but will leave the parties in the plight in which their own illegal action placed them; 27 U. S. App. 1. See 9 *id.* 96; 3 *id.* 16.

The reasonableness of such covenants, and consequently whether they are in restraint of trade or not, is a question of law for the court and not of fact for the jury; 11 M. & W. 548; *id.* 653; 3 Chand. 133; 7 Bing. 743.

Covenants of this character have been held divisible, partly valid and partly void; 11 M. & W. 653; 2 Ohio 519; 113 Pa. 579; 20 Wall. 64; 40 Cal. 251.

Where the restriction of a business is in accordance with public policy, the rule against such covenants does not apply, upon the ground that the reason ceasing, the rule also ceases. This is true in the case of patents, the object of granting which is to create a monopoly; 103 Mass. 73; 32 Mo. 265; 133 U. S. 88; trade secrets; L. R. 9 Eq. 345; 19 Pick. 523; intoxicating liquors; 25 Ind. 112; but in case of a business in which competition is particularly beneficial to the public interest, the tendency is to view with disfavor any restrictions. This principle has been applied to the manufacture of gas; 121 Ill. 530; pipe lines; 22 W. Va. 660; telegraphing; 65 Ga. 160. It is this principle which underlies the legislation against limitations upon railroad competition. See *infra*. But it has been held that a statute which prohibits companies doing business in a state from combining with other persons in the state for the creation of a monopoly, or the unlawful restraint of trade, or the prevention of competition, applies to a combination to control the price of a certain article, though its manufacture is protected by patents; 47 N. Y. Supp. 462; and that the fact that several patentees are exposed to litigation does not justify the creation by them of combinations to public disadvantage; 83 Fed. Rep. 36.

While the strictness of the ancient rule with respect to what was then termed restraint of trade has thus been relaxed, the mischief against which that rule was directed has taken a new form, and the creation of monopolies and restrictions upon competition are now accomplished under the guise of what are termed trusts, pooling agreements, and the like. The distinguishing feature of these attempts to stifle competition is a combination of persons engaged in any particular business under agreements for controlling and limiting the output of manufacturing establishments, lessening the amount of goods placed upon the market, and stipulating for uniform minimum prices of goods sold. The term *trust* is derived from the means employed to carry out the designs of these combinations, the stock of the various corporations or the property of the various concerns which become parties to a combination being in some cases assigned to trustees to control and manage in execution of the agreement.

It has been maintained that the rules governing contracts in restraint of trade are not applicable to trusts because persons constituting trusts become partners, and, as is well known, partners are not subject to these rules; see 3 Political Sci. Quart. 592; and the same writer is doubtful whether the offence of engrossing, forestalling, or regrating ever existed independently of the statutes 5 & 6 Edw. IV. ch. 14, and when these statutes were repealed courts had no authority to punish offenders; *id.* See 4 Harv. L. Rev. 128.

In modern state constitutions, following generally that of Illinois, 1870, there are efforts to prevent combinations to suppress competition. Most of these are

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directed against such attempts by railroad companies either through unjust discriminations or consolidation of competing lines. There are constitutional provisions on this subject in Alabama, Arkansas, California, Colorado, Georgia, Illinois, Louisiana, Michigan, Massachusetts, Nebraska, Pennsylvania, Texas, and West Virginia. A summary of them will be found in Spelling, Trusts & Monopolies § 89, note. They are usually considered as declaratory of the common law, as that of Colorado was expressly decided to be; 102 U. S. 667. Of the same character are state statutes directed against restraint of trade generally, which add but little to the limitations of the common law. The difficulty in dealing with the subject by state legislation is inherent. The great trusts cannot be reached by legislation within the states, inasmuch as their operations are not circumscribed by state boundaries. On the other hand attempts to deal with the subject by congress are hampered and obstructed by the constitutional limitation that federal legislation can deal only with interstate and foreign commerce; nevertheless an attempt was made by what was known as the anti-trust act of July 2, 1890, 26 Stat. L. 209, which is generally admitted to deal very unsatisfactorily with the acknowledged evil which it was intended to reach. The most peculiar feature of this law is that, as construed, it expressly fails to prevent the combinations of capital and affords very drastic remedies against combinations of labor whenever they affect interstate commerce, which is the fact in almost every case of railroad strikes. See STRIKE; LABOR UNION.

Where an effort has been made under the anti-trust act to prosecute attempts to create a monopoly they have usually failed by reason of the vague and general terms in which the offences are described by the act; 50 Fed. Rep. 469; 52 *id.* 104, where the construction of the statute and the common-law principles involved are elaborately discussed by Jackson, J.; *id.* 146.

A bill was introduced in the senate in 1893 to repeal the anti-trust act of 1890 and "to defeat, punish, and restrain acts, contracts and combinations in restraint of trade and interstate commerce." This bill, which was referred and never passed, is characterized as comprehensive and specific and covering the necessities of the situation; Spell. Tr. & Mon. § 134, n.

In New York, the act of 1897, ch. 384, prohibits combinations for the creation of a monopoly or unlawful restraint of trade. The Texas constitution forbids perpetuities and monopolies, and the Texas act of 1889, ch. 117, makes void any contract whereby a combination of capital or goods of two or more persons is effected to create restrictions in trade or to prevent competition in the sale of commodities. In California, a contract restraining a profession, trade, or business except in the sale of good-will, as for a county or city or dissolution of partnership, is void by statute; Civ. Code § 1673; and in Georgia one in general restraint of trade is void; Code § 2750.

The decisions on the subject of these trusts and combinations are usually under the constitutional provisions or statutes on the subject, either state or federal, but most of them have been made in view of the common-law doctrine concerning restraint of trade and the creation of monopolies, and they need to be read and considered in connection with both the common and local statute law.

It has been said that "the nearest to a definite proposition which may be advanced is that any compact between two or more persons or corporations affecting any article or commodity of which the public must have a constant supply, the sole intent and direct tendency of such arrangement being the creation of a scarcity or the enhancement of the price, will be nullified by the courts, or specific enforcement refused." Spelling, Trusts & Monopolies § 52.

This principle has been applied to the case of agreements for combinations of manufacturers to control the market for many articles of general consumption. The usual features of such agreements are substantially the same, and the method adopted is the formation of a trust through which the objects of the combination are affected (see *supra*). Such trusts have been held illegal in the case of: coal mining companies: 68 N. Y. 568, where the principles involved are well stated; manufacturers of grain bags; 90 Cal. 110; of lumber; 76 Cal. 387; of wire cloth; 14 N. Y. S. 277; persons engaged in the transportation of freight and passengers on New York canals; 5 Den. 534; 4 *id.* 349; or in the business of manufacturing and selling preserves; 157 Ill. 284; in the manufacture and sale of distillery products; 156 *id.* 448; brewers who combined to lease "all the cooling room capacity for cooling beer" in a town, to prevent competition (and in this case it was held that the parties could not recover for non-performance of the contract); 88 Tex. 184; dealers in mineral waters; 63 L. T. 455; a combination of local milk dealers for buying and selling milk, wholesale and retail, but which only acted as the seller's agent to find purchasers and charged to commission, and acted under a by-law giving the directors the power to fix the price to be paid for milk; 145 N. Y. 267; a combination to control the price and production of a floating-spring tooth harrow which is held to be an instrument of such general use and utility as to render such a combination a violation of public policy; 21 App. Div. N. Y. 290. See also 67 Fed. Rep. 131; 76 *id.* 667; 47 U. S. App. 166; s. c. 77 Fed. Rep. 293.

A similar combination between a corporation and its stockholders, although it did not combine with any other corporation, was void within the Illinois anti-trust act; 155 Ill. 166, reversing 46 Ill. App. 576. An agreement for buying and selling coal at prices fixed by an association organized to control them is void so far as it is not

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executed, but not so as to deny to the seller his remedy for non-payment for coal delivered under the contract; 81 Hun 178. A contract for the sale of good-will and agreeing not to do the business of carpet beating in several counties is void as to all but the county in which the business is carried on, under the California Code; 102 Cal. 506. An association, the object of which is to prevent competition in a certain business and pay dues of an officer thereof, is illegal, and the parties cannot recover the amount so paid; 55 Ill. App. 213. A railroad pool, ing contract, the manifest purpose of which is to stifle competition and raise rates, is void as against public policy; 61 Fed. Rep. 993; s. c. 27 U. S. App. 1. An agreement between sheep brokers, to form an association and pay the treasurer so much for every head sold and receive an arbitrary proportion of the sum accumulated, which is made to carry out a contract with a similar butchers' association, simultaneously formed,—under which the brokers were to slaughter no sheep and the butchers were to buy only of the brokers' association—is void as a contract to enhance the price of food and not enforcible against a member of the association; 139 N. Y. 105. A contract not to sell or be interested in the sale of beer except to one company, which, in its turn, contracts not to sell or consign beer to any other party in the vicinity, is a combination in violation of the Texas statute; 90 Tex. 298, 277. Where a masons and builders' association, by its laws or rules, required all who competed for any contract or job to bring their bids for examination and have six per cent. added to the lowest before it should be submitted in competition, is contrary to public policy; 95 Wis. 129.

In Montana, where water rights are of great importance in connection with mining, a contract to control them is void; 7 Mont. 89. What are known as "corners" in the necessaries of life have been held void as violating the law against the creation of monopolies; 40 Mich. 447; 78 Ind. 487; 101 Mass. 145; and this is true whether the agreement on which they are based is temporary or permanent; *id.*; so the courts have held invalid a combination of grain-dealers; 79 Ill. 346; of cotton bagging; 66 N. Y. 288. So also the courts hold void expedients for buying up or cornering particular stocks in the market, by whatever means the result is accomplished; 19 Abb. N. C. 460; 30 Fed. Rep. 91; and see 5 Blatchf. 535; 6 Paige 337. An agreement of a large number of stenographers to raise the price and force the increase by penalties, was held invalid, though the combination did not include all the stenographers in the city; 41 Ill. App. 164; as was also the agreement by the grocers of a town with a firm about to open a butter store, that they would not buy any butter for two years; 83 Ia. 156; and a combination of mill-owners designed to control the output of cotton seed oil; 83 Tex. 650.

There are other cases in which the courts have held combinations of this general character valid, as in 143 Mass. 353; but there the manufactured article was shade-rollers, which possibly would not be enumerated among the necessaries of life, as to the enhancement of the price of which the law is so jealous.

A corporation organized for the purpose of acquiring patents and granting licenses thereunder covering machines relating to a certain art, is not subject to the anti-trust laws of Illinois; 53 Fed. Rep. 592; 51 *id.* 819; 69 *id.* 333; 71 *id.* 302, disapproving 67 *id.* 131. The purchase of the stock of sugar refining companies for the purpose of acquiring control of the business in the United States, does not involve a monopoly or restraint of interstate or foreign commerce within the meaning of the federal anti-trust act, since the business of refining and selling sugar is not commerce; 156 U. S. 1, affirming 60 Fed. Rep. 934.

A contract to refrain from forming a corporation for the construction of water-works in a specified city and from carrying on such work in order that the other party to the contract might obtain a corporation for such purpose and conduct the business without competition, is not void as against public policy; 143 N. Y. 430. An agreement by manufacturers of watch cases to fix an arbitrary price on them, and not to sell them to persons buying watch cases of a rival manufacturer, was held not to be a violation of the federal anti-trust act or to be a cause of action in favor of the rival manufacturer; 58 Fed. Rep. 851.

A contract by which three out of four persons engaged in manufacturing oleomargarine consolidate, in order to stop sharp competition and agree not to engage separately in the business for five years, is not void; 18 R. I. 484.

It was held by the circuit court that what was known as the railroad freight pooling association to maintain rates and regulate freight traffic was not a contract in restraint of trade under the federal anti-trust act, where the rates maintained were reasonable and the tendency was to diminish rather than to enhance them, and no monopoly of trade or attempt at such is proved by such contract; 58 Fed. Rep. 58, affirming 53 *id.* 44; but this decision was reversed by the supreme court which held that any contract or combination made in violation of law is void, without respect to previous decisions as to what was the public policy of the country on the subject, and the right of a railroad company to charge reasonable rates does not include the right to enter into a combination with competing roads to maintain reasonable rates; 166 U. S. 290.

An arrangement by which a company promised all persons who would purchase from its distributing agents for six months exclusively and would permit the company to regulate their prices, that it would pay them a rebate on the amount of their purchases, was not a contract in restraint of



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trade or an attempt to monopolize it; 52 Fed. Rep. 104, where it was held that the restraint was only partial, and reasonable for the protection of the particular business; *id.*, approving [1892] App. Cas. 25.

An agreement to raise the price of lumber fifty cents a thousand feet is not a restraint upon trade unless it involves the absorption of the entire traffic; 52 Fed. Rep. 646. The by-law of the Associated Press, which provides that no member of it "shall receive or publish the regular news dispatches of any other news association covering a like territory and organized for a like purpose," is not void as unreasonable and in restraint of trade; 136 N. Y. 333, 662. In California it is held that the law against unlawful restraint of trade is not violated by an agreement by an association of stevedores to control prices, unless it appears that the entire business of the city is controlled by it, and that the prices are unreasonable or the restriction prevents fair competition; 115 Cal. 16.

A contract with an independent manufacturer for the entire product of his plant is not in itself a contract in illegal restraint of trade; and if made without knowledge of similar contracts made by the buyer with other manufacturers, and without any knowledge that such contract was intended as a step in a general scheme of monopoly, there is no conspiracy against freedom of commerce, or contract in illegal restraint of trade; 86 Fed. Rep. 439.

To constitute the offence of "monopolizing or attempting to monopolize" trade or commerce among the states, within the meaning of the federal anti-trust act, it is necessary to acquire or attempt to acquire an exclusive right in such commerce by such means as are adequate to prevent others from engaging therein; 52 Fed. Rep. 104.

The federal anti-trust act of July 2, 1890, confers no right upon private individuals to sue in equity to restrain the acts forbidden by the statute. That right is vested only in the district attorneys of the United States and the only remedy of private persons injured is an action at law for damages; 64 Fed. Rep. 821.

It is not a legal defence to an action for goods sold and delivered or service rendered, that the seller or person rendering service is a member of an illegal trust or combination, since the illegality is collateral to the contract of sale and does not taint it; 86 Wis. 352; 74 Fed. Rep. 802; and it is no defence to an action by a milk-shippers' association for goods sold that it is an illegal corporation under the Illinois act of June 11, 1891; 46 Ill. App. 576.

It is no defence to an action for compensation due from the federal government for mail service over a leased line that the leases were void because operated by a combination intended to prevent competition; 28 Ct. Cl. 77.

In the U. S. *v.* Trans-Missouri Freight Association, it was held (four justices dissenting), that the prohibitory provisions of the federal anti-trust act of July 2, 1890, applied to all contracts in restraint of interstate or foreign trade or commerce without exception or limitation, and are not confined to those in which the restraint is unreasonable. In that case it was applied to a contract between competing railroads forming an association for maintaining and regulating transportation rates, and it was held that such an agreement is within the act; 166 U. S. 290, reversing the circuit court of appeals which held the agreement reasonable; 19 U. S. App. 36. After the decision of the circuit court of appeals and before that of the supreme court, two other cases were decided holding such agreements not contracts in unlawful restraint of trade or in violation of the act; 73 Fed. Rep. 438; 76 *id.* 495.

See TRUST for the decision in the Joint Traffic case just handed down.

The federal anti-trust act was held not applicable to the case of a state which by its laws assumed a monopoly of the traffic in intoxicating liquors; 69 Fed. Rep. 908. So the act was held not to apply where members of a business exchange sought to enjoin the board of directors from enforcing against them by-laws which were alleged to be illegal as in restraint of trade and commerce; 77 Fed. Rep. 1.

See report on the federal anti-trust law in Report of Amer. Bar Asso., 1897; Patterson, Contracts in Restraint of Trade; Spelling, Trusts and Monopolies; Beach, Monopolies and Industrial Trusts.

**RESTRAINT ON ALIENATION.** A provision in a settlement to the special use of a married woman without power of alienation, which is valid as an exception to the general rule against any restraint on alienation. It is in force only during marriage; Snell, Eq. 290; 11 Ch. D. 645.

A restriction, by way of devise over, against all alienation during a limited time upon an estate in fee, is void; 141 U. S. 296. See PERPETUITY; SPENDTHRIFT TRUST; MARRIED WOMAN.

**RESTRICTIVE INDORSEMENT.** See INDORSEMENT.

**RESTS.** A term used in computing interest especially on mortgages and in trust accounts. It consists in striking a balance of the account, at the end of any fixed period, upon which interest is allowed, thus giving the benefit of compound interest. 3 Pars. Contr. § 151.

**RESULTING TRUST.** A trust raised by implication or construction of law, and presumed to exist from the supposed intention of the parties and the nature of the transaction.

All trusts created by implication or construction of law are often included under the general term implied trusts; but these are commonly distinguished into implied or resulting and constructive trusts; *resulting* or *presumptive* trusts being those which are implied or presumed from the supposed intention of the parties and the

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nature of the transaction; *constructive* trusts, such as are raised independently of any such intention, and which are forced on the conscience of the trustee by equitable construction and the operation of law. Story, Eq. Jur. § 1095; 1 Spence, Eq. Jur. 510; 2 *id.* 198; 3 Swanst. 585; 1 Ohio 321; 6 Conn. 285; 2 Edw. Ch. 373; 6 Humphr. 93.

Where upon a purchase of property the conveyance of the legal estate is taken in the name of one person, while the consideration is given or paid by another, the parties being strangers to each other, a resulting or presumptive trust immediately arises by virtue of the transaction, and the person named in the conveyance will be a trustee for the party from whom the consideration proceeds; 30 Me. 126; 8 N. H. 187; 5 Cush. 435; 10 Paige, Ch. 618; 2 Green, Ch. 480; 18 Pa. 283; 2 Harr. Del. 225; Beach, Mod. Eq. Jur. 218; 75 Cal. 166; 83 Ala. 135; 64 Vt. 326; 112 Mo. 412; and if he conveys the property to the *cestui que trust*, such conveyance is good as against the creditors of the trustee; 151 U. S. 420.

Resulting trusts are raised by the law from the presumed intention of the parties, and the natural equity that one who furnishes the means for the acquisition of property should enjoy its benefits. But it cannot arise where an obligation exists on his part, legal or moral, to provide for the grantee, as in the case of a husband for his wife, or a father for his child, as under such circumstance the relation to the party is of itself sufficient evidence to rebut the presumption of a resulting trust, for in such cases arises the contrary presumption of an advancement for the grantee's benefit; 91 U. S. 125.

Where land is bought by a husband with the separate property of a married woman, and the title is taken in his name, a trust results to her, in the absence of any agreement to the contrary; 110 N. C. 403; 176 Pa. 67. But where a wife gives to her husband money from her father's estate, without any agreement for its investment, or that he should be accountable to her for it, and he subsequently informed her that he has invested it in land for her, when, in fact, he has not done so, but has taken the title in his own name, it was held that, under the proof in that case, no resulting trust therein was created in favor of the wife; 36 S. W. Rep. (Tenn.) 977.

To establish a resulting trust in one person of land purchased in the name of another, to whom title is conveyed, it is essential that the party setting up the trust shall have paid, or become bound for the purchase-money on his own account, and as part of the original transaction of purchase; 4 Del. Ch. 445; payment by way of loan to the nominal purchaser raises no resulting trust; *id.* It is a latent equity, which cannot prejudice a *bona fide* holder for value; *id.* 135.

The fact that a conveyance is voluntary, especially when accompanied by other circumstances indicative of such an intention, it is said, may raise a resulting trust. See 2 Vern. 473; 23 Pa. 243; 29 Me. 410; 1 Johns. Ch. 240; 1 Dev. Eq. 456; 14 B. Monr. 585.

Where a voluntary; 1 Atk. 188; disposition of property by deed; 1 Dev. Eq. 493; or will is made to a person as trustee, and the trust is not declared at all; 10 Ves. 527; 3 Sim. 538; or is ineffectually declared; 1 Myl. & C. 286; 13 Sim. 496; 2 Dev. Eq. 255; or does not extend to the whole interest given to the trustee; 8 Pet. 326; 14 B. Monr. 585; 3 H. L. C. 492; or it fails either wholly or in part by lapse or otherwise; 5 Harr. & J. 392; 5 Paige, Ch. 318; 6 Ired. Eq. 137; 7 P. Monr. 481; 15 Pa. 500; 10 Hare 204; the interest so undisposed of will be held by the trustee, not for his own benefit, but as a resulting trust for the donor himself, or for his heir at law or next of kin, according to the nature of the estate.

A resulting trust must arise at the time the title is taken. No subsequent oral agreement or payment will create it; 32 W. Va. 14; 85 Va. 740; 84 *id.* 813; 65 N. H. 39; 149 Mass. 400; 138 U. S. 587. Where a father was induced to execute an absolute deed of his land to one of his children, by fraudulent representations that the grantee would hold it in trust for the other children, and subsequently without fraud executed another deed to the same grantee for the same land, the latter deed passed the title free from any trust in favor of the other children, as the fraud in procuring the first deed created a resulting trust in favor of the father, the express trust being void, as not being in writing, and the second deed carried the father's equitable interest; 60 N. W. Rep. (Mich.) 976.

The property may be personal or real; 8 Humphr. 447; 1 Ohio St. 10; 26 Miss. 615; 2 Beav. 454. Parol evidence is admissible to prove a resulting trust in land; 34 N. E. Rep. (Ind.) 810; 37 W. Va. 507; 52 Kan. 469. One who buys shares of stock with his own money does not become trustee for another, though he tells him that the purchase is made for his benefit and he expects to be reimbursed by him; 18 U. S. App. 293. Resulting trusts cannot be declared upon doubtful evidence, nor upon a mere preponderance of evidence. There should be no room for a reasonable doubt as to the facts relied upon to establish the trust: 96 Mo. 361; 76 Ia. 192; 5 Tex. Civ. App. 367.

The statute of frauds has no application to a trust resulting from the purchase of property with funds of another; 126 Ill. 58; 69 Tex. 685.

Consult Story, Bispham, Spence, Adams, on Equity Jur.; Hill, Lewin, Sanders, on Trusts.

**RESULTING USE.** A use raised by equity for the benefit of a feoffor who has made a voluntary conveyance to uses without any declaration of the use. 2 Washb. R. P. 100.

The doctrine, at first limited to the case of an apparently voluntary conveyance with no express declaration, became so extended that a conveyance of the legal estate

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ceased to imply an intention that the feoffee should enjoy the beneficial interest therein; and if no intent to the contrary was expressed, and no consideration proved or implied, the use always resulted to the feoffor; 2 Washb. R. P. 100. And if part only of the use was expressed, the balance resulted to the feoffor; 2 Atk. 150; 2 Rolle, Abr. 781 · Co. Litt. 23 *a*. And, under the statute, where a use has been limited by deed and expires, or cannot vest, it results back to the one who declared it; 4 Wend. 494; 15 Me. 414; 5 W. & S. 323. And see Cro. Jac. 200; Tudor, Lead. Cas. Eq. 258; 2 Washb. R. P. 132.

**RESUME WORK.** To begin work anew with a *bona fide* intention of prosecuting it. 104 Cal. 227.

**RESUMMONS.** A second summons calling upon a person to answer an action where the first summons is defeated. 2 Chitty, Arch. Pr. 1347.

**RESUMPTION.** The taking again by the crown of land or tenements, which, on false suggestion, had been granted by letters patent. Whart. Dict.

**RETAIL.** To sell by small parcels, and not in the gross. 5 Mart. La. N. s. 297; 7 Metc. 308.

**RETAILER OF MERCHANDISE.** One who deals in merchandise by selling it in smaller quantities than he buys,—generally with a view to profit. 1 Cra. C. C. 268.

**RETAIN.** To continue to hold; to keep in possession. To keep is a synonym for retain. 84 Va. 269.

**In Practice.** To engage the services of an attorney or counsellor to manage a cause. See RETAINER.

**RETAINER.** The act of withholding what one has in one's own hands, by virtue of some right. See ADMINISTRATOR; EXECUTOR; LIEN.

**In Practice.** The act of a client by which he engages an attorney or counsellor to manage a cause, either by prosecuting it, when he is plaintiff, or defending it, when he is defendant.

The retaining fee.

*A general retainer* merely gives a right to expect professional service when requested. It binds the person retained not to take a fee from another against his retainer; but to do nothing except what he is asked to do, and for this he is to be distinctly paid; 6 R. I. 206.

In English practice a much more formal retainer is usually required than in America. Thus it is said by Chitty, 3 Pr. 116, note m, that, although it is not indispensable that the retainer should be in writing, unless required by the other side, it is very expedient. It is therefore recommended, particularly when the client is a stranger, to require from him a written retainer, signed by himself; and, in order to avoid the insinuation that it was obtained by contrivance, it should be witnessed by one or more respectable persons. When there are several plaintiffs, it should be signed by all, and not by one for himself and the others, especially if they are trustees or assignees of a bankrupt or insolvent. The retainer should also state whether it be given for a general or a qualified authority. See 9 Wheat. 738, 830; 6 Johns. 34, 296; 11 *id.* 464; 1 N. H. 23; 28 *id.* 302; 7 Harr. & J. 275; 37 Miss. 567. The existence of the relation of solicitor and client between parties may be inferred from their acts, although the solicitor has not received any express retainer; [1891] 1 Ch. 337.

The effect of a retainer to prosecute or defend a suit is to confer on the attorney all the powers exercised by the forms and usages of the courts in which the suit is pending; 2 M'Cord, Ch. 409; 13 Metc. 269. He may receive payment; 13 Mass. 320; 4 Conn. 517; 39 Me. 386; may bring a second suit after being nonsuited in the first for want of formal proof; 12 Johns. 315; may sue a writ of error on the judgment; 16 Mass. 74; may discontinue the suit; 6 Cow. 385; may restore an action after a *nol. pros.*; 1 Binn. 469; may claim an appeal, and bind his client in his name for the prosecution of it; 1 Pick. 462; may submit the suit to arbitration; 1 Dall. 164; 16 Mass. 396; 6 McLean 190; 7 Cra. 436; 89 Ga. 83; may sue out an alias execution; 2 N. H. 376; may receive livery of seisin of land taken by an extent; 13 Mass. 363; may waive objections to evidence, and enter into stipulation for the admission of facts or conduct of the trial; 2 N. H. 520; and for release of bail; 1 Murph. 146; may waive the right of appeal, review, notice, and the like, and confess judgment; 5 N. H. 393; 4 T. B. Monr. 377; 5 Pet. 99; may agree to the entry of a judgment; 3 Ind. App. 379; 66 Hun 151; may waive a jury trial; 99 N. C. 58. But he has no authority to execute a discharge of a debtor except upon the actual payment of the full amount of the debt; 8 Dowl. 656; 8 Johns. 361; 10 Vt. 471; 32 Me. 110; 21 Conn. 245; 3 Md. Ch. Dec. 392; 14 Pa. 87; 13 Ark. 644; 1 Pick. 347; 35 W. Va. 323; nor to satisfy a judgment for a less sum than is due; 66 Tex. 366; and that in money only; 16 Ill. 272; 1 Ia. 360; see 6 Barb. 201; nor to release sureties; 3 J. J. Marsh. 532; 4 McLean 87; nor to enter a *retraxit*; 3 Blackf. 137; nor to act for the legal representatives of his deceased client; 2 Penn. N. J. 689; and ordinarily one retained to collect a debt has no right to compromise it; 85 Ia. 643; 47 Mo. App. 1; 122 Pa. 1. An attorney's authority to appear for his client ceases after the entry of final judgment, except that he may take the necessary steps to collect the judgment; 66 Hun 626.

There is an implied contract on the part of an attorney who has been retained, that he will use due diligence in the course of legal proceedings; but it is not an undertaking to recover a judgment; Wright Ohio 446. See 3 Camp. 17; 7 C. & P. 289; 16 S. & R. 368; 2 Cush. 316; 73 Mich. 331. An attorney is bound to act with the most scrupulous honor; he ought to disclose to his client if he has any adverse retainer which may affect his judgment or his client's interest; but the concealment of the fact does not necessarily imply fraud; 3 Mas. 305. See Weeks, Att. at Law

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**RETAINING A CAUSE.** Under the English Judicature Acts of 1873 and 1875, a cause brought in a wrong division of the High Court of Justice may be *retained* therein, at the discretion of the court or a judge.

**RETAINING FEE.** A fee given to counsel on being consulted, in order to insure his future services. See RETAINER.

**RETAKING.** The taking one's goods, wife, child, etc., from another, who without right has taken possession thereof. See RECAPTION; RESCUE.

**RETALIATION.** See LEX TALIONIS.

**RETENEMENTUM.** Detaining, withholding, or keeping back. Cowel.

**RETENTION. In Scotch Law.** The right which the possessor of a movable has of holding the same until he shall be satisfied for his claim either against such movable or the owner of it; a lien.

*General retention* is the right to withhold or detain the property of another, in respect of any debt which happens to be due by the proprietor to the person who has the custody, or for a general balance of accounts arising on a particular train of employment. 2 Bell, Com. 90.

*Special retention* is the right of withholding or retaining property or goods which are in one's possession under a contract, till indemnified for the labor or money expended on them.

**RETIRE.** As applied to bills of exchange, this word is ambiguous. It is commonly used of an indorser who takes up a bill by handing the amount to a transferee, after which the indorser holds the instrument with all his remedies intact. But it is sometimes used of an acceptor, by whom, when a bill is taken up or retired at maturity, it is in effect paid, and all the remedies on it extinguished; Byles, Bills, 15th ed. 93, 195, 263, 296; Dan. Neg. Inst. 12.

**RETORNA BREVIUM. In Old English Law.** The return of writs by sheriffs and bailiffs, which is only a certificate delivered to the court on the day of return, of that which he hath done touching the execution of their writ directed to him: this must be indorsed on back of writ by officer; 2 Lilly, Abr. 476. Each term has return days, fixed, as early as 51 Hen. III., at intervals of about a week, on which all original writs are returnable. The first return day is regularly the first day in the term; but there are three days' grace. 3 Bla. Com. 278.

**RETORNO HABENDO. In Practice.** A writ issued to compel a party to return property to the party to whom it has been adjudged to belong, in an action of replevin. See DE RETORNO HABENDO; REPLEVIN.

**RETORTION, RETORSION.** An act employed by a government to impose the same hard treatment on the citizens or subjects of a state that the latter has used towards the citizens or subjects of the former, for the purpose of obtaining the removal of obnoxious measures. Vattel, liv. 2, c. 18, § 341. An act of retaliation in kind when a nation has failed in courtesy or friendship. Instances of retortion usually arise in discriminating duties or restrictions upon commercial intercourse; Snow, Int. Law 78. It is equivalent to retaliation and may be either amicable or vindictive. The former, *retorsion de droit*, is a remedy for a departure from any international courtesy, done in an unfriendly, but not an illegal manner. The latter, *retorsio facti*, implies the infliction of the same amount of evil on an aggressive state that it has inflicted on the state aggrieved; Risley, Law of War 57. This is a purely belligerent act; *id.*

**RETOUR SANS PROTET.** A request or direction by the drawer of a bill of exchange, that in case the bill should not be honored by the drawee, it may be returned without protest, by writing the words "*retour sans protet*" or "*sans pais.*" Should such request be made, it is said that a protest as against the drawer, and perhaps as against the indorsers, is unnecessary; Byles, Bills, 15th ed. 216.

**RETRACT** (Lat. *re*, back, *traho*, to draw). To withdraw a proposition or offer before it has been accepted. See LETTER; OFFER.

After pleading guilty, a defendant will, in certain cases where he has entered that plea by mistake or in consequence of some error, be allowed to retract it. But where a prisoner pleaded guilty to a charge of larceny, and sentence has been passed upon him, he will not be allowed to retract his plea and plead not guilty; 9 C. & P. 346; Dig. 12. 4. 5.

**RETRAXIT** (Lat. he has withdrawn). **In Practice.** The act by which a plaintiff withdraws his suit. It is so called from the fact that this was the principal word used when the law entries were in Latin.

A *retraxit* differs from a nonsuit—the former being the act of the plaintiff himself, for it cannot even be entered by attorney; 8 Co. 58; 8 Pa. 157, 163; 68 Ind. 305; 31 Ala. 108; and it must be after declaration filed; 8 Pa. 163; while the latter occurs in consequence of the neglect merely of the plaintiff. A *retraxit* also differs from a *nolle prosequi*. The effect of a *retraxit* is a bar to all actions of a like or a similar nature; Bac. Abr. *Nonsuit* (A); 31 Ala. 108; 79 Va. 333; 120 U. S. 95; a *nolle prosequi* is not a bar even in a criminal prosecution; 2 Mass. 172. See 2 Sell. Pr. 338; Com. Dig. *Pleader* (X 2).

**RETRIBUTION.** That which is given to another to recompense him for what has been received from him: as, a rent for the hire of a house.

A salary paid to a person for his services.

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The distribution of rewards and punishments.

**RETROACTIVE.** See RETROSPECTIVE.

**RETROCESSION. In Civil Law.** When the assignee of heritable rights conveys his rights back to the cedent, it is called a retrocession. Erskine, Inst. 3. 5. 1.

**RETROSPECTIVE** (Lat. *retro*, back, *spectare*, to look). Looking backward. Having reference to a state of things existing before the act in question.

This word is usually applied to those acts of the legislature which are made to operate upon some subject, contract, or crime which existed before the passage of the acts; and they are therefore called *retrospective laws*. These laws are generally unjust, and are to a certain extent forbidden by that article in the constitution of the United States which prohibits the passage of *ex post facto* laws, or laws impairing contracts. See EX POST FACTO LAW; IMPAIRING THE OBLIGATION OF CONTRACTS.

A general law for the punishment of offences, which endeavors to reach, by its retrospective operation, acts previously committed, as well as to prescribe a rule of conduct for the citizen in future, is void in as far as it is retrospective; but such invalidity will not affect its operation in regard to future cases; 128 U. S. 189; but statutes affecting remedies are entirely at the discretion of the legislature.

A statute of limitations which provides that in all civil suits in which the cause of action shall have arisen within the state, the defendant, who shall have become a non-resident of the state after such cause of action shall have arisen, shall not have the benefit of any statute of this state for the limitation of actions during the period of such residence without the state, if retrospective in its effect, is constitutional and applies to the trial of issues pending when the act was passed; 177 Pa. 633.

Legislation which concerns merely modes of procedure, applies to pending suits whether the act so specify or not; 140 Pa. 99.

A statutory amendment allowing, as of right, but one new trial in ejectment is not unconstitutional as retrospective legislation, when applied to a pending action in which there has been one new trial long after the date of the act; 83 Fed. Rep. 643.

In the absence of constitutional prohibition against it, retrospective legislation is usually valid if not subject to the objection that it impairs vested rights. Where there is a constitutional prohibition, much legislation otherwise valid will fail; as, for example, the deed of a person of unsound mind could not in such case be ratified: 35 Mo. 174. Retrospective statutes which have been held valid are: One validating a married woman's power of attorney; 30 Cal. 138; authorizing the insertion in a deed of the name of a married woman which was omitted by mistake: 11 Ohio St. 641; or validating an unauthorized conveyance of a married woman of her separate estate; 57 Pa. 369; prohibiting the defence to a suit on a contract that it was made on Sunday, unless the defendant restores whatever of value he received under the contract; 77 Me. 482; rendering a bond valid which when executed was invalid because not bearing the proper stamp; 12 Md. 195.

It has been held that the legislature has power to cure a defective conveyance by retroactive legislation; 17 Ia. 528; or to confirm conveyances defectively executed; 6 Gill & J. 461.

The right to pass retrospective laws, with the exceptions above mentioned, exists in the several states, according to their own constitutions, and they become obligatory if not prohibited by the latter: 4 S. & R. 364; 1 Bay 179; 7 Johns. 477. See 2 Cra. 272; 2 Pet. 414; 18 Ind. 237; 19 Ia. 388; 52 Pa. 474; 57 N. J. L. 180.

An instance may be found in the laws of Connecticut. In 1795, the legislature passed a resolve setting aside a decree of a court of probate disapproving of a will, and granted a new hearing: it was held that the resolve, not being against any constitutional principle in that state, was valid; 3 Dall. 386. And in Pennsylvania a judgment was opened by the act of April 1, 1837, which was held to be constitutional; 2 W. & S. 271.

Under a New York statute which provides that no person should practise medicine in the state who had ever been convicted of a felony, it was held that the statute applied to persons convicted before its passage, and that as to such of them at least as were not engaged in the practice of medicine at the time of its passage, it was not an *ex post facto* law; 46 N. E. Rep. (N. Y.) 607. See PHYSICIAN.

Laws should never be considered as applying to cases which arose previously to their passage, unless the legislature have clearly declared such to be their intention; 12 La. 352. See Barrington, Stat. 466, n.; 7 Johns. 477; 1 Kent 455; Code 1. 14. 7; Story, Const. § 1393; 1 McLean 40; 12 S. & R. 330.

The English courts also hold that a statute should not be construed so as to make it retrospective; 3 C. B. 551. Nothing but clear and express words will give such effect to it; 4 H. & N. 76; so of criminal acts; [91] 2 Q. B. 148.

The power of congress to pass a retrospective tariff act is discussed in 55 Alb. L. J. 243, in connection with the tariff act of 1897, and the conclusion reached that if it is desired to make a law retrospective, all that is necessary is that congress shall express its intention to that effect in unambiguous terms. The writer contends that the only decision bearing upon the subject is Burr v. United States, in which the question of the constitutionality of retrospective legislation would naturally have arisen, but it was assumed both by counsel and the court that the only question was as to the intent of congress in fixing a date from

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which the act should take effect. The court said, "No question exists, or is really made, but that this whole subject was within the law-making power; but that a law should not have any retrospective application unless that is plainly intended is more strenuously urged;" 66 Fed. Rep. 642. It had been previously declared by the supreme court with respect to such a tax that "congress could have passed a law to reimpose this tax retrospectively, to revive the sections under consideration if they had expired, to re-act the law by a simple reference to sections; 20 Wall. 332; and this case was determined as one merely of intent. The same court in another case treated the case from the same standpoint of intent, but arrived at a different conclusion. The main point made by Chief Justice Fuller was that the new act comprised a saving clause to the effect that "all rights and liabilities under said law shall continue, and may be enforced in the same manner as if said repeal or modification had not been made." "If," it was argued, "congress intended that this section should relate back to August 1, still the intention is quite apparent that the act of 1890 should remain in full force and effect until the passage of the new act, on August 28, and that all acts done, rights accrued, and liabilities incurred under the earlier act, prior to the repeal, should be saved from the effect thereof as to all parties interested, the United States included." 159 U. S. 78. This principle of construction appears also to have been accepted by the supreme court in a very early case, where it was said that "words in a statute ought not to have a retrospective application, unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot otherwise be satisfied." 3 Cra. 398, 413; 15 How. 423; 112 U. S. 559. See, also, 52 Pa. 315; 31 N. J. L. 133; 54 Md. 486; 16 Pa. 62; 17 How. 456; 66 N. C. 361. See, generally, 4 Wall. 277, 333; 129 U. S. 114; Pom. Const. L. § 530, 525–533. See STATUTE; REMEDY; EX POST FACTO LAW; IMPAIRING THE OBLIGATION OF CONTRACTS; Wade, Retrosp. Leg.

**RETURN.** An official statement by an officer of what he has done in obedience to a command from a superior authority, or why he has done nothing, whichever is required. 61 Conn. 287.

Persons who are beyond the sea are exempted from the operation of the statute of limitations of some states, till after a certain time has elapsed after their *returning*. See 14 Mass. 203; 3 Johns. 263; 2 W. Bla. 723; 3 Litt. 48; 1 Harr. & J. 89, 350.

When a member of parliament has been elected to represent a certain constituency, he is said to be *returned*, in reference to the return of the writ directing the proper officer to hold the election. In this country, election *returns* are the statements or reports of the balloting at an election, by the proper officers.

To come or go back to the same place; to revisit. 12 Conn. 186.

**RETURN-DAY.** A day appointed by law when all writs are to be returned which have issued since the preceding return-day. The sheriff is, in general, not required to return his writ until the return-day. After that period he may be ruled to make a return. See RULE DAY.

**RETURN OF PREMIUM. In Insurance.** A repayment of a part or the whole of the premium paid. Policies of insurance, especially those on marine risks, not unfrequently contain stipulations for a return of the whole or a part of the premium in certain contingencies; 2 Phill. Ins. xxii. sect. xi.; but in the absence of any such stipulation, in a case free of fraud on the part of the assured, if the risk does not commence to run, he is entitled to a return of it, if paid, or an exoneration from his liability to pay it, subject to deduction settled by stipulation or usage; and so, *pro rata*, if only a part of the insured subject is put at risk; 2 Phill. Ins. ch. xxii. sect. i.; and so an abatement of the excess of marine interest over the legal rate is made in hypothecation of ship or cargo in like case; *id.* sect. vii.

**RETURN OF WRITS. In Practice.** A short account, in writing, made by the sheriff, or other ministerial officer, of the manner in which he has executed a writ. Steph. Pl. 24.

It is the duty of such officer to return all writs on the return-day: on his neglecting to do so, a rule may be obtained on him to return the writ, and if he do not obey the rule he may be attached for contempt. See 19 Com. Dig. *Return;* 1 Rawle 520.

**RETURNUM AVERIORUM.** A judicial writ, similar to the *retorno habendo*. Cowel.

**RETURNUM IRREPLEGIABILE.** A judicial writ addressed to the sheriff for the final restitution or return of cattle to the owner when unjustly taken or distrained, and so found by verdict; it is granted after a nonsuit in a second deliverance. Reg. Judic. 27.

**REUS (Lat.). In Civil Law.** A party to a suit, whether plaintiff or defendant. *Reus est qui cum altero litum contestatum habet, sive id egit, sive cum eo actum est.*

A party to a contract. *Reus credendi* is he to whom something is due, by whatever title it may be: *reus debendi* is he who owes, for whatever cause. Pothier, Pand. lib. 50. *Reus stipulandi*, a party to a stipulation; *reus promittendi*, the debtor or obligor to the stipulation. Where there were several creditors or several debtors jointly entitled to, or jointly liable under, a stipulation they were respectively called *correi*.

See MENS REA.

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**REVE.** The bailiff of a franchise or manor; an officer in parishes within forests who marks the commonable cattle. Cowel.

**REVELAND.** In Domesday Book we find land put down as thane-lands, which were afterwards converted into revelands, *i. e.* such lands as, having reverted to the king upon death of his thane, who had it for life, were not since granted out to any by the king, but vested in charge upon account of the reve or bailiff of the manor. Spelm. Feuds, c. 24. Coke was mistaken in thinking it was land held in socage.

**REVELS.** Sports of dancing, masking, etc., formerly used in princes' courts, the inns of court, and noblemen's houses, commonly performed by night; there was an officer to order and supervise them, who was entitled the "master of the revels." Cowel.

**REVENDICATION. In Civil Law.** An action by which a man demands a thing of which he claims to be owner. It applies to immovables as well as movables, to corporeal or incorporeal things. Merlin, *Répert.*

By the civil law, he who has sold goods for cash or on credit may demand them back from the purchaser if the purchase-money is not paid according to contract. The action of *revendication* is used for this purpose. See an attempt to introduce the principle of revendication into our law, in 2 Hall, Law Journ. 181.

Revendication, in another sense, corresponds very nearly to the *stoppage in transitu* of the common law. It is used in that sense in the *Code de Commerce*, art. 577. Revendication, says that article, can take place only when the goods sold are on the way to their place of destination, whether by land or water, and before they have been received into the warehouse of the insolvent (*failli*) or that of his factor or agent authorized to sell them on account of the insolvent. See Dig. 14. 4. 15; 18. 1. 19. 53; 19. 1. 11.

**REVENUE.** The income of the government arising from taxation, duties, and the like; and, according to some correct lawyers, under the idea of revenue is also included the proceeds of the sale of stocks, lands, and other property owned by the government. Story, Const. § 877. *Internal revenue.* The revenue raised by the United States from all sources of taxation except duties on imports. By revenue is also understood the income of private individuals and corporations.

See TAXATION.

A bill establishing rates of postage is not a bill for for raising revenue, within the meaning of the constitution; but post-office laws may be revenue laws without being laws for raising revenue: 13 Blatchf. 207. See 15 Wall. 390; 4 Blatchf. 311; 15 Int. Rev. Rec. 30.

**REVENUE LAWS.** Laws made for the direct and avowed purpose of creating and securing revenue or public funds for the service of the government. 1 Gall. 398. See 123 U. S. 686.

No country ever takes notice of the revenue laws of another; 1 Cowp. 343, per Lord Mansfield; 3 D. & R. 190.

Under the constitution of the United States revenue bills must originate in the house of representatives; Const. art. 1, § 7. In the sense of this clause, revenue bills are not those which create revenue incidentally, or those which are intended primarily for other purposes, but those which upon their face are plainly designed to raise revenue; 4 Biss. 188; those which levy taxes in the strict sense of the word; 1 Sto. Const. § 880. See 41 Cal. 165. "An act of congress providing a national currency secured by a pledge of bonds of the United States, and which, in the furtherance of that object, and also to meet the expenses attending the execution of the act, imposed a tax on the notes in circulation of the banking association organized under statute, is clearly not a revenue bill which the constitution declares must originate in the house of representatives." 167 U. S. 196.

The existing revenue laws of the United States under which the funds necessary for the expenses and disbursements of the government are raised, are the tariff laws and the internal revenue laws. The existing tariff law is what is commonly known as the Dingley tariff bill, being the act passed July 24, 1897. The internal revenue taxes are provided for by what is known as the war revenue bill, being an act to provide ways and means to meet war expenditures, passed June 13, 1898.

**REVENUE SIDE OF THE EXCHEQUER.** That jurisdiction of the court of exchequer, or of the exchequer division of the high court of justice, by which it ascertains and enforces the proprietary rights of the crown against the subjects of the realm. The practice in revenue cases is not affected by the orders and rules under the Judicature Act of 1875. Moz. & W.

**REVERSAL. In International Law.** A declaration by which a sovereign promises that he will observe a certain order, or certain conditions, which have been once established, notwithstanding any changes that may happen to cause a deviation therefrom; as, for example, when the French court consented for the first time, in 1745, to grant to Elizabeth, the Czarina of Russia, the title of empress, it exacted as a *reversal* a declaration purporting that the assumption of the title of an imperial government by Russia should not derogate from the rank which France had held towards her.

Letters by which a sovereign declares that by a particular act of his he does not mean to prejudice a third power. Of this we have an example in history: formerly the emperor of Germany, whose coronation, according to the golden bull, ought

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to have been solemnized at Aix-la-Chapelle, gave to that city, when he was crowned elsewhere, reversals, by which he declared that such coronation took place without prejudice to its rights, and without drawing any consequences therefrom for the future.

**In Practice.** The decision of a superior court by which the judgment, sentence, or decree of the inferior court is annulled.

After a judgment, sentence, or decree has been rendered by the court below, a writ of error may be issued from the superior to the inferior tribunal, when the record and all proceedings are sent to the supreme court on the return to the writ of error. When, on the examination of the record, the superior court gives a judgment different from the inferior court, they are said to reverse the proceeding. As to the effect of a reversal, see 9 C. & P. 513. See REVERSE; JUDGMENT; RES JUDICATA.

**REVERSE, REVERSED.** A term frequently used in the judgments of an appellate court, in disposing of the case before it. It then means "to set aside, to annul, to vacate." 7 Kans. 254.

**REVERSER. In Scotch Law.** A reversioner.

**REVERSION.** The residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him. The return of land to the grantor and his heirs after the grant is over. Co. Litt. 142 *b*; 2 Bla. Com. 175; 4 Kent 354. See CONDITION; CONDITIONAL FEE; BASE FEE.

The reversion is a vested interest or estate and arises by operation of law only. In this latter respect it differs from a remainder, which can never arise except either by will or deed; Chall. Real Pr. 68; Cruise, Dig. tit. 17; 4 Kent 345; 19 Vin. Abr. 217. A reversion is said to be an incorporeal hereditament; 4 Kent 354; 1 Washb. R. P. 37, 47; 38 N. J. Eq. 124. The possibility of reverter in the grantor of a qualified or determinable fee is not void for remoteness; 130 Mass. 448; 106 *id.* 479; 155 *id.* 171; as to the reversion or remainder in lands confiscated by the United States because of the owners engaging in the rebellion, see 145 U. S. 546. See REMAINDER; LIMITATION.

In some cases land taken under the right of eminent domain for a specific purpose reverts to the former owner when that purpose has ceased. See EMINENT DOMAIN; 6 Am. & E. Corp. Cas. 586.

**REVERSIONARY INTEREST.** The interest which one has in the reversion of lands or other property. The residue which remains to one who has carved out of his estate a lesser estate. See REVERSION. An interest in the land when possession shall fail. Cowel.

**REVERSIONARY LEASE.** One to take effect *in futuro*. See LEASE.

**REVERSOR. In Scotch Law.** A debtor who makes a wadset, and to whom the right of reversion is granted. Erskine, Inst. 2. 8. 1. A reversioner. Jacob, Law Dict.

**REVERTER.** Reversion. A possibility or reverter is that species of reversionary interest which exists when the grant is so limited that it may possibly terminate. See 1 Washb. R. P. 63.

**REVEST.** To replace one in the possession of anything of which he has been divested, or put out of possession. 1 Rop. H. & W. 353.

**REVIEW. In Practice.** A second examination of a matter. For example, by the laws of Pennsylvania, the courts having jurisdiction of the subject may grant an order for a view of a proposed road: the reviewers make a report, which, when confirmed by the court, would authorize the laying out of the same. After this, by statutory provision, the parties may apply for a review or second examination, and the last viewers may make a different report. For the practice of reviews in chancery, see BILL OF REVIEW. A bill of review is the appropriate mode of correcting errors apparent on the face of the record. 103 U. S. 766; 125 *id.* 1.

The criticism of a publication. See CRITICISM; LIBEL.

**REVIEW, COURT OF. In England.** A court of appeal in bankruptcy cases, established in 1832 and abolished in 1847. Robson, Bkcy.

**REVILING CHURCH ORDINANCES.** An offence against religion punishable in England by fine and imprisonment. 4 Steph. Com. 208. See BLASPHEMY.

**REVISED STATUTES OF THE UNITED STATES.** The Revised Statutes were enacted June 22, 1874, and, when printed in 1875, embraced the laws, general and permanent in their nature, in force December 1, 1873. A second edition was completed in the latter part of 1878, and includes only the specific amendments passed by the forty-third and forty-fourth congresses, with references to some other acts. The period from 1874 to 1880 is provided for by a supplement published in 1881. See Preface to Supplement to Rev. Stat. A second edition of the supplement, covering the legislation from 1874 to 1891, and embracing the matter in the Supplement to the Revised Statutes of 1881, was prepared and published under the direction of congress by Chief Justice Wm. A. Richardson of the Court of Claims. Volume 2 of the Supplement has since been published, covering legislation down to March 4, 1897.

Transactions subsequent to the enactment of the Revised Statutes must be determined by the law as there found, and not by the earlier statutes incorporated

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therein. In cases of ambiguity or uncertainty, the previous statutes may be referred to to elucidate the legislative intent, but where the language is clear, the Revised Statutes must govern. The second edition is neither a new revision nor a new enactment; it is only a new publication, a compilation containing the original law with certain specific alterations and amendments made by subsequent legislation incorporated therein according to the judgment of the editor, who had no discretion to correct errors or supply omissions; 15 Ct. Cl. 80. Sections of a statute re-enacted in the Revised Statutes are to be given the same meaning they had in the original, unless a contrary intention is clearly manifested; 121 U. S. 278; the Revised Statutes are merely a compilation of the statutes of the United States, and resort may be had to the original statute to ascertain what, if any, change of phraseology there is, and whether such change should be construed as changing the law; 134 U. S. 626; and this is specially so where the act authorizing the revision directs marginal references as in this case; 169 U. S. 227, where some historical matter relating to the subject is found. "They must be treated as the legislative declaration of the statute law on the subjects embraced, on the first day of December, 1873. When the meaning is plain, the courts cannot look to the statutes which have been revised, to see if congress erred in that revision, but may do so when necessary to construe doubtful language." 157 U. S. 1; 74 Fed. Rep. 145.

The act of June 4, 1897, appointed a commission to revise the Criminal Code of the United States.

See STATUTES AT LARGE.

**REVISING ASSESSORS. In English Law.** Two officers formerly elected to assist the mayor in revising the parish burgess lists, but now abolished and the duties transferred to the revising barristers.

**REVISING BARRISTERS. In English Law.** Barristers appointed to revise the list of voters for county and borough members of parliament, and who hold courts for that purpose throughout the country.

**REVIVAL. Of Contracts.** An agreement to renew the legal obligation of a just debt after it has been barred by the act of limitation or lapse of time is called its revival.

**In Practice.** The act by which a judgment which has lain dormant or without any action upon it for a year and a day is, at common law, again restored to its original force.

When a judgment is more than a day and a year old, no execution can issue upon it at common law; but till it has been paid, or the presumption arises from lapse of time that it has been satisfied, it may be revived and have all its original force, which was merely suspended. This may be done by a *scire facias* or an action of debt on the judgment. See SCIRE FACIAS.

**REVIVE.** To bring again to life, to reanimate, to renew; to bring into action after a suspension. 37 Ia. 207.

**REVOCATION** (Lat. *re*, back, *vocare*, to call). The recall of a power or authority conferred, or the vacating of an instrument previously made.

An act of the mind demonstrated by some outward and visible sign. 47 Minn. 171.

*Revocation of grants.* Grants may be revoked by virtue of a power expressly reserved in the deed, or where the grant is without consideration or in the nature of a testamentary disposition; 3 Co. 25.

*Voluntary conveyances*, being without pecuniary or legal consideration, may be superseded or revoked, in effect, by a subsequent conveyance of the same subject-matter to another for valuable consideration. And it will make no difference that the first conveyance was meritorious, being a voluntary settlement for the support of one's self or family, and made when the grantor was not indebted, or had ample means besides for the payment of his debts. And the English cases hold that knowledge of the former deed will not affect the rights of the subsequent purchaser; 9 East 59; 4 B. & P. 332; 18 Ves. 84. See, also, the exhaustive review of the American cases, in note to Sexton *v.* Wheaton, 1 Am. Lead. Cas. 36.

In America, it is generally held that a voluntary conveyance which is also fraudulent, is void as to subsequent *bona fide* purchasers for value with notice; but if not fraudulent in fact, it is only void as to those purchasing without notice. See Bisp. Eq. 257; 18 Pick. 131; 2 B. Monr. 345; 10 Ala. N. S. 348, 352; 12 Johns. 536, 557; 4 McCord 295; FRAUDULENT CONVEYANCE.

The fact that the voluntary grantor subsequently conveys to another, is regarded as *prima facie* evidence that the former deed was fraudulent as to subsequent purchasers without notice, or it would not have been revoked; 5 Pet. 265; 4 M'Cord 295; 3 Strobh. 59; 1 Rob. Va. 500, 544.

In some of the states, notice of the voluntary deed will defeat the subsequent purchaser; 1 Rawle 231; 6 Md. 242; 4 M'Cord 295; 2 M'Mull. 508; 1 Bail. 575; 15 Ala. 525; 5 Pet. 265. But in other states the English rule prevails; 1 Yerg. 13; 1 A. K. Marsh. 208; 1 Dana 531; 3 Ired. Eq. 81.

There is a distinction between the creditors of the grantor by way of family settlement (he being not insolvent or in embarrassed circumstances), and a subsequent purchaser for value. The claim of the latter is regarded as superior to a mere creditor's, whether prior or subsequent to the voluntary conveyance,—especially if he buy without notice. Some of the foregoing cases do not advert to this distinction; 3 Ired. Eq. 81; 4 Vt. 389.

So, too, if one bail money or other valuables to another, to be delivered to a third person on the day of marriage, he may

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countermand it at any time before delivery over; 1 Dy. 49. But if such delivery be made in payment or security of a debt, or for other valuable consideration, it is not revocable; 1 Stra. 165. And although the gift be not made known to the donee, being for his benefit, his assent will be presumed until he expressly dissents; 3 Co. 26 *b*; 2 Salk. 618.

Powers of appointment to uses are revocable if so expressed in the deed of settlement. But it is not indispensable, it is said, that this power of revocation should be repeated in each successive deed of appointment, provided it exist in the original deed creating the settlement; 4 Kent 336; 1 Co. 110 *b*; 2 Bla. Com. 339.

It has been said that the power of revocation does not include the appointment of new uses; 2 Freem. 61; Pr. in Ch. 474.

A voluntary deed of trust, without power of revocation, made with a nominal consideration, and without legal advice as to its effect, when there was evidence that its effect was misunderstood by the grantor, will be set aside in equity; 13 Am. L. Reg. N. S. 345, and note. In a similar case it was held that the mere omission of counsel to advise the insertion of a power of revocation is not a ground to set aside the deed; but that this omission and the absence of the power are circumstances tending to show that the act was not done with a deliberate intent. The deliberate intent of a party to tie up his hands should clearly appear. In the absence of such an intent the omission of a power to revoke is *prima facie* evidence of mistake. The mistake being one of fact mixed with legal effects, equity will relieve; 75 Pa. 269; the earlier English cases seem to have insisted upon the presence of a power of revocation in voluntary settlements; L. R. 8 Eq. 558; 14 *id.* 365; but in a later case it was held that the absence of such a power was merely a circumstance of more or less weight, according to the other circumstances of each case; L. R. 8 Ch. Ap. 430. A reserved right of revocation is not inconsistent with the creation of a valid trust; 1 Mo. App. 99.

A quitclaim deed from a trustee to the donor of the trust will not revoke the trust, though made solely for that purpose, since a completed trust, without reservation of power to revoke, can only be revoked by the consent of all the beneficiaries; 113 Mo. 188. See 70 Cal. 449.

As to the revocation of powers conferred upon agents, see AGENCY. It is a general rule that a principal may revoke the agent's authority at his own will; 141 U. S. 627.

The American courts, following the case of Brown *v.* M'Gran, 14 Pet. 479, hold that the consignee of goods for sale, who has incurred liability or made advances upon the faith of the consignment, acquires a power of sale which, to the extent of his interest, is not revocable or subject to the control of the consignor. But if orders are given by the consignor, contemporaneously with the consignment and advances, in regard to the time and mode of sale, and which are, either expressly or impliedly, assented to by the consignee, he is not at liberty to depart from them afterwards. But if no instructions are given at the time of the consignment and advances, the legal presumption is that the consignee has the ordinary right of factors to sell, according to the usages of the trade and the general duty of factors, in the exercise of a sound discretion, and reimburse the advances out of the proceeds, and that this right is not subject to the interference or control of the consignor. See 52 Miss. 7; 45 Ind. 115.

The right of the factor to sell in such case is limited to the protection of his own interest, and if he sell more than is necessary for that purpose contrary to the order of his principal, he is liable for the loss incurred; 37 Conn. 378.

The case of Parker *v.* Branker, 22 Pick. 40, seems to go to the length of holding that where the consignment is to sell at a limited price the consignee may after notice sell below that price, if necessary, to reimburse advances. But to this extent the American rule has not gone; 1 Pars. Contr., 8th ed. 70. See, also, 12 N. H. 239; 3 N. Y. 78.

The English courts do not hold such a power irrevocable in law; 3 C. B. 380; 5 *id.* 895. In the last case, Wilde, C. J., thus lays down the rule. It may furnish a ground for inferring that the advances were made upon the footing of an agreement that the factor shall have an irrevocable authority to sell in case the principal made default. But it would be an inference of fact, not a conclusion of law. The fact that the agent has incurred expense in faith of the authority being continued, and will suffer loss by its revocation, is a ground of recovery against the principal, but does not render the power irrevocable. A pledge of personal property to secure liabilities of the pledgor, with an express power of sale, confers such an interest in the subject-matter that it will not be revoked by his death; 10 Paige, Ch. 205. But a power to pledge or sell the property of the constituent and from the avails to reimburse advances made on liabilities incurred by the appointee is not so coupled with an interest as to be irrevocable; 8 Wheat. 174; 6 Conn. 559. The interest must exist in the subject-matter of the power, and not merely in the result of its exercise, to become irrevocable; 15 N. H. 468; 20 Ohio St. 185. Hence, if one give a letter of credit agreeing to accept bills to a certain amount within a limited time, the letter is revoked by death, and bills drawn after the death and before knowledge thereof reaches the drawer cannot be enforced against the estate of such deceased party; 28 Vt. 209.

All contracts which are to be executed in the name of the constituent by virtue of an agency, although forming an essential part of a security upon the faith of which

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advances have been made, are of necessity revoked by the death of the constituent. Even a warrant of attorney to confess judgment, although not revocable by the act of the party, is revoked by his death. The courts, however, allow judgment in such cases to be entered as of a term prior to the death of the constituent; 2 Kent 646; 9 Wend. 452; 8 Wheat. 174. See 75 Cal. 349; see, also, 2 Ld. Raym. 766, 849, where the form of procedure is discussed; 7 Mod. 93; Stra. 108. A warrant of attorney to confess judgment, executed by a *feme sole*, is revoked by her marriage; but if executed to a *feme sole*, the courts will allow judgment to be entered up in the name of the husband and wife; 3 Harring. 411.

Where one is not notified of the revocation of the authority of an agent, he is justified in acting upon the presumption of its continuance; 128 U. S. 374; 75 Cal. 159; 82 Va. 712.

*The powers of arbitrators.* These are revocable by either party at any time before final award; 20 Vt. 198; 156 Mass. 113; 126 Ill. 72; 58 Mo. App. 288; 22 S. E. Rep. (Va.) 165. It is not competent for the parties to deprive themselves of this power by any form of contract; 8 Co. 80; 16 Johns. 205. But where the submission releases the original cause of action, and the adversary revokes, the party so releasing may recover the amount so released by way of damages caused by the revocation; 13 Vt. 97.

Where the submission is made a rule of court, it becomes practically irrevocable, since such an act would be regarded as a contempt of court and punishable by attachment; 7 East 608. This is the only mode of making a submission irrevocable "when the fear of an attachment may induce them to submit." 6 Bingh. 443.

In the American courts a submission by rule of court is made irrevocable by the express provisions of the statutes in most of the states, and the referee is required, after due notice, to hear the case *ex parte*, where either party fails to appear; 12 Mass. 47; 1 Conn. 498; 4 Me. 459; 5 Pa. 497; 3 Ired. 333. In Ohio, a submission under the statute is irrevocable after the arbitrators are sworn; 19 Ohio St. 245; and it has been held that a naked submission is not revocable after the arbitrator has made his award and published it to one of the parties; 6 N. H. 36. But while a statute requisite, as being witnessed, is not complied with, it is incomplete and so the submission is revocable; 5 Paige, Ch. 575.

When one party to the submission consists of several persons, one cannot revoke without the concurrence of the others; Rolle, Abr. *Authority* (H); 12 Wend. 578. But the text-writers are not fully agreed in this proposition; see Russ. Arb. 141; 2 Chitty, Bail. 452, where it was held that the death of one of several parties on one side of the submission operates as a revocation as to such party at least, and that an award made in the name of the survivors and the executor of the deceased party is void. It is here intimated by way of query whether, that where the cause of action survives, the award might not legally be made in the name of the surviving party. See Russ. Arb. 155.

An award made after the revocation of the submission is entirely void; 1 Sim. 134.

The power of the arbitrator is determined by the occurrence of any fact which incapacitates the party from proceeding with the hearing. The *marriage of a feme sole* is a revocation of the arbitrator's power; 11 Vt. 525; without notice to the arbitrators: Russ. Arb. 152. So, also, if she be joined with another in the submission, her marriage is a revocation as to both; W. Jones, 228; Rolle, Abr. *Authority*.

Insanity in either party, or in the arbitrator, will determine his authority. The *death of either party*, or of the arbitrator, or one of them, or where the arbitrators decline to act, will operate as a revocation of the submission; 4 T. B. Monr. 3; 1 B. & C. 66; 36 Fed. Rep. 408; 58 Mo. App. 288.

It is competent to make provision in the submission for the completion of the award, notwithstanding the death of one of the parties, by proceedings in the name of the personal representative. This seems to be the general practice in England in late years; 3 B. & C. 144; 8 M. & W. 873. And in some of the American states it is held that a submission by rule of court is not determined by the death of the party, where the cause of action survives, but may be revived and prosecuted in the name of the personal representative; 15 Pick. 79; 3 Halst. 116; 3 Gill 190. *Bankruptcy of the party* does not operate to revoke a submission to arbitration; Caldw. Arb. 89. But it seems to be considered in 9 B. & C. 659, that the bankruptcy of one party will justify the other in revoking. But see 2 Chitt. Bail. 43; 1 C. B. 131.

The *time* when the revocation becomes operative. Where it is by the express act of the party, it will be when notice reaches the arbitrator; 5 B. & Ald. 507; 8 Co. 80. But in the case of death, or marriage, or insanity, the act itself terminates the power of the arbitrator at once, and all acts thereafter done by him are of no force; 11 Vt. 525; 5 East 266.

The form of the revocation is not important, if it be in conformity with the submission, or if, when it is not, it be acquiesced in by the other party; 7 Vt. 237.

It is said in the books that the revocation must be of as high grade of contract as the submission. This seems to be assumed by the text-writers and judges as a settled proposition; 8 Co. 82; 8 Johns. 125. Where the submission is in writing, the revocation "ought to be in writing"; 18 Vt. 91. But see 7 Vt. 237, 240; 15 N. H. 468. It seems questionable whether at this day a submission by deed would require to be revoked by deed, since the revocation is not a contract, but a mere notice, and no special right is conferred upon such an act by the addition of wax or wafer; 8 Ired.

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74. But see 26 Me. 251, *contra*. But it is conceded the party may revoke by any act which renders it impracticable for the arbitrators to proceed; 7 Mod. 8; Story, Ag. 474.

So a revocation imperfectly expressed, as of the bond instead of the submission, will receive a favorable construction, in order to effectuate the intention of the party; 1 Cow. 325.

It has been held, too, that bringing a suit upon the same cause of action embraced in the submission, at any time before the award, was an implied revocation; 6 Dana 107; 126 Ill. 72.

*The power of a partner* to contract in the name of the firm may be revoked, by injunction out of chancery, where there is a wanton or fraudulent violation of the contract constituting the association; Bisp. Eq. 426; 1 Story, Eq. Jur. § 673. This will sometimes be done on account of the impracticability of carrying on the undertaking; 1 Cox, Ch. 213; 2 V. & B. 299. So, too, such an injunction might be granted on account of the insanity or permanent incapacity of one of the partners; 1 Story, Eq. Jur. § 673. But insanity is not alone sufficient to produce a dissolution of the partnership; 2 My. & K. 125. See PARTNERSHIP.

*An oral license* to occupy land is, where the statute of frauds prevails, revocable at pleasure, unless permanent and expensive erections have been paid by the licensee in faith of the permission. In such case a court of equity will decree a conveyance on equitable terms, in conformity with the contracts of the parties, or else require compensation to be made upon equitable principles; 1 Stockt. 471; Red. Railw. 106; 13 Vt. 150; 10 Conn. 375.

For the law in regard to the revocation of wills, see WILLS.

**REVOCATIONE PARLIAMENTI.** An ancient writ for recalling a parliament. 4 Inst. 44.

**REVOCATUR** (Lat. it is recalled). A term used to denote that a judgment is annulled for an error in fact. The judgment is then said to be recalled, *revocatur;* not *reversed*, which is the word used when a judgment is annulled for an error in law; Tidd, Pr. 1126.

**REVOLT.** The endeavor of the crew of a vessel, or any one or more of them, to overthrow the legitimate authority of her commander, with intent to remove him from his command, or against his will to take possession of the vessel by assuming the government and navigation of her, or by transferring their obedience from the lawful commander to some other person. 11 Wheat. 417.

According to Wolff, revolt and rebellion are nearly synonymous: he says it is the state of citizens who unjustly take up arms against the prince or government. Wolff, *Droit de la Nat.* § 1232. See REBELLION.

By R. S. § 5359, if any one of the crew of an American vessel, on the high seas or other waters, within the admiralty and maritime jurisdiction of the U. S., endeavors to make a revolt, etc., or conspires, etc., so to do, or incites, etc., any other of the crew to disobey lawful others, or to neglect their duty, or assembles such orders in a mutinous manner, or makes a riot, or unlawfully confines the master, etc., he is punishable by a fine of not over $1,000, or imprisonment for not over five years, or both. By § 5360, if any one of the crew, etc., usurps the command of the vessel, or deprives the master of authority, or resists his authority, or transfers the same to one not entitled thereto, he is punishable by a fine of not over $2,000, and imprisonment for not over ten years. Foreign seamen on American vessels are punishable under this section; 1 N. Y. Leg. Obs. 88. If, before a voyage is begun, the seamen for good reason believe that the vessel is unseaworthy, they may resist an attempt to compel them to go to sea in her, without being guilty of revolt; 1 Sprague 75.

Revolts on shipboard are to be considered as defined by the last-mentioned act; 1 W. & M. 306.

A confederacy or combination must be shown; 2 Sumn. 582; 1 W. & M. 305; Crabbe 558. The vessel must be properly registered; 3 Sumn. 342; must be pursuing her regular voyage; 2 Sumn. 470. The indictment must specifically set forth the acts which constitute the crime; Whart. Prec. § 1061, n. And see 1 Mas. 147; 5 *id.* 402; 1 Sumn. 448; 4 Wash. C. C. 402, 528; 2 Curt. C. C. 225; 1 Pet. C. C. 213. See SEAMEN.

**REWARD.** The offer of recompense given by authority of law for the performance of some act for the public good, which, when the act has been performed, is to be paid. The recompense actually so paid.

The offer may be made to an individual; 6 Blatch. 426; or by public, oral statement, poster, or newspaper; 56 Ind. 46; 14 Cal. 134; 6 Mass. 244; and its acceptance and performance create a valid contract; Poll. Contr. 11; Ans. Contr. 31; 82 N. Y. 503; 71 Tex. 584; 52 Pa. 484; such performance being sufficient consideration; 7 N. H. 549; 73 Am. Dec. 634; 4 B. & Ad. 621. The offer, not being a contract until performance, may be withdrawn prior thereto; 16 Ind. 140; 79 Ga. 658; 5 Metc. 57; 14 Cal. 137. See 92 U. S. 75. As to what information will constitute a performance, see 3 C. B. 254; L. R. 2 Q. B. 301. The offer of a reward may contain such terms as the party sees fit to prescribe; 43 Ark. 337; 7 Metc. 412; provided they are lawful; Bish. Contr. § 467; 106 Mass. 269; 68 Me. 142; 61 Pa. 415; and substantial performance is usually sufficient; 9 Allen 152; 85 Am. Dec. 747.

A reward may be offered by the government or by a private person; 21 N. J. L. 310; by a railroad company; 19 Am. Rep. 80; 85 Ala. 48; but not by the District of Columbia; 7 D. C. 134; nor by municipal corporations, unless authorized by statute; 32 Ill. App. 397; 41 Mich. 367; 51 Me. 174; 48 Ia. 472; 14 Bush 324; 18 Fla. 318; 72 Ind. 455; *contra*, 23 Pa. 391. But where the selectmen of a town offered a reward in excess of that authorized by statute, it was held good for the lawful amount; 39 Conn. 159; and such officials are personally liable for the excess; 30 N. E. Rep. (Mass.) 95; 7 Dana 29; *contra*, 2 McCrary 152.

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Any one who complies with the terms of the offer, if not guilty of fraud, may recover the reward; 38 Me. 45; 133 Mass. 288; 69 Tex. 74; 24 Ia. 78; although not embraced in the description of the persons to whom it was originally proposed; 55 Ill. 62; 64 L. T. 594; but not for apprehending a person who has been admitted to bail; 8 Bush 22; nor one discharged from arrest by the committing magistrate; 62 Miss. 193.

One may recover a reward offered by his employers; 16 Ill. App. 181; but not if he is morally bound to furnish the information; 50 Cal. 218; or it is his official duty to do so; 79 Tex. 141; 10 Pa. 39. And a reward offered by the state for the capture of a criminal cannot be claimed by an officer whose official duty it is to make the arrest; the rule being founded on public policy, it is opposed to opening the door to any inducement for public officers to delay arrests until rewards are offered; 45 S. W. Rep. (Ky.) 515. In that case it was also decided that no one could have any property right in a reward until it was earned by making the arrest, so that where, by sharp practice in making use of information derived over the telephone, one person secured the reward and prevented another, who really gave the information, from obtaining the benefit of it, the latter had no right of action. But it is held that a promise to pay a reward to a police constable is binding because there might be some information which he was not bound, in the discharge of his ordinary duty, to give; 11 A. & E. 856.

An offer of a reward is not void as against public policy, because made for conviction of offences afterwards to be committed; 151 Pa. 200.

It is held to be necessary that the person performing the service should know of the offer when he did so; 51 N. Y. 604; 16 Ill. App. 181; 2 Handy 193; 7 Dana 129; *contra*, 3 Ind. App. 459; 9 Bush 459; 44 Vt. 170; 12 C. B. N. S. 740; 104 E. C. L. 740.

The person first complying with the terms of the offer is entitled to the reward; 4 B. & Ad. 621; 24 E. C. L. 126; 7 Fed. Rep. 709; 6 Blatch. 406; and where the offer is for information, the whole of which is furnished in fragments by different persons, the reward may be equitably apportioned; 48 N. H. 86; 43 How. Pr. 193; 28 Md. 147; and so as to the recovery of property; 48 Ia. 472; 25 Am. Dec. 187; 6 Mass. 344.

The finder of lost property is not entitled to a reward, if there was no promise of one by the owner; 1 Ore. 86.

**RHANDIR.** A part in the division of Wales before the Conquest; every township comprehended four gavels, and every gavel had four rhandirs, and four houses or tenements constituted every rhandir. Tayl. Hist. Gav. 69.

**RHODE ISLAND.** One of the original thirteen states of the United States of America; its full style being, "The State of Rhode Island and Providence Plantations."

Its territory lies between Massachusetts and Connecticut, in the southwest angle of that portion of the territory of the former state which was known as the colony of New Plymouth, and is situated at the head and along both shores of the Narragansett Bay, comprising the islands in the same, the principal of which is Rhode Island, placed at the mouth of the bay. The settlement was commenced as early as June, 1636, on the present site of the city of Providence, by five men under Roger Williams. Williams founded his colony upon a compact which bound the settlers to obedience to the major part "only in civil things"; leaving to each perfect freedom in matters of religious concernment, so that he did not, by his religious practices, encroach upon the public order and peace. A portion of the Massachusetts colonists, who were of the antinomian party, after their defeat in that colony, settled on the island of Aquetnet, now Rhode Island, where they associated themselves as a colony on March 7, 1638. These settlements, together with one "at Shawomet, now Warwick, made by another sect of religious outcasts, under Gorton, in 1642-3, remained under separate voluntary governments until 1647, when they were united under one government, styled "The Incorporation of Providence Plantations in the Narragansett Bay in New England," by virtue of a charter granted in 1643.

This colony remained under this charter, which, upon some divisions, was confirmed by Cromwell in 1655, until after the restoration, when a new charter was procured from Charles II., in the fifteenth year of his reign, under which a new colonial government was formed on the 24th of November, 1663, which continued, with the short interruption of the colonial administration of Sir Edmund Andros, down to the period of the American revolution.

In the general assembly of the colony, on the first Wednesday of May, 1776, in anticipation of the declaration of independence, an act was passed which absolved the colonists from their allegiance to the king of Great Britain, and which ordered that in future all writs and processes should issue in the charter name of "The Governor and Company of the English Colony of Rhode Island and Providence Plantations," instead of the name of the king. The old colonial charter, together with a bill of rights adopted by the general assembly, remained the sole constitution of state government until the first Tuesday in May, 1843, when a state constitution framed by a convention assembled in November, 1842, and adopted by the people of the state, went into operation.

THE LEGISLATIVE POWER.—*The Senate* consists of the lieutenant-governor and one senator from each town or city in the state; the governor, and in his absence the lieutenant-governor, shall preside, and may vote only in case of a tie; the senate may elect a presiding officer in case of the death or disability of the governor and lieutenant-governor; the secretary of state shall be secretary of the senate, unless otherwise provided by law, and shall preside over the senate in case of death of the presiding officer, till a new one is chosen.

*The House of Representatives* shall not exceed seventy-two members, elected on the basis of population, giving each town and city one at least, and one for more than half the ratio, allowing reapportionment after each United States or state census. The districting any town or city is forbidden; the house shall elect its presiding officer, and the senior members from the town of Newport shall preside in the organization.

THE EXECUTIVE POWER.—The chief executive power is to be vested in a governor, who, together with a lieutenant-governor, shall be annually elected by the people.

THE JUDICIAL POWER.—This is vested by the constitution in a supreme court and in such inferior courts as may from time to time be prescribed by law. Chancery powers may be conferred on the supreme court but on no other to any greater extent than was prescribed by law at the time of the adoption of the constitution. *The Supreme Court* consists of a chief justice and five associate justices elected by the two houses of the assembly in grand committee. They hold office until their places are declared vacant by a resolution passed by a majority of both houses at the annual session for electing officers, unless removed by impeachment.

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This court has original jurisdiction concurrent with courts of common pleas, of all civil actions, as well between the state and its citizens as between citizens, and of all criminal proceedings legally brought before it, and statutory power to punish contempts. It consists of two divisions. *The Appellate Division* consists of the chief justice and two associate justices to be from time to time designated by the chief justice. No justice can exercise appellate jurisdiction of a case heard by him. One justice is a quorum for motions, interlocutory proceedings, etc., and three justices constitute a quorum for all purposes in the appellate division, but as many as practicable shall sit on all constitutional questions. It has exclusive jurisdiction of all suits in equity, and exclusive authority to issue writs of error, certiorari, mandamus, prohibition, *quo warranto*, to entertain informations in the nature of *quo warranto*; has exclusive cognizance of all motions and petitions for a new trial, petitions for divorce, separate maintenance, alimony, custody of children. It is also the supreme court of probate. This division is required by law to be in session from the third Monday in September to the third Monday in July. The sessions are at Providence, except that on two days each year fixed by law and such others as may be designated by the court, sessions are held at Newport and South Kingston respectively.

*The Common Pleas Division* is held by some one or more of the justices of the supreme court, designated for that purpose by the chief justice. This court has original jurisdiction of all civil actions which involve title to real estate or where real estate is attached, if the amount exceed $300, except in case of certain writs. It has original jurisdiction of all crimes. It has appellate jurisdiction in such cases from other tribunals as may be given to it by the law. This division holds four sessions a year in each county except Providence, where it is to sit continuously from the third Monday in September to the third Monday in July.

The state is divided into twelve judicial districts and a *district court* is established in each, to be held by a justice elected by the general assembly for a term of three years. It has all the statutory jurisdiction of justices of the peace and also of offences against municipal laws and ordinances unless the same is otherwise specially conferred. It may also take the declarations of any alien of his intention to become a citizen, and may issue writs of *habeas corpus*.

*Courts of Probate* are held by the town councils of the various towns, except in Providence, where the municipal court acts as a probate court. This court has jurisdiction of the settlement of estates of deceased persons, supervision of guardians, probate of wills, and other similar matters, with a right of appeal to the supreme court.

**RHODIAN LAWS.** A code of maritime laws adopted by the people of Rhodes, who had by their commerce and naval victories obtained the sovereignty of the sea, about nine hundred years before the Christian era. There is reason to suppose this code has not been transmitted to posterity, at least not in a perfect state. See CODE.

**RIAL.** A piece of gold coin current for ten shillings in the reign of Henry VI.

**RIBAUD.** A rogue; a vagrant.

**RIBBONMEN.** Associations or secret societies formed in Ireland, having for their object the dispossession of landlords and political purposes. See Whart. Law Lex.

**RIDER.** A schedule or small piece of paper or parchment added to some part of a record or policy of insurance; as, when on the reading of a bill in the legislature a new clause is added, this is tacked to the bill on a separate piece of paper, and is called a rider.

**RIDING. In English Law.** An ascertained district; part of a county. This term has the same meaning in Yorkshire that division has in Lincolnshire. 4 Term 459.

**RIDING ARMED.** The offence of riding or going armed with dangerous or unusual weapons. It is a misdemeanor; 4 Steph. Com., 11th ed. 203.

**RIDING CLERK.** One of the Six Clerks in chancery, who, in his turn, for one year kept the controlment books of all grants that passed the Great Seal. Whart. Dict.

**RIENS.** A French word which signifies *nothing*. It has generally this meaning: as, *riens en arriere; riens passe per le fait*, nothing passes by the deed; *riens per descent*, nothing by descent: it sometimes signifies not, as, *rien culpable*, not guilty.

**RIENS EN ARRIERE** (L. Fr. nothing in arrear). **In Pleading.** A plea which alleges that there is nothing remaining due and unpaid of the plaintiff's demand. It is a good plea, and raises the general issue in an action for rent. 2 Wm. Saund. 297, n. 1; 2 Chitty, Pl. 486; 2 Ld. Raym. 1503; Gould, Pl. 286; McKelv. Pl. 38.

**RIENS PASSE PER LE FAIT** (L. Fr. nothing passed by the deed). **In Pleading.** A plea which avoids the effect of a deed where its execution cannot be denied, by asserting that nothing passed thereby: for example, an allegation that the acknowledgment was before a court which had not jurisdiction.

**RIENS PER DESCENT.** A plea by an heir sued for the debt of his ancestor that he had no lands by descent from the ancestor. Chitty, Prec. 433.

**RIER, or REER-COUNTY.** Close county, in opposition to open county. It appears to be some public place which the sheriff appoints for the receipt of the king's money after the end of the county court. Fleta says it is *dies crastinus post comitatum*. Encyc. Lond.

**RIFFLARE.** To take away anything by force.

**RIGGING THE MARKET.** A term of the stock exchange denoting the practice of inflating the price of given stocks or enhancing their quoted value by a system of pretended purchasers, designed to give the air of an unusual demand for such stocks. L. R. 13 Eq. 447.

**RIGHT.** A well-founded claim.

If people believe that humanity itself establishes or proves certain claims, either upon fellow-beings, or upon society or government, they call these claims human rights; if they believe that these claims inhere in the very nature of man himself, they called them inherent, inalienable rights; if people believe that there inheres

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in monarchs a claim to rule over their subjects by divine appointment, they call the claim divine right, *jus divinum;* if the claim is founded or given by law, it is a legal right. The ideas of claim and that the claim must be well founded always constitute the idea of right. Rights can only inhere in and exist between moral beings: and no moral beings can coexist without rights, consequently without obligations. Right and obligation are correlative ideas. The idea of a *well-founded* claim becomes in law a claim founded in or established by the law: so that we may say a right in law is an *acknowledged* claim.

Men are by their inherent nature moral and social beings; they have, therefore, mutual claims upon one another. Every well-grounded claim on others is called a right, and, since the social character of man gives the element of mutuality to each claim, every right conveys along with it the idea of obligation. Right and obligation are correlative. The consciousness of all constitutes the first foundation of the right or makes the claim well grounded. Its incipiency arises instinctively out of the nature of man. Man feels that he has a right of ownership over that which he has produced out of appropriated matter, for instance, the bow he has made of appropriated wood; he feels that he has a right to exact obedience from his children, long before laws formally acknowledge or protect these rights; but he feels, too, that if he claims the bow which he made as his own, he ought to acknowledge (as correlative obligation) the same right in another man to the bow which he may have made; or if he, as father, has a right to the obedience of his children, they have a corresponding claim on him for protection as long as they are incapable to protect themselves. The idea of rights is coexistent with that of authority (or government); both are inherent in man; but if we understand by government a coherent system of laws by which a state is ruled, and if we understand by state a sovereign society, with distinct authorities to make and execute laws, then rights precede government, or the establishment of states, which is expressed in the ancient law maxim: *Ne ex regula jus sumatur, sed ex jure quod est, regula fiat.* See GOVERNMENT. We cannot refrain from referring the reader to the noble passage of Sophocles, Œdyp. Tyr. 876 *et seq.*, and to the words of Cicero, in his oration for Milo: *Est enim hæc, judices, non scripta sed nata lex; quam non didicimus, accepimus, legimus; verum ex natura ipsa arripuimus, hausimus, expressimus; ad quam non docti sed facti; non instituti sed imbuti sumus.*

As rights precede government, so we find that now rights are acknowledged above governments and their states, in the case of international law. International law is founded on rights, that is, well-grounded claims which civilized states, as individuals, make upon one another. As governments come to be more and more clearly established, rights are more clearly acknowledged and protected by the laws, and right comes to mean a claim acknowledged and protected by the law. A legal right, a constitutional right, means a right protected by the law, by the constitution; but government does not create the idea of right or original rights; it acknowledges them; just as government does not create property or values and money, it acknowledges and regulates them. If it were otherwise, the question would present itself, whence does government come? whence does it derive its own right to create rights? By compact? But whence did the contracting parties derive their right to create a government that is to make rights? We would be consistently led to adopt the idea of a government by *jus divinum*,—that is, a government deriving its authority to introduce and establish rights (bestowed on it in particular) from a source wholly separate from human society and the ethical character of man, in the same manner in which we acknowledge revelation to come from a source not human.

Rights are claims of moral beings upon one another: when we speak of rights to certain things, they are, strictly speaking, claims of persons on persons,—in the case of property, for instance, the claim of excluding others from possessing it. The idea of right indicates an ethical relation, and all moral relations may be infringed; claims may be made and established by law which are wrong in themselves and destitute of a corollary obligation; they are like every other wrong done by society or government; they prove nothing concerning the origin or essential character of rights. On the other hand, claims are gradually more clearly acknowledged, and new ones, which were not perceived in early periods, are for the first time perceived, and surrounded with legislative protection, as civilization advances. Thus, original rights, or the rights of man, are not meant to be claims which man has always perceived or insisted upon or protected, but those claims which, according to the person who uses the term, logically flow from the necessity of the physical and moral existence of man; for man is born to be a man,—that is, to lead a human existence. They have been called inalienable rights; but they have been alienated, and many of them are not perceived for long periods. Lieber, in his Political Ethics, calls them primordial rights: he means rights directly flowing from the nature of man, developed by civilization, and always showing themselves clearer and clearer as society advances. He enumerates, as such especially, the following: the right of protection; the right of personal freedom,—that is, the claim of unrestricted action except so far as the same claim of others necessitates restriction: these two rights involve the right to have justice done by the public administration

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of justice, the right of production and exchange (the right of property), the right of free locomotion and emigration, the right of communion in speech, letter, print, the right of worship, the right of influencing or sharing in the legislation. All political civilization steadily tends to bring out these rights clearer and clearer, while in the course of this civilization, from its incipiency, with its relapses, they appear more or less developed in different periods and frequently wholly in abeyance: nevertheless, they have their origin in the personality of man as a social being.

Publicists and jurists have made the following further distinction of rights:—

Rights are *perfect and imperfect.* When the things which we have a right to possess, or the actions we have a right to do, are or may be fixed and determinate, the right is a perfect one; but when the thing or the actions are vague and indeterminate, the right is an imperfect one. If a man demand his property which is withheld from him, the right that supports his demand is a perfect one, because the thing demanded is or may be fixed and determinate; but if a poor man ask relief from those from whom he has reason to expect it, the right which supports his petition is an imperfect one, because the relief which he expects is a vague, indeterminate thing. Rutherforth, Inst. c. 2, § 4; Grotius, lib. 1, c. 1, § 4.

Rights are also *absolute and qualified.* A man has an absolute right to recover property which belongs to him; an agent has a qualified right to recover such property when it has been intrusted to his care and which has been unlawfully taken out of his possession.

Rights might with propriety be also divided into *natural and civil rights;* but as all the rights which man has received from nature have been modified and acquired anew from the civil law, it is more proper, when considering their object, to divide them into political and civil rights.

*Political rights* consist in the power to participate, directly or indirectly, in the establishment or management of government. These political rights are fixed by the constitution. Every citizen has the right of voting for public officers, and of being elected; these are the political rights which the humblest citizen possesses.

*Civil rights* are those which have no relation to the establishment, support, or management of the government. These consist in the power of acquiring and enjoying property, of exercising the paternal and marital powers, and the like. It will be observed that every one, unless deprived of them by a sentence of civil death, is in the enjoyment of his civil rights,—which is not the case with political rights; for an alien, for example, has no political, although in the full enjoyment of his civil, rights.

These latter rights are divided into *absolute and relative.* The absolute rights of mankind may be reduced to three principal or primary articles: the *right of personal security*, which consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation; the right of *personal liberty*, which consists in the power of locomotion, of changing situation or removing one's person to whatsoever place one's inclination may direct, without any restraint unless by due course of law; the right of *property*, which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution save only by the laws of the land. 1 Bla. Com. 124–139.

The *relative rights are public or private:* the first are those which subsist between the people and the government; as, the right of protection on the part of the people, and the right of allegiance which is due by the people to the government; the second are the reciprocal rights of husband and wife, parent and child, guardian and ward, master and servant.

Rights are also divided into *legal and equitable.* The former are those where the party has the legal title to a thing; and in that case his remedy for an infringement of it is by an action in a court of law. Although the person holding the legal title may have no actual interest, but hold only as trustee, the suit must be in his name, and not, in general, in that of the *cestui que trust;* 8 Term 332; 1 Saund. 158, n. 1; 2 Bing. 20. The latter, or equitable rights, are those which may be enforced in a court of equity by the *cestui que trust.*

**RIGHT CLOSE, WRIT OF.** An abolished writ which lay for tenants in ancient demesne, and others of a similar nature, to try the right of their lands and tenements in the court of the lord exclusively. 1 Steph. Com. 224.

**RIGHT HEIRS.** The heirs of the testator at common law, who, if more than one, take as tenants in common. 47 L. J. Ch. 714; 35 W. R. 356.

**RIGHT OF ACTION.** The right to bring suit in a case. Also sometimes used in the same sense as right *in* action, which is identical with chose in action (*q. v.*).

**RIGHT OF APPEAL.** This is not limited to a right of appeal by statute, but includes a case where a judge has given leave to appeal. 46 L. J. Q. B. 226; 2 Q. B. D. 125.

**RIGHT OF COMMON.** See COMMON.

**RIGHT OF DISCUSSION. In Scotch Law.** The right which the cautioner (surety) has to insist that the creditor shall do his best to compel the performance of the contract by the principal debtor, before he shall be called upon. 1 Bell, Com. 347.

**RIGHT OF DIVISION. In Scotch Law.** The right which each of several cautioners (sureties) has to refuse to answer for more than his own share of the



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debt. To entitle the cautioner to this right, the other cautioners must be solvent, and there must be no words in the bond to exclude it. 1 Bell, Com. 347.

**RIGHT OF HABITATION.** **In Louisiana.** The right of dwelling gratuitously in a house the property of another. La. Civ. Code, art. 623; 3 Toullier, c. 2, p. 325; 14 *id.* n. 279, p. 330; Pothier, n. 22-25.

**RIGHT OF LIEN.** The word lien is of the same origin as the word liable, and the right of lien expresses the liability of certain property for a certain legal duty, or a right to resort to it in order to enforce the duty. 30 Pa. 277. See LIEN.

**RIGHT OF POSSESSION.** The right to possession which may reside in one man, while another has the actual possession, being the right to enter and turn out such actual occupant: *e. g.* the right of a disseisee. An apparent right of possession is one which may be defeated by a better; an actual right of possession, one which will stand the test against all opponents. 2 Bla. Com. *196.

**RIGHT OF PROPERTY.** The abstract right (*merum jus*) which remains after the actual possession has been so long gone that the right of possession is also lost, and the law will only allow recovery of the land by a writ of right. It, together with possession and right of possession, makes a perfect title; *e. g.* a disseisor has naked possession, the disseisee has right of possession and right of property. But after twenty years without entry the right of possession is transferred from the disseisee to the disseisor; and if he now buys up the right of property which alone remains in the disseisee, the disseisor will unite all three rights in himself, and thereby acquire a perfect title. 2 Bla. Com. *197.

**RIGHT OF SALE.** A contractual right of sale of an article constitutes the taker of such right an agent for the sale of the article, but does not bind the giver to supply the article; 6 L. R. Ir. 319.

**RIGHT OF SEARCH.** See SEARCH, RIGHT OF; PRISONER.

**RIGHT OF WAY.** See EASEMENT; WAY.

**RIGHT PATENT.** The name of an ancient writ, which Fitzherbert says, "ought to be brought of lands and tenements, and not of an advowson, or of common, and lieth only of an estate of fee-simple, and not for him who has a lesser estate, as tenant in tail, tenant in frank-marriage, or tenant for life." Fitzh. N.B.1.

**RIGHT, PETITION OF.** See PETITION OF RIGHT.

**RIGHT TO BEGIN.** **In Practice.** The party who asserts the affirmative of an issue has the right to begin and reply, as on him is the burden of proof. The substantial affirmative, not the verbal, gives the right; 1 Greenl. Ev. § 74; 18 B. Monr. 136; 6 Ohio St. 307; 2 Gray 260; Tay. Ev. 356. See OPENING AND CLOSING.

**RIGHT, WRIT OF.** See WRIT OF RIGHT.

**RIGHTS, BILL OF.** See BILL OF RIGHTS.

**RING.** A combination of persons, usually for the attainment of a selfish aim or purpose; especially a clique formed for controlling a market, or local or state politics. See RESTRAINT OF TRADE.

**RING-DROPPING.** **In Criminal Law.** A phrase applied in England to a trick frequently practised in committing larcenies. It is difficult to define it; it will be sufficiently exemplified by the following cases. The prisoner, with some accomplices, being in company with the prosecutor, pretended to find a valuable ring wrapped up in a paper, appearing to be a jeweller's receipt for "a rich brilliant diamond ring." They offered to leave the ring with the prosecutor if he would deposit some money and his watch as a security. The prosecutor, having accordingly laid down his watch and money on a table, was beckoned out of the room by one of the confederates, while the others took away his watch and money. This was held to amount to a larceny; 1 Leach 273. In another case, under similar circumstances, the prisoner procured from the prosecutor twenty guineas, promising to return them the next morning, and leaving the false jewel with him. This was also held to be larceny; 1 Leach 314; 2 East, Pl. Cr. 679.

**RINGING THE CHANGE.** A trick practised by a criminal, by which, on receiving a good piece of money in payment of an article, he pretends it is not good, and, changing it, returns to the buyer a spurious coin. See 2 Leach 786.

**RINGS-GIVING.** The giving of golden rings by a newly-created sergeant-at-law to every person of rank at court, from the princes of the blood, through the lords in parliament and the justices and barons of the courts, down to the meanest clerk of common pleas, to each one according to his dignity. The expense was not less than forty pounds English money. Fortesque 190; 10 Co. Introd. 23.

**RIOT.** **In Criminal Law.** A tumultuous disturbance of the peace by three persons or more, assembling together of their own authority with an intent mutually to assist each other against any who shall oppose them, in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful. Hawk. Pl. Cr. c. 65, § 1. See 3 Blackf. 209; 3 Rich. 337; 5 Pa. 83; 78 Ga. 258.

"An unlawful assembly which has actually begun to execute the purpose for

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which it is assembled, by a breach of the peace, and to the terror of the public or a lawful assembly, may become a riot if the persons assembled form and proceed to execute an unlawful purpose to the terror of the people, although they had not that purpose when they assembled." Steph. Dig. Cr. Law, art. 77.

In this case there must be proved—*first*, an unlawful assembling; 15 N. H. 169; for if a number of persons lawfully met together, as, for example, at a fire, or in a theatre or a church, should suddenly quarrel and fight, the offence is an affray, and not a riot, because there was no unlawful assembling; but if three or more being so assembled, on a dispute occurring, form into parties with promises of mutual assistance, which promises may be express, or implied from the circumstances, then the offence will no longer be an affray, but a riot; the unlawful combination will amount to an assembling within the meaning of the law. In this manner any lawful assembly may be converted into a riot; 18 Me. 346; 1 Camp. 328; 24 Hun 562. Any one who joins the rioters after they have actually commenced is equally guilty as if he had joined them while assembling.

*Secondly*, proof must be made of actual violence and force on the part of the rioters, or of such circumstances as have an apparent tendency to force and violence, and calculated to strike terror into the public mind; 2 Camp. 369. See 60 Ga. 126; 26 Mo. 429. The definition requires that the offenders should assemble of their own authority, in order to create a riot: if, therefore, the parties act under the authority of the law, they may use any necessary force to enforce their mandate, without committing this offence. See 1 Hill S. C. 362; 72 N. C. 25.

*Thirdly*, evidence must be given that the defendants acted in the riot and were participants in the disturbance; 1 Morr. Tenn. 142. It is sufficient if they be present encouraging or giving countenance, support, or acquiescence to the act; 9 Miss. 270. See 1 Russ. Cr. *382; Co. 3d Inst. 176; 4 Bla. Com. 146; Com. Dig.; Ros. Cr. Ev. Women and infants above, but not those under, the age of discretion are punishable as rioters; 1 Russ. Cr. *387.

In a case growing out of the riots in Pittsburg in 1877, under a statute making a county liable for the property "situated" therein, when destroyed by a mob, the liability was held to attach to property owned by a non-resident of the state, in transit in possession of a common carrier; 90 Pa. 397; s. c. 35 Am. Rep. 670.

In the absence of a statute giving a remedy, municipal corporations are not liable for damages resulting in loss of life from the acts of a mob or riotous assemblage, no matter what the negligence of the city officials may have been; 23 U. S. App. 533. See RIOT; MOB; UNLAWFUL ASSEMBLY; PUBLIC MEETING; AFFEAY.

**RIOT ACT.** The stat. 1 Geo. I. st. 2, c. 5. It forbade the unlawful assembling of twelve persons or more to the disturbance of the peace. If they continue together for one hour after the sheriff, mayor, etc., has commanded them to disperse, such contempt shall be felony. Stat. 24 & 25 Vict. c. 97, s. 11, requires that, in order to constitute felony, the riotous act must consist in demolishing, or beginning to demolish, some building; Moz. & W.; Cox & S. Cr. Law 104.

By statute 1 Geo. I., the Riot Act, which is directed to be read in a loud voice by a justice of the peace or other person authorized by the act, is to be in the following words or in words of like effect:—"Our Sovereign Lord the King chargeth and commandeth all persons, being assembled, immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, upon the pains contained in the act made in the first year of King George for preventing tumults and riotous assemblies. God save the King."

Persons who wilfully obstruct or hinder the reading of the proclamation are guilty of felony, and if the proclamation would have been read had it not been prevented by the interference of any person or persons, any twelve or more persons who remain together after the proclamation would have been read, are guilty of felony, as if the act had been read. See 21 St. Tr. 485.

**RIOTOUSLY. In Pleading.** A technical word, properly used in an indictment for a riot, which of itself implies violence. 2 Sess. Cas. Sc. 13; 2 Stra. 834; 2 Chitty, Cr. Law 489.

**RIPA** (Lat.). The banks of a river, or the place beyond which the waters do not in their natural course overflow.

An extraordinary overflow does not change the banks of the river. Pothier, Pand. lib. 50. See BANKS; RIVER.

**RIPARIAN NATIONS.** Those that possess opposite banks or different parts of banks of the same river.

**RIPARIAN PROPRIETORS.** Those who own the lands bounding upon a watercourse. 4 Mass. 397.

Each riparian proprietor owns that portion of the bed of the river (not navigable) which is adjoining his land *usque ad filum aquæ*; or, in other words, to the thread or central line of the stream; Hargr. Tracts 5; Holt 499; 3 Dane, Abr. 4; 7 Mass. 496; 5 Wend. 423; 2 Conn. 482; 11 Ohio St. 138; Ang. Wat.-Courses 3; 28 Am. Law Reg. 147, 337; 47 Ill. App. 258; 142 U. S. 254. Where the middle of a stream is the boundary between states or private landowners, that boundary follows any changes in the stream which are due to a gradual accretion or degradation of its banks; 143 U. S. 359; but where a navigable stream suddenly changes its course, the owner of the shore does not acquire title to the abandoned channel; 117 Mo. 33.

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Where one had obtained title by adverse possession of land bounded by a stream, it was held that he had not acquired title to the middle line of the stream; 39 S. W. Rep. (Ky.) 495. See RIVER; WATER-COURSE; TIDE-WATER; WHARF; ALLUVION; AVULSION; FISHERY; RELICTION; LAKE; ACCRETION.

As to the rights of riparian owners over the bed of navigable waters between high and low water-mark, the decisions are somewhat conflicting, although the general rule is that the riparian owner holds the right of access to the water, subject to the right of the state to improve navigation; Wood, Nuisances, 3d ed. 413, 592 *et seq.*; 81 Pa. 80; 7 W. N. C. Pa. 322; 122 Pa. 191. That the riparian owner has a right of action where his access to the water is cut off by a structure erected between high and low water mark, by a corporation acting under its charter, see L. R. 5 H. L. 418; 10 Wall. 497; 25 Wend. 462; 42 Wisc. 214; s. c. 24 Am. Rep. 394, n.; *contra*, 32 Ia. 106; s. c. 7 Am. Rep. 176; 8 Cow. 146; 34 N. J. 532; 3 Am. Rep. 269. Where, by the action of the sea, the sea front was cut off between certain points, and a beach formed outside the main-land, divided from it by a navigable bay, the title to the new formation was held to be in the owners of the part cut off; 61 How. Pr. 197. See 95 Ill. 84; 85 Ia. 241. An owner does not lose his property in the soil by submersion or avulsion if he afterwards reclaims it by natural or artificial means, nor does the length of time during which the soil was submerged bar his rights: 169 Ill. 392.

Where the land of the riparian owner ended in an almost perpendicular bank from five to six feet high, to the foot of which the bed of the river reached, often rising some height above it, and by accretion caused by the planting of trees in the river a short distance from the bank by one who owned the bed of the river and a separate fishery, the accretion was held to be the property of the latter, and not of the riparian owner; [1896] 2 Ch. 1, practically reversing [1896] 1 Ch. 78. In the leading cases of Gould v. Hudson River R. R. Co., 6 N. Y. 522, it was held, Edmonds, J., dissenting, that "whatever rights the owner of the land has in the river, or in its shore below high-water mark, are public rights, which are under the control of the legislative power, and any loss sustained through the act of the legislature affecting them is *damnum absque injuria*." Government grants for lands bordering upon navigable waters extend only to high-water mark; 85 Fed. Rep. 45. One riparian owner cannot build out into the stream, so as to injure the land of another riparian owner, even when armed with a license granted under act of parliament; L. R. 1 App. Cas. 662. The owner of lands situated on the sea cannot maintain ejectment for that portion of a wharf constructed on his land, which extends below low-water mark; 52 Cal. 385. The owner of both sides of a stream above tide-water has a right to the ice formed between his boundaries; 14 Chic. Leg. News 83. The intervention of a public road between an estate and a river does not prevent the owner of the estate from being considered as the front or riparian proprietor, when nothing susceptible of private ownership exists between the road and river; 44 La. Ann. 1043. A riparian proprietor of land bordering upon a running stream has a right to the flow of its waters as a natural incident to his estate, and they cannot be lawfully diverted against his consent; 133 U. S. 541.

As to riparian rights, see 10 L. R. A. 207, n.; 3 Kent [427]; RIVER; LAKES.

**RIPTOWELL, or REAPTOWEL.** A gratuity or reward given to tenants after they had reaped their lord's corn, or done other customary duties. Cowell.

**RIPUARIAN LAW.** A code of laws of the Franks, who occupied the country upon the Rhine, the Meuse, and the Scheldt, who were collectively known by the name Ripuarians, and their laws as Ripuarian law.

**RISKS AND PERILS. In Insurance.** Those causes against loss from which the insurer is to be protected in virtue of the contract for insurance.

The risk or peril in a life policy is death; under a fire policy, damage by fire; and under a marine policy, by perils of the seas, usually including fire; and under a policy upon subjects at risk in lake, river, or canal navigation, by perils of the same. See INSURABLE INTEREST; INSURANCE; POLICY; WARRANTY.

Under a marine insurance the risks are from a certain place to a certain other, or from one date to another. The perils usually insured against as "perils of the seas" are—fire, lightning, winds, waves, rocks, shoals, and collisions, and also the perils of hostile capture, piracy, theft, arrest, barratry, and jettisons. 1 Phill. Ins. § 1099. But a distinction is made between the extraordinary action of perils of the seas, for which underwriters are liable, and wear and tear and deterioration by decay, for which they are not liable; 1 Phill. Ins. § 1105. See PERILS OF THE SEA.

Perils of lakes, rivers, etc., are analogous to those of the seas; 1 Phill. Ins. § 1099, n.

Underwriters are not liable for loss occasioned by the gross misconduct of the assured or imputable to him; Biddle, Ins. 981; but if a vessel is seaworthy, with suitable officers and crew, underwriters are liable for loss though occasioned through the mistakes or want of assiduity and vigilance of the officers or men; 1 Phill. Ins. § 1049; Beach, Ins. 922. Underwriters are not answerable for loss directly attributable to the qualifications of the insured subject, independently of the specified risks; 1 Phillips, Ins. c. xiii. sect. v.; or for loss distinctly occasioned by the

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fraudulent or gross negligence of the assured.

Insurance against illegal risks—such as trading with an enemy, the slave-trade, piratical cruisers, and illegal kinds of business—is void; 1 Phill. Ins. §§ 210, 691. Policies usually contain express exceptions of some risks besides those impliedly excepted. These may be—in *maritime insurance*, contraband and illicit, interloping trade, violation of blockade, mobs and civil commotions; in *fire policies*, loss on jewelry, paintings, sculpture, by hazardous trades, etc.; in *life policies*, loss by suicide, risk in certain climates or localities, and in certain hazardous employments without express permission; 1 Phill. Ins. §§ 55, 63, 64. See Loss; Total Loss; Average.

**RIVAGE.** In French law, the shore, as of the sea. In English law, a toll anciently paid to the crown for the passage of boats or vessels on certain rivers. Cowel.

**RIVER.** A natural stream of water flowing betwixt banks or walls in a bed of considerable depth and width, being so called whether its current sets always one way or flows and reflows with the tide. Woolrych, Wat. 40; 16 N. H. 467.

A body of flowing water; a running stream of no specific dimensions, larger than a brook or rivulet, and pent on either side by walls or banks; 7 Ind. App. 309.

Rivers are either public or private. Public rivers are divided into navigable and non-navigable,—the distinction being that the former flow and reflow with the tide, while the latter do not. Both are navigable in the popular sense of the term; Ang. Tide-Wat. 74; 7 Pet. 324; 5 Pick. 199; 26 Wend. 404; 4 B. & C. 602.

At common law, the bed or soil of all rivers subject to the ebb and flow of the tide, to the extent of such ebb and flow, belongs to the crown; and the bed or soil of all rivers above the ebb and flow of the tide, or in which there is no tidal effect, belongs to the riparian proprietors, each owning to the centre or thread,—*ad filum aquæ*, which see,—where the opposite banks belong to different persons; Ang. Tide-Wat. 20; Daveis 149; 5 B. & Ald. 268. In this country the common law has been recognized as the law of many of the states,—the state succeeding to the right of the crown; 4 Pick. 268; 26 Wend. 404; 31 Me. 9; 1 Halst. 1; 2 Conn. 481; 2 Swan 9; 16 Ohio 540; 4 Wis. 486; 117 Mo. 33. See 146 U. S. 387. But in some states the common-law distinction founded on the tide is not recognized, and it is held that the ownership of the bed of soil of all rivers navigable for any useful purpose of trade or agriculture, whether tidal or fresh-water, is in the state; 2 Binn. 475; 14 S. & R. 71; 3 Ired. 277; 1 M'Cord 580; 3 Ia. 1; 29 Miss. 21; 11 Ala. 436; 71 Hun 153; 122 Pa. 191. See 152 U. S. 1. At common law, the ownership of the crown extends to high-water mark; Ang. Tide-Wat. 69; 3 B. & Ald. 967; and in several states this rule has been followed; 12 Barb. 616; 3 Zabr. 624; 7 Cush. 53; 7 Pet. 324; 3 How. 221; 25 Conn. 346; 44 N. J. Eq. 398; 124 U. S. 656; but in others it has been modified by extending the ownership of the riparian proprietor, subject to the servitudes of navigation and fishery, to low-water mark; 28 Pa. 206; 14 B. Monr. 367; 11 Ohio 138; 95 Ala. 116; see 122 Pa. 191; 84 Ky. 372; unless these decisions may be explained as applying to fresh water rivers; 2 Smith, Lead. Cas. 224.

In Wisconsin the riparian ownership extends to the centre or thread of the stream, subject, if such stream be navigable, to the right of the public to its use as a public highway for the passage of vessels; 142 U. S. 254.

In Michigan, a grant of land bounded by a stream, whether navigable or not, carries with it the bed of the stream to the centre line thereof; 159 U. S. 87.

So in Ohio it was held that the ownership of a riparian proprietor to the middle of a navigable river does not carry with it the right to the exclusive use of the water over land ordinarily covered by water, but is subordinate to the paramount easement of navigation by the public, which includes the right to use such water for navigation and commerce, and such uses as may be reasonably incident thereto; Pollock *v.* Cleveland Ship Building Co., Ohio Sup. Ct., June 22, 1897. Among the rights of the public is that of mooring vessels for repairs and of putting in engine, boilers, and machinery, after such vessels have been launched; *id.* The right of the public does not extend to the use of lands not covered by water, and such use may be prevented by injunction, although the land may be unimproved and there is no present damage; *id.*

Upon the acquisition of territory by the United States, whether by cession from one of the states, or by treaty with a foreign country, or by discovery and settlement, the title and dominion over land under tide water passes to the United States for the benefit of the whole people and in trust for the several states; 152 U. S. 1.

In England, many rivers originally private have become public, as regards the right of navigation, either by immemorial use or by acts of parliament; Woolr. Wat. 40. In this country, all rivers, whether tidal or fresh-water, are, of common right, navigable highways, if naturally capable of use for the floating of vessels, boats, rafts, or even logs, or "whenever they are found of sufficient capacity to float the products of the mines, the forests, or the tillage of the country through which they flow, to market;" 8 Barb. 239; 31 Me. 9; 3 N. H. 321; 10 Ill. 351; 2 Swan 9; 2 Mich. 519; 5 Ind. 8. As to the navigability of rivers. See Navigable Waters. The state has the right to improve all such rivers, and to regulate them by lawful enactments for the public good; 4 Rich. 69; 31 Me. 361; 5 Ind. 13; 29 Miss. 21. Any obstruction of them without legislative authority is a

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nuisance, and any persons having occasion to use the river may abate the same, or, if injured thereby, may receive his damages from its author; 28 Pa. 195; 4 Wisc. 454; 4 Cal. 180; 10 Mass. 70; 1 McCrary 281; 80 N. Y. 239; 53 Md. 422; 8 Mo. App. 266. See BRIDGE. One who seeks to abate an obstruction in a navigable stream and for an injunction must allege and show that the commerce for which he would utilize the stream is lawful; 50 Fed. Rep. 429. By the ordinance of 1787, art. 4, relating to the northwestern territory, it is provided that the navigable waters leading into the Mississippi and St. Lawrence, and the carrying-places between the same, shall be common highways and forever free; 29 Miss. 21; 2 Mich. 519.

Congress has absolute power over the navigable waters of the United States and may declare what constitutes obstruction thereto. The act of March 1, 1893, created a California *débris* commission and prohibited hydraulic mining "directly or indirectly injuring the navigability" of the Sacramento and San Joaquin river systems; the commission may, on petition, grant permission to mine. The act is intended to prohibit such mining until such permission is granted; 81 Fed. Rep. 243, affirmed in 48 U. S. App. 2; s. c. 83 Fed. Rep. 2. See 7 Yale L. J. 385.

To bring obstructions and nuisances in navigable waters within a state within the cognizance of the federal courts, there must be a federal statute directly applicable to such streams; 81 Fed. Rep. 658.

Rivers, when naturally unfit for public use, as above described, are called private rivers. They are the private property of the riparian proprietors, and cannot be appropriated to public use, as highways, by deepening or improving their channels, without compensation to their owners; 16 Ohio 540; 6 Barb. 265; 8 Pa. 379; 10 Me. 278; 1 McCord 580. And see WATER-COURSE.

A river, then, may be considered—as private in the case of shallow and obstructed streams; as private property, but subject to public use, when it can be navigated; and as public, both with regard to its use and property. Some rivers possess all these qualities. The Hudson is mentioned as an instance; in one part it is entirely private property; in another, the public have the use of it; and it is public property from the mouth as high up as the tide flows; 6 Barb. 265. See, generally, La. Civ. Code 444; Bac. Abr. *Prerogatives* (B 3); Jacobsen, Sea Laws; 3 Kent 411; Woolr. Waters; Schultes, Aquatic Rights; Washb. R. P.; Cruise, Dig., Greenl. ed.; BOUNDARIES; FISHERY; RIPARIAN PROPRIETORS; POLLUTION.

**In International Law.** A river which is entirely within a state is part of its territory. Where a river forms a boundary between two states and flows to the ocean, it is "now generally considered that the right of navigation, for commercial purposes, is common to all the states inhabiting the different parts of its banks; but this is a right of innocent passage only, subject to the regulations of the abutting state. These rights have usually been adjusted by treaty; the Rhine is free in its whole navigable length, under the Congress of Vienna; and so of most of the other large rivers of Europe. In 1795, the free navigation of the Mississippi was secured to the United States by treaty. After much controversy, the St. Lawrence was, in 1871, stipulated to be free to the United States for the purposes of commerce, from the point where it ceased to be a boundary between it and Canada, to the sea, subject to the regulations of Great Britain or Canada, not inconsistent with such privilege. See 1 Halleck, Int. L., Baker's ed. 171.

**Levees.** The construction and maintenance of levees is an important subject of legislation in the states bordering on the Mississippi river and its tributaries. Such statutes usually provide for the construction of levees by some public authorities or under delegated power of eminent domain, and provide for a charge on the land benefited thereby for making and repairing the same. This tax is usually a lien on the land and applies to all lands lying within a certain specified distance of the Mississippi river. It has been held that such taxation is constitutional, and that the power, whether exercised for general or local purposes, belongs to the legislature and is not subject to interference from the court; 27 Miss. 209. The legislature has power to impose local taxation for such purposes, and laws imposing taxes upon certain districts, whether the citizens affected are of the same political division, subdivision, or district or not, are constitutional; 38 Miss. 652.

The building of the levees is a proper subject of legislation and a general tax may be levied therefor; 26 La. Ann. 564; 22 *id.* 58. In Louisiana, it has been made a criminal offence to cut levees; Laws 1875, 49. Crevasses in the district, do not release the owner of the land from the levee tax; there is in such case a greater necessity for its payment; 16 La. Ann. 440.

**RIXA** (Lat.). **In Civil Law.** A dispute; a quarrel. Dig. 48. 8. 17.

**RIXATRIX** (Lat.). A common scold.

**ROAD.** A passage through the country for the use of the people. 3 Yeates 421; and it is frequently used as a synonym of railroad; 46 N. J. L. 292; 33 Fed. Rep. 699; as when a charter power to take stock in companies for making "roads" to a city was held to authorize a subscription to the stock of a railroad; 161 U. S. 434.

A state statute imposing a duty of two days' labor in every year on each person for the purpose of keeping roads in repair is not unconstitutional; 91 Ga. 770; 36 N. E. Rep. (Ohio) 832. As to the constitutionality of an act authorizing the establishment of a private way over property of another, see EMINENT DOMAIN, where the

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cases are collected, and see also 4 Ore. 318, where such an act was held unconstitutional. See HIGHWAY; WAY; STREET; DEDICATION; EASEMENT.

**In Maritime Law.** An open passage of the sea, which, from the situation of the adjacent land and its own depth and width, affords a secure place for the common riding and anchoring of vessels. Hale, *de Port. Mar.* p. 2, c. 2. This word, however, does not appear to have a very definite meaning; 2 Chitty, Com. Law 4, 5. Often called "roadstead"; 2 Hugh. 17.

**ROADBED, ROADWAY.** The roadbed of a railroad "is the foundation upon which the superstructure of a railroad rests;" the roadway is the right of way which has been held to be the property liable to taxation; 32 Cal. 499, cited in 118 U. S. 413. See 25 Md. 353. The roadbed does not include ends of ties of unusual length; 60 Ark. 681. A space of 10 ft. between railroad tracks is not the roadbed; 31 S. W. Rep. (Mo.) 578.

**ROBBATOR.** A robber. Bract.

**ROBBER.** One who commits a robbery. One who feloniously and forcibly takes goods or money to any value from the person of another by violence or putting him in fear.

**ROBBERY. In Criminal Law.** The felonious and forcible taking from the person of another, goods or money to any value, by violence or putting him in fear. 4 Bla. Com. 243; Baldw. 102. See 12 Ga. 293; 33 Neb. 354; 2 N. Dak. 510; 28 N. E. Rep. (Ind.) 868.

In this offence the kind and value of the property taken is not material, but it must be of some value, however little, to the person robbed; 61 Ala. 287; 73 N. C. 83; 58 Mo. 581.

Robbery, by the common law, is larceny from the person, accompanied by violence or by putting in fear; and an indictment therefor must allege that the taking was from the person, and that it was by violence, or by putting in fear, in addition to the averments that are necessary in indictments for other larcenies; Jebb 62; 1 Leach 195; 7 Mass. 242; 17 *id.* 539; 8 Cush. 215.

By "taking from the person" is meant not only the immediate taking from his person, but also in his presence when it is done with violence and against his consent; 1 Hale, Pl. Cr. 533; 2 Russ. Cr. 61; 3 Wash. C. C. 209; 11 Humphr. 167; Whart. C. L. 847. The taking must be by violence or putting the owner in fear; but both these circumstances need not concur; for if a man should be knocked down, and then robbed while he is insensible, the offence is still a robbery; 4 Binn. 379. And if the party be put in fear by threats and then robbed, it is not necessary there should be any greater violence; 17 Mass. 539. The violence or putting in fear must be at the time of the act or immediately preceding; 1 C. & P. 304. See 53 Kan. 324.

A person taking property from another under a *bona fide* claim of right, and with the purpose of applying it to the payment of a debt from the latter to himself, is not guilty of robbery, for in such case the *animus furandi* is lacking; 90 Ga. 701.

One who is present and aids and abets a robbery is punishable as a principal, though he receives none of the money, and the amount taken is immaterial; 104 Mo. 365.

**ROE, RICHARD.** See EJECTMENT; PLEDGES.

**ROGATORY LETTERS.** See LETTERS ROGATORY.

**ROGUE.** A French word, which in that language signifies proud, arrogant. In some of the ancient English statutes it means an idle sturdy beggar, which is its meaning in law. Rogues are usually punished as vagrants. Although the word rogue is a word of reproach, yet to charge one as a rogue is not actionable; 5 Binn. 219. See 2 Dev. 162; Hard. 529.

**ROGUES' GALLERY.** See PRISONER.

**ROLE D'EQUIPAGE.** The list of a ship's crew; the muster roll.

**ROLL.** A schedule of parchment which may be turned up with the hand in the form of a pipe or tube. Jacob. Law Dict.; 2 Hun 502.

In early times, before paper came in common use, parchment was the substance employed for making records, and as the art of bookbinding was but little used, economy suggested as the most convenient mode the adding of sheet to sheet, as was found requisite, and they were tacked together in such a manner that the whole length might be wound up together in the form of spiral rolls. Rolls of the exchequer are kept in that court relating to the revenue. The ancient manuscript registers of the proceedings in parliament were called Rolls of Parliament. A Roll of the Temple is kept in each of the two temples, called the calves' head roll, wherein every bencher, barrister, and student is taxed yearly.

The records of a court or offices.

**ROLL OF A MANOR.** See COURT ROLLS; COPYHOLD.

**ROLLING STOCK.** Rolling stock has been held in some cases to be a fixture, so far as to pass under a mortgage of the realty; 25 Ill. 357; 12 Bush 233; 3 Dill. 412. Where essential to the operation of the road, it is held to pass under a mortgage of the railroad; 56 Me. 458; 18 Md. 493; 6 Wall. 142. A mortgage of a railroad afterwards to be built, and of the rolling stock appurtenant to such road, attaches to the rolling stock as soon as it is acquired: 23 How. 117; 6 Biss. 529; 11 Wall. 459; Jones, Railr. Sec. 147. It is not essential that the rolling stock should be especially mentioned in the mortgage; general words are enough. For instance, a mortgage of a line of a railroad "with all the revenue or tolls thereof" covers rolling stock; 18 Md. 183. See also 53 Ala. 237; 4 Biss. 35. See FUTURE ACQUIRED PROPERTY.

Rolling stock has been held to be subject to execution as a chattel; 130 Ind.

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97; and to attachment; 140 Mass. 131; so, when not in use; 37 N. H. 410; but where a company is insolvent or the equipment is mortgaged, it has been held not subject to execution; 3 Grant, Cas. 384. It is held that it may be sold for taxes as personal property, notwithstanding a statute declaring it to be a fixture; 21 Wis. 44; and see 51 Ia. 184, 714. It is held to be a chattel in 20 N. J. 307, reversing 28 *id.* 277. The better opinion is said to be that it is personalty; 3 Wood, Rys. 1961, citing 39 Ia. 56; 53 Mo. 17; 54 N. Y. 315; 37 N. H. 410; 29 N. J. Eq. 311.

It is held that a mortgage of rolling stock should be recorded as a chattel mortgage; 29 N. J. Eq. 311; but it has also been held that chattel mortgage acts do not apply; 105 U. S. 77; 3 Dill. 412. The constitutions of some states provide that rolling stock shall be considered personal property and shall be liable to execution and sale. Such is the case in Arkansas, Illinois, Kentucky, Mississippi, Missouri, Nebraska, South Dakota, Texas, Washington, and West Virginia.

Of late years railroad companies have secured large quantities of rolling stock on deferred periodical payments, commonly known as the "car trust" plan. The contracts in some instances are drawn as *leases* from the builder or owner to the railroad company. In other cases they take the form of conditional sales. The earliest car trust was created in Pennsylvania in 1868. It is probable that the form of a lease or hiring of the cars, with a reservation of title in the former owner, was rendered necessary in that state because of the well-established rule there that a reservation of title under a conditional sale of a chattel is void as against the vendee's creditors, when the vendee is in possession. See SALES. The weight of authority would seem to hold that such contracts, though drawn in the form of bailments, if the aggregate of all the instalments is really the purchase price and the contract gives the "bailee" an option to purchase when all the payments have been made, are, in legal effect, conditional sales. It was said in 93 U. S. 664, in holding such a contract to be a conditional sale: "Nor is the transaction changed by giving it the form of a lease. In determining the real character of a contract, courts will always look to its purpose rather than to the name given it by the parties." So in 54 Vt. 544, the "hire" of an organ was held to be a conditional sale. To the same effect is 102 U. S. 235. See *id.* 1. In 102 U. S. 1, the court considered it unnecessary to decide the question. In 3 Super. Ct. Rep. (Pa.) 149, a "lease" or purchase on the instalment plan was held to be a conditional sale. So of the sale of a clock upon weekly payments, the aggregate of which amounted to the price of the article; 166 Pa. 89; s. c. 27 L. R. A. 388; but see 115 Pa. 487. In 84 Fed. Rep. 582, it was held that whether a contract for the sale of fixed machinery was a bailment or a conditional sale depended upon the intent of the parties. The contract there was held a bailment.

Statutes have been passed in nearly all the states and territories providing that conditional sales or contracts of leasing or hiring of railroad equipment shall be valid if duly acknowledged and recorded, and the name of the vendor, etc., placed on both sides of each car. Most of these acts are substantially uniform in their language. There is some diversity among them as to the place of record, some specifying the county where the principal office of the vendee is, others the counties through which its line runs, and still others the office of the secretary of state. Many of these acts were passed through the instrumentality of Joseph I. Doran, Esq., in 1881 to 1883, and others were passed in 1891 and subsequently, by the efforts of the present editor. An existing statute in Utah covers the necessary ground for the protection of these contracts. No acts exist in California, Idaho, or Nevada.

The lien on, or title to, cars thus sold is not subordinate to the lien of the company's mortgage; 99 U. S. 256; even if the contract has not been recorded; 102 U. S. 1.

Contracts of this kind usually contain a clause that the vendor or lessor may retake the property on default in the payment of instalments. Statutes in some of the states forbid the retaking of chattels sold under the instalment plan except upon the condition of refunding the purchase-money paid, less a certain proportion to cover the depreciation. See 46 Ohio St. 450.

There is a conflict of authority as to the right of the vendor to collect unpaid purchase-money after retaking the property. Some cases hold that the retaking excludes further recovery; other cases hold that the remedies are not inconsistent. See 32 L. R. A. 455, where the cases are collected. The fact that the property has been destroyed after possession has passed to the conditional vendee or lessee does not relieve him from making the periodical payments; 107 N. C. 47; 66 Miss. 48; 58 Ill. 248; *contra*, 2 Tex. App. 153. See also 111 Mass. 355.

Usually a clause is inserted covering this ground, and the contract provides that the vendor, upon retaking, shall sell the property and credit the proceeds on the unpaid instalments, holding the vendee for the residue then remaining unpaid.

The usual lease notes or warrants given to cover the periodical payments have been held to be negotiable instruments; 136 U. S. 268.

A car trust association is an association of capitalists formed to buy and sell rolling stock, usually for a particular road. The members furnish the funds to buy the property and the association transfers it to the railroad company, usually through the intervention of a trustee, under a conditional sale (sometimes in the form of a lease), the purchase-money being payable in a series of years, by instalments, and the title to pass in the railroad company upon the payment of the final instalment.

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The trustee issues certificates to the members of the association indicating the amount of their investment. The railroad company pays the instalments with interest to the trustee, who distributes to the holders of the certificates. Such an association has been held to be a partnership; 140 U. S. 346; but in 29 Fed. Rep. 410, such an association was held to be an unincorporated association resembling those partnerships which are not dissolved by the death or bankruptcy of a member, or by the assignment of a member's interest, and such as are referred to in 102 U. S. 64; 114 *id.* 252. They are analogous to mining partnership; 23 Cal. 206. See PARTNERSHIP. They are said to be unincorporated joint stock associations with transferable shares; Poll. Contr. 222.

As to the status of car trust cars under railroad receiverships, see LEASE; MORTGAGE; RECEIVER; RECEIVERS' CERTIFICATES.

See a pamphlet by Davis & Browne, and a paper by the present editor in Am. Bar Asso. Reports (1885).

Cars of other companies in use on a railroad are materials furnished for its operation, and claims for their loss when destroyed are properly payable by the receivers as operating expenses; 88 Fed. Rep. 636.

A railroad company receiving the cars of other companies to be hauled in its trains is bound to inspect such cars before putting them on its trains, and is responsible for the consequence of defects in them which might have been discovered by a reasonable inspection; 157 U. S. 72.

See LEX REI SITÆ.

**ROLLING STOCK (OF RAILWAYS) PROTECTION ACT.** The act of 35 & 36 Vict. c. 50, passed to protect the rolling stock of railways from distress or sale in certain cases.

**ROLLS, MASTER OF THE.** See MASTER OF THE ROLLS; JUDICATURE ACTS.

**ROLLS OFFICE OF THE CHANCERY.** An office in Chancery Lane, London, which contains rolls and records of the high court of chancery, of which the master of the rolls is keeper.

**ROMAN CATHOLIC CHARITIES ACT.** The stat. 23 & 24 Vict. c. 134, providing a method for enjoying estates given upon trust for Roman Catholics, but invalidated by reason of certain of the trusts being superstitious or otherwise illegal. 3 Steph. Com. 76. See SUPERSTITIOUS USES; CHARITIES.

**ROMAN CATHOLIC CHURCH.** See PAPACY.

**ROMAN LAW.** See CIVIL LAW.

**ROME PENNY, ROME SCOT, or ROME FEOH.** See PETER PENCE.

**ROMNEY MARSH.** A tract of land in the county of Kent, England, containing twenty-four thousand acres, governed by certain ancient and equitable laws of sewers, composed by Henry de Bathe, a venerable judge in the reign of king Henry III.; from which laws all commissioners of sewers in England may receive light and direction. 3 Steph. Com. 442; 3 Bla. Com. 73.

**ROOD OF LAND.** The fourth part of an acre.

**ROOT.** The part of a tree or plant under ground from which it draws most of its nourishment from the earth. See TREE.

In a figurative sense, *root* is used to signify the person from whom one or more others are descended. See CONSANGUINITY; LINE.

**ROTA** (Lat.). A court. A celebrated court of appeals at Rome, of which one judge must be a German, one a Frenchman, two Spaniards, and eight Italians. Encyc. Brit. Its decisions had great weight, but were not law, although judged by the law. There was also a celebrated rota at Genoa about the sixteenth century, or before, whose decisions in maritime matters form the first part of *Straccha de Merc.* See Ingersoll's Roccus.

**ROTURIER. In Old French Law.** One not noble. *Dict. de l'Acad. Franç.* A free commoner; one who did not hold his land by homage and fealty, yet owed certain services. Howard, *Dict. de Normande.*

**ROUP. In Scotch Law.** Sale by auction. Auction. Bell, Dict. *Auction.*

**ROUT.** A disturbance of the peace by persons assembled together with an intention to do a thing which if executed would have made them rioters, and actually making a motion towards the execution of their purpose. Hawk. Pl. C. 516.

It generally agrees in all particulars with a riot, except only in this: that it may be a complete offence without the execution of the intended enterprise; *id.* c. 65, s. 14; 1 Russ. Cr. 253; 4 Bla. Com. 140. Where a number of persons met, staked money, and agreed to engage in a prize-fight, it was held a rout; 2 Speers 599. Not less than three assembled persons are sufficient to constitute the offence; 2 Bish. Cr. L. § 1186. See RIOT.

**ROUTOUSLY.** A technical word, properly used in indictments for a rout as descriptive of the offence. 2 Salk. 593.

**ROYAL BURGHS.** Boroughs incorporated in Scotland by royal charter. Bell.

**ROYAL ASSENT.** See LE ROI LE VEUT; VETO.

**ROYAL COURTS OF JUSTICE.** The buildings, together with all the additions thereto, erected under the statute 28 & 29 Vict. c. 48, 49.

**ROYAL FISH.** See FISH ROYAL.

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**ROYAL GRANTS.** Conveyances of record in England. They are of two kinds: letters patent and letters close; 2 Bla. Com. 346. See PATENT.

**ROYAL HONORS.** In diplomatic language, by this term is understood the rights enjoyed by every empire or kingdom in Europe, by the pope, the grand duchies of Germany, and the Swiss confederation, to precedence over all others who do not enjoy the same rank, with the exclusive right of sending to other states public ministers of the first rank, as ambassadors, together with other distinctive titles and ceremonies. Vattel, Law of Nat. b. 2, c. 3, § 38; Wheat. Int. Law pt. 2, c. 3, § 2.

**ROYAL MINES.** See MINES AND MINING.

**ROYALTY.** A payment reserved by the grantor of a patent, mining lease, etc., and payable proportionately to the use made of such right., 1 Ex. Div. 310. See PATENT.

**RUBRIC.** The title or inscription of any law or statute; because the copyists formerly drew and painted the title of laws and statutes in red letters (*rubro colore*). Ayliffe, Pand. b. 1, t. 8; *Dict. de Jur.*

**RUDENESS.** An impolite action, contrary to the usual rules observed in society, committed by one person against another. This is a relative term, which it is difficult to define, and must be considered with reference to the station in life which the parties occupy; 2 Hagg. Eccl. 731. See BATTERY.

**RULE.** A regulation or formula to which conduct must be conformed. See GENERAL RULES.

An order or direction. See ORDER.

To establish by direction; to determine; to decide.

**RULE ABSOLUTE.** If, upon the hearing of a rule to show cause, the cause shown should be decided insufficient, the rule is made absolute, *i. e.* the court makes final order for the party to perform the requirements of the rule. See RULE NISI.

**RULE DAY.** The regularly appointed day on which to make orders to show cause returnable.

In the United States circuit court it is the first Monday of each month, on which subpœnas are to be made returnable, and answers and replications filed.

**RULE IN SHELLEY'S CASE.** See SHELLEY'S CASE, RULE IN.

**RULE NISI. In Practice.** A rule obtained on motion *ex parte* to show cause against the particular relief sought. Notice is served on the party against whom the rule is obtained, and the case is then heard like other motions, except that the party showing cause is entitled to open and reply. The rule is made absolute unless (*nisi*) good cause is shown against it; 3 Steph. Com. 680.

**RULE OF COURSE.** A rule which a court authorizes their officers to grant without formal application to a judge.

**RULE OF COURT.** An order made by a court having competent jurisdiction.

Rules of court are either general or special; the former are the laws by which the practice of the court is governed; the latter are special orders made in particular cases.

Disobedience to these is punished by giving judgment against the disobedient party, or by attachment for contempt.

**RULE OF LAW.** A general principle of law, recognized as such by authorities. It is called a rule because in new cases it is a rule for their decision; it embraces particular cases within general principles; 1 Bla. Com. 44; Ram, Judgm. 30; 3 B. & Ad. 34; 1 B. & C. 86; 4 Maule & S. 348. See MAXIM.

**RULE OF 1793.** Where a commerce which had previously been considered a nominal monopoly is thrown open, in time of war, to all nations, by a general regulation, neutrals have no right to avail themselves of the concession, and their entrance on such trade is a breach of the impartiality they are bound to observe. 2 Halleck, Int. L. 302.

**RULE OF THE ROAD.** See NAVIGATION RULES; HIGHWAY; BICYCLES.

**RULE OF THE WAR OF 1756.** A rule relating to neutrals, practically established in 1756, and universally promulgated, providing that "neutrals are not to carry on in times of war a trade which was interdicted to them in times of peace." Chitty, Law of Nat. 166; 2 C. Rob. 186; 4 *id.* App.; 1 Kent 82.

**RULE TO PLEAD.** A rule of court requiring defendant to plead within a given time, entered as of course by the plaintiff on filing his declaration, or thereafter. On defendant's failure to put in his plea accordingly, a judgment in the nature of a judgment by default may be entered against him. In England, under the common-law Procedure Act of 1852, the rule to plead is abolished, a notice to plead indorsed on the declaration being sufficient. The Judicature Act of 1875 allows the defendant eight days for his defence after the delivery of the statement of claim.

**RULE TO SHOW CAUSE.** An order made by the court, in a particular case, upon motion of one of the parties calling upon the other to appear at a particular time before the court, to show cause, if any he have, why a certain thing should not be done.

This rule is granted generally upon the oath or affirmation of the applicant; but upon the hearing the evidence of competent witnesses must be given to support the

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rule, and the affidavit of the applicant is insufficient. See RULE ABSOLUTE; RULE NISI.

**RULES.** Certain limits without the actual walls of the prisons, where the prisoner, on proper security previously given to the proper authority, may reside. These limits are considered, for all legal and practical purposes, as merely a further extension of the prison walls. So used in America. See 3 Bibb 202. The rules or permission to reside without the prison may be obtained by any person not committed criminally; 2 Stra. 845; nor for contempt; *id.* 817; by satisfying the marshal or warden or other authority of the security with which he may grant such permission.

Proceedings in an action out of court, and in vacation time. See 12 Gratt. 312.

**RULES OF PRACTICE.** Certain orders made by the courts for the purpose of regulating the practice of members of the bar and others.

Every court of record has an inherent power to make rules for the transaction of its business; which rules they may from time to time change, alter, rescind, or repeal. While they are in force, they must be applied to all cases which fall within them; they can use no discretion, unless such discretion is authorized by the rules themselves. Rules of court cannot, of course, contravene the constitution or the law of the land; 3 Pick. 512; 2 Harr. & J. 79; 1 Pet. 604; 3 S. & R. 253.

**RUMOR.** A general public report of certain things, without any certainty as to their truth.

In general, rumor cannot be received in evidence; but when the question is whether such rumor existed, and not its truth or falsehood, then evidence of it may be given. See LIBEL; EVIDENCE.

**RUN.** A watercourse of a small size. 2 Bibb 354. The word is sometimes used interchangeably with creek. 7 Wheat. 162.

**RUNCINUS** (Lat.). A nag. 1 Thomas, Co. Litt. 471.

**RUNNING ACCOUNT.** An open account. See 2 Pars. Contr. 351; ACCOUNT; MERCHANTS' ACCOUNTS; LIMITATIONS.

**RUNNING AT LARGE.** A term applied to animals estray, wandering apparently without owner or keeper, and not confined to any certain place. The phrase has been judicially construed in a number of recent cases. In 50 Vt. 130, a hound, in close pursuit of a fox, and out of sight and hearing of its master, was held not to be within the meaning of a statute permitting any one to kill a dog "running at large off the premises of the owner or keeper, without a collar with the keeper's name on it." Animals *escaping* from the owner's premises cannot be said to be running at large; the phrase implies permission or assent, or at least some fault, on the owner's part; 21 Hun 249; but *contra*, 53 Ia. 632. See 52 Cal. 653; 23 Alb. L. J. 504. An animal running on the range where it was permitted to run by its owner has been held not an estray, especially where the owner was known to the person taking it up; 4 Oreg. 206; 27 Wisc. 422; 29 Ia. 437. See ESTRAY; POUND.

**RUNNING DAYS.** Days counted in succession, without any allowance for holidays. The term is used in settling lay-days or days of demurrage, which see.

**RUNNING LANDS. In Scotch Law.** Lands where the ridges of a field belong alternately to different proprietors. Bell, Dict.

**RUNNING OF THE STATUTE OF LIMITATIONS.** A metaphorical expression, by which is meant that the time mentioned in the statute of limitations is considered as passing. See LIMITATIONS.

**RUNNING POLICY.** One which contemplates successive insurance and provides that the object of the policy may be from time to time defined by additional statements or indorsements. Cal. Civ. Code § 2597.

**RUNNING WITH THE LAND.** A technical expression applied to covenants real which affect the land. See COVENANT.

**RURAL SERVITUDE.** See SERVITUDE.

**RUSE DE GUERRE** (Fr.). Literally, a trick in war. A stratagem. It is said to be lawful among belligerents, provided it does not involve treachery and falsehood. Grotius, *Droit de la Guerre*, liv. 3, c. 1, § 9.

**RUSTICUM JUDICIUM.** A rough judgment or decision, applied in maritime law when the blame for a collision is undiscoverable. 3 Kent 231.

**RUTA** (Lat.). **In Civil Law.** The name given to those things which are extracted or taken from land: as, sand, chalk, coal, and such other things. Pothier, Pand. l. 50.

**RYOT. In India.** A peasant, subject, or tenant of house or land. Whart. Dict.

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# S.

**S S.** A collar formerly worn on state occasions by the Lord Chief Justice of England, and of the Common Pleas and the Lord Chief Baron—now only by the first named of these (*q. v.*).

**SABBATH.** A name sometimes used for Sunday (*q. v.*).

Sabbath and Sunday are used indiscriminately to denote the Christian Sabbath, Sunday ; 64 N. C. 591.

**SABBATH-BREAKING.** The desecration of the Lord's day. 45 Md. 432. See SUNDAY.

**SABBULONARIUM.** A gravel pit, or liberty to dig gravel and sand ; money paid for the same. Cowel.

**SABINIANS.** A sect of lawyers whose first chief was Atteius Capito, and the second Cælius Sabinus, from whom they derived their name. *Clef des lois Rom.*

**SABLE.** The heraldic term for black. It is called *Saturn* by those who blazon by planets, and *Diamond* by those who use the names of jewels. Engravers commonly represent it by numerous perpendicular and horizontal lines crossing each other. Whart. Law Lex.

**SAC, SAK** (Lat. *saca* or *sacha*). An ancient privilege, which a lord of a manor claimed to have in his court, of holding plea in causes of trespass arising among his tenants, and imposing fines touching the same.

**SACABURTH, SACABERE** (from *sac*, cause, and *burh*, pledge). He that is robbed and puts in surety to prosecute the felon with fresh suit. Britton, c. 15, 29 ; Bracton, l. 3, c. 32 ; Cowel.

**SACCUS CUM BROCHIA.** A service or tenure of sending a sack and a broach (pitcher) to the sovereign for the use of the army. Bract. l. 2, c. 16.

**SACQUIER. In Maritime Law.** The name of an ancient officer, whose business was to load and unload vessels laden with salt, corn, or fish, to prevent the ship's crew defrauding the merchant by false tale, or cheating him of his merchandise otherwise. Laws of Oleron, art. 11, published in an English translation in 1 Pet. Adm. xxv. See ARRAMEUR ; STEVEDORE.

**SACRAMENTALES** (L. Lat. *sacramentum*, oath). *Compurgatores*, which see. Jurors. Law Fr. & Lat. Dict.

**SACRAMENTUM** (Lat.). **In Civil Law.** A gage in money laid down in court by both parties that went to law, returned to him who had the verdict on his side, but forfeited by the party who was cast, to the exchequer, to be laid out *in sacris rebus*, and therefore so called. Varro, lib. 4. *de Ling. Lat.* c. 36.

An oath, as a very sacred thing. Ainsworth, Dict. ; Vicat, Voc. Jur.

*Sacramentum Fidelitatis.* The oath of fealty. See FEALTY.

The oath taken by soldiers to be true to their general and country. *Id.*

**SACRAMENTUM DECISIONIS** (Lat.). The voluntary or decisive oath of the civil law, where one of the parties to a suit, not being able to prove his case, offers to refer the decision of the cause to the oath of his adversary, who is bound to accept or make the same offer on his part, or the whole is considered as confessed by him. 3 Bla. Com. 342.

**SACRILEGE, SACRILEGIUM.** The act of stealing, from the temples or churches dedicated to the worship of God, articles consecrated to divine uses. Ayliffe, Parerg. 476 ; Cowell. Also, the alienation to laymen of property given to pious uses. Par. Ant. 390.

**SÆMEND.** An umpire, arbitrator. Anc. Inst. Eng.

**SÆVITIA** (Lat.). Cruelty. To constitute *sævitia* there must be such a degree of cruelty as to endanger the party's suffering bodily hurt. 1 Hagg. Cons. 35 ; 2 Mass. 150 ; 4 *id.* 587.

**SAFE-CONDUCT.** A written permission given by a belligerent government, or one of its naval or military commanders, enabling an enemy subject to go to a particular place for a particular object. Risley, Law of War 156.

According to common usage, the term *passport* is employed on ordinary occasions for the permission given to persons when there is no reason why they should not go where they please ; and *safe-conduct* is the name given to the instrument which authorizes certain persons, as enemies, to go into places where they could not go without danger unless thus authorized by the government.

A safe-conduct is said to be a name given to an instrument which authorizes an enemy or an alien to go into places where he could not go without danger, or to carry on trade forbidden by the laws of war ; it may cover either persons or things, while a passport usually is given to a friend and applies only to persons. 2 Halleck, Int. L., Baker's ed. 323.

They may be given for a certain time only and revoked for cause, the holder being allowed to withdraw in safety.

The grantor of the safe-conduct tacitly pledges himself to protect the holder of it and to punish any person subject to his

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command who may violate it. Should the holder be detained beyond the time limited, by illness or some cause over which he has no control, he should still be protected, but if he otherwise exceeds the limited time, he is subject to the ordinary rules of war or to penalties, if such are imposed by the law of the place; Risley, L. of War 156.

For a limited territory, they may be framed by a commander; but when general, they must proceed from the supreme authority.

The name of an instrument given to the captain or master of a ship to proceed on a particular voyage: it usually contains his name and residence, the name, description, and destination of the ship, with such other matters as the practice of the place requires. This document is indispensably necessary for the safety of every neutral ship.

The act of congress of April 30, 1790, s. 27, punishes the violation of any safe-conduct or passport granted under the authority of the United States, on conviction, with imprisonment, not exceeding three years, and a fine at the discretion of the court.

See PASSPORT; 18 Viner, Abr. 272.

**SAFE DEPOSIT COMPANY.** A company which maintains vaults for the deposit and safekeeping of valuables in which compartments or boxes are rented to customers who have exclusive access thereto, subject to the oversight and under the rules and regulations of the company. It was formerly the custom for banks to accept gratuitously the custody of boxes containing securities for their customers; but this custom has been discontinued since the establishment of companies making that their special business. The relation of the company to the depositor is rather that of bailor and bailee, though it has been said that there is a resemblance to the relation of landlord and tenant, but that it exists merely in form; 9 Harv. L. Rev. 131; but a case of joint renting, cited *infra*, seems to the contrary. The reasons given for the relation of bailor and bailee are that by analogy to the case of an agreement for board and lodging, there is no interest acquired by the depositor in the real estate, and the agreement of the company for safekeeping established the relation of bailor and bailee; *id.* 132. This view has been sustained in the courts; 123 N. Y. 57; 90 *id.* 4. In the latter case the plaintiff had an allotment of space in a storage house for the safekeeping of household furniture under an agreement that the same would be securely kept and guarded. The action was brought to recover damages for the loss of the property by theft committed by persons in charge of the building, and the relation of the parties was described by Earl, J., as "a species of bailment like that existing in the case of a depositor in a safe deposit company who hires a box for his valuables and keeps the key." In such case he says further, that the company, without special contract, would be held to at least ordinary care, the duty of which would arise from the nature of the business and the relation of the parties.

From this relation springs naturally the obligation and liability of the company, and where the contract was that the depositor was to "keep a constant and adequate guard and watch over and upon the safe," and the bonds were stolen, there being no evidence that the vault was broken or the lock tampered with, it was held to throw upon the company the burden of showing whether it was guilty of negligence, and that question was properly left to the jury; 85 Pa. 391.

Where property was taken from the safe under a search warrant against the depositor, the description in which did not actually correspond with the property taken, the company was held liable for not resisting so far as it was able to do, and contenting itself with a mere protest; 153 N. Y. 57. The burden of proof in actions against such companies for damages on account of negligence is, in accordance with the general rule in similar cases, upon the plaintiff unless, as in the Pennsylvania case above cited, there is *prima facie* evidence of negligence on the part of the defendant which demands an explanation and a *prima facie* case is made by the bailor when he shows such loss or damage to the chattels as ordinarily does not happen if such care as the law requires has been exercised; Edw. Bailm. § 399; 14 Mo. App. 431; 46 N. Y. 490; 9 Harv. L. Rev. 134.

An important question arises as to the position and duty of the company where legal proceedings are taken against the property of the depositor, and the conclusion from an examination of the subject is thus stated: "The extent of their duty is reached in satisfying themselves beyond question that the process is legal and regular; and that, this being so, the company is exempt from all responsibility for the subsequent acts of the officer under it; . . . that the company cannot be subjected to garnishment or trustee process; that the only process by which property deposited with it can be reached is through seizure by the sheriff under direct attachment; also that the company is not liable for property of third persons taken from the safe of the debtor, either as his property or because confused with this property." 9 Harv. L. Rev. 135. That there can be no garnishment in such case would seem to arise from the principle that to be subjected to it, a bailee must have more than constructive possession; as, in the case of baggage in transportation, horses in a livery stable, etc.; Waples, Attachment § 453. The point was directly decided with respect to a safe deposit company in 8 Phila. 91; and as to a locked trunk deposited in a bank vault in 7 Cush. 487.

The property in the safe may be seized

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under a direct attachment; 67 Barb. 304; 128 N. Y. 57. The officer may be directed in the order of attachment to open the safe, and the company's officers may be required to give such assistance as will not lead to a breach of trust; 9 Harv. L. Rev. 139. It has been held that an officer may force the door of a warehouse if refused admittance by those in charge of it; 18 Vt. 186; and in the case of a safe deposit company the officers and representatives of the company were not allowed to be present at the time of the opening of the safe by the sheriff; 67 Barb. 304.

In case of a joint rental of a safe by two or more persons, they were treated as co-tenants of real estate, and a renewal of the lease obtained by one of the renters in his own name was held to inure to the benefit of the co-tenants; 40 N. Y. St. 813. Where one co-tenant abstracted, without authority, a stock certificate and transferred it to an innocent purchaser for value, it was held that it had not been intrusted to the possession of the wrong-doer either directly or by implication, and he was not authorized to remove it from the box and the transfer passed no title; 52 Fed. Rep. 520.

**SAFE LOADING PLACE.** A place where a vessel can be rendered safe for loading by reasonable measures of precaution. 14 Q. B. D. 105; 54 L. J. Q. B. 121.

**SAFE-PLEDGE.** A surety given that a man shall appear upon a certain day. Bracton, l. 4, c. 1.

**SAFEGUARD.** A protection of the king to one who is a stranger, who fears violence from some of his subjects for seeking his right by course of law. Reg. Orig. 26.

Protection granted by an officer commanding belligerent forces, for persons or property within the limits of their commands, and against the operations of their own troops. 2 Halleck, Int. L., Baker's ed. 325.

**SAFELY.** "Safely and securely" in a declaration in bailment means with due care. 15 L. J. C. P. 182.

**SAID.** Before mentioned.

In contracts and pleadings it is usual and proper, when it is desired to speak of a person or thing before mentioned, to designate them by the term *said* or *aforesaid*, or by some similar term; otherwise the latter description will be ill for want of certainty. Com. Dig. *Pleader* (C 18); Gould, Pl. § 63. Adopted in 28 Tex. App. 379.

The reference of the word said is to be determined, in any given case, by the sense. The relative *same* refers to the next antecedent, but in the interpretation of a written instrument, the word *said* does so only when the plain meaning requires it; 2 Kent 555; 10 Ind. 373. See 97 Ind. 502.

**SAILING.** It is sometimes important, in the construction of a charter party, or marine insurance policy, to know when a vessel commenced her voyage, and to this end to determine what constitutes a *sailing*. It has been held that *complete* readiness for the sea, with the intention of proceeding at once on the voyage, is sufficient, though head winds should prevent any actual progress; 20 Pick. 275; see 32 Fed. Rep. 842; but the word sail is held to be a technical word and to mean to start on a voyage; 34 L. J. C. P. 195; so a ship which drew out from its wharf and anchored in a river, whence it proceeded the next day, sailed on the latter day; [1898] 1 Q. B. 27. It has also been held that some measurable progress, though by tow-boat, is also necessary; 4 W. N. C. Pa. 415. See NAVIGATION, RULES OF.

If the vessel quits her moorings and removes, though only to a short distance, being perfectly ready to proceed upon her voyage, and is by some subsequent occurrence detained, that is, nevertheless, a sailing; 3 B. & Ad. 514. There can be no "sailing" without a clear intention on the part of the master to proceed directly on his voyage; [1898] 1 Q. B. 27. Moving from the wharf into the stream may be enough; *id.* See 37 Am. L. Reg. N. s. 201, an article by Erskine Hazard Dickson.

As advanced freight is frequently made payable at or within a certain time after *final sailing* from the *port* of loading, there has been much discussion as to the meaning of both of these terms. In the leading English case, Parke, B., considered that final sailing "meant more than if the word sailing were used alone," that it had reference to the particular port of Cardiff, out of which the vessel sailed, meaning a final departure and being out of the limits of the artificial port, at sea, ready to proceed upon her voyage; 23 L. J. Ex. 169. Where the ship left the harbor to anchor in the roadstead and lie there until the crew should be completed, without the intention of returning to the harbor, it was held that she had not sailed; 24 L. J. Q. B. 340; so also where the master took the vessel out of the port and left her in the roads under easy sailing, while he returned ashore to complete her papers; 26 *id.* 239. "Final sailing I apprehend means getting clear of the port for the purpose of proceeding on the voyage;" Lindley, L. J., in 9 Q. B. D. 679.

**SAILING INSTRUCTIONS. In Maritime Law.** Written or printed directions, delivered by the commanding officer of a convoy to the several masters of the ships under his care, by which they are enabled to understand and answer his signals, to know the place of rendezvous appointed for the fleet in case of dispersion by storm, by an enemy, or by any other accident.

Without sailing instructions no vessel can have the full protection and benefit of convoy. Marsh. Ins. 368.

**SAILORS.** Seamen; mariners. See SEAMEN; SHIPPING ARTICLES.

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**ST. MARTIN LE GRAND, COURT OF.** An ancient court in London, of local importance, formerly held in the church from which it took its name.

**SAISIE-ARRET. In French Law.** An attachment of property in the hands of a third person.

**SAISIE-EXECUTION. In French Law.** A writ of execution by which the creditor places under the custody of the law the movables of his debtor, which are liable to seizure, in order that out of them he may obtain payment of the debt due by him. La. Code of Pract. art. 641; Dalloz, Dict. It is a writ very similar to the *fieri facias* of the common law.

**SAISIE-FORAINE. In French Law.** A permission given by the proper judicial officer to authorize a creditor to seize the property of his debtor in the district which he inhabits. Dalloz, Dict. It has the effect of an attachment of property, which is applied to the payment of the debt due.

**SAISIE-GAGERIE. In French Law.** A conservatory act of execution, by which the owner or principal lessor of a house or farm causes the furniture of the house or farm leased, and on which he has a lien, to be seized, in order to obtain the rent due to him. It is similar to the *distress* of the common law. Dalloz, Dict.

**SAISIE-IMMOBILIERE. In French Law.** A writ by which the creditor puts in the custody of the law the immovables of his debtor, that out of the proceeds of their sale he may be paid his demand.

**SALADIN'S TENTH.** A tax imposed in England and France, in 1188, by Pope Innocent III., to raise a fund for the crusade undertaken by Richard I. of England and Philip Augustus of France, against Saladin, Sultan of Egypt, then going to besiege Jerusalem. Encyc. Lond.; Whart.

**SALARY.** A reward or recompense for services performed.

It is usually applied to the reward paid to a public officer for the performance of his official duties. (Adopted in 24 Fla. 29.)

Salary is also applied to the reward paid for the performance of other services; but if it be not fixed for each year it is called honorarium. Pothier, Pand. According to M. Duvergier, the distinction between honorarium and salary is this. By the former is understood the reward given to the most elevated professions for services performed; and by the latter the price of hiring of domestic servants and workmen; 19 Toullier, n. 268, p. 292, note.

There is this difference between salary and price; the former is the reward paid for services or for the hire of things; the latter is the consideration paid for a thing sold: *Leç. Elem.* § 907. Salary seems to denote a higher degree of employment and is suggestive of a larger compensation for more important services than wages, which indicates inconsiderable pay; 69 Hun 291. See also 42 Alb. L. J. 332; 99 Pa. 542; 10 Md. 85, where salary is regarded as a per annum compensation, while wages are defined as compensation paid or to be paid by the day, week, etc.

**SALE.** An agreement by which one of two contracting parties, called the seller, gives a thing and passes the title to it, in exchange for a certain price in current money, to the other party, who is called the buyer or purchaser who, on his part, agrees to pay such price. 2 Kent 363; Pothier, *Vente*, n. 1.

Ordinarily a transfer of property for a fixed price in money or its equivalent. 110 U. S. 471; 47 Fed. Rep. 604.

An executed sale is both a contract and a conveyance.

This contract differs from a barter or exchange in this; that in the latter the price or consideration, instead of being paid in money, is paid in goods or merchandise susceptible of a valuation. 12 N. H. 390; 43 Ia. 194; 65 Ind. 409; 21 Vt. 520. See PRICE. It differs from accord and satisfaction, because in that contract the thing is given for the purpose of quieting a claim, and not for a price; and from bailment, because there the agreement is for the return of the subject-matter, in its original or an altered form, while in sale it is for the return of an equivalent in money; L. R. 3 P. C. 101; 81 Tex. 505; and see 100 Mass. 198; 79 Pa. 488; 39 Conn. 70; 55 Ill. 45; 150 U. S. 312.

An onerous gift, when the burden it imposes is the payment of a sum of money, is, when accepted, in the nature of a sale. When partition is made between two or more joint owners of a chattel, it would seem the contract is in the nature of a barter. See 11 Pick. 311.

An *absolute* sale is one made and completed without any condition whatever.

A *conditional* sale is one which depends for its validity upon the fulfilment of some condition.

A *forced* sale is one made without the consent of the owner of the property, by some officer appointed by law, as by a marshal or a sheriff, in obedience to the mandate of a competent tribunal. This sale has the effect to transfer all the rights the owner had in the property, but it does not, like a voluntary sale of personal property, guarantee a title to the thing sold; it merely transfers the rights of the person as whose property it has been seized. This kind of a sale is sometimes called a judicial sale.

A *private* sale is one made voluntarily, and not by auction.

A *public* sale is one made at auction to the highest bidder. Auction sales sometimes are voluntary, as when the owner chooses to sell his goods in this way, and then as between the seller and the buyer the usual rules relating to sales apply; or they are involuntary or forced, when the same rules do not apply.

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A *voluntary* sale is one made freely without constraint by the owner of the thing sold: this is the common case of sales, and to this class the general rules of the law of sale apply.

*A sale in gross* is one without regard to quantity. 77 Va. 616.

*An offer* to sell imposes no obligations until accepted according to its terms; and an offier rejected cannot be afterward accepted; 119 U. S. 149. See OFFER.

*Parties.* As a general rule, all persons *sui juris* may be either buyers or sellers; Story, Sales § 9. See PARTIES. But no one can sell goods and convey a valid title to them unless he be owner or lawfully represent the owner; *nemo dat quod non habet;* Benj. Sales § 6; 2 Ad. & E. 495; 89 Ill. 540; 56 N. H. 158; 115 Mass. 129. And even an innocent purchaser from one not the owner, or his proper representative, acquires no valid title; 13 M. & W. 603; Benj. Sales § 6; 54 Ind. 141; 61 N. Y. 477.

An innocent purchaser of property from a bailee for hire acquires no title, and on disposing of the property is liable to the bailor for its value; 155 Pa. 208. But see MARKET OVERT. Another exception is that one not the owner, even a thief, may make a valid transfer of negotiable instruments, if they are in the usual state in which they commonly pass on delivery, provided the buyer has been guilty of no fraud in taking them. The *bona fide* holder of such negotiable instruments, and also of bank-notes, or money, lost or stolen, who has paid a valuable consideration or furnished an equivalent, can retain title against any former owner; even against one from whom such chattel has been stolen; 20 Pick. 545; 32 Vt. 125; 8 Conn. 336; 6 Tex. 515; 3 Burr. 1516; 5 B. & Ad. 909; 10 Ad. & E. 784; Benj. Sales (4th ed.) § 15. So (*arguendo*) of coupon bonds of the ordinary kind; 2 Wall. 110, disapproving Gill *v.* Cubit, 3 B. & C. 466; and approving Goodman & Harvey, 4 Ad. & El. 870; also a lost or stolen bill or note; *arguendo* in 101 U. S. 357; but otherwise of a lost or stolen bill of lading; *id.*

Where two parties in good faith buy the same property, the one first receiving possession is entitled to hold it; 47 Mo. App. 84.

There is a class of persons who are incapable of purchasing except *sub modo*, as infants and married women, insane persons and drunkards; Benj. Sales § 21; and *another class*, who, in consequence of their peculiar relation with regard to the owner of the thing sold, are totally incapable of becoming purchasers while that relation exists; such as trustees, guardians, assignees of insolvents, and, generally, all persons who, by their connection with the owner, or by being employed concerning his affairs, have acquired a knowledge of his property, as attorneys, conveyancers, and the like.

*Mutual assent.* The consent of the contracting parties, which is of the essence of a sale, consists in the agreement of the will of the seller to sell a certain thing to the buyer for a certain price, and in the will of the buyer to purchase the same thing for the same price. It must, therefore, be *mutual*, intended to bind both parties, and must co-exist at the same moment of time; Benj. Sales § 39. Thus, if a condition be affixed by the party to whom an offer is made, or a modification requested, this constitutes a rejection of the offer, and a new proposal, which must be accepted by the first proposer, otherwise there would be no assent by the parties to the same thing, at the same time; 4 De G. J. & S. 646; 34 U. C. Q. B. 410; 1 Bradw. 153. It follows that the assent must correspond with the offer in every particular; 8 C. E. Green 512; 14 Pet. 77; 43 Vt. 161; 118 Mass. 232.

Goods delivered to one for examination, with an option to buy, may be retaken by the owner before the exercise of the option; 4 Misc. Rep. 88.

When there has been a mistake made as to the article sold, there is no sale, because no mutual agreement upon the subject of the sale: as, for example, where a broker, who is the agent of both parties, sells an article and delivers to the seller a sold note describing the article sold as "St. Petersburg clean hemp," and a bought note to the buyer as "Riga Rhine hemp," there is no sale; 4 Q. B. 747; 112 Mass. 32; 49 N. Y. 583.

The consent is certain when the parties expressly declare it. This, in some cases, it is requisite should be in writing. By the statute of frauds no sale of goods, etc., for the price of £10 sterling and upwards, is valid, except the buyer shall accept part of the goods and actually receive the same, or give something in earnest to bind the bargain or in part payment, or some note or memorandum be made, signed by the party to be charged. This applies to both executed and executory contracts of sale.

The writing may be a letter. See LETTER; 4 Bingh. 653; 3 Metc. Mass. 207; 16 Me. 458.

See ACCEPTANCE; EARNEST; PART PAYMENT; PARTY TO BE CHARGED; GOODS, WARES, AND MERCHANDISE; NOTE OR MEMORANDUM; FRAUDS, STATUTE OF.

When a party, by his acts, approves of what has been done, as if he knowingly uses goods which have been left at his house by another who intended to sell them, he will by that act confirm the sale.

One who has accepted and used goods cannot refuse to pay for them on the ground that he never ordered them; 152 U. S. 200.

Care must be taken to distinguish between an agreement to enter into a future contract of sale, which would be called an *executory contract* of sale, and pass no title until executed, and a present actual agreement to make a sale, which passes the title immediately.

The distinction between executed and executory contracts of sale depends upon

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the intention of the parties. When the vendor appropriates goods to the vendee, or, in other words, signifies his intention that the right of property shall pass at once, and the vendee assents, the law will give effect to the intention and the title will pass immediately; 104 Mass. 262; 54 N. Y. 167; 14 B. Monr. 413. This principle remains the same,—whether the goods are sold for cash or on credit, whether they are to be delivered forthwith or at a future time; whether they have yet to be weighed, measured, or set apart, or whether they are still unfinished; and by the terms of the agreement, the vendor has either to complete them, or in some way add to their value. These circumstances may be reason for supposing that the parties do not mean to pass the title, but will not defeat the intention to do so if it exists; Lectures on Contracts, by Prof. Hare; 1 Q. B. 389; 2 B. & C. 540; 102 Mass. 443; 13 Pick. 175; 6 Rand. 473.

*The thing sold.* There must be a thing which is the *object* of the sale; for if the thing sold at the time of the sale had ceased to exist, it is clear there can be no sale; Benj. Sales § 76; 5 Maule & S. 228; 11 Pet. 63; 20 Pick. 139; if, for example, you and I being in Philadelphia, I sell you my house in Cincinnati, and at the time of the sale it be burned down, it is manifest there was no sale as there was not a thing to be sold. Where the thing does not exist at the date of the contract the sale is void: as where, unknown to the parties, corn on a vessel not yet arrived, had, before the sale, been sold at an intermediate port; 5 H. L. C. 673. Where, after the sale, and without fault of the seller, the thing sold perished, the seller is released; 107 Mass. 514; 70 Me. 288; but it is otherwise if property has passed, though the goods were left in the seller's possession; 32 L. J. Q. B. 164. On a contract of future sale, if the subject-matter perish before property has passed, the contract is avoided. It is evident, too, that no sale can be made of things not in commerce: as, the air, the water of the sea, and the like.

In general, there must be an agreement as to the specific goods which form the basis of the contract of sale; in other words, to make a perfect sale the parties must have agreed, the one to part with the title to a *specific article*, and the other to acquire such title.

In an unconditional contract of sale of specific goods, title passes at once, without delivery; 143 U. S. 354; 3 B. & C. 862, though it is said that no title vests in the buyer under a cash sale till the price is paid; 141 Mass. 423. Other cases hold that title passes, but the vendor has a lien for the price. Where no time is agreed upon for payment, it is presumed to be a cash sale; 58 Cal. 431; 111 Mass. 489; 76 Ill. 358. If the seller delivers possession upon the understanding of immediate payment, he may reclaim the goods in case he is not paid; 81 Wis. 176; 53 N. Y. 426; 18 Pa. 91. Where goods sold have to be selected from a larger mass of uniform quality, some cases hold that title passes when the sale is made; 19 N. Y. 330; 137 Ill. 393; 39 Conn. 413; this is approved as the true rule in Hare, Contr. 425. Other cases hold that the property does not pass till the separation is complete; 11 Cush. 573; 90 Ind. 268; 9 Ore. 66. If the larger mass consists of units of varying quality or value, it is held that the property does not pass till selection; Tiff. Sales 95.

Where the seller is to do anything to the goods to put them in shape to deliver under the contract, this is a condition precedent to the vesting of the property in the buyer; Blackb. Sales 151; and so where anything is to be done for the purpose of ascertaining the price, as weighing, testing, etc., where the price depends on quantity, etc.; *id.* But it is said that the latter rule is too broad and that the property is presumed to pass to the buyer; when weighing, testing, etc., alone remain to be done by the buyer; Graves, Title to Pers. Prop. 50. This presumption is stronger when the buyer receives possession; *id.*

Where a brewer's carter took orders for jars of beer, and delivered the jars to the customers' houses, making his collections the following week, there being no mark to show that any particular jar had been appropriated to any particular customer, until delivery, it was held that the sale was made at the customers' house; [1895] 2 Q. B. 229.

Where a contract provides for the sale, delivery, and setting up of machinery and for payment of part of the price on receipt of the bill of lading, and the residue at stated times thereafter, it was held that the delivery of the machinery completed the sale; 146 U. S. 42.

The thing sold must have an actual or potential existence and be specifically identified and capable of delivery; otherwise it is not strictly a sale, but an executory agreement; 2 Kent 468.

In the sale of non-existent chattel, at law, if the seller has a *potential interest* in it, the sale is a valid sale *in præsenti* to take effect *in futuro;* but if the contract concerns a mere possibility or expectation, the transaction will not take effect unless the seller, after the chattel has come into existence, ratifies the contract, or the buyer, with his consent, gets possession; Graves, Title to Pers. Prop. 41. A *potential interest* would include the wool to grow upon a man's own sheep, but not on those of another. A sale of fish to be caught did not pass the property in them when caught; 108 Mass. 347. An assignment of future wages, there being no existing contract of service, is invalid; 1 Gray 105; otherwise if the wages are to accrue under an existing contract of service; 2 Gray 265.

One may sell a crop of hay to be grown on his field or wool from his sheep or the milk that his cows will yield the coming month, and the sale is valid; but he can only make a contract to sell, and not an actual sale, where the subject is something to be after-



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wards acquired, as the sale of any sheep, etc., or any goods, which he may attain the title to within the next six months; Benj. Sales § 78.

The statutes as to the assignment of an invention before patent embraces only perfected inventions. There can, properly speaking, be no assignment of an incomplete invention, although a contract to convey a future invention may be valid; Curt. Pat. § 160. A contract to transfer inventions not yet in being is not an assignment; 2 Rob. Pat. § 771.

But in equity the sale takes effect as soon as the chattel comes into existence, without further act of the parties; 10 H. L. C. 209. See 3 Pom. Eq. § 1288; but see 46 Am. Dec. 718; 76 *id.* 731.

As to mortgages or sales of unplanted crops, some cases hold them invalid; 9 Bush 318; others hold them valid to transfer a legal title; 51 Cal. 620; others hold them valid only to transfer an equitable title; 69 Ala. 403; 48 Miss. 513. See 4 Am. Dec. 559.

The delivery of crops to be grown is not essential to pass title, crops being an exception to the rule that no title can vest in property not in existence; 143 U. S. 346.

The sale of grain in an elevator, part of a mass, passes the title of the vendor without separation; 111 Mass. 490; 4 Ill. 344.

In case of unascertained goods, part of a larger quantity, the seller usually has the right to select the particular goods. The selection is fixed and title passes on delivery to the buyer, and, usually, upon the delivery to a carrier, unless the contract is for a delivery to the buyer at the place of destination.

It is held that where delivery is made to a carrier C. O. D. (*q.v.*), the property does not pass; 146 Mass. 68; 3 Colo. 176; 58 Vt. 140; *contra*, 130 Pa. 138; 73 Me. 278; 104 N. C. 25. When goods are delivered by the seller to the postoffice the title vests in the buyer; [1898] A. C. 204.

In shipbuilding contracts, where payments are to be made as the work progresses, property does not pass till the work is complete; 99 Mass. 397; 81 Pa. 18; 1 Houst. 506, 546. But in England it passes when the first instalment is paid, and subsequent additions to the work become the property of the buyer; 5 B. & Ald. 942; 4 Ad. & E. 448; so also in 1 Cliff. 370; 27 Ind. 522.

Where goods are delivered to a carrier, but the bill of lading is made out to the seller's order, the property does not pass to the buyer; 74 N. Y. 568; 84 Ala. 173; so where the seller ships the goods consigned to himself; 56 Ill. 494.

A buyer has a right to a reasonable opportunity to inspect the goods before he accepts them; Tiff. Sales 197.

When goods are to be paid for on delivery at a certain place, title will not pass till delivery; 153 Pa. 440; 88 *id.* 147; 113 Mass. 391.

The *price*. To constitute a sale, there must be a *price* agreed upon. The presumption is that where the price is not definitely ascertained, the title remains in the vendor until a computation has been made; Blackb. Sales 122; 24 N. H. 336; 11 Cush. 573; 78 Ga. 66. But this may be rebutted by proof that the parties intended to have the right of property vest in the purchaser at once; 39 Conn. 413; 55 Ga. 633; 19 N. Y. 330. Upon the maxim *id certum est quod reddi certum potest*, a sale may be valid although it is agreed that the price for the thing sold shall be determined by a third person; 4 Pick 179. See 10 Bingh. 382, 487; 11 Ired. 166. A contract of sale is valid though no time of payment is agreed on, the law implying payment on delivery; 96 Mich. 175.

The price must be an *actual* or *serious* price, with an intention on the part of the seller to require its payment: if, therefore, one should sell a thing to another, and *by the same agreement* he should release the buyer from the payment, this would not be a sale, but a gift; because in that case the buyer never agreed to pay any price, the same agreement by which the title to the thing is passed to him discharging him from all obligations to pay for it. As to the *quantum* of the price, that is altogether immaterial unless there has been fraud in the transaction. The price must be *certain or determined;* but it is sufficiently certain if, as before observed, it be left to the determination of a third person; 4 Pick. 179. And an agreement to pay for goods what they are worth is sufficiently certain; Coxe N. J. 261. The title to property may pass to the vendee without fixing an absolute price, if the circumstances attending the transaction show the same to be the intention of the parties; 85 Ala. 221; 100 N. C. 59.

If the passing of property is made to depend upon doing some act as a condition, such as paying the price, the property remains in the seller, though possession may be in the buyer. Apart from statute, the buyer, in most states, takes no title which can be reached by creditors or which he can transfer even to a *bona fide* purchaser, except subject to the seller's rights; 118 U. S. 663; though in Pennsylvania the rule is otherwise, and also in Illinois, Kentucky, and Maryland. In Pennsylvania transactions which are in legal effect conditional sales on the instalment plan, have been sustained when drawn in the language of bailments with an option of purchase, but the rule there seems uncertain.

The buyer in conditional sales ordinarily acquires an interest which he may sell or which may be attached; and may maintain trover if his possession is wrongfully invaded. The seller may mortgage his interest and it is subject to attachment by his creditors.

Upon breach of condition, the seller may retake or replevin the goods or sue to recover their value. In some states, in a suit to recover their value, he need not allow for payments on account; and if he reclaim the goods, the buyer is not entitled

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to recover instalments paid; 89 Ill. 233; 7 Daly 297; in others, the buyer is held to be entitled to an account for instalments paid; 28 Mich. 260; 61 Ga. 230; 25 Minn. 530. In some states by statute he must repay the instalments less a proportion for wear and use. An action will not lie for the residue of the purchase-money after the properties have been retaken by the vendor; 43 Minn. 409.

Where there is a contract for leasing property with an option of buying it, with a provision allowing its return to the seller, upon such return of the property, equity will decree a return of the money paid on account of its purchase, less the amount of damages to the property and reasonable pay therefor; 142 U. S. 313. The cases are collected in 32 L. R. A. 455.

Statutes exist in many states which provide that conditional sales of chattels with a reservation of title in the vendor are void as against third parties purchasing from the vendee or against his creditors, unless recorded. In nearly all the states there are similar statutes relating specially to the conditional sale of railroad rolling stock. See ROLLING STOCK.

A common transaction is the hire of furniture and other like chattels, on the instalment plan, called hire-purchase in England, by which "an intending purchaser of goods is put into immediate possession thereof and agrees to pay a fixed sum by fixed periodical instalments; the amount payable for each instalment is expressly declared to be nothing more than hire-money for the use of the goods during the period intervening between two consecutive instalments, and the lender agrees that on a certain number of instalments, making up the total sum, being paid, the hirer shall become the owner of the goods. On default in the payment of any instalment, power is reserved to the lender to resume possession of the goods." Law Mag. & Rev., Feb. 1896.

Where one had hired a piano on this plan and after paying some instalments on it, pledged it to a third party, against whom the lender brought suit, the house of lords sustained the lender's title; 11 L. T. R. 446.

A contract for the hire-purchase of a chattel, the title to pass when the last instalment is paid, is a conditional sale; 85 Ga. 741; s. c. 9 L. R. A. 373; 46 Ill. 47; the court will look to the purpose of the contract rather than to the name given to it; 93 U. S. 664; *contra*, 115 Pa. 487, where the cases are somewhat at variance with other decisions, due to the necessity of sustaining conditional sales, held invalid in that state, by calling them bailments. See ROLLING STOCK.

A conditional vendee under an instalment purchase contract cannot return the goods when not fully paid for and escape liability for the future instalments; 53 Conn. 4.

*Sale to arrive.* A sale of goods to arrive per Argo, or on arrival per Argo, is construed to be a sale of goods subject to a double condition precedent: that the ship arrives and the goods are on board; 5 M. & W. 639; Ry. & M. 406. In such case, title to the goods does not pass till their arrival; 16 N. Y. 597.

*Sale for illegal purpose.* A sale of goods for the purpose of smuggling is invalid; 3 Term 454; but not when a foreigner sold the goods abroad having no concern in the smuggling; 1 Cowp. 34. See 50 N. H. 253. The mere knowledge of the vendor that the goods sold would be used for an illegal purpose does not render the sale illegal; 50 N. H. 253; 32 Vt. 110; 3 Cliff. 494. See Benj. Sales § 511, n.

Where a buyer is insolvent and has no intention to pay for goods, the sale may be avoided by the seller: 93 U. S. 631; 67 N. Y. 1; but the mere knowledge on the buyer's part that he will be unable to pay for them, will not alone form a fraudulent intent; Tiedm. Sales § 170; there must be other facts of a suspicious nature, such as re-selling them at a reduced price; *id.* In Pennsylvania, it is not enough to show that the buyer was insolvent and did not intend to pay for the goods; some artifice must be shown; 21 Pa. 367.

A Massachusetts act of 1884 makes it a crime for any one to sell any property under representation that anything other than what is specifically stated to be the subject of the sale is to be delivered, etc., as a part of the transaction. In a case under this act it appeared that a retail dealer in tobacco offered to each purchaser a selection of a photograph among a number exposed for his choice. A conviction under this act was set aside upon the ground that what was sold in this case was specifically understood to be the subject of the sale. In a case under a like act in New York, the buyer purchased coffee and received a present as a part of the transaction. It appeared that the presents were lying in full view of the purchasers who could make their choice if they bought as much as two pounds of coffee. The act was held to be unconstitutional; 109 N. Y. 389. A Maryland act was held to be unconstitutional only so far as related to transactions which were dependent upon chance; 74 Md. 565. See LOTTERY.

A New York act (1898) provides that a seller who publicly advertises statements with respect to quantity, quality, value, price, method of production, or manufacture, which are untrue or calculated to mislead, shall be guilty of a misdemeanor. See DECEIT; MISREPRESENTATION.

*Real estate.* The above rules apply to sales of personal property. The sale of real estate is governed by other rules. When a contract has been entered into for the sale of lands, the legal estate in such lands still remains vested in the vendor, and it does not become vested in the vendee until he shall have received a lawful deed of conveyance from the vendor to him; and the only remedy of the purchaser at law is to bring an action on the contract

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and recover pecuniary damages for a breach of the contract. In equity, however, after a contract for the sale, the lands are considered as belonging to the purchaser, and the court will enforce his rights by a decree for a specific performance; and the seller will be entitled to the purchase-money; Wms. R. P. 127. See SPECIFIC PERFORMANCE.

In general, the seller of real estate does not guarantee the title; and if it be desired that he should, this must be done by inserting a warranty to that effect.

Section 3 of the statute of frauds provides that no interest in land shall be created unless by deed or note in writing signed by the party or his agent, authorized by writing, or by act of operation of law.

The question whether sales of standing timber involves any interest in land has been much mooted. The majority of cases seem to support the following propositions: 1. Where the vendor has expressly stipulated that the trees may remain standing on the land a given number of years if the purchaser elects. Here, as they derive more or less growth and increase from the soil, there is some reason to hold that the sale involves an interest in land. It has in fact been considered a sale, not only of the trees as they then are, but as they will be at the end of the stipulated period with all the additions to them subsequently acquired by the soil. See 6 Seld. 114; 50 Barb. 302; 57 *id.* 243; 45 N. H. 313; 40 *id.* 304. 2. Where the trees are to stand for an indefinite time and to be severed solely at the pleasure of the buyer, the statute of frauds requires a written agreement. See 27 Vt. 157; 42 *id.* 309.

See ACCEPTANCE; CONTRACT; DELIVERY; PARTIES; STOPPAGE IN TRANSITU; WARRANTY; EARNEST; FRAUDS, STATUTE OF; CONSIDERATION; PRICE; GOODS, WARES, AND MERCHANDISE; NOTE OR MEMORANDUM; SAMPLE; MORTGAGE; ROLLING STOCK; TRADING STAMPS; OPENING BIDDINGS.

Under the civil law, in a contract of sale the seller was not bound to make the buyer absolute master (*dominus*) of the thing sold, as he would have been in a stipulation. What he was bound to do was this: 1. To deliver the thing itself (*præstare, tradere*), to give free and undisturbed possession of it (*possessionem vacuam tradere*), and to give lawful possession of it (*præstare licere habere*). 2. If the buyer was disturbed in his possession by the real owner (*evictio*), to recompense him for what was lost. 3. To secure the buyer against secret faults; if such faults were discovered, either compensation might be claimed by an *actio æstimatoria*, reducing the price to a greater or less amount, according as the seller had or had not knowledge of the defect, or at the option of the buyer, the contract might be rescinded by an action *actio redhibitoria*, and the thing returned (which was termed *redhibitio: redhibere est facere ut rursus habeat venditor quod habuerat*). Just. Inst., 8th ed. 365.

**SALE-NOTE.** A memorandum given by a broker to a seller or buyer of goods, stating the fact that certain goods have been sold by him on account of a person called the seller to another person called the buyer. Sale-notes are also called *bought and sold notes*. See BOUGHT NOTE.

**SALE ON APPROVAL.** See SALE.

**SALE OR RETURN.** When goods are sent from a manufacturer or wholesale dealer to a retail trader, in the hope that he may purchase them, with the understanding that what he may choose to take he shall have as on a contract of sale, and what he does not take he will retain as a consignee for the owner, the goods are said to have been sent on sale and return.

The goods taken by the receiver as on sale will be considered as sold, and the title to them is vested in the receiver of them: the goods he does not buy are considered as a deposit in the hands of the receiver of them, and the title is in the person who sent them. 1 Bell, Com. 268.

Contracts of *sale or return* exist where the privilege of purchase or return is not dependent upon the character or quality of the property sold, but rests entirely upon the option of the purchaser to retain or return; and the title passes to the purchaser subject to his option to return the property; 150 U. S. 312; upon return the title reverts (a condition subsequent); Tiff. Sales 93.

**SALIC OR SALIQUE LAW.** The name of a code of laws, so called from the Salians, a people of Germany who settled in Gaul under their king Pharamond.

The most remarkable law of this code is that which regards succession. *De terra vero salica nulla portio hæreditatis transit in mulierem, sed hoc virilis sextus acquirit; hoc est, filii in ipsa hæreditate succedunt:* no part of the salique land passes to women, but the men alone are capable of taking; that is, the sons succeed to the inheritance. This has always excluded women from the throne of France.

**SALOON.** A place of refreshment. 26 Mich. 325. An apartment for a specified public use. 45 N. W. Rep. (Ia.) 408; 20 Nev. 282. In common parlance, the word is used to designate a place where intoxicating liquors are sold, and this restricted meaning may be given to saloons, where the context or other circumstances requires it; 13 Neb. 434; 40 Mich. 401; 105 Mass. 40; but it is held that it does not necessarily import a place where liquors are sold; 26 Mich. 328; 23 Tex. App. 364. The word has a much broader meaning than dram shop. To constitute a saloon it is not necessary that ardent spirits should be offered for sale and that it should be a business requiring a license under the revenue laws of the state; 50 Ark. 561. See LIQUOR LAWS.

**SALT.** In an insurance policy salt does not include saltpetre. 1 Park. 245.

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**SALUTE.** A coin made by Henry V., after his conquests in France.

In the army and navy an honor paid to a distinguished personage, when troops or squadrons meet, when officers are buried, or to celebrate an event or show respect to a flag and on many other ceremonial occasions. Cent. Dict.

Upon the arrival of a man of war in a foreign port the salutes and other ceremonials toward the port and its authorities are prescribed in full detail by the naval regulations. A ship of war entering a harbor or passing by a port or castle should pay the first salute except when the sovereign or his ambassador is on board, in which case the salute should be made first on the shore; Woolsey, Introd. Int. Law, 4th ed. § 85.

No salute is to be fired in honor of any nation, or official of any nation not formally recognized by the United States; Snow, Lect. Int. Law 70. See 2 Phill. Int. Law.

**SALVAGE. In Maritime Law.** A compensation given by the maritime law for service rendered in saving property or rescuing it from impending peril on the sea or wrecked on the coast of the sea, or, in the United States, on a public navigable river or lake, where interstate or foreign commerce is carried on. 1 Sumn. 210, 416; 12 How. 466; 1 Blatchf. 420; 5 McLean 359.

*The property saved.* The only proper subjects of salvage are vessels or ships used for the purpose of being navigated, and goods which at one time formed the cargoes of such vessels, whether found on board, or drifting, or cast on shore; [1897] A.C. 347. It has been held that there can be no salvage against a floating dry dock intended to be permanently moored to the shore; 119 U. S. 625; nor against coal barges on the Mississippi river, which were mere boxes without tackle, apparel, furniture, master, or crew, and which were sold with the coal or broken up for old lumber; 46 Fed. Rep. 204; nor a floating structure intended to be moored alongside a wharf for carts containing refuse to drive over it to a dumping boat; 38 Fed. Rep. 158; nor a pile-driving machine erected on a floating platform; 69 Fed. Rep. 1005; nor a gas-float fifty feet long by twenty wide moored in a river to give light to vessels; [1897] A. C. 337; as to rafts of timber, *quære;* see *id.*

When a ship was almost becalmed on the high seas a floating chest was found and with but little trouble taken on board. It contained seventy doubloons. It was held that the finders were not entitled to the whole property, though there were no marks of ownership, but should be compensated by a moiety as for salvage services. The other moiety was directed to be paid into court; Fed. Cas. 6620. Passengers' lives may be the subject of salvage services, by statute. See 55 Alb. L. J. 404.

A person who offers useful services to a vessel in distress without any previous contract, is a salvor; 24 U. S. App. 559.

Salvage, after actual compensation for the services rendered, is a gratuity for the benefit of commerce, as an encouragement for like services and efforts; no amount of reward to owners and machinery will so stimulate efforts to save life and property as will moderate awards to master and crew who are the effective agents to set the machinery in motion; 13 U. S. App. 662.

"Salvage consists (1) of an adequate compensation for the actual outlay of labor and expense made in the enterprise; and (2) of the reward as bounty allowed from motives of public policy, as a means of encouraging such exertions. In determining the amount of an award the leading considerations are: the degree of danger from which the rescue is made; value of the property saved; risk to the salvors; the value of property risked by salvors and the dangers to which it was exposed; the skill shown and the time and labor spent." 23 U. S. App. 435.

Moral considerations and questions of policy enter largely into salvage cases. 2 Hagg. 3.

*The peril.* In order to found a title to salvage, the peril from which property was saved must be real, not speculative merely; 1 Cra. 1; 1 Ben. Adm. 166; but it need not be such that escape from it by any other means than by the aid of the salvors was impossible. It is sufficient that the peril was something extraordinary, something differing in kind and degree from the ordinary perils of navigation; 1 Curt. C. C. 353; 2 *id.* 350. See 9 C. C. App. 292; 40 Fed. Rep. 909; 41 *id.* 103. All services rendered at sea to a vessel in distress are salvage services; 1 W. Rob. 174; 3 *id.* 71. But the peril must be present and pending, not future, contingent, and conjectural; 1 Sumn. 216; 3 Hagg. Adm. 344. It may arise from the sea, rocks, fire, pirates, or enemies; 1 Cra. 1; see 22 Ct. Cls. 408; or from the sickness or death of the crew or master; 1 Curt. C. C. 376; 2 Wall. Jr. 59; 1 Swab. 84.

*The saving.* In order to give a right to salvage, the property must be effectually saved; it must be brought to some port of safety, and it must be there in a state capable of being restored to the owner, before the service can be deemed completed; 1 Sumn. 417; 1 W. Rob. 329, 406; 35 Fed. Rep. 796; 57 *id.* 661. The salvage services must be performed by persons not bound by their legal duty to render them; 1 Hagg. Adm. 227; 2 Spinks, Adm. 253. The property must be saved by the instrumentality of the asserted salvors, or their services must contribute in some certain degree to save it; 4 Wash. C. C. 651; Olc. 462; though, if the services were rendered on the request of the master or owner, the salvor is entitled to salvage though the services were slight and the property was saved mainly by a providential act; 5 McLean 359; 1 Newb. 130; 2 W. Rob 91; Bee 90.

Towage services are sometimes the subject of compensation as salvage. Mere expediting the voyage of a vessel, by towing,

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is not salvage; but salvage was allowed in the case of a steamship who had broken her main shaft, but could sail fairly well, the weather also being favorable, in which condition she was towed ninety miles; 1 Spinks, A. & E. 169, said to be the extreme case; Kennedy, Civil Salvage 22; courts are liberal to such claims in respect of the amount of danger necessary to render towage a salvage source; *id.*

*The place.* In England it has been held that the services must be rendered on the high seas, or, at least, *extra corpus comitatus*, in order to give the admiralty court jurisdiction to decree salvage; but in this country it is held that the district courts of the United States have jurisdiction to decree salvage for services rendered on tide waters and on the lakes or rivers where interstate or foreign commerce is carried on, although *infra corpus comitatus*; 12 How. 466; 1 Blatchf. 420; 5 McLean 359.

*The amount.* Some foreign states have fixed by law the amount or proportion to be paid for salvage services; but in England and the United States no such rule has been established. In these countries the amount rests in the sound discretion of the court awarding the salvage, upon a full consideration of all the facts of the case. It generally far exceeds a mere remuneration *pro opere et labore*, the excess being intended, upon principles of sound policy, not only as a reward to the particular salvor, but also as an inducement to others to render like services; 2 Cra. 240; 1 C. Rob. 312, n.; 3 *id.* 355; 3 Hagg. Adm. 95. But it is equally the policy of the law not to provoke the salvor's appetite of avarice, nor encourage his exorbitant demands, nor teach him to stand ready to devour what the ocean has spared; Gilp. 75. Adequate rewards encourage the tendering and acceptance of salvage services; exorbitant demands discourage their acceptance and tend to augment the risk and loss of vessels in distress. 7 Notes of Cas. 579. Salvage viewed as a reward is not properly the subject of a binding contract in advance. Courts of admiralty fully examine into the circumstances of the service in the interest of the property saved, and award no more than a reasonable sum, and are not bound by the amount agreed on beforehand; 48 Fed. Rep. 923. But a salvage agreement for services to be performed on the high seas will not be set aside merely because only one of the contracting parties was at a disadvantage. But, if in addition to that circumstance, the sum required by the intending salvor appears to the court exorbitant, the agreement will be set aside as inequitable; [1891] P. 175. The amount is determined by a consideration of the peril to which the property was exposed, the value saved, the risk to life or property incurred by the salvors, their skill, the extent of labor or time employed, and the extent of the necessity that may exist in any particular locality to encourage salvage services; 3 Hagg. Adm. 121; 1 Gall. 133; 1 Sumn. 413; 2 Sprague 102. An ancient rule of the admiralty allowed the salvors one-half of the property saved, when it was absolutely derelict or abandoned; but that rule has been latterly distinctly repudiated by the high court of admiralty and our supreme court, and the reward in cases of derelict is now governed by the same principles as in other salvage cases; 20 E. L. & E. 607; 4 Notes of Cas. 144; 19 How. 161. While there is no rule of giving salvors of a derelict a moiety, or other specific proportion of the value of the property saved, and the award is to be assessed as in other cases of salvage, still there are usually present three special elements which tend to increase the award: the high degree of danger to which the property is exposed; the difficulty of approaching a derelict vessel without any aid in boarding her; and the necessity of supplying men to steer her; [1897] Pr. Div. 59. But it is usual to give half of the value, and even seven-eighths have been given. See 2 Blatch. 323.

Risking life to save the lives of others is an ingredient in salvage service which will enhance the salvage upon the property saved; Daveis 61; 3 Hagg. Eccl. 84. No salvage was formerly due for saving life merely, unaccompanied by any saving of property; 1 W. Rob. 330; unless it was the life of a slave; Bee 226, 260. But the saving of life in addition to property was held to increase the award of salvage on the property; Br. & L. 344. By statute 17 & 18 Vict. salvage was extended to the saving of life and the award therefor was given priority over other salvage. If the vessel is not of large enough value to pay the award, it is payable out of the Mercantile Marine Fund.

"It is the value of the property which is restored to the owner that is to be considered, and of which a proportion is to be awarded as salvage in salvage cases, and not the original value imperilled. The exact value of the property saved, when large, is but a minor element in computing salvage, and as it increases, the rate per cent. given is rapidly reduced." 13 U. S. App. 662.

Where part of a cargo saved consists of specie, it must bear its share of the common burden; 86 Fed. Rep. 340; up to the time when it was removed, but not of the expense of getting the ship afloat after the specie was removed; 82 *id.* 104. There is no distinction in the proportion of salvage charges against different parts of a cargo; 4 Asp. 385.

The fact that a vessel receives injuries in the course of salvage operations will tend to reduce the amount of compensation; 83 Fed. Rep. 715.

A salvage award will not be set aside as too large, unless so grossly excessive as to shock the conscience of the appellate court; 82 Fed. Rep. 751.

*The property saved.* Salvage is properly a charge apportionable upon all the interests and property at risk in the voyage which derive any benefit from the salvage

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service ; 1 Stor. 469. *Qui sentit commodum sentire debet et onus.* It follows that salvage expenses incurred in saving ship, cargo, and freight in one common and continuous service are apportionable upon them all, according to their respective values ; but expenses incurred for any one interest separately, or any two interests only, are chargeable wholly to it or to them ; 2 W. Rob. 315 ; 7 E. & B. 523 ; 2 Pick. 1 ; 11 *id.* 90 ; 4 Whart. 301 ; 5 Du. 310. Goods of the government pay the same rate as if owned by individuals ; 3 Sumn. 308 ; Edw. Adm. 79 ; but not the mails ; Marv. Salv. 132. But, it is said, no proceedings *in rem* can be instituted against public ships or stores on them, or against property of the state on a private ship ; though the question is not always raised, and the British Admiralty usually appeals and submits to the judgment of the court in the case of claims for saving public stores, and foreign governments have sometimes requested the British Admiralty to award as an arbitrator in respect of their property when salved ; Kennedy, Civil Salvage 61. See 5 P. D. 197, where the subject was reviewed. Vessels of war belonging to a foreign neutral power cannot be arrested in our ports for salvage ; 7 Cra. 116.

Salvage is not allowed on the clothing left by the master and crew on board the vessel which they abandon, but this should be returned free of charge ; Ware 378 ; or for saving from a wreck bills of exchange or other evidences of debt, or documents of title ; Daveis 20.

The wearing apparel of passengers is not liable for salvage services ; L. R. 3 A. & E. 490 ; this extends only to apparel with the usual changes for the voyage and not to trunks in the hold ; 36 Fed. Rep. 705.

Wreck was formerly limited to those portions of ship or cargo which are stranded. But by the Merchant Shipping Act, 1854, it includes jetsam and derelict, and, in salvage law, it includes any part of a ship or cargo aground or afloat ; Kennedy, Civil Salvage 53.

The right to salvage for saving life depends upon something—ship, cargo, or freight—having been preserved ; 8 P. D. 117 ; and such salvage can be recovered only against the party to whom the property belonged ; 15 P. D. 146 ; *i. e.* from the ship if the cargo was lost ; or from the cargo, if the ship was lost. The value of the property salved is the limit of recovery ; 2 P. D. 157. Life salvors may claim against the property salved, although its preservation was not due to salvage services ; 2 P. D. 145. Taking passengers from a burning vessel at sea is not the subject of salvage under the British act ; L. R. 3 A. & A. 487.

The liability to pay salvage is not confined to the actual legal owners of the property saved, but extends to those who have an interest in the property, and whose interests have been saved by the placing of the property itself in security ; 15 Prob. Div. 142.

A tug being partly in fault in colliding with a schooner, is not entitled to salvage for towing the schooner into port ; 52 Fed. Rep. 323.

*Bar to salvage claim.* An express explicit agreement, in distinct terms, to pay at all events, whether the property shall be saved or not, a sum certain, or a reasonable sum, for work, labor, and the hire of a vessel in attempting to save the property, is inconsistent with a claim for salvage ; and when such agreement is pleaded in bar and proved, any claim for salvage will be disallowed ; 2 Curt. C. C. 350 ; 2 W. Rob. 177. See 123 U. S. 40. An agreement fairly made and fully understood by the salvors, to perform a salvage service for a stipulated sum or proportion to be paid in the event of a successful saving, does not alter the nature of the service as a salvage service, but fixes the amount of compensation. But such an agreement will not be binding upon the master or owner of the property unless the court can clearly see that no advantage has been taken of the party's situation, and that the rate of compensation agreed upon is just and reasonable ; 1 Stor. 323 ; 1 Sumn. 207 ; 1 Blackf. 414. A custom in any particular trade that vessels shall assist each other without claiming salvage is legal, and a bar to a demand for salvage in all cases where it properly applies ; 1 W. Rob. 440. See *supra.*

*Forfeiture or denial of salvage.* Embezzlement of any of the goods saved works a forfeiture of the salvage of the guilty party ; Ware 380 ; 1 Sumn. 328 ; and, in general, fraud, negligence, or carelessness in saving or preserving the property, or any gross misconduct on the part of the salvors in connection with the property saved, will work a total forfeiture of the salvage, or a diminution of the amount ; 2 Cra. 240 ; 1 W. Rob. 497 ; 3 *id.* 122 ; 2 E. L. & E. 554 ; 6 Wheat. 152 ; 6 Wall. 548 ; [1892] Prob. 58, 70.

Salvors rescuing a derelict property are bound to care for its preservation while they retain possession ; 84 Fed. Rep. 202.

*Distribution.* The distribution of salvage among the salvors, like the amount, rests in the sound discretion of the court. In general, all persons, not under a pre-existing obligation of duty to render assistance, who have contributed by their exertions to save the property, and who have not forfeited their rights by their misconduct, are entitled to share in the salvage, as well those who remain on board the salvor vessel in the discharge of their duty, but are ready and willing to engage in the salvage enterprise, as those who go on board and navigate the wreck ; Ware 483 ; 2 Dods. 132 ; 2 W. Rob. 115 ; 2 Cra. 240. The apportionment between the owners and crew of the salvor ship depends upon the peculiar circumstances of each case ; such as, the character, size, value, and detention of the vessel, its exposure to peril, and like considerations, and the number, labor,

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exposure, and hazard of the crew. In ordinary cases, the more usual proportion allowed the owners of a salvor sail-vessel is one-third; 2 Cra. 240; 1 Sumn. 425; 3 *id.* 579. The owner of a steam-vessel, if of considerable value, is often allowed a larger proportion; Marv. Wreck & Salv. 247. The master's share is usually double that of the mate, and the mate's double that of a seaman, and the share of those who navigate the derelict into port, or do the labor, double that of those who remain on board the salvor vessel. But these proportions are often varied according to the circumstances, so as to reward superior zeal and energy and discourage indifference and selfishness; 3 Hagg. Adm. 121. See Abb. Shipp., 13th ed. 1021.

In marine insurance, the salvage is to be accounted for by the assured to underwriters in an adjustment of a total or salvage loss, or assigned to the underwriters by abandonment or otherwise; 2 Phill. Ins. § 1726. And so, also, the remnant of the subject insured or of the subject pledged in bottomry, and (if there be such) in that of a fire insurance, and of the interest in the life of a debtor (if so stipulated in this case), is to be brought into the settlement for the loss in like manner; 2 Dutch. 541; 15 Ohio 81; 2 N. Y 285; 4 La. 289; 2 Sumn. 157.

The liability to pay salvage is not confined to the actual legal owners of the property saved, but it extends to all those who have an interest in the property and whose interests have been saved; 15 Prob. Div. 142.

Provision is made in R. S. § 4652 for salvage for the recapture of vessels or other property captured by any force hostile to the United States, before the capture. See the next titles; WRECK; RECAPTURE.

**SALVAGE CHARGES. In Insurance.** All those costs, expenses, and charges necessarily incurred in and about the saving and preservation of the property imperilled, and which, if the property be insured, are eventually borne by the underwriters. Stevens, Av. c. 2, § 1.

**SALVAGE LOSS.** That kind of loss which it is presumed would, but for certain services rendered and exertions made, have become a total loss. It also means, among underwriters and average-adjusters, a mode of settling a loss, under a policy, in cases where the goods have been necessarily sold at a port short of the port of destination, in consequence of the perils insured against. In such cases, though the property be not abandoned to the underwriter, the principle of abandonment is assumed in the adjustment of the loss. The underwriter pays a total loss. The net proceeds of the sale of the goods, after deducting all the expenses, are retained by the assured, and he credits the underwriter with the amount; 2 Phill. Ins. § 1480.

**SALVOR. In Maritime Law.** A person who saves property or rescues it from impending peril on the sea or when wrecked on the coast of the sea, or, in the United States, on a public navigable river or lake where interstate commerce is carried on, and who is under no pre-existing contract or obligation of duty by his relation to the property to render such services. 1 Hagg. Adm. 236; 1 Curt. C. C. 378.

In general the crew cannot claim as salvors of their own ship or cargo, they being under a pre-existing obligation of duty to be vigilant to avoid the danger, and when in it to exert themselves to rescue or save the property, in consideration of their wages merely; 1 Hagg. Adm. 236; 2 Mas. C. C. 319. But if their connection with the ship be dissolved, as by a capture, or the ship or cargo be voluntarily abandoned by order of the master, *sine spe revertendi aut recuperandi*, such abandonment taking place *bona fide* and without coercion on their part, and for the purpose of saving life, their contract is put an end to, and they may subsequently become salvors; 16 Jur. 572; 3 Sumn. 270; 2 Cra. 240; Daveis 121. A passenger; 3 B. & P. 612, n.; 1 W. N. C. (Pa.) iv.; 48 Fed. Rep. 479; 33 *id.* 884; a pilot; 10 Pet. 108; Gilp. 65; Lloyd's agent; 3 W. Rob. 181; an agent; [1892] Prob. 366; official persons; 3 Wash. C. C. 567; 1 C. Rob. 46; officers and crews of naval vessels; 2 Wall. Jr. 67; 1 Hagg. Adm. 158; 15 Pet. 518; coast guards; Bened. Adm. § 300 *a*; may all become salvors, and, as such, be entitled to salvage for performing services in saving property, when such services are not within or exceed the line of their proper official duties. But it is said that neither crew, pilot, ship's agent, nor public servants can, under ordinary circumstances, be salvors; Kennedy, Civil Salvage 25; nor can passengers; 2 Hagg. 3.

The fact that a part owner in a salving ship also has an interest in the salved property, will not prevent him from sharing in the salvage; 51 Fed. Rep. 916. An incorporated wrecking and salvage company may be granted salvage awards as liberally as natural persons so engaged; 40 Fed. Rep. 301.

The finders of a derelict (that is, a ship or goods at sea abandoned by the master and crew without the hope or intention of returning and resuming the possession) who take actual possession with an intention and with the means of saving it, acquire a right of possession which they can maintain against all the world, even the true owner, and become bound to preserve the property with good faith and bring it to a place of safety for the owner's use. They are not bound to part with the possession until their salvage is paid, or the property is taken into the custody of the law preparatory to the amount of salvage being legally ascertained; Davies 20; Olc. 462; Ware 339. If they cannot with their own force convey the property to a place of safety without imminent risk of a total or material loss,

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they cannot, consistently with their obligations to the owner, refuse the assistance of other persons proffering their aid, nor exclude them from rendering it under the pretext that they are the finders and have thus gained the right to the exclusive possession. But if third persons unjustifiably intrude themselves, their services will inure to the benefit of the original salvors; 1 Dods. 414; 3 Hagg. Adm. 156; Olc. 77. See SALVAGE.

If a first set of salvors fall into distress, and are assisted by a second or third set, the first or second do not lose their claim to salvage, unless they voluntarily and without fraud or coercion abandon the enterprise, but they all share together according to their respective merits; 1 Sumn. 400; 1 W. Rob. 406; 2 *id.* 70. When a vessel stands by and renders services to another, upon request, even though no benefit result from her doing so, she is entitled to salvage; 8 Asp. Mar. L. Cas. 263. In cases of ships stranded or in distress, not derelicts, salvors do not acquire an exclusive possession as against the owner, the master, or his agent. While the master continues on board, he is entitled to retain the command and control of the ship and cargo and to direct the labor. The salvors are assistants and laborers under him; and they have no right to prevent other persons from rendering assistance, if the master wishes such aid; 3 Hagg. Adm. 383; 2 W. Rob. 307; 2 E. L. & E. 551. When the ship has been relieved from its peril, salvors forfeit no right and impair no remedy by leaving the ship; 1 Hagg. Adm. 156; 1 Newb. 275. Their remedy to recover salvage is by libel or suit in the district court of the United States, sitting as a court of admiralty.

**SALVUS PLEGIUS.** A safe pledge; called, also, "*certus plegius*," a sure pledge. Bract. 160 *b*.

**SAME.** Same does not always mean identical. It frequently means of the kind or species, not the specific thing. 40 Ia. 487, 493. See Stroud, Dict.

**SAMPLE.** A small quantity of any commodity or merchandise, exhibited as a specimen of a larger quantity called the bulk.

A part shown as a specimen. 33 Gratt. 909.

When a sale is made by sample, the vendor warrants the quality of the bulk to be equal to that of the sample; Benj. Sales § 648; and if it afterwards turn out that the bulk does not correspond with the sample, the purchaser is not, in general, bound to take the property on a compensation being made to him for the difference; 1 Camp. 113. See 4 Camp. 22; 5 Johns. 395; 13 Mass. 139; 3 Rawle 37; 14 M. & W. 651. It is held that the vendor does not warrant goods, as fit for a particular purpose; 37 S. C. 7.

To constitute a sale by "sample," the contract must be made solely with reference to the sample; 13 Mass. 139; 40 N. Y. 113. Not every sale where a sample is shown is a sale by sample; there must be an understanding, expressed or implied, that the sale is by sample; 10 Wall. 383; 19 Md. 157. The mere exhibition of a sample is but a representation that it has been fairly taken from the full; 5 N. Y. 73. In Pennsylvania it has been held that in the absence of fraud or representation as to the quality, a sale by sample is not in itself a warranty of the quality of the goods, but simply a guaranty that the goods shall be similar in kind and merchantable; 83 Pa. 319; but the rule was changed by statute in 1887, the decision having been unsatisfactory to the profession and the public.

Although goods sold by sample are not in general deemed to be sold with an implied warranty that they were merchantable, the facts and circumstances may justify the inference that this implied warranty is superadded to the contract; L. R. 4 Ex. 49. If a manufacturer agrees to furnish goods according to sample, the sample is to be considered as if free from any secret defect of manufacture not discoverable on inspection, and unknown to both parties; L. R. 7 C. P. 438; but if the sale is made by a merchant, who is not a manufacturer, there is no implied warranty against secret defects; 7 Allen 29. It is an implied condition in a sale by sample that the buyer shall have a fair opportunity of comparing the bulk with the sample, and an improper refusal by the vendor to allow this will justify the buyer in rejecting the contract; 1 B. & C. 1. See Benj. Sales § 649.

**SAN SALVADOR.** A republic of Central America. The president is elected for four years and has a ministry. The national assembly is elected for two years by universal suffrage. There is a high court and a court of appeal. The code of laws is adopted from the Spanish and Napoleonic Codes.

**SANCTION.** That part of a law which inflicts a penalty for its violation or bestows a reward for its observance. Sanctions are of two kinds,—those which redress civil injuries, called civil sanctions, and those which punish crimes, called penal sanctions. 1 Hoffm. Leg. Outl. 279; Ruth. Inst. b. 2, c. 6, s. 6; Toull. tit. prél. 86; 1 Bla. Com. 56. See LAW.

**SANCTUARY.** A place of refuge, where the process of the law cannot be executed.

Sanctuaries may be divided into religious and civil. The former were very common in Europe,—religious houses affording protection from arrest to all persons, whether accused of crime or pursued for debt. This kind was never known in the United States, and was abolished in England by statute 21 Jac. I. c. 28.

Civil sanctuary, or that protection which is afforded to a man by his own house, was always respected in this country. The house protects the owner from the service

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of all civil process in the first instance, but not if he is once lawfully arrested and takes refuge in his own house. See DOOR; HOUSE; ARREST.

No place affords protection from arrest in criminal cases: a man may, therefore, be arrested in his own house in such cases, and the doors may be broken for the purpose of making the arrest. See ARREST.

**SANÆ MENTIS.** Of sound mind. Fleta, lib. 3, c. 7, § 1.

**SANE.** Whole; sound; in healthful state. It is applicable equally to the mind and to the body. 5 N. J. L. 661.

**SANE MEMORY.** That understanding which enables a man to make contracts and his will, and to perform such other acts as are authorized by law. See LUNACY; MEMORY; NON COMPOS MENTIS.

**SANG, SANC.** Blood. These words are nearly obsolete.

**SANGUINEM EMERE.** A redemption by villeins, of their blood or tenure, in order to become freemen.

**SANGUIS.** The right or power which the chief lord of the fee had to judge and determine cases where blood was shed. Mon. Ang. t. i. 1021.

**SANIS.** A kind of punishment among the Greeks; inflicted by binding the malefactor fast to a piece of wood. Encyc. Lond.

**SANITARY AUTHORITIES.** Persons having jurisdiction over their respective districts in regard to sewerage, drainage, supply of water, prevention of nuisances, etc. See HEALTH; QUARANTINE.

**SANITY.** The state of a person who has a sound understanding; the reverse of insanity.

The sanity of an individual is always presumed; 5 Johns. 144; 1 Pet. 163; 1 Hen. & M. 476; 4 Wash. C. C. 262. See INSANITY.

**SANS CEO QUE.** The same as *Absque hoc*, which see.

**SANS FRAIS.** Without expense.

**SANS IMPEACHMENT DE WASTE.** Without impeachment of waste. Litt. § 152.

**SANS NOMBRE** (Fr. without number). **In English Law.** A term used in relation to the right of putting animals on a common. The term common *sans nombre* does not mean that the beasts are to be innumerable, but only indefinite, not certain; Willis 227; but they are limited to the commoner's own commonable cattle, *levant et couchant*, upon his lands, or as many cattle as the land of the commoner can keep and maintain in winter. 5 Term 48; 1 Wms. Saund. 28, n. 4.

**SANS RECOURS** (Fr. without recourse). Words which are sometimes added to an indorsement by the indorsee to avoid incurring any liability. 7 Taunt. 160; 3 Cra. 193; 7 *id.* 159; 12 Mass. 172; 14 S. & R. 325. See INDORSEMENT.

**SAIO.** A tip-staff or sergeant-at-arms. Cowel; Cunningham.

**SASINE. In Scotch Law.** The ceremony of the symbolical tradition of land, answering to livery of sasine of the English law. 4 Kent 459.

**SATISDATIO** (Lat. *satis*, and *dare*). **In Civil Law.** Security given by a party to an action to pay what might be adjudged against him. It is a satisfactory security in opposition to a naked security or promise. Vicat, Voc. Jur.; 3 Bla. Com. 291.

**SATISFACTION** (Lat. *satis*, enough, *facio*, to do, to make). **In Practice.** An entry made on the record, by which a party in whose favor a judgment was rendered declares that he has been satisfied and paid.

In many states provision is made by statute, requiring the mortgagee to discharge a mortgage upon the record, by entering satisfaction in the margin, or by separate instrument, to be recorded on the margin. The refusal or neglect to enter satisfaction after payment and demand renders the mortgagee liable to an action after the time given him by the respective statutes for doing the same has elapsed, and subjects him to the payment of damages, and, in some cases, treble costs. In Indiana and New York, the register or recorder of deeds may himself discharge the mortgage upon the record on the exhibition of a certificate of payment and satisfaction signed by the mortgagee or his representatives, and attached to the mortgage, which shall be recorded. See MORTGAGE. As to accord and satisfaction, see ACCORD.

**In Equity.** The donation of a thing, with the intention, expressed or implied, that such donation is to be an extinguishment of some existing right or claim in the donee. See LEGACY; CUMULATIVE LEGACY.

**SATISFACTION, CONTRACTS TO.** A term used to express a class of contracts in which one party agrees to perform his promise to the satisfaction of the other. The cases have been recently classified by an able writer (Prof. Lawson, in 46 Cent. L. J. 360) as follows:—1. Where the fancy, taste, sensibility, or judgment of the promisor are involved. 2. Where the question is merely one of operative fitness or mechanical utility. In the first class the courts refuse to say that where a man agrees to pay if he is satisfied with the performance, he should be compelled to pay if some one else is satisfied with it. The courts recognize that in matters of taste or opinion there is no absolute standard as to what is good or bad. Hence, where the subject-matter is a suit of clothes; 113 Mass. 136; a bust of the defendant's husband; 44 Conn. 218; a portrait of the defendant's daughter; 39

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Mich. 49; a cabinet organ; 2 Atl. Rep. (Va.) 583; a set of artificial teeth; 7 Pitts. L. J. 140; a carriage; 2 C. B. N. S. 779; a steam-heater for a house; 26 Atl. Rep. (Pa.) 745; a play to be written by an author for an actor; 34 N. Y. Supp. 292; a design for a bank-note; 10 N. Y. Supp. 5; 14 *id.* 155; the question is not one for the court or jury to decide, but for the promisee alone.

So where the contract gives the master a right to discharge a servant if he is satisfied that the servant is incompetent; 54 Am. Rep. 714; or to employ him so long as he is satisfactory; 24 Hun 115; 6 Lans. 280; or to pay for services if they are satisfactory; 8 N. Y. Supp. 485.

In the second class of cases, the writer maintains that the same principle of law should be applied, and gives a number of cases where it has been applied; where the subject-matter of the agreement was the making of a book-case; 7 Gray 171; the sale of a harvesting machine; 50 Mich. 565; the sale of a steam fire engine; 24 Fed. Rep. 893; of a cord binder; 33 Minn. 32; a steamboat; 11 Hun 70; an elevator; 108 Pa. 297; steam fans; 66 Wis. 218; a printing press; 36 Fed. Rep. 414; a grain binder; 35 N. W. Rep. (Mich.) 841; a gas machine; 99 Mass. 183; a fanning mill; 43 Ill. 445.

The promisee, to come under the rules in the above cases, must act in good faith; his dissatisfaction must be actual, not feigned; real, not merely pretended; 49 Vt. 345; 108 Pa. 297; 43 Vt. 528. He must not act from caprice; 130 Pa. 66. He must, if a test is necessary to determine its fitness, give that test or allow it to be made; 65 Md. 198; 66 Wis. 218; 38 Pac. Rep. (Wash.) 763; 80 Fed. Rep. 705; 26 Atl. Rep. (Pa.) 745, holding that where the promisor dies before the test is made, the right to reject vests in his executor.

So an article to be manufactured cannot be rejected before it is substantially completed, so that the promisor will be able fairly to determine whether it was or would be satisfactory to him; 108 Pa. 297.

In a contract to furnish ventilating machinery, to the buyer's satisfaction, in order to justify a refusal of the work, some reasonable ground of dissatisfaction must be shown, and the existence of such ground is for the jury; 18 N. Y. L. J., following 108 N. Y. 289.

That the goods are not satisfactory does not give the purchaser the right to reject them and to claim damages for the breach of contract of the seller; 15 Atl. Rep. (Conn.) 405; nor to keep them and recover damages in an action for the contract price; 36 Fed. Rep. 414; 19 Me. 147.

If one agrees to perform to the satisfaction of another, he cannot recover without fulfilling the terms of the contract.

But, (1) in matters of personal taste the promisee is the sole judge as to whether he is or ought to be satisfied; 113 Mass. 136; 44 Conn. 218; 155 Pa. 394.

(2) In sales of goods where the promisor can be put substantially *in statu quo* the promisee is the sole judge; 50 Mich. 565; 66 Wis. 218.

(3) In contracts for work and labor other than such as are to satisfy a matter of personal taste, where the work and labor would be wholly lost to the promisor if refused, the courts tend to the view that the promisee must be satisfied when he ought to be; 101 N. Y. 387; 149 Mass. 284. See Huffcutt's Ans. Contr. 348.

There are a few cases which are apparently discordant, but which will be found, as Prof. Lawson observes, to rest on the difference between executory contracts of sale, and contracts for work and labor which have been done on the house or land of the promisee; 149 Mass. 284; 116 N. Y. 230; 108 *id.* 292; 9 N. W. Rep. (Mich.) 427; 81 Fed. Rep. 943; 21 So. Rep. (Ala.) 983; 14 Mo. App. 503. The cases in 127 Mo. 138; 2 Johns. 395; 45 Hun 75, appear to be really discordant.

**SATISFACTION PIECE. In English Practice.** An instrument of writing in which it is declared that satisfaction is acknowledged between the plaintiff and defendant. It is signed by the attorney, and on its production and the warrant of attorney, to the clerk of the judgments, satisfaction is entered on payment of certain fees. Lee, Dict of Pract. *Satisfaction.*

**SATISFACTORY EVIDENCE.** That which is sufficient to induce a belief that the thing is true; in other words, it is credible evidence. 3 Bouvier, Inst. n. 3049.

**SATISFACTORY LEASE.** Under an agreement to pay commissions for negotiating a "satisfactory lease" the lessor cannot arbitrarily refuse to accept a lease negotiated; 29 S. W. Rep. (Mo.) 1001.

**SATISFACTORY PROOF.** Where a city charter authorized contracts for street improvements to be given to the lowest bidder "who shall give satisfactory proof of his" ability to properly perform the work, it was held that the board of public works could not exercise an arbitrary discretion in awarding the contract, but must base their discretion on facts reasonably tending to support its determination. 31 Atl. Rep. (N. J.) 613.

**SATISFIED.** When applied to a note or bond, *paid.* 1 Root 306.

**SATISFIED TERMS ACT.** The stat. 8 & 9 Vict. c. 112, passed to abolish satisfied outstanding terms of years in land. By this act, terms which shall henceforth become attendant upon the inheritance, either by express *declaration* or construction of law, are to cease and determine. This in effect abolishes outstanding terms; 1 Steph. Com., 11th ed. 296, 297; Wms. R. P. pt. iv. c. 1; Moz. & W.

**SATURDAY'S STOP.** A space of time from evensong on Saturday till sunrising on Monday, in which it was not

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lawful to take salmon in Scotland and the northern parts of England. Cowel.

**SAVING CLAUSE.** In a legal instrument a clause exempting something which might otherwise be subjected to the operation of the instrument. In an act of parliament, a saving clause which is repugnant to the body of such act is void. 1 Co. 118. See CONSTRUCTION.

**SAVING THE STATUTE OF LIMITATIONS.** The saving or preserving a debt from being barred by the operation of the statute.

**SAVINGS BANK.** An institution in the nature of a bank, established for the purpose of receiving deposits of money, for the benefit of the persons depositing, to accumulate the produce of so much thereof as shall not be required by the depositors, their executors or administrators, at compound interest, and to return the whole or any part of such deposit, and the produce thereof to the depositors, their executors or administrators, deducting out of such produce so much as shall be required for the necessary expenses attending the management of such institution, but deriving no benefit whatever from any such deposit or the produce thereof. Grant, Bank., 5th ed. 262; Bolles, Banks & Dep. 177.

Savings banks are not banking institutions in the commercial sense of that phrase and are not to be classed as national banks in determining the validity of state taxation of the latter; 125 U. S. 60.

Savings banks cannot do business as banks of discount unless by statute; 12 Blatch. 209. It has been considered that savings banks are trustees for depositors; 68 Me. 396; 32 N. J. Eq. 163; and therefore subject to the jurisdiction of equity; 28 N. J. Eq. 552; they have been held to be agents for the depositor; 38 Conn. 203; and debtors; 92 N. Y. 7; 122 *id.* 135; 130 Mass. 443. That the rights of the depositors are of a two-fold character and occupy a position similar to that of stockholders in an ordinary corporation, see 1 Moraw. Corp. § 391; but as long as the institution is solvent the depositors are mere creditors; *id.*

Where the by-laws require the presentation of the pass-book, as a condition precedent to the withdrawal of the deposit and this regulation is printed in the book, it becomes a part of the contract between the parties; 91 Pa. 315; 141 Mass. 33. In case of the loss of the pass-book, the depositor has the right to receive his money without producing it; 14 R. I. 68.

It has been held that after payment to one who was apparently in lawful possession of the pass-book, the real depositor cannot recover unless upon proof of want of care on the part of the officers of the savings banks. See 101 N. Y. 58. And even where the pass-book contains a stipulation that the deposit may be paid to any one who presents the book, the officers are still bound to use reasonable care; 59 N. H. 1. A by-law that a savings bank shall not be liable to pay a depositor when it has already paid the holder of his pass-book which had been stolen, is not binding unless the depositor has notice of it; 68 N. W. Rep. (Mich.) 118.

In case of insolvency the assets are distributable among the depositors; 93 Mo. 503. In 28 N. J. Eq. 552, the court made an order scaling down the deposits and authorized the savings bank to continue business. By statute in New York courts may scale down deposits of insolvent savings banks and authorize them to continue business.

The surplus of a savings bank belongs in equity to its depositors, and si a part of its deposits in the same sense as the stipulated interest is; 154 N. Y. 122; and is exempt from taxation as much as deposits; 18 N. Y. L. J. 1341 (S. C. of N. Y., since affirmed).

*Postoffice saving banks* were established in England in 1861. The act authorized the postmaster-general, with the consent of the treasury, to cause his officers to receive deposits in all towns in which a branch office for that purpose was appointed, for remittance to the principal office, and to repay the same, under such regulations as should be prescribed. Deposits are payable ten days after demand, with interest at the rate of two pounds ten shillings per cent. per annum. The deposits are paid over to the national debt commissioners and by them invested in such securities as are lawful for the funds of other savings banks. Any deficiency is made good out of the consolidated fund; 3 Steph. Com. 88.

**SAVOY.** One of the ancient privileged places or sanctuaries. 4 Steph. Com. 227, n.

**SAXON LAGE.** The laws of the West Saxons. Cowel.

**SAY ABOUT.** Words frequently used in contracts to indicate an uncertain quantity. They have been said to mark emphatically the vendor's purpose to guard himself against being supposed to have made an absolute promise as to quantity; 21 W. R. 609. There a sale of all the spars manufactured, say about 600, was held to be complied with by tender of 496 spars. See 2 B. & Ad. 106; 5 Gray 589; 8 Pet. 181.

**SCACCARIUM.** A chequered cloth resembling a chess-board which covered the table in the Exchequer, and on which, when certain of the king's accounts were made up, the sums were marked and scored with counters. Hence the court of exchequer or *curia scaccarii* derived its name. 3 Bla. Com. 44.

**SCALAM.** The old way of paying money into the Exchequer. Cowel.

**SCALING LAWS.** A term used to signify statutes establishing the process of adjusting the difference in value between depreciated paper money and specie.

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Such statutes were rendered necessary by the depreciation of paper money necessarily following the establishment of American independence. And, more recently, to discharge those debts which were made payable in Confederate money. The statutes are now obsolete.

**SCANDAL.** A scandalous verbal report or rumor respecting some person.

**SCANDALOUS MATTER. In Equity Pleading.** Unnecessary matter criminatory of the defendant or any other person, alleged in the bill, answer, or other pleading, or in the interrogatories to or answers by witnesses. Adams, Eq. 306. Matter which is relevant can never be scandalous; Story, Eq. Pl. § 270; 15 Ves. 477; see 42 N. J. Eq. 248, and the degree of relevancy is of no account in determining the question; Cooper, Eq. Pl. 19; 2 Ves. 24; 15 *id.* 477. Where scandal is alleged, whether in the bill; 2 Ves. 631; answer; Mitf. Eq. Pl. 313; or interrogatories to or answer of witnesses; 2 Y. & C. 445; it will be referred to a master at any time; 2 Ves. 631; and, by leave of court, even upon the application of a stranger to the suit; 6 Ves. 514; 5 Beav. 82; and matter found to be scandalous by him will be expunged; Story, Eq. Pl. §§ 266, 862; 4 Hen. & M. 414; at the cost of counsel introducing it, in some cases; Story, Eq. Pl. § 266. The circuit court has an inherent power to strike out scandalous matter on their own motion and in the absence of pleading, and may order a bill to be struck from its files and to permit the complainant to file a new bill excluding such matter; 85 Fed. Rep. 55. The presence of scandalous matter in the bill is no excuse for its being in the answer; 19 Me. 214. Parts of an answer, though immaterial as a defence and scandalous, will not be suppressed when intended to meet charges of bad faith in the bill; 84 Fed. Rep. 379.

**SCANDALUM MAGNATUM** (L. Lat. slander of great men). Words spoken in derogation of a peer, a judge, or other great officer of the realm. 1 Ventr. 60. This was distinct from mere slander in the earlier law, and was considered a more heinous offence. Bull. N. P. 4; Webb's Poll. on Torts 288 *b*.

It depended on early English statutes which after being long obsolete in practice were repealed in 1887. See 3 Bla. Com. 124.

**SCAVAGE, SCHEVAGE, SCHEWAGE, or SHEWAGE.** A kind of toll or custom, exacted by mayors, sheriffs, etc., of merchant strangers, for wares showed or offered for sale within their liberties. Prohibited by 19 Hen. VII. c. 7. Cowel.

**SCHEDULE. In Practice.** When an indictment is returned from an inferior court in obedience to a writ of certiorari, the statement of the previous proceedings sent with it is termed the schedule. 1 Saund. 309 *a*, n. 2.

Schedules are also frequently annexed to answers in a court of equity, and to depositions and other documents, in order to show more in detail the matter they contain than could otherwise be conveniently shown.

The term is frequently used instead of inventory.

**SCHIREMAN.** A sheriff; the ancient name of an earl.

**SCHIRRENS-GELD.** A tax paid to sheriffs for keeping the shire or county court. Cowel.

**SCHISM-BILL.** An act passed in the reign of Queen Anne to restrain Protestant dissenters from educating their own children, and forbade all tutors and schoolmasters to be present at any dissenting place of worship.

**SCHOOL.** An institution of learning of a lower grade than a college or a university. A place of primary instruction. Webster, Dict. As used in the American reports, the term generally refers to the common or public schools existing under the laws of each state and maintained at the expense of the public.

Public school is synonymous with common school; 103 Mass. 97; but the term is not limited to a school of the lowest grade; it includes all schools from those lower than grammar schools to high schools, but not one founded by a charitable bequest which vests the order and superintendence of it in a board of trustees; *id.*

When the legislature has placed the management of public schools under the exclusive control of directors, trustees, and boards of education, the courts have no rightful authority to interfere by directing what instruction shall be given, or what book shall be used therein; 23 Ohio St. 211; s. c. 13 Am. Rep. 233. A statute establishing separate systems of schools for white and colored children is not in violation of the fourteenth amendment of the constitution of the United States. And where appropriate schools for colored children are maintained, such children may be lawfully excluded from schools established for white children; 48 Col. 36; s. c. 17 Am. Rep. 405; 48 Ind. 327; s. c. 17 Am. Rep. 738; 93 Ind. 303; 45 Ark. 121; 95 U. S. 504; nor did such exclusion violate any constitutional right before the fourteenth amendment was adopted; 5 Cush. 108. But it has been held that unless the legislature clearly confers upon boards of education the power to establish separate schools for white and colored children, the power does not exist; 25 Pac. Rep. (Kan.) 616. A Chinese pupil cannot be excluded from a public school; 66 Cal. 478. A mandamus will lie compelling trustees to admit colored children to public schools where separate schools are not provided for them; 7 Nev. 342; s. c. 8 Am. Rep. 718.

Reading the Bible in the public schools is sectarian instruction; 76 Wis. 177 (under the language of the constitution and

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laws); *contra*, 38 Me. 379; 12 Allen 127; 95 Ill. 263; 64 Ia. 367; 23 Ohio St. 211.

*In Ohio*, the constitution of the state does not enjoin or require religious instruction or the reading of religious books in the public schools of the state.

The legislature having placed the management of the public schools under the exclusive control of directors, trustees and boards of education, the courts have no rightful authority to interfere by directing what instruction shall be given or what books read therein; 23 Ohio St. 211.

In that case an injunction was granted by the court below to restrain the Board of Education of Cincinnati from prohibiting the reading of the Bible in the public schools and the decree was reversed. For the history of the case, arguments, and opinions, see "The Bible in the Public Schools," published in Cincinnati, 1870.

A writ of mandamus to compel the discontinuance of Bible reading in the common schools was granted by a unanimous court, upon the ground that it was sectarian instruction, forbidden by the state constitution; 76 Wis. 177; S. C. 7 L. R. A. 330.

This case was followed by Carpenter, J., in a case in Detroit, Pfeiffer *v.* School Board, May, 1897.

In a Pennsylvania case it was held by Edwards, J., that the reading of the Holy Scriptures, in either version, as a part of the opening exercises in our public schools, does not violate any constitutional provision. It is not in contravention of art. 1, 3, nor art. 10, 2; 7 Dist. Rep. Pa. 586.

The argument of Richard H. Dana, Jr., in the case in 38 Me. 376, has been published in pamphlet form.

In an action by a father for the expulsion of his child from school for a refusal to comply with the orders of her instructor to read the Bible as a part of the course of instruction, a non-suit was granted and confirmed on the ground that an action could not be maintained by a parent, for want of direct pecuniary injury; 38 Me. 376; and an action by the child by her next friend was not sustained upon the ground that the action by the school committee was discretionary and could not be reviewed.

A student of the University of Illinois, after six years' acquiescence in the regulations requiring attendance at chapel, absented himself, disclaiming any conscientious scruples on the subject and was dismissed; an application for a mandamus to reinstate him was denied upon the ground that the rule requiring attendance upon chapel was not a violation of the constitutional provision that "no person shall be required to attended on or support any ministry or place of worship, against his consent;" 137 Ill. 296.

A bill by a taxpayer for an injunction to restrain school directors from allowing the schoolhouse to be used by any society or organization for the purpose of a religious meeting-house, was dismissed on demurrer; 93 Ill. 61. But it has been held that school directors have no authority to permit public school buildings to be used for holding sectarian religious meetings or public lyceum meetings, or for any other purpose than school purposes, but they may permit them to be used for lectures of an educational nature; 182 Pa. 251.

A public school teacher has no authority to compel a pupil to pursue a certain study against the wishes of its parent; 35 Wis. 59; 79 Ill. 567; 87 Ill. 303; *contra*, 108 Ind. 31; 105 Mass. 475; 48 Vt. 444; 38 Me. 379; 59 N. H. 473; 29 Ohio St. 89. A teacher has no right to punish a child for neglecting or refusing to study certain branches from which the parents of the child have requested that it might be excused, or which they have forbidden it to pursue, if those facts are known to the teacher. The proper remedy is to exclude the pupil from the school; 50 Ia. 145; 35 Wis. 59.

Directors; 105 Mass. 475; and teachers; 48 Vt. 444; may expel or suspend pupils for sufficient cause, as for breach of discipline; 46 Vt. 452; or for general immoral character; 8 Cush. 160; for refusal to take part in musical exercises; 108 Ind. 31; for refusal to write English compositions; 32 Vt. 224; for absence contrary to rules; 48 *id.* 444; for refusal on the part of the parents to sign and return periodical written reports of the pupil's standing; 52 N. W. Rep. (Neb.) 710; for misbehavior outside of the school tending to injure the school and subvert the master's authority; 32 Vt. 114; for a father's refusal to permit the master to whip the child or to correct him himself; 30 S. W. Rep. 269; by reason of the parent visiting the school when in session and using offensive language to the teacher; 28 S. E. Rep. (Ga.) 896, in which case the court cited a letter from Bleckley, C. J., to the court relating to the case. In 71 Mo. 628, it was held that the proper remedy for truancy was not expulsion, but it is also held that the conduct of a pupil at a boarding school, in continually playing truant, and finally leaving for his home, is ground for expulsion; 30 S. W. Rep. (Tex.) 268.

Truancy is an offence not known to the common law, but it is held that boys between the ages of twelve and fifteen who refuse to attend school and wander about public places during school hours are truants under a statute; 36 Atl. Rep. (Me.) 1001, which case see as to correction for that offence. Where the rules of a boarding school provide that there will be no reduction in case of withdrawals, and that all payments will be forfeited on expulsion, there can be no recovery; 30 S. W. Rep. (Tex.) 268.

It is usually provided by constitution or statute that school facilities must be provided for children of the proper age, and compulsory education has been established in Connecticut, New Hampshire, New Jersey, New Mexico, Massachusetts, Montana, Vermont, Washington, Wyoming, Wis-

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consin, Rhode Island, Ohio, and Pennsylvania.

School directors cannot terminate a contract with a teacher by doing away with the particular school; 1 Ind. App. 138.

In the absence of any express stipulation to that effect there is no contract to give a scholarship to the candidate who obtains the highest marks in the scholarship examination; [1895] 1 Ch. 480.

A college has no right to refuse arbitrarily to examine a student for a degree. See N. Y. L. J., June 27, 1891.

Within the scope of his powers the decision of a state superintendent of schools is conclusive and will be enforced by mandamus; 31 Atl. Rep. (N. J.) 168.

See Am. & E. Encyc. Law; Taylor, Public Schools; VACCINATION; LANDS, PUBLIC; EDUCATION; CORRECTION; ASSAULT; BATTERY. And as to correction, see also 35 Am. L. Reg. 88.

**SCHOOLMASTER.** One employed in teaching a school. See SCHOOL.

The schoolmaster is entitled to be paid for his services, by those who employ him. See 1 Bingh. 357; 8 J. B. Moore 368. His duties are to teach his pupils what he has undertaken, and to have a special care over their morals. See 1 Stark. 421; ASSAULT. The salary of a public school teacher is not attachable by trustee process while in the hands of city officials whose duty it is to pay it; 54 Ga. 21; s. c. 21 Am. Rep. 273.

**SCENERY.** Where a contract provided for the furnishing of scenery and fixtures for a theatre it was held that painting the walls did not fall within the denomination either of scenery or fixtures. 4 R. I. 364.

**SCIENCE.** The knowledge of many, methodically digested and arranged, so as to be attainable by one; a body of principles and deductions to explain the nature of some matter. 33 La. Am. 637. See 13 Wend. 205; BOOKS OF SCIENCE.

**SCIENDUM** (L. Lat.). **In English Law.** The name given to a clause inserted in the record by which it is made "known that the justice here in court, in this same term, delivered a writ thereupon to the deputy sheriff of the county aforesaid, to be executed in due form of law." Lee, Dict. *Record.*

**SCIENTER** (Lat. knowingly). The allegation in a pleading of knowledge; Webb's Poll. Torts 614; on the part of a defendant or person accused, which is necessary to charge upon him the consequence of the crime or tort.

A man may do many acts which are justifiable or not, as he is ignorant or not ignorant of certain facts. He may pass a counterfeit coin, when he is ignorant of its being counterfeit, and is guilty of no offence; but if he knew the coin to be counterfeit, which is called the *scienter*, he is guilty of passing counterfeit money.

Where evidence of the *scienter* has been given, it may be rebutted, as where the charge is passing counterfeit money, the defendant may show that the bill was genuine or that under the circumstances he had reason to suppose it was, or that he examined a counterfeit detector in regard to it; 8 Wis. 167. Proof of a conspiracy to put forth counterfeit bills is admissible to show the *scienter* as against one of the parties to it; 19 Conn. 233.

In an action against the owner of a dog, alleged to be a dangerous animal, the fact that it is a watch-dog, chained during the day and loosed at night, is sufficient without further proof of *scienter*; 35 La. Ann. 1091.

The averment of a *scienter* in an indictment is not sufficient to supply omission of the positive statement that the defendant did the act; 2 McCord 377; and a charge in an indictment that the defendant passed, etc., a counterfeit, without alleging that he knew it to be such, is insufficient even after verdict; 105 U. S. 611.

**SCILICET** (Lat. *scire*, to know, *licet*, it is permitted: you may know: translated by *to wit*, in its old sense of to know). That is to say; to wit; namely.

It is a clause to usher in the sentence of another, to particularize that which was too general before, distribute what was too gross, or to explain what was doubtful and obscure. It neither increases nor diminishes the premises or *habendum*, for it gives nothing of itself; it may make a restriction when the preceding words may be restrained; Hob. 171; 1 P. Wms. 18; Co. Litt. 180 *b*, n. 1.

When the scilicet is repugnant to the precedent matter, it is void: for example, when a declaration in trover states that the plaintiff on the *third* day of May was possessed of certain goods which on the fourth day of May came to the defendant's hands, who afterward, to wit, on the *first* day of May, converted them, the scilicet was rejected as surplusage; Cro. Jac. 428. And see 6 Binn. 15; 3 Saund. 291, note 1.

Stating material and traversable matter under a scilicet will not avoid the consequences of a variance; 1 M'Cl. & Y. 277; 2 B. & P. 170, n. 2; 4 Johns. 450; 2 Pick. 223; nor will the mere omission of a scilicet render immaterial matter material; 2 Saund. 206 *a*; even in a criminal proceeding; 2 Camp. 307, n. See 3 Term 68; 3 Maule & S. 173.

**SCINTILLA OF EVIDENCE.** The doctrine that where there is *any* evidence, however slight, *tending* to support a material issue, the case must go to the jury, since they are the exclusive judges of the weight of the evidence. 43 Ga. 323; 106 Mass. 271; 40 Mo. 151; 87 *id.* 462; 35 Ia. 585; 48 Vt. 358. In the United States courts and in England, it has been decided that the more reasonable rule is, "that before the evidence is left to the jury, there is, or may be, in every case, a preliminary question for the judge, not whether there

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is literally *no* evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden or proof is imposed;" 94 U. S. 278; 11 How. 373; 9 Wall. 197; 13 C. B. 916; 3 C. B. N. S. 150.

The old rule is likewise exploded in several of the states, whose courts are now in the constant habit of ordering nonsuits against the complaint of the plaintiff; 49 N. J. L. 671; 76 Me. 132; 1 Greene 494; 9 Gill 331; 26 N. H. 351; 49 N. Y. 671; or giving peremptory instructions to the jury to find for one party or the other; 71 N. C. 451; 15 Kan. 244; or of sustaining demurrers to the evidence, in cases where there is confessedly some evidence supporting a material issue. This is done under the guise of various expressions, which seem to leave the ancient prerogative of the jury intact. In Maryland, the judge achieves this result by determining the *legal* sufficiency of the evidence; 7 Gill & J. 20; and in Missouri by determining its legal effect; 9 Mo. 113. See Thomps. Charg. Jury § 30; Thomps. Jur. § 2246.

**SCINTILLA JURIS** (Lat. a spark of law or right). A legal fiction resorted to for the purpose of enabling feoffees to uses to support contingent uses when they come into existence, thereby to enable the statute of uses, 27 Hen. VIII., to execute them. For example, a shifting use: a grant to A and his heirs to the use of B and his heirs, until C perform an act, and then to the use of C and his heirs. Here the statute executes the use in B, which, being coextensive with A's seisin, leaves no actual seisin in A. When, however, C performs the act, B's use ceases, and C's springs up, and he enjoys the fee-simple; upon which the question arises, out of what seisin C's use is served. It is said to be served out of A's original seisin; for upon the cessor of B's use it is contended that the original seisin reverted to A for the purpose of serving C's use, and is a possibility of seisin, or *scintilla juris*. See 4 Kent 238, and the authorities there cited, for the learning upon this subject; Burton, R. P. 48; Wilson, Springing Uses 59; Washb. R. P.

**SCIRE FACIAS** (Lat. that you make known). The name of a writ (and of the whole proceeding) founded on some public record. Fost. Fed. Pr. 301.

Public records, to which the writ is applicable, are of two classes, *judicial* and *non-judicial*.

Judicial records are of two kinds, judgments in former suits, and recognizances which are of the nature of judgments. When founded on a judgment, the purpose of the writ is either to revive the judgment, which because of lapse of time —a year and a day at common law, but now varied by statutes—is presumed in law to be executed or released, and therefore execution on it is not allowed without giving notice, by *scire facias*, to the defendant to come in, and show if he can, by release or otherwise, why execution ought not to issue; or to make a person, who derives a benefit by or becomes chargeable to the execution, a party to the judgment, who was not a party to the original suit. In both of these classes of cases, the purpose of the writ is merely to continue a former suit to execution. When the writ is founded on a recognizance, its purpose is, as in cases of judgment, to have execution; and though it is not a continuation of a former suit, as in the case of judgments, yet, not being the commencement and foundation of an action, it is not an original, but a judicial, writ, and at most is only in the nature of an original action. When founded on a judicial record, the writ must issue out of the court where the judgment was given or recognizance entered of record, if the judgment or recognizance remains there, or if they are removed out of the court where they are; 3 Bla. Com. 416, 421; 3 Gill & J. 359; 2 Wms. Saund. 71, notes. See 78 Ill. 78; 58 Tex. 472.

*Scire facias* to revive a judgment being a continuation of the suit, jurisdiction thereon is in the court where the judgment was rendered, regardless of the residence of the parties; 71 Tex. 103. A *scire facias* to revive a judgment being regarded in Pennsylvania as a substitute for an action of debt on the judgment, a judgment so revived without service or appearance has no binding force as against a defendant who resides in another state; 161 U. S. 642; and in Vermont it is held that when judgment is thus revived the plaintiff cannot recover in another state thereon after the limitation has run against the original judgment; 35 Atl. Rep. (Vt.) 489. A judgment may be revived at common law on a writ and alias writ of *sci. fa.* with return of *nihil* as to each; 52 Mo. App. 251; but such revival on two returns of *nihil* operates merely to keep in force the local lien and does not stop the running of the statute of limitations in another state where the defendant resides; 161 U. S. 642.

Non-judicial records are letters patent and corporate charters. The writ, when founded on a non-judicial record, is the commencement and foundation of an original action; and its purpose is always to repeal or forfeit the record. *Quo warranto* is the usual and more appropriate remedy to forfeit corporate charters and offices; and *scire facias*, though used for that purpose, is more especially applicable to the repeal of letters patent. When the crown is deceived by a false suggestion, or when it has granted anything which by law it cannot grant, or where the holder of a patent office has committed a cause of forfeiture, and other like cases, the crown may by its prerogative repeal by *scire facias* its own grant. And where by several letters patent the self-same thing has been granted to several persons, the first patentee is of right permitted, in the name and at the suit of the crown by *scire facias*, to repeal

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the subsequent letters patent; and so, in any case of the grant of a patent which is injurious to another, the injured party is permitted to use the name of the crown in a suit by *scire facias* for the repeal of the grant. This privilege of suing in the name of the crown for the repeal of the patent is granted to prevent multiplicity of suits; 2 Wms. Saund. 72, notes. A state may by *scire facias* repeal a patent of land fraudulently obtained; 1 H. & M'H. 162. See REPEAL; PATENT.

*Scire facias* is also used by government as a mode to ascertain and enforce the forfeiture of a corporate charter; 3 Wood, Ry. L. 208, n.; where there is a legal existing body capable of acting, but who have abused their power; it cannot, like *quo warranto* (which is applicable to all cases of forfeiture), be applied where there is a body corporate *de facto* only, who take upon themselves to act, but cannot legally exercise their powers. In *scire facias* to forfeit a corporate charter, the government must be a party to the suit; for the judgment is that the parties be ousted and the franchises be seized into the hands of the government; 2 Kent 313; 10 B. & C. 240; 5 Mass. 230; 16 S. & R. 140; 4 Gill & J. 1; 9 *id.* 365; 4 Gill 404. See QUO WARRANTO.

*Scire facias* is also used to suggest further breaches on a bond with a condition, where a judgment has been obtained for some but not all of the breaches and to recover further instalments where a judgment has been obtained for the penalty before all the instalments are due; 1 Wms. Saund. 58, n. 1; 4 Md. 375.

By statute, in Pennsylvania, *scire facias* is the method of proceeding upon a mortgage.

The pleadings in *scire facias* are peculiar. The writ recites the judgment or other record, and also the suggestions which the plaintiff must make to the court to entitle him to the proceeding by *scire facias*. The writ, therefore, presents the plaintiff's whole case, and constitutes the declaration, to which the defendant must plead; 1 Blackf. 297. And when the proceeding is used to forfeit a corporate charter, all the causes of forfeiture must be assigned in distinct breaches in the writ, as on a bond with a condition is done in the declaration or replication. And the defendant must either disclaim the charter or deny its existence, or deny the facts alleged as breaches, or demur to them. The suggestions in the writ, disclosing the foundation of the plaintiff's case, must also be traversed if they are to be avoided. The *scire facias* is founded partly upon them and partly upon the record; 2 Inst. 470. 679. They are substantive facts, and can be traversed by distinct pleas embracing them alone, just as any other fundamental allegation can be traversed alone. All the pleadings after the writ or declaration are in the ordinary forms. There are no pleadings in *scire facias* to forfeit a corporate charter to be found in the books, as the proceeding has been seldom used. There is a case in 1 P. Wms. 207, but no pleadings. There is a case also in 9 Gill 379, with a synopsis of the pleadings. Perhaps the only other case is in Vermont; and it is without pleadings. A defendant cannot plead more than one plea to a *scire facias* to forfeit a corporate charter: the statutes of 4 & 5 Anne, ch. 16, and 9 Anne, ch. 20, allowing double pleas, do not extend to the crown; 1 Chitty, Pl. 479; 1 P. Wms. 220.

**SCIRE FACIAS AD AUDIENDUM ERRORES** (Lat.). The name of a writ which is sued out after the plaintiff in error has assigned his errors. Fitzh. N. B. 20; Bac. Abr. *Error* (F). Where a *scire facias ad audiendum errores* describes correctly, in its recital, the parties to the judgment complained of, but in the citing part brings in parties whose names do not appear in the writ of error, the irregularity in the *scire facias* may be cured by amendment; 30 Fla. 210.

**SCIRE FACIAS AD DISPROBANDUM DEBITUM** (Lat.). The name of a writ in use in Pennsylvania, which lies by a defendant in foreign attachment against the plaintiff, in order to enable him, within a year and a day next ensuing the time of payment to the plaintiff in the attachment, to disprove or avoid the debt recovered against him. Act, June 13, 1836.

**SCIRE FACIAS FOR THE CROWN.** The summary proceeding by extent is only resorted to when a crown debtor is insolvent, or there is good ground for supposing that the debt may be lost by delay. Whart. Law Lex.

**SCIRE FACIAS QUARE RESTITUTIONEM NON.** A writ which lies where execution on a judgment has been levied, but the money has not been paid over to the plaintiff, and the judgment is afterwards reversed in error or on appeal; in such a case a *scire facias* is necessary before a writ of restitution can issue. Chit. 582.

**SCIRE FECI** (Lat. I have made known). **In Practice.** The return of the sheriff, or other proper officer, to the writ of *scire facias*, when it has been served.

**SCIRE FIERI INQUIRY. In English Law.** The name of a writ formerly used to recover the amount of a judgment from an executor.

The history of the origin of the writ is as follows: When on an execution *de bonis testatoris* against an executor the sheriff returned *nulla bona* and also a *devastavit*, a *fieri facias de bonis propriis* might formerly have been issued against the executor, without a previous inquisition finding a *devastavit* and a *scire facias*. But the most usual practice upon the sheriff's return of *nulla bona* to a *fieri facias de bonis testatoris* was to sue out a special writ of *fieri facias de bonis testatoris*, with a clause in it, "*et si tibi constare poterit*," that the executor had wasted the goods, then to levy *de bonis propriis*. This was the practice in the king's bench till the time of Charles I.



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In the common pleas a practice had prevailed in early times upon a suggestion in the special writ of *fieri facias* of a *devastavit* by the executor, to direct the sheriff to inquire by a jury whether the executor had wasted the goods, and if the jury found he had, then a *scire facias* was issued out against him, and, unless he made a good defence thereto, an execution *de bonis propriis* was awarded against him.

The practice of the two courts being different, several cases were brought into the king's bench on error, and at last it became the practice of both courts, for the sake of expedition, to incorporate the *fieri facias* inquiry, and *scire facias*, into one writ, thence called a *scire fieri inquiry*,—a name compounded of the first words of the two writs of *scire facias* and *fieri facias*, and that of inquiry, of which it consists.

This writ recites the *fieri facias de bonis testatoris* sued out on the judgment against the executor, the return of *nulla bona* by the sheriff, and then, suggesting that the executor had sold and converted the goods of the testator to the value of the debt and damages recovered, commands the sheriff to levy the said debt and damages of the goods of the testator in the hands of the executor, if they could be levied thereof, but if it should appear to him by the inquisition of a jury that the executor had wasted the goods of the testator, then the sheriff is to warn the executor to appear, etc. If the judgment had been either by or against the testator or intestate, or both, the writ of *fieri facias* recites that fact, and also that the court had adjudged, upon a *scire facias* to revive the judgment, that the executor or administrator should have execution for the debt, etc. Clift, Entr. 659; Lilly, Entr. 664.

Although this practice is sometimes adopted, yet the most usual proceeding is by action of debt, on the judgment, suggesting a *devastavit* because in the proceeding by *scire fieri inquiry* the plaintiff is not entitled to costs unless the executor appears and pleads to the *scire facias*: 1 Saund. 219, n. 8. See 2 Archb. Pr. 934.

**SCIREWYTE.** The annual tax or prestation paid to the sheriff for holding the assizes or county courts. Par. Ant. 573.

**SCOLD.** See COMMON SCOLD.

**SCOPE.** Design, aim, or purpose. 75 Ill. 246. As ordinarily used, extent, limits, etc.

**SCOT AND LOT. In English Law.** See LOT AND SCOT.

**SCOTALE.** An extortion by officers of the forests who kept ale-houses and compelled people to drink there under fear of their displeasure. Manw. For. Laws, pt. 1, 216.

**SCOTCH MARRIAGES.** See GRETNA GREEN.

**SCOTCH PEERS.** Peers of the kingdom of Scotland; of these sixteen are elected by the rest and represent the whole body. They are elected for one parliament only. See PEERS.

**SCOTLAND.** See UNITED KINGDOM OF GREAT BRITAIN AND IRELAND.

**SCOUNDREL.** An opprobrious title, applicable to a person of bad character. General damages will not lie for calling a man a scoundrel, but special damages may be recovered when there has been an actual loss; 2 Bouvier, Inst. n. 2250; 1 Chitty, Pr. 44.

**SCRAWL.** A mark which is to supply the place of a seal. 2 Pars. Contr., 8th ed. 589. See SCROLL.

**SCRIBE.** See CANCELLARIUS.

**SCRIP.** A certificate or schedule. Evidence of the right to obtain shares in a public company; sometimes called scrip certificate, to distinguish it from the real title to shares. Whart. L. Dict.; 15 Ark. 12. Sometimes, in this country, it indicates a substitute for a cash dividend, usually payable out of future earnings. Land scrip is a certificate that the holder is entitled to take up so much (usually government) land. The possession of such scrip is *prima facie* evidence of ownership of the shares therein designated; Add. Contr. 203*. It is not goods, wares, or merchandise within the statute of frauds; 16 M. & W. 66. Scrip certificates have been held negotiable; L. R. 10 Ex. 337; Dos Passos, Stockbrokers 488. Where the interest of a mortgage bond may, at the option of the mortgagor, be paid in scrip, if he allows the day for payment to pass without exercising such option, the interest must be paid in money; 122 U. S. 687. See DIVIDEND.

**SCRIPT.** The original or principal instrument, where there are part and counterpart.

**SCRIVENER.** A person whose business it is to write deeds and other instruments for others; a conveyancer.

Money scriveners are those who are engaged in procuring money to be lent on mortgages and other securities, and lending such money accordingly. They act also as agents for the purchase and sale of real estates.

An attorney, *qua* attorney, is not a scrivener; 18 E. L. & Eq. R. 402.

To be considered a money scrivener, a person must be concerned in carrying on the trade or profession as a means of making a livelihood. He must in the course of his occupation receive other men's money into his trust and custody, to lay out for them as occasion offers; 3 Camp. 538.

**SCROLL.** A mark intended to supply the place of a seal made with a pen on a deed or other instrument of writing. Mitch. R. E. & Conv. 454, 455. In Mississippi and Florida it has been held, that "a scroll attached to a written instrument has the effect of a seal, whenever it appears from the body of the instrument, the scroll itself, or the place where affixed, that such scroll was intended as a seal;" 42 Miss. 304; 9 Sm. & M. 34. In Tennessee and Minnesota the word "seal" affixed to the name has been held equivalent to a seal or scroll; 1 Swan 333; 57 Minn. 499; and so where the word seal is printed and appears opposite the name; 156 Pa. 329; otherwise in Virginia and Indiana. In Wisconsin and Pennsylvania a printed "L. S." inclosed in brackets, in the usual place of a seal, is sufficient; 5 Wis. 549 (see 140 N. Y. 249); or in

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the latter state a seal made with a flourish of the pen; 1 S. & R. 72; 121 Pa. 192. In Georgia a printed "L. S." annexed to the maker's signature constitutes a seal by adoption where the instrument recites that it is executed under the maker's hand and seal; 81 Ga. 453. An expression in the body of the instrument denoting that it is sealed is sufficient, whatever the scroll may be; 5 Mo. 79; 1 Morris (Ia.) 43; 5 Harr. (Del.) 351; 13 La. Ann. 524. See Martindale, Conveyancing; SEAL.

**SCRUET ROLL** (called, also, *Scruet Finium*, or simply *Scruet*). **In Old English Law.** A record of the bail accepted in cases of *habeas corpus*. The award was set down in the remembrance roll, together with the cause of commitment, the writ and return were put on file, the bail was recorded in the scruet. 3 Howell, St. Tr. 134, arg. For remembrance roll, see Reg. Mich. 1654, § 15.

**SCRUTATOR** (Lat. from *scrutari*, to search). **In Old English Law.** A bailiff whom the king of England appointed in places that were his in franchise or interest, whose duty was to look after the king's water-rights: as, *flotsam*, *jetsam*, wreck, etc. 1 Hagr. Tracts 23; Pat. 27 Hen. VI. parte 2, m. 20; Pat. 8 Ed. IV. parte 1, m. 22.

**SCUTAGE** (from Lat. *scutum*, a shield). Knight-service. Littleton § 99. The tax which those who, holding by knight-service, did not accompany the king, had to pay on its being assessed by parliament. Scutage certain was a species of socage where the compensation for service was fixed. Littleton § 97; Reg. Orig. 88.

**SCYREGEMOTE.** The name of a court among the Saxons. It was the court of the shire, in Latin called *curia comitatis*, and the principal court among the Saxons. It was holden twice a year for determining all causes both ecclesiastical and secular.

**SE DEFENDENDO** (Lat.). Defending himself. Homicide *se defendo* may be justifiable.

**SEA.** The ocean; the great mass of water which surrounds the land, and which probably extends from pole to pole, covering nearly three-quarters of the globe. Waters within the ebb and flow of the tide are to be considered the sea. Gilp. 526.

A large body of salt water communicating with the ocean is also called a sea; as, the Mediterranean sea, etc.

Very large inland bodies of salt water are also called seas: as, the Caspian sea, etc.

"A sea," in nautical language, may mean a general disturbance of the surface of the water occasioned by a storm, and breaking it up into the roll and lift of waves following or menacing each other; some particular wave or surge, separate from its fellows; 101 N. Y. 463.

As a boundary in a conveyance, includes the beach to low water mark; 84 Me. 14.

The high seas include the whole of the seas below high water mark and outside the body of the county. Couls. & F. on Waters. See 2 Ex. Div. 62; HIGH SEAS.

The open sea is public and common property, and any nation or person has ordinarily an equal right to navigate it or to fish therein; 1 Kent 27; Ang. Tide-Waters 44; and to land upon the sea-shore. Bened. Adm. 224–257.

Every nation has jurisdiction over the person of its own subjects in its own public and private vessels when at sea; and so far territorial jurisdiction may be considered as preserved; for the vessels of a nation are in many respects considered as portions of its territory, and persons on board are protected and governed by the laws of the country to which the vessel belongs. The extent of jurisdiction over adjoining seas is often a question of difficulty, and one that is still open to controversy. As far as a nation can conveniently occupy, and that occupation is acquired by prior possession or treaty, the jurisdiction is exclusive; 1 Kent 29–31. This has been heretofore limited to the distance of a *cannon-shot*, or marine league, over the waters adjacent to its shore; 2 Cra. 187, 234; 1 Cra. C. C. 62; Bynkershoek, Qu. Pub. Juris. 61; 1 Azuni, Marit. Law 185, 204; Vattel 207. See LEAGUE; SEAMAN; ADMIRALTY; ARM OF THE SEA; LOW WATER MARK; LITUS MARIS; TERRITORIAL WATERS; SEA-SHORE; LEGISLATIVE POWER.

**SEA BATTERIES.** Assaults by masters in the merchant service upon seamen, at sea.

**SEA DAMAGED.** In a contract for sale of goods shipped or to be shipped, the phrase, "Sea damaged, if any, to be taken at a fair valuation," contemplates the risk of damage to the goods by perils of the sea, and does not restrict to any particular ship the subsequent transportation of such goods to their destination. 161 U. S. 57. See PERILS OF THE SEA.

**SEA-GREENS.** **In Scotch Law.** Grounds overflowed by the sea in spring tides. Bell, Dict.

**SEA-LETTER. SEA-BRIEF.** **In Maritime Law.** A document which should be found on board of every neutral ship; it specifies the nature and quantity of the cargo, the place from whence it comes and its destination. Chitty, Law of Nat. 197; 1 Johns. 192. See SHIP'S PAPERS.

**SEA POSTAGE.** The difference reached by subtracting inland postage from the total postage. 28 Ct. Cl. 1.

**SEA-SHORE.** That space of land on the border of the sea which is alternately covered and left dry by the rising and falling of the tide; or, in other words, that space of land between high and low water mark. Hargrave, St. Tr. 12; 6 Mass. 435; 1 Pick. 180; 5 Day 22; 15 Me. 237; 2 Zabr. 441; 4 De G. M. & G. 206; 40 Conn. 382; s. c. 16 Am. Rep. 51, n; 123 Mass. 361; 23

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Tex. 358; 70 Cal. 206; 34 Miss. 21. See TIDE; TIDE-WATER.

At common law, the sea-shore, in England, belongs to the crown; in this country, to the state; Ang. Tide-Wat. 20; 3 Kent 347; 27 E. L. & E. 242; 6 Mass. 435; 1 Pick. 180; 60 N. Y. 56; 16 Pet. 367; 3 How. 221; 3 Zabr. 624. In England, the sovereign is not the absolute proprietor, but holds the sea-shore subject to the public rights of navigation and fishery; and if he grants it to an individual, his grantee takes subject to the same rights; Phear, Rights of Water 45–55; Ang. Tide-Wat. 21. So in this country it has been held that the rights of fishery and navigation remain unimpaired by the grant of lands covered by navigable water; 6 Gill 121. But the power of the states, unlike that of the crown, is absolute except in so far as it is controlled by the federal constitution; Ang. Tide-Wat. 59. The states, therefore, may regulate the use of their shores and the fisheries thereon, provided such regulations do not interfere with the laws of congress; 4 Wash. C. C. 371; 18 How. 71; 4 Zabr. 80; 2 Pet. 245. And see TIDE-WATER; RIVER; FISHERY.

The public right of fishing includes shrimping and gathering all shell-fish or other fish whose natural habitat is between high and low water mark; 5 Day 22; 2 B. & P. 472; 22 Me. 353.

In Massachusetts and Maine, by the colony ordinance of 1641, and by usage arising therefrom, the proprietors of the adjoining land on bays and arms of the sea, and other places where the tide ebbs and flows, go to low water mark, subject to the public easement, and not exceeding one hundred yards below high water mark; 6 Mass. 439; 19 Pick. 191; 3 Kent 429; Dane, Abr. c. 68, a. 3, 4. It was a question whether this ordinance extended to New Hampshire; 17 N. H. 527. A description of lands extending *to* the sea-*shore* will not include the shore itself; 6 Mass. 439; 13 Gray 257; 31 Me. 134; but it is the general rule that the owner of land holds to low water mark, although bounded by stakes and stones on the bank of the river; 1 Whart. 131; 5 Dana 181; 6 Humphr. 358.

A conveyance of a wharf has been held to include flats in front of it; 6 Mass. 332; 7 Cush. 66; and as an incident sea weed cast upon them is *prima facie* an appurtenant belonging to the owner of the soil; 6 Hun 257; 7 Metc. 322. See LAKE; WHARF.

By the Roman law, the shore included the land as far as the greatest wave extended in winter: *est autem littus maris, quatenus hibernus fluctus maximus excurrit.* Inst. l. 2, t. 1, s. 3. *Littus publicum est eatenus qua maxime fluctus exæstuat.* Dig. 50. 16. 112.

The Civil Code of Louisiana seems to have followed the law of the Institutes and the Digest; for it enacts, art. 442, that the "sea-shore is that space of land over which the waters of the sea are spread in the highest water during the winter season." See 5 Rob. 182; Dougl. 425; 1 Holst. 1; 2 Rolle, Abr. 170; Dy. 326; 5 Co. 107; Bacon, Abr. *Courts of Admiralty* (A); 16 Pet. 234, 367; Ang. Tide-Waters; 5 M. & W. 327; 22 Me. 350; Coul. & F. Waters; Hale's *De Jure Maris*, given in full in Hale, Sea Sh. and for the most part in 16 Am. Rep. 54.

**SEA WEED.** A species of grass which grows in the sea.

When cast upon land, it belongs to the owner of the land adjoining the sea-shore, upon the grounds that it increases gradually, that it is useful as manure and a protection to the ground, and that it is some compensation for the encroachment of the sea upon the land; 3 B. & Ad. 967; 2 Johns. 313, 323. See 5 Vt. 223; 84 N. Y. 215; 2 R. I. 218. But when cast upon the shore between high and low water mark it belongs to the public and may be lawfully appropriated by any person; 40 Conn. 382; s. c. 16 Am. Rep. 54.

**SEAL.** An impression upon wax, wafer, or some other tenacious substance capable of being impressed. 5 Johns. 239; 4 Kent 452. It does not seem necessary that an impression be made; 6 C. P. 411; Sugd. Powers 232.

Lord Coke defines a seal to be wax, with an impression. 3 Inst. 169. "*Sigillum*," says he, "*est cera impressa, quia cera sine impressione non est sigillum.*" The definition given above is the common-law definition of a seal; Perkins 129, 134; Brooke, Abr. *Faits* 17, 30; 2 Leon. 21; 5 Johns. 239; 21 Pick. 417; but any other material besides wax may be used; 1 Am. L. Rev. 639; 5 Cush. 359.

Where the seal of a public officer does not contain the name of the state, but it is written in a blank left for that name, a verification authenticated by such a seal is insufficient; 68 N. W. Rep. 393.

Merlin defines a seal to be a plate of metal with a flat surface, on which is engraved the arms of a prince or nation, or private individual, or other device with which an impression may be made on wax or other substance on paper or parchment, in order to authenticate them; the impression thus made is also called a seal; Répert. mot *Sceau*; 3 M'Cord 583; 5 Whart. 563.

A person may adopt any seal as his own, or anything in place of a seal; 35 Fed. Rep. 337; it is not necessarily of any particular form or figure, and may consist of an outline without an enclosure, or of a single dash or flourish of the pen; and its precise form in each case depends wholly upon the taste or fancy of the person who makes it; 121 Pa. 192.

In many states, a scroll or similar device may constitute a valid seal: California, Connecticut, Florida, Illinois, Indiana, Michigan, Minnesota, Missouri, New Jersey, New Mexico, Oregon, Pennsylvania, Virginia, West Virginia, and Wisconsin. In several states the distinction between sealed and unsealed instruments is abolished; Arkansas, California, North Dakota,

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South Dakota, Mississippi, Indiana, Kentucky, and Tennessee. The use of seals by private persons is unnecessary in Arizona, Colorado, Idaho, Iowa, Kansas, Mississippi, Nebraska, Nevada, Ohio, Tennessee, Utah, and Washington. In some states official or corporate seals may be impressed on the paper itself: California, Connecticut, Dakota, Kansas, New York, Rhode Island, and Virginia. By U. S. R. S. § 6, an impression on the paper of any common process or instrument is sufficient.

When a seal is affixed to an instrument it makes it a specialty, and consideration is presumed; 2 Bla. Com. 446; 94 U. S. 76; but the presumption does not extend to contracts in restraint of trade where actual consideration is wanting; 3 Bing. 327; or where the real consideration was illegal; Whart. Contr. § 495; but where the distinction between sealed and unsealed instruments is abolished by statute, any failure of consideration may be shown; 27 Ia. 251; 21 Ala. 88. One seal may serve for a number of signers; 47 Am. Rep. 521; 36 Am. Dec. 511; although the contrary was held in 7 Gill & J. 248; 54 Md. 327. It is said the burden is upon a party to prove the adoption of another's seal; and the question of the adoption of a seal has been held to be for the jury; 3 Dev. 420. The same contract may be the specialty of one and the parol agreement of another party to it; 20 Ill. 389; whether a mark or character is a seal depends upon the intention of the executant, as shown by the paper; 160 U. S. 514.

It is not necessary to recite in a deed that it is under seal; 34 Am. Dec. 558; 22 Cal. 157; 20 Ill. 389; although the contrary is held in Virginia and Alabama; 1 Wash. C. C. 170; 4 Ala. 140; and is recognized in New Jersey; 16 N. J. L. 324; and in many jurisdictions, conclusions are expressed as to what language in an instrument is a recognition of the seal, it being held that the use of the technical language of specialties is sufficient; 15 Ala. 43; 12 Johns. 197; or if the fact of the seal appears in the attestation clause; 5 Sawy. 510. The word "*seal*" written or printed within a scroll is held to be a sufficient seal; 42 Miss. 304; 28 Pa. 489; *contra*, 2 Rand. 446; 1 E. D. Smith 335. A recital in an instrument that it is sealed, will not make it a specialty; 66 Ill. 501; 68 Me. 160.

When an instrument concludes with the words, "witness our hands and seals," and is signed by two persons, with only one seal, the jury may infer from the face of the paper that the person who signed last adopted the seal of the first; 6 Pa. 302.

An executory contract under seal, ignorantly made in pursuance of a parol authority, will be sufficient to maintain an action, the seal being disregarded as mere excess; 60 Pa. 214.

Where a corporation executed a promissory note, payable to the order of its president, attaching thereto, before delivery, its corporate seal, it was held that the note was not a negotiable note under the law merchant, but was a specialty; 8 Fed. Rep. 534. See 1 Ohio 386; PROMISSORY NOTE; as to the origin and use of seals, see Addison, Contr. 6; SCROLL. The affixing of his private seal by a corporate officer to a contract of the corporation binds the latter only by simple contract; 14 Pet. 19; Ang. & Ames, Corp. § 295.

The public seal of a foreign state proves itself; 4 Dall. 416; and public acts, decrees, and judgments exemplified under this seal are received as true and genuine; 2 Cra. 187, 238; 7 Wheat. 273, 335; 2 Conn. 85; 6 Wend. 475; 35 Fed. Rep. 134. See 2 Munf. 53. But to entitle its seal to such authority the foreign state must have been acknowledged by the government within whose jurisdiction the forum is located; 3 Wheat. 610; 9 Ves. 347.

While an action of covenant will lie on an unsealed instrument in the state where executed, it will not lie in the state requiring a sealed instrument to support such action; 8 Pet. 362; nor is the rule different where, by the *lex loci contractus*, a scroll or other device is recognized as a seal, but is not in the state of the forum; 8 How. 471. Whether any seal is required upon a protest of a bill of exchange is determined by the *lex loci contractus*; 13 How. 472; 106 U. S. 546. A scroll does not amount to a seal of office; 15 Neb. 470; or a corporate seal; 10 Allen 251.

The seal of a notary public is taken judicial notice of the world over; 2 Esp. 700; 5 Cra. 535; 6 S. & R. 484; 3 Wend. 173; 1 Gray 175; but it must not be a scroll; 4 Blackf. 158. Judicial notice is taken of the seals of superior courts; Com. Dig. *Evidence* (A 2); not so of foreign courts; 3 East 221; 9 *id.* 192; except admiralty or marine courts; 2 Cra. 187; 4 *id.* 292, 435; 3 Conn. 171. See Story, Confl. Laws § 643; 2 Phill. Ev. 454, notes.

In Louisiana and other civil-law jurisdictions the effects of a deceased person are taken into public custody by being sealed, and the details of the action of officials in connection therewith are carefully regulated by statute.

**SEAL DAYS. In English Practice.** Motion days in the court of chancery, so called because every motion had to be stamped with the seal, which did not lie in court in the ordinary sittings out of term. Whart. Dict.

**SEAL FISHERIES.** The controversy concerning the sealing interest in Bering sea between the United States and Great Britain has involved an elaborate discussion with respect to the characteristics and habits of the seals, and the question whether their custom of going in herds through the open sea to certain islands at stated periods of the year for breeding purposes, made them the lawful prey of any captor, or whether the United States could assert over them a property right growing out of the fact that unquestionably the *home* of

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the animal was in the territory of the United States. This subject occupied the attention of the Paris tribunal under the treaty for the settlement of claims growing out of the seizure of vessels engaged in the seal fishery. The discussions were of great interest and extended to the general question so much mooted by writers on the subject, whether international law had any real basis other than the mere consent of nations to specific propositions. That particular controversy was decided against the United States and the proceedings may be referred to for information on the subject. See INTERNATIONAL LAW.

Rev. St. § 1956 prohibits the killing within the limits of Alaska Territory of fur seals and various other fur-bearing animals under penalty of fine and imprisonment, and forfeiture of vessels found engaged in violating the section, but power is given to the secretary of the treasury to make regulations authorizing the killing of such animals.

Rev. St. § 1957 provides for the prosecution of offences under the preceding section in the United States district courts of California, Oregon, and Washington.

Rev. St. § 1958 authorizes the secretary of the treasury to remit the fine where in his opinion it was incurred without wilful negligence or fraud.

By act of Feb. 21, 1893, it was provided that when any international arrangement for the protection of fur seals should be concluded, the provisions of R. S. § 1956 should be extended over all that portion of the Pacific ocean included in such international arrangement; 2 Sup. 89. By act of Dec. 21, 1897, all citizens of the United States or owing an allegiance thereto are prohibited from killing, capturing, or hunting fur seals in the waters of the Pacific ocean north of Lat. 35° N. and including Bering sea and the sea of Okhotsk, or from equipping vessels for that purpose under penalty of fine and imprisonment and forfeiture of the vessel. Any seals found in any vessel of the United States within the waters specified are presumed to have been unlawfully killed, and the importation into the United States of fur seals' skins is prohibited under penalty of being seized and destroyed; Stat. 55 Cong. 2d Sess. 226.

It has been held by United States courts that the waters of Bering sea are those within the three-mile zone from Alaska; 75 Fed. Rep. 513; 143 U. S. 472. R. S. § 1956 is violated though the animals are taken by boats sent out to a distance from the vessel seized; 60 Fed. Rep. 914. See 50 *id.* 108. A vessel is liable to forfeiture if her boats take seals within the prohibited zone though she does not go there; 77 Fed. Rep. 908, under act of 1894. R. S. § 1958 does not authorize the secretary of the treasury to remit forfeiture of a vessel condemned by the United States district court for Alaska for being engaged in killing fur seals; 18 Op. Atty. Gen. 584.

See FISHERY.

**SEAL OFFICE. In English Practice.** The office at which certain judicial writs are sealed with the prerogative seal, and without which they are of no authority. The officer whose duty it is to seal such writs is called "sealer of writs."

**SEAL OF THE UNITED STATES.** The seal used by the United States in congress assembled shall be the seal of the United States, viz.: ARMS, paleways of thirteen pieces argent and gules; a chief azure; the escutcheon on the breast of the American eagle displayer proper, holding in his dexter talon an olive-branch, and in his sinister a bundle of thirteen arrows, all proper, and in his beak a scroll, inscribed with this motto, "*E pluribus unum.*" For the CREST: over the head of the eagle which appears above the escutcheon, a glory, or breaking through a cloud, proper, and surrounding thirteen stars, forming a constellation argent on an azure field. REVERSE, a pyramid unfinished. In the zenith, an eye in a triangle, surrounded with a glory proper: over the eye, these words, "*Annuit cœptis.*" On the base of the pyramid, the numerical letters MDCCLXXVI; and underneath, the following motto: "*Novus ordo sectorum.*" Resolution of Congress, June 20, 1782; R. S. § 1793. See 1 Cra. 158. It is in the custody of the secretary of state; R. S. § 1794.

**SEAL-PAPER.** A document issued by the lord chancellor previously to the commencement of the sittings, detailing the business to be done for each day in his court, and in the courts of the lords justices and vice-chancellors. The master of the rolls in like manner issued a seal-paper in respect to the business to be heard before him. Sm. Ch. Pr. 9.

**SEALED AND DELIVERED.** The common formula of attestation of deeds and other instruments, written immediately over the witnesses' names.

**SEALER.** An officer in chancery who sealed the writs and instruments.

**SEALING A VERDICT. In Practice.** The putting a verdict in writing, and placing it in an envelope, which is sealed. To relieve jurors after they have agreed, it is not unusual for the counsel to agree that the jury shall seal their verdict and then separate. When the court is again in session, the jury come in and give their verdict in all respects as if it had not been sealed; and a juror may dissent from it if since the sealing he has honestly changed his mind; 8 Ohio 405; 1 Gilm. 333.

**SEAMAN.** A sailor; a mariner; one whose business is navigation. 2 Boulay-Paty, *Dr. Com.* 232; Laws of Oleron, art. 7; Laws of Wisbuy, art. 19; Bened. Adm. 277.

The term seamen, in its most enlarged sense, includes the captain as well as other persons of the crew; in a more confined signification, it extends only to the common sailors; 3 Pardessus, n. 667. But the

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mate; 1 Pet. Adm. 246; the cook and steward; 2 *id.* 268; and engineers, clerks, carpenters, firemen, deck-hands, porters, and chamber-maids, on passenger-steamers, when necessary for the service of the ship; 1 Conkl. Adm. 107; 2 Pars. Marit. Law 582; are considered, as to their rights to sue in the admiralty, as common seamen; and persons employed on board of steamboats and lighters engaged in trade or commerce on tide-water are within the admiralty jurisdiction; while those employed in ferry-boats are not; Gilp. 203, 532. Persons who do not contribute their aid in navigating the vessel or to its preservation in the course of their occupation, as musicians, are not to be considered as seamen with a right to sue in the admiralty for their wages; Gilp. 516. Persons employed upon a flat boat with an engine erected thereon, mainly employed in constructing bulkheads and to assist in moving materials to and fro, are to be regarded as rendering maritime services, so as to give them a lien on the vessel for their wages; 84 Fed. Rep. 200. One who brings a vessel to her home port, and lays her up there, *i. e.* anchors her out of the channel, pumps her out, dries her sails, sees to her fastenings, and renders other services usually performed by mariners, is entitled to a lien for his compensation; 59 Fed. Rep. 297. See LIEN.

Seamen are employed either in merchant-vessels for private service, or in public vessels for the service of the United States.

Seamen in the merchant-vessels are required to enter into a contract in writing, commonly called shipping articles, which see. This contract being entered into, they are bound, under severe penalties, to render themselves on board the vessel according to the agreement; they are not at liberty to leave the ship without the consent of the captain or commanding officer; and for such absence, when less than forty-eight hours, they forfeit three days' wages for every day of absence; and when the absence is more than forty-eight hours at one time, they forfeit all the wages due to them, and all their goods and chattels which were on board the vessel, or in any store where they may have been lodged at the time of their desertion, to the use of the owners of the vessel; and they are liable for damages for hiring other hands. They may be imprisoned for desertion until the ship is ready to sail.

A consular officer of the United States may discharge a seaman on the application of the master, for any cause sanctioned by the usages and principles of maritime law, as recognized in the United States, on the payment of the wages then earned; and all claims for wages for the remainder of the voyage is thereby cut off and barred; 36 Fed. Rep. 443.

On board, a seaman is bound to do his duty to the utmost of his ability; and when his services are required for extraordinary exertions, either in consequence of the death of other seamen or on account of unforeseen perils, he is not entitled to an increase of wages, although it may have been promised to him; 2 Camp. 317; 38 U. S. App. 219. For disobedience he could formerly be imprisoned or punished with stripes; but the correction must be reasonable; 4 Mas. 508; 2 Day 294; 1 Wash. C. C. 316; but see CORRECTION; ASSAULT; BATTERY; and, for just cause, may be put ashore in a foreign country; 1 Pet. Adm. 186; 2 *id.* 268; 2 East 145. By act of congress, Sept. 28, 1850, it is provided that flogging in the navy and on board of vessels of commerce be abolished. And this prohibits corporal punishment by stripes inflicted with a cat, and any punishment which in substance amounts thereto; 1 Curt. C. C. 501. See 35 Fed. Rep. 152. A master may punish a seaman who refuses to do his duty, and may, if he is incorrigible, discharge him, confine him, or deprive him of privileges; but forfeiture of wages cannot be superadded to corporal punishment, and it is not within the ordinary powers of a master to imprison a sailor on shore; 54 Fed. Rep. 533.

Seamen are entitled to their wages, of which one-third is due at every port at which the vessel shall unlade and deliver her cargo before the voyage be ended; and at the end of the voyage an easy and speedy remedy is given them to recover all unpaid wages. When taken sick, a seaman is entitled to medical advice and aid at the expense of the ship, such expense being considered in the nature of additional wages and as constituting a just remuneration for his labor and services; Gilp. 435; 2 Mas. 541; 40 Fed. Rep. 904. In case of sickness preventing a performance of duty, if the malady be not occasioned by the mariner's malconduct, the full wages are payable; and if a sailor dies on the voyage, his heirs shall have his full wages; 41 Fed. Rep. 224; Bee 134.

The right of seamen to wages is founded not in the shipping articles, but in the services performed; Bee 395: and to recover such wages the seaman has a triple remedy,—against the vessel, the owner, and the master; Gilp. 592; Bee 254. But he cannot claim wages to the end of the voyage when he has obtained his discharge at his own solicitation, and against the advice and even against the expostulation of the master; 40 Fed. Rep. 903. The legislation of most maritime countries, ancient and modern, established that the contract of a seaman always involved, to a certain extent, the surrender of his personal liberty during the life of the contract, and the necessities, and perhaps the safety, of navigation have called into existence legislation, by nearly all maritime nations, for the purpose of securing the personal attendance of the crew on board and for their criminal punishment for their desertion or absence without leave; and it is, therefore, a natural and equitable result that the expenses of their confinement and the wages of their substitutes whilst they

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are refusing to work should be deducted from their wages; 85 Fed. Rep. 978. In cases of desertion of seamen, the proper expenses for their arrest and detention, and the cost of supplying substitutes whilst so detained, and also the cost of any damage to property by them, may be deducted from their wages; *id.*

When destitute in foreign ports, American consuls and commercial agents are required to provide for them, and for their passage to some port of the United States, in a reasonable manner, at the expense of the United States; and American vessels are bound to take such seamen on board at the request of the consul, but not exceeding two men for every hundred tons of the ship, and transport them to the United States, on such terms, not exceeding ten dollars for each person, as may be agreed on. See R. S. §§ 4554–4591; SEAMEN'S FUND.

Seamen in the public service are governed by particular laws. See NAVY; NAVAL CODE; LIEN; DESERTION OF A SEAMAN; SHIPS; PARTIES.

**SEAMEN'S FUND.** By the act of July 16, 1798, a provision is made for raising a fund for the relief of disabled and sick seamen: the master of every vessel arriving from a foreign port into the United States is required to pay to the collector of customs at the rate of twenty cents per month for every seaman employed on board of his vessel, which sum he may retain out of the wages of such seamen; vessels engaged in the coasting trade, and boats, rafts, or flats navigating the Mississippi with intention to proceed to New Orleans, are also laid under similar obligations. The fund thus raised is to be employed by the president of the United States, as circumstances shall require, for the benefit and convenience of sick and disabled American seamen. Act of March 3, 1802, s. 1.

By R. S. § 4584, it is provided that when a seaman is discharged in a foreign country with his own consent, or when the ship is sold there, he shall, in addition to his usual wages, be paid three months' wages into the hands of the American consul, two-thirds of which are to be paid to such seamen on his engagement on board any vessel to return home, and the remaining one-third is retained in aid of a fund for the relief of distressed American seamen in foreign ports. See 11 Johns. 66; 12 *id.* 143; 1 Mas. 45; 4 *id.* 541; Edw. Adm. 239.

**SEARCH. In Criminal Law.** An examination of a man's house, premises, or person, for the purpose of discovering proof of his guilt in relation to some crime or misdemeanor of which he is accused. See SEARCH WARRANT.

By act of March 2, 1799, s. 68, it is enacted that every collector, naval officer, and surveyor, or other person specially appointed by either of them for that purpose, shall have full power and authority to enter any ship or vessel or any dwelling-house in the daytime, upon taking proper measures, to search for goods forfeited for non-payment of duties; R. S. § 3066.

In England a prisoner arrested for an indictable offence may be searched for the purpose of finding upon him any property which will afford material evidence for the prosecution or any weapon or instrument which might be used for the purpose of escape or of inflicting injury on himself or others. There does not appear to be any authority permitting the search of prisoners for other purposes than the above, and there have been cases in which the court has directed property taken from an unconvicted person and not necessary to be used for the purpose of evidence, to be returned to him. It is said that money not connected with the offence charged should not be taken from a prisoner. Women should be employed to search female prisoners. The person's lodgings and effects may also be searched. In England special statutory provisions as to searching are made in the case, of numerous specified crimes; see Haycraft, Ex. Pow. in Rel. to Crime.

Where one was fined for drunkenness and the mayor, as a committing magistrate, found certain money on his person and applied it, against his protest, to the payment of the fine, and the prisoner insisted upon his right to accept imprisonment in place of a fine, it was held that the mayor was justified; 19 Co. Ct. Rep. Pa. 669.

Officers making arrests may seize articles on a prisoner and retain them for the purposes of evidence against him, though they belong to other parties; 36 Wash. L. Rep. 421. See PRISONER.

An English (1897) act provides that police magistrates may order the return of such articles, or, if not claimed, may make such order as to their disposal as they deem proper. See RES JUDICATA, as to this act.

**In Practice.** An examination made in the proper lien office for mortgages, liens, judgments, or other incumbrances against real estate. The certificate given by the officer as to the result of such examination is also called a search.

Conveyancers and others who cause searches to be made ought to be very careful that they should be correct with regard to the time during which the person against whom the search has been made owned the premises; to the property searched against, which ought to be properly described; and to the form of the certificate of search. In England, by the act of 1897, a search may be ordered by telegraph.

See JUDGMENT; LIEN.

**SEARCH, RIGHT OF. In International Law.** The right existing in a belligerent to visit and search a neutral vessel at sea. On the continent of Europe this is called the right of visit. A distinction was formerly maintained by England between visitation and search. The former was claimed in time of peace, to ascertain whether a merchant vessel was justly entitled to the protection of the flag she had hoisted. The distinction was repudiated by Mr. Webster and by Wheaton and Kent (who concede the right of *approach* for

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the same purpose) and by Story, J., in 11 Wheat. 42. Visitation and search are no longer permissible in time of peace; 3 Whart. Dig. Int. L. § 327; except where a cruiser is sent in pursuit of a merchant vessel which has left its port under the suspicion of having committed a fraud upon the revenue, or some other crime; Snow, Lect. Int. L. 159.

The right does not extend to examine the cargo, nor does it extend to a ship of war, it being strictly confined to the searching of merchant-vessels. The exercise of the right is to prevent the commerce of contraband goods. Although frequently resisted by powerful neutral nations, yet this right appears now to be fixed beyond contravention; 1 C. Rob. 340; 11 Wheat. 42. Unless in extreme cases of gross abuse of his right by a belligerent, the neutral has no right to resist a search; 1 Kent 154.

The right of search does not exist in time of peace except upon reasonable ground to believe that the vessel is a pirate. By the Treaty of Washington, 1862, Great Britain and the United States concede a mutual right of search in certain latitudes where there is reasonable ground to believe that the flag of either country is being used to cover the African slave trade.

The right, in time of war, can be exercised by a belligerent's war-vessel or a privateer. It exists even though the neutral vessel have a government mail on board; 5 Wall. 28; neutral public ships are not subject to it; 1 Kent 156.

In making a search the ship papers are first examined, and if anything suspicious appear, the ship and cargo may be examined. If the search is resisted, or if the ship's papers (*q. v.*) are unsatisfactory or are absent or are destroyed or concealed, the ship may be captured. The right does not extend to persons on board. A neutral when searched is bound to have and produce proper papers. If a neutral ship resists search, both ship and cargo are liable to confiscation; 4 C. Rob. 408.

In treaties made by the United States it has generally been stipulated that the declaration of the commander of the convoy that the vessels under his charge belong to his flag and, when bound to an enemy's port, that they carry no contraband of war, shall be sufficient, and European nations, except England, have generally excepted from search merchant vessels under the convoy of public ships of the same state; and such is the opinion of most continental writers. Lord Stowell and English writers have held the opposite opinion as to the *right* of search in such case; 2 Halleck, Int. L., Baker's ed. 264; and so Kent holds; 1 Kent 157, and Story, J., in 2 Cra. 438. Sailing under an enemy's convoy is conclusive ground of confiscation in England; 2 Halleck, Int. L. 266; so also 2 Cra. 438 (a *dictum* by Story, J.), and 1 Kent 157.

By the navy regulations, 1876, United States vessels of war are not to take under their convoy the vessels of any power at war with another, with which we are at peace, nor vessels of a neutral, unless for some special reason. Commanding officers are forbidden to permit vessels under their protection to be searched or detained by a belligerent.

The exercise of search is not a trespass; but if the cruiser capture the vessel as prize, and upon adjudication there is no probable cause, the cruiser is responsible; 2 Mas. 439.

As to the right of search—or rather of visitation—in time of peace, especially in its connection with the suppression of the slave-trade, see Wheat. Right of Search; Webster, Works, vol. 6, 329; 3 Phillimore, Int. Law, *Visit and Search*; Morse, Citizenship 75.

**SEARCH WARRANT.** **In Practice.** A warrant requiring the officer to whom it is addressed to search a house, or other place, therein specified, for property therein alleged to have been stolen, and, if the same shall be found upon such search, to bring the goods so found, together with the body of the person occupying the same, who is named, before the justice or other officer granting the warrant, or some other justice of the peace, or other lawfully authorized officer.

It should be given under the hand and seal of the justice, and dated.

Originally search warrants were used almost exclusively for the discovery of stolen property, but of late years their use has been extended to searches for intoxicating liquors; 54 N. H. 164; 150 Mass. 164; gaming implements; 119 *id.* 332; and the like. The United States laws provide for the search in the daytime only, by any custom-house officer under a search warrant; Rev. Stat. § 3066. Ownership in some specific person must be alleged in the information; 64 Ia. 300.

The constitution of the United States, Amendm. art. 4, declares that "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized." See 11 Johns. 500; 3 Cra. 447; Story, Const. 1900; 116 U. S. 616.

Hale, 2 Pl. Cr. 149, recommends great caution in granting such warrants:—*first*, that they be not granted without oath made before a justice of a felony committed, and that the complainant has probable cause to suspect that the goods are in such a house or place, and his reason for such suspicion, see 2 Wils. 283; 1 Dowl. & R. 97; 13 Mass. 236; 5 Ired. 45; 1 R. I. 464; *second*, that such warrants express that the search shall be made in the daytime (but in this country this limitation is not observed; 25 Conn. 278; 145 Mass. 182; *third*, that they ought to be directed to a constable or other proper officer, and not to a private person; *fourth*, that they ought to com-

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mand the officer to bring the stolen goods, and the person in whose custody they are, before some justice of the peace. See 6 B. & C. 332; 5 Metc. Mass. 98. They should designate the place to be searched; 1 M. & W. 255; 2 Metc. 329; 2 J. J. Marsh. 44; 6 Blackf. 249; 1 Conn. 40; 10 Johns. 263. The description "suspected place" is not sufficient; 3 Par. Cr. C. 656. It has been said that "the description of the place to be searched should be as certain in a warrant as would be necessary in a deed to convey such place;" 41 Me. 254. Trespass will not lie against a party who has procured a search warrant to search for stolen goods, if the warrant be duly issued and regularly executed; 6 Wend. 382; but if the warrant itself shows that the magistrate had no jurisdiction, the officer who serves it will be a trespasser; 19 How. St. Tr. 1029; 5 Ired. 45. And see 6 Me. 421; 2 Conn. 700; 11 Mass. 500; 2 Litt. 231; 6 Gill & J. 377.

Search warrants are available only in public prosecutions and not to enforce private rights; 13 Gray 454, where it was said: "Even in those cases, if we may rely on the authority of Lord Coke, their legality was formerly doubted; and Lord Camden said that they crept into the law by imperceptible practice. But their legality has long been considered to be established, on the ground of public necessity; because, without them, felons and other malefactors would escape detection." At common law they were confined to places, but in California it is held that a search warrant may be authorized by law for the person; 68 Cal. 284. See Cooley, Const. Lim., 6th ed. 364; 1 Archb. Cr. Pr. & Pl. 126, note; 1 Bish. New Cr. Proc. ch. 16; GENERAL WARRANT.

**SEAT OF JUSTICE.** The county seat; the place where the courthouse, jail, and county offices are located; the place where the chancery, circuit, and county courts are held, and where the county records are kept. 20 S. W. Rep. (Tenn.) 502.

**SEATED LANDS.** In the early land legislation of some of the United States, *seated* is used, in connection with improved, to denote lands of which actual possession was taken. 5 Pet. 468.

Lands which are actually resided upon, cultivated, or occupied. Residence without cultivation or cultivation without residence, or both together, constitute seated lands. 6 Watts 269; 4 Pa. 214; 55 *id.* 98; 73 *id.* 418. See UNSEATED LANDS.

**SEAWORTHINESS. In Maritime Law.** The sufficiency of the vessel in materials, construction, equipment, officers, men, and outfit, for the trade or service in which it is employed.

It is that quality which fits a ship for carrying safely the particular cargo which it takes on board for the voyage for which it is destined. 8 U. S. App. 580.

Under a marine policy on ship, freight, or cargo, the fitness for the service of the vessel, if there is no provision to the contrary at the outset, is an implied condition, non-compliance with which defeats the insurance; 2 Johns. 231; 1 Whart. 399; 1 Camp. 1; 5 Pick. 21; 2 Ohio 211; 2 B. & Ald. 73; 6 Cow. 270; 3 Hill N. Y. 250; 4 Mas. 439; 20 Wend. 287; 1 Pet. C. C. 410; 1 Wall. Jr. 273; 1 Curt. C. C. 278; 26 Pa. 193; 4 H. L. C. 253; Olc. 110; 12 Md. 348.

It is of no consequence whether the insured was aware of the condition of the ship, or not. His innocence or ignorance is no answer to the fact that the ship was not seaworthy. When the want of seaworthiness arises from justifiable ignorance of the cause of the defect, and is discovered and remedied before any injury occurs, it is not to be considered as a defect; 1 Johns. 241; 1 Pet. 183; 2 B. & Ald. 73. See 136 U. S. 408.

The warranty of seaworthiness is absolute and extends to latent defects; 10 P. D. 103. Seaworthiness varies with the place of voyage, the class of ship, and the nature of the cargo; 2 F. & F. 263.

It includes a master having competent skill in navigation; 3 C. & P. 18; and a sufficient and competent crew; 7 B. & C. 798; and proper equipment, including proper medicines and necessaries for the voyage; 3 Esp. 257.

A vessel is not seaworthy if the cargo is so badly stowed that it is difficult and dangerous to navigate the ship; 2 F. & F. 663; or if she is not properly disinfected for the carriage of cattle; 12 Q. B. Div. 297; or has a defective crank-shaft; 10 P. D. 103; as to unseaworthiness by reason of not employing a pilot, it is said that if a vessel sails from a port where there is a pilot and the navigation requires one, the master must employ one; 3 B. & Ad. 383; but in entering a port, if the master uses due diligence to obtain a pilot but cannot find one, and, being competent himself, attempts to enter a harbor without one, it is not a breach of the warranty of seaworthiness; 3 B. & Ad. 383.

The warranty of seaworthiness in a time policy is complied with if the vessel be seaworthy at the commencement of the risk; 124 U. S. 405. Where a vessel sprung a leak, and was lost without encountering any sea peril, it was held that she was not seaworthy, heavy seas not being a sea peril within the meaning of a policy of marine insurance; 42 Fed. Rep. 861.

The opinion of carpenters who have repaired the vessel, however they may strengthen the presumption that the ship is seaworthy, when it is favorable, is not conclusive of the fact of seaworthiness; 4 Dowl. 269. The presumption *prima facie* is for seaworthiness; 1 Dowl. 336. See 40 Fed. Rep. 847. And it is presumed that a vessel continues seaworthy if she was so at the inception of the risk; 20 Pick. 389. See 1 Brev. 252. Where nothing is said on the subject, seaworthiness is an implied condition of a hiring of shipping; 76 Mich.

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158. Any sort of disrepair left in the ship, by which she or the cargo may suffer, is a breach of the warranty of seaworthiness. A deficiency of force in the crew, or of skill in the master, mate, etc., is a want of seaworthiness; 1 Camp. 1; 4 Du. N. Y. 234; 36 Fed. Rep. 784. See 48 Fed. Rep. 463. But if there was once a sufficient crew, their temporary absence will not be considered a breach of warranty; 2 B. & Ald. 73; 1 Johns. Cas. 184; 1 Pet. 183. A charge of unseaworthiness by reason of the pilot's intoxication is not sustained when there is no evidence that he was not perfectly capable when the vessel left port, or, if he was not, that the master knew the fact, and where the pilot, when sober, was one of the best; 44 Fed. Rep. 374. A vessel may be rendered not seaworthy by being overloaded; 2 B. & Ald. 320; or by having a defective compass; 136 U. S. 408. The burden of the proof of seaworthiness is on the one who alleges it; 3 Q. B. Div. 594. The fact that a ship after being eleven hours at sea in fair weather began to leak so that she was obliged to run for a harbor of refuge, is sufficient to throw the burden of proof on the carrier even if it is not sufficient proof of unseaworthiness; 75 Fed. Rep. 74.

It can never be settled by positive rules of law how far this obligation of seaworthiness extends in any particular case, for the reason that improvements and changes in the means and modes of navigation frequently require new implements, or new forms of old ones; and these, though not necessary at first, become so when there is an established usage that all ships of a certain quality, or those to be sent on certain voyages or used for certain purposes, shall have them; 2 Pars. Marit. Law 134. Seaworthiness is, therefore, in general, a question of fact; 1 Pet. 170, 184; 9 Wall. 526; 116 N. Y. 599.

**SEAWORTHY FOR THE VOYAGE.** The words in the Merchant Shipping Act, 1876, mean that the ship must be "in a fit state, as to repairs, equipment, and crew, and in all other respects, to encounter ordinary perils of the voyage." They do not include "a neglect properly to use the appliances on board a vessel well equipped and furnished." [1894] App. Cas. 222, approving 5 M. & W. 405.

**SEBASTOMANIA. In Medical Jurisprudence.** Religious insanity or monomania.

**SECESSION.** The act of withdrawing; separation.

The attempted secession of eleven of the states from the United States government led to the civil war of 1861–65, and gave rise to many important decisions affecting the mutual relations of the national and state governments, and the rights of citizens under contracts made before and during the war. And first, as to the *Power or Right of Secession.*

The union of the states was never a purely artificial relation. By the articles of confederation the union was declared to be perpetual, and the constitution was ordained to form a more perfect union. But this by no means implies the loss of individual existence on the part of the states; the constitution looks throughout to an indestructible union of indestructible states; and the more recent states are no less subject to this principle than the original ones. Considered as transactions under the constitution, the ordinance of secession adopted by any one of the seceding states, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null and without operation in law. The state did not cease to be a state, nor her citizens, citizens of the union. The war of secession was therefore treason. It is the practice of modern governments when attacked by formidable rebellion to concede belligerent rights: this establishes no rights except during the war. Legal rights could neither be created nor defeated by the action of the government of the Confederate States. Neither the pretended acts of secession nor the magnitude of the war could constitute a confederate state government *de facto*, so as to create civil rights which could outlast the war, *except* that acts necessary to peace and good order among citizens, such as those relating to private relations and private property, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful, government; 7 Wall. 700; 1 Abb. U. S. 50; Chase's Dec. 136.

*As to the validity of contracts.* Where one engaged actively in the service of the rebel government purchased cotton which was afterwards seized by the military forces of the United States, sold, and the proceeds paid into the treasury, *held*, that his purchase of the cotton was illegal and void and gave him no title thereto; 98 U. S. 605; 21 Wall. 350. The Confederate government had no corporate power to take, hold, or convey a valid title to property, real and personal, and a purchaser of cotton from said government during the rebellion acquired no title thereto; 8 Ct. Cls. 499.

*Confederate bonds.* The bonds issued by the seceding states do not constitute a valid consideration for a promissory note; 15 Wall. 439; and so of the securities known as confederate treasury notes; 1 Abb. U. S. Rep. 261; but a promise to pay in "Confederate notes" in consideration of the receipt of such notes and of drafts payable by them, is neither a *nudum pactum* nor an illegal contract; 16 Wall. 488.

*Validity of statutes.* When the military forces of the Confederate government were overthrown, it perished, and with it all its enactments. But the legislative acts of the several states forming the confederacy stand on different grounds, and so far as they did not impair or tend to impair the supremacy of the national authority or the just rights of citizens under the constitution, they are in general to be treated as valid and binding; 96 U. S. 177; 97 *id.* 594; 1 Chase's Dec. 167; 7 Wall. 733; 22 *id.* 99.

Payments made under the Confederate sequestration acts were void and gave no title. See 96 U. S. 193.

*Decisions of the Confederate courts.* Judgments of such courts merely settling the rights of private parties actually within their jurisdiction, not tending to defeat the just rights of citizens of the United States, nor in furtherance of laws passed in aid of the rebellion, are valid; 1 Woods 437; 97 U. S. 509; and a judgment of a court of Georgia in November, 1861, for the purchase-money of slaves, was held a valid judgment when entered, and enforcible in 1871; 10 Am. L. Reg. N. S. 641. But during the war, the courts of states in rebellion had no jurisdiction of parties residing in states which adhered to the the national government; 10 Am. L. Reg. N. S. 53. See further, 15 Wall. 610; 12 Op. Att. Gen. 141, 182; 13 *id.* 149; 45 Ga. 370; 20 Gratt. 81; 13 Wall. 646; Hurd's Theory of Nat. Govt.; RECONSTRUCTION; CONFEDERATE STATES; CONFEDERATE MONEY; WAR.

**SECK.** A want of remedy by distress. Littleton, s. 218. See RENT. Want of present fruit or profit, as in the case of the reversion without rent or other service, except fealty. Co. Litt. 151 *b*, n. 5.

**SECOND COUSINS.** Those who are

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related, being descended from the same great-grandfather, or great-grandmother. L. R. 19 Ch. Div. 204. See LEGACY.

**SECOND DELIVERANCE.** The name of a writ given by statute of Westminster 2d, 13 Edw. I. c. 2, founded on the record of a former action of replevin. Co. 2d Inst. 341. It commands the sheriff, if the plaintiff make him secure of prosecuting his claim and returning the chattels which were adjudged to the defendant by reason of the plaintiff's default, to make deliverance. On being nonsuited, the plaintiff in replevin might, at common law, have brought another replevin, and so *ad infinitum*, to the intolerable vexation of the defendant. The statute of Westminster restrains the plaintiff when nonsuited from so doing, but allows him this writ, issuing out of the original record, in order to have the same distress delivered again to him, on his giving the like security as before; 3 Bla. Com. 150.

**SECOND DISTRESS.** See DISTRESS.

**SECOND-HAND EVIDENCE.** This term is sometimes applied to *hearsay* evidence, and should not be confounded with secondary evidence. See Pow. Ev.

**SECOND SURCHARGE, WRIT OF.** The name of a writ issued in England against a commoner who has a second time surcharged the common. 3 Bla. Com. 239.

**SECONDARY.** An officer who is second or next to the chief officer; as, secondaries to the prothonotaries of the courts of king's bench or common pleas; secondary of the remembrancer in the exchequer, etc. Jacob, L. Dict.

**SECONDARY CONVEYANCES,** or derivative conveyances, are those which presuppose some other conveyance precedent, and only serve to enlarge, confirm, alter, restrain, restore, or transfer the interest granted by such original conveyance. 2 Sharsw. Bla. Com. 234*.

**SECONDARY EVIDENCE.** That evidence which is admissible after proof which accounts satisfactorily for the absence of the evidence. The rule which requires the production of the best evidence of which the case in its nature is susceptible, is adopted for the prevention of fraud and is essential to the administration of justice; 31 Fed. Rep. 313. For discussion of this subject see EVIDENCE.

Secondary evidence includes:

1. Examined copies, exemplifications, office copies, and certified copies.

2. Other copies made from the original and proved to be correct.

3. Counterparts of documents as against the parties who did not execute them.

4. Oral accounts of the contents of a document given by some person who has himself seen it; Steph. Dig. Ev. art. 70. A good illustration of the rule respecting such evidence is that in an action to recover a stock subscription, the subscription paper is primary evidence; the stock ledger is secondary; 51 Fed. Rep. 409.

**SECONDARY USE.** A use limited to take effect in derogation of a preceding estate, otherwise called a "shifting use" as a conveyance to the use of A and his heirs, with a proviso that when B returns from India, then to the use of C and his heirs. 1 Steph. Com. 546.

**SECONDS. In Criminal Law.** Those persons who assist, direct, and support others engaged in fighting a duel.

Where the principal in deliberate duelling would be guilty of murder, the second is considered equally guilty. It has been contended that the second of him who is killed is equally guilty with the second of the successful principal; but this is denied by Hale, who considers such a one guilty only of a great misdemeanor; 2 Bish. Cr. Law § 311.

**SECRET COMMITTEE.** A secret committee of the house of commons is a committee especially appointed to investigate a certain matter, and secrecy being deemed necessary in furtherance of its objects, its proceedings are conducted with closed doors. All other committees are open to members of the house, although they may not be serving upon them. Brown.

**SECRET PARTNERSHIP.** One where the existence of certain persons as partners is not avowed to the public. 49 N. H. 225. See PARTNERS.

**SECRET SERVICE.** A branch of government service concerned with the detection of counterfeiting and other offences, civil or political, committed or threatened by persons who operate in secrecy. It is under the charge and direction of the treasury department.

**SECRETARY.** An officer who, by order of his superior, writes letters and other instruments. He is so called because he is possessed of the *secrets* of his employer. This term was used in France in 1343, and in England the term secretary was first applied to the clerks of the king, who being always near his person were called *clerks of the secret*, and in the reign of Henry VIII. the term secretary of state came into use.

In the United States the term is used to denote the head of a department: as, secretary of state, etc. See DEPARTMENT.

**SECRETARY OF EMBASSY.** An officer appointed by the sovereign power to accompany a minister of the first or second rank, and sometimes, though not often, of an inferior rank.

He is, in fact, a species of public minister; for, independently of his protection as attached to an ambassador's suite, he enjoys in his own right the same protection of the law of nations, and the same immunities, as an ambassador. But *private secretaries* of a minister must not be confounded with secretaries of embassy or of legation. Such private secretaries are entitled to protection only as belonging to the suite of the ambassador.

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**SECRETARY OF LEGATION.** An officer employed to attend a foreign mission and to perform certain duties as clerk.

He is considered a diplomatic officer; R. S. § 1674. The salary of a secretary of embassy, or the secretary of a minister plenipotentiary, is the same as that of a secretary of legation.

**SECTA** (Lat. *sequor*, to follow). The persons, two or more in number, whom the plaintiff produced in court, in the ancient form of proceedings, immediately upon making his declaration, to confirm the allegations therein, before they were called in question by the defendant's plea. Bracton 214 *a*. The word appears to have been used as denoting that these persons *followed* the plaintiff into court; that is, came in a matter in which the plaintiff was the leader or one principally concerned. The actual production of *suit* was discontinued very early; 3 Bla. Com. 295; but the formula "*et inde producit sectam*" (for which in more modern pleadings "and thereupon he brings suit" is substituted) continued till the abolition of the Latin form of pleadings. Steph. Pl., And. ed. 171. The count in dower and writs of right did not so conclude, however; 1 Chitty, Pl. 399. A suit or action. Hob. 20; Bracton 399 *b*. A suit of clothes. Cowel; Spelman, Gloss.

**SECTA AD CURIAM.** A writ that lay against him who refused to perform his suit either to the county court or the court-baron. Cowel.

**Ad Furnum.** Suit due a public bake-house.

**Ad Molendrinum.** A service arising from the usage, time out of mind, of carrying corn to a particular mill to be ground. 3 Bla. Com. 235. A writ adapted to the injury lay at the old law. Fitzh. N. B. 123.

**Ad Torrale.** Suit due a man's kiln or malt-house. 3 Bla. Com. 235.

**Curiæ.** Suit at court. The service due from tenants to the lord of attending his courts-baron, both to answer complaints alleged against themselves, and for the trial of their fellow-tenants. 2 Bla. Com. 54.

**SECTA FACIENDA PER ILLAM QUÆ HABET ENICIAM PARTEM.** A writ to compel the heir, who has the elder's part of the co-heirs, to perform suit and services for all the coparceners. Reg. Orig. 177.

**SECTA REGALIS.** A suit or service by which all persons were bound twice in a year to attend the sheriff's tourn.

**SECTA UNICA TANTUM FACIENDA PRO PLURIBUS HÆREDITATIBUS.** A writ for an heir who was distrained by the lord to do more suits than one, that he should be allowed to do one suit only in respect of the land of divers heirs descended to him. Cowel.

**SECTARIAN.** A Roman Catholic orphanage where the pupils are instructed in the doctrines of their church is a sectarian institution within a constitutional provision forbidding the use of public funds for sectarian purposes. 16 Nev. 373. See RELIGION.

**SECTATORES.** A man's followers. Suitors of court among the Saxons. 1 Reeve's Hist. Eng. L. 22.

**SECTION.** A part separated from the rest, a division, a portion, as, specifically, a distinct part of a book or writing; the subdivision of a chapter; the division of a law or other writing, a paragraph, an article. 23 Neb. 128. The smallest numbered subdivision of a statute, code, text-book, etc., which contains a distinct subject. A paragraph (*q. v.*); an article. 23 Neb. 128.

**SECTION OF LAND.** A parcel of government land containing six hundred and forty acres. The lands of the United States are surveyed into parcels of six hundred and forty acres; each such parcel is called a section.

These sections are divided into half-sections, each of which contains three hundred and twenty acres, and into quarter-sections of one hundred and sixty acres each. See 2 Washb. R. P.

**SECTIS NON FACIENDIS.** A writ for a woman, who, for her dower, ought not to perform suit of court. Reg. Orig. 174.

**SECTORES** (Lat.). **In Roman Law.** Bidders at an auction. Babington, Auct. 2.

**SECULAR.** Temporal things; of the world; worldly. 14 N. H. 139.

**SECURITATIS PACIS.** A writ that lay for one who was threatened with death or bodily harm by another, against him who so threatened. Reg. Orig. 98.

**SECURITY.** That which renders a matter sure; an instrument which renders certain the performance of a contract. A person who becomes the surety for another, or who engages himself for the performance of another's contract. See 3 Blackf. 431.

**SECURITY FOR COSTS. In Practice.** In some courts there is a rule that when the plaintiff resides abroad he shall give security for costs, and until that has been done, when demanded, he cannot proceed in his action.

This is a right which the defendant must claim in proper time; for if he once waives it he cannot afterwards claim it: the waiver is seldom or perhaps never expressly made, but is generally implied from the acts of the defendant. When the defendant had undertaken to accept short notice of trial; 2 H. Bla. 573; or after issue joined, and when he knew of plaintiff's residence abroad, or, with such knowledge, when the defendant takes any step in the cause, these several acts will amount to a waiver; 5 B. & Ald. 702; 3 Wash. Ty. 518. It is never too late, however, if the motion do not delay the trial;

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1 Yeates 176. See 1 Johns. Ch. 202; 1 Ves. 396; Bright. Costs 257.

The fact that the defendant is out of the jurisdiction of the court will not alone authorize the requisition of security for costs: he must have his domicil abroad; 1 Ves. 396. A wife petitioning for a writ of *habeas corpus* to obtain from her husband, who resides in the state, the custody of their child, cannot be required without proofs to give bond as a non-resident, since her domicil is *prima facie* the same as her husband's; 131 Ind. 489. When the defendant resides abroad, he will be required to give such security although he is a foreign prince. See 11 S. & R. 121; 1 Miles, Pa. 321; 2 *id.* 402. A general affidavit is sufficient on moving for security for costs; the particulars of the defence need not be specified; 1 W. N. Cas. (Pa.) 134; a rule of court requiring non-residents to enter security for costs does not violate article iv. sec. 2 of the constitution, which provides that citizens of each state shall be entitled to all the privileges and immunities of the citizens in the several states; 19 Pa. Co. Ct. Rep. 339; 9 Md. 194; 13 W. Va. 299.

**SECUS** (Lat.). Otherwise.

**SEDERUNT, ACTS OF.** Ancient ordinances of the court of session in Scotland, by which authority is given to the court to make regulations equivalent to the Regulæ Generales of the English courts. Various modern acts give the court such power; Whart. Dict.

**SEDGE FLAT.** A tract of land below high water mark. 84 Conn. 421.

**SEDITION. In Criminal Law.** The raising commotions or disturbances in the state: it is a revolt against legitimate authority. Erskine, Inst. 4. 4. 14.

The distinction between sedition and treason consists in this: that though the ultimate object of sedition is a violation of the public peace, or at least such a course of measures as evidently engenders it, yet it does not aim at direct and open violence against the laws or the subversion of the constitution. Alison, Crim. Law 580.

The obnoxious and obsolete act of July 14, 1798, 1 Story, Laws 543, was called the *sedition law*, because its professed object was to prevent disturbances.

**SEDUCED.** Means that a virtuous woman has been corrupted, deceived, and drawn aside from the path of virtue which she was pursuing, by such acts and wiles, in connection with a promise of marriage, as were calculated to operate upon a virtuous woman. 106 Mo. 585; 108 *id.* 658.

**SEDUCING TO LEAVE SERVICE.** See ENTICE.

**SEDUCTION.** The act or crime of persuading a female, by flattery or deception, to surrender her chastity. Webster.

The wrong of inducing a female to consent to unlawful sexual intercourse, by enticements and persuasions overcoming her reluctance and scruples. 111 N. C. 215. See 17 Or. 283; 98 Mo. 368. And seduction may occur whether the woman is conscious or not; 98 Cal. 55. In civil cases, seduction and debauching are generally used as substantially similar terms; 73 Mich. 588.

Mere illicit intercourse is not seduction, although a promise of marriage be made; 38 Mich. 112; there must be some promise, deception, art, or influence of the seducer whereby chastity is surrendered; 55 Am. Dec. 542; 97 Mo. 668. Force is not an element of seduction, although force is used after consent is obtained; 31 N. W. Rep. 585.

The complainant must be chaste at the time of the seduction, and a reasonable doubt as to such fact is fatal to a recovery; 51 Ia. 467. Chastity, in the civil or criminal action, means actual personal virtue, and not reputation; 68 Am. Dec. 708; and requires specific acts of lewdness for impeachment; 26 N. Y. 203. Previous chastity is presumed; 42 N. W. Rep. 933. As to what may be shown to establish lack of chastity, see 7 S. W. Rep. 103; 5 Ia. 389; 7 N. W. Rep. 707; 42 N. W. Rep. 562; 11 S. W. Rep. 732; 88 Mo. 88. Chastity must be affirmatively shown where the statute requires that the person seduced be of good repute; 101 Pa. 215. Although a woman may have fallen, if she repent and reform, she is the object of seduction; 87 Am. Dec. 401; 73 Ala. 527.

Most states have enacted statutes making seduction a crime. What allurements are sufficient to constitute seduction, is for the jury to determine; 32 Ia. 262; and the courts allow considerable latitude in the evidence; 37 Mich. 518; 79 Ia. 703.

The indictment should allege the essential elements of the crime as defined by statute; 73 Ala. 527. Where there are several counts the prosecution cannot be compelled to elect; 70 N. Y. 38.

The statutes generally require:—that seduction be accomplished by promise of marriage; 102 Pa. 408; which need not be valid; 63 Ind. 198; provided the seduced was ignorant of its invalidity; 106 Mass. 339; and it may have been made some time prior to the seduction; 70 N. Y. 38; and the defendant may have intended to fulfil it; 27 Conn. 319; and he need not be of lawful age to marry; 48 Am. Rep. 17. Chastity of character must be alleged; 13 Md. 565; the previous character of the prosecutrix is to be determined by the jury; 18 Ia. 372. Chastity is always an issue; 86 Ala. 34; but is always presumed, and the burden of impeaching it is on the defendant; 73 Ia. 663.

The statutes generally require the evidence of the complainant to be corroborated; 104 Mo. 644; but as to what must be corroborated there is much confusion; 4 Minn. 325; 110 N. Y. 188; 73 Ala. 527.

The seduction of a married woman is known as criminal conversation, for which the husband has an action against the se-

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ducer; 2 Greenl. Ev. § 40. In England the statute 20 & 21 Vict. ch. 85, § 59, deprives the husband of the action but allows him damages in a suit for divorce where the seducer is made co-respondent. See CRIM. CON.

As to the seduction or alienation of a husband's affections, see ENTICE.

At common law the woman herself has no action for damages, though practically the end is reached by a suit for breach of promise of marriage, in many cases, but in some states the rule has been altered by statute. The parent, as being entitled to the services of his daughter, may maintain an action in many cases grounded upon that right, but only in such cases; 6 M. & W. 55; 7 Ired. 408; 4 N. Y. 38; 14 Ala. N. S. 235; 11 Ga. 603; 13 Gratt. 726; 3 Sneed 29; 6 Ind. 262; 10 Mo. 634; 130 N. Y. 239. In England the parent's right of action terminates when the child leaves the parent's house without the intention of returning; 5 East 45; but in America the right of action depends on the will of the parent, not the child; if he has not divested himself of a right to require his child's services, he may recover, even though at the time of the injury she was in another's service with his permission; 9 Johns. 387; s. c. Big. L. C. Torts 286; 16 S. W. Rep. 4; otherwise if his power over the child was gone at the time of the seduction. If the control was divested by fraud, the parent has still a right of action; 2 Stark. 493. Specific acts of service are not necessary to a right of action: the right to the service is enough; Big. Torts 146. The right of action continues after the majority of the child, if the relation of master and servant continues; 3 Vroom 58; 84 Wis. 629; 48 Ill. App. 371. See 111 N. C. 215. It is not necessary that pregnancy should ensue; Big. Torts 147; *contra*, 1 Exch. 61; where the proper consequence of the defendant's act was a loss of the child's health, resulting in an incapacity for service, an action lies; 104 Mass. 222; especially where sexual disease is communicated to the child; Big. Torts 147. The daughter's consent does not affect the parent's right to recover; 5 Lans. 454. If the mother, after the father's death, is the child's guardian, she has a right of action; Big. Torts 149; apart from the mother's guardianship, she has a right of action so long as the daughter continues to give her services to her mother. See 51 N. Y. 424. Where the daughter in her illness returns to her mother and is taken care of by her, the mother may sue for the seduction; 5 Cow. 106; *contra*, 2 Watts 474; 14 Ala. 235. See, generally, as to the mother's right of action, Big. L. C. Torts 302. Any one standing *in loco parentis*, and entitled to, or receiving, in his own right, the services of a minor, is entitled to maintain the action; Big. Torts 152; 2 C. & P. 303. If the parent consented to the seduction, or rendered it easy by his misconduct or neglect, he cannot recover; Peake 240; Big. Torts 151.

It is competent to show that the seduced yielded to defendant's solicitations under promise of marriage; 91 Mich. 611; but the mere promise of marriage as the inducement is not sufficient, where she was not seduced by any arts, wiles, or blandishments; 97 Mo. 668.

While the loss of services is the gist of the action, yet, when that has once been established, the jury may give damages commensurate with the real injury inflicted on the plaintiff. See Big. L. C. Torts 294. By statutes, seduction has been made a criminal offence in some states.

**SEE.** The diocese of a bishop.

**SEEDS.** The substance which nature prepares for the reproduction of plants or animals.

Seeds which have been sown in the earth immediately become a part of the land in which they have been sown: *quæ sata solo cedere intelliguntur*. Inst. 2. 1. 32.

**SEIGNIOR, SEIGNEUR.** Among the feudists, this name signified lord of the fee. Fitzh. N. B. 23. It is still used in French Canada. The most extended signification of this word includes not only a lord or peer of parliament, but is applied to the owner or proprietor of a thing: hence the owner of a hawk, and the master of a fishing vessel, is called a seigneur. 37 Edw. III. c. 19; Barrington, Stat. 258. *Seignior in gross*, a lord without a manor.

**SEIGNIORAGE.** A royalty or prerogative of the sovereign, whereby an allowance of gold and silver, brought to a mint in the mass to be exchanged for coin, is claimed. Cowel. Mintage, the charge for coining bullion into money at the mint. Black, L. Dict.

**SEIGNIORY. In English Law.** The rights of a lord, as such, in lands. Swinb. Wills 174.

**SEISIN.** The completion of the feudal investiture, by which the tenant was admitted into the feud and performed the rights of homage and fealty. Stearns, Real Act. 2; Mitchell, R. E. & Conv. 225.

Possession with an intent on the part of him who holds it to claim a freehold interest. 8 N. H. 58; 1 Washb. R. P. 35.

*Ex vi termini*, the whole legal title. 48 Minn. 462.

"Seisin is a technical term to denote the completion of that investiture, by which the tenant was admitted into the tenure, and without which no freehold could be constituted or pass." 1 Burr. 110, per Lord Mansfield.

This definition is said to be more applicable to the ceremony of livery of seisin than to seisin itself, while the definition of seisin as possession, does not lay sufficient stress on what is really the most important element in seisin—the element of title; 12 L. Quart. Rev. 240.

It is said that seisin is of practical importance at the present day in England in those rare cases where land is conveyed by

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an infant under the custom of gavelkind, and where a man claims an estate by curtesy. If feoffments were abolished and the law of curtesy made similar to that of dower, seisin would be completely obsolete, as it is in all other respects; 12 L. Quart. Rev. 246, 251.

Immediately upon the investiture or livery of seisin the tenant became tenant of the freehold; and the term seisin originally contained the idea of possession derived from a superior lord of whom the tenant held. There could be but one seisin, and the person holding it was regarded for the time as the rightful owner; Littleton § 701; 1 Spence, Eq. Jur. 136. In the early history of the country, livery of seisin seems to have been occasionally practised. See 1 Washb. R. P., 5th ed. *344; Colony Laws (Mass.) 85, 86; Smith, Landl. & T. 6, n.

In Connecticut, Massachusetts, Pennsylvania, and Ohio, seisin means merely ownership, and the distinction between seisin in deed and in law is not known in practice; 4 Day 305; 14 Pick. 224. A patent by the commonwealth, in Kentucky, gives a right of entry, but not actual seisin; 3 Bibb 57.

*Seisin in fact* is possession with intent on the part of him who holds it to claim a freehold interest.

*Seisin in law* is a right of immediate possession according to the nature of the estate. Cowel; Com. Dig. *Seisin* (A 1, 2).

If one enters upon an estate having title, the law presumes an intent in accordance, and requires no further proof of the intent; 12 Metc. 357; 4 Wheat. 213; 8 Cra. 229; but if one enters without title, an intent to gain seisin must be shown; 5 Pet. 402; 9 *id.* 52. Seisin once established is presumed to continue till the contrary is shown; 5 Metc. Mass. 173. Seisin will not be lost by entry of a stranger if the owner remains in possession; 1 Salk. 246; 9 Metc. 418. Entry by permission of the owner will never give seisin without open and unequivocal acts of disseisin known to the owner; 10 Gratt. 305; 9 Metc. 418. Simple entry by one having the freehold title is sufficient to regain seisin; 4 Mass. 416; 25 Vt. 316; 10 Pet. 412; 8 Cra. 247. The heir is invested with the seisin by law upon descent of the title; 24 Pick. 78. As a general proposition, by the law in this country, the making, delivery, and recording of a deed of lands passes the seisin without any formal entry being necessary. This is generally by force of the statutes of the several states,—in some such a deed being in terms declared to be equivalent to livery of seisin, and in others dispensing with any further act to pass a full and complete title; 4 Greenl. Cruise, Dig. 45, n., 47, n; Smith, Landl. & T. 6, n.; 3 Dall. 489.

The seisin could never be in abeyance; 1 Prest. Est. 255; and this necessity gave rise to much of the difficult law in regard to estates enjoyable in the future. See 1 Spence, Eq. Jur. 156.

**SEISIN OX. In Scotch Law.** A perquisite formerly due to the sheriff when he gave possession to an heir holding crown lands. It was long since converted into a payment in money proportioned to the value of the estate. Bell, Dict.

**SEISINA HABENDA.** A writ for delivery of seisin to the lord, of lands and tenements, after the sovereign, in right of his prerogative, had had the year, day, and waste, on a felony committed, etc. Reg. Orig. 165.

**SEIZING OF HERIOTS.** Taking the best beast, etc., where an heriot is due, on the death of the tenant. 2 Bla. Com. 423; Whart. Dict.

**SEIZURE. In Practice.** The act of taking possession of the property of a person condemned by the judgment of a competent tribunal to pay a certain sum of money, by a sheriff, constable, or other officer lawfully authorized thereto, by virtue of an execution, for the purpose of having such property sold according to law to satisfy the judgment. 54 N. W. Rep. (Wis.) 20. The taking possession of goods for a violation of a public law; as, the taking possession of a ship for attempting an illicit trade; 2 Cra. 187; 4 Wheat. 100; 1 Gall. 75; 2 Wash. C. C. 127, 567; 6 Cow. 404.

The seizure is complete as soon as the goods are within the power of the officer; 16 Johns. 287; 2 N. & M'C. 392; 2 Rawle 142; 3 *id.* 401; Wats. Sher. 172, approved 84 Wis. 80.

The taking of part of the goods in a house, however, by virtue of a *fieri facias* in the name of the whole, is a good seizure of all; 8 East 474. As the seizure must be made by virtue of an execution, it is evident that it cannot be made after the return-day; 2 Caines 243; 4 Johns. 450. See DOOR; HOUSE; SEARCH WARRANT.

**SELECTI JUDICES** (Lat.). **In Roman Law.** Judges who were selected very much like our juries. They were returned by the prætor, drawn by lot, subject to be challenged and sworn. 3 Bla. Com. 366.

**SELECTMEN.** The name of certain town officers in several states of the United States, who are invested by the statutes of the states with extensive powers for the conduct of the town business.

**SELF-DEFENCE. In Criminal Law.** The protection of one's person and property from injury. Whart. Crim. Law 97. A man may defend himself, and even commit a homicide for the prevention of any forcible and atrocious crime which if completed would amount to a felony; 17 Ala. N. S. 587; 5 Ga. 85; 1 Jones N. C. 190; 30 Miss. 619; 14 B. Monr. 103, 614; 3 Wash. C. C. 515; and, of course, under the like circumstances, mayhem, wounding, and battery would be excusable at common law; 4 Bla. Com. 180. A man may repel force by force even to the taking of life; 45 Vt. 308; 134 Ind. 46; in defence of his person, property, or habitation, or of a member of his family, against any one who manifests, intends, attempts, or endeavors, by violence or surprise, to commit a forcible felony, such as murder, rape, robbery, arson, burglary, and the like; 38 Pa. 265; 8 Bush 481. In these cases he is not

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required to retreat; 57 Ind. 80; but he may resist, and even pursue his adversary, until he has secured himself from all danger; 7 J. J. Marsh. 478; 4 Bingh. 628; 45 La. Ann. 969; but see 7 N. Y. 396. A man may defend his dwelling to any extremity; and this includes whatever is within the curtilage of his dwelling-house; 8 Mich. 150. Where one finds another trying to break into his house in the night-time he may employ such force as to prevent his doing so, and if the other threatens to kill him and makes a motion as if to do so and puts him in fear of his life, he is not bound to retreat, but may use such force as is necessary to repel the assault; 162 U. S. 499. In deciding what force is necessary, a person need only act upon the circumstances as they appear to him at the time. See 24 Tex. 454; 23 Ill. 17.

In the case of homicide the law permits the resistance of force or seriously threatened force, actually impending or reasonably apparent, by force sufficient to repel the actual or apparent danger, and no more; 96 Ala. 81. The law of self-defence justifies an act done "in an honest and reasonable belief of immediate danger;" 142 U. S. 18. To justify a homicide, however, on the ground of self-defence, there must have been not only the belief but also reasonable ground for believing that at the time of killing the deceased, he was in imminent or immediate danger of his life or great bodily harm; 30 Fla. 234; 99 Cal. 1; 27 Tex. App. 562; 28 S. C. 201; and to justify shooting, on apparent necessity, the circumstances must have been such as to induce the mind of a reasonably prudent person to entertain the belief that the defendant was in imminent peril of his life or great bodily harm; 97 Ala. 54; there must be a reasonable apprehension of immediate danger justified by the circumstances; 89 Va. 619.

Reasonable fear does not mean the fear of a coward, but the fear of a reasonably courageous man; 92 Ga. 463; 89 Mont. 77; 79 Ga. 696; fear that one's life is in danger will not excuse a homicide in the absence of an overt act or hostile demonstration on the part of the deceased.

A question whether a homicide is committed in repelling an attack is a question of fact not necessarily dependent upon the duration or quality of the reflection by which the act may have been preceded; 151 U. S. 303. One assailed on his own grounds, without provocation, by a person armed with a deadly weapon and apparently seeking his life, is not obliged to retreat and may defend himself with such means as are within his control; 158 U. S. 550; 95 Ky. 623; 86 *id.* 99. So a person who has had an angry altercation with another person may be justified in arming himself for self-defence; and if, on meeting his adversary afterwards, he kills him, but not in necessary self-defence, his crime may be manslaughter or murder, according to the circumstances on the occasion of the killing, and is not necessarily murder by reason of his having previously armed himself; 155 U. S. 271. Accordingly it is wrong to charge that the intentional arming of himself with a pistol by a defendant, even if with a view to self-defence, would make a case of murder unless the actual affray developed a case of self-defence; 157 U. S. 675.

Where the accused embarks in the quarrel with no felonious intent or malice or purpose of doing bodily harm or killing, and, under reasonable belief of imminent danger, inflicts a deadly wound, it is not murder; 162 U. S. 466; but where a difficulty is intentionally brought on for the purpose of killing the deceased, the fact of imminent danger to the accused constitutes no defence; 162 U. S. 466.

What is or what is not an overt demonstration of violence sufficient to justify a resistance which ends in the death of the party making the demonstration varies with the circumstances and is a question for the jury; 160 U. S. 203.

If a person, under the provocation of offensive language, assaults the speaker personally, but in such a way as to show that there is no intention to do him serious bodily harm, and then retires under such circumstances as show that he does not intend to do anything more, but in good faith withdraws from further contest, his right of self-defence is restored when the person assaulted, in violation of law, pursues him with a deadly weapon, and seeks to take his life, or do him great bodily harm; 164 U. S. 546; 88 Ala. 4; Whart. Hom. § 483; 158 U. S. 550, 564; but there must be a real and *bona fide* surrender and withdrawal on the part of the original aggressor, otherwise he will continue to be so regarded; Whart. Cr. L., 9th ed. § 486. The meaning of the principle is that the law will always leave the original aggressor an opportunity to respond before he takes the life of his adversary; Bish. Cr. L., 7th ed. § 871; 1 Bish. N. Cr. L. § 702. It is "for the jury to say whether the withdrawal was not in good faith or was a mere device by the accused to obtain some advantage of his adversary"; 164 U. S. 546. It is said of the two United States cases cited that they "consistently united in expressing a judicial policy on the subject of self-defence which is not only logical in principle, but commends itself to the practical sense of justice"; 55 Alb. L. J. 268; to the same effect in substance are recent cases in state courts; 124 Mo. 397; 141 Ind. 236.

The possession of a good conscience is not an indispensable prerequisite to justification of action in the face of imminent and deadly peril, nor does the intrinsic rightfulness of the occupation or situation of a party, having in itself no bearing upon or connection with an assault, impose a limitation upon the right to repel it; 153 U. S. 614.

The doctrine of constructive self-defence comprehends the principal civil and domestic relations; therefore master and



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servant, parent and child, husband and wife, killing an assailant in the necessary defence of each, respectively, are excused, the act of the relation being construed the same as the act of the party himself; 4 Bla. Com. 186; 32 Fla. 56; strangely enough, there seems to be no authority for placing a brother or sister in this category, though they doubtless occupy as good a position as a stranger; 25 Alb. L. J. 187. See 2 Bish. Cr. L. 877.

A man may defend himself when no felony has been threatened or attempted. *First*, when the assailant attempts to beat another and there is no mutual combat: as where one meets another and attempts to commit or does commit an assault and battery on him, the person attacked may defend himself; 4 Den. 448; 24 Vt. 218; 3 Harring. Del. 22; 3 Brev. 515; 5 Gray 475; 8 C. & P. 31; but it is not true as a general proposition, that one who is assaulted by another with a dangerous weapon is justified in taking the life of the person so assaulting him; 45 La. Ann. 14; and in case of an offer or attempt to strike another, when sufficiently near, so that there is danger, the person assailed may strike first, and is not required to wait until he has been struck; Bull. N. P. 18. *Second*, when there is a mutual combat upon a sudden quarrel. In these cases both parties are the aggressors; and if in the fight one is killed, it will be manslaughter at least, unless the survivor can prove two things, viz.: that before the mortal stroke was given he had refused any further combat, and had retreated as far as he could with safety; 8 N. Y. 396; 4 D. & B. 491; 15 Ga. 117; 1 Ohio St. 66; 1 Hawks 78, 210; and that he killed his adversary from necessity, to avoid his own destruction; 32 Me. 279; 2 Halst. 220; 11 Humphr. 200; 2 N. Y. 193; Coxe, N. J. 424; 25 Ala. N. S. 15.

A person assaulted by another, whom he kills, cannot set up the plea of self-defence if he could have safely retreated or have disarmed the other without danger to himself, and believed himself able to do so; 86 Ala. 13; *id.* 595; 83 *id.* 33; 74 Ia. 653.

The settled rule that where a person having authority to arrest and using the proper means for that purpose is resisted, he can repel force with force, and, if the party making the resistance is unavoidably killed, the homicide is justifiable, may be invoked by a person who resists and kills the officer, if he was ignorant of the fact that he was an officer; 153 U. S. 614.

A man may defend himself against animals, and he may during the attack kill them, but not afterwards; 1 C. & P. 106; 10 Johns. 365; 13 *id.* 12. See Horr. & T. Cas. on Self-Defence, where cases are collected. See JUSTIFICATION; MURDER; HOMICIDE.

**SELF-DESTRUCTION.** This term in an insurance policy is synonymous with, not more comprehensive than, suicide. It does not include an intentional though insane killing of one's self. "The act, whether described by words of Saxon or of Latin origin, or partly of the one and partly of the other, 'dying by his own hand,' 'self-killing,' 'self-slaughter,' 'suicide,' 'self-destruction,' without more, cannot be imputed to a man who, by reason of insanity (as is commonly said), 'is not himself';" 150 U. S. 468. See SUICIDE.

**SELF-DISSERVING EVIDENCE.** See SELF-REGARDING EVIDENCE.

**SELF-EXECUTING PROVISIONS.** See CONSTITUTIONAL; and also Thomps. Corp. § 3004.

**SELF-REGARDING EVIDENCE.** That evidence for or against a party which is afforded by the language or demeanor of himself or of those who represent him. When in favor of the party supplying it, the evidence may be said to be "self-serving," when otherwise, "self-disserving," and these terms are alse applicable to the statement and demeanor of witnesses.

Self-serving evidence is not originally admissible except where part of the document is used against the party, who is entitled to have the whole of it laid before the jury who may consider such statements as are self-serving, and give such weight to them as they see fit; 5 Taunt. 245; 2 D. & Ryl. 358. See CONFESSION.

Self-disserving statements are termed "admissions" in civil cases and "confessions" in criminal cases. See those titles. They are also classified as "plenary" when the statements are not absolutely inconsistent with the existence of fact different from those indicated by it. See, generally, Best, Evidence §§ 518–577.

**SELF-SERVING EVIDENCE.** See SELF-REGARDING EVIDENCE.

**SELION OF LAND.** A ridge of ground rising between two furrows, containing no certain quantity, but sometimes more and sometimes less. *Termes de la Ley.*

**SELLER.** One who disposes of a thing in consideration of money; a vendor.

This term is more usually applied in the sale of chattels, and that of vendor in the sale of estates. See SALE.

**SELLING PUBLIC OFFICES.** Buying or selling any office in the gift of the crown, or making any negotiation relating thereto, was deemed a misdemeanor under stats. 5 & 6 Edw. VI. c. 16, and 49 Geo. III. c. 126. 2 Steph. Com., 11th ed. 631.

**SEMBLE** (Fr. it seems). A term frequently used before the statement of a point of law which has not been directly settled, but about which the court have expressed an opinion and intimated what a decision would be.

**SEMESTRIA.** The collected deci-

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sions of the emperors in their councils. Whart. Dict.

**SEMI-COLON.** According to well-established grammatical rules, this is a point only used to separate parts of a sentence more distinctly than a comma. 76 N. Y. 220.

**SEMI-MATRIMONIUM.** Half-marriage. Concubinage was so called in the Roman law. Tayl. Civ. L. 273.

**SEMI-PROOF. In Civil Law.** Presumption of fact. This degree of proof is thus defined: "*Non est ignorandum probationem semiplenam eam esse, per quam rei gestæ fides aliqua fit judici; non tamen tanta ut jure debeat in pronuncianda sententia eam sequi.*" Mascardus, de Prob. vol., 1 Quæst. 11, n. 1, 4.

**SEMINARY.** A place of education. Any school, academy, college, or university in which young persons are instructed in the several branches of learning which may qualify them for their future employments. Webster, Dict.

The word is said to have acquired no fixed and definite legal meaning. 12 N. Y. 229.

**SEMINAUFRAGIUM** (Lat.). A term used by Italian lawyers, which literally signifies *half-shipwreck*, and by which they understand the jetsam, or casting merchandise into the sea to prevent shipwreck. Locré, *Esp. du Code de Com.* art. 409. The state of a vessel which has been so much injured by tempest or accident that to repair the damages, after being brought into port, and prepare her for sea, would cost more than her worth. 4 Bost. L. Rep. 120.

**SEMPER PARATUS** (Lat. always ready). The name of a plea by which the defendant alleges that he has always been ready to perform what is demanded of him. 3 Bla. Com. 303. The same as *Tout temps prist.*

**SEN.** This is said to be an ancient word which signified justice. Co. Litt. 61 *a.*

**SENAGE.** Money paid for synodals.

**SENATE.** The name of the less numerous of the two bodies constituting the legislative branch of the government of the United States, and of the several states. See the articles upon the various states.

The Senate of the United States is composed of two senators from each state, chosen by the legislature thereof for six years; and each senator has one vote. The equal suffrage of the states in the senate is secured to them beyond the ordinary power of amendment; no state can be deprived thereof without its consent. Art. 5. The senate has been, from the first formation of the government, divided into three classes. The rotation of the classes was originally determined by lot, and the seats of one class are vacated at the end of the second year, so that one-third of the senate is chosen every second year. Const. art. 1, s. 3. This provision was borrowed from a similar one in some of the state constitutions, of which Virginia gave the first example.

The qualifications which the constitution requires of a senator are that he should be thirty years of age, have been nine years a citizen of the United States, and, when elected, be an inhabitant of that state for which he shall be chosen. Const. art. 1, s. 3. See CONGRESS.

**SENATORS OF THE COLLEGE OF JUSTICE.** The judges of the court of session in Scotland are so called.

**SENATUS. In Roman Law.** The senate. Also the place where the senate met. Calv. Lex.

**SENATUS CONSULTUM** (Lat.). **In Roman Law.** A decree or decision of the Roman senate, which had the force of law.

When the Roman people had so increased that there was no place where they could meet, it was found necessary to consult the senate, instead of the people, both on public affairs and those which related to individuals. The opinion which was rendered on such an occasion was called *senatus consultum.* Inst. 1. 2. 5; *Clef. des Lois Rom.*; Merlin, *Répert.* These decrees frequently derived their titles from the names of the consuls or magistrates who proposed them; as senatus-consultum Claudianum, Libonianum, Velleianum, etc., from Claudius, Libonius, Valleius. Ayliffe, Pand. 30.

**SENATUS DECRETA.** (Decisions of the senate.) Private acts concerning particular persons merely.

**SENESCHAL.** A steward; also one who has the dispensing of justice. Co. Litt. 61 *a.*

**SENESCHALLO ET MARESHALLO QUOD NON TENEAT PLACITA DE LIBERO TENEMENTO.** A writ addressed to the steward and marshal of England, inhibiting them to take cognizance of an action in their court that concerns freehold. Reg. Orig. 185.

**SENESCHALLUS** (Lat.). A steward. Co. Litt. 61 *a.*

**SENILITY.** The state of being old.

When on account of senility the party is unable to manage his affairs, a committee will be appointed as in case of lunacy; 1 Collier, Lun. 66; 2 Johns. Ch. 232; 4 Call 423; 12 Ves. Jr. 446; 8 Mass. 129; 19 Ves. Jr. 285.

**SENILE DEMENTIA.** See DEMENTIA.

**SENIOR.** The elder. This addition is sometimes made to a man's name, when two persons bear the same, in order to distinguish them. In practice, when nothing is mentioned, the senior is intended; 3 Miss. 59. See NAME.

One older in office, or whose entrance upon an office was anterior to that of another. 44 Ohio St. 6. See 126 Mass. 603.

**SENTENCE.** A judgment, or judicial declaration made by a judge in a cause. The term judgment is more usually applied to civil, and sentence to criminal, proceedings.

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Sentences are final, when they put an end to the case; or interlocutory, when they settle only some incidental matter which has arisen in the course of its progress. See Aso & Man. Inst. b. 3, t. 8, c. 1.

A sentence exceeding the term allowed by law will be reversed upon *certiorari*; 3 Brews. 30. Under some circumstances a sentence may be suspended after conviction; 43 N. J. L. 113; 115 Mass. 133. But a single sentence exhausts the power of the court to punish the offender, after the term is ended or the judgment has gone into operation; 18 Wall. 163; 122 Mass. 317; 57 Pa. 291. See ACCUMULATIVE SENTENCE.

The court may set a day for the execution of a prisoner after the time originally fixed has elapsed. The prisoner may be held in confinement after the first day fixed for execution has passed; 146 U. S. 271. Upon the affirmance of a judgment, sentencing a prisoner to death, there is nothing which requires that he shall be sentenced anew by the trial court; 143 U. S. 442.

Where a court has jurisdiction of the person and the offence, the imposition of a sentence in excess of what the law permits does not render the authorized portion of the sentence void, but only such part as may be in excess; 153 U. S. 48; so, on a plea of guilty, if the court had authority to impose the punishment actually adjudged on a conviction of a higher grade of the offence; 42 Pac. Rep. (Kan.) 373.

Where the judgment on the first count is reversed and there is arrest of judgment under the second, a term of imprisonment under the third may be made to commence on the day fixed for the first count; 153 U. S. 396.

Failure in the sentence to name the crime for which the prisoner was sentenced may be supplied by reference to the rest of the record; 151 U. S. 396.

Where a verdict against one for embezzling money received by him as an assistant postmaster, was taken on embezzlement alone, without, as required by law, finding the amount embezzled as a fine, and was reversed for that reason, the trial court was without authority to fix the fine without the finding of a jury, and as he could not be put in jeopardy again, he was discharged; 68 Fed. Rep. 536.

When a sentence different from that authorized by law has been imposed and the judgment has been reversed for that error, and the cause remanded to the trial court with instructions to proceed therein according to law, the trial court resumes jurisdiction of the cause at the point where the error supervened and may resentence the defendant and impose the penalty provided by law, although part of the void sentence has been executed; 68 Fed. Rep. 472.

Statutes providing for a severer punishment when a criminal is convicted of a second or third offence are not in violation of the constitutional provision that no one shall be twice put in jeopardy for the same offence; 159 U. S. 673. The doctrine is that the subsequent punishment is not for the first offence, but for persistence in crime; 47 Cal. 113; 115 Ill. 583; 158 Mass. 598; 48 Wis. 647. For the same reason, they are not open to the objection that they are *ex post facto*, even when the prior convictions occurred before the passage of the act imposing the additional penalty; 45 Cal. 429; 155 Mass. 163; 50 Ohio St. 428; 9 Gratt. 738. Such statutes cannot apply to the case of a conviction for an offence committed after that for which the prisoner is on trial, but for which he is first tried; 9 Gratt. 738.

The indictment must allege that the defendant had been previously convicted, sentenced, and imprisoned (once or twice, as the case may be) in some penal institution for felonies (as such penalties are usually only prescribed for felonies or penitentiary offences), describing each separately; 130 Mass. 35; 158 Mass. 598; 113 Mo. 538; 50 Ohio St. 428. As a general rule the courts have no discretion in the matter of imposing sentence under the habitual criminal acts; 158 Mass. 598; 50 Ohio St. 428. It is not necessary, unless required by statute, that the subsequent conviction or convictions should be for the same identical offence or character of offence. It is sufficient if the accused has been convicted of any one of the offences of the grade named; 115 Ill. 583. The previous offences must have been penitentiary offences, and not merely made so by repeated convictions for what would otherwise have been misdemeanors; 22 S. E. Rep. (Va.) 874.

See ACCUMULATIVE SENTENCES; JUDGMENT; HABITUAL CRIMINALS' ACT.

As to parole and indeterminate sentences, see PRISONER; 31 Am. L. Rev. 744.

**SENTENCE OF DEATH RECORDED.** A custom in the English courts, now disused, of entering sentence of death on the record which is not intended to be pronounced. The effect was the same as if it had been pronounced and the offender reprieved.

**SENTENTIA.** See MAXIM.

**SEPARALITER** (Lat. separately). A word sometimes used in indictments to show that the defendants are charged separately with offences which without the addition of this word would seem, from the form of the indictment, to be charged jointly; as, for example, when two persons are indicted together for perjury, and the indictment states that A and B came before a commissioner, etc., this is alleging that they were both guilty of the same crime, when by law their crimes are distinct, and the indictment is vicious; but if the word *separaliter* is used, then the affirmation is that each was guilty of a separate offence. 2 Hale, Pl. Cr. 174.

**SEPARATE ACTION.** An action is so called which each of several persons must bring when they are denied the privilege of joining in one suit. See JOINDER.

**SEPARATE ESTATE.** That which belongs to one only of several persons: as,

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the separate estate of a partner, which does not belong to the partnership. 2 Bouvier, Inst. n. 1519.

The separate estate of a married woman is that which belongs to her and over which her husband has no right in equity. It may consist of lands or chattels. 4 Barb. 409; 1 Const. 452.

See MARRIED WOMAN.

**SEPARATE MAINTENANCE.** The allowance made by a husband to his wife for her separate support and maintenance. In general, if a wife is abandoned by her husband, without fault on her part, and left without adequate means of support, a bill in equity will lie to compel the husband to support her, without asking for or procuring a decree of divorce; Schoul. Hus. & W. § 485; 50 Miss. 694; 30 N. J. Eq. 359.

When this allowance is regularly paid, and notice of it has been given, no person who has received such notice will be entitled to recover against the husband for necessaries furnished to the wife, because the liability of the husband depends on a presumption of authority delegated by him to the wife, which is negatived by the facts of the case; 2 Stark. Ev. 699.

**SEPARATE TRIAL.** See JOINDER.

**SEPARATION.** A cessation of cohabitation of husband and wife by mutual agreement.

Contracts of this kind are generally made by the husband for himself and by the wife with trustees; 3 Paige, Ch. 483; 4 *id.* 516; 5 Bligh N. S. 339; 1 Dow & C. H. L. 519. This contract does not affect the marriage, and the parties may at any time agree to live together as husband and wife. The husband who has agreed to a *total* separation cannot bring an action for criminal conversation with the wife; 4 Viner, Abr. 173; 2 Stark. Ev. 698; Shelf. Marr. & D. 608. Articles of separation are no bar to proceedings for divorce for subsequent cause; 4 Paige 516; 33 Md. 401. Under recent legislation, separation deeds are legalized in England; L. R. 11 Ch. D. 508; Schoul. Hus. & W. §§ 476, 479; Bish. M. D. & S. 1489.

Reconciliation after separation supersedes special articles of separation, in courts of law and equity; 1 Dowl. P. C. 245; 11 Ves. 532; 9 Cal. 479. Public policy forbids that parties should be permitted to make agreements for themselves to hold good whenever they choose to live separate; 5 Bligh N. S. 367. And see 1 C. & P. 36; 11 Ves. 526; 2 S. & S. 372; 1 Y. & C. 28; 3 Johns. Ch. 521; 1 Des. Eq. 45, 198; 8 N. H. 350.

**SEPARATION A MENSA ET THORO.** A partial dissolution of the marriage relation.

By the ecclesiastical or canon law of England, which had exclusive jurisdiction over marriage and divorce, marriage was regarded as a sacrament and indissoluble. This doctrine originated with the church of Rome, and became established in England while that country was Catholic; and though after the reformation it ceased to be the doctrine of the church of England, yet the law remained unchanged until the recent statute of 20 & 21 Vict. (1857) c. 85, and amendments; Bish. Marr. & D. §§ 65, n., 225; 1 Bish. M. Div. & S. § 1377. Hence, as has been seen in the article on divorce, a valid marriage could not be dissolved in England except by what has been termed the omnipotent power of parliament.

This gave rise, in the ecclesiastical courts, to the practice of granting divorces from bed and board, as they used to be called, or judicial separation, as they are called in the recent statute 20 & 21 Vict. c. 85, § 7; Bish. Marr. & D. §§ 65, n., 225; 1 Bish. M. D. & S. § 1377. From England this practice was introduced into this country; and though in some of the states it has entirely given way to the divorce *a vinculo matrimonii*, in others it is still in use, being generally granted for causes which are not sufficient to authorize the latter.

The only causes for which such a divorce is granted in England are adultery and cruelty. In this country it is generally granted also for wilful desertion, and in some states for other causes.

The legal consequences of a separation from bed and board are much less extensive than those of a divorce *a vinculo matrimonii* or a sentence of nullity. Such a separation works no change in the relation of the parties either to each other or to third persons, except in authorizing them to live apart until they mutually come together. In coming together, no new marriage is required; neither, it seems, under the general law, are any new proceedings in court necessary; but the reconciliation, of its own force, annuls the sentence of separation; 5 Pick. 461; 4 Johns. Ch. 187; 2 Dall. 128; Cro. Eliz. 908.

Nor does such a separation, at common law and without statutory aid, change the relation of the parties as to property. Thus, it neither takes away the right of the wife to dower, nor the right of the husband to the wife's real estate, either during her life or after her death, as tenant by the curtesy; neither does it affect the husband's right in a court of law to reduce into possession the choses in action of the wife; though in equity it may be otherwise; 2 Pick. 316; 5 *id.* 61; 6 W. & S. 85; Cro. Eliz. 908; 4 Barb. 295.

It should be observed, however, that in this country the consequences of a judicial separation are frequently modified by statute. See Bishop, Marr. & D. §§ 660–695, Bish. M. D. & S. § 1832.

Of those consequences which depend upon the order and decree of the court, the most important is that of alimony. See ALIMONY. In respect to the custody of children, the rules are the same as in case of divorce *a vinculo matrimonii*; Bish. Marr. & D. c. 25. See DIVORCE; 2 Bish. M. D. & S. § 1185; Macq. Husb. & W. 220; Browne, Div. 29.

**SEPTUM.** An enclosure; any place paled in. Cowel.

**SEPULCHRE.** The place where a corpse is buried. The violation of sepulchres is a misdemeanor at common law.

The right of a widow to remove the body of her husband from its place of original sepulchre is dependent on her consent to

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the first interment; 26 Atl. Rep. (R. I.) 42. See DEAD BODY; CEMETERY.

**SEQUATUR SUB SUO PERICULO.** A writ that lay where a summons *ad warrantizandum* was awarded, and the sheriff returned that he had nothing whereby he might be summoned, then issued an *alias* and a *pluries*, and if he came not in on the *pluries*, this writ issued. O. N. B. 163.

**SEQUEL.** A small quantity of meal given to the servants at a mill where corn was ground, under the names of knaveship, bannock, and lock or gowpen. Ersk. Prin. 211. See THIRLAGE.

**SEQUELA CAUSÆ.** The process and depending issue of a cause for trial. Cowel.

**SEQUELA CURIÆ.** Suit of court. Cowel.

**SEQUELA VILLANORUM.** The family retinue and appurtenances to the goods and chattels of villeins, which were at the absolute disposal of the lord. Par. Ant. 216.

**SEQUESTER. In Civil and Ecclesiastical Law.** To renounce. Example: when a widow comes into court and disclaims having anything to do or to intermeddle with her deceased husband's estate, she is said to sequester. Jacob, Law Dict.

**SEQUESTRATIO.** The separating or setting aside of a thing in controversy, from the possession of both the parties that contend for it; it is twofold—*voluntary*, done by consent of all parties; and *necessary*, when a judge orders it.

**SEQUESTRATION. In Chancery Practice.** A writ of commission, sometimes directed to the sheriff, but usually to four or more commissioners of the complainant's own nomination, authorizing them to enter upon the real or personal estate of the defendant, and to take the rents, issues, and profits into their own hands, and keep possession of or pay the same, as the court shall order or direct, until the party who is in contempt shall do that which he is enjoined to do and which is especially mentioned in the writ. Newl. Ch. Pr. 18; Blake, Ch. Pr. 103.

A process for contempt, used by chancery courts, to compel a performance of their orders and decrees. 88 Ga. 361.

Upon the return of *non est inventus* to a commission of rebellion, a sergeant-at-arms may be moved for; and if he certifies that the defendant cannot be taken, a motion may be made upon his certificate for an order for a sequestration; 2 Madd. Ch. Pr. 203; Blake, Ch. Pr. 103. It is the process formerly used instead of an attachment to secure the appearance of persons having the privilege of peerage or parliament, before a court of equity; Adams, Eq. 326.

Under a sequestration upon mesne process, as in respect of a contempt for want of appearance or answer, the sequestrators may take possession of the party's personal property and keep him out of possession, but no sale can take place, unless perhaps to pay expenses; for this process is only to form the foundation of taking the bill *pro confesso*. After a decree it may be sold. See 3 Bro. C. C. 72, 372; 2 Cox, Ch. 224; 1 Ves. 86.

A judgment of sequestration does not dissolve the corporation against which it is rendered, but it may appeal from an adverse judgment in an action brought by it and pending when the judgment of sequestration was rendered; 68 Hun 401.

See, generally, as to this species of sequestration, 19 Viner, Abr. 325; Bac. Abr. *Sequestration*; Com. Dig. *Chancery* (D 7, Y 4); 1 Hov. Suppl. to Ves. 25; 7 Vern., Raithby ed. 58, n. 1, 421, n. 1.

**In Contracts.** A species of deposit which two or more persons, engaged in litigation about anything, make of the thing in contest with an indifferent person, who binds himself to restore it, when the issue is decided, to the party to whom it is adjudged to belong. La. Code, art. 2942; Story, Bailm. § 45. See 19 Viner, Abr. 325; 1 Vern. 58, 420; 2 Ves. 28.

**In Louisiana.** A mandate of the court, ordering the sheriff, in certain cases, to take in his possession, and to keep, a thing of which another person has the possession, until after the decision of a suit, in order that it be delivered to him who shall be adjudged entitled to have the property or possession of that thing. This is what is properly called a judicial sequestration. See 1 Mart. La. 79; 1 La. 439; La. Civ. Code 2941, 2948.

**SEQUESTRATOR.** One to whom a sequestration is made.

A depositary of this kind cannot exonerate himself from the care of the thing sequestered in his hands, unless for some cause rendering it indispensable that he should resign his trust. La. Civ. Code, art. 2947.

Officers appointed by a court of chancery and named in a writ of sequestration. As to their powers and duties, see 2 Madd. Ch. Pr. 205; Blake, Ch. Pr. 103.

**SERF. In Feudal Law.** A term applied to a class of persons who were bound to perform very onerous duties towards others. Pothier, *Des Personnes*.

There is this essential difference between a serf and a slave: the serf was bound simply to labor on the soil where he was born, without any right to go elsewhere without the consent of his lord; but he was free to act as he pleased in his daily life: the slave, on the contrary, was the property of his master, who might require him to act as he pleased in every respect, and who might sell him as a chattel. Lepage, *Science du Droit*, c. 3, art. 2, § 2.

**SERGEANT-AT-ARMS.** An officer appointed by a legislative body, whose duties are to enforce the orders given by such bodies, generally under the warrant of its presiding officer.

**SERIATIM** (Lat.). In a series; severally: as, the judges delivered their opinions *seriatim*.

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**SERIOUS.** Important, weighty, momentous, and not trifling. 74 Ill. 231. A *serious injury* is defined by statute in Ohio to be any such injury as shall permanently or temporarily disable a person receiving it from earning a livelihood by manual labor; Ohio L. 1892, 136, and *serious bodily injury* is held to be one which gives rise to apprehension, or is attended with great danger. 21 Tex. App. 317.

**SERJEANTS-AT-LAW.** A very ancient and the most honorable order of advocates at the common law.

They were called, formerly, countors, or serjeant-countors, or countors of the bench (in the old law-Latin phrase, *banci narratores*), and are mentioned by Matthew Paris in the life of John I., written in 1255. They are limited to fifteen in number, in addition to the judges of the courts of Westminster, who were always admitted before being advanced to the bench.

The most distinctive feature in the Serjeant's dress in olden times was the "coif," a close-fitting head-covering of lawn or silk. He was invested with this on the day of his call by the chief justice of the king's bench, and it was not doffed even in the presence of the sovereign. It is supposed that the coif was invented for the purpose of hiding the clerical tonsure. This concealment became desirable after the law of 1217, which debarred churchmen from their lucrative practice in the courts.

The most valuable privilege formerly enjoyed by the serjeants was the monopoly of the practice in the court of common pleas. A bill was introduced into parliament for the purpose of destroying this monopoly, in 1755, which did not pass. In 1833, a warrant under the sign manual was directed to the judges of the common pleas, commanding them to open that court to the bar at large. The order was received and complied with. In 1839, the matter was brought before the court and decided to be illegal; 10 Bingh. 571; 6 Bingh. N. C. 187, 232. The statute 9 & 10 Vict. c. 54, has since extended the privilege to all barristers; 3 Sharsw. Bla. Com. 27, n. Upon the Judicature Act coming into operation, the institution and office of serjeant-at-law virtually came to an end; Weeks, Att. at Law § 33. See Experiences of Serjeant Ballantine, Lond. 1882; Pulling, Order of Coif; INNS OF COURT; FARYNDON INN.

**SERJEANTS' INN.** The Inn to which the serjeants-at-law belonged, near Chancery Lane, formerly called Faryndon Inn. See INNS OF COURT; 3 Steph. Com. 11th ed. 292, n. It no longer exists.

**SERJEANTY. In English Law.** A species of service which cannot be due or performed from a tenant to any lord but the king, and is either grand or petit.

"The exact idea of serjeanty as conceived in the thirteenth century," says a recent writer on this subject, "is not one easily defined." Several different classes of men were grouped together under one heading, the bond between them being very slight, and the distinction between serjeanty and knight's service on the one hand and socage on the other is hard to determine; 1 Poll. & Maitl. 262.

*Grand serjeanty* consisted in some service immediately respecting the person or dignity of the sovereign; as, to carry the king's standard or to be his constable or marshal, his butler or chamberlain, or to perform some military service; Litt. § 153. The honorable parts of this tenure were retained and its oppressive incidents swept away by stat. 12 Car. II. c. 24. *Termes de la Ley*; 2 Bla. Com. 73; while *petit serjeanty* required some inferior service, not strictly military or personal, to the king; as, the annual render of a bow, a sword, a lance, or an arrow; Litt. § 159; and this service, Littleton continues, is but socage in effect, as it was no personal service but a certain rent. It has, however, been overlooked by this writer that, whilst it is clearly not a predial service or service of the plough, and in all respects *liberum et commune socagium*, it was, nevertheless, held of the king, and by way of eminence was dignified by the title of *parvum servitium regis*, and in this light was respected by *Magna Charta* when it enacted that no wardship of lands or body should be claimed by the king in virtue of a tenure by petit serjeanty; 2 Bla. Com. 82.

**SERVAGE.** Where a tenant, besides his rent, finds one or more workmen for his lord's service. King John brought the Crown of England in servage to the see of Rome; 2 Inst. 174; Whart. Dict.

**SERVANTS. In Louisiana.** A term including slaves and, in general, all free persons who let, hire, or engage their services to another in the state, to be employed therein at any work, commerce, or occupation whatever, for the benefit of him who has contracted with them, for a certain sum or retribution, or upon certain conditions. La. Civ. Code, art. 155.

**Personal Rolations.** Domestics; those who receive wages, and who are lodged and fed in the house of another and employed in his service. Such servants are not particularly recognized by law.

One who serves, or does service, voluntary or involuntary; a person who is employed by another for menial offices or for other labor, and is subject to his command; a person who labors or exerts himself for the benefit of another, his master or employer; a subordinate helper. Webst., approved in 115 Mo. 1. They are called menial servants, or domestics, from living *infra mœnia*, within the walls of the house. 1 Bla. Com. 324; Wood, Inst. 53.

The right of the master to their services in every respect is grounded on the contract between them.

Laborers or persons hired by the day's work or any longer time are not considered servants; 3 S. & R. 351. See 12 Ves. 114; 16 *id.* 486; 2 Vern. 546; 3 Deac. & C.

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332; 2 Mart. La. N. S. 652; DOMESTIC; OPERATIVE; MASTER AND SERVANT.

**SERVI.** Bondmen or servile tenants.

**SERVIA.** A kingdom in the Balkan peninsula in southeastern Europe. The government is a constitutional, hereditary monarchy. The legislative power is vested in the king jointly with the Skuptschina or National Assembly. No military man or lawyer may be a member of this assembly. There is a senate, or council of state, constantly in session, which examines and elaborates projects of laws, etc. The Skuptschina of one hundred and seventy-eight members is, as to three-fourths, elected by the nation, and as to one-fourth, appointed by the king. There is also a Great Assembly of five hundred and thirty-eight members, none being royal nominees. This is called upon when required to decide vital and constitutional questions. All taxpaying citizens are electors. The Greek church is the religion of the state but other religions are tolerated. At the close of the war against Turkey in 1876, Servia was declared independent. Before then it was an autonomous province of Turkey.

**SERVICE. In Contracts.** The being employed to serve another.

In cases of seduction, the gist of the action is not the injury which the seducer has inflicted on the parent by destroying his peace of mind and the reputation of his child, but for the consequent inability to perform those services for which she was accountable to her master or her parent, who assumes this character for the purpose. See SEDUCTION; 2 M. & W. 539; 7 C. & P. 528.

**In Feudal Law.** That duty which the tenant owed to his lord by reason of his fee or estate.

The services, in respect of their quality, were either free or base, and in respect of their quantity, and the time of exacting them, were either certain or uncertain. 2 Bla. Com. 62.

**In Civil Law.** A servitude.

**In Practice.** The execution of a writ or process. Thus, to serve a writ of *capias* signifies to arrest a defendant under the process; Kirb. 48; 2 Aik. 338; 11 Mass. 181; to serve a summons is to deliver a copy of it at the house of the party, or to deliver it to him personally, or to read it to him: notices and other papers are served by delivering the same at the house of the party, or to him in person.

But where personal service is impossible, through the non-residence or absence of a party, constructive service by *publication* is, in some cases, permitted, and is effected by publishing the paper to be served in a newspaper designated in the order of court and by mailing a copy of the paper to the last known address of the party.

*Substituted* service is a constructive service made upon some recognized representative, as where a statute requires a foreign insurance company doing business in the state of Massachusetts to appoint the insurance commissioner of the state their attorney, "upon whom all lawful processes in any proceeding against the company may be served with like effect as if the company existed in that commonwealth;" 16 Am. L. Rev. 421. Questions are constantly arising as to the validity of service on some particular agent of a foreign corporation within state statutes giving jurisdiction in suits against such corporations. It was held in Louisiana that any service sufficient as against a domestic corporation might be, by law, sufficient against a foreign one, and consequently, that such service might be made upon the president of the latter while temporarily within the jurisdiction of the court in which the suit was commenced; 47 La. Ann. 389; but the rule laid down by the federal courts is that such service is insufficient; 156 U. S. 518; 53 Fed. Rep. 850. See FOREIGN CORPORATION. But it was held by the circuit court that when the manager of a corporation goes into another state on business of the corporation, service of summons against the corporation in a suit relating to that business may be made on him there; 85 Fed. Rep. 757.

"It is useful in all cases to consult the careful opinion in U. S. *v.* American Bell Tel. Co., 29 Fed. 17, and to re-state the three conditions which it is there said must concur or co-exist in order to give the federal courts jurisdiction *in personam* over a corporation created in another state:

"(1) It must appear as a matter of fact that the corporation is carrying on its business in the state where it is served with process; (2) that such business is transacted or managed by some agent or officer appointed by and representing the corporation in such state; and (3) the existence of some local law making such corporation, or foreign corporations generally, amenable to suit there, as a condition, express or implied, of doing business in the state." 83 Fed. Rep. 823.

Service of a subpœna in New York on a foreign steamship company may be made on its financial agent who is the head of a firm which is the general agent of the company; 150 U. S. 653.

A salaried agent, empowered to solicit advertisements for a non-resident newspaper corporation, and to make contracts therefor, and receive payment, and who carries on business at an office having the name of the newspaper on its windows, is a "managing agent," on whom valid service of process against the corporation may be made under the New York Code; 82 Fed. Rep. 694.

In an action against a foreign corporation service on an officer who is also the attorney in fact of the plaintiff to institute and prosecute the action is invalid and confers no jurisdiction; 46 S. C. 1.

Service by publication is in general held

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valid only in proceedings *in rem*, where the subject-matter is within the jurisdiction of the court, as in suits in partition, attachment, for the foreclosure of mortgages, and the enforcement of mechanics' liens. In many of the states statutes have been passed to meet this class of cases. In purely personal actions, service by publication is invalid, upon the well-settled principle that the person or thing proceeded against must be within the jurisdiction of the court entertaining the cause of action. 27 Am. L. Reg. 92; 95 U. S. 704; 103 *id.* 439; Story, Confl. L. § 539. See 144 U. S. 41.

No court can exercise, at common law, jurisdiction over a party unless he is served with the process within the territorial jurisdiction of the court, or voluntarily appears; 149 U. S. 194.

Where suit was brought in Massachusetts against a non-resident, and he, in Pennsylvania, accepted service of process, it was held that this did not give the court jurisdiction; 72 Pa. 110.

A notice served in another state upon a person alleged to be a stockholder in a Missouri corporation must be personally made upon him within the territorial jurisdiction of the court which issued it; 144 U. S. 41. The process does not run outside of the state; 25 U. S. App. 70.

Substituted service will be allowed upon a defendant who was within the jurisdiction when the writ issued, but had left the country (though not to evade service), before service could be made; 77 L. T. R. 335.

Where a suit is brought to enforce a lien on real estate in the district to remove a cloud on the title, the plaintiffs are entitled to get substituted service on a non-resident party in order to bring him within the jurisdiction of the court; 31 U. S. App. 486.

The fact that duly qualified officers of a township live outside the township, but within the county, does not necessarily render invalid the service of a notice upon them as officers of the township; 4 U. S. App. 616.

Some states, however, have gone so far as to allow suits in chancery to be maintained against non-residents upon constructive service of process by publication; 15 Am. L. Reg. 2. Proceedings in divorce are sometimes recognized as forming an exception to the rule; 1 Bish. Marr. Div. & Sep. § 837; Bish. Mar. & D. § 159.

A suit in equity in the federal court is commenced by suing out process and a *bona fide* attempt to serve it; 85 Fed. Rep. 827.

Priority of jurisdiction between two courts of concurrent jurisdiction is determined by the date of the service of process; 86 N. Y. 271; 84 Fed. Rep. 633; as to criminal cases, see 16 Wall. 366. As to the effect of service in relation to the commencement of actions see LIMITATION.

See DIVORCE; FOREIGN JUDGMENT; NON-RESIDENT.

When the service of a writ is prevented by the act of the party on whom it is to be served, it will, in general, be sufficient if the officer do everything in his power to serve it; 1 Mann. & G. 238.

If the service of a summons is not illegal, but slightly irregular, and the irregularity does not appear on the face of the return, it will not be set aside on motion, but the objection must be raised by plea; 15 U. S. App. 400.

As to what constitutes the being in the service of the United States within the meaning of an act relating to longevity pay, see that title.

**SERVICE OF AN HEIR.** An old form of Scotch law, fixing the right and character of an heir to the estate of his ancestor. Bell, Dict. Abolished in 1874.

**SERVICES FONCIERS. In French Law.** Easements.

**SERVIENT. In Civil Law.** A term applied to an estate or tenement by or in respect of which a servitude is due to another estate or tenement.

**SERVIENTIBUS.** Certain writs touching servants and their masters violating the statutes made against their abuses. Reg. Orig. 189.

**SERVILE.** The service of a writ has been held to be servile labor. 6 Conn. 49.

**SERVITIIS ACQUIETANDIS.** A judicial writ for a man distrained for services to one, when he owes and performs them to another, for the acquittal of such services. Reg. Jud. 27.

**SERVITIUM FEODALE ET PRÆDIALE.** A personal service, but due only by reason of lands which were held in fee. Bract. l. 2, c. 16.

**SERVITIUM FORINSECUM.** A service which did not belong to the chief lord, but to the king. Mon. Angl. ii. 48.

**SERVITIUM LIBERUM.** See FREEHOLD.

**SERVITIUM REGALE.** Royal service, or the prerogatives that within a royal manor, belonged to the lord of it, viz.: power of judicature in matters of property; of life and death in felonies and murders; right to waifs and estrays; remitting of money; assize of bread and beer, and weights and measures. Whart. Dict.

**SERVITORS OF BILLS.** Such servants or messengers of the marshal belonging to the king's bench as were heretofore sent abroad with bills or writs to summon men to that court, being now called "tipstaves." Blount; 2 Hen. IV. c. 23.

**SERVITUDE. In Civil Law.** The subjection of one person to another person, or of a person to a thing, or of a thing to a person, or of a thing to a thing.

A right which subjects a land or tenement to some service for the use of another

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land or tenement which belongs to another master. Domat, Civ. Law, Cushing's ed. § 1018.

A *mixed* servitude is the subjection of persons to things, or things to persons.

A *natural* servitude is one which arises in consequence of the natural condition or situation of the soil.

A *personal* servitude is the subjection of one person to another: if it consists in the right of property which a person exercises over another, it is slavery. When the subjection of one person to another is not slavery, it consists simply in the right of requiring of another what he is bound to do or not to do: this right arises from all kinds of contracts or *quasi*-contracts. *Lois des Bât.* p. 1, c. 1, art. 1.

A *real* or *predial* servitude is a charge laid on an estate for the use and utility of another estate belonging to another proprietor. La. Code, art. 643. When used without any adjunct, the word servitude means a real or predial servitude. *Lois des Bât.* p. 1, c. 1; Mitch. R. E. & Conv. 49. Real servitudes are divided into rural and urban.

*Rural* servitudes are those which are due by an estate to another estate, such as the right of passage over the serving estate, or that which owes the servitude, or to draw water from it, or to water cattle there, or to take coal, lime, and wood from it, and the like.

*Urban* servitudes are those which are established over a building for the convenience of another, such as the right of resting the joists in the wall of the serving building, of opening windows which overlook the serving estate, and the like. Dalloz, Dict. *Servitudes.*

This term is used as a translation of the Latin term *servitus* in the French and Scotch Law, Dalloz, Dict.; Paterson, Comp., and by many common-law writers, 3 Kent 434; Washb. Easem., and in the Civil Code of Louisiana. Service is used by Wood, Taylor, Harris, Cowper, and Cushing in his translation of Domat. Much of the common-law doctrine of easements is closely analogous to, and probably in part derived from, the civil-law doctrine of servitudes.

In common law the use of the word servitude is as a correlative of easement; where one person has an easement which creates a burden upon the property of another, the latter is said to be burdened with a servitude. See also HIGHWAYS; WAYS; RAILROADS; PIPE LINES; SEWER; ELEVATED RAILWAYS; POLES; WIRES; Jones, Easements.

**SERVITUS** (Lat.). **In Roman Law.** Servitude; slavery; a state of bondage; a disposition of the law of nations by which, against common right, one man has been subjected to the dominion of another. Inst. 1. 2. 3; Bracton 4 *b*; Co. Litt. 116.

A service or servitude; a burden imposed by law, or the agreement of parties, upon one estate for the advantage of another, or for the benefit of another person than the owner.

*Servitus actus*, a right of way on horseback or in a carriage. Inst. 2. 3. pr.

*Servitus altius non tollendi*, a servitude preventing the owner of a house from building higher than his neighbor. Inst. 2. 3. 4; Paterson, Comp.

*Servitus aquæ ducendæ*, a right of leading water to one's own land over that of another. Inst. 2. 3. pr.

*Servitus aquæ educendæ*, a right of conducting water from one's own land unto a neighbor's. Dig. 8. 3. 29.

*Servitus aquæ hauriendæ*, a right of drawing water from another's spring or well. Inst. 2. 3. 2.

*Servitus cloacæ mittendæ*, a right of having a sewer through a neighbor's estate. Dig. 8. 1. 7.

*Servitus fumi immitendi*, a right of conducting smoke or vapor through a neighbor's chimney or over his ground. Dig. 8. 5. 8.

*Servitus itineris*, a right of way on horseback or in a carriage. This includes a *servitus actus*. Inst. 2. 3.

*Servitus luminum*, a right to have an open place for receiving light into a chamber or other room. Domat, 1. 1. 4; Dig. 8. 2. 4.

*Servitus oneris ferendi*, a servitude of supporting a neighbor's building.

*Servitus pascendi*, a right of pasturing one's cattle on another's lands. Inst. 2. 3. 2.

*Servitus pecoris ad aquam adpulsam*, a right of driving one's cattle on a neighbor's land to water.

*Servitus prædii rustici*, a rural servitude.

*Servitus prædii urbani*, an urban servitude.

*Servitus prædiorum*, a servitude on one estate for the benefit of another. See PRÆDIÆ.

*Servitus projiciendi*, a right of building a projection into the open space belonging to a neighbor. Dig. 8. 2. 2.

*Servitus prospectus*, a right of prospect. Dig. 8. 2. 15. This may be either to give one a free prospect over his neighbor's land, or to prevent a neighbor from having a prospect over one's own land. Domat, 1. 1. 6.

*Servitus stillicidii*, a right of having the water drip from the eaves of one's house upon a neighbor's house or ground.

*Servitus tigni immittendi*, a right of inserting beams in a neighbor's wall. Inst. 2. 3. 1. 4; Dig. 8. 2. 2.

*Servitus viæ*, a right of way on foot or horseback, or with a loaded beast or wagon, over a neighbor's estate. Inst. 2. 3.

See, generally, Inst. 2. 3; Dig. 8. 2; *Dict. de Jur.*; Domat. Civ. Law; Bell, Dict.; Washb. Easem.; Gale, Easem.; Jones, Easem.

**SERVUS** (Lat.). **A slave.**

The institution of slavery is traced to the remotest antiquity. It is referred to in the poems of Homer; and all the Greek philosophers mention it without the slightest censure. Aristotle justified it on the ground of a diversity of race. The Roman jurists rest the institution of slavery on the law of nations: in a fragment of Florentinus copied in the Institutes of Justinian, servitude is defined, *Servitus autem est constitutio juris gentium, qua quis dominio alieno contra naturam subjicitur.* D 1 5. 4. 1; Inst. 1. 3. 2. The Romans considered that they had the right of killing their prisoners of war.

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*manu capti*; and that by preserving their lives, *servati*, they did not abandon but only postponed the exercise of that right. Such was, according to their ideas, the origin of the right of the master over his slave. Hence the etymology of the words *servi*, from *servati*, and *mancipia*, from *manu capti*, by which slaves were designated. It is, however, more simple and correct to derive the word *servus* from *servire*. Inst. 1. 3. 3. Children born of a woman who was a slave followed the condition of their mother; *servi nascuntur aut fiunt*.

A free person might be reduced to slavery in various ways: by captivity, *ex captivitate*. The Roman who was taken prisoner by the enemy lost all his rights as a citizen and a freedman: thus, when Regulus was brought to Rome by the Carthaginian ambassadors he refused to take his seat among the senators, saying that he was nothing but a slave. But if he had made his escape and returned to Rome, all his rights would have been restored to him by the *jus postliminii*; and the whole period of his captivity would have been effaced, and he would have been considered as if he had never lost his freedom. According to the law of the Twelve Tables, the insolvent debtor became the slave of his creditor, by a judgment rendered in a proceeding called *manus injectio*,—one of the four *leges actiones*. The thief taken in the act of stealing, or while he was carrying the thing stolen to the place where he intended to conceal it, was deprived of his freedom, and became a slave. So was a person, who, for the purpose of defrauding the state, omitted to have his name inscribed on the table of the *census*. The illicit intercourse of a free woman with a slave without the permission of his master, the sentence to a capital punishment and the sentence to work perpetually in the mines,—*in metallum dati*,—made the culprit the slave as his punishment (*servi pœnæ*). The ingratitude of the emancipated slave towards his patron or former master and the fraud of a freeman who had suffered himself to be sold by an accomplice (after having attained the age of twenty years) in order to divide the price of the sale, were so punished.

Liberty being inalienable, no one could sell himself; but in order to perpetrate a fraud on the purchaser, a freeman was offered for sale as a slave and bought by an innocent purchaser: after the price had been paid and divided between the confederates, the pretended slave claimed and, of course, obtained his freedom. To remedy this evil and punish this fraud, a *senatus consultum* issued under Claudius provided that the person who had thus suffered himself to be sold should loose his liberty and remain a slave. In the social and political organization slaves were not taken into consideration; they had no *status*. *Quod attinet ad jus civile, servi pro nullis habentur. Servitutem mortalitati fere comparamus.* With regard to the master there was no distinction in the condition of slaves: they were all equally subject to the *domini potestas*. But the master some times established a distinction between the *servi vicarii* and the *servi ordinarii*: the former exercised a certain authority over the latter. But there was a marked difference between those slaves of whom we have been speaking and the *coloni censili*, *adscripti* and *tributarii*, who resembled the serfs of the middle ages. 1 Ortolan 27; 1 Etienne 68 *et seq.*; Lagrange 93. See SLAVE.

**SESSION.** The time during which a legislative body, a court, or other assembly, sits for the transaction of business: as, a session of congress, which commences on the day appointed by the constitution, and ends when congress finally adjourns before the commencement of next session; the session of a court which commences at the day appointed by law, and ends when the court finally rises. Approved 64 Ill. 86.

A term.

**SESSION COURT.** See COURT OF SESSION.

**SESSION LAWS.** A term used to designate the printed statutes as passed at the successive legislative sessions of the various states. In Pennsylvania they are usually called pamphlet laws. See PAMPHLET.

**SESSIONAL ORDERS.** Certain orders agreed to by both houses of parliament at the commencement of each session, and in force only during that session. May, P. L.

**SESSIONS OF THE PEACE. In English Law.** Sittings of justices of the peace for the execution of the powers which are confided to them as such.

*Petty sessions* (or petit sessions) are sittings held by one or more justices for the trial of minor offences, admitting to bail prisoners accused of felony, and the like purposes.

When sitting for purposes of preliminary inquiry, the public cannot claim admittance; but it is otherwise when sitting for purposes of adjudication.

*Special sessions* are sittings of two or more justices on a particular occasion for the exercise of some given branch of their authority, upon reasonable notice given to the other magistrates of the hundred or other division of the county, city, etc., for which they are convened. See stat. 7 & 8 Vict. c. 33.

The counties are distributed into divisions, and authority given by various statutes to the justices acting for the several divisions to transact different descriptions of business, such as licensing alehouses, or appointing overseers of the poor, surveyors of the highways, etc., at special sessions. 3 Steph. Com., 11th ed. 37.

*General sessions of the peace* are courts of record, holden before the justices, whereof one is of the *quorum*, for execution of the general authority given to the justices by the commission of the peace and certain acts of parliament.

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See COURT OF GENERAL QUARTER SESSIONS OF THE PEACE.

**SETI.** As used in mining laws, lease. Brown.

**SET ASIDE.** To annul; to make void: as, to set aside an award.

When proceedings are irregular, they may be set aside on motion of the party whom they injuriously affect.

**SET OF EXCHANGE.** The different parts of a bill of exchange, taken together. Each part is a perfect instrument by itself; but the parts are numbered successively, and upon payment of any one the others become useless. See Chitty, Bills 175; Pars. Notes & B.

**SET-OFF. In Practice.** A demand which a defendant makes against the plaintiff in the suit for the purpose of liquidating the whole or a part of his claim. See 7 Fla. 329.

A set-off was unknown to the common law, according to which mutual debts were distinct, and inextinguishable except by actual payment or release; Waterm. Set-Off; 1 Rawle 293; Babingt. Set-Off 1. The statute 2 Geo. II. c. 22, which has been generally adopted in the United States, with some modifications, in cases of mutual debts, however, allowed the defendant to set his debt against the other, either by pleading it in bar, or giving it in evidence, when proper notice had been given of such intention, under the general issue. The statute, being made for the benefit of the defendant, is not compulsory; 8 Watts 39; the defendant may waive his right, and bring a cross-action against the plaintiff; 2 Camp. 594; 9 Watts 179.

It seems, however, that in some cases of intestate estates and of insolvent estates, perhaps owing to the peculiar wording of the law, the statute has been held to operate on the rights of the parties before action brought or an act done by either of them; 2 Rawle 293; 3 Binn. 135; Bac. Abr. *Bankrupt* (K). See 7 Gray 191, 425.

Set-off takes place only in actions on contracts for the payment of money: as, assumpsit, debt, and covenant; and where the claim set off grows out of a transaction independent of the contract sued on; 31 Conn. 398; the claims to be set off against each other must both be due. In a suit by a railroad company, the company's coupons which had matured during the suit are admissible under a set-off, but not those that had matured after the appointment of a receiver of the plaintiff company; 25 U. S. App. 306. An unliquidated claim cannot be set off against one which is for a stipulated amount. Damages for malicious prosecution cannot be set off in an action for rent; 24 U. S. App. 21. A set-off is not allowed in actions arising *ex delicto*; as, upon the case, trespass, replevin, or detinue; Bull. N. P. 181; 4 E. D. Sm. 162. And an independent tort cannot be made a defence against another tort, either by way of set-off or counter-claim; 117 Ind. 556; 39 Kan. 183; nor is a set-off available as a defence to an action of tort; 14 So. Rep. (Ala.) 790. Nor can there be a set-off to a set-off; 86 Ala. 523. The right of set-off, except in equity, is a matter of local legislation, and the federal court will follow the rules established by the tribunals of the state in which it is sitting; 73 Fed. Rep. 980.

In Pennsylvania, if it appear that the plaintiff is overpaid, then defendant has a certificate of the amount due to him, which has the effect of a verdict against the plaintiff; Purd. Dig. 487; 10 Pa. 436. But the plaintiff may suffer a nonsuit, notwithstanding a plea of set-off; 7 Watts 496.

The matters which may be set off may be mutual liquidated debts or damages; but unliquidated damages cannot be set off; 3 Bosw. 560; 34 Pa. 239; 34 Ala. N. S. 659; 20 Tex. 31; 2 Head 467; 3 Ia. 163; 1 Blackf. 394; 6 Halst. 397; 5 Wash. C. C. 232. Damages for malicious prosecution cannot be set off in an action for rent; 24 U. S. App. 21. There must be a mutuality in claims to authorize a set-off; 62 Mich. 517. The statutes refer only to mutual unconnected debts; for at common law, when the nature of the employment, transaction, or dealings necessarily constitute an account consisting of receipts and payments, debts and credits, the balance only is considered to be the debt, and therefore in an action it is not necessary in such cases either to plead or give notice of set-off: 4 Burr. 2221. By joining his wife in a suit for her legacy, a husband exercises his election to treat it as joint property: and in such case her debt, *dum sola*, may be set off, but not his own debt: if he sues alone, his debt may be set off, but not hers *dum sola*; 4 Del. Ch. 117.

A purchaser of goods from the agent of a known principal cannot set off a sum owing to him from the agent; 83 Fed. Rep. 66.

A claim, an action to recover which would be barred by statute, is also barred as a set-off; 61 Vt. 65; but a plea of set-off cannot be defeated by the statute of limitations, where the claim offered to be set off was a legal subsisting claim at the time the right of action accrued to the plaintiff on the claim in the suit; 83 Ala. 420.

Set-off against the government will only be allowed after the claim has been rejected by the accounting department, or where a statute permits it; 9 Cra. 213. There can be no recovery on an independent claim against a state; 4 Dall. 303.

A depositor in an insolvent bank, who had indorsed a note that was subsequently discounted by said bank, can, in a suit by the bank to recover the amount of the note, set off his deposit against this amount, when the note matured after the insolvency of the bank; 49 Fed. Rep. 337. See 146 U. S. 499. A debt from an insolvent not due at the time of his making an assignment for the benefit of creditors, may be set off by the creditor against a debt due from him to the insolvent at the time

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of the assignment; 42 Hun 78; 65 *id.* 619. Where mutual obligations have grown out of the same transaction insolvency on the one hand justifies the set-off of the debt due upon the other; 146 U. S. 499. A stockholder indebted to an insolvent corporation for unpaid shares cannot set off against this trust fund for creditors a debt due him by the corporation; 139 U. S. 417.

Judgments in the same rights may be set off against each other, at the discretion of the court; 3 Bibb 233; 3 Watts 78; 3 Halst. 172; 18 Tex. 541; 30 Ala. N. S. 470; 4 Ohio 90; 7 Mass. 140, 144; 8 Cow. 126; 112 N. Y. 655. Equitable set-off cannot be pleaded by way of answer, but the relief sought must be invoked by bill or cross-bill; 36 S. W. Rep. (Tenn.) 960. See Montague, Babington, Set-Off; 10 L. R. A. 378; DEFALCATION; LIEN; RECOUPMENT.

**SET ON FOOT.** Arrange; place in order; set forward; put in the place of being ready. 53 Fed. Rep. 538. See NEUTRALITY.

**SETTLE.** To adjust or ascertain; to pay.

Two contracting parties are said to settle an account when they ascertain what is justly due by one to the other; when one pays the balance or debt due by him, he is said to settle such debt or balance. 11 Ala. N. S. 419.

**SETTLED CASE ON APPEAL.** That power of the record of appeal which consists of a statement prepared by the appellant's counsel setting forth so much of the testamentary proceedings had in the court below as may be material to the questions intended to be required of the appellate court, subject to amendments of the opposing counsel and to a statement of the trial judge. In other states the word appeal book or paper book is applied. 15 Alb. L. J. 242.

**SETTLEMENT.** A residence under such circumstances as to entitle a person to support or assistance in case of becoming a pauper.

It is obtained in various ways, to wit: by *birth;* by the *legal settlement* of the father, in the case of minor children; by *marriage;* by *continued residence;* by the payment of requisite taxes; by the *lawful exercise of a public office;* by *hiring and service* for a specified time; by *serving an apprenticeship;* and perhaps some others, which depend upon the local statutes of the different states. See 1 Bla. Com. 363; 1 Dougl. 9; 6 S. & R. 103, 565; 10 *id.* 179.

**In Contracts.** An agreement by which two or more persons who have dealings together so far arrange their accounts as to ascertain the balance due from one to the other; payment in full.

The conveyance of an estate for the benefit of some person or persons. See ANTE-NUPTIAL CONTRACT; WIFE'S EQUITY.

**SETTLEMENT, DEED OF.** A deed made for the purpose of settling property, *i.e.* arranging the mode and extent of the enjoyment thereof. The party who settles property is called the settler; Brown. See SETTLEMENT. In England, the term was used prior to 1862, indicating in relation to a corporation the same things as articles or memorandum of association. Cook, St. & Stockh. § 15.

**SETTLER.** A person who, for the purpose of acquiring a pre-emption right, has gone upon the land in question, and is actually resident there. See 27 Minn. 222. See LANDS, PUBLIC; SETTLEMENT, DEED OF.

**SETTLING DAY.** The day on which transactions for the "account" are made up on the Stock Exchange. Whart. Dict. The settling days for English and foreign stocks and shares occur twice a month, the middle and the end. Those for consols are once in every month, generally near the commencement of the month; Moz. & W. A conspiracy to obtain a settling day by fraudulent means in order to defraud buyers of shares, or a conspiracy by fraudulent means to raise or lower the price of shares with intent to defraud buyers or sellers, is an indictable offence; 1 Q. B. D. 730; 3 M. & S. 67; 2 Lind. Part. *711, 816.

**SETTLING ISSUES. In English Practice.** Deciding the forms of the issues to be determined in a trial, according to the provisions of the Judicature Act of 1875. Sched. I. ord. 26; 3 Steph. Com., 11th ed. 549.

**SEVER. In Practice.** To separate; to insist upon a plea distinct from that of other co-defendants.

**SEVERAL.** Separate; distinct. Exclusive, individual, appropriated. In this sense it is opposed to common; and it has been held that the word could not be construed as equivalent to respective; 67 N. Y. 348; though it has been construed to mean all; 42 N. J. Eq. 501.

More than two, but not very many. 58 Ala. 153; several hundred dollars includes seven hundred dollars. *Id.* See JOINT AND SEVERAL.

**SEVERAL FISHERY.** See FISHERY.

**SEVERAL ISSUES.** This occurs where there is more than one issue involved in a case. 3 Steph. Com. 560.

**SEVERAL OBLIGATION.** See OBLIGATION.

**SEVERAL TAIL.** An entail severally to two; as, if land is given to two men and their wives, and to the heirs of their bodies begotten; here the donees have a joint estate for their two lives, and yet they have a several inheritance, because the issue of the one shall have his moiety, and the issue of the other the other moiety. Cowel.

**SEVERAL TENANCY.** A tenancy which is separate, and not held jointly with another person.

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**SEVERALLY.** Distinctly, separately, apart from others. 124 Ill. 471. When applied to a number of persons the expression *severally liable* usually implies that each one is liable alone. 21 N. Y. 301.

**SEVERALTY, ESTATE IN.** An estate which is held by the tenant in his own right only, without any other being joined or connected with him in point of interest during the continuance of his estate. 2 Bla. Com. 179.

**SEVERANCE.** The separation of a part of a thing from another: for example, the separation of machinery from a mill is a severance, and in that case the machinery, which while annexed to the mill was real estate, becomes by the severance personalty, unless such severance be merely temporary. Mitch. R. E. & Conv. 20; 8 Wend. 587.

**In Pleading.** When an action is brought in the name of several plaintiffs, in which the plaintiffs must of necessity join, and one or more of the persons so named do not appear, or make default after appearance, the other may have judgment of severance, or, as it is technically called, judgment *ad sequendum solum*.

But in personal actions, with the exception of those by executors, and of detinue for charters there can be no summons and severance; Co. Litt. 139.

After severance, the party severed can never be mentioned in the suit nor derive any advantage from it.

When there are several defendants, each of them may use such plea as he may think proper for his own defence; and they may join in the same plea, or sever, at their discretion; Co. Litt. 303 *a*; except, perhaps, in the case of dilatory pleas; Hob. 245, 250. But when the defendants have once united in the plea they cannot afterwards sever at the rejoinder, or other later stage of the pleading. See, generally, Brooke, Abr. *Summ. and Sev.*; 2 Rolle 488.

**Of Estates.** The destruction of any one of the unities of a joint tenancy. It is so called because the estate is no longer a joint tenancy, but is severed.

A severance may be effected in various ways, namely: by *partition*, which is either voluntary or compulsory; by *alienation* of one of the joint tenants, which turns the estate into a tenancy in common; by the *purchase* or descent of all the shares of the joint tenants, so that the whole estate becomes vested in one only. Comyns, Dig. *Estates by Grant* (K. 5); 1 Binn. 175.

**SEVERE.** Within the meaning of a life insurance policy, *severe illness* means such an illness as has, or ordinarily does have, a permanent, detrimental effect upon the physical system. 20 Fed. Rep. 569; 64 N. Y. 236.

**SEWAGE PURPOSES.** Where the effluent water from a sewage farm flows into a pool, the cleansing, levelling, and concreting the bottom of that pool to prevent the accumulation of sewage is a work for "sewage purposes." 56 L. J. Ch. 159; 32 Ch. D. 421; Stroud.

**SEWER.** A subterranean passage for drainage, usually constructed and maintained by a municipal corporation.

A drain or passage to carry off water and filth underground. Webst. Dict.

A conduit or canal constructed, especially in a town or city, to carry off superfluous water, soil, and other matters; a public drain. Cent. Dict.

A fresh-water trench or little river, encompassed with banks on both sides, to carry the water into the sea and thereby preserve the lands against inundation, etc. See Callis, Sew. 80, 99; Cowel. Properly, a trench artificially made for the purpose of carrying water into the sea, river, or some other place of reception. Crabb, R. P. s. 113; 110 Mass. 433. A ditch or trench through marshy places to carry off water. Spelman, Gloss. See Washb. Easem.

The general corporation act in Pennsylvania provides for the construction of sewerage systems by private corporations by consent of the local authorities.

The authority to construct public sewers is not incident to corporate powers, if ample provision is made by general statutes; 82 Me. 352; but permission may be granted to a private person to lay an under-drain in the street from his premises, without the consent of abutting lot-owners; 150 Pa. 451.

Where general laws place the duty of constructing sewers on municipal officers, the municipality cannot be held liable for negligence; 82 Me. 352; or for injuries to one who falls into a sewer which they negligently leave unguarded.

Damages for the negligent construction of a sewer must be confined to actual, not prospective, damages at time of suit; 88 Tenn. 415.

A municipal corporation owes to the public a duty in the construction of its sewers not to injure the gas mains or other under-ground conveniences and is responsible to any one injured in consequence of a breach of that duty, although the performance of it had been delegated to an independent contractor; [1896] 1 Q. B. 335, where it was held that when a gas main was broken by the negligence of the contractors, and an explosion took place in a private house because of the escape of the gas from the broken main, the municipality was liable, the damages not being too remote.

Generally a city will be enjoined from using or building a sewer so as to create a nuisance; 142 Ill. 197; 127 N. Y. 261; and a license for discharge of sewage from a particular district will not authorize the discharge from a larger one; 127 *id.* 591; but an injunction was refused to restrain the discharge of sewage from one district into another, where the first district had

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private connections with the sewer, the remedy being a suit against the inhabitants; [1891] 3 Ch. 527. Authority to carry a sewer under a highway does not grant power to discharge it into a river; 1 Hen. & M. 299; at a place that destroys navigation or the use of a dock; 126 Mass. 367; or into a private canal; 117 Mass. 396.

A borough has a right to make a sewer which empties into a natural stream, though it increased the flowage; 40 Pa. 364; and may permit citizens to lay a drain pipe into it to carry off their surplus water; 150 Pa. 451.

A landlord making a sewer under his tenant's land, without his consent, is liable for damages caused by the tenant stopping the sewer; 40 L. T. N. S. 130; but if the nuisance is created by a tenant, a grantee subject to the tenancy is not liable to third persons; 157 Mass. 117.

A drain passing through private ground, but receiving the drainage of more than one building, is held to be a sewer; [1894] 1 Q. B. 233.

The construction of sewers does not impose an additional burden on a highway; 32 Vt. 367; 28 Conn. 363; 27 N. Y. 204; 13 Allen 159, 211, 291; see 99 U. S. 635; but in Pennsylvania it is *contra* as to country roads; 18 Co. Ct. Rep. (Pa.) 670. And the consent of abutting owners is required, where they are constructed by private corporations; 160 Pa. 372. See POLLUTION.

**SEX.** The physical difference between male and female in animals.

In the human species the male is called *man*, and the female *woman*. Some human beings whose sexual organs are somewhat imperfect have acquired the name of *hermaphrodite*.

**SEXTERY LANDS.** Lands given to a church for maintenance of a sexton or sacristan. Cowel.

**SHACK.** See COMMON.

**SHALL.** The various meanings of this word range under two general classes according as it is used as implying futurity or implying a mandate, as the words *shall be born* in a will in the absence of a context are words of futurity; 6 App. Cas. 471; and where a statute declares a thing SHALL be done, the natural and proper meaning is that a peremptory mandate is enjoined; Stroud, L. Dict., which see for classifications of cases in which the word has been held to be used in a directory and others in which it is used in a peremptory sense. It is held in the United States that it is to be construed as *may*, unless a contrary intention is shown. 95 U. S. 170.

**SHAM PLEA.** See PLEA.

**SHARE.** A portion of anything. Sometimes shares are equal, at other times they are unequal.

As to shares in corporation law, see CORPORATION; PERSONAL PROPERTY; STOCK; STOCKHOLDER.

The proportion which descends to one of several children from his ancestor is called a share. The term share and share alike signifies in equal proportions. See PURPART.

**SHARE CERTIFICATE.** See STOCK.

**SHAREHOLDER.** See STOCKHOLDER.

**SHARPING CORN.** A customary gift of corn which, at every Christmas, the farmers in some parts of England give to their smith for sharpening their plough-irons, harrow-tines, etc. Blount.

**SHAVE.** To buy any security for money at a discount. 2 Den. 293; also, to obtain the property of another by oppression and extortion. *Id.*

**SHEADING.** A riding, tithing, or division in the Isle of Man, where the whole island is divided into six sheadings, in each of which there is a coroner or chief constable appointed by a delivery of a rod at the Tinewald court or annual convention. King, Isle of Man 7.

**SHEEP.** A wether more than a year old. 4 C. & P. 216.

**SHEEP SILVER.** A service turned into money which was paid because anciently the tenants used to wash the lord's sheep.

When applicable it is not affected by the testator's intention; 28 Atl. Rep. (N. J.) 587. It is equally applicable to conveyances by deed and limitations by will; 4 Kent *217. If applied to real estate, it enlarges the estate for life into an inheritance, and makes the tenant for life a tenant in fee; it makes the tenant for life of personalty an absolute owner; 4 Kent 227.

**SHELLEY'S CASE, RULE IN.** "When the ancestor, by any gift or conveyance, taketh an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or in tail, *the heirs* are words of limitation of the estate, and not words of purchase." 1 Co. 104.

This rule has been the subject of much comment. Its origin can be deduced from feudal tenure; 4 Kent 217. It is given by Mr. Preston, Estates, pp. 263, 419, as follows: When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of the same legal or equitable quality, to his heirs, or heirs of his body, as a class of persons to take in succession from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate. See 15 B. Monr. 282; Hargr. Law Tracts 489, 551; 2 Kent 214.

If the limitation be to one and the *heirs of the body*, he takes an estate tail; if to one and his *heirs* generally, a fee-simple; 1 Day 299; 2 Yeates 410.

It does not apply where the ancestor's estate is equitable and that of the heirs legal; 1 Curt. C. C. 419.

The rule was adopted as a part of the common law of this country, and in many of the states still prevails. It has been abolished in most of them. The subject has been exhaustively treated in Penn-

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sylvania, and the numerous decisions will be found analyzed and arranged in tabular form in an essay by J. P. Gross, Esq. (Harrisburg, 1877.) The rule has been held applicable to instruments in which the words, "*heir*" or "*heirs*;" 8 W. & S. 38; "*issue*;" 3 W. & S. 160; 30 Pa. 158; 45 *id.* 179; "*child*" or "*children*;" 7 W. & S. 288; 50 Pa. 483; "*son*" or "*daughter*;" 3 S. & R. 433; 70 Pa. 335; "*next of kin*;" "*offspring*;" 36 Pa. 117; "*descendants*," and similar expressions are used in the technical sense of the word heirs. Chief Justice Gibson states the operation of the rule as follows: "It operates only on the intention (of the devisor) when it has been ascertained, not on the meaning of the words used to express it. The ascertainment is left to the ordinary rules of construction peculiar to wills. . . . It gives the ancestor an estate for life, in the first instance, and, by force of the devise to his heirs, general or special, the inheritance also, by conferring the remainder on him, as the stock from which alone they can inherit;" 13 Pa. 344, 354. Although a fee is given in the first part of a will, it may be restrained by subsequent words, so as to convert it into a life estate; 86 Pa. 386. See 75 *id.* 339; 83 *id.* 242, 377; 87 *id.* 144; *id.* 248; 91 *id.* 30; Hayes on Est. Tail *53. See 9 Yerg. 309; 77 L. J. Rep. (H. of L.) 170.

**SHEPWAY, COURT OF.** See COURTS OF THE CINQUE PORTS.

**SHERIFF** (Sax. *scyre*, shire, *reve*, keeper). A county officer representing the executive or administrative power of the state within his county.

The office is said by Camden to have been created by Alfred when he divided England into counties; but Lord Coke is of opinion that it is of still greater antiquity, and that it existed in the time of the Romans, being the deputy of the earl (*comes*), to whom the custody of the shire was originally committed, and hence known as *vicecomes*; Camden 156; Co. Litt. 168 *a*; Dalt. Sheriff 5.

At the common law the office of sheriff might be granted to one in fee, and the grant was not void although the office should descend to an infant; 9 Co. 97 *b*; and the reason for the validity of such grants was that responsible deputies might be appointed on behalf of infants; 5 B. & Ald. 81. An infant cannot be appointed general deputy sheriff, but might be deputed to serve a particular writ; 1 Kan. 169.

The selection of sheriffs in England was formerly by an election of the inhabitants of the respective counties, except that in some counties the office was hereditary, and in Middlesex the shrievalty was and still is vested by charter in the city of London. But now the lord chancellor, in conjunction with the judges of the courts, nominates suitable persons for the office, and the king appoints. See 22 & 23 Vict. c. 21, § 42.

In this country the usual practice is for the people of the several counties to elect sheriffs.

It is the sheriff's duty to preserve the peace within his bailiwick or county. To this end he is the first man within the county, and may apprehend and commit to prison all persons who break or attempt to break the peace, or may bind them over in a recognizance to keep the peace. He is bound, *ex officio*, to pursue and take all traitors, murderers, felons, and rioters; has the safekeeping of the county jail, and must defend it against all rioters; and for this, as well as for any other purpose, in the execution of his duties he may command the inhabitants of the county to assist him, which is called the *posse comitatus*. And this summons every person over fifteen years of age is bound to obey, under pain of fine and imprisonment; Dalt. Sheriff 355; 2d Inst. 454.

In his ministerial capacity he is bound to execute, within his county, all processes that issue from the courts of justice, except where he is a party to the proceeding, in which case the coroner acts in his stead. On *mesne* process he is to execute the writ, to arrest and take bail; when the cause comes to trial he summons and returns the jury, and when it is determined he carries into effect the judgment of the court. In criminal cases he also arrests and imprisons, returns the jury, has the custody of the prisoner, and executes the sentence of the court upon him, whatever it may be.

It is a settled principle of the common law that every man's house is his castle; accordingly, in the service of civil process, an officer may not break open the outer door of a dwelling-house. He must await his opportunity to enter peaceably without force or violence; 5 Co. 91; 19 Vt. 151; 24 Wend. 369; but having, without force, obtained admission to the house, he may go from one room to another and forcibly open any inner doors, chests, trunks, or other places where property is kept, in order to make a levy; Cowp. 1; 2 Harring. 494; 5 Johns. 352; 1 Bay 858. Where a building was kept by several tenants and had an outer door through which they all passed to gain their several apartments, it was held that an officer who entered this door might enter any other; 6 Daly 449. A building occupied for business as a work-shop, any other building not being a dwelling-house, but connected therewith, may be entered by breaking through the outer door; [1895] 2 Q. B. 663. Where a building is occupied partly as a dwelling and partly for business, a common outer door through which both parties are approached may be broken to make a levy in the store; 50 Mich. 209; but where a milliner carried on her business and resided in one room, it was held to be a trespass, when an officer made an entry by breaking; 34 Minn. 92.

In England it was formerly held that although an officer who forced the outer door of a dwelling was a trespasser, the levy made by him was good; 5 Co. 93; Year Book 18 Edw. IV. fol. 4, pl. 19; but it is now doubtful; 7 Ex. 72; 6 H. L. Cas. 443; and in the United States the doctrine is said to have met with no favor; Freem. Ex. 256; and it is held that such a levy is void; 12 Pick. 270; 24 Wend. 369; 4 Hill 433; 47 N. H. 482.

He also possesses a judicial capacity, and may hold a court and summon a jury for certain purposes; this jurisdiction, in this respect, is at common law quite extensive. This branch of his powers, however, is circumscribed in this country by

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the statutes of the several states, and is generally confined to the execution of writs of inquiry, of damages, and the like, sent to him from the superior courts of law; 1 Bla. Com. 389.

He has no power or authority out of his own county, except when he is commanded by a writ of *habeas corpus* to carry a prisoner out of his county; and then if he conveys him through several counties the prisoner is in custody of the sheriffs of each of the counties through which he passes; Plowd. 37 *a*; 2 Rolle 163; 26 Tex. App. 7. If, however, a prisoner escapes and flies into another county, the sheriff or his officers may, upon fresh pursuit, take him again in such county. But he may do mere ministerial acts out of his county, if within the state, such as making out a panel or return, or assigning a bail-bond, or the like; 2 Ld. Raym. 1455; 2 Stra. 727.

To assist him in the discharge of his various duties, he may appoint an under-sheriff, and as many general or special deputies as the public service may require, who may discharge all the ordinary ministerial duties of the office, such as the service and return of process and the like, but not the execution of a writ of inquiry, for this is in the nature of a judicial duty, which may not be delegated. All acts of the under-sheriff or of the deputies are done in the name of the sheriff, who is responsible for them, although such acts should amount to a trespass or an extortion on the part of the officer; for which reason he usually takes bonds from all his subordinates for the faithful performance of their duties; Cro. Eliz. 294; Dougl. 40. But a deputy sheriff cannot, as such, engage to guard the property of a private person not in the custody of the law; 58 Ark. 381.

The sheriff also appoints a jailer, who is usually one of his deputies. The jailer is responsible for the escape of any prisoner committed to his charge, and is bound to have sufficient force at his disposal to prevent a breach of the prison by a mob or otherwise; and nothing will excuse him but an act of God or the public enemy. He must not be guilty of cruelty, without sufficient cause; but he may defend himself at all hazards if attacked. In a case where a prisoner, notwithstanding his remonstrances, was confined by the jailer in a room in which was a person ill with the small-pox, which disease he took and died, it was held to be murder in the jailer; Viner, Abr. *Gaol* (A); 4 Term 789; 4 Co. 84; Co. 3d Inst. 34; 2 Stra. 856.

A deputy cannot depute another person to do the duty intrusted to him; although it is not necessary that his should be the hand that executes the writ: it is sufficient if he is present and assists. A deputy sheriff's return of process in his own name, with the words "deputy sheriff" added, is void; 31 Fla. 147; but a return of a levy may properly be indorsed on an execution by a third person at the discretion and in the presence of the sheriff; 98 Ala. 479. In the execution of criminal process, he may, after demanding admittance, break open the outer door of a house; but in civil actions he may not forcibly enter a dwelling-house, for every man's house is said to be his castle and fortress, as well for defence as for repose. But a warehouse, store, or barn, or the inner door of a dwelling-house after the officer has peaceably entered, is not privileged. Process or writs of any description may not be served on Sunday, except in cases of treason, felony, or breach of the peace; nor may the sheriff on that day retake a prisoner who has escaped from custody; 6 Wend. 454; 4 Taunt. 619; Cro. Eliz. 908; Cro. Car. 537; W. Jones 429; 3 B. & P. 223.

In the absence of representations of title made at a sheriff's sale of property on execution, the purchaser has no remedy against the plaintiff or sheriff for failure of title; 117 Ind. 206.

A sheriff is not liable on his bond, but is personally liable, for acts done under process void on its face; and the order of a criminal court in excess of its jurisdiction, directing him to redeliver a certain person to prison, is no protection to a sheriff, no matter what the decision of the court having jurisdiction of the *habeas corpus* proceeding might be; 92 Tenn. 520; but he is not liable for acts done by order of a court of competent jurisdiction; 45 La. Ann. 1221; or by a court in excess of its jurisdiction, if the process does not show that fact on its face; 61 Am. Dec. 470. He is not required to question apparently regular process; 66 Mich. 181. He is bound to serve voidable process; 11 S. E. Rep. (S. C.) 383; if the error may be amended; 2 Col. 388. See FALSE IMPRISONMENT.

If a court having jurisdiction issues a writ against specific property, the sheriff is protected in seizing it; 50 N. Y. 355; whoever owns it; 87 Ill. 617; if he take it from the defendant in the writ; 114 Mass. 570; although the plaintiff had no claim; 39 Conn. 507. See *infra*.

A levy on the goods of a stranger to an execution amounts to a trespass, although the goods are not touched and there is no actual taking, and to maintain the action the plaintiff must have the right of, or be in actual, possession of the property at the time of the levy; and the sheriff may abandon or restrict the levy to the defendant's interests, and be thereby discharged, even though the return was not altered until after the action of trespass is begun; 128 Pa. 397.

A sheriff may not serve a writ to which he is a party; 17 Pick. 166; or in which he is interested; 43 N. H. 238.

Where there are several writs, it is the sheriff's duty to serve them in the order of their receipt; Freeman, Exec. § 197; 18 Wis. 406. Where the judgment is a lien, it is his duty to apply the proceeds to the oldest lien; 85 Am. Dec. 568; but if the defendant gives him money to apply to a



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junior execution, he must so apply it; 35 Pa. 166.

A sheriff cannot arrest in civil proceedings without a writ; 8 Term 187; which the person arrested is entitled to see; 13 Mass. 321; and the writ must contain the correct name of the person arrested; 9 Wend. 319; unless he is known by either name; 1 Wend. 132; but the officer is liable for arresting the wrong person, whose name is the same as that in the writ; 14 Mass. 184. Misnomer in an execution in which the same mistake occurred as in the original writ, does not affect the officer; 1 Mass. 76. See ARREST.

Where a person in custody on civil process escapes, the sheriff is liable to the plaintiff for the value of the claim; 63 N. C. 188. At common law, voluntary escape made the sheriff liable for the plaintiff's claim, and discharged the defendant; 78 Pa. 396; but if the escape was through negligence, or was involuntary, recaption before suit by the plaintiff was a bar; 10 Gratt. 529.

The sheriff must act with diligence; 38 Ala. 315; and, in the absence of instructions, execute the process according to its terms; 60 N. H. 127; 18 Barb. 56. Special instructions regarding a general writ should be followed; 34 N. H. 261; in the absence of which he should make reasonable search for the defendant and his property; Freeman, Exec. § 252. If he has doubt as to the title of the defendant, he may require indemnity; 8 Ala. 685; which is implied by instructions to proceed in a special manner; 83 Mo. 323. If he seize the property of one not named in the writ he is liable as a trespasser; 24 Ill. 56; if he remain in a house a long time in possession of goods taken in execution, he becomes a trespasser *ab initio;* 8 Ex. 237.

An officer may continue to levy until the return day in order to satisfy the writ; 26 N. J. L. 124; but is liable for an excessive levy; 40 Cal. 408; and must take due care to preserve the lien on the property attached; 16 Mass. 5; in moving goods; 2 La. Ann. 162; but if the property attached perishes without his fault, he is not liable; 20 Me. 266.

See EXECUTION; ARREST; ESCAPE; LEVY; SERVICE; PROCESS.

**SHERIFF-DEPUTE.** The judge of a Scotch county. Bell.

**SHERIFF-GELD.** A rent formerly paid by a sheriff, and it is prayed that the sheriff in his account may be discharged thereof. Rot. Parl. 50 Edw. III.

**SHERIFF-TOOTH.** 1. A tenure by the service of providing entertainment for the sheriff at his county courts. 2. An ancient tax on land in Derbyshire. 3. A common tax levied for the sheriff's diet. Cowel; Moz. & W.

**SHERIFF'S COURT. In Scotch Law.** A court having an extensive civil and criminal jurisdiction.

Its judgments and sentences are subject to review by the court of session and court of justiciary. Alison, Pract. 25; Paterson, Comp. 941, n.

**SHERIFF'S COURT IN LONDON.** A tribunal having cognizance of personal actions under the London (city) Small Debts Act of 1852.

The sheriff's court in London is one of the chief of the courts of limited and local jurisdiction in London. 3 Steph. Com., 11th ed. 301, 449, note (1); 3 Bla. Com. 80, note (j).

By the County Courts Act, 1867, 30 & 31 Vict. c. 142, this court is now classed among the county courts, so far as regards the administration of justice; 3 Steph., 11th ed. 30, n.

**SHERIFF'S JURY. In Practice.** A jury composed of no determinate number, but which may be more or less than twelve, summoned by the sheriff for the purposes of an inquisition or inquest of office. 3 Bla. Com. 258.

**SHERIFF'S OFFICERS.** Bailiffs who are either bailiffs of hundreds or bound-bailiffs.

**SHERIFF'S SALE.** A sale of property by a sheriff or his deputy, in execution of the mandate of legal process. Anderson, L. Dict; 2 Vt. 172.

**SHERIFF'S TOURN.** A court of record in England, held twice every year, within a month after Easter and Michaelmas, before the sheriff, in different parts of the county.

**SHERIFFALTY, or SHRIEVALTY.** The office of sheriff.

**SHERRERIE.** A word used by the authorities of the Roman church, to specify contemptuously the technical parts of the law, as administered by non-clerical lawers. Bacon.

**SHIFTING CLAUSE.** In a settlement, a clause by which some other mode of devolution is subtituted for that primarily prescribed.

**SHIFTING USE.** Such a use as takes effect in derogation of some other estate, and is limited expressly by the deed or is allowed to be created by some person named in the deed. Gilb. Uses 152, n.; 2 Washb. R. P. 284.

For example, a feoffment in fee is made to the use of W and his heirs till A pays £40 to W, and then to the use of A and his heirs. A very common application is in the case of marriage settlements. Wms. R. P., 16th ed. 330. The doctrine of shifting uses furnished a means of evading the principle of law that a fee could not be limited after a fee. See 2 Washb. R. P. 284; Wms. R. P., 16th ed. 330; 1 Spence, Eq. Jur. 452; 1 Vern. 403; 1 Edw. Ch. 34.

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**SHILLING. In English Law.** The name of an English coin, of the value one-twentieth part of a pound. In the United States while they were colonies there were coins of this donomination; but they varied greatly in their value.

**SHIN-PLASTER.** Formerly a jocose term for a bank-note greatly depreciated in value; also for paper money of a denomination less than a dollar. Webster. See 2 Ind. 483.

**SHIP.** A vessel employed in navigation; Ben. Ad. § 215; for example, the terms the ship's papers, the ship's husband, shipwreck, and the like, are employed whether the vessel referred to be a brig, a schooner, a sloop, or a three-masted vessel.

The word comprehends every description of vessel navigating on any sea or channel, lake or river, to which the provisions of revised statutes, title "Merchant Marine," may be applicable; R. S. § 4612; 48 Fed. Rep. 312. See 119 U. S. 629. See 46 Fed. Rep. 204, as to what is not a ship.

A vessel with three masts, employed in navigation; 4 Wash. C. C. 530; the boats and rigging; 2 Marsh. Ins. 727; together with the anchors, masts, cables, and such-like objects, are considered as part of the ship; Pardessus, n. 599.

As to what passes by a bill of sale under the general term ship, or ship and her appurtenances, or ship, apparel, and furniture, see 1 Pars. Marit. Law 71, n. 3; APPAREL. The capacity of a ship is ascertained by its tonnage, or the space which may be occupied by its cargo. A majority of the owners cannot change the ownership by forming themselves into a limited company; [1895] P. 284; admiralty will authorize a majority in value of the owners of a ship to employ the ship, taking a bond for the protection of the minority; 3 Kent 151; a dissenting part-owner, receiving securities, cannot claim compensation or a share of the profits; 4 Sim. 439; and is not liable for a collision; 18 Fed. Rep. 547.

Carriers by water are to a certain extent common carriers, in all the strictness of the common-law rule; 3 Kent *217; 19 How. 312; like common carriers, apart from express contract, they are absolutely responsible for the goods intrusted to them, and insure them against all contingencies excepting only the act of God and the enemies of the Queen. Per Lopes, L. J., in 16 Q. B. D. 633. See, also, L. R. 9 Ex. 342; 1 C. P. D. 19; this rule is said to have been established in the seventeenth century; 1 C. P. D. 430. The master of a general ship is liable where his goods were stolen by robbers; 1 Mod. 85; and an action will lie against the owners as well as the master; Carth. 58. It has been held that the owner of a private ship is subject to the same rule; L. R. 9 Ex. 638.

Lord Cockburn has denied that a carrier by sea is subject to the same liability as a common carrier by land; 1 C. P. D. 426; and Brett, J., was of opinion that he is not a common carrier, but that his liability to carry at his absolute risk arises from recognized custom; L. R. 9 Ex. 338; 7 *id.* 267. See article in 5 L. Q. Rev. 15. It is said that they are not common carriers, because not bound to receive all goods offered. See 1 Pars. Ship. 248.

Ships are of different kinds: as, ships of war and merchant-ships, steamships and sailing-vessels. Merchant-ships may be devoted to the carriage of passengers and property, or either alone. When propelled in whole or in part by steam, and employed in the transportation of passengers, they are subject to inspection and certain stringent regulations imposed by act of congress passed 28th Feb., 1871; R. S. §§ 4463–4500; and steam-vessels not carrying passengers are likewise subject to inspection and certain regulations; R. S. §§ 4399–4462.

Stringent regulations in regard to the number of passengers to be taken on board of sailing-vessels, and the provisions to be made for their safety and comfort, are also prescribed by R. S. § 4465.

Numerous acts of congress have been passed from time to time in reference to the registering, enrolling, licensing, employment, and privileges of the vessels of commerce owned in the United States. See R. S. §§ 4399, 4500.

*Construction of the Harter Act.* The act of Feb. 13, 1893, known as the Harter Act (see that title), was not intended as general legislation concerning the rights or liabilities of ship-owners, but only to deal with the carrying vessel and her own cargo. And all principles and rules of decisions previously applicable, as to the apportionment of damages in case of mutual fault, should still be followed as closely as possible and no more changes admitted than the evident intent of the act necessitates; 60 Fed. Rep. 296; 74 *id.* 899; s. c. 33 U. S. App. 510. In determining the effect of the statute in restricting the operation of general and well-settled principles, the course of decision has been to treat those principles as still existing, and limit the relief from their operation afforded by the statute to precisely that called for by the language of the statute, and no more. It is said that the intent of the act is that damages to the cargo arising from negligence in navigation shall be borne by the cargo owner and not by the ship, and that the act was not designed to increase or diminish the liability of the other vessel in cases of mutual fault and a division of damages; 77 Fed. Rep. 329. The requirement in the act of due diligence to exempt the owner from liability to cargo owners means not only the personal diligence of the owner but also of his agents employed to fit the vessel for sea; 82 Fed. Rep. 664. Such diligence is not exercised where no inspection is made of the cement covering the bottom of an iron steamship; 51 U. S. App. 100; s. c. 79 Fed. Rep. 973. The word management in the act relates to management on the voyage and not to the master's

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acts in stowing the ship; 82 Fed. Rep. 665. Insufficiency of the mechanical fog-horn on the sailing vessel because of failure to provide any means for repairing it is a lack of proper equipment under the act; 77 Fed. Rep. 329. Diligent care of the ship for the purposes of the act does not require re-docking more than once a year; 79 *id.* 371.

The provisions of the Harter Act relieving vessel owners from liability do not extend to foreign vessels; 33 U. S. App. 510; s. c. 74 Fed. Rep. 899; and no restrictive operation can be given to it; 73 *id.* 239; s. c. 44 U. S. App. 434.

The words "ex ship" are not restricted to any particular ship; and by the usage of merchants, simply denote that the property in the goods shall pass to the buyer upon their leaving the ship's tackle, and that he shall be liable for all subsequent charges of lading. They do not constitute a condition of the contract but are inserted for the benefit of the seller; 161 U. S. 57; L. R. 1 C. P. 684. See PRIZE.

As to limited liability of owners in cases of collisions, see ABANDONMENT. As to statute regarding overcrowding of steamers, see 1 U. S. App. 147.

In regard to collisions at sea where both are to blame, see paper by F. W. Raikes, 17th Rep. Int. Law Asso. 193. See COLLISION.

A vessel is deemed a part of the territory of the country to which she belongs; 150 U. S. 249; 154 U. S. 152; and although the deck of a private American vessel is considered for many purposes constructively as territory of the United States, yet persons on board of such vessels, whether officers, sailors, or passengers, cannot invoke the protection of the provisions of the constitution as to the indictment and trial by jury, until brought within the actual territorial boundaries of the United States; 140 U. S. 453.

**SHIP-BROKER.** One who transacts business relating to vessels and their employment between the owners of vessels and merchants who send cargoes.

**SHIP-MONEY.** An imposition formerly levied on port towns and other places for fitting out ships; revived by Charles I. and abolished in the same reign. 17 Car. I. c. 14; Whart. Dict.

**SHIP'S BILL.** The copy of the bill of lading retained by the master. In case of a variance between this and the bill delivered to the shipper, the latter must control; 14 Wall. 98.

**SHIP'S HUSBAND.** An agent appointed by the owner of a ship, and invested with authority to make the requisite repairs and attend to the management, equipment, and other concerns of the ship. He is the general agent of the owners in relation to the ship, and may be appointed in writing or orally. Abb. Sh. 90. He is usually, but not necessarily, a part-owner; 1 Pars. Mar. Law 97. He must *see to the proper outfit* of the vessel in the repairs adequate to the voyage and in the tackle and furniture necessary for a seaworthy ship; must *have a proper master*, mate, and crew for the ship, so that in this respect it shall be seaworthy; must *see to the due furnishing* of provisions and stores according to the necessities of the voyage; must *see to the regularity of the clearances* from the custom-house and the regularity of the registry; must *settle the contracts* and provide for the payment of the furnishings which are requisite to the performance of those duties; must *enter into proper charter-parties*, or engage the vessel for general freight under the usual conditions, and settle for freight and adjust averages with the merchant; and must *preserve the proper certificates*, surveys and documents, in case of future disputes with insurers and freighters, and keep regular books of the ship; 4 B. & Ad. 375; 1 Y. & C. 326; 8 Wend. 144; 16 Conn. 12. These are his general powers; but, of course, they may be limited or enlarged by the owners; and it may be observed that without special authority he cannot borrow money generally for the use of the ship; though, as above observed, he may settle the accounts for furnishings, or grant bills for them, which form debts against the concern whether or not he has funds in his hands with which he might have paid them; 1 Bell, Com. § 499. Although he may, in general, levy the freight which is by the bill of lading payable on the delivery of the goods, it would seem that he would not have power to take bills for the freight and give up the possession of the lien over the cargo, unless it has been so settled by the charter-party.

He cannot insure or bind the owners for premiums; 17 Me. 147; 2 Maule & S. 485; 7 B. Monr. 595; 11 Pick. 85; 5 Burr. 2627.

As the power of the master to enter into contracts of affreightments is superseded in the port of the owners, so it is by the presence of the ship's husband or the knowledge of the contracting parties that a ship's husband has been appointed; 2 Bell, Com. 199. The ship's husband, as such, has no lien on the vessel or proceeds; 2 Curt. C. C. 427; 31 Fed. Rep. 923. See EXERCITOR MARIS.

**SHIP'S PAPERS.** The papers or documents required for the manifestation of the ownership and national character of a vessel and her cargo, and to show her compliance with the revenue and navigation laws of the country to which she belongs.

The want of these papers or any of them renders the character of a vessel suspicious; 2 Boulay-Paty, *Droit Com.* 14; and the use of false or simulated papers frequently subjects the vessel to confiscation; 15 East 46, 70, 364; or avoid an insurance, unless the insurer has stipulated that she may carry such papers; *id.*

The absence of any one of a ship's proper

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papers is not conclusive against the good faith of the ship; 1 Kent *157. Spoliation of ship's papers is an aggravated ground of suspicion and is said to be almost conclusive of guilt; 1 Dods. 480; but it is not of itself a ground of condemnation; 2 Wheat. 227.

A ship's papers are of two sorts: *first*, those required by the law of the particular country to which the ship belongs: as, the certificate of registry or of enrolment, the license, the crew-list, the shipping articles, clearance, etc.; and, *second*, such as are required by the law of nations to be on board of neutral ships as evidence of their title to that character: as, the sea brief or letter, or passport; the proofs of property in the ship, as bills of sale, etc.; the charter-party; the bills of lading; the invoices; the crew-list or muster-roll; the log-book, and the bill of health. M'Culloch, Com. Dict.

The following constitute a ship's papers according to 1 Kent *157: a certificate of registry, sea-letter, muster-roll, log-book, charter-party, invoice, and bill of lading. As to what are ship's papers under the rules of various foreign nations, see 2 Halleck, Int. L., Baker's ed. 98.

The register, or other document in lieu thereof, together with the clearance and other papers granted by the officers of the customs to any foreign vessel, at her departure from the port from which she may have arrived, are required to be produced to the collector of any United States port previous to her entry. The master is required, within forty-eight hours after entry, to deposit the papers with the consul or vice-consul of the nation to which the vessel belongs, and to deliver to the collector of the port the certificate of such consul or vice-consul that he has done so; R. S. § 4209.

An application by a vice-consul for a permit for a vessel to depart, a bill of lading signed by the captain, a license to sail, a certificate of the custom-house official that the vessel had paid its tax for hospital dues, and a bill of health signed by the maritime sub-delegate; the bill of lading being identified by the mate and the other papers being official documents under seal executed by the Chilian authorities, are entitled to confidence and should be admitted in evidence as documents of a public nature; 86 Fed. Rep. 156. It is not necessary that they should be confirmed and sanctioned by the ordinary tests of truth; *id.*, citing 1 Greenl. Ev. § 423.

**SHIPPER.** One who ships or puts goods on board of a vessel, to be carried to another place during her voyage. In general the shipper is bound to pay for the hire of the vessel or the freight of the goods; 1 Bouvier, Inst. n. 1030.

**SHIPPING.** Ships in general; ships or vessels of any kind intended for navigation. Relating to ships; as, shipping interests, shipping affairs, shipping business, shipping concerns. Putting on board a ship or vessel, or receiving on board a ship or vessel. Webster, Dict.; Worcester, Dict. See SHIP; SHIP'S PAPERS.

**SHIPPING ARTICLES.** An agreement, in writing or print, between the master and seamen or mariners on board his vessel (except such as shall be apprenticed or servant to himself or owners), declaring the voyage or voyages, term or terms of time, for which such seamen or mariners shall be shipped. It is also required that at the foot of every such contract there shall be a memorandum, in writing, of the day and the hour on which each seaman or mariner who shall so ship and subscribe shall render himself on board to begin the voyage agreed upon. Provision is made in the R. S. of U. S. for shipping articles, and a penalty is imposed for shipping seamen without them; R. S. § 4509 *et seq.*

The shipping articles ought not to contain any clause which derogates from the general rights and privileges of seamen; and, if they do, such clause will be declared void; 2 Sumn. 443; 2 Mas. 541.

A seaman who signs shipping articles is bound to perform the voyage; and he has no right to elect to pay damages for non-performance of the contract; 2 Va. Cas. 276.

See, generally, Gilp. 147, 219, 452; 1 Pet. Adm. 212; 1 Mas. 443; 5 *id.* 272; 14 Johns. 260; SEAMEN.

**SHIPPING COMMISSIONER.** An officer appointed by the several circuit courts of the United States for each port of entry, which is also a port of ocean navigation within their respective jurisdictions, which, in the judgment of such court, may require the same. His duties are: to facilitate and superintend the engagement and discharge of seamen; to secure the presence on board of the men engaged at the proper times; to facilitate the making of apprenticeship to the sea service; and such other like duties as may be required by law; R. S. §§ 4501–4508.

**SHIPMENT.** The delivery of the goods within the time required on some vessel destined to the particular port which the seller has reason to suppose will sail within a reasonable time. It does not mean a clearance of the vessel as well as putting the goods on board where there is nothing to indicate that the seller was expected to exercise any control over the clearance of the vessel or of her subsequent management; 121 N. Y. 179. See L. R. 2 App. Cas. 455; 97 N. Y. 221; 7 Mass. 453; 105 N. Y. 404.

**SHIPS OF WAR.** The ports of every nation are considered as open to the ships of war of other powers with whom it is at peace. They are exempt from all forms of process in private suit and cannot be seized or interfered with by judicial proceedings to punish violation of the public laws; 7 Op. A. G. 122. Such violations are to be remedied by the offended state appealing directly to the other sovereign.

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But such ships must not appear as a disturbing agency in the port of a friendly state. They must conform to the rules of quarantine and anchorage, and a ship of war which refuses to comply with such local regulations may be refused admittance, or her stay limited. If any of her crew while on land infringe the laws of the country, they are subject to the local authorities, but if an offender escapes to his vessel, he cannot be pursued there; Snow, Lect. Int. Law 33. They are probably not subject to salvage claims; 1 Halleck, Int. L., Baker's ed. 217.

In international law a state has jurisdiction over its property and citizens on the high seas when carried under its own flag. This jurisdiction is sometimes based on the theory that the ships of a country are a prolongation of its territory and sometimes on the theory that the jurisdiction arises from the mere fact of property; Snow, Lect. Int. L. 147.

Woolsey says of public ships: "They are not only public property, built or bought by the government, but they are, as it were, floating barracks, a part of the public organism and represent the national dignity, and on these accounts even foreign ports are exempt from the local jurisdiction. . . . However, it is on account of the crew rather than on account of the ship itself that they have any territorial quality. Take the crew away, let the abandoned hulk be met at sea; it now becomes property, nothing more." Wheaton says: "A public vessel belonging to an independent sovereign is exempt from every species of visitation and search, even within the territorial jurisdiction of another state." The principle is universally admitted.

Public ships of a friendly nation, coming into ports of the United States, and demeaning themselves in a friendly manner are exempt from the jurisdiction of the country; 7 Cr. 116. See NEUTRALITY.

**SHIRE. In English Law.** A district or division of country. Co. Litt. 50 *a*.

A county.

The ancient English states, though degraded to the rank of shires, preserved their autonomy to the utmost practicable extent. They retained the state assembly, which was the supreme court of law, the king himself sitting in it as in the national assembly. In the absence of the king, the ealdorman presided in it. The shire government was not royal, but ducal. The king, in appointing the ealdorman, appointed, not a servant of his will, but a prince and lord of the shire. The Anglo-Saxon shire constitution, in spite of the establishment of the empire, was an expression of still undeveloped royalty. See Essays Ang. Sax. Law 21.

**SHIRE-GEMOT** (spelled, also, *Scire-gemote*, *Scir-gemot*, *Scyre-gemote*, *Shire-mote*; from the Saxon *scir* or *scyre*, county, shire, and *gemote*, a court, an assembly).

The Saxon county court. It was held twice a year before the bishop and aldermen of the shire, and was the principal court. Spelman, Gloss, *Gemotum*; Crabb, Hist. Eng. Law 28.

**SHIRE-MAN, or SCYRE-MAN.** Before the conquest the judge of the county, by whom trials for land, etc., were determined. Toml.; Moz. & W.

**SHIRE RIEVE, or SHIRE REVE** A sheriff (*q. v.*).

**SHOP.** A place kept and used for the sale of goods. 14 Gray 378. A building as distinguished from a place of sale which is open like a stall. 60 Mich. 426. In order to constitute a shop there must be some structure of a more or less permanent character; 6 B. & S. 303.

As used in a statute it is a house or building in which small quantities of goods, wares, or drugs and the like are sold, or in which mechanics labor, and sometimes keep their manufactures for sale. 98 N. C. 643.

**SHOP-BOOKS.** The books of a retail dealer, mechanic, or other person, in which entries or charges are made of work done, or goods sold and delivered to customers, commonly called "account-books," or "books of account." The party's own *shop-books* are in certain cases admissible in evidence to prove the delivery of goods therein charged, where a foundation is laid for their introduction. The following are the general rules governing the production of this kind of evidence. *First*, that the party offering the books kept no clerk; *second*, that the books offered by the party are his books of account, and that the entries therein are in his handwriting; *third*, it must appear, by some of those who have dealt with the party and settled by the books offered, that they found them correct; *fourth*, it must be shown that some of the articles charged have been delivered. Where entries are made by a clerk who is dead, such entries are admissible in evidence on proof of the handwriting; Steph. Ev. art. 38; 4 Ill. 120; 19 *id.* 393; 8 Johns. 212; 11 Wend. 568; 1 Greenl. Ev. § 117; 1 Smith, Lead. Cas. 282. Where memoranda made during the day by one, are at night transcribed to a book by another, who did not know the truth of the facts recorded by the former, the book is not competent testimony and cannot be used to refresh his memory; 22 U S. App. 646. See ORIGINAL ENTRY; MEMORANDUM; ACCOUNT BOOK.

**SHOP LIFTING.** See LARCENY; KLEPTOMANIA.

**SHOP RIGHT.** See PATENT.

**SHORE.** Land on the side of the sea, a lake, or a river. Strictly speaking, when the water does not ebb and flow in a river, there is no shore. See 6 Mass 435; 23 Tex. 349; 23 N. J. L. 624, 683; 38 *id.* 548; RIVER; SEA.

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**SHORT CAUSE.** A suit in the chancery division of the high court of justice, where there is only a simple point for discussion, which will probably occupy not more than ten minutes in the hearing. A suit may often be greatly accelerated by being placed on the list of short causes, which are heard one day in each week (generally Saturday) during the sittings of the court; Dan. Ch. Pr., 5th ed. 836; Hunt. Eq. Pt. I. ch. 4, s. 4. A similar provision is familiar to the practice of the courts of several of the states, but its operation is not restricted to chancery cases, and the time allowed for the hearing varies in the different courts.

**SHORT ENTRY.** A term used among bankers to denote the fact which takes place when a note has been sent to a bank for collection, and an entry of it is made in the customer's bank-book, stating the amount in an inner column, and carrying it out into the accounts between the parties when it has been paid.

**SHORT-FORD.** An ancient custom of the city of Exeter, similar to that of *gavelet* in London, which was in effect a foreclosure of the right of the tenant by the lord of the fee, in cases of non-payment of rent; Cowel.

**SHORT HAUL.** See INTERSTATE COMMERCE COMMISSION.

**SHORT NOTICE. In English Practice.** Four days' notice of trial. Wharton, Law Dict. *Notice of trial;* 1 Cr. & M. 499. Where short notice has been given, two days is sufficient notice of continuance; Wharton, Lex.

**SHORTAGE.** No allowance for shortage can be made where the contents of missing bags of sugar had been put into new bags by seamen and actually delivered; 1 U. S. App. 14.

**SHOW.** To make apparent or clear by evidence, to prove. 104 Pa. 133.

**SHRUB.** A low, small plant, the branches of which grow directly from the earth without any supporting trunk or stem. 70 Miss. 406.

**SHUT DOWN.** Within the meaning of an insurance policy, a saw mill which has stopped running for the winter, is shut down, though men are employed about the premises and the machinery has not been dismantled. 44 Pac. Rep. (Cal.) 922.

**SHYSTER.** A trickish knave; one who carries on any business, especially a legal business, in a dishonest way. 34 Minn. 343; see 40 Mich. 251.

**SI ACTIO.** The conclusion of a plea to an action when the defendant demands judgment, if the plaintiff ought to have his action, etc. Obsolete.

**SI ITA EST.** If it be so. Emphatic words in the old writ of mandamus to a judge, commanding him, if the act alleged be truly stated (*si ita est*), to affix his seal to a bill of exceptions. 5 Pet. 192.

**SI PRIUS.** If before. Formal words in ancient writs for summoning juries. Fleta, l. 2, c. 65, § 12.

**SI TE FECERIT SECURUM** (Lat. if he make you secure). Words which occur in the form of writs, which originally required, or still require, that the plaintiff should give security to the sheriff that he will prosecute his claim, before the sheriff can be required to execute such writ.

**SICKNESS.** By sickness is understood any affection of the body which deprives it temporarily of the power to fulfil its usual functions. It has been held to include insanity. L. R. 8 Q. B. 295.

Sickness is either such as affects the body generally, or only some parts of it. Of the former class a fever is an example; of the latter, blindness. When a process has been issued against an individual for his arrest, the sheriff or other officer is authorized, after he has arrested him, if he be so dangerously sick that to remove him would endanger his life or his health, to let him remain where he found him, and to return the facts at large, or simply *languidus*.

**SIDE-BAR RULES. In English Practice.** Rules which were formerly moved for by attorneys on the side-bar of the court, but now may be had of the clerk of the rules, upon a *præcipe*. These rules are, that the sheriff return his writ, that he bring in the body, for special imparlance, to be present at the taxing of costs, and the like. As to side-bar applications, see Mitchell, Rules 20.

**SIDESMEN** (*testes, synodales*). **In Ecclesiastical Law.** A kind of impanelled jury, consisting of two, three, or more persons, in every parish, who were upon oath to present all heretics and irregular persons. In process of time they became standing officers in many places, especially cities. They were called synodsmen,—by corruption sidesmen; also questmen. But their office has become absorbed in that of church-warden. 1 Burn, Eccl. Law 399.

**SIDEWALK.** That part of a public street or highway designed for the use of pedestrians.

As used in this country it does not mean a walk or way constructed of any particular kind of material, or in any special manner, but ordinarily is used to designate that part of the street of a municipality which has been set apart and used for pedestrians, as distinguished from that portion set apart and used for animals and vehicles. 48 Minn. 201.

Generally the sidewalk is included with the gutters and roadway in the general term *street*; 42 Ill. 503; 76 N. Y. 174; 50 Wis. 429. It was so held in the construction of a statute providing for compensation for damages caused by changing the grade of streets; 100 Ind. 242; and in one authorizing the improvement of streets; 114 Ind. 371; but in many cases of municipal ordinances and contracts, the word street is held not to include sidewalks; 52 Cal. 440; 138 Mass. 555.

It is the duty of a municipal corporation

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to keep the sidewalks, as well as the roadbed of the street, in repair; 74 N. Y. 264; 76 *id.* 174; 136 Pa. 533; but it has been held that where the absolute duty is not imposed by the charter, the obligation of the city with respect to keeping the sidewalks free from defects is less imperative than the same obligation with respect to the roadway; 51 Barb. 396; 36 *id.* 226; but these decisions have been questioned; 44 *id.* 385. One who knows of a defect in the sidewalk is bound to use particular care to avoid injury; 14 Hun 544; but the injury does not defeat recovery, if due care is used; 2 N. Y. St. 351.

The duty imposed on municipal corporations of keeping highways safe and convenient includes obstructions from ice and snow; 12 Vt. 338; 13 Pick. 343; 17 How. 161, where it was held that it was for the jury to say whether treading down and not removing the snow was a safe and convenient method of removing the obstruction.

Ice formed by melting snow and ice falling from a building simply as the result of natural laws, is not a defect for which the municipality is liable; 85 Wis. 187. There must be a breach of duty on the part of the city, such as an unusual or dangerous obstruction to travel from snow and ice, and such time must have elapsed after the creation of the obstruction as to afford a presumption of knowledge; 121 N. Y. 147. The duty of removing such obstructions is a qualified one, becoming imperative only under the circumstances mentioned; 109 *id.* 134. Where, however, there is by statute an absolute liability for injuries resulting from a defective sidewalk, no question of want of notice or the exercise of care is a defence; 31 W. Va. 384. The remedy for an injury resulting from a defective sidewalk is exclusively against the city, and its liability cannot be avoided by the existence of any ordinance on the subject; 105 N. Y. 202; 14 Gray 249. The right of action arises solely from negligence; 122 Ind. 39; the fact that an accident occurs is not sufficient, there must be a neglect of duty; 39 N. Y. St. 603. In order to hold the city liable for negligence in permitting an obstruction, it must have notice, but this may be constructive through the elapse of sufficient time for the presumption of notice to arise; 27 Can. 545; 18 Hun 167; 22 W. N. C. 132.

Where an awning over the sidewalk was permitted to remain in an unsafe condition by the accumulation of snow and ice, the city was held liable for injuries sustained by the fall of the awning; 13 Metc. 292; but where an accident was occasioned by ice formed by water dripping from the awning, it was held that the city was not liable and the action should have been against the owner; 22 W. N. C. Pa. 133.

In actions for damages from defective sidewalks, it was a question for the jury whether, under the circumstances, the corporation is liable; 48 Conn. 469; 185 Pa. 32. A question for their decision was whether ordinary care was used and whether the sidewalk was reasonably safe: 40 *id.* 134; 10 Cush. 260; or whether there was negligence in not removing the obstruction; 100 N. Y. 15; 25 Neb. 133; or whether there was a sufficient lapse of time to be considered constructive notice; 39 N. Y. St. 744.

Even if the city were negligent, a person injured by a defective sidewalk cannot recover unless he show himself in the exercise of due care; 133 Ill. 177; and if the accident occurred by reason of the plaintiff's being intoxicated, he cannot recover; 76 Wis. 499.

Where the sidewalk is manifestly dangerous it is the duty of a pedestrian to walk on the roadway; 130 Pa. 123; and he cannot recover for an injury which his own observation, prudently exercised, ought to have enabled him to avoid; 31 W. Va. 842.

A municipal corporation may require its citizens to clean the snow from their sidewalks; 105 N. Y. 202. A law requiring the abutting owners to keep sidewalks in repair is a duty cast directly upon the property owner and is in the nature of a police regulation; it is not a tax or municipal assessment; 131 Pa. 109.

Where the abutting owners permitted the sidewalk to be obstructed for an unreasonable time in loading and unloading a truck with skids so that a pedestrian was injured in passing over it, the owner was held liable; 29 App. Div. N. Y. 462; *id.* 509.

Where the proprietor of a theatre invites an unusual crowd to occupy his sidewalk, he is bound to greater precaution and owes a duty to pedestrians that they are not injured through any lack of care; 5 Super. Ct. Rep. (Pa.) 609. See STREET; HIGHWAY.

**SIGHT.** Presentment. Bills of exchange are frequently drawn payable at sight or a certain number of days or months after sight.

Bills payable at sight are said to be entitled to days of grace by the law merchant; Big. Bills & N. 92; Dan. Neg. Instr. § 617; 13 Gray 597; 42 Ala. 186; 28 Mo. 596; *contra*, 1 E. D. Sm. 505. Statutes have settled the question in some states.

The holder of a bill payable at sight is required to use due diligence to put it into circulation, and, if payable after sight, have it presented in reasonable time; 20 Johns. 146; 12 Pick. 399; 28 E. L. & E. 131; 13 Mass. 137; 4 Mas. 336; 5 *id.* 118; 1 M'Cord 322; 1 Hawks 195.

After sight in a bill means after acceptance; in a note, after exhibition to the maker; Dan. Neg. Instr., 4th ed. § 619. It is usual to leave a bill for acceptance one whole day; but the acceptance is dated as on the day it was left; Sewell, Bank.

A bill drawn payable a certain number of days after sight, acceptance waived, must be presented to fix the time at which the bill is to become due, and the term of

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the bill begins to run from the date of presentment. See 4 Montreal L. Rep. 249.

Sight drafts and sight bills are bills payable at sight.

**SIGILLUM** (Lat.). A seal.

**SIGN.** To affix a signature to; to ratify by hand or seal; to subscribe in one's own handwriting. Webst.; 131 Pa. 230.

**SIGN MANUAL. In English Law.** The signature of the king to grants or letters patent, inscribed at the top. 2 Sharsw. Bla. Com. 347*.

Any one's name written by himself. Webster, Dict.; Wharton, Law Dict. The sign manual is not good unless countersigned, etc.; 9 Mod. 54.

**SIGNA** (Lat.). **In Civil Law.** Those species of indicia which come more immediately under the cognizance of the senses: such as, stains of blood on the person of one accused of murder, indications of terror at being charged with the offence, and the like.

**SIGNAL.** A means of communication between vessels at sea or between a vessel and the shore. The international code of signals for the use of all nations assigns arbitrary meanings to different arrangements of flags or displays of lights. Where a steamer did not hear the signal but should have heard it, she is as culpable as if she had heard and disregarded it; 1 U. S. App. 72. Where a collision results through the failure of one of two colliding steamers to conform to her own signals, she is responsible for the collision; 35 U. S. App. 161. See COLLISION; VESSEL; NAVIGATION, RULES OF.

**SIGNATORY.** A term used in diplomacy to indicate a nation which is a party to a treaty.

**SIGNATURE. In Ecclesiastical Law.** The name of a sort of rescript, without seal, containing the supplication, the signature of the pope or his delegate, and the grant of a pardon. Dict. Dr. Can.

**In Practice.** By signature is understood the act of putting down a man's name at the end of an instrument, to attest its validity. The name thus written is also called a signature.

A person's name as set down by himself. 2 N. Dak. 30.

It is not necessary that a party should write his name himself, to constitute a signature: his mark is now held sufficient, though he was able to write; 8 Ad. & E. 94; 7 L. R. Pr. 590; 3 Nev. & P. 228; 3 Curt. C. C. 752; 5 Johns. 144; see 96 Cal. 598; 138 N. C. 134; and the signature to a note may be by initials only; 14 L. T. 433; 1 Ames, B. & N. 145. A signature by pencil is valid; 5 B. & C. 234; or on a telegraph message given to an operator; L. R. 5 C. P. 295. The printed name of the vendor on the heading of a bill of parcels sent by him to the vendee is a sufficient signature to bind the vendor under the statute of frauds. A signature made by a party, another person guiding his hand with his consent, is sufficient; 4 Wash. C. C. 262, 269.

It is not necessary in the execution of a note, that the person executing it, if unable to write, touch the pen while the person authorized signs his name; 9 Md. App. 624; and the signature of the grantor affixed to a deed by another in the presence and at the request of the grantor is as binding as if he had personally affixed his signature; 98 Ala. 479. A person who is *sui juris*, will not, in the absence of a fraud, be permitted to avoid his written obligation by showing that he did not read it or hear it read; 16 Mo. App. 527. And where a promissory note was signed under the impression that it was one of some unimportant papers, the signature was held valid in the hands of an innocent third party; 43 S. W. Rep. (Ky.) 699.

One who cannot read a contract which he is about to execute is bound to procure it to be read and explained to him before he signs it, and is chargeable with knowledge of its contents whether he does so or not; 83 Fed. Rep. 437.

The signature is usually made at the bottom of the instrument; but in wills it has been held that when a testator commenced his will with these words, "I, A B, make this my will," it was a sufficient signing; 3 Lev. 1. And see Sudg. Vend. 71; 2 Stark. Ev. 605, 613. But this decision is said to be absurd; 1 Brown, Civ. Law 278, n. 16; Schoul. Wills 315. The initials "A. B." are not the signature of the judge, or a sufficient authentication of the bill of exceptions, or sufficient evidence of its allowance by the judge; 125 U. S. 240. The possession of a rubber stamp of his signature by a depositor in a bank, kept without negligence, but without notice to the bank, does not relieve the latter for having paid out money on a forged check, made from the stamp. Here an employe used the stamp to obtain a tracing of the depositor's signature; 186 Pa. 458. See Merlin, *Répert. Signature*, for a history of the origin of the signature; and, also, 4 Cruise, Dig. 32, c. 2, s. 73 *et seq.* See, generally, 8 Toullier, n. 94; 1 Dall. 64; 5 Whart. 386; 2 B. & P. 238; 2 Maule & S. 286; MONOGRAM; MARK.

**SIGNET.** A seal commonly used for the sign manual of the sovereign. Whart. Lex. The signet is also used for the purpose of civil justice in Scotland; Bell. See WRITERS TO THE SIGNET.

**SIGNIFICATION** (Lat. *signum*, a sign, *facere*, to make). **In French Law.** The notice given of a decree, sentence, or other judicial act.

**SIGNIFICAVIT** (Lat.). **In Ecclesiastical Law.** When this word is used alone, it means the bishop's certificate to the court of chancery in order to obtain the writ of excommunication; but where the words *writ of significavit* are used, the meaning is the same as *writ de excommuni-*

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*eato capiendo.* 2 Burn, Eccl. Law 248; Shelf. Marr. & D. 502. Obsolete.

**SIGNING JUDGMENT. In English Practice.** The plaintiff or defendant, when the cause has reached such a stage that he is entitled to a judgment, obtains the signature or allowance of the proper officer; and this is called signing judgment, and is instead of the delivery of judgment in open court. Steph. Pl., And. ed. 196. It is the leave of the master of the office to enter up judgment, and may be had in vacation. 3 B. & C. 317; Tidd, Pr. 616.

**In American Practice,** it is an actual signing of the judgment on the record, by the judge or other officer duly authorized. Graham, Pr. 341.

**SILENCE.** The state of a person who does not speak, or of one who refrains from speaking.

Pure and simple silence cannot be considered as a consent to a contract, except in cases where the silent person is bound in good faith to explain himself; in which case silence gives consent; 14 S. & R. 393; L. R. 6 Q. B. 597; 102 Mass. 135; 6 Pa. 336. But no assent will be inferred from a man's silence unless he knows his rights and knows what he is doing, nor unless his silence is voluntary.

When any person is accused of a crime or charged with any fact, and he does not deny it, in general, the presumption is very strong that the charge is correct; 5 C. & P. 332; 7 *id.* 832; Joy, Conf. p. 77.

The rule does not extend to the silence of the prisoner when, on his examination before a magistrate, he is charged by another prisoner with having joined with him in the commission of an offence; 3 Stark. 33; Steph. Ev. art. 7.

When an oath is administered to a witness, instead of expressly promising to keep it, he gives his assent by his silence and kissing the book.

The person to be affected by the silence must be one not disqualified to act, as, *non compos*, an infant, or the like; for even the express promise of such a person would not bind him to the performance of any contract.

**SILENTIARIUS.** One of the privy council; an usher who saw that good rule and silence were kept in the court.

**SILK.** Under a statute referring to silk in a manufactured or unmanufactured state, any fabric which contains silk will not necessarily be included, but silk watchguards and silk dresses; 28 L. J. C. P. 265; silk hose: *id.*; and elastic webbing composed of one-third silk; 33 L. J. Ex. 187, will be so considered.

**SILK GOWN.** Used especially of the gowns worn by queen's counsel; hence, "to take silk" means to attain the rank of queen's counsel. Moz. & W.

**SILVA CÆDUA** (Lat.). By these words, in England, is understood every sort of wood, except gross wood of the age of twenty years. Bac. Abr. *Tythes* (C).

**SILVER.** The legislation on the subject of silver coinage is stated up to that date in a note to R. S. 1 Supp. 774, which with the addition of legislation subsequent to that date is as follows: Laws on silver coinage are as follows: By R. S. §§ 3513, 3516, the silver coins of the United States are limited to a trade dollar, a half dollar, a quarter dollar, and a dime. By § 3526 silver bullion is to be purchased with the bullion fund. By § 3586 the silver coins of the United States are legal tender in amounts not exceeding $5. By act of 1875, Jan. 14, ch. 15, fractional silver is to be issued in redemption of fractional currency. By act of 1876, April 17, ch. 63, this is repeated with some amendments. By Res. No. 17, of 1876, July 22, the silver coin in the treasury is to be issued in exchange for legal tender notes. The issue of fractional silver to fifty million dollars is authorized. By act of 1878, Feb. 28, ch. 20, the coinage of the standard silver dollar and the issuance of silver certificates of $10 or over is authorized. By act of 1879, June 9, ch. 12, fractional silver and lawful money of the United States may be reciprocally exchanged at the treasury or any sub-treasury in sums of $20, and fractional silver is made legal tender up to $10. By act of 1882, August 7, ch. 433, par. 5, free transportation of silver coins is authorized. By act of 1887, March 3, ch. 362, the issuance of silver certificates of one, two, and five dollars is authorized in lieu of higher denominations.

By act of July 14, 1890, the purchasing clause of the act of 1878 was repealed and the secretary of the treasury was authorized to purchase not to exceed 4,500,000 ounces of silver per month and to issue in payment therefor treasury notes. By act of 1890, Sept. 26, ch. 944, changes in the design of coins are authorized. The trade dollar was declared not a legal tender by Res. No. 17, of 1876, July 22, and by act of 1887, March 3, ch. 396, § 2 (24 Stat. L. 643), its coinage was terminated and its redemption and recoinage into standard dollars was directed. By act of 1893, Nov. 1, repeal of the purchasing clause of the act of July 14, 1890.

**SIMILAR.** Denotes partial resemblance, and also sameness in all essential particulars; 127 Mass. 454. Similar offence may mean an offence identical in kind. *Id.*

**SIMILAR DESCRIPTION.** Such words as used in a tariff act import that the goods are similar in product and adopted to similar uses; not necessarily that they have been produced by similar methods of manufacture; 1 Hask. 586.

**SIMILITER** (Lat. likewise). **In Pleading.** The plaintiff's reply, that, as the defendant has put himself upon the country, he, the plaintiff, does the like. It occurs only when the plea has the conclu

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sion to the country, and its effect is to join the plaintiff in the issue thus tendered by the defendant; Co. Litt. 126 *a*. The word *similiter* was the effective word when the proceedings were in Latin; 1 Chitty, Pl. 519; Archb. Civ. Pl. 250. See Steph. Pl. 255; 2 Saund. 319 *b*; Cowp. 407; 1 Stra. 551; 11 S. & R. 32.

**SIMONY. In Ecclesiastical Law.** The selling and buying of holy orders or an ecclesiastical benefice. Bacon, Abr. *Simony*. By simony is also understood an unlawful agreement to receive a temporal reward for something holy or spiritual. Code 1. 3. 31; Ayliffe, Parerg. 496.

**SIMPLE AVERAGE.** Particular average. See AVERAGE.

**SIMPLE CONTRACT.** A contract the evidence of which is merely oral or in writing, not under seal nor of record. 1 Chitty, Contr., 12th ed. 6. See 11 Mass. 30; 4 B. & Ald. 588; 2 Bla. Com. 472. See CONTRACT; PAROL.

Under the act of 32 & 33 Vict. c. 46, s. 1, in the administration of the estate of a decedent, after Jan. 1, 1870, his simple contract debts are placed on an equal footing with those secured by specialty. But this does not prejudice any lien or other security, which any creditor may hold.

**SIMPLE LARCENY.** The felonious taking and carrying away the personal goods of another, unattended by acts of violence: it is distinguished from compound larceny, which is stealing from the person or with violence. LARCENY.

**SIMPLE OBLIGATION.** An unconditional obligation; one which is to be performed without depending upon any event provided by the parties to it.

**SIMPLE TRUST.** A simple trust corresponds with the ancient use, and is where property is simply vested in one person for the use of another, and the nature of the trust, not being qualified by the settler, is left to the construction of law. It differs from a *special trust*. 2 Bouvier, Inst. n. 1896.

**SIMPLE WARRANDICE.** See WARRANDICE.

**SIMPLEX** (Lat.). Simple or single; as, *charta simplex* is a deed-poll or single deed. Jacob, Law Dict.

**SIMPLEX JUSTICIARIUS.** A style formerly used for any *puisne* judge who was not chief in any court.

**SIMPLEX OBLIGATIO.** A single unconditional bond.

**SIMPLICITER** (Lat.). Simply; without ceremony; in a summary manner.

**SIMUL CUM** (Lat. together with). **In Pleading.** Words used in indictments and declarations of trespass against several persons, when some of them are known and others are unknown.

In cases of riots, it is usual to charge that A B, together with others unknown, did the act complained of; 2 Chitty, Cr. Law 488; 2 Salk. 593.

When a party sued with another pleads separately, the plea is generally entitled in the name of the person pleading, adding, "sued with ——," naming the other party. When this occurred, it was, in the old phraseology, called pleading with a *simul cum*.

**SIMULATIO LATENS.** A species of feigned disease in which disease is actually present, but where the symptoms are falsely aggravated. Beck, Med. Jur. 3.

**SIMULATION** (Lat. *simul*, together). **In French Law.** The concert or agreement of two or more persons to give to one thing the appearance of another, for the purpose of fraud. Merlin. *Répert.*

**SINCE.** The proper signification is after, and in its apparent sense includes the whole period between the event and the present time; 79 Me. 195; *since* the day named, does not necessarily include that day; 41 N. H. 201.

**SINE DIE** (Lat.). Without day. A judgment for a defendant in many cases is *quod eat sine die*, that he may go without day. While the cause is pending and undetermined, it may be continued from term to term by *dies datus*. See CONTINUANCE; Co. Litt. 362 *b*. When the court or other body rise at the end of a session or term, they adjourn *sine die*.

**SINE HOC.** A phrase formerly used in pleading as equivalent to *absque hoc* (*q. v.*).

**SINE PROLE.** Without issue. Used in genealogical tables, and often abbreviated into "s. p."

**SINECURE. In Ecclesiastical Law.** A term used to signify that an ecclesiastical officer is without a charge or cure.

In common parlance, it means the receipt of a salary for an office when there are no duties to be performed.

**SINGLE BILL.** One without any condition, which does not depend upon any future event to give it validity.

**SINGLE BOND.** A deed whereby the obligor obliges himself, his heirs, executors, and administrators to pay a certain sum of money to the obligee at the day named.

**SINGLE COMBAT.** See WAGER OF BATTEL.

**SINGLE ESCHEAT.** The reversion of a person's movables to the crown because of his being declared a rebel.

**SINGLE WOMAN.** The words include a widow; 12 L. J. W. C. 74; and a married woman living apart from her husband; 12 Q. B. D. 681.

**SINGULAR.** In grammar, the singular is used to express only one; not plural. Johnson.

In law, the singular frequently includes

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the plural. A bequest to "*my nearest relation*," for example, will be considered as a bequest to all the relations in the same degree who are nearest to the testator; 1 Ves. Sen. 357; 1 Bro. C. C. 293. A bequest made to "*my heir*," by a person who had three heirs, will be construed in the plural; 4 Russ. Cr. Cas. 384.

Under the 13 & 14 Vict. c. 21, s. 4, words in acts of parliament importing the singular shall include the plural, and *vice versa*, unless the contrary is expressly provided; Whart. Lex.

**SINGULAR SUCCESSOR.** A phrase in Scotch law, applied to the purchase of a specific chattel or specific land, as *e. g.* an executor or administrator, in contradistinction to the heir. Bell.

**SINKING FUND.** A fund arising from particular taxes, imposts, or duties, which is appropriated towards the payment of the interest due on a public loan and for the gradual payment of the principal. This definition was quoted and approved in 9 Neb. 453. A fund created for extinguishing or paying a funded debt. 14 N. Y. 379, cited in 30 Fed. Rep. 89. Formerly corporation mortgages usually contained a provision for a sinking fund. They are now less common.

The constitution of Pennsylvania provides that every city shall create a sinking fund which shall be inviolably pledged for the payment of the public debt. Under this provision commissioners of the sinking fund may apply the money in the sinking fund to the purchase of the funded debt of the city, and the debt to that extent is thereby paid, and it is immaterial in determining the actual debt that the commissioners of the sinking fund have no authority immediately upon purchase to cancel or destroy the obligation of the city which they have bought. Securities other than those of the city held by the sinking fund are merely an asset of the city and do not operate to the reduction of the funded debt. If payments are not made into the sinking fund as required by law the commissioner must see to it that they are made, even to the institution of legal proceedings against the city to compel payment; 162 Pa. 123. See FUNDING SYSTEM.

**SIST ON A SUSPENSION.** A Scotch phrase equivalent to "stay of proceedings." Bell.

**SISTER.** A woman who has the same father and mother with another, or has one of them only. In the first case, she is called sister, simply; in the second, half-sister. Approved in 61 How. Pr. 48.

**SITIO.** A measure used in Mexican land grants, equivalent to 4338.464 acres. A *sitio de ganado menor* or sheep ranch is equivalent to 1928.133 acres. 161 U. S. 219.

**SITTINGS IN BANK, or BANC.** The sittings which the respective superior courts of common law hold during every term for the purpose of hearing and determining the various *matters of law* argued before them.

They are so called in contradistinction to the sittings at *nisi prius*, which are held for the purpose of trying issues of fact.

In America, the practice is essentially the same, all the judges, or a majority of them usually, sitting *in banc*, and but one holding the court for jury trials; and the term has the same application here as in England. See LONDON AND MIDDLESEX SITTINGS.

**SITTINGS IN CAMERA.** See CHAMBERS.

**SITUS** (Lat.). Situation; location. 5 Pet. 524.

Real estate has always a fixed situs, while personal estate has no such fixed situs: the law *rei sitæ* regulates real but not personal estate; Story, Confl. Laws, 8th ed. §§ 363–365. See PROPERTY; LEX LOCI; TAX; Waples, Debtor and Creditor, where the subject of the location of property is treated.

**SIX ACTS.** The acts passed in 1819 for the pacification of England.

**SIX ARTICLES, LAWS OF.** A celebrated act entitled "An act for abolishing diversity of opinion," 31 Hen. VIII. c. 14; enforcing conformity to six of the strongest points in the Roman Catholic religion, under the severest penalties; repealed by 1 Eliz. c. 1; 4 Reeve, Eng. L. 378.

**SIX CLERKS IN CHANCERY.** Officers who received and filed all proceedings, signed office copies, attended court to read the pleadings, etc. Abolished by 5 Vict. c. 5. 3 Sharsw. Bla. Com. 443*; Spence, Eq. Jur.

**SIX MONTHS' RULE.** See MORTGAGE; RECEIVER.

**SKELETON BILL. In Commercial Law.** A blank paper, properly stamped, in those countries where stamps are required, with the name of the person signed at the bottom.

In such case the person signing the paper will be held as the drawer or acceptor, as it may be, of any bill which shall afterwards be written above his name, to the sum of which the stamp is applicable; 1 Bell, Com. 390.

**SKILL.** The art of doing a thing as it ought to be done.

Every person who purports to have skill in a business, and undertakes for hire to perform it, is bound to do it with ordinary skill, and is responsible civilly in damages for the want of it; 11 M. & W. 483; and sometimes he is responsible criminally. See PHYSICIAN; 2 Russ. Cr. 288.

The degree of skill and diligence required rises in proportion to the value of the article and the delicacy of the operation: more skill is required, for example, to repair a very delicate mathematical instrument, than upon a common instrument; Jones, Bailm. 91; 2 Kent 458, 463; Ayliffe, Pand.

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466; 1 Rolle Abr. 10; Story, Bailm. § 431; 2 Greenl. Ev. § 144.

**SLANDER. In Torts.** Words falsely spoken, which are injurious to the reputation of another.

False, defamatory words spoken of another. See Odger, Libel & S. *7.

There is a distinction, probably the result of some historical accident, between slander and libel; in libel any defamatory matter is *prima facie* libellous while the same matter when spoken would require proof of special damage, excepting in the classes of cases mentioned *infra*, which are actionable *per se*.

*Verbal slander.* Actionable words are of two descriptions: first, those actionable in themselves, without proof of special damages; and, secondly, those actionable only in respect of some actual consequential damages.

Words of the first description must impute.

*First*, the guilt of some offence for which the party, if guilty, might be indicted and punished by the criminal courts; as, to call a person a "traitor," "thief," "highwayman," or to say that he is guilty of "perjury," "forgery," "murder," and the like. And although the imputation of guilt be general, without stating the particulars of the pretended crime, it is actionable; Cro. Jac. 114, 142; 6 Term 694; 5 B. & P. 335; 56 Ark. 100; 43 La. Ann. 967; 82 Va. 239; it is enough if the offence charged be a misdemeanor involving moral turpitude; Bigel. Torts 44. If the charge is that the plaintiff has already suffered the punishment, the words, if false, are actionable; *ibid.*; see 5 Pa. 272; 50 Ohio St. 71.

*Second*, that the party has a disease or distemper which renders him unfit for society; Bac. Abr. *Slander* (B. 2). An action can, therefore, be sustained for calling a man a leper; Cro. Jac. 144. Imputations of having at the present time a venereal disease are actionable in themselves; 8 C. B. N. S. 9; 7 Gray 181; 22 Barb. 396; 2 Ind. 82; 2 Ga. 57. But charging another with *having had* a contagious disease is not actionable, as he will not on that account be excluded from society; 2 Term 473, 474; 2 Stra. 1189.

*Third*, unfitness in an officer, who holds an office to which profit or emolument is attached, either in respect of morals or inability to discharge the duties of the office; in such a case an action lies; 4 Co. 16 *a*; 5 *id.* 125; 1 Stra. 617; 2 Ld. Raym. 1369; Bull. N. P. 4. The holder of an office, not being an office of profit, cannot, in the absence of special damage, maintain an action of slander for words imputing to him misconduct and consequent unfitness for the office, unless the imputation relates to his conduct in the office, or unless, if true, it would lead to his removal therefrom; [1892] 1 Q. B. 797; or where the office is not one of profit, and whether there is a power of removal from the office for such misconduct or not; [1895] 1 Q. B. 571.

*Fourth*, the want of integrity or capacity, whether mental or pecuniary, in the conduct of a profession, trade, or business, in which the party is engaged, is actionable; as, to accuse an attorney or artist of inability, inattention, or want of integrity; 3 Wils. 187; 2 W. Bla. 750; or a clergyman of being a drunkard; 1 Binn. 178, is actionable. Words spoken of a butcher, charging him with slaughtering diseased cattle for sale for human food are actionable *per se*; 70 Md. 328.

*Fifth.* Bigelow (Torts 48) gives as a fifth class words tending to defeat an expected title: as to call an heir apparent to estates a bastard. See Cro. Car. 469.

Of the second class are words which are actionable only in respect of special damages sustained by the party slandered. Though the law will not permit in these cases the inference of damage, yet when the damage has actually been sustained the party aggrieved may support an action for the publication of an untruth; 1 Lev. 53; unless the assertion be made for the assertion of a supposed claim; Com. Dig. *Action upon the Case for Defamation* (D 30); Bac. Abr. *Slander* (B); but it lies if maliciously spoken. In this case special damage is the gist of the action, and must be particularly specified in the declaration. For it is an established rule that no evidence shall be received of any loss or injury which the plaintiff had sustained by the speaking of the words unless it be specially stated in the declaration. And this rule applies equally where the special damage is the gist of the action and where the words are in themselves actionable; Heard, Libel & S. § 51.

The charge must be false; 5 Co. 125. The falsity of the accusation is to be implied till the contrary is shown; 2 East 436; 1 Saund. 242. The instance of a master making an unfavorable representation of his servant, upon an application for his character, seems to be an exception, in that case there being a presumption, from the occasion of speaking, that the words were true; 3 B. & P. 587.

The slander must, of course, be published,—that is, must be communicated to a third person,—and in a language which he understands; otherwise the plaintiff's reputation is not impaired; 1 Rolle, Abr. 74; Cro. Eliz. 857; 1 Saund. 242, n. 3; Bac. Abr. *Slander* (D 3). There is no publication if the words were not understood by the persons present, nor repeated by them; 48 Ill. App. 435. The slander must be published respecting the plaintiff.

It is not enough to say that by some person or other the words used might be understood in a defamatory sense; [1897] A. C. 68. "Because some persons may choose, not by reason of the language itself, but by reason of some fact to which it refers, to draw an unfavorable inference,

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it does not follow that such matter is libellous: 5 C. P. D. 541.

It will afford no justification that the defamatory matter has been previously published by a third person, that the defendant at the time of *his* publication disclosed the name of that third person and believed all the statements to be true; Heard, Libel & S. § 148. And a repetition of oral slander already in circulation, without expressing any disbelief of it or any purpose of inquiring as to its truth, though without any design to extend its circulation or credit, or to cause the person to whom it is addressed to believe or suspect it to be true, is actionable; 5 Gray 3. It is no defence in an action of slander that the words were used to and not of plaintiff, when others were present and heard the words spoken; 89 Ga. 829.

To render the words actionable, they must be uttered without legal occasion. On some occasions it is justifiable to utter slander of another; in others it is excusable, provided it be uttered without express malice; Bac. Abr. *Slander* (D, 4); Rolle, Abr. 87; 1 Viner, Abr. 540. It is justifiable for an attorney to use scandalous expressions in support of his client's cause and pertiment thereto; 1 Maule & S. 280; 1 Holt 531; 1 B. & Ald. 232. See 2 S. & R. 469; 11 Vt. 536. The *bona fide* statements of one church member, on the trial of another before a church tribunal, that such other had committed adultery with plaintiff, not a member of the church, are privileged communications; 88 Ga. 620. Members of congress and other legislative assemblies cannot be called to account for anything said in debate. See PRIVILEGED COMMUNICATIONS.

Malice is essential to the support of an action for slanderous words. Odgers, Lib. & Sl. 271. But malice is, in general, to be presumed until the country be proved; 4 B. & C. 247; 1 Saund. 242, n. 2; 1 East 563; 5 B. & P. 385; Bull. N. P. 8; see 55 Fed. Rep. 240; except in those cases where the occasion *prima facie* excuses the publication; 4 B. & C. 247. See 14 S. & R. 359; 48 Ill. App. 294. Repetition of the slander after suit begun may be shown to prove malice and aggravate damages; 48 Ill. App. 413. Defendant is not required, in an action for slander in charging plaintiff with theft, to prove the truth of the charge beyond a reasonable doubt, but a preponderance of evidence is sufficient; 67 Hun 543. An admission by defendant at plaintiff's request and in the presence of a third party that on a previous occasion he had used the alleged slanderous words, is no ground of action when it does not appear that the language was originally used in the presence of a third party; 86 Fed. Rep. 96.

The word "malicious" in defining the intent with which a slander is spoken, is not to be considered in the sense of spite or hatred against a person, but as meaning that the party is actuated by improper and indirect motives other than interest of the public; 70 Md. 328; 57 Conn. 78. See MALICE.

See as to slander of a physican, 28 Am. L. Reg. 465. As to the admissibility of evidence of the defendant's pecuniary means, see 23 Alb. L. J. 44.

See, generally, Comyns, Dig.; Bacon, Abr.; 1 Viner, Abr. 187; Starkie, Slander; Heard, Libel & Slander; Odger, Slander; Bigelow, L. C. Torts; 1 Marvel, Del. 408; JUSTIFICATION; PUBLICATION; LIBEL.

**SLANDER OF TITLE.** A statement tending to cut down the extent of one's title.

"An action on the case for special damage sustained by reason of the speaking or publication of the slander of the plaintiff's title." 3 Bing. N. C. 371.

Malice, that is absence of good faith, is an essential condition of liability; 19 Ch. Div. 386; or actual malice, as well as special damage; Poll. Torts 294.

The action formerly applied only to real property; but now extends to chattels and to property rights, such as those under patents. See LIBEL, where the subject is discussed.

An assertion of title made by way of self-defence or as a warning to others, is not actionable, though the claim be mistaken, if made in good faith; Poll. Torts 295; L. R. 4 Q. B. 730.

An action for *slander of title* is not properly an action for words spoken, but an action on the case for special damage sustained by reason of the speaking or publication of the slander of the plaintiff's title. The property may be either real or personal, and the plaintiff's interest therein may be anything that has a market value. It makes no difference whether the defendant's words be spoken, written, or printed, save as affecting the damages, which should be larger when the publication is more permanent or extensive, as by advertisement. The action is ranged under that division of actions in the digests and other writers on the text law, and is so held by the courts of the present day. The slander may be of such a nature as to fall within the scope of ordinary slander. It is essential, to give a cause of action, that the statement *should* be false. It is essential, also, that it should be malicious,—not malicious in the worst sense, but with intent to injure the plaintiff. If the statement be true, if there really be the infirmity in the title that is suggested, no action will lie however malicious the defendant's intention might be; Heard, Libel & S. §§ 10, 59; Poll. Torts 389. See 90 Cal. 532.

Where a person claims a right in himself which he intends to enforce against a purchaser, he is entitled, and in common fairness bound, to give the intended purchaser warning of his intention; and no action will lie for giving such preliminary warning, unless it can be shown either that the threat was made *mala fide*, only with intent to injure the vendor, and

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without any purpose to follow it up by an action against the purchaser, or that the circumstances were such as to make the bringing an action altogether wrongful; L. R. 4 Q. B. 730; 14 Cent. L. J. 187; Odger, Libel & S. 138. The denial of a complaining party's title made *bona fide* in assertion of the title (real or honestly believed to exist) of the party making such denial, will not sustain an action for slander of title; 101 N. C. 273.

**SLANDERER.** A calumniator who maliciously and without reason imputes a crime or fault to another of which he is innocent. See SLANDER.

**SLAVE.** One over whose life, liberty, and property another has unlimited control.

Every limitation placed by law upon the absolute control modifies and to that extent changes the condition of the slave. In every slaveholding state of the United States the life and limbs of a slave were protected from violence inflicted by the master or third persons.

Among the Romans the slave was classed among things (*res*). He was *homo sed non persona*. Heineccius, Elem. Jur. l. 1, § 75. He was considered *pro nullo et mortuo, quia nec statu familiæ nec civitatis nec libertatis gaudet*. *Id.* § 77. See, also, 4 Dev. 340; 9 Ga. 582. In the United States, as a person, he was capable of committing crimes, of receiving his freedom, of being the subject of homicide, and of modifying by his volition very materially the rules applicable to other species of property. His existence as a person being recognized by the law, that existence was protected by the law; 1 Hawks 217; 1 Ala. 8; 1 Miss. 83; 5 Rand. 678; 1 Yerg. 156.

In the slaveholding states the relations of husband and wife and parent and child were recognized by statutes in relation to public sales, and by the courts in all cases where such relations were material to elucidate the motives of their acts.

A slave had no political rights. His civil rights, though necessarily more restricted than the freemen's, were based upon the law of the land. He had none but such as were by that law and the law of nature given to him. The civil-law rule, "*partus sequitur ventrem*," was adopted in all the slaveholding states, the status of the mother at the time of birth deciding the status of the issue; 2 Rand. 246; 1 Hayw. 234; 1 Cooke 381; 2 Dana 432; 2 Mo. 71; 14 S. & R. 446; 3 H. & M'H. 139; 20 Johns. 1; 12 Wheat. 568; 2 How. 265, 496.

The slave could not acquire property: his acquisitions belonged to his master; 5 Cow. 397; 1 Bail. 633; 2 Hill, Ch. 397; 6 Humphr. 299; 2 Ala. 320; 5 B. Monr. 186; 92 U. S. 27. The *peculium* of the Roman slave was *ex gratia*, and not of right; Inst. 2, 9, 3. In like manner, negro slaves in the United States were, as a matter of fact, sometimes permitted by their masters *ex gratia*, to obtain and retain property. The slave could not be a witness, except for and against slaves or free negroes. This was, perhaps, the rule of the common law. None but a freeman was *otherwise*. In the United States the rule of exclusion which we have mentioned was enforced in all cases where the evidence was offered for or against white persons; 6 Leigh 74. In most of the states this exclusion was by express statutes, while in others it existed by custom and the decision of the courts; 10 Ga. 519. In the slaveholding states, and in Ohio, Indiana, Illinois, and Iowa, by statute, the rule was extended to include free persons of color or emancipated slaves; 14 Ohio 190; 3 Harr. & J. 97. The slave could be a suitor in court only for his freedom. For all other wrongs he appeared through his master, for whose benefit the recovery was had; 9 Gill & J. 19; 1 Mo. 608; 4 Yerg. 303; 3 Brev. 11; 4 Gill 249; 9 La. 156; 4 T. B. Monr. 169. The suit for freedom was favored: 1 Hen. & M. 143; 8 Pet. 44; 2 A. K. Marsh. 467. Lapse of time worked no forfeiture by reason of his dependent condition; 8 B. Monr. 631; 1 Hen. & M. 141. The master was bound to maintain, support, and defend his slave, however helpless or impotent. If he failed to do so, public officers were provided to supply his deficiency at his expense.

Cruel treatment was a penal offence of a high grade. Emancipation of the slave was the consequence of conviction in Louisiana; and the sale of the slave to another master was a part of the penalty in Alabama and Texas.

It will be presumed that a person who was a slave before 1865 in this country is a negro; 107 N. C. 609.

The enfranchisement of a slave was called manumission. See BONDAGE; MANUMISSION; SERVUS; FREEDOM. Slavery was abolished in the United States by the thirteenth amendment to the constitution.

**SLAVE-TRADE.** The traffic in slaves, or the buying and selling of slaves for profit. It is either foreign or domestic.

The history of the slave-trade is as old as the authentic records of the race. Joseph was sold to Ishmaelitish slave-traders, and Egypt has been a mart for the traffic from that day to this. The negro early became a subject of it. In every slave-market he has been found, and never as a master except in Africa. The Roman mart, however, exhibited a variety of all the conquered races of the world. At Bristol, in England, for many years about the eleventh century, a brisk trade was carried on in purchasing Englishmen and exporting them to Ireland for sale. And William of Malmsbury states that it seems to be a natural custom with the people of Northumberland to sell their nearest relations.

The African slave-trade on the eastern coast has been carried on with India and Arabia from a period difficult to be established, and was continued with British India while British ships-of-war hovered on the western coast to capture the pirates engaged in the same trade. On the western coast the trade dates from 1442. The Spaniards for a time monopolized it. The Portuguese soon rivalled them in its prosecution. Sir John Hawkins, in 1562, was the first Englishman who engaged in it; and queen Elizabeth was the first Englishwoman known to share in the profits.

Immense numbers of African negroes were transported to the New World, although thousands were landed in England and France and owned and used as servants. The large profits of the trade stimulated the avarice of bad men to forget all the claims of humanity; and the horrors of the middle passage, though much exaggerated, were undoubtedly very great.

The American Colonies raised the first voice in Christendom for the suppression of the slave-trade, but the interests of British merchants were too powerful with the king, who stifled their complaints. The constitution of the United States, in 1789, was the first governmental act towards its abolition. By it, congress was forbidden to prohibit the trade until the year 1808. This limitation was made at the suggestion of South Carolina and Georgia, aided by some of the New England states. Yet both of those states, by state action, prohibited the trade many years before the time limited.—Georgia as early as 1793. In 1807, an act of congress was passed which prohibited the trade after 1808, and by subsequent acts it was declared piracy. The federal legislation on the subject will be found in acts of congress passed respectively March 22, 1794, May 10, 1800, March 2, 1807, April 20, 1818, March 3, 1819, and May 15, 1820. In the year 1807, the British parliament also passed an act for the abolition of the slave-trade,—the consummation of a parliamentary struggle continued for nineteen years, and fourteen years after a similar act had been adopted by Georgia. Great efforts have been made by Great Britain, by treaties and otherwise, to suppress this trade, one being entered into at Brussels in 1896. As to the present condition of the slave trade throughout the world, see Rep. Int. L. Assn. (1895) 155. See Buxton's Slave-Trade, etc.; Carey's Slave-Trade; Cobb's Historical Sketch of Slavery.

**SLAY.** When not used in relation to battle the word is synonymous with kill. 32 La. Ann. 351.

**SLEEPING-CAR.** The servants and

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employes in charge of sleeping or drawing-room cars are considered in the same light as if they were employed by the railroad company, notwithstanding the existence of a separate agreement between the railroad and the sleeping-car company, whereby the latter furnishes its own servants and conductors, and has exclusive control of the cars used on the former company's road; Beach, Railr. 1007; 19 Alb. L. J. 471; 125 Mass. 54. See 52 Fed. Rep. 262.

Sleeping-car companies are not liable as innkeepers; 73 Ill. 360; 16 Abb. Pr. (N. S.) 352; 6 Ohio Dec. 85; 24 Am. L. Reg. N. S. 95; 28 Neb. 239; nor as common carriers; 73 Ill. 360; 143 Mass. 267; 40 La. Ann. 87; 151 N. Y. 163; 3 Penny. 78; 124 N. Y. 53; 69 Tex. 120; 24 Mo. App. 29; 63 Miss. 609; 52 Fed. Rep. 262; 74 *id.* 499; nor as a carrier providing state-rooms for his passengers; 43 How. Pr. 466.

A sleeping-car company impliedly undertakes to keep a reasonable watch on the passenger and his property; but no more; 23 Am. L. Reg. N. S. (Ky.) 788; whether the passenger is in his berth or in the wash-room; 28 Mo. App. 199; 23 S. E. Rep. (Ga.) 186; while he is asleep; 73 Ill. 360; 24 Mo. App. 29; or while occupying his berth; 143 Mass. 267. The company is liable for the watch and money of a passenger stolen while he was asleep, where it appeared that the company's servant disobeyed a regulation which required him to keep a continuous watch during the night; 16 Am. & Eng. R. Cas. 324. It is the duty of a sleeping-car company to keep reasonable guard over the persons and property of passengers; 84 Ind. 474; 74 Tex. 654; 143 Mass. 267; it is liable only where there is a lack of ordinary care; 6 Ohio Dec. 85.

It is not liable for a pocket-book, containing money, negligently left by a passenger, if stolen by some one not in the company's employ, unless an agent of the company knew, before the theft, that the property had been so left; 63 Miss. 609. It is not ordinarily liable for property stolen by another passenger; 84 Ind. 474. Where a porter, acting under the rules of the company, takes charge of baggage to aid in removing it from the car, it is within the scope of his employment, and the company is liable for its loss; 44 N. E. Rep. (Ind. App.) 1010.

The company is liable—in any case—only for a reasonable amount of money and personal belongings appropriate to the circumstances of the plaintiff; 51 Fed. Rep. 796; 143 Mass. 267; 28 Mo. App. 199; 72 Ia. 228; 49 N. Y. S. 1111. In the absence of evidence of what is a reasonable amount, it has been held that the verdict must be for nominal damages only; 32 Mo. App. 682.

The duty of a sleeping-car company to protect its passengers from thieves cannot be waived by words printed upon the passenger's ticket or notices posted in the car; 26 S. W. Rep. (Tex.) 112. It cannot avoid its liability by posting in the car a notice disclaiming responsibility for personal property left in berths, if such notice is not known to the passenger; 143 Mass. 267.

Though a passenger negligently leave his property exposed, if it is stolen by a servant of the sleeping-car company, the company is liable; 74 Tex. 754; 23 S. W. Rep. Tenn. 70; but it is not liable where a passenger's satchel is carelessly left, during his absence from his seat, within the reach of persons outside; 143 Mass. 243; if a passenger leave a large sum of money under his pillow while he goes to the wash-room, he cannot recover; 37 Mo. App. 600; unless it was left with the porter; 50 *id.* 474.

Negligence on the part of the sleeping-car company's servants is not to be presumed from the mere fact of the loss, but must be shown; 28 Mo. App. 199; 6 Ohio Dec. 85; 124 N. Y. 53; 72 Ia. 228; 69 Tex. 120. Contributory negligence on the part of plaintiff may defeat his recovery; 143 Mass. 267; 51 Fed. Rep. 796; 63 Miss. 609. The presumption of negligence arising from proof of loss is rebutted by the porter's uncontradicted evidence that he watched the car till after the loss; 3 Colo. App. 340.

The railroad company is liable to a passenger who is injured through the negligence of a servant of a sleeping-car company; 38 Ohio St. 461; 102 U. S. 451; though riding in a different car from the one in which he has purchased a seat; 102 U. S. 451; even though he knew that the sleeping-car was operated by a separate corporation; see 102 U. S. 451; Wood, Ry. 1700; though the question of his knowledge was deemed important in 38 Ohio St. 461.

For an unjustifiable and wanton assault by a porter on a passenger on a railroad train who had not purchased a sleeping-car ticket, it was held that the railway company was liable, but that the sleeping-car company was not; 40 La. Ann. 87, 417. Whether the latter is to be held liable for the violent act of a porter depends upon whether the act came within the scope of his employment; 20 Fed. Rep. 100. The porter was held to be the servant of the railroad company in 120 N. Y. 117 (8 L. R. A. 224); 102 U. S. 451. Where a passenger is ejected from a sleeping-car by train hands, their act is the act of the railroad company, not of the sleeping-car company; 49 Mo. App. 75.

It has been held that where a passenger is wrongfully expelled from a sleeping-car by a servant of the railroad company, the sleeping-car company is not liable, and if expelled by a servant of the latter, the railroad company is not liable; 37 Fed. Rep. 841.

It cannot be said on demurrer that a company is not liable for injury to a passenger caused by the excessively low temperature of a car; 74 Fed. Rep. 499.

A railroad company cannot, by any arrangement with a sleeping-car company, evade the duty of providing proper means

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for the safe carriage of passengers; 102 U. S. 457; 16 Lea 380; 125 Mass. 54; 108 N. Y. 80.

A passenger travelling on a free pass, by which he waived action for injuries, purchased a seat in a sleeping-car, and while riding in it was injured; it was held that he was still bound by his waiver; 108 N. Y. 80.

A rule of a railroad company requiring a passenger to have a first-class ticket for his transportation before he can be assigned to a berth in a sleeping-car, is a reasonable one and can be legally enforced; 49 Ill. App. 75.

A sleeping-car company is bound to afford equal facilities to all travellers who apply for them in compliance with reasonable regulations; 106 Ill. 222; 45 Fed. Rep. 330; but it has a right to sell a section to one passenger and is not liable to a passenger to whom it has refused to sell one of the berths in such section, though it was not occupied; 45 Fed. Rep. 339. And it is not bound to furnish a berth to one who by the rules of the railroad company is not entitled thereto; 144 Mass. 6; 52 Fed. Rep. 262.

A purchaser of a section may share its use with any proper person whom he invites into it; 45 Fed. Rep. 330; and he may, on leaving the train, transfer the use of his section to another first-class passenger for the rest of the trip; 34 Am. L. Reg. 709 (Super. Ct. of Baltimore).

A passenger is entitled to occupy only the berth he pays for and which his ticket specifies; 14 S. W. Rep. (Tex.) 855.

One who has paid for a berth from one point to another is entitled to a continuous passage in it, or in one equally good, and cannot be transferred to another berth or another car at the arbitrary discretion of the company; 65 Ind. 153.

In the contract for the use of the berth there is directly involved an obligation to awaken and notify the passenger in time for him to prepare safely and comfortably to leave the train at his destination; 79 Tex. 468.

See 2 Beach, Railways § 1007; Hutchinson, Carriers, 2d ed. § 617 *d*; 2 Rorer, Railroads; Bishop, Non-Contract Law § 1162; 21 L. R. A. 289; 9 L. R. A. 173.

**SLEDGE.** A hurdle used to draw traitors to execution. 1 Hale, P. C. 82.

**SLEEPING RENT.** A fixed rent, as opposed to one varying with the profits. 2 Harr. & W. 43.

**SLIP.** In negotiations for a policy of insurance the "slip" is a memorandum between the parties containing the terms of the proposed insurance, and initialled by the underwriters.

**SLIPPA.** A stirrup. There is a tenure of land in Cambridgeshire by holding the sovereign's stirrup.

**SLOUGH.** An arm of a river flowing between islands and the main land. 55 Ia. 565.

**SMALL DEBTS COURTS.** The several county courts established by 9 & 10 Vict. c. 95, for the purpose of bringing justice home to every man's door.

**SMART-MONEY.** Vindictive or exemplary damages given beyond the actual damage, by way of punishment and example, in cases of gross misconduct of defendant. 15 Conn. 225; 14 Johns. 352; 10 Am. L. Reg. N. S. 566. That it cannot be given by jury, see 2 Greenl. Ev. § 253, n. See EXEMPLARY DAMAGES.

**SMELTING.** Smelting, though by derivation synonymous with melting, has come to mean a melting of ores in the presence of some re-agent which operates to separate the metallic element by combining with a non-metallic element. 68 Fed. Rep. 354.

**SMOKE-SILVER.** A modus of sixpence in lieu of tithe-wood. Twisdale, Hist. Vindicat. 77.

**SMUGGLING.** The fraudulent taking into a country, or out of it, merchandise which is lawfully prohibited.

This definition was quoted and approved by Brewer, J., in 156 U. S. 185.

"Smuggling consists in the *bringing on shore*, or carrying from the shore, goods and merchandise, for which the duty has not been paid, or of goods of which the importation or exportation is prohibited." 6 Bac. Abr. 258; so, in almost precisely the same words in 1 Hawk. Pl. Cr. 661; 1 Russ. Cr. 172; Gabb. Cr. L. 848.

In the Anti-Moiety Act, June 22, 1874, it was provided:

"That *for the purpose of this act*, smuggling shall be construed to mean *the act*, with intent to defraud, of bringing into the United States, or with like intent, attempting to bring into the United States, dutiable articles without passing the same, or the packages containing the same, through the custom-house, or submitting them to the officers of the revenue, for examination." 18 U. S. Statutes at Large, ch. 391, p. 186.

**SO.** The terms "hence" and "therefore" are sometimes the equivalent of "so," and the latter word is thus understood whenever what follows is an illustration of or conclusion from what has gone before. 33 Ind. 431.

**SO HELP YOU GOD.** See OATH.

**SOC.** See SOCAGE.

**SOCAGE.** A species of tenure, whereby the tenant held his lands of the lord by any certain service in lieu of all other services, so that the service was not a knight's service. Its principal feature was its certainty: as, to hold by fealty and a certain rent, or by fealty-homage and a certain rent, or by homage and fealty without rent, or by fealty and certain corporal service, as ploughing the lord's land for a specified number of days. 2 Bla. Com. 80.

The term socage was afterwards ex-



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tended to all services which were not of a military character, provided they were fixed: as, by the annual payment of a rose, a pair of gilt spurs, a certain number of capons, or of so many bushels of corn. Of some tenements the service was to be hangman, or executioner of persons condemned in the lord's court; for in olden times such officers were not volunteers, nor to be hired for lucre, and could only be bound thereto by tenure. There were three different species of these socage tenures—one in frank tenure, another in ancient tenure, and the third in base tenure: the second and third kinds are now called, respectively, tenure in ancient demesne, and copyhold tenure. The first is called free and common socage, to distinguish it from the other two; but, as the term socage has long ceased to be applied to the two latter, socage and free and common socage now mean the same thing. Bracton; Co. Litt. 17, 86. See TENURE.

By the statute of 12 Car. II. c. 24, the ancient tenures by knight's service were abolished, and all lands, with the exception of copyholds and of ecclesiastical lands, which continued to be held in free alms (frankalmoigne), were turned into free and common socage and the great bulk of real property in England is now held under this ancient tenure. Many grants of land in the United States, made, previous to the revolution, by the British Crown, created the same tenure among us, until they were formally abolished by the legislatures of the different states. In 1787, the state of New York converted all feudal tenures within its boundaries into a tenure by free and common socage; but in 1830 it abolished this latter tenure, with all its incidents, and declared that from thenceforth all lands in the state should be held upon a uniform allodial tenure, and vested an absolute property in the owners according to their respective estates. Similar provisions have been adopted by other states; and the ownership of land throughout the United States is now essentially free and unrestricted. See TENURE; SOKA.

**SOCER** (Lat.). The father of one's wife; a father-in-law.

**SOCIAL ENJOYMENT.** These words are too comprehensive to state as the object for which a corporation is to be formed, as some social enjoyments are unlawful. 2 D. R. Pa. 702.

**SOCIDA** (Lat.). **In Civil Law.** The name of a contract by which one man delivers to another, either for a small recompense or for a part of the profits, certain animals, on condition that if any of them perish they shall be replaced by the bailor or he shall pay their value.

A contract of hiring, with the condition that the bailee takes upon him the risk of the loss of the thing hired. Wolff § 638.

**SOCIETAS** (Lat.). **In Civil Law.** A contract in good faith made to share in common the profit and loss of a certain business or thing, or of all the possessions of the parties. Calvinus, Lex.; Inst. 3. 26; Dig. 17. 21. See PARTNERSHIP.

**SOCIETAS LEONINA** (Lat.). **In Roman Law.** That kind of society or partnership by which the entire profits should belong to some of the partners in exclusion of the rest.

It was so called in allusion to the fable of the lion and other animals, who having entered into partnership for the purpose of hunting, the lion appropriated all the prey to himself; Dig. 17. 2. 29. 2; Poth. *Traité de Société*, n. 12. See 2 M'Cord 421; 6 Pick. 372.

**SOCIETE. In French Law.** Partnership.

**SOCIETE EN COMMANDITE. In Louisiana.** A partnership formed by a contract by which one person or partnership agrees to furnish another person or partnership a certain amount, either in property or money, to be employed by the person or partnership to whom it is furnished, in his or their own name or firm, on condition of receiving a share in the profits, in the proportion determined by the contract, and of being liable to losses and expenses to the amount furnished and no more. La. Civ. Code, art. 2810; *Code de Comm.* 26, 33; 4 Pardessus, *Dr. Com.* n. 1027; Dalloz, Dict. *Société Commerciale*, n. 166. See Goirand, Code; COMMENDAM; PARTNERSHIP.

**SOCIETY.** A society is a number of persons united together by mutual consent, in order to deliberate, determine, and act jointly for some common purpose.

Societies are either incorporated and known to the law, or unincorporated, of which the law does not generally take notice.

By *civil society* is usually understood a state, a nation, or a body politic. Rutherforth, Inst. c. 1, 2.

**SODOMITE.** One who has been guilty of sodomy. Formerly such offender was punished with great severity, and was deprived of the power of making a will.

**SODOMY.** A carnal copulation by human beings with each other against nature, or with a beast. See 2 Bish. Cr. Law § 1191; Whart. Cr. Law 579.

It may be committed between two persons both of whom consent, even between husband and wife; 8 C. & P. 604; and both may be indicted; 1 Den. Cr. Cas. 464; 2 C. & K. 869. Penetration of the mouth is not sodomy; Russ. & R. 331; 31 Tex. Cr. R. 551. As to emission, see 12 Co. 36; 1 Va. Cas. 307. See 1 Russ. Cr. 698; 1 Mood. Cr. Cas. 34; 8 C. & P. 417; 3 Harr. & J. 154; 94 Mich. 27.

A minor 12 years of age cannot consent to an act of sodomy committed on his person; and if he submits to it without resistance the act is still done by force; 61 Conn. 50.

A domestic fowl is an "animal" within 24 & 25 Vict. c. 100, punishing unnatural

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offences. 24 Q. B. Div. 357. But see 1 Russ. Cr. 698.

**SOIL.** The superficies of the earth on which buildings are erected or may be erected.

The soil is the principal, and the building, when erected, is the accessory.

**SOIT DROIT FAIT AL PARTIE.** **In English Law.** Let right be done to the party. A phrase written on a petition of right, and subscribed by the king. See PETITION OF RIGHT.

**SOIT FAIT COMME IL EST DESIRE.** Let it be as it is desired. The royal assent to private acts of parliament.

**SOKA, SOC, SOK.** Jurisdiction; a power or privilege to administer justice and execute the laws; also a shire, circuit, or territory. Cowel.

In the Domesday Book and the Leges Henrici distinction between "*sake* and *soke*" is obliterated. *Soke* means jurisdiction and "*sake* and *soke*" is but a pleonastic phrase, which means no more than *soke*. Before the Norman times the idea of jurisdiction was expressed by a technical word, the meaning of which was rigorously observed. This is *sacu* and the word has strangely vanished from our legal vocabulary, but is still preserved even in its technical sense by the German *sache*; Maitl. Domesd. 259. The same writer says that of the two words *soke* is by far the commoner, and that *sake* is rarely found except in connection with *soke*, and when so found it seems to be merely an equivalent for the latter word. *Sake* originally signified a matter, a thing; hence, a matter or cause in the lawyers' sense of these terms. A "matter" in dispute between litigants, a "cause" before a court. While *soke*, *socna*, *soka*, is the Anglo-Saxon *socn*, and has for its primary meaning a seeking. The phrase "holding with *sake* and *soke*" seems to be equivalent after the Conquest with "he held freely;" Maitl. Domesd. 80; which see for a learned discussion as to the distinction between the two words.

**SOKEMANS, SOCMEN.** Freeholders whose holdings might be no larger than those of the villans, but who would generally, instead of the heavy services, pay fixed and not heavy rent; 1 Soc. Eng. 360. Those who held their land in socage 2 Bla. Com. 100.

**SOLAR DAY.** That period of time which begins at sunrise and ends at sunset; the same as "artificial day." Co Litt. 135 *a*.

**SOLAR MONTH.** A calandar month. Co. Litt. 135 *b*; 1 W. Bla. 450; 1 Maule & S. 111; 1 Bingh. 307.

**SOLARES.** **In Spanish Law.** Lots of ground. This term is frequently found in grants from the Spanish government of lands in America. 2 White, Recop. 474.

**SOLATIUM.** Compensation.

**SOLD NOTE.** The name of an instrument in writing, given by a broker to a buyer of merchandise, in which it is stated that the goods therein mentioned have been sold to him. 1 Bell, Com. 435; Story, Ag. § 28. Some confusion may be found in the books as to the name of these notes: they are sometimes called *bought notes*.

**SOLDIER.** A military man; a private in the army.

Soldiers re-enlisted "for clerical service and messenger duty," under act of congress of July 29, 1886, are still in the service, and under U. S. Rev. St. § 1285, are entitled to the additional pay for certificates of merit. 28 Ct. Cl. 462. See LONGEVITY PAY.

**SOLE.** Alone, single; used in contradictinction to *joint* or *married*. A sole tenant, therefore, is one who holds lands in his own right, without being joined with any other. A *feme sole* is a single woman; a sole corporation is one composed of only one natural person.

**SOLEMNITY.** The formality established by law to render a contract, agreement, or other act valid.

As the solemnization of a marriage is the consummation of a valid marriage; 33 L. J. Ch. 139; 49 *id.* 193; and an oath to be taken solemnly does not merely mean religiously, but with all due solemnities; 14 Q. B. D. 667. See MARRIAGE.

**SOLICITATION.** Solicitation to commit a crime is usually held to be punishable as a misdemeanor, though the offence solicited may not be committed; 135 Mass. 545; 27 N. J. 112; but it has been held otherwise, as, where a letter was written requesting one to commit murder, which never reached the person to whom it was addressed; 19 W. R. 109. See 29 Mich. 50; 11 Ga. 253. If the offence requires the concurrent action of two or more persons, it is doubtful whether a solicitation of one person by another to commit the offence is in itself criminal; 1 McClain, Cr. Law § 220.

The offence of this character most frequently mentioned in criminal law books is what is termed solicitation of chastity. The asking a person to commit adultery or fornication of itself is not an indictable offence; Salk. 382; 2 Chitty, Pr. 478; 54 Pa. 209; *contra*, 7 Conn. 267; Bish. N. Cr. L. §§ 767, 768. The distinction is sharply drawn by the Pennsylvania case and the Connecticut case. In the latter, solicitation to commit adultery, which was a statutory felony, was held indictable, in the former where the offence was a misdemeanor, it was not. See also Whart. Cr. L., 9th ed. § 179, and a criticism thereon in 146 Pa. 83. In England, the bare solicitation of chastity is punished in the ecclesiastical courts; 2 Chitty, Pr. 478. See Whart. Cr. Law 1738; 2 Ld. Raym. 809; Bish. Cr. Law § 767.

The civil law punished arbitrarily the person who solicited the chastity of another; Dig 47. 11. 1.

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The term solicitation is also used in connection with other offences, as, solicitation to larceny, sodomy, bribery, threatening notice. 1 Bish. Cr. L. § 767. Under the stat. of 24 & 25 Vict. c. 100, § 4, whoever shall solicit any one to murder any other person, shall be guilty of a misdemeanor. Under this act the editor of a German paper in London was indicted and found guilty, for having published an article commending the assassination of the emperor of Russia; 7 Q. B. Div. 244; 1 Bish. Cr. L. 768 *a*. Solicitation and an offer of money to commit murder, meet the test of a common-law crime (see MISDEMEANOR), constituting an act done, a step in the direction of that crime; 146 Pa. 88. On an indictment for solicitation to commit arson, evidence that the prisoner solicited other parties to burn the same building is admissible; 19 Co. Ct. Rep. Pa. 360.

**SOLITARY CONFINEMENT.** See PENITENTIARY; PUNISHMENT.

**SOLICITOR.** A person whose business is to be employed in the care and management of suits depending in courts of chancery.

A solicitor, like an attorney, will be required to act with perfect good faith towards his clients. He must conform to the authority given him. It is said that to institute a suit he must have a special authority, although a general authority will be sufficient to defend one. The want of a written authority may subject him to the expenses incurred in a suit; 3 Mer. 12. See 1 Phil. Ev. 192; 2 Chitty, Pr. 2. In a recent English case it was held that a compromise entered into before the issue of a writ is not binding on the client; 16 L. T. N. S. 332; the English court of appeal has just held that the same rule applies where a solicitor before action accepted a small sum in discharge of his client's claim without the latter's sanction; 55 Alb. L. J. 404. See ATTORNEY AT LAW; COUNSELLOR AT LAW; PROCTOR.

Solicitors have hitherto been regarded as officers of the court of chancery; and it has been the usual course that, as soon as any one has been admitted an attorney, he should apply to be admitted a solicitor, which is done by the Master of the Rolls as a matter of course. Hunt, Eq. Pl. III. c. 6. But now by the Judicature Act of 1873, s. 87, all solicitors, attorneys, and proctors are to be henceforth called solicitors of the supreme court; Moz. & W.

**SOLICITOR-GENERAL.** The solicitor-general of the United States is appointed by the president to assist the attorney-general in the performance of his duties, and in case of a vacancy in the office of attorney-general, or of his absence or disability, the solicitor-general has the power to exercise all the duties of that office. Except when the attorney-general in particular cases otherwise directs, he and the solicitor-general argue cases in the supreme court, in which the United States is interested. R. S. §§ 347, 359.

**In English Law.** A law officer of the crown, appointed by patent during the royal pleasure, who assists the attorney-general in managing the law business of the crown. Selden I. 6. 7. He is first in right of preaudience; 3 Sharsw. Bl. Com. 28, n. (a), n. 9; Encyc. Brit.

**SOILICTOR OF THE SUPREME COURT.** The solicitors before the supreme courts, in Scotland, are a body of solicitors entitled to practise in the court of session, etc. Their charter of incorporation bears date August 10, 1797.

**SOLICITOR OF THE TREASURY.** The title of one of the officers of the United States, created by the act of May 29, 1830; he is appointed by the president, by and with the advice and consent of the senate, and is under the supervision of the department of justice. R. S. § 349.

**SOLIDO, IN.** See IN SOLIDUM.

**SOLUTIO** (Lat. release). **In Civil Law.** Payment. By this term is understood every species of discharge or liberation, which is called satisfaction, and with which the creditor is satisfied. Dig. 46. 3. 54; Code 8. 43. 17; Inst. 3. 30. This term has rather a reference to the substance of the obligation than to the numeration or counting of the money. Dig. 50. 16. 176.

**SOLUTIO INDEBITI** (Lat.). **In Civil Law.** The case where one has paid a debt, or done an act or remitted a claim because he thought that he was bound in law to do so, when he was not. In such cases of mistake there is an implied obligation (*quasi ex contractu*) to pay back the money, etc.; Poll. Contr. 439; Mackeldey, Civ. Law § 458.

**SOLVENCY.** The state of a person who is able to pay all his debts: as also such attitude of his property as that it may be reached and subjected by process of law, without his consent, to the payment of such debts. 116 Mo. 226; 32 *id.* 369; 4 Cush. 127. The opposite of *insolvency* (*q. v.*).

**SOLVENT.** One who has sufficient to pay his debts and all obligations. Dig. 50. 16. 114.

A person is solvent who owns property enough and so situated that all his debts can be collected from it by legal proceedings; 13 Wend. 377; 53 Barb. 547. But other cases hold that to be solvent one must be able to pay all his debts in the ordinary course of trade. See 2 N. B. R. 149; 79 Ia. 432. See INSOLVENCY.

**SOLVERE** (Lat. to unbind; to untie). To release; to pay; *solvere dicimus eum qui fecit quod facere promisit.* 1 Bouvier, Inst. n. 807.

**SOLVIT AD DIEM** (Lat. he paid at the day). The name of a plea to an action on a bond, or other obligation to pay money, by which the defendant pleads that he paid the money on the day it was due. See 1 Stra. 652; Rep. *temp.* Hardw. 133; Comyns, Dig. *Pleader* (2 W. 29).

This plea ought to conclude with an averment, and not to the country; 1 Sid. 215; 12 Johns. 253. See 2 Phill. Ev. 92; Coxe N. J. 467.

**SOLVIT POST DIEM** (Lat. he paid after the day). The name of a special plea

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in bar to an action of debt on a bond, by which the defendant asserts that he paid the money after the day it became due. 1 Chitty, Pl. 480, 555; 2 Phill. Ev. 93.

**SOMNAMBULISM** (Lat. *somnium*, sleep; *ambulo*, to walk). Sleep-walking.

The mental condition in this affection is not very unlike that of dreaming. Many of their phenomena are the same; and the former differs from the latter chiefly in the larger number of the functions involved in the abnormal process. In addition to the mental activity common to both, the somnambulist enjoys the use of his senses in some degree, and the power of locomotion. He is thereby enabled to perform manual operations as well, frequently, as in his waking state. Usually, however, the action of the senses is more or less imperfect, many of the impressions being incorrectly or not at all perceived. The person walks against a wall, or stumbles over an object in his path; he mistakes some projections for a horse, strides across it, and imagines himself to be riding; he hears the faintest sound connected with what he is doing, while the voices of persons near him, and even the blast of a trumpet, are entirely unnoticed. Occasionally the power of the senses is increased to a degree unknown in the waking state. Jane Rider, whose remarkable history was published some thirty years ago, could read the almost obliterated dates of coins in a dark room, and was able to read and write while her eyes were covered with several folds of handkerchief. For the most part, however, the operations of the somnambulist consist in getting up while asleep, groping about in the dark, endeavoring to make his way out of the house through doors or windows, making some inarticulate sounds, perhaps, and all the while unconscious of persons or things around him. The power of the perceptive faculties, as well as that of the senses, is sometimes increased in a wonderful degree. It is related of the girl just mentioned that in the fit she would sing correctly, and play at backgammon with considerable skill, though she had never done either when awake.

The somnambulist always awakes suddenly, and has but a faint conception, if any, of what he has been thinking and doing. If conscious of anything, it is of an unpleasant dream imperfectly remembered. This fact, not being generally known, will often enable us to detect simulated somnambulism. If the person on waking continues the same train of thought and pursues the same plans and purposes which he did while asleep, there can be no doubt that he is feigning the affection. When a real somnambulist, for some criminal purpose, undertakes to simulate a paroxysm, he is not at all likely to imitate one of his own previous paroxysms, for the simple reason that he knows less than others how he appeared while in them. If, therefore, somnambulism is alleged in any given case, with no other proof than the occurrence of former paroxysms unquestionably genuine, it must be viewed with suspicion if the character of the alleged paroxysm differs materially from that of the genuine ones. In one way or another, a case of simulation would generally be detected by means of a close and intelligent scrutiny, so difficult is it to imitate that mixture of consciousness and unconsciousness, of dull and sharp perceptions, which somnambulism presents. The history of the individual may throw some light on the matter. If he has had an opportunity of witnessing the movements of a somnambulist in the course of his life, this fact alone would rouse suspicion, which would be greatly increased if the alleged paroxysm presented many traits like those of the paroxysms previously witnessed.

The legal consequences of somnambulism should be precisely those of insanity, which it so nearly resembles. The party should be exempt from punishment for his criminal acts, and be held amenable in damages for torts and trespasses. Somnambulism, though possibly not technical insanity, will sometimes have the same effect as excusing crime; 78 Ky. 183; 1 Bish. N. Cr. L. § 395; "simply because the person committing it would not know what he was doing;" Stephen, J., in 23 Q. B. D. 168. The only possible exceptions to this principle is to be found in those cases where the somnambulist, by meditating long on a criminal act while awake, is thereby led to commit it in his next paroxysm. Hoffbauer contends that, such being generally the fact, too much indulgence ought not to be shown to the criminal acts of the somnambulist. *Die Psychologie, etc.*, c. 4, art. 2. But surely this is a rather refined and hazardous speculation; and seems like punishing men solely for bad intentions,—because the acts, though ostensibly the ground of punishment, are actually those of a person deprived of his reason. The truth is, however, that criminal acts have been committed in a state of somnambulism by persons of irreproachable character. Tayl. Med. Jur. 744. See Gray, Med. Jur. 265; Whart. & S. Med. Jur. § 492; Rush on the Mind 302; 18 Am. Journ. of Ins. 236. Tirrell's Case, Mass.

**SON.** An immediate male descendant. In its technical meaning in devises, this is a word of purchase; but the testator may make it a word of descent. Sometimes it is extended to more remote descendants. 2 Des. 123, n.

**SON ASSAULT DEMESNE** (L. Fr. his own first assault). **In Pleading.** A form of a plea to justify an assault and battery, by which the defendant asserts that the plaintiff committed an assault upon him and the defendant merely defended himself.

When the plea is supported by evidence, it is a sufficient justification, unless the retaliation by the defendant were excessive and bore no proportion to the necessity or to the provocation received; 1 East, Pl. Cr. 406; 4 Denio 448.

**SON-IN-LAW.** The husband of one's daughter.

**SOON.** Within a reasonable time. 14 Kan. 232.

**SOREHON, or SORN.** An arbitrary exaction, formerly existing in Scotland and Ireland. Whenever a chieftain had a mind to revel he came down among the tenants with his followers, by way of contempt called "*Gilliwitfitts*," and lived on free quarters. Bell, Dict.

**SORS** (Lat.). **In Civil Law.** A lot; chance; fortune. Calvinus, Lex.; Ainsworth, Dict. Sort. Kind. The little scroll on which the thing to be drawn by lot was written. Carpentier, Gloss. A principal or capital sum: *e. g.* the capital of a partnership. Calvinus, Lex.

**In Old English Law.** A principal lent on interest, as distinguished from the interest itself. Pryn. Collect. p. 161; Cowel.

**SORTITIO.** A casting of lots. *Sortitio judicum*, a drawing of judges, on criminal trials, similar to the modern practice of drawing a jury. 3 Bla. Com. 366.

**SOUL SCOT.** A mortuary, or customary gift due ministers, in many par-

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ishes of England, on the death of parishioners. It was originally voluntary and intended as amends for ecclesiastical dues neglected to be paid in the lifetime. 2 Sharsw. Bla. Com. 425*.

**SOUND MIND.** That state of a man's mind which is adequate to reason and comes to a judgment upon ordinary subjects like other rational men. 2 Hamilton, Syst. Leg. Med. 28.

The law presumes that every person who has acquired his full age is of sound mind, and, consequently, competent to make contracts and perform all his civil duties; and he who asserts to the contrary must prove the affirmation of his position by explicit evidence, and not by conjectural proof; 2 Hagg. Eccl. 434; 3 Add. Eccl. 86; 8 Watts 66; Ray, Med. Jur. § 92; 3 Curt. Eccl. 671.

**SOUND MIND AND MEMORY.** This phrase does not mean a mind without a flaw, or a memory without a fault. 16 Daly 540. See WILL.

**SOUNDING IN DAMAGES.** When an action is brought, not for the recovery of lands, goods, or sums of money (as is the case in real or mixed actions or the personal action of debt or detinue), but for damages only, as in covenant, trespass, etc., the action is said to be *sounding in damages*. Steph. Pl. 126.

**SOUNDNESS.** General health; freedom from any permanent disease. 1 Carr. & M. 291. To create unsoundness, it is requisite that the animal should not be useful for the purpose for which he is bought, and that inability to be so useful should arise from disease or accident. 2 Mood. & R. 113, 137; 9 M. & W. 670.

In the sale of animals they are sometimes warranted by the seller to be sound; and it becomes important to ascertain what is soundness. Horses affected by roaring; a temporary lameness, which rendered the horse less fit for service; 4 Camp. 271; but see 2 Esp. Cas. 573; a cough, unless proved to be of a temporary nature; 2 Chitty, Bail. 245, 416; and a nerved horse; Ry. & M. 290; have been held to be unsound. But crib-biting is not a breach of a general warranty of soundness; Holt, Cas. 630; but see 8 Gray 430; 43 Vt. 608. The true test is whether the defect complained of renders the horse less than reasonably fit for present use; 9 M. & W. 668. See Oliph.; Hanover, on Horses; Benj. Sales § 619.

An action on the case is the proper remedy for a verbal warrant of soundness; 1 H. Bla. 17; 9 B. & C. 259; 2 Dowl. & R. 10; 1 Taunt. 566; Bac. Abr. *Action on the Case* (E).

**SOURCES OF THE LAW.** The authority from which the laws derive their force. A term used to include all the reliable testimonials of what constitutes the law.

The power of making all laws is in the people or their representatives, and none can have any force whatever which are derived from any other source. But it is not required that the legislator shall expressly pass upon all laws, and give the sanction of his seal, before they can have life or existence. The laws are, therefore, such as have received an express sanction, and such as derive their force and effect from implication.

The *express* laws are—first, the constitution of the United States: secondly, the treaties made with foreign powers; thirdly, the acts of congress; fourthly, the constitutions of the respective states; fifthly, the laws made by the several state legislatures; sixthly, the laws made by inferior legislative bodies, such as the councils of municipal corporations, and the general rules made by the courts.

The constitutions of the respective states, if not opposed to the provisions of the constitution of the United States, are of binding force in the states respectively; and no act of the state legislature has any force which is made in contravention of the state constitution.

The laws of the several states constitutionally made by the state legislatures have full and complete authority in the respective states.

Laws are frequently made by inferior legislative bodies which are authorized by the legislature: such are the municipal councils of cities or boroughs. Their laws are generally known by the name of ordinances, and when lawfully ordained they are binding on the people. The courts, perhaps by a necessary usurpation, have been in the practice of making general rules and orders, which sometimes affect suitors and parties as much as the most regular laws enacted by congress. These apply to all future cases. There are also rules made in particular cases as they arise: but these are rather decrees or judgments than laws.

The *tacit* laws, which derive their authority from the consent of the people without any legislative enactment, may be subdivided into,—

The *common law*, which is derived from two sources, the common law of England, and the practice and decisions of our own courts. In some states it has been enacted that the common law of England shall be the law, except where the same is inconsistent with our constitutions and laws. See LAW.

*Customs* which have been generally adopted by the people have the force of law.

The principles of *Roman* law. See CIVIL LAW.

The *Canon* law, which was adopted by the ecclesiastical courts, figures in our laws respecting marriage, divorces, wills and testaments, executors and administrators, and many other subjects.

The *jurisprudence*, or decisions of the various courts, have contributed their full share of what makes the law. These decisions are made by following precedents, by borrowing from the sources already mentioned, and sometimes by the less excusable disposition of the judges to legislate on the bench.

The monument where the common law is to be found are the records, reports of cases adjudicated by the courts, and the treatises of learned men. The books of reports are the best proof of what is the common law; but, owing to the difficulty of finding out any systematic arrangement, recourse is had to treatises upon the various branches of the law. The records, owing to their being kept in one particular place and therefore not generally accessible, are seldom used.

See LAW; PRECEDENT; JUDGE-MADE LAW; JUDICIAL POWER; LEGISLATIVE POWER; STARE DECISIS, CONSTITUTIONAL; TREATY; STATUTE; COMMON LAW; CIVIL LAW; PRIZE COURT.

**SOUS SEING PRIVE.** In Louisiana. An act or contract evidenced by writing under the *private signature* of the parties to it. The term is used in opposition to the *authentic act*, which is an agreement entered into in the presence of a notary or other public officer.

**SOUTH AUSTRALIA.** A colony of Great Britain constituting a part of Australia. See AUSTRALIA.

**SOUTH CAROLINA.** One of the original thirteen United States.

This state was originally part of the British province of *Carolina*, then comprehending both North

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Carolina and South Carolina. That province was granted by Charles II., by charter issued to eight lord proprietors, in 1663, and amended in 1665 so as to extend it between twenty-nine and thirty-six degrees thirty minutes, north latitude, drawn from the Atlantic to the Pacific ocean. The first permanent settlement in South Carolina was effected in 1670 by emigrants from England who landed at Beaufort, then Port Royal, in the same year and removed to the point on the river Ashley nearly opposite the present site of Charleston; but, abandoning this position, they again removed, in 1680, to Oyster Point, at the confluence of the Ashley and Cooper, where they founded Charleston.

In 1719, the colonial legislature disowned the proprietary government and threw the colony into the hands of the king, who, accordingly, assumed the control of it, but not until 1729 was the charter surrendered. In that year the shares of seven out of the eight lords proprietors were ceded. The eighth share, which belonged to the family of Lord Granville, formerly Cartaret, was retained, and laid off in North Carolina,—which was about the same time finally divided from South Carolina.

In 1732, that part of South Carolina lying west of the river Savannah was granted by the crown to the Georgia Company, under Oglethorpe. Thus South Carolina was reduced in extent, and, in consequence of subsequent arrangements, made with Georgia in 1787 in the treaty of Beaufort, and with North Carolina in the early part of the present century, the present boundaries were established.

On March 26, 1776, the first constitution was adopted,—the earliest it is believed, of the American constitutions. This constitution was replaced in 1778 by another, and that in 1790 by yet another. Some amendments were made in 1808, 1810, 1816, 1828, and 1834. In 1865 a new constitution was adopted. This in its time was succeeded by that of 1868, which was amended in 1873 and 1876. The present constitution of the state was adopted Dec. 4, 1895.

THE LEGISLATIVE POWER.—The legislative power consists of a senate and a house of representatives, and both together are called the general assembly of the state of South Carolina.

The *Senate* is composed of one member from each county as established for the election of the house of representatives. The members are elected for four years, one half going out of office each second year. The election takes place on the first Tuesday following the first Monday in November.

The *House of Representatives* consists of one hundred and twenty-four members, apportioned among the counties according to their population, elected for two years, at the same time that the election of senators is held.

THE EXECUTIVE POWER.—The supreme executive authority is the governor. No person is eligible to the office of governor who denies the existence of the Supreme Being or who has not attained the age of thirty years and has not been a citizen of the United States, and a citizen and resident of this state five years preceding his election.

He is elected, by the electors qualified to vote for members of the house of representatives, for two years and until his successor is chosen and qualified. He has the usual executive powers and may grant reprieves and pardons after conviction, except in cases of impeachment, and remit fines and forfeitures unless otherwise directed by law.

A *Lieutenant-Governor* is to be chosen at the same time, in the same manner, continue in office for the same period, and be possessed of the same qualifications, as the governor, and shall be *ex-officio* president of the senate. The succession after the lieutenant-governor is to the president of the senate, or in case of his disability the speaker of the house.

THE JUDICIAL POWER.—The judicial power is vested in a supreme court, two circuit courts (common pleas and general sessions). The legislature may establish county courts, municipal courts, and such inferior courts as may be deemed necessary.

The *Supreme Court* consists of a chief justice and three associate justices. They are elected by the legislature for the term of eight years.

It has appellate jurisdiction only in cases of chancery, and otherwise is a court for the correction of errors at law. It has power to issue writs of injunction, *mandamus, quo warranto, habeas corpus, certiorari*, prohibition, and other original and remedial writs.

The state is required to be divided into judicial districts as the general assembly may prescribe and for which a circuit judge is elected by the general assembly for a term of four years. He must be an elector of a county of, and during his continuance in office must reside in, the circuit. These judges hold two circuit courts, to wit: A court of common pleas and a court of general sessions.

The *courts of common pleas* have original jurisdiction, subject to appeal to the supreme court, to issue writs of injunction, *mandamus, habeas corpus*, and such other writs as may be necessary to carry their powers into full effect. They have jurisdiction in all civil cases. They have appellate jurisdiction in all cases within the jurisdiction of inferior courts, except those in which an appeal may be provided by law directly to the supreme court.

The *court of general sessions* has jurisdiction in all criminal cases except those in which exclusive jurisdiction shall be given to inferior courts, and in these it has appellate jurisdiction. It has concurrent jurisdiction with, as well as appellate jurisdiction from, the inferior courts in all cases of riot, assault and battery, and larceny. It sits in each county twice each year at such times and places as the general assembly may direct.

They have such powers as the legislature may grant.

The *Probate Court* in the county of Charleston has jurisdiction in all matters testamentary and of administration; in business appertaining to minors and the allotment of dower, in cases of idiocy and lunacy, and of persons *non compotes*.

In all the other counties this jurisdiction is vested under the constitution as the general assembly may provide, and until such provision in the then existing courts of probate.

## SOUTH DAKOTA. One of the states of the United States.

It was admitted to the Union under the act of Feb. 22, 1889, which included also North Dakota, Montana, and Washington, which together constituted the territories of Dakota, Montana, and Washington. See NORTH DAKOTA.

THE LEGISLATIVE POWER.—This is vested in a legislature consisting of a senate and house of representatives. The number of members of the house shall not be less than seventy-five nor more than one hundred and thirty-five, and those of the senate not less than twenty-five nor more than forty-five. Members of both houses must be qualified electors in the district and citizens of the United States, twenty-five years of age and resident in the state or territory for two years. The sessions are biennial, on the first Tuesday after the first Monday of January in the odd-numbered years.

THE EXECUTIVE POWER.—This is vested in the governor who is elected for two years, a lieutenant-governor, being elected at the same time and for the same term. A plurality elects, but in case of a tie one of the two candidates must be elected by the legislature. The governor has the usual powers, including that of granting pardons and reprieves except in case of treason and impeachment; *provided*, that where the sentence is capital punishment or imprisonment for more than two years, or a fine exceeding $200, no pardon, commutation, or remission shall be granted except on the recommendation of a board of pardons consisting of the presiding judge, secretary of state, and attorney-general. In case of treason the governor may suspend execution until the next meeting of the legislature, which may pardon or commute the sentence.

The lieutenant-governor succeeds to the powers and duties of the governor in case of a vacancy, with the succession, after him, to the secretary of state.

THE JUDICIAL POWER is vested in a supreme court, circuit courts, county courts, justices of the peace, and such municipal courts as may be created by law.

The *Supreme Court* consists of three judges chosen from districts by qualified electors of the state at large. The number may be increased after five years but not to exceed five. It has appellate jurisdiction only, with a superintending control over inferior courts. It may also issue writs of *mandamus, quo warranto, certiorari*, injunction, etc.

The *Circuit Courts* have original jurisdiction of all suits at law and in equity and such appellate jurisdiction as may be conferred by law. The jurisdiction as to value and amount and grade of offence may be limited by law, and the judges thereof have power to issue writs of *habeas corpus, mandamus, quo warranto, certiorari*, injunction, etc.

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The state is divided into judicial circuits, the electors of each of which elect one circuit judge for four years. The number of circuits and judges may be increased by the legislature. Writs of error and appeals lie from the decisions of the circuit courts to the supreme court.

The *County Courts*. There is elected in each organized county a county judge for two years. County courts are courts of record and have original jurisdiction in matters of probate, guardianship, and settlement of estates of decedents, and such other civil and criminal jurisdiction as may be conferred by law, provided that they shall not have jurisdiction in any case where the amount involved exceeds $1,000, except in matters of probate, guardianship, and decedents' estates. Writs of error and appeal may be allowed from the county to the circuit courts or to the supreme court as provided by law. But no appeal or writ of error shall be allowed to the circuit court from its judgment on appeal from a justice of the peace or police magistrate. They have jurisdiction in criminal matters not of the grade of felony and prosecutions may be by information.

**SOVEREIGN.** A chief ruler with supreme power; a king or other ruler with limited power. An action is not maintainable against a foreign sovereign. 44 L. T. Rep. N. S. 199.

Courts of England will take judicial notice of the status of a foreign sovereign and will not take jurisdiction over him, unless he voluntarily submits to it; [1894] 1 Q. B. 149.

A foreign sovereign brought suit to restrain the defendants from using a fund in a certain way, and the defendants set up a claim for damages; it was held that the court had no jurisdiction over such claim; [1898] 1 Ch. 190.

"When a foreign sovereign comes into court for the purpose of obtaining a remedy, then, by way of defence to that proceeding (by counter-claim, if necessary), to the extent of defeating that claim, the person sued may file a cross claim . . . for the purpose of enabling complete justice to be done between them." 29 W. R. 125, per James, L. J.

It is a general rule that the sovereign cannot be sued in his own court without his consent; and hence no direct judgment can be rendered against him therein for costs, except in the manner and on the condition he has prescribed; 40 La. Ann. 856.

See STATE.

**In English Law.** A gold coin of Great Britain, of the value of a pound sterling.

**SOVEREIGN STATE.** One which governs itself independently of any foreign power. See SOVEREIGNTY; STATE.

**SOVEREIGNTY.** The union and exercise of all human power possessed in a state: it is a combination of all power: it is the power to do everything in a state without accountability,—to make laws, to execute and to apply them, to impose and collect taxes and levy contributions, to make war or peace, to form treaties of alliance or of commerce with foreign nations, and the like. Story, Const. § 207.

Abstractly, sovereignty resides in the body of the nation and belongs to the people. But these powers are generally exercised by delegation.

When analyzed, sovereignty is naturally divided into three great powers: namely, the legislative, the executive, and the judiciary; the first is the power to make new laws and to collect and repeal the old; the second is the power to execute the laws, both at home and abroad; and the last is the power to apply the laws to particular facts, to judge the disputes which arise among the citizens, and to punish crimes. See EXECUTIVE POWER; LEGISLATIVE POWER; JUDICIAL POWER.

Strictly speaking, in our republican forms of government the absolute sovereignty of the nation is in the people of the nation; and the residuary sovereignty of each state, not granted to any of its public functionaries, is in the people of the state; 2 Dall. 471.

In international law a state is considered sovereign when it is organized for political purposes and permanently occupies a fixed territory. It must have an organized government capable of enforcing law and be free from all external control. A wandering tribe of savages, or nomads, or people united merely for commercial purposes or under control of another state cannot be considered as a sovereign state. Until a state becomes sovereign in the sense above described, it is not subject to international law. The states of the American Union are each, in a certain sense, sovereign in their domestic concerns, but not in international law, and Norway is an instance of a community not sovereign in international law because bound in a union with Sweden. The fact of sovereignty is usually established by general recognition of other states, and, until such recognition is universal, no community can be considered as sovereign; Snow, Int. Law 19. See INTERNATIONAL LAW.

Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. 168 U. S. 250.

"The transactions of independent states between each other are governed by other laws than those which municipal courts administer; such courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may make." 13 Moore, P. C. 75. And the same is the case with their dealings with the subjects of other states; Poll. Torts 105.

Public agents, military or civil, of foreign governments, whether such governments be *de jure* or *de facto*, cannot be held responsible in any courts of the United States for things done in their own states in the exercise of the sovereignty thereof, in pursuance of the directions of their governments. 65 Fed. Rep. 577. See TORT.

As to the jurisdiction of English courts over foreign subjects and ambassadors, see 20 Law Mag. & Rev. 23.

A judgment for plaintiffs in an action against army officers in possession of land used as a fort in which the plaintiff claimed

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a one-third interest, was a judgment directly against the United States and will be set aside ; 162 U. S. 255, reversing 8 Tex. Civ. App. 679.

**SOWMING AND ROWMING.** The apportioning or placing of cattle on a common, according to the rights of the different persons interested. See Bell, Dict.

**SOWNE.** A corruption of the French *souvenn*, remembered. Estreats that *sowne* are such as the sheriff may gather. Cowel. See ESTREATS.

**SPADONES** (Lat.). **In Civil Law.** Those who, on account of their temperament or some accident they have suffered, are unable to procreate. Inst. 1. 11. 9 ; Dig. 1. 7. 2. 1. And see IMPOTENCE.

**SPAIN.** A kingdom of Europe. It is a constitutional monarchy.

The executive authority is vested in a king; the power to make laws is in the Cortez with the king. The Cortez comprises a senate and congress with equal authority. There are three classes of senators : those by their own right by birth ; life senators nominated by the crown ; and the senators elected by the corporations of state and by the largest taxpayers. In the first class are the sons of the king, after majority ; grandees who can prove an annual rental of $12,000 ; captains-general of the army and admirals of the navy : the patriarch of the Indies and the archbishops ; the president of the council of state, of the supreme tribunal and of the tribunal of Cuentas del Reino. The elective senators are one-half renewable every five years and all of them go out when the king dissolves that part of the Cortez. The congress consists of 431 deputies apportioned according to population and elected for five years. Both chambers meet annually. The sovereign may convoke and dissolve them. The ministers are responsible and all royal decrees must be signed by one of them. The succession to the crown follows the regular order of primogeniture. If all the lines become extinct, the Cortez will elect a king. Spain is divided into various provinces, districts, and communes governed by local laws free from the control of the king or Cortez. The present constitution was proclaimed June 30, 1876. Justice is administered by a *Tribunal Supremo* or highest court of appeal, the *Audiencias civiles*, and eighty courts for criminal causes—*Audencias de la Criminal*. In every important town there are one or more judges. There are two codes, a *Codigo Civil* and a *Codigo Penal*.

**SPARSIM** (Lat.). Here and there ; in a scattered manner ; sparsely ; dispersedly. It is sometimes used in law : for example, the plaintiff may recover the place wasted, not only where the injury has been total, but where trees growing *sparsim* in a close are cut. Bac. Abr. *Waste* (M) ; Brownl. 240.

**SPEAKER.** The title of the presiding officer of the house of representatives of the United States. The position is one of great importance, as the speaker appoints the standing committees of the house. The presiding officer of either branch of the state legislature generally is called the speaker.

Both houses of parliament are presided over by a speaker. That of the house of lords is commonly the lord chancellor, or lord keeper of the great seal, though the latter office is practically merged in that of lord chancellor. In the commons the speaker never votes, except when the votes are equal ; in the lords he has a vote with the rest of the house ; see May, P. L. ch. 7. See QUORUM ; PROLOCUTOR ; MacConochie, Congressional Committees ; Follett, The Speaker.

**SPEAKING DEMURRER.** **In Pleading.** One which alleges new matter in addition to that contained in the bill as a cause for demurrer. 4 Bro. C. C. 254 ; 2 Ves. 83 ; 4 Paige, Ch. 374 ; 85 Ala. 589.

**SPEAKING WITH PROSECUTOR.** A kind of imparlance, allowed in English practice, where the court permits a defendant convicted of a misdemeanor to speak with the prosecutor before judgment is pronounced ; if the prosecutor declares himself satisfied, the court may inflict a trivial punishment. 4 Steph. Com., 11th ed. 260.

**SPECIAL.** That which relates to a particular species or kind ; opposed to general : as, special verdict and general verdict ; special imparlance and general imparlance ; special jury, or one selected for a particular case, and general jury ; special issue and general issue, etc.

The meaning of special, as used in a constitutional provision authorizing the legislature to confer jurisdiction in *special cases*, has been the subject of much discussion in the court of appeals of the state of New York. See 12 N. Y. 593 ; 18 *id.* 57.

**SPECIAL ACCEPTANCE.** The qualified acceptance of a bill of exchange, as payable at a particular place, and there only. Byles, Bills, 15th ed. 260, 1891. See ACCEPTANCE.

**SPECIAL ACT.** See STATUTE.

**SPECIAL AGENT.** One authorized to do one or two special things. Ross, Cont. 44. One appointed only for a particular purpose, and vested with limited powers. Chit. Cont. 285 ; 94 Ala. 346.

It is a general rule that he who is invested with a special authority must act within the bounds of his authority, and he cannot bind his principal beyond what he is authorized to do ; 15 Johns. 44 ; 1 Wash. C. C. 174 ; Story, Ag. 17. See AGENT.

**SPECIAL ASSESSMENTS.** They differ from general taxation, in that they are made upon the assumption that a portion of the community is to be specially and peculiarly benefited in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds. 35 Neb. 133.

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**SPECIAL ASSUMPSIT.** An action of assumpsit brought on a special contract, which the plaintiff declares upon setting out its particular language or its legal effect.

It is distinguished from a general assumpsit, where the plaintiff, instead of setting out the particular language or effect of the original contract, declares as for a debt arising out of the execution of the contract, where that constitutes the debt. 3 Bouvier, Inst. n. 3426.

**SPECIAL BAIL.** See BAIL.

**SPECIAL BAILIFF.** A bound bailiff (*q. v.*).

**SPECIAL BASTARD.** One whose parents afterwards intermarry. 3 Bla. Com. 335.

**SPECIAL CASE.** See CASE STATED.

**SPECIAL COMMISSION.** An extraordinary commission of oyer and terminer and gaol delivery, issued by the crown to the judges when it is necessary that offences should be immediately tried and punished. Whart. Law Lex.

**SPECIAL CONSTABLE.** One who has been appointed a constable for a particular occasion, as in the case of an actual tumult or a riot, or for the purpose of serving a particular process.

**SPECIAL COUNT.** As opposed to the common counts, in pleading, a special count is a statement of the actual facts of the particular case.

**SPECIAL CUSTOM.** A particular or local custom. 23 Me. 95. See CUSTOM.

**SPECIAL DAMAGES.** See MEASURE OF DAMAGES.

**SPECIAL DEMURRER.** See DEMURRER.

**SPECIAL DEPOSIT.** A deposit made of a particular thing with the depositary: it is distinguished from an irregular deposit.

A deposit made with the understanding that the identical money deposited shall be returned to the depositor. 43 Ill. App. 340.

When a thing has been specially deposited with a depositary, the title to it remains with the depositor, and if it should be lost the loss will fall upon him. When, on the contrary, the deposit is irregular, as where money is deposited in a bank, the title to which is transferred to the bank, if it be lost, the loss will be borne by the bank. This will result from the same principle: the loss will fall in both instances, on the owner of the thing, according to the rule *res periit domino*. See 1 Bouvier, Inst. n. 1054; Edw. Bailm. 48; BAILMENT.

**SPECIAL ERRORS.** Special pleas in error are those which assign for error matters in confession and avoidance, as a release of errors, the act of limitations, and the like, to which the plaintiff in error may reply or demur. See PLEA.

**SPECIAL EXAMINER.** An examiner appointed by a court of equity in a particular case. See EXAMINERS IN CHANCERY.

Any fit person may be a special examiner. The taking of testimony by a special examiner is conducted in the same manner as before a standing examiner in chancery. The examination should take place in the presence of the parties and their attorneys; the testimony is, under the English chancery practice, taken in the narrative form, and the examiner may take down the questions and answers if he thinks fit; he cannot pass upon the materiality or relevancy of any question. When there is an objection, it should be noted, and the examiner will state his opinion thereon to the attorney and refer to it in the depositions.

The depositions should not be prepared beforehand; 35 Vt. 476. Formerly it was considered that the whole of the deposition should be written down by the examiner, with his own hand; 1 Dan. Ch. Pr. *906; but such is not now the usual practice. An examiner is a ministerial officer and has no power to lay down rules as to the most convenient time of taking examinations; L. R. 16 Eq. 102. He may exclude the public from the hearings; 1 Dan. Ch. Pr. *906. Subpœnas may issue to bring witnesses before him. If an examiner in England dies, his successor may sign the deposition; 1 Dan. Ch. Pr. *910. If the witness refuse to sign his deposition, the examiner signs it. See EXAMINERS IN CHANCERY.

**SPECIAL EXECUTION.** A copy of a judgment with a direction to the sheriff indorsed thereon to execute it. 47 Minn. 581.

**SPECIAL FINDING.** Where a jury find specially a particular fact, presumably material to the general question before them, but which does not involve the whole of that question. Moz. & W. The special findings referred to in the Revised Statutes, § 700, is not a report of the evidence, but it must be like the special verdict of a jury, a finding of the ultimate facts which the evidence establishes; 19 U. S. App. 567.

**SPECIAL IMPARLANCE. In Pleading.** An imparlance which contains the clause, "saving to himself all advantages and exceptions, as well to the writ as to the declaration aforesaid." 2 Chitty, Pl. 407. See IMPARLANCE.

**SPECIAL INDORSEMENT.** An indorsement in *full*, which, besides the signature of the indorser, expresses in whose favor the indorsement is made; thus "Pay C D, or order, A B." See Byles, Bills, 15th ed. 172; Tiedm. Com. Paper 266.

In English practice, under the Judicature Act of 1875, a special indorsement on a writ of summons is one which may be made in all cases where a definite sum of money is claimed. When the writ is thus indorsed and the defendant does not appear within the time appointed, the plaintiff may then sign

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final judgment for any sum not exceeding that indorsed on the writ. See 3 Steph. Com., 11th ed. 530; Lush. Pr. 366. See INDORSEMENT.

**SPECIAL INJUNCTION.** An injunction obtained only on motion, usually with notice to the other party. It is applied for sometimes on affidavit before answer, and frequently upon merits disclosed in the defendant's answer. 4 Bouvier, Inst. n. 3756. See INJUNCTION.

**SPECIAL ISSUE. In Pleading.** A plea to the action which denies some particular material allegation, which is in effect a denial of the entire right of action. It differs from the general issue which traverses or denies the whole declaration or indictment. Gould, Pl. c. 2, § 38. See GENERAL ISSUE; ISSUE.

**SPECIAL JURY.** One selected in a particular way by the parties. See JURY.

**SPECIAL LAWS.** See STATUTE; GENERAL LAWS.

**SPECIAL LEGISLATION.** See GENERAL LAWS; STATUTE.

**SPECIAL LICENSE.** One granted by the Archbishop of Canterbury to authorize a marriage at any time or place. 2 Steph. Com. 247.

**SPECIAL MATTER.** Under a plea of the general issue, a defendant may, instead of pleading specially, give the plaintiff notice, that on the trial he will give some special matter, of such and such a nature, in evidence.

Such notice is not required in an action on a sealed instrument where consideration need not be averred in the declaration, except when a failure of consideration is set up as an equitable defence.

Notice of special matter is required by R. S. § 4920 in actions at law on letters patent, in some cases. It must be given thirty days "before trial," which is said to be before the opening of the term. See 3 Rob. Pat. § 1019.

See PLEA; PLEADING.

**SPECIAL NON EST FACTUM.** The name of a plea by which the defendant says that the deed which he has executed is not his own or binding upon him, because of some circumstance which shows that it was not intended to be his deed, or because it was not binding upon him for some lawful reason.

**SPECIAL OCCUPANT.** When an estate is granted to a man and his heirs during the life of *cestui que vie*, and the grantee die without alienation, and while the life for which he held continues, the heir will succeed, and is called a special occupant. 2 Bla. Com. 259. In the United States the statute provisions of the different states vary considerably upon this subject. In New York and New Jersey, special occupancy is abolished. Virginia, and probably Maryland, follow the English statutes. In Massachusetts and other states, where the real and personal estates of intestates are distributed in the same way and manner, the question does not seem to be material; 4 Kent 27.

**SPECIAL PAPER.** A list kept in the courts of common law, and afterwards in the Queen's Bench Division of the High Court, in which list special cases, etc., to be argued are set down. Whart. Law Lex.

**SPECIAL PARTNERSHIP.** See PARTNERSHIP.

**SPECIAL PLEA IN BAR.** See PLEA.

**SPECIAL PLEADER. In English Practice.** A lawyer whose professional occupation is to give verbal or written opinions upon statements submitted to him, either in writing or verbally, and to draw pleadings, civil or criminal, and such practical proceedings as may be out of the general course. 2 Chitty, Pr. 42.

Special pleaders are not necessarily at the bar; but those that are not are required to take out annual certificates under stat. 33 & 34 Vict. c. 97, ss. 60, 63; Moz. & W.

**SPECIAL PLEADING.** The allegation of special or new matter to avoid the effect of the previous allegations of the opposite party, as distinguished from a direct denial of matter previously alleged on the opposite side. Gould, Pl. c. 1, § 18; 3 Wheat. 246; Com. Dig. *Pleader* (E 15); Steph. Pl., And. ed. 240, n. See PLEADING, SPECIAL.

**SPECIAL PROPERTY.** That property in a thing which gives a qualified or limited right. See PROPERTY.

**SPECIAL REQUEST.** A request actually made, at a particular time and place; this term is used in contradiction to a general request, which need not state the time when nor place where made. 3 Bouvier, Inst. n. 2843.

**SPECIAL RULE.** See RULE OF COURT.

**SPECIAL SESSIONS.** See SESSIONS OF THE PEACE.

**SPECIAL TAIL.** See ESTATE TAIL.

**SPECIAL TERM OR TERMS.** See TERM.

**SPECIAL TRAVERSE.** See TRAVERSE.

**SPECIAL TRUST.** A special trust is one where a trustee is interposed for the execution of some purpose particularly pointed out, and is not, as in case of a simple trust, a mere passive depositary of the estate, but is required to exert himself actively in the execution of the settler's intention: as, where a conveyance is made to trustees upon trust to reconvey, or to sell for the payment of debts. Lew. Tr. 3, 16; 2 Bouvier, Inst. n. 1896. See TRUST.

**SPECIAL VERDICT. In Practice.**

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A special verdict is one by which the facts of the case are put on the record, and the law is submitted to the judges. See VERDICT; Bac. Abr. *Verdict* (D).

**SPECIAL.** Metallic money issued by public authority. See also IN SPECIE.

This term is used in contradistinction to paper money, which in some countries is issued by the government, and is a mere engagement which represents specie.

In cases of salvage, specie on board is treated like any other cargo; 1 Pet. Adm. 416; 44 L. T. Rep. N. s. 254; 86 Fed. Rep. (C. C. A.) 340. See 15 Am. L. Rev. 416; SALVAGE.

**SPECIAL GRAVITY.** The ratio of the weight of a body to the weight of an equal volume of some other body, taken as the standard or unit. This standard is usually water for liquids and solids, and air for gases. 6 U. S. App. 53.

**SPECIALTY.** A writing sealed and delivered, containing some agreement or promise. 2 S. & R. 503; 1 P. Wms. 130. A writing sealed and delivered, which is given as a security for the payment of a debt, in which such debt is particularly specified. Bac. Abr. *Obligation* (A).

Although in the body of the writing it is not said that the parties have set their hands and seals, yet if the instrument be really sealed it is a specialty, and if it be not sealed it is not a specialty, although the parties in the body of the writing make mention of a seal. 2 S. & R. 504; 2 Co. 5 *a*; Perkins § 120. See BOND; DEBT; OBLIGATION; SEAL.

**SPECIFIC LEGACY.** See LEGACY.

**SPECIFIC PERFORMANCE.** The actual performance of a contract by the party bound to fulfil it. As the exact fulfilment of an agreement is not always practicable, the phrase may mean, in a given case, not literal, but substantial performance; Waterm. Spec. Perf. § 1.

Many contracts are entered into by parties to fulfil certain things, and then the contracting parties neglect or refuse to fulfil their engagements. In such cases the party aggrieved has generally a remedy at law, and he may recover damages for the breach of the contract; but in many cases the recovery of damages is an inadequate remedy, and the party seeks to recover a specific performance of the agreement.

It is a general rule that courts of equity will entertain jurisdiction for a specific performance of agreements, whenever courts of law can give but an inadequate remedy; and it is immaterial whether the subject relate to real or personal estate; 2 Story, Eq. § 717; Pom. Contr. 28, 34; 1 S. & S. 607; 1 P. Wms. 570; 1 Sch. & L. 553; 84 Me. 195. But the rule is confined to cases where courts of law cannot give an adequate remedy; 1 Grant, Cas. 83; 18 Ga. 473; 2 Story, Eq. Jur. § 718; if there is an adequate legal remedy, the court will refuse specific performance, unless under all the circumstances it would be inequitable and unjust to do so; 84 Ky. 157; 30 W. Va. 790; and a decree is to be granted or refused in the discretion of the court; 38 N. H. 400; 2 La. 126; 9 Ohio St. 511; 8 Wisc. 392; 5 Harring. 74; Hempst. 245; 2 Jones, Eq. 267; 6 Ind. 259; 51 Fed. Rep. 860; 152 Pa. 529. Specific performance is not of absolute right, but one which rests entirely in judicial discretion; exercised according to the settled principles of equity and with reference to the facts of the particular case, and not arbitrarily or capriciously; 144 U. S. 224; 128 *id.* 438; 127 *id.* 668; 82 Va. 269; 99 N. C. 215; 23 Neb. 795.

A vendor of real estate may either sue at law for the purchase-money or resort to equity for specific performance; 10 U. S. App. 601.

As the doctrine of a specific performance in equity arises from the occasional inadequacy of the remedy at law upon a violated contract, it follows that the contract must be such a one as is binding at law; 33 Ala. N. S. 449; 37 U. S. App. 185; and where the existence of a contract is in doubt, equity will not, as a rule, decree specific performance, especially when it appears that the property in question was rapidly rising in value; 158 U. S. 216; and it must be executory, certain in its terms, and fair in all its parts. It must also be founded upon a valuable consideration, and its performance in *specie* must be practicable and necessary; and, if it be one of the contracts which is embraced in the statute of frauds, it must be evidenced in writing; 2 Story, Eq. Jur. § 751; Adams, Eq. 77; Busb. Eq. 80. The *first* requisite is that the contract must be founded *upon a valuable consideration;* 19 Ark. 51; either in the way of benefit bestowed or of disadvantage sustained by the party in whose favor it is sought to be enforced; 1 Beasl. Ch. 498; and this consideration must be proved even though the contract be under seal; 12 Ind. 539; 14 La. Ann. 606; 17 Tex. 397; a promise against a promise is not such a consideration as will support a decree of specific performance, nor does the presence of seals import such a consideration; 2 Colo. App. 259. The consideration must be strictly a valuable one, and not one merely arising from a moral duty or affection, as towards a wife and children; although it need not necessarily be an adequate one; Adams, Eq. 78. See 6 Ia. 279; 6 Mich. 364.

The *second* requisite is that the *mutual enforcement* of the contract must be practicable; for if this cannot be judicially secured on both sides, it ought not to be compelled against either party. Among the cases which the court deems impracticable is that of a covenant by a husband to convey his wife's land, because this cannot be effectuated without danger of infringing upon that freedom of will which the policy of the law allows the wife in the alienation of her real estate; 2 Story, Eq. Jur. § 731; 63 Pa. 335; 3 Bush 694. See 3 Wash. St. 554. To justify a decree, the proof must be clear both as to the exist-

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ence of the agreement and the terms. Equity will not enforce a contract in favor of an employer as against an employe which is against conscience; 149 U. S. 315. And the actual performance of personal services by an employe will not be enforced in equity; 24 U. S. App. 239. And the contract must be mutual at the time it is entered into; 29 W. Va. 577; and specific performance of a contract will not be enforced, unless the remedy as well as the obligation is mutual, and alike attainable by both parties to the agreement; 83 Ala. 498; 73 Cal. 415.

The *third* requisite is that the enforcement in *specie* must be necessary; that is, it must be really important to the plaintiff, and not oppressive to the defendant; 1 Beasl. Ch. 497. However strong, clear, and emphatic a contract may be, and however plain the right at law, specific performance will not be decreed if it would cause a result harsh, inequitable, or contrary to good conscience; 81 Me. 365; see 144 U. S. 224; and the court is not bound to shut its eyes to the evident character of the transaction; it will never lend its aid to carry out an unconscionable bargain, but will leave a party to his remedy at law; 135 U. S. 457. Specific performance was refused of a contract for an unexpired term of years by which one party agreed to perform continuous mechanical services (in the generation of electricity), demanding the highest degree of skill, and the other to maintain costly machinery and the daily use of cars moved by electricity on the line of its railway; 109 Ala. 190. Mere inadequacy of consideration is not necessarily a bar to a specific performance of a contract; but if it be so great as to induce the suspicion of fraud or imposition, the court of equity will refuse its aid to the party seeking to enforce, and leave him to his remedy at law; 2 Jones, Eq. 267. This is upon the ground that the specific enforcement of the contract would be oppressive to the defendant. The court will equally withhold its aid where such enforcement is not really important to the plaintiff, as it will not be in any case where the damages which he may recover at law will answer his purpose as well as the possession of the thing which was contracted to be conveyed to him; Adams, Eq. 83. As a general rule, a contract to convey real estate will be specifically enforced; unless the title thereto is not marketable; 15 Cent. L. J. 8; 40 Minn. 312; 40 La. Ann. 845; while one for the transfer of personal chattels will be ordinarily denied any relief in equity; Waterm. Spec. Perf. § 16; 40 Miss. 119. An instrument defective as a deed will not be enforced as a contract to convey, if no valuable consideration passed between the parties; 49 N. J. Eq. 210. But even in the case of personal property, if the plaintiff has not an adequate remedy at law, equity will take jurisdiction; and more willingly in America than in England; Story, Eq. Jur. § 724; Bisph. Eq. 368. When goods were sold and there were no other similar goods in the market, a disposal of them by the seller has been enjoined; 33 L. J. Q. B. 335. Equity will decree the specific delivery of goods of a peculiar value; as heirlooms; 10 Ves. 139; an ancient silver altar; 3 P. Wms. 390; the celebrated Pusey horn; 1 Vern. 273; the decorations of a lodge of Freemasons; 6 Ves. 773; a faithful family slave; 3 Murphey 74. Contracts for the sale of stock will not, usually, be enforced, but the rule has been departed from; 23 Cal. 390; L. R. 3 Ch. 388; 1 S. & S. 174. A covenant for a renewal of a lease, which is indefinite as to the length of the term and rental to be paid, cannot be enforced specifically; 65 Hun 39; nor will a contract which is perpetual; 136 U. S. 393. A right to use a right of way under a traffic agreement between two railroad companies will be enforced in equity; 138 U. S. 1; and a contract between railroad companies for the joint use of a bridge and seven miles of track; 51 Fed. Rep. 309; or a contract by which one had acquired the right to use a part of the other party's railroad line for 999 years; 10 U. S. App. 98. Option contracts for the purchase or sale of land may be enforced; 12 U. S. App. 274; and the rule of non-enforcement for want of mutuality has no application to such an option contract; *id.* Where time is of the essence of a contract, specific performance will not be decreed after the lapse of the time specified; but it is otherwise when time is not of the essence of the contract; 23 U. S. App. 401

A court of equity will not refuse to enforce a contract specifically which was fair when made, by reason of the increase in value of the subject-matter; 145 U. S. 459. Where the vendee bought property for $300, and paid one dollar down and then did nothing for nine years, and it appeared that the property had reached a value of $15,000, specific performance was refused; 155 U. S. 550.

Equity will enforce a contract for the exclusive rights under letters patent, and will enjoin the breach of a negative covenant; 23 Fed. Rep. 86; 147 Mass. 185; 4 Del. Ch. 337; 34 Conn. 325. See 149 U. S. 315; including a contract to assign all future inventions relating to a certain art; 122 Pa. 392; although the agreement be oral; 73 Ia. 367; but not if the contract be unconscionable; 34 Fed. Rep. 877.

When the statute of frauds requires that a contract shall be evidenced in writing, that will be a *fourth* requisite to the specific execution of it. In such case the contract must be in writing and certain in its terms; but it will not matter in what form the instrument may be, for it will be enforced even if it appear only in the consideration of a bond secured by a penalty; 6 Gray 25; 2 Story, Eq. Jur. § 751. The specific performance of a parol contract to convey land cannot be enforced if defendant urges the statute of frauds; 99 N. C. 85.

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Equity will not decree specific performance of an agreement to convey property which has no existence, or to which the defendant has no title; 128 U. S. 671. If it appear that the want of title was known to the plaintiff when he began suit, the bill will not be retained for the assessment of damages, but the plaintiff will be left to his remedy at law; *id.*

In applying the equity of specific performance to real estate, there are some modifications of legal rules, which at first sight appear inconsistent with them and repugnant to the maxim that equity follows the law, The modifications here referred to are those of enforcing parol contracts relating to land, on the ground that they have been already performed in part; of allowing time to make out a title beyond the day which the contract specifies; and of allowing a conveyance with compensation for defects; Adams, Eq. 85; Bisph. Eq. 364.

The principle upon which it is held that part-performance of a contract will in equity take a case out of the operation of the statute of frauds, is that it would be a fraud upon the opposite party if the agreement were not carried into complete execution; Pom. Contr. 103; 11 Cal. 28; 30 Barb. 633; 24 Ga. 402; 28 Mo. 134; 40 Me. 94. The act which is alleged to be part-performance must be done in pursuance of the contract and with the assent of the defendant. What will be a sufficient part-performance must depend on circumstances. The taking possession of the land and making improvements thereon will answer: 10 Cal. 156; 8 Mich. 463; 6 Ia. 279; 30 Vt. 516; 5 R. I. 149; 33 N. H. 32; 4 Wisc. 79; 76 Ia. 565, 82 Va. 269; though the payment of a part or even the whole of the purchase-money will not; 14 Tex. 373; 22 Ill. 643; 4 Kent 451; 103 Mass. 404; 68 N. Y. 499. See, however, 1 Harr. Del. 532; 26 Md. 37. If the purchaser have entered and made improvements upon the land, and the vendor protect himself from a specific performance by taking advantage of the statute, the plaintiff shall be entitled to a decree for the value of his improvements; 14 Tex. 331; 1 D. & B. 9. The doctrine of part-performance is not recognized in some of the states; 37 Mo. 388; 40 Me. 187; 8 Cush. 223; 13 Sm. & M. 93.

Where several parcels of land are included in one parol contract of sale, part payment of the purchase-money and the delivery of one of those parcels is sufficient to enable the purchaser to enforce specific performance of the contract as to all the parcels; 95 U. S. 96.

The doctrine of allowing time to make out a title beyond the day which the contract specifies, and which is embodied in the maxim that time is not of the essence of a contract in equity, has no doubt been generally adopted in the United States; 1 D. & B. Eq. 237; 3 Jones, Eq. 84, 240; 2 McLean 495; 57 Ill. 480. But to entitle the purchaser to a specific performance he must show good faith and a reasonable diligence; 4 Ired. Eq. 386; 3 Jones, Eq. 321 If during the vendor's delay there has been a material change of circumstances affecting the rights and interests of the parties, equity will not relieve; 15 Pa. 429.

The third equity, to wit, that of allowing a conveyance with compensation for defects, applies where a contract has been made for the sale of an estate, which cannot be literally performed *in toto*, either by reason of an unexpected failure in the title to part of the estate; 34 Ala. N. S. 633; 1 Head 251; 6 Wisc. 127; of inaccuracy in the terms of the description, or of diminution in value by a liability to a charge upon it. In any such case, the court of equity will enforce a specific performance, allowing a just compensation for defects, whenever it can do so consistently with the principle of doing exact justice between the parties; Adams, Eq. 89. This doctrine has also been adopted in the United States. See 2 Story, Eq. Jur. 794; 1 Ired. Eq. 299; 1 Head 251; 76 Cal. 299.

A contract for the sale of land entered into under the belief by both parties that the vendor has title, when in fact he has none, will not be specifically enforced in equity; 140 Ill. 583. The fact that vendor's title is disputed by a third person gives him no right to refuse to convey such title as he has; and the fact will not prevent a decree for specific performance; 128 Ill. 540.

When a vendor files a bill he must show a tender of the title and an offer to perform; 46 Ill. 113; 39 Mich. 175; that is a tender of a deed; 63 Ind. 213; Tiedm. Eq. Jur. 499; but it has been held that an offer of a deed in the bill is enough; 63 N. Y. 301; 20 Ia. 295; 52 N. W. Rep. (S. Dak.) 586. Where a vendee announces that he will not comply with his contract, the vendor need not tender a deed before suing for specific performance; 114 Ill. 388. See PERFORMANCE. And a vendee must show a tender of the purchase-money; 67 Pa. 24; 21 Gratt. 29; 142 Ill. 258. And such tender must not be delayed till circumstances have changed; 4 Brewst. 49. The vendee need not tender the purchase-money where the vendor refuses to consider the question of sale under the contract and denies any obligation thereunder: 87 Tenn. 4.

A decree for specific performance will not be made against a vendor whose wife refuses to join in the conveyance; 75 Pa. 141.

In a suit for specific performance, the plaintiff must show that he has performed, or was ready to perform, his part of the contract, and that he has not been guilty of laches or unreasonable delay, and, where the proof leaves the case doubtful, the plaintiff is not entitled to a decree; 76 Md. 229. See 48 N. J. Eq. 638; 140 Ill. 583. Specific performance will not be decreed after an unreasonable delay; 127 U. S. 668; or where a party has been backward in claiming the relief, and has held off until circumstances have changed, so as to give him an opportunity to enforce or

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abandon the contract, as events might prove most advantageous; 86 Va. 75; 35 Fed. Rep. 174; 76 Cal. 590.

Specific performance of a contract to leave property by will will not be decreed, where the contract is made by a mere donee of a testamentary power of appointment; [1892] 3 Ch. 510.

Specific performance should never be granted unless the terms of the agreement sought to be enforced are clearly proved, or where it is left in doubt whether the party against whom the relief is asked in fact made such an agreement; 128 U. S. 438: 127 *id.* 668; and performance will not be decreed unless the proof is clear and satisfactory, both as to the existence of the agreement and as to its terms; 149 U. S. 315.

A *feme covert* cannot maintain a bill for specific performance; 4 Brewst. 49. A decree for the specific performance of a contract for the sale of a real estate is granted or withheld according as equity and justice seems to demand; 155 U. S. 550. See, generally, Fry; Waterman, on Specific Performance.

**SPECIFICATIO** (Lat.). **In Civil Law.** The process by which, from material either of one kind or different kinds, either belonging to the person using them or to another, a new form or thing is created; as, if from gold or gold and silver a cup be made, or from grapes wine. Calvinus, Lex. Whether the property in the new article was in the owner of the materials or in him who effected the change was a matter of contest between the two great sects of Roman lawyers. Stair, Inst. p. 204, § 41; Mackeldey, Civ. Law § 241.

**SPECIFICATION.** A particular and detailed account of a thing. When used in the patent law without the word *claim*, it means the description and claims. 6 Fed. Rep. 611. See PATENT.

**In Military Law.** The clear and particular description of the charges preferred against a person accused of a military offence. Tytler, Courts-Mar. 109.

**SPECULATION.** The hope or desire of making a profit by the purchase and resale of a thing. Pardessus, *Droit Com.* n. 12. The profit so made.

**SPEECH.** A formal discourse in public. The liberty of speech is guaranteed to members of the legislature, in debate, and to counsel in court.

The reduction of a speech to writing and its publication is a libel if the matter contained in it is libellous; and the repetition of it upon occasions not warranted by law, when the matter is slanderous, will be slander; and the character of the speaker will be no protection to him from an action; 1 Maule & S. 273; 1 Esp. 226. See DEBATE; LIBERTY OF SPEECH; SLANDER; LIBEL.

**SPEED.** The test of safe speed is whether it is such as allows the vessel to comply with the duty imposed on her and to avoid collision with other vessels in the situations in which she may reasonably expect to find them. 8 U. S. App. 9.

In a fog a vessel is bound to observe unusual caution and to maintain only such rate of speed as will enable her to come to a standstill by reversing her engines at full speed, before she shall collide with a vessel which she may see; 8 U. S. App. 312.

A vessel running fifteen knots an hour, when she strikes a fog bank, has not complied with the statutory requirements to go at moderate speed; 24 U. S. App. 164. See MODERATE SPEED.

**SPEEDY TRIAL.** The right to a speedy trial in all criminal prosecutions is given under the United States constitution.

The speedy trial to which a person charged with crime is entitled under the constitution is a trial at such a time, after the finding of the indictment, regard being had to the terms of court, as shall afford the prosecution a reasonable opportunity, by the fair and honest exercise of reasonable diligence, to prepare for trial, and if the trial is delayed or postponed beyond such period, when there is a term of court at which the trial might be had, by reason of the neglect or laches of the prosecution in preparing for trial, such delay is a denial to the defendant of his right to a speedy trial, and in such case a party confined, upon application by *habeas corpus*, is entitled to a discharge from custody; 3 Mont. 512.

**SPELLING.** The art of putting the proper letters in words in their proper order.

It is a rule that bad spelling will not vitiate a contract when it appears with certainty what is meant: for example, where a man agreed to pay *threty* pounds he was held bound to pay *thirty* pounds; and *seutene* was holden to be *seventeen;* Cro. Jac. 607; 10 Co. 133 *a;* 2 Rolle, Abr. 147. Even in an indictment *undertood* has been holden as *understood;* 1 Chitty, Cr. Law.

A misspelling of a name in a declaration will not be sufficient to defeat the plaintiff, on the ground of variance between the writing produced and the declaration, if such name be *idem sonans:* as, *Kay* for *Key;* 16 East 110; 2 Stark. 29; *Segrave* for *Seagrave;* 2 Stra. 889. See IDEM SONANS; ELECTION.

**SPENDTHRIFT.** A person who, by excessive drinking, gaming, idleness, or debauchery of any kind, shall so spend, waste, or lessen his estate as to expose himself or his family to want or suffering, or expose the town to charge or expense for the support of himself or family. Vt. Rev. Stat. c. 65, § 9.

A person having the entire right to dispose of property may settle it or give it by will in trust for another, with the provision that the income shall not be alienated by the beneficiary by anticipation, or be taken by his creditors in advance of its payment to him, although there is no cesser or limitation over of the estate in such

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an event; 133 Mass. 170; 146 *id.* 369; 91 U. S. 716; 94 *id.* 523; 8 B. Mon. 56; 2 Rawle 33; 134 Pa. 114; 30 Vt. 338; 87 Va. 758; 111 Ill. 247; 4 Fed. Rep. 136; 84 Me. 325; 86 Tenn. 81; 20 Mo. App. 616. See also 1 Perry, Trusts 495.

In a very recent case in the New York court of appeals, it was held that a party could not by conveying his property in trust, reserving to himself the income thereof during his life, with remainder over, place his beneficial interest beyond the reach of creditors. Notwithstanding the life beneficiary was solvent and free from debt at the time he created the trust, the interest in the estate which he has reserved to himself is subject to a judgment upon a debt incurred subsequently to the creation of the trust; 156 N. Y. 316.

One cannot create a spendthrift trust of his own property for his own benefit; 42 Pa. 330. Nor can there be a valid spendthrift trust where the trustee is also the *cestui que trust*, with the absolute ownership of the subject of the trust; 42 Pa. 330; 177 *id.* 208; 133 Mass. 175.

A trust to place one's property beyond the reach of creditors, while retaining full enjoyment of the income, through the instrumentality of a trustee, cannot be created by a married woman or a woman in contemplation of marriage; 39 L. R. A. (Md.) 806. A married woman may, however, make a valid spendthrift trust in favor of her husband; 177 Pa. 208.

The rule has prevailed in the English courts that when the income of a trust estate is given to any person (other than a married woman) for life, the equitable estate for life is alienable by, and liable in equity to the debts of, the *cestui que trust*, and that this quality is so inseparable from the estate that no provision, however express, which does not operate as a cesser or limitation over of the estate itself, can protect it from his debts or control; 18 Ves. 429; 6 Sim. 524; 1 Russ. & Myl. 395; 9 Hare 475.

Spendthrift trusts, there called alimentary funds, are upheld in Scotland; Gray, Restr. on Alienation 158. The English rule has been adopted in several courts of this country; 5 R. I. 305; 4 Ired. Eq. 131; 83 Ga. 703; 73 N. C. 119; 4 Rich. Eq. 46; 1 Dev. & Bat. Eq. 480.

In Arkansas; 8 Ark. 302; Indiana; 82 Ind. 38; and New Hampshire; 58 N. H. 155, the question has been raised, but not decided. Apart from statute, the rule in New Jersey is the same as the English rule; See 3 Stockt. 172; 12 C. E. Green 308; 41 N. J. Eq. 100. In Wisconsin, the question is in doubt. See 35 Wis. 687; 87 *id.* 449; 64 *id.* 210. In Connecticut, the status of such trusts is undecided; 21 Conn. 1; 36 *id.* 18.

By statute, in Kentucky, one cannot vest property or funds in trustees for the use of another without subjecting it to the debts of the *cestui que trust*; 14 S. W. Rep. 423; 12 Bush 344. In New York a statute excludes from proceedings in equity to reach beneficial interests, all cases of trusts for maintenance and support where the trust has proceeded from some person other than the debtor, but makes available to the creditor any surplus beyond what may be necessary for the maintenance and support of the beneficiary; 70 N. Y. 270; 42 Hun 636.

Where property is devised in trust for a testator's son and his family, the profits to be applied to the extent the trustee sees fit, judgment creditors of the son cannot reach the property or its income; 59 Fed. Rep. 923.

An absolute discretion vested in trustees to make payments out of trust property confers no interest on the beneficiary that can be asserted by him or his assignee in bankruptcy; 91 U. S. 716, where the court proceeded to sustain the doctrine of trusts of this class in a forcible argument.

A spendthrift trust may be created for a term of years with the remainder to the *cestui que trust* in fee; 13 W. N. C. (Pa.) 282.

See Gray, Restr. on Alienation, where the cases are fully considered and an able protest made against the validity of such trusts.

**SPERATE** (Lat. *spero*, to hope). That of which there is hope.

In the accounts of an executor and the inventory of the personal assets, he should distinguish between those which are sperate and those which are desperate: he will be *prima facie* responsible for the former and discharged for the latter; 1 Chitty, Pr. 520; 2 Will. Exec. 644; Toller, Exec. 248. See DESPERATE.

**SPES RECUPERANDI** (Lat. the hope of recovery). A term applied to cases of capture of an enemy's property as a booty or prize, while it remains in a situation in which it is liable to be recaptured. As between the belligerent parties, the title to the property taken as a prize passes the moment there is no longer any hope of recovery; 2 Burr. 683. See INFRA PRÆSIDIA; POSTLIMINY; BOOTY; PRIZE.

**SPIGURNEL.** The sealer of the royal writs.

**SPINSTER.** An addition given, in legal writings, to a woman who never was married. Lovelace, Wills 269. So called because she was supposed to be occupied in spinning.

**SPIRITUAL CORPORATIONS.** See ECCLESIASTICAL CORPORATIONS.

**SPIRITUAL COURTS.** Ecclesiastical courts (*q. v.*).

**SPIRITUAL LORDS.** The archbishops and bishops of the house of peers. 2 Steph. Com., 11th ed. 341.

**SPIRITUOUS LIQUORS.** See LIQUOR LAWS.

**SPLITTING A CAUSE OF ACTION.** The bringing an action for only a part of the cause of action. This is not

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permitted either at law or in equity. 4 Bouvier, Inst. n. 4167.

**SPOLIATION. In English Ecclesiastical Law.** The name of a writ sued out in the spiritual court to recover for the fruits of the church or for the church itself. Fitzh. N. B. 85.

A waste of church property by an ecclesiastical person. 3 Bla. Com. 90.

**In Torts.** Destruction of a thing by the act of a stranger: as, the erasure or alteration of a writing by the act of a stranger is called spoliation. This has not the effect to destroy its character or legal effect. 1 Greenl. Ev. § 566. See IN ODIUM SPOLIATORIS.

**In Admiralty Law.** By spoliation is also understood the total destruction of a thing: as, the spoliation of papers by the captured party is generally regarded as a proof of guilt; but in America it is open to explanation, except in certain cases where there is a vehement presumption of bad faith; 2 Wheat. 227, 241; 1 Dods. Admr. 480, 486. Bened. Adm. 310. See ALTERATION; FRENCH SPOLIATION CLAIMS.

**SPONSALIA STIPULATIO SPONSALITIA** (Lat.). A promise lawfully made between persons capable of marrying each other, that at some future time they will marry. See ESPOUSALS; Ersk. Inst. 1. 6. 3.

**SPONSIO JUDICIALIS** (Lat.). A judicial wager. This corresponded in the Roman law to our feigned issue.

**SPONSIONS. In International Law.** Agreements or engagements made by certain public officers, as generals or admirals, in time of war, either without authority or by exceeding the limits of authority under which they purport to be made.

Before these conventions can have any binding authority on the state, they must be confirmed by express or tacit ratification. The former is given in positive terms and in the usual forms; the latter is justly implied from the fact of acting under the agreement as if bound by it, and from any other circumstance from which an assent may be fairly presumed; Wheat. Int. Law, 3d Eng. ed. § 255; Grotius, *de Jur. Bel. de Pac.* l. 2, c. 15, § 16; *id.* l. 3, c. 22, § 1; Vattel, Law of Nat. b. 2, c. 14, § 209; Wolff, Inst. § 1156.

**SPONSOR. In Civil Law.** He who intervenes for another voluntarily and without being requested. The engagement which he enters into is only accessary to the principal. See Dig. 17. 1. 18; Nov. 4. 1; *Code de Comm.* art 158, 159; Code Nap. 1236; Wolff, Inst. § 1556.

**SPOUSE BREACH.** Adultery. Cowel.

**SPREADING FALSE NEWS.** See FALSE NEWS.

**SPRING.** A fountain.

A natural source of water, of a definite and well-marked extent. 6 Ch. Div. 264 (C. A.). A natural chasm in which water has collected, and from which it either is lost by percolation, or rises in a defined channel. 41 L. T. Rep. N. S. 457. The water issuing by natural forces out of the earth at a particular place. It is not a mere place or hole in the ground, nor is it all the water that can be gathered or caused to flow at a particular place. A well is not necessarily a spring, nor is water which by the expenditure of labor can be gathered into a reservoir. 135 N. Y. 50.

The owner of the soil has the exclusive right to use a spring arising on his grounds. When another has an easement or right to draw water from such a spring, acquired by grant or prescription, if the spring fails the easement ceases, but if it returns the right revives.

The owner of land on which there is a natural spring has a right to use it for domestic and culinary purposes and for watering his cattle, and he may make an aqueduct to another part of his land and use all the water required to keep the aqueduct in order or to keep the water pure; 15 Conn. 366. He may also use it for irrigation, provided the volume be not materially decreased; Ang. Waterc. 34. See 1 Root 535; 9 Conn. 291; 2 Watts 327; 2 Hill S. C. 634; Coxe N. J. 460; 2 D. & B. 50; 8 Mass. 106; 3 Pick. 269; 8 Me. 253.

The owner of a spring cannot lawfully turn the current or give it a new direction. He is bound to let it enter the inferior estate on the same level it has been accustomed to, and at the same place, for every man is entitled to a stream of water flowing through his land without diminution or alteration; 6 East 206; 2 Conn. 584. See 3 Rawle 84; 12 Wend. 330; 10 Conn. 213; 14 Vt. 239.

Where one conveyed a spring or well to be enjoyed without interruption, and afterwards conveyed contiguous property to a railway company whose works drained the water from the land before it reached the spring, on an action for breach of agreement, *held*, that the grantor had only conveyed the flow of the water after it had reached the spring, and therefore there was no breach; 41 L. T. N. S. 455 (C. A.). See Gould, Waters 286; 15 L. J. N. S. Ex. 315. Where the value of land was enhanced by a spring, it was held ratable for taxation at such improved value; 1 M. & S. 503. See Coul. & F. Waters.

The owner of the superior inheritance, or of the land on which there is a spring, has no right to deprive the owner of the estate below him; 5 Pick. 175; 3 Harr. & J. 231; 12 Vt. 178; 13 Conn. 303; 4 Ill. 492; nor can he detain the water unreasonably; 17 Johns. 306; 2 B. & C. 910. See 1 Dall. 211; 3 Rawle 256; 13 N. H. 360; IRRIGATION; SUBTERRANEAN WATER; SURFACE WATER; WATER-COURSE.

**SPRING-BRANCH.** A branch of a stream flowing from a spring. 12 Gratt. 196.



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**SPRINGING USE.** A use limited to arise on a future event where no preceding use is limited, and which does not take effect in derogation of any other interest than that which results to the grantor or remains in him in the meantime. Gilbert, Uses, Sugden ed. 153, n.; 2 Crabb, R. P. 498.

A future use, either vested or contingent, limited to arise without any preceding limitation. Cornish, Uses 91.

It differs from a remainder in not requiring any other particular estate to sustain it than the use resulting to the one who creates it, intermediate between its creation and the subsequent taking effect of the springing use; Dy. 274; Pollexf. 65; 1 Ed. Ch. 34; 4 Drur. & W. 27; 1 Me. 271. It differs from an executory devise in that a devise is created by will, a use by deed; Fearne, Cont. Rem. 385, Butler's note; Wilson, Uses. It differs from a shifting use, though often confounded therewith. See, generally, 2 Washb. R. P., 5th ed. 281*.

**SPUILZIE** (*spoliatio*). **In Scotch Law.** The taking away movables without the consent of the owner or order of law. Stair, Inst. 96, § 16; Bell, Dict.

**SPY.** One who enters the enemy's lines secretly or in disguise, or upon false pretences, for the purpose of obtaining information. The punishment, if captured, *flagrante delicto*, is death. But if a spy rejoins his own army and is afterwards captured, he cannot be treated as a spy.

The employment of spies in time of war is recognized as a military necessity. The Brussels Conference admitted no distinction between a merely mercenary spy and one who acts from purely patriotic motives. See Risley, Law of War 121.

**SQUATTER.** One who settles on the lands of others without any legal authority; this term is applied particularly to persons who settle on the public land. 3 Mart. La. N. S. 293. See PRE-EMPTION RIGHT.

**STAB.** To make a wound with a pointed instrument. A stab differs from a cut or a wound. Russ. & R. 356; Russ. Cr. 597; Bac. Abr. *Maihem* (B).

**STABILIA.** A writ called by that name, founded on a custom of Normandy, that where a man in power claimed lands in the possession of an inferior, he petitioned the prince that it might be put into his hands till the right was decided, whereupon he had this writ. Whart. Law Lex.

**STAGNUM** (Lat.). A pool. It is said to consist of land and water; and therefore by the name of *stagnum* the water and the land may be passed. Co. Litt. 5.

**STAKE LANDS.** Tide lands belonging to the state are held not to be stake lands. 7 Wash. 150.

**STAKE RACE.** See SWEEPSTAKES.

**STAKEHOLDER.** A third person chosen by two or more persons to keep in deposit property the right or possession of which is contested between them, and to be delivered to the one who shall establish his right to it. Thus, each of them is considered as depositing the whole thing. This distinguishes this contract from that which takes place when two or more tenants in common deposit a thing with a bailee. Domat, *Lois Civ.* liv. 1, t. 7, s. 4; 1 Vern. 44, n. 1.

A person having in his hands money or other property claimed by several others is considered in equity as a stakeholder. 1 Vern. 144.

A mere depositary for both parties of the money advanced by them respectively with a naked authority to deliver it over upon the proposed contingency. He is not regarded as a party to the illegal contract. 117 Mass. 562.

The duties of a stakeholder are to deliver the thing holden by him to the person entitled to it on demand. It is frequently questionable who is entitled to it. In case of an unlawful wager, although he may be justified in delivering the thing to the winner, by the express or implied consent of the loser; 8 Johns. 147; yet if before the event has happened he has been required by either party to give up the thing deposited with him by such party, he is bound so to deliver it; 3 Taunt. 377; 4 *id.* 492; or if, after the event has happened, the losing party give notice to the stakeholder not to pay the winner, a payment made to him afterwards will be made in his own wrong, and the party who deposited the money or thing may recover it from the stakeholder; 16 S. & R. 147; 7 Term 536; 8 *id.* 575; 2 Marsh. 542. See 5 Wend. 250; 1 Bail. 486, 503; WAGER; HORSE RACE.

A deposit of stakes by one of the parties in a match may be recovered back on demand from the stakeholder, as upon a void contract; 1 Q. B. D. 189; 5 App. Ca. 342, overruling 5 C. B. 818.

**STALE DEMAND.** A claim which has been for a long time undemanded: as, for example, where there has been a delay of twelve years unexplained. 3 Mas. 161.

**STALLAGE** (Sax. *stal*). The liberty or right of pitching or erecting stalls in fairs or markets, or the money paid for the same. Blount; Whart. Dict.; 6 Q. B. 31.

**STALLARIUS** (Lat.). **In Saxon Law.** The *praefectus stabuli*, now master of the horse (Sax. *stalstabulum*). Blount. Sometimes one who has a stall in a fair or market. Fl. lib. 4, c. 28, p. 13.

**STAMP.** An impression made by order of the government, on paper, which must be used in reducing certain contracts to writing, for the purpose of raising a revenue. See Stark. Ev.; 1 Phill. Ev. 444.

A paper bearing an impression or device authorized by law and adopted for attachment to some subject of duty or excise.

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The term in American law is used often in distinction from stamped paper, which latter meaning, as well as that of the device or impression itself, is included in the broader signification of the word.

Stamps or stamped paper are prepared under the direction of officers of the government, and sold at a price equal to the duty or excise to be collected. The stamps are affixed and cancelled; and where stamped paper is used, one use obviously prevents a second use. The Internal Revenue acts of the United States of 1862 and subsequent years required stamps to be affixed to a great variety of subjects, under severe penalties in the way of fines, and also under penalty of invalidating written instruments and rendering them incapable of being produced in evidence. The statutes under which these stamps were required had been repealed from time to time, and that method of raising revenue was discontinued except in the case of tobacco and possibly some other articles. The necessity of raising additional revenue to meet the expenditures required for the Spanish-American war of 1898 led to the passage of what was known as the War Revenue Act of June 13, 1898, under which stamps are now required on almost every kind of document. The stamp taxes imposed by this act will be found in schedule A of the act, stat. 55 Cong. 2d Sess. 458.

Instruments not duly stamped are not void or inadmissible in evidence, in the absence of a fraudulent intent; 39 Vt. 412; 53 Pa. 176; 26 Wis. 163; s. c. 7 Am. Rep. 51; 47 N. Y. 467; 7 Am. Rep. 468; see 82 Pa. 280; in the absence of affirmative proof, a fraudulent intent will not be presumed; cases *supra*. See PORTAGE.

If a foreign instrument is, by the laws of the country where it is made, void for want of a stamp, it cannot be enforced in England. But if those laws merely require that it must be stamped before it can be received in evidence there, it is admissible in England without a stamp; 5 Exch. 279. The revenue act of 1898 is too recent to have been the subject of finished litigation at the time this title goes to the press. One question raised in the courts, but not yet decided, is whether the stamp tax on express receipts are to be paid by the carrier or whether they may be added by him to his charges for freight or expressage.

Under the previous revenue acts imposing stamp taxes the question arose as to the exact legal effect of the requirement that an instrument should be stamped, and whether if an unstamped instrument was wholly invalid the law made it necessary to have certain contracts in writing which would otherwise be valid by parol, as for instance, the contract of insurance. The suggestion that the passage of these laws requiring a stamp might make it necessary that such contracts should be in writing was made in 2 Kan. 347; but this doctrine is said not to be well founded; 1 May, Ins., 3d ed. § 25; and in New York it was held that the validity of a parol contract for insurance was not affected by the stamp act, that, if in writing, it would require to be stamped, but it might be oral; 44 N. Y. 538. The power of congress to declare unstamped instruments wholly void was seriously doubted; 1 Bush 238; 45 Ill. 29; and the doubt went so far as to deny the constitutional right of the federal government to determine rules of evidence by which the state courts should be governed; May, Ins. § 85; 101 Mass. 243. Some of the cases hold that congress cannot prohibit the making of contracts permitted by state laws, and that to declare them void is not a proper penalty for the enforcement of tax laws; Cooley, Const. Lim., 6th ed. 592; 50 Mich. 505; 105 Mass. 49; 22 Ind. 276; 40 Ala. 385; 19 Wis. 369. See, also, 1 Joyce, Ins. § 33.

**STAND.** To abide by a thing; to submit to a decision; to comply with an agreement.

**STANDARD. In War.** An ensign or flag used in war.

**In Measures.** A weight or measure of certain dimensions, to which all other weights and measures must correspond: as, a standard bushel. Also, the quality of certain metals, to which all others of the same kind ought to be made to conform: as, standard gold, standard silver. See DOLLAR; EAGLE.

**STANDARD POLICY.** See POLICY.

**STANDING ASIDE JURORS.** In order to mitigate the effect of the statute 33 Edw. I. which forbade the challenging of jurors by the crown excepting for cause shown, a rule of practice gradually arose of permitting the prosecution to direct jurors to stand aside until the whole panel was exhausted, without showing cause. The validity of this practice has been repeatedly upheld in England; 26 How. St. Tr. 1231.

In the United States this statute became a part of the fundamental law after the revolution; Baldw. 78, 82; 8 Phila. 440; 22 Pa. 94; 7 Watts 585; and notwithstanding statutes of various states granting to the prosecution a number of peremptory challenges, the custom of standing aside has been preserved. This practice has been opposed where the statutes allowing peremptory challenges are in force, but where the number allowed is very small, it has heretofore been allowed to continue. See Thomp. & Mer. Juries 147; 14 Cent. L. J. 402.

The practice applies in misdemeanors as well as felonies, although there is a peremptory right of challenge; 39 Leg. Int. 384.

**STANDING BY.** This term, as so often used in discussing cases of estoppel, does not mean actual presence or actual participation in the transaction, but it means silence where there is knowledge and a duty to make a disclosure. 93 Ind. 573; 6 *id.* 289.

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**STANDING MUTE.** See MUTE; PEINE FORTE ET DURE.

**STANDING ORDERS.** General regulations of the procedure of the two houses of the parliamentary body, respecting the manner in which its business shall be conducted.

**STANNARY COURTS** (*stannary*, —from Lat. *stannum*, Cornish *stean*, tin,—a tin mine).

**In English Law.** Courts of record, in Devonshire and Cornwall, England, for the administration of justice among the tinners therein. They are of the same limited and exclusive nature as those of the counties palatine.

By 9 & 10 Vict. c. 95, the plaintiff may choose between the stannary court and the county court of the district in which the cause of action arises.

**STAPLE. In International Law.** The right of staple, as exercised by a people upon foreign merchants, is defined to be that they may not allow them to set their merchandises and wares to sale but in a certain place.

This practice is not in use in the United States. 1 Chitty, Com. Law 103; Co. 4th Inst. 238; Bac. Abr. *Execution* (B 1). See STATUTE STAPLE.

**STAPLE INN.** An inn of chancery. See INNS OF COURT.

**STAR-CHAMBER.** See COURT OF STAR-CHAMBER.

**STAR PAGE.** The line and word at which the pages of the first edition of a book began are frequently marked by a star in later editions, and always should be.

**STARE DECISIS** (Lat.). To abide by, or adhere to, decided cases. *Stare decisis et non quieta movere.* It is a general maxim that when a point has been settled by decision, it forms a precedent which is not afterwards to be departed from. The rule as stated is "to abide by former precedents, *stare decisis*, where the same points come again in litigation, as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion, as also because, the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or swerve from according to his private sentiments; he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land,—not delegated to pronounce a new law, but to maintain and expound the old one—*jus dicere et non jus dare.*" Broom, Leg. Max., 7th ed. 147. As it was said more briefly by Alderson, B., "My duty is plain. It is to expound and not to make the law to decide on it as I find it, not as I may wish it to be;" 7 Exch. 543, quoted by Coltman, J., in 4 C. B. 560.

The doctrine of *stare decisis* is not always to be relied upon; for the courts find it necessary to overrule cases which have been decided contrary to principle. It should not be pressed too far; 8 Gr. Bag 257. Many hundreds of such overruled cases may be found in the American and English reports. It is held that it should require very controlling considerations to induce any court to break down a former decision, and lay again the foundations of the law; 7 How. (Miss.) 569.

The doctrine of *stare decisis* is a salutary one and is to be adhered to on proper occasions, in respect of decisions directly upon points in issue; but the supreme court should not extend any decision upon a constitutional question if it is convinced that error in principle might supervene; 157 U. S. 429; and there are cases in which a court of last resort has felt constrained by a sense of duty to disregard all precedents, even their own. This is particularly so in constitutional questions involving the validity of statutes affecting public interests, but where no right of property or contract *inter partes* is involved. In such a case, said Bleckley, C. J., the maxim for a supreme court "supreme in the majesty of duty as well as in the majesty of power," is not *stare decisis*, but *fiat justitia ruat coelum*; 87 Ga. 691, and it was said by Howard, J., in quoting this language: "Let this decision be right whether other decisions were right or not;" 144 Ind. 593 (involving the validity of statutes of apportionment of legislative representatives). And a court when asked to do so should consider how far its action would affect transactions entered into and acted upon, under the law as it exists; 11 Tex. 455. Where there have been a series of decisions by the supreme judicial tribunal of a state, the rule of *stare decisis* may usually be regarded as impregnable, except by legislative act: 29 Ind. 470. Especially is this the case where the law has become settled as a rule of property, and titles have become vested on the strength of it; 44 Mo. 206; and even an isolated decision will not be reversed when it has remained undisputed for a long time, and rights to land have been acquired under it; 31 Cal. 402; 22 Cal. 110. The court will not overrule cases upon which conveyancers may have relied, even though the court does not consider the case a sensible decision; [1891] 1 Ch. 258. It has been said that the doctrine of *stare decisis* has greater or less force according to the nature of the question decided, those questions where the decisions do not constitute a business rule, *e. g.* as where personal liberty is involved, will be met only by the general considerations which favor certainty and stability in the law; but where a decision relates to the validity of certain modes of transacting business, and a change of decision must necessarily invalidate everything done in the mode prescribed by the former case, as in the manner of executing deeds or wills, the maxim becomes imperative, and no court

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is at liberty to change it; 15 Wisc. 691. An erroneous decision subsequently overruled, though the law of the particular case, and binding on the parties, does not conclude other parties having rights depending on the same question; 52 Minn. 59. The United States courts will follow the decisions of those of the several states in interpreting state laws; but when the decisions of the state courts are unsettled and conflicting the rule does not apply; 1 Wall. 205; 5 Wall. 772; 37 Fed. Rep. 323; 35 *id.* 357. When titles to real estate depend on any compact between states, the rule of decision will not be drawn from either of the states; 11 Pet. 1; but where any principle of law is laid down by a state court regarding a sale of real property; 6 Wall. 723; or concerning the title to land; 37 Fed. Rep. 767; 125 U. S. 309; 128 *id.* 212; the violation of a charter by a state corporation; 7 How. 198; that a particular corporation is a corporation of that state; 45 Fed. Rep. 812; the payment of taxes; 7 Wall. 71; the United States courts will follow it in analogous cases; 7 How. 738. In matters relating to the construction of treaties, constitutional provisions, or laws of the United States, the authority of the federal courts is paramount, while *e converso* in the construction of state constitutions and state laws, the decisions of the state courts are final within their jurisdiction; 23 Miss. 498; Wells, Res. Adj. & Stare Decisis 583. The doctrine of *stare decisis* will not be applied by the circuit court of appeals to those decisions of the circuit courts from which no appeal has been taken; 29 U. S. App. 12. A decision of one of the circuit courts of the United States is not necessarily binding on the others; 47 Fed. Rep. 604; but see 46 Fed. Rep. 854; 53 *id.* 791; 40 *id.* 677. See RES JUDICATA. On a question of jurisprudence the circuit court of appeals is bound by a decision of the United States supreme court, but not the highest courts of the various states; 35 U. S. App. 67. See Cooley, Const., 2d ed. 137; Greenl. Overruled Cases; 1 Kent 477; Livingston, Syst. of Pen. Law 104; 35 Cent. L. J. 322; 32 *id.* 486. See Jenkins, Century vi., for a list of curious aphorisms on this subject; AUTHORITIES; PRECEDENTS; JUDGE-MADE LAW; JUDICIAL LEGISLATION; JUDICIAL POWER.

**STARE IN JUDICIO** (Lat.). To appear before a tribunal, either as plaintiff or defendant.

**START.** This term is not limited to setting out upon a journey or a race; it means, as well, the commencement of an enterprise or an undertaking. 54 Ia. 721.

**STATE** (Lat. *stare*, to place, establish). A body politic, or society of men, united together for the purpose of promoting their mutual safety and advantage, by the joint efforts of their combined strength. Cooley, Const. Lim. 1. A self-sufficient body of persons united together in one community for the defence of their rights and to do right and justice to foreigners. In this sense, the state means the whole people united into one *body politic;* and the state, and the people of the state, are equivalent expressions. 2 Dall. 425; 3 *id.* 93; 2 Wilson, Lect. 120; 1 Story, Const., 5th ed. §§ 208, 209. So, frequently, are state and nation; 7 Wall. 720. See Morse, Citizenship; Wheat. Int. L. 17; but it is said that "a state is distinguished from a nation or a people, since the former may be composed of different races of men all subject to the same supreme authority. . . . The same nation or people may be subject to, or compose, several distinct and separate states. . . The terms nation and people are frequently used by writers on international law as synonymous terms for state." 1 Halleck, Int. L. 66.

Another writer commenting on the definition of Cicero which is substantially that first above given, says: "This definition is not complete without some additions and restrictions. A state must be an organization of people for political ends; it must permanently occupy a fixed territory; it must possess an organized government capable of making and enforcing law within the community; and, finally, to be a sovereign state it must not be subject to any external control. Thus a company of men united for commercial purposes cannot be a state in the sense held in international law; neither can a tribe of wandering people, nor a community, be so considered if their government is permanently incapable of enforcing its own laws or its obligations toward other states.

So long as a state possesses the requisite attributes mentioned in the preceding paragraphs, international law does not concern itself with the form of its government; it may be an absolute monarchy, a limited monarchy, or a republic; it may be a centralized state or a federal union; or it may change from one to another of these forms at will, without in the least affecting its position in the view of international law; Snow, Int. L. 19.

A state neither loses any of its rights nor is discharged from any of its duties, by a change in the form of its civil government. The body politic is still the same, though it may have a different organ of communication. So if a state should be divided in respect to territory, its rights and obligations are not impaired; and if they have not been apportioned by special agreement, those rights are to be enjoyed, and those obligations fulfilled, by all the parts in common; Snow, Cas. Int. L. 21. The same writer also thus states the distinctions between a state and a nation: "Though the terms are frequently used interchangeably, strictly speaking, a nation is composed of people of the same race, whereas a state may be composed of several nations. The Jews are considered to be a nation, while Austria-Hungary, as a state, is composed of three distinct races: Germanic, Slavic, and Magyar. This distinction has in recent years become of im-

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portance from the fact of the movements towards the unity of races, each under one state. Thus we have the Pan-Slavic movement, the Irridentist party in Italy, and various other minor cases." Snow, Int. L. 20. This distinction, however, cannot be said to be at present recognized to the extent here suggested.

The actual organization of governmental powers: thus, the actual government of the state is designated by the name of the state; hence the expression, the state has passed such a law or prohibited such an act.

The section of territory occupied by a state: as, the state of Pennsylvania.

A union of two or more states under a common sovereign is called a personal union where there is no incorporation, but the component parts are united with equality of rights, as in the case, by way of illustration, when Great Britain and Ireland and Hanover were under one prince but without any interdependence. On the other hand, a real union of different states is where there is a merging of the separate sovereignties in a new and general one, at least as to all international relations; as, in the case of the union of Hungary, Bohemia, and other states prior to 1849. An incorporate union is where there is one sovereign government, though there may be a separate subordinate administration; Halleck, Int. L. §§ 11, 12, 13.

One of the commonwealths which form the United States of America.

As to the relation between the state and the United States, see UNITED STATES OF AMERICA.

The District of Columbia and the territorial districts of the United States are not states within the meaning of the constitution and of the Judiciary Act, so as to enable a citizen thereof to sue a citizen of one of the states in the federal courts: 2 Cra. 445; 1 Wheat. 91; 15 C. L. J. 308. But the District of Columbia is a "State of the Union," within the meaning of the treaty of 1853 between the United States and France, relieving Frenchmen from the disability of alienage in disposing of and inheriting property; 133 U. S. 258.

The several states composing the United States are sovereign and independent in all things not surrendered to the national government by the constitution, and are considered, on general principles, by each other as foreign states: yet their mutual relations are rather those of domestic independence than of foreign alienation; Miller, Const. 103; 7 Cra. 481; 3 Wheat. 324.

A state can be sued only by its own consent; 82 Va. 721; 134 U. S. 1. See 40 La. Ann. 856. But under the constitution of the United States the supreme court has original jurisdiction of suits by one state against another, and this jurisdiction has been frequently exercised, particularly in cases involving boundary disputes between the states.

A suit by a non-resident insurance company which seeks an injunction to restrain the state superintendent of insurance from revoking its license to do business in the state, is a suit against the state, and a federal court has no jurisdiction; 81 Fed. Rep. 888. So it was held that an effort to enjoin state officers charged with the collection of taxes, and seeking to establish exemption from taxation under the state laws and the repayment of amounts previously collected, was, to all intents and purposes, a suit against the state, and in part for the recovery of money, and that the state court had no jurisdiction; 35 Fla. 625. Suits to enjoin state officers either from assessing or enforcing taxes, without authority or warrant under the state laws, is not a suit against the state within the prohibition of the eleventh amendment to the constitution of the United States; 58 Fed. Rep. 620: neither is a suit against the railroad commissioners of the state to restrain the enforcement of their regulations as unjust and unreasonable, at least if the state has no pecuniary interest in the railroad; 154 U. S. 362; 57 Fed. Rep. 436; nor a suit in equity against state land commissioners to restrain them from acts alleged to be in violation of the plaintiff's contract of purchase of the lands from the state; 140 U. S. 1; 48 Fed. Rep. 196, 338. An injunction may be granted against a state board of officers to restrain them from proceeding against a corporation engaged in interstate commerce, for failure to comply with state and statutory regulations, and this is held not to be against the state; 60 Fed. Rep. 186. Nor is a proceeding for contempt in the federal courts against a state officer who has seized property in the hands of a receiver in attempting to collect a tax alleged to be illegal and attacked by proceeding in the federal court, in any sense a suit against the state; 149 U. S. 164.

A state cannot be sued to recover the amount due to the holders of its bonds; 134 U. S. 1; nor will a suit be maintained against a state auditor to compel the levying of a special tax for the benefit of holders of its bonds, since that is in effect a suit against the state; *id.* 22. Actions held to be properly suits against the state and therefore not maintainable, are, against the state board of agriculture to recover money alleged to be wrongfully collected by it as a license tax; 111 N. C. 135; a suit by a private citizen to enjoin the erection of a public building at a place other than that prescribed by law; 24 Ore. 553; a suit to determine the rights of conflicting claimants to a fund granted by congress to the states for agricultural colleges; 56 Fed. Rep. 55.

The rights and immunities of a foreign state belong to her only within her own jurisdiction and territory, and, when she becomes a suitor in the courts of a foreign state, she is treated as a foreign private corporation; 29 W. Va. 326. See SOVEREIGN.

When a state brings a suit against citizens, she thereby voluntarily accepts all the conditions which affect ordinary suitors, except that no affirmative judgment, as

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for the payment of costs, can be rendered against her; and if the cause is removed to a federal court it will proceed in the same manner as a suit between individuals; 56 Fed. Rep. 329. So where the state has brought a suit in equity and the cause has been removed to a federal court, the defendant may there file a cross bill against the state; 60 Fed. Rep. 552; but if the cross bill seeks any affirmative relief against the state, it cannot be filed, under a constitutional provision that the state shall not be made a defendant in any court of law or equity; 100 Ala. 80; nor can a cross demand be maintained against a state; 46 La. Ann. 431; *id.* 55; 37 *id.* 623.

While a state cannot be compelled by suit to perform its contracts, any attempt on its part to violate property or rights acquired under its contracts may be judicially resisted; and any law impairing the obligation of contracts under which such property or rights are held is void; 134 U. S. 1.

As to whether states can be compelled to pay their debts, see 12 Am. L. Rev. 625; 15 *id.* 519.

**In Society.** That quality which belongs to a person in society, and which secures to and imposes upon him different rights and duties in consequence of the difference of that quality.

**In Practice.** To make known specifically; to explain particularly: as, to state an account or to show the different items in an account; to state the cause of action in a declaration.

**STATEMENT.** The act of stating, reciting, or presenting verbally or on paper. 91 Tenn. 168. See PARTICULAR STATEMENT.

**STATEMENT OF AFFAIRS.** In English bankruptcy practice, the giving by the debtor of a list of creditors, secured and unsecured with the value of the securities, a list of bills discounted, and a statement of his property. Bank. Act 1869, § 19.

**STATEMENT OF CLAIM.** The specification of the plaintiff's cause of action. See DECLARATION. The term is now used in Pennsylvania under the Practice Act of 1887.

It is not a legitimate function of a statement of claim to reply to an anticipated affirmative defence; 84 Fed. Rep. 102.

**STATE'S EVIDENCE.** See KING'S EVIDENCE; PROVER.

**STATING-PART OF A BILL.** See BILL.

**STATION. In Civil Law.** A place where ships may ride in safety. Dig. 49. 12. 1. 13; 50. 15. 59.

A place where railroad trains regularly come to a stand, for the convenience of passengers, taking in fuel, discharging freight, or the like. Webst.

A railroad company may exclude from its stations all persons except those using or desirous of using the railway, and may impose upon the rest of the public any terms it may deem proper as the condition of admittance; [1897] A. C. 479; to the same effect, 18 C. B. 46.

Discrimination between competing omnibus lines at a railroad depot, by giving one of them a more favorable stand than is allowed to the other, where both are given access to the grounds, is insufficient to constitute any legal ground of complaint against the railroad company; 37 L. R. A. (Ind.) 376. See RAILROAD.

**STATIONERS' HALL.** The hall of the Stationers' Company at which every person claiming copyright must register his title, and without such registration no action shall be commenced against persons infringing it.

**STATIST.** A statesman; a politician; one skilled in government.

**STATU LIBERI** (Lat.). **In Louisiana.** Slaves for a time, who had acquired the right of being free at a time to come, or on a condition which was not fulfilled, or in a certain event which had not happened, but who in the meantime remained in a state of slavery. La. Civ. Code, art. 37. See 3 La. 176; 6 *id.* 571; 4 Mart. La. 102; 8 *id.* 219. This is substantially the definition of the civil law. *Hist. de la Jur.* l. 40; Dig. 40. 7. 1; Code 7. 2. 13.

**STATUS** (Lat.). The condition of persons. The movement of progressive societies has been from status to contract; Maine, Anc. Law 170. It also means estate, because it signifies the condition or circumstances in which the owner stands with regard to his property.

**STATUS QUO.** The existing state of things at any given date.

**STATUS QUO ANTE BELLUM.** A phrase used in international law to indicate the condition of the territory of a belligerent and the ownership of the property of the subjects of such belligerent, as they existed prior to the breaking out of war, which, under the stipulations of some treaties of peace are restored to their former ownership. In other treaties, a belligerent who has possession of an enemy's territory or property at the end of the war retains it. See TREATY OF PEACE; UTI POSSIDETIS.

**STATUTE.** A law established by the act of the legislative power. An act of the legislature. The written will of the legislature, solemnly expressed according to the forms necessary to constitute it the law of the state.

This word is used to designate the written law in contradistinction to the unwritten law. See COMMON LAW.

Among the civilians, the term statute is generally applied to laws and regulations of every sort; every provision of law which ordains, permits, or prohibits anything is designated a statute, without considering from what source it arises. Some-

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times the word is used in contradistinction to the imperial Roman law, which, by way of eminence, civilians call the common law. Wharton.

*A negative statute* is one expressed in negative terms, and so controls the common law that it has no force in opposition to the statute. Bac. Abr. *Statute* (G).

*An affirmative statute* is one which is enacted in affirmative terms.

Such a statute does not necessarily take away the common law; Co. 2d Inst. 200; if, for example, a statute without negative words declares that when certain requisites shall have been complied with, deeds shall have a certain effect as evidence, this does not prevent their being used in evidence, though the requisites have not been complied with, in the same manner they might have been before the statute was passed; 2 Caines 169; or a custom; 6 Cl. & F. 41. Nor does such an affirmative statute repeal a precedent statute if the two can both be given effect; Dwarris, Statute 474. The distinction between negative and affirmative statutes has been considered inaccurate; 13 Q. B. 33.

*A declaratory statute* is one which is passed in order to put an end to a doubt as to what is the common law or the meaning of another statute, and which declares what it is and ever has been.

*Penal statutes* are those which command or prohibit a thing under a certain penalty. Bac. Abr. A statute affixing a penalty to an act, though it does not in words prohibit it, thereby makes it illegal; 14 Johns. 273; 1 Binn. 110; 37 E. L. & E. 475; 14 N. H. 294; 4 Ia. 490; 7 Ind. 77. See, as to the construction of penal statutes, 2 Cr. L. Mag. Jan. 81; 49 Fed. Rep. 360; 120 U. S. 678; 134 *id.* 624; Bish. Stat. Cr. 226; PENAL STATUTES.

*A perpetual statute* is one for the continuance of which there is no limited time, although it be not expressly declared to be so.

If a statute which did not itself contain any limitation is to be governed by another which is temporary only, the former will also be temporary and dependent upon the existence of the latter. Bac. Abr. *Statute* (D).

*Private statutes* or *acts* are those of which the judges will not take notice without pleading; such as concern only a particular species or person. See 1 Bla. Com. 86. Special or private acts are regarded as "rather exceptions than rules, being those which only operated on particular persons and private concerns" (cited with approval in 104 U. S. 447, where it was held that where an act amends a general act it is a public act).

Private statutes may be rendered public by being so declared by the legislature; 1 Bla. Com. 85; 4 Co. 76. And see 1 Kent 459. In England private statutes are said not to bind *strangers;* though they should contain any saving of their rights. A general saving clause used to be inserted in all private bills; but it is settled that, even if such saving clause be omitted, the act will bind none but the parties. But this doctrine does not seem to be applicable to this country.

*Public statutes* are those of which the courts will take judicial notice without pleading or proof.

They are either general or local,—that is, have operation throughout the state at large, or within a particular locality. It is not easy to say what degree of limitation will render an act local. Thus, it has been held that a public act relating to one county only is not local within the meaning of a constitutional provision which forbids enactments of local bills embracing more than one subject; 5 N. Y. 285; 2 Sandf. 355.

*A remedial statute* is one made to supply such defects or abridge such superfluities in the common law as may have been discovered. 1 Bla. Com. 86.

These remedial statutes are themselves divided into *enlarging* statutes, by which the common law is made more comprehensive and extended than it was before, and into *restraining* statutes, by which it is narrowed down to that which is just and proper. The term *remedial statute* is also applied to those acts which give the party injured a remedy; and in some cases such statutes are penal; Esp. Pen. Acts 1.

*A temporary statute* is one which is limited in its duration at the time of its enactment.

It continues in force until the time of its limitation has expired, unless sooner repealed. A statute which by reason of its nature has only a single and temporary operation—*e. g.* an appropriation bill—is also called a temporary statute.

There is also a distinction in England between *general* and *special* statutes. The former affect the whole community, or large and important sections, the interest of which may be identical with those of the whole body. *Special* statutes relate to private interests, and deal with the affairs of persons, places, classes, etc., which are not of a public character. Wilb. Stat. 218. See 104 U. S. 447.

*Local statute* is used by Lord Mansfield as opposed to *personal statute*, which relates to personal transitory contracts; whereas a local statute refers to things in a certain jurisdiction alone; *e. g.* the statute of frauds relates only to things in England; 1 W. Bla. 246.

As to *mandatory* and *directory* statutes, it is said that when the provision of a statute is the essence of the thing required to be done, it is mandatory; otherwise, when it relates to form and manner; and where an act is incident, or after jurisdiction acquired, it is directory merely; 58 N. H. 17. See, also, 2 Ky. L. Rep. 166.

*Expository statutes.* Acts passed for the purpose of affecting the construction to be placed upon prior acts. They are often expressed thus: "The true intent and meaning of an act passed . . . be and is hereby declared to be;" "the provisions

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of the act shall not hereafter extend"; or "are hereby declared and enacted not to apply," and the like. This is a common mode of legislation. "It is always competent to change an existing law by a declaratory statute; and where the statute is only to operate on future cases it is no objection to its validity that it assumes the law to have been in the past what it is now declared that it shall be in the future." Cooley, Const. Lim. 94; such acts are binding upon the courts, although the latter, without such a direction, would have understood the language to have meant something different. They have the same effect upon the construction of former acts, in the absence of intervening rights, as if they had been embodied in the former act at the time of its passage; Endlich, Interpr. Stat. 365. See Pomeroy's Sedgw. Constr. Stat. Law 214; Sutherl. Stat. Constr. sec. 402.

A statute declaring the meaning of a prior act, etc., will not be construed to be an invasion of the judicial function, but will be treated as a direct enactment controlling the meaning of the prior act; 24 Fed. Rep. 667. But it has been held that the legislature cannot pass an act so as to compel the courts in the future to adopt a particular construction of an earlier statute; 172 Pa. 140, Mitchell, J., dissenting: but see 122 *id.* 627; 68 *id.* 45, where the doctrine seems to have been confined to retrospective legislation.

See an article in 35 Am. L. Reg. & Rev. 25, by William M. Meigs.

It is a general rule that when the provision of a statute is general, everything which is necessary to make such provision effectual is supplied by the common law; Co. Litt. 235; Co. 2d Inst. 222; and when a power is given by statute, everything necessary for making it effectual is given by implication: *quando lex aliquid concedit, concedere videtur et id sine quo res ipsa esse non potest;* 12 Co. 130.

The provisions of a statute cannot be evaded by any shift or contrivance; 2 B. & C. 655. Whatever is prohibited by law to be done directly cannot legally be effected by an indirect and circuitous contrivance; 7 Cl. & F. 540.

The mode of enacting laws in the United States is regulated by the constitution of the Union and of the several states respectively. The advantage of having a law officer, or board of officers, to revise bills and amendments of bills during their progress through the legislature, has been somewhat discussed. See Reports of Eng. Stat. Law Com. 1856, 1857; Street, Council of Revision; 5 Rep. Am. Bar Assn.

*Enacting legislation.* As to formalities required it has been held that a statute which the legislative journals showed was never passed, was valid because signed by the presiding officers of the legislature; 22 S. E. Rep. (N. C.) 16, 120; and that it is not admissible to prove that an act signed by the governor was in fact passed by the legislature and sent to him within two days next preceding the final adjournment of the legislature in violation of the constitution; 40 N. E. Rep. (Ind.) 1050.

The signing by the speaker of the United States house of representatives, and by the president of the senate, in open session, of an enrolled bill, is an official attestation by the two houses that such bill has passed congress, and when the bill thus attested, receives the approval of the president, and is deposited in the department of state its authentication as a bill that has passed congress is complete and unimpeachable; 143 U. S. 649.

See JOURNALS, where this subject is treated.

Evidence that individual members were mistaken as to facts is inadmissible to effect legislative action; 36 Atl. Rep. (Conn.) 1019.

As to whether the president has the power to sign bills after the adjournment of congress, Attorney-General Wirt was of the opinion that he had not, and President Monroe acted on his opinion. President Lincoln signed the act of March 12, 1863, after the adjournment of congress. A house committee subsequently reported that in their opinion the act was not in force, but the house never acted upon their report. The court of claims holds that this act has been recognized by the supreme court, and was therefore valid; see 32 Amer. Law Rev. 211; 29 Ct. Cl. 549.

Attorney-General Garland advised President Cleveland that he was without authority to sign a bill after adjournment.

In 29 Ct. Cl. 523, it was held that the president had the power to sign bills after the adjournment of congress. In cases arising under state constitutions, it was held in 2 Cal. 165; 50 Miss. 802, that the power to sign a bill ceased with the adjournment, but under the language of the Illinois constitution, a signature after adjournment was held valid; 103 U. S. 423.

In 21 N. Y. 517, it was held, under a constitutional provision almost identical with that of the constitution of the United States, that a signature after adjournment was valid. And this was followed in 22 La. Ann. 545.

Much interesting discussion has arisen on the question whether a statute which appears to be contrary to the laws of God and nature, and to right reason, is void. Earlier dicta in the affirmative (see 8 Co. *118 *a*; 12 Mod. 687) are not now considered to be law; L. R. 6 C. P. 582. See Dwarris, Stat. 482. The question as applicable to this country is treated under CONSTITUTIONAL. It being historically true that the American people are a religious people, as shown by the religious objects expressed by the original grants and charters of the colonies, and the recognition of religion in the most solemn acts of their history, as well as in the constitutions of the states and the nation, the courts, in construing statutes, should not impute to any legislature a purpose of action against religion; 143 U. S. 457.

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In the United States, a statute which contravenes a provision of the constitution of the state by whose legislature it was enacted, or of the constitution of the United States, is in so far void. See CONSTITUTIONAL. The presumption, however, is that every state statute the object and provision of which are among the acknowledged powers of legislation is valid and constitutional: and such presumption is not to be overcome unless the contrary is clearly demonstrated; 6 Cra. 87; 1 Cow. 564; 7 N. Y. 109. Where a part only of a statute is unconstitutional, the rest is not void, if it can stand by itself; 1 Gray 1; Bish. Writ. Law 84.

By the common law, statutes took effect by relation back to the first day of the session at which they were enacted; 4 Term 660. The injustice which this rule often worked led to the statute of 33 Geo. III. c. 13, which declared that, except when otherwise provided, statutes should take effect from the day of obtaining the royal assent, unless otherwise ordered therein. This rule, however, does not obviate the hardship of holding men responsible under a law before its promulgation. By the Code Napoléon, a law takes effect in each department of the empire as many days after its promulgation in that department as there are distances of twenty leagues between the seat of government and the place of promulgation. The general rule in America is, that an act takes effect from the time when the formalities of enactment are actually complete, unless it is ordered otherwise or there is some constitutional or statutory rule on the subject; Cooley, Const. Lim. 187; 7 Wheat. 164.

The constitutions of many states contain provisions that acts shall not take effect till a certain time after their passage, or after adjournment of the legislature, but such constitutions usually contain also a provision that the legislature may, in a case of emergency, provide that an act shall take effect immediately, and it has become a common practice so to provide even in ordinary acts. Where an act was passed May 16, which declared that it should take effect May 14, it went into effect on its passage; 30 Atl. Rep. (N. J. Sup.) 543.

The Tariff Act of 1897 took effect at the moment it was approved by the president, which was six minutes past 4 o'clock P. M., Washington time, on July 24, 1897, and goods imported and entered for consumption on that day, but prior to such approval, were dutiable under prior legislation; 87 Fed. Rep. 194. So held, also, by Colt, J., in U. S. C. C., 1st Circ. (Boston Herald, Oct. 12, 1898).

An act increasing taxes and denouncing penalties, falls within the first article of the constitution prohibiting *ex post facto* laws, and giving effect to statutes only from the time of their receiving the president's signature; 1 Hughes 356. "The law is an entirety. If, as to its penal features, it cannot be held to have gone into effect until 9 P. M. of the day of its enactment, neither can it be held to have gone into effect before that hour as to its other provisions." *Id.* See, also, 159 U. S. 78, as to the tariff act of 1894.

*Local and special legislation.* In all but a few states constitutional provisions are found forbidding the passage of local or private or special laws. While these provisions were not unknown at an earlier date, the principle was fully developed in the Illinois constitution of 1870, and has become more fixed as a part of American constitutional law since then. In some states, such prohibited legislation is specified as "local or special," and in some "special or private," and in some "private, local, or special." The act of congress of July 30, 1886, prohibited local and special legislation in the territories. See Binney, Restrict. upon Loc. and Spec. Legisl. 130. The subject-matter of legislation to which this prohibition applies varies in different states. Mr. Binney has grouped them in a general way. See *id.* 132. Among the subject-matters most usually found are: changing names of persons; legitimation and adoption of children; divorce; granting charters; changing laws of descent; providing for the sale or conveyance of real estate of persons under disability; granting the right of eminent domain; regulating legal procedure; incorporating municipalities; creating offices; or regulating the fees of officers; laying out highways; providing for the management of public schools; taxation. In some states special laws are permitted only when a general law cannot be made applicable.

A general law is defined as "neither for one or more particular persons, nor to operate exclusively in any particular part or parts of the state"; Binney, Restr. etc. 22. Such an act is not necessarily universal and need not be one which operates on all persons or all things; a law which effects a class of persons or things may be a general law; 37 Cal. 375; 40 N. J. L. 1. A law is to be regarded as such when its provisions apply to all objects of legislation, distinguished alike by quality and attribute which necessitate the enactment as manifest relation. Such laws must embrace all and exclude none whose condition and wants render such legislation equally necessary or appropriate to them as a class; 49 N. J. L. 88. See GENERAL LAWS.

A special law is one which relates either to particular persons, places, or things, or to persons, places, or things which, though not particularized, are separated by any method of selection from the whole class to which the law might, but for such legislation, be applicable. Binney, Restr. etc. 26.

A local law is one whose operation is confined within territorial limits, other than those of the whole state or any properly constituted class or locality therein.

The features of local and special legislation overlap, but they are not conterminous. The matter to which a local law re-

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lates may be either general or special, but in either case the law itself is not in force outside of the locality for which it is passed.

The following are held special acts and invalid: An act for holding primary elections made applicable only to counties casting a certain number of votes at the last election, which makes it applicable only to two counties; 48 Pac. Rep. (Cal.) 975; an act, though general in form, regulating the re-location of county seats which was in fact applicable to but a single county; 143 Ind. 306; an act for the extension of corporate limits of cities having a certain population which can be applicable only to one city; 65 N. W. Rep. (Ia.) 818; an act relating to the collection of taxes, cities of the first, second, and fourth class being excepted, and it not being confined to municipal matters; 171 Pa. 157.

The following are not within the constitutional prohibition: An act amending a city charter granted previously to the adoption of the constitution; 45 Pac. Rep. (Col.) 356; an act relating to a subject as to which there was already a local law; 96 Ga. 403; an act providing a *per diem* pay for jurors although it only applied to a single county in which there was already a special law, it being at the time of the passage of the act the existing rate in the remaining counties; 64 N. W. Rep. (Minn.) 813; an act making it a misdemeanor to work as a barber on Sunday, exempting from its operation New York and Saratoga; 13 Misc. 587; an act providing a different and better system of education for cities of ten thousand or more inhabitants than is enjoyed by the rest of the state; 13 Wash. 696.

A territorial act classifying counties according to the equalized assessed valuation of property and graduating salaries of county officers in reference to population is not a local special law under the act of congress; 162 U. S. 547.

The proviso of a general act that it shall not apply to suits pending at its passage does not render it special; 169 Pa. 359.

An act offering a reward for the first to obtain in each county an artesian well is void; 44 Pac. Rep. (Ari.) 299. At least two individuals, actual or potential, are necessary to constitute a class which may be the subject of an act on the subject concerning which special acts are forbidden; such a class cannot be created by statute, however general, which takes as a class characteristic, to designate the members of a class, peculiarities of a single individual; 42 W. Va. 587. An act forbidding a sale of stocks of bonds and provisions, cotton, etc., on margin without delivering the property is not a special act; 134 Mo. 512; but an act prohibiting bookmaking and pool-selling excepting on a race course is a special act; 136 Mo. 400; and so is an act permitting a limited divorce instead of an absolute divorce when asked by a person holding conscientious scruples against absolute divorce; 36 L. R. A. (N. J.) 221.

When there is a general act for the incorporation of companies with the right of amendment reserved to the state, any amendment thereto must affect all corporations incorporated under the act; 82 Fed. Rep. 1; and where it is limited to cities of a certain size whereby it can be applicable only to a certain city, it is special legislation and void; *id.*

*Classification.* Under modern constitutions which prohibit special legislation, it has been found necessary to permit of the classification of certain subjects of legislation, chiefly in relation to municipalities or what may be termed home rule.

Mr. Binney, in the work quoted, gives five rules as, in his opinion, supported by judicial decisions.

1. All classification must be based upon substantial distinctions which make one class really different from another.

2. The classification adopted in any law must be germane to the purpose of the law.

3. Classification must not be based upon existing circumstances only, or those of limited duration, except where the object of the law is itself a temporary one.

4. To whatever class a law may apply, it must apply equally to each member thereof, except only where its application is affected by the existence of prior unrepealed local or special laws.

5. If the classification be valid, the number of members in a class is wholly immaterial.

While the classification of municipalities is permitted, it is held that not more than three classes can lawfully be made in cities in Pennsylvania; 122 Pa. 266; and that a classification, which is in effect legislation for certain cities to the exclusion of others which are really of the same class, is invalid; 96 Pa. 422.

A classification act may furnish a precedent for the legislature in future cases, but cannot control its action. The constitutionality of each law which establishes or adopts a classification must be judged of separately, and the mere fact that a classification has constitutionally been employed in one case does not bind the legislature to employ it again, even in a similar case; 25 Atl. Rep. (N. J.) 269.

Wheeler *v.* Philadelphia, 77 Pa. 338 (1875), is an early and leading case on classification. It holds that a statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is special; that the necessity for classification is recognized in the constitution by the creation of courts on a basis of population and that classification is incident to legislation and necessary to the promotion of the public welfare; that the question is not whether it is authorized but whether it is expressly prohibited in the constitution. It further holds that, for the purpose of taxation, real estate may be classified; as into timber lands, mineral lands, farm lands, etc., and that the act of 1874, which classifies cities according to their population, is constitutional.

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Where a federal statute has been taken from a state statute the settled construction of the latter before the enactment of the former must be considered as having been adopted by congress; 171 U. S.—not reported. So also of the Interstate Commerce Act, so far as it is based on English acts; 145 U. S. 263.

In a statute the words "it shall be lawful" are usually only permissive; they confer a faculty or power; but there may be something in the act imposing a duty to exercise such power, in which case the words become obligatory; 5 App Cas. 222.

As to referring proposed legislation to a vote of the citizens, and as to the initiation of legislation by citizens, see REFERENDUM.

See CONSTRUCTION; INTERPRETATION; EX POST FACTO LAWS: CONSTITUTIONAL; CONSTITUTION; FOREIGN LAW; PUNCTUATION; PROVISO; OBSOLETE; REPEAL; REVISED STATUTES; STATUTES AT LARGE; RETROSPECTIVE LEGISLATION; PROMULGATION; PROCLAMATION.

See 3 Binney for a list of British statutes in force in Pennsylvania. See Sanderson, Validity of Statutes in Pennsylvania; Endlich, Interp. of Statutes.

**STATUTE MERCHANT.** A security entered before the Mayor of London, or some chief warden of a city, in pursuance of 13 Ed. I. stat. 3, c. 1, whereby the lands of the debtor are conveyed to the creditor till out of the rents and profits of them his debt may be satisfied. 2 Bla. Com. 160.

**STATUTE OF FRAUDS.** See FRAUDS, STATUTE OF.

The statute of frauds "is a weapon of defence, not of offence," and "does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intentions of the parties" Lord Selborne, C., in L. R. 8 Ch. 351.

**STATUTE OF LIMITATIONS.** See LIMITATIONS.

**STATUTE STAPLE.** The statute of the staple, 27 Ed. III. stat. 2, confined the sale of all commodities to be exported to certain towns in England, called *estaple* or *staple*, where foreigners might resort. It authorized a security for money, commonly called statute staple, to be taken by traders for the benefit of commerce; the mayor of the place is entitled to take recognizance of a debt in proper form, which had the effect to convey the lands of the debtor to the creditor till out of the rents and profits of them he should be satisfied. 2 Bla. Com. 160; 2 Rolle, Abr. 446; Bac. Abr. *Execution* (B. 1); Co. 4th Inst. 238.

**STATUTES AT LARGE.** Statutes in full or at length as originally enacted, in distinction from abridgments, compilations, and revisions. In particular, the title of the publication containing, chiefly, the acts of congress—the United States, Statutes at Large. Anderson, L. Dict.

If there is any variance between an act of congress, as found in the printed volume of statutes, and the original, as enrolled and deposited with the secretary of state, the latter will prevail; 38 Pac. Rep. (Cal.) 973.

**STATUTI (Lat.). In Roman Law.** Those advocates whose names were inscribed in the registers of matriculation, and formed a part of the college of advocates. The number of advocates of this class was limited. They were distinguished from the supernumeraries, from the time of Constantine to Justinian. See Calvinus, Lex.

**STATUTORY OBLIGATION.** An obligation arising under a statute. See OBLIGATION.

**STATUTORY STAPLE.** An ancient writ that lay to take the body of a person and seize the lands and goods of one who had forfeited a bond called statute staple. Reg. Orig. 151.

**STATUTUM DE MERCATORIBUS.** The statute of Acton Burnell (*q. v.*).

**STATUTUM HIBERNIÆ DE COHÆREDIBUS.** The third public act in the statute book. It appears to be an instruction given by the king to his justices in Ireland, directing them how to proceed in a certain point where they entertained doubt. 1 Reeve, Hist. Eng. L. 259.

**STATUTUM SESSIONUM.** The Statute Sessions. A meeting in every hundred of constables and householders, by custom, for the ordering of servants, and debating of differences between masters and servants, rating of wages, etc., 5 Eliz. c. 4.

**STAY AND TRADE.** Within the meaning of an insurance policy, covering a ship during her stay and trade at a place these words were held to mean during her stay there for the purpose of trade; a stay for a purpose unconnected with trade is a deviation. 42 L. J. Ex. 60. See DEVIATION.

**STAY LAWS.** Acts of the legislature prescribing a stay in certain cases, or a stay of foreclosure of mortgages, or closing the courts for a limited period, or otherwise suspending legal remedies. See STAY OF EXECUTION.

**STAY OF EXECUTION. In Practice.** A term during which no execution can issue on a judgment.

It is either conventional, when the parties agree that no execution shall issue for a certain period, or it is granted by law, usually on condition of entering bail or security for the money.

An execution issued before the expiration of the stay is irregular and will be set aside; and the plaintiff in such case may be liable to an action for damages. What is said above refers to civil cases.

In criminal cases, when a woman is capitally convicted and she is proved to be *enceinte* there shall be a stay of execution

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till after her delivery. See PREGNANCY; JURY OF WOMEN.

A statute which authorizes stay of execution for an unreasonable and indefinite period, on judgments rendered on pre-existing contracts, is void; 41 Pa. 441; 31 Mo. 205; a law permitting a year's stay upon judgments where security is given has been held invalid; 6 Heisk. 98; S. C. 19 Am. Rep. 593. See Cooley, Const. Lim., 2d ed. 354, n.

**STAYING PROCEEDINGS.** The suspension of an action.

Proceedings are stayed absolutely or conditionally.

They are peremptorily stayed when the plaintiff is wholly incapacitated from suing: as, for example, when the plaintiff is not the holder, nor beneficially interested in a bill on which he has brought his action; 2 Cr. & M. 416; 3 Chitty, Pr. 628; or when the plaintiff admits in writing that he has no cause of action; 3 Chitty, Pr. 870, 630; or when an action is brought contrary to good faith; Tidd, Pr. 515, 529, 1134; 3 Chitty, Pr. 633.

Proceedings are sometimes stayed until some order of the court shall have been complied with; as, when the plaintiff resides in a foreign country or in another state, or is insolvent, and he has been ruled to give security for costs, the proceedings are stayed until such security shall be given; 3 Chitty, Pr. 633, 635; or until the payment of costs in a former action; 1 Chitty, Bail. 195.

**STEALING.** This term imports, *ex vi termini*, nearly the same as larceny; but in common parlance it does not always import a felony. 3 Wheel. Cr. Cas. 183.

In slander cases, it seems that the term stealing takes its complexion from the subject-matter to which it is applied, and will be considered as intended of a felonious stealing, if a felony could have been committed of such subject-matter; 12 Johns. 239; 3 Binn. 546. The word steal is held synonymous with theft. 9 Tex. App. 463. See 12 Tex. 450.

**STEAMSHIP.** A vessel, the principal motive power of which is steam and not sails. L. R. 7 Q. B. 569. See 32 Pa. 352. The owner of a steamboat is not an innkeeper so as to be liable for personal property stolen from a passenger. 118 Mass. 275. See SLEEPING-CAR; SHIP; VESSEL.

**STEELBOW GOODS.** Instruments of husbandry, cattle, corn, etc., delivered by a landlord to his tenant on condition that the like number of goods of like quality should be returned on expiration of the lease. Bell, Dict.; Stair, Inst. 285, § 81; Ersk. Inst. 2. 4. 2.

**STELLIONATE.** In Civil Law. A name given generally to all species of frauds committed in making contracts.

This word is said to be derived from the Latin *stellio*, a kind of lizard remarkable for its cunning and the change of its color, because those guilty of frauds used every art and cunning to conceal them. But more particularly it was the crime of a person who fraudulently assigned, sold, or engaged the thing which he had before assigned, sold, or engaged to another, unknown to the person with whom he was dealing. Dig. 47. 20. 3; Code 9. 34. 1; Merlin, *Répert.*; La. Civ. Code, art. 2069; 1 Brown, Civ. Law 426. As a punishment those persons who granted double conveyances were declared infamous and their lives and goods were at the mercy of the king. Ersk. Prin. 441.

**STENOGRAPHER.** One who writes in short-hand, by using abbreviations or characters for words.

He does not come within the common-law definition of the word "clerk." 25 Neb. 662.

The depositions of witnesses taken in short-hand, and transcribed, will be suppressed, if not read to and signed by the witness, though the witness's subsequent attendance for the purpose could not be procured; 9 Fed. Rep. 754: but see *contra*, 79 Ill. 576, where it is held that the transcript of evidence taken in short-hand is admissible, where the stenographer testifies that he transcribed the testimony, and that the transcript is correct; that the witnesses were sworn and testified as therein stated. See also 48 Mich. 257. Where it is sought to impeach a witness's testimony by proving his testimony at a former trial, the stenographer is not the only witness who may be called, but any one who heard the testimony may be; 65 Me. 466; 35 S. C. 587.

A stenographic report of the testimony of an absent witness, at a former trial, may be admitted if complete and correct; 80 Fed. Rep. 361; or a copy of testimony compared with a stenographic report thereof, by a person who was present at the trial and remembers the testimony as given; 21 So. Rep. (Ala.) 328.

In Pennsylvania, where a stenographer is appointed under the provisions of an act of legislature authorizing the appointment of stenographers in the several courts of the commonwealth, the stenographer who actually takes the testimony must certify to the correctness of the transcript which he files, and the trial judge should order the transcript filed and certify to its correctness; 180 Pa. 161.

The charges of a stenographer are not taxable for costs in a suit in equity; 7 Fed. Rep. 42; but the agreement of the parties may make them taxable costs, though not so by statute; 1 Bingh. 345. See 10 Wash. L. Rep. 7; 61 Ill. 271; 44 Mich. 438.

Compensation for testimony taken before a referee is the subject of contract, as a stenographer is not then an officer of the court; 41 N. Y. S. 583; and the expense of a transcript of a stenographer's notes, for convenience, instead of use on the trial, is not taxable as costs; 8 U. S. App. 129.

An association of stenographers, whose leading object is to control the prices charged by its members, is an illegal combination, and its rules will not be enforced; 140 Ill. 69.

**STEP-DAUGHTER.** The daughter

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of one's wife by a former husband, or of one's husband by a former wife.

**STEP-FATHER.** The husband of one's mother by virtue of a marriage subsequent to that of which the person spoken of is the offspring.

**STEP-MOTHER.** The wife of one's father by virtue of a marriage subsequent to that of which the person spoken of is the offspring.

**STEP-SON.** The son of one's wife by a former husband, or of one's husband by a former wife.

**STERE.** A French measure of solidity, used in measuring wood. It is a cubic metre. See MEASURE.

**STERILITY.** Barrenness; incapacity to produce a child. It is curable and incurable; when of the latter kind at the time of the marriage, and arising from impotency, it is a good cause for dissolving a marriage. 1 Foderé, *Méd. Lég.* § 254. See IMPOTENCY.

**STERLING.** Current money of Great Britain, but anciently a small coin worth about one penny, and so called, as some suppose, because it was stamped with the figure of a small star, or, as others suppose, because it was first stamped in England in the reign of king John by merchants from Germany called Esterlings. *Pounds sterling* originally signified so many pounds in weight of these coins. Thus, we find in Matthew Paris, A. D. 1242, the expression *Accepit a rege pro stipendio tredecim libras esterlingorum.* The secondary or derived sense is a certain value in current money, whether in coins or other currency. Lowndes 14; Watts, Gloss. *Sterling.*

**STET PROCESSUS** (Lat.). **In Practice.** An order made, upon proper cause shown, that the *process remain stationary.* As, where a defendant having become insolvent would, by moving judgment in the case of nonsuit, compel a plaintiff to proceed, the court will, on an affidavit of the fact of insolvency, award a *stet processus.* See 7 Taunt. 180; 1 Chitty, Bail. 738; 10 Wentw. Pl. 43.

**STEVEDORE.** A person employed in loading and unloading vessels. Dunlap, Adm. Pract. 98. See LIENS.

**STEWARD.** Formerly an officer of disputes, namely, a keeper of the courts. Co. Litt. 61. See COURT OF MARSHALSEA.

**STEWARD OF A MANOR.** An officer who transacts all the legal and other business connected with the estate, and takes care of the court rolls. In royal manors he is appointed by patent. See 10 George IV. c. 40, § 14.

**STEWARD OF ALL ENGLAND. In Old English Law.** An officer who was invested with various powers; among others, to preside on the trial of peers.

**STEWARD OF THE HOUSEHOLD.** See MARSHALSEA.

**STEWS.** Places formerly permitted in England to women of professed lewdness, who for hire would prostitute their bodies to all comers.

These places were so called because the dissolute persons who visited them prepared themselves by bathing,—the word stews being derived from the old French *estuves*, stove, or hot bath. Co. 3d Inst. 205.

**STILLICIDIUM** (Lat.). **In Civil Law.** The rain-water that falls from the roof or eaves of a house by scattered drops. When it is gathered into a spout, it is is called *flumen.* See SERVITUS; Inst. 3. 2. 1; Dig. 8. 2. 2.

**STINT.** The proportionable part of a man's cattle which he may keep upon the common. The general rule is that the commoner shall not turn more cattle upon the common than are sufficient to manure and stock the land to which his right of common is annexed. There may be such a thing as common without stint or number; but this is seldom granted, and a grantee cannot grant it over. 3 Bla. Com. 239; 1 Ld. Raym. 407.

**STIPEND.** A provision made for the support of the clergy. Salary; settled pay. In a bequest of £100 for masses for the repose of the testator's soul, at a *stipend* of five shillings each, it was held to mean price and not to involve any attempt to create a perpetuity; 19 L. R. Q. B. 177.

**STIPENDIARY ESTATES.** Estates granted in return for services, generally of a military kind. 1 Steph. Comm. 174.

**STIPENDIARY MAGISTRATES.** Paid magistrates, appointed in London and some other municipal boroughs with the authority and jurisdiction of justices of the peace. 21 & 22 Vict. c. 73.

**STIPULATED DAMAGE.** See LIQUIDATED DAMAGE.

**STIPULATIO** (Lat.). **In Roman Law.** A contract made in the following manner: the person to whom the promise was to be made proposed a question to him from whom it was to proceed, fully expressing the nature and extent of the engagement; and, the question so proposed being answered in the affirmative, the obligation was complete. No consideration was required.

**STIPULATIO AQUILIANA. In Civil Law.** A particular application of the *stipulatio*, which was used to collect together into one verbal contract all the liabilities of every kind and quality of the debtor, with a view to their being released or discharged by an *acceptilatio*, that mode of discharge being applicable only to the verbal contract. Brown.

**STIPULATION.** A material article in an agreement.

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The term appears to have derived its meaning from the use of *stipulatio* above given; though it is applied more correctly and more conformably to its original meaning to denote the insisting upon and requiring any particular engagement. 2 Pothier, Obl., Evans ed. 19.

**In Practice.** An agreement between counsel respecting business before a court. Anderson, L. Dict.

A case may be reversed on stipulation; 131 U. S. 428; 123 *id.* 619; 124 *id.* 369.

**In Admiralty Practice.** A recognizance of certain persons (called in the old law *fide jussores*) in the nature of bail for the appearance of a defendant. 3 Bla. Com. 108.

These stipulations are of three sorts: namely, *judicatum solvi*, by which the party is absolutely bound to pay such sum as may be adjudged by the court; *de judicio sisti*, by which he is bound to appear from time to time during the pendency of the suit, and to abide the sentence; *de ratio*, or *de rato*, by which he engages to ratify the acts of his proctor: this stipulation is not usual in the admiralty courts of the United States.

The securities are taken in the following manner: namely, *cautio fide jussoria*, by sureties; *pignoratitia*, by deposit; *juratoria*, by oath: this security is given when the party is too poor to find sureties, at the discretion of the court; *nuda promissoria*, by bare promise: this security is unknown in the admiralty courts of the United States. Dunl. Adm. Pr. 150.

**STIRPES** (Lat.). Descents. The root-stem, or stock of a tree. Figuratively, it signifies in law that person from whom a family is descended, and also the kindred or family.

**STOCK. In Mercantile Law.** The capital of a merchant, tradesman, or other person, including his merchandise, money, and credits. The goods and wares he has for sale and traffic.

**In Corporation Law.** A right to partake, according to the amount of the party's subscription, of the surplus profits obtained from the use and disposal of the capital stock of the company. Ang. & A. Corp. § 557.

The capital stock of a corporation is that money or property which is put into a fund by those who, by subscription therefor, become members of the corporate body. 75 N. Y. 211. The phrase *capital stock* has been objected to, as the two words have separate meanings, *capital* being the sum subscribed and paid into the company, and *stock* being the thing which the subscriber receives for what he pays in; Dos Passos, St. Brokers 579. See 23 N. Y. 192. The interest which each person has in the corporation is termed a share, which is the right to participate in the profits of the corporation, and, upon its dissolution, in the division of its assets. See 75 N. Y. 211. "Capital stock" has been held to mean the amount contributed by the shareholders, and not the property of the company; 23 N. J. L. 195.

Capital stock is the sum fixed by the corporate charter as the amount paid in or to be paid in by the stockholders for the prosecution of the business of the corporation and for the benefit of corporate creditors. Cook, St. & Stockh. § 9. It is to be clearly distinguished from the amount of property possessed by the corporation; *id.*

The property or means contributed by the stockholders as the fund or basis for the business or enterprise for which the corporation or association was formed. 21 Wall. 284. See definitions in 126 N. Y. 433; 30 Ark. 693; 10 Mo. App. 146. Capital stock is a different thing from shares of stock; the latter are evidences of ownership; 24 Atl. Rep. (Pa.) 111. Stock is commonly used to mean shares of stock, and it has been so held in a tax statute; 23 Atl. Rep. (Conn.) 9.

The capital stock of a corporation differs widely in legal import from the aggregate shares into which it is divided by its charter (95 U. S. 686; 126 N. Y. 437); while the former includes only the fund of money or other property derived by it from the sale or exchange of its shares of stock, the latter represents the totality of the corporate assets and property; 84 Fed. Rep. 396.

A share of stock is a right which its owner has in the management, profits, and ultimate assets of the corporation. Cook, St. & Stockh. § 12. So, also, 92 N. Y. 592; 3 Wall. 585. It is the right to participate in stockholders' meetings, and in the profits of the business, and to require that the corporate property shall not be diverted from the original purposes; 2 Woods 331.

The number of shares depends upon the statutory regulations, or in their absence the agreement of the parties forming the corporation; 45 Me. 524. Shares may be arranged in classes, one class being *preferred* to another in the distribution of profits; 78 N. Y. 159. Voting may be restricted to a certain class.

The ownership of shares is usually attested by a certificate issued under the corporate seal; and when a new transfer is effected, such certificate is surrendered and cancelled, and a new one is issued to the transferee. A certificate need not be under seal; 103 U. S. 409. But a person may be the owner of shares in a corporation without holding such certificate; 102 Mass. 261; see 64 Cal. 117; 46 Mo. 248; and, strictly speaking, a company need not issue any certificates or muniments of title, if not required to do so by law or its charter; 24 Me. 256. The presence of a party's name on the stock books of the company is evidence of his ownership of shares; 73 Pa. 59. The possession of a corporate certificate of stock, duly issued, is a continuing affirmation of ownership of the stock by the person named therein; 11 Wall. 369; which generally creates an estoppel against the company in favor of the holder; 57 N. Y. 616; though in England

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it is said to be merely a solemn affirmation that the specified amount of stock stands on the stock books in the name of the person specified in the certificate; L. R. 7 H. L. 498. Every stockholder is entitled to a certificate of his shares; 105 U. S. 217.

The stock of a national bank is said to be a species of chose in action, or an equitable interest which the shareholder possesses, and which he can enforce against the corporation. See 53 N. Y. 161, 237. "If a share in a bank is not a chose in action, it is in the nature of a chose in action, and is personal property;" per Shaw, C. J., in 12 Metc. 421. Shares are not, strictly speaking, chattels; they bear a greater resemblance to choses in action; or, in other words, they are merely evidence of property; Ang. & A. Corp. § 560. They are now universally considered to be personal property; Ang. & A. Corp. § 557; Moraw. Priv. Corp. 119, 200; though in some earlier cases it was held otherwise. See Cook, St. & Stockh. § 12, n. They are not a debt; Dos Passos, St. Brokers 590. Shares in a corporation are said to be incorporeal personal property; 16 Ia. 173, per Dillon, J. In Louisiana, stock is property and not a credit; 10 Fed. Rep. 330.

It is settled in England that shares in a joint-stock company are not goods, wares and merchandise within the statute of frauds; 11 A. & E. 205; it has been otherwise decided in Massachusetts; 20 Pick. 9, uniformly followed in this country; Cook, St. & Stockh. § 339.

Stock is issued for money, in payment for property or labor, or as a stock dividend. It is established in England that stock may be issued for property, and such was the common law; 106 Ill. 43. See 91 U. S. 60. The subject is usually regulated by statute in this country. Stock can be issued by way of a stock dividend, which "is lawful when an amount of money or property equal in value to the stock distributed as a dividend has been accumulated and is permanently added to the capital stock of the corporation." Cook, St. & Stockh. § 536.

It is generally held that stock cannot be issued at a discount, and made full paid; 139 U. S. 429; [1897] A. C. 299; 38 Ch. Div. 415; 2 De G. F. & J. 295; 11 Manitoba 629; but it has been held that an agreement with the company that the holders should never be called upon to pay any further assessment upon stock is valid as between the parties; 105 U. S. 143. See 86 N. Y. 384; L. R. 14 Ch. Div. 394.

Directors issued stock at a discount; its market price went above par. It was held that the issue was unlawful and that the directors were liable, but only for the difference between the price at which they issued it and its par value; [1894] A. C. 654.

Where stock is issued for property which is overvalued, the transaction may be set aside for fraud; 3 Dill. 45; 59 Md. 1; 14 Fed. Rep. 12. The corporation, after issuing its stock as full paid cannot complain; 105 U. S. 143; unless the entire transaction is such that equity will rescind it for actual fraud. See, as to overvaluing property, 7 Am. & E. Corp. Cas. 652; 92 Ala. 407.

It has been held that a railroad company in need of funds may settle with a contractor by issuing stock to him as full-paid at twenty cents on the dollar, and that creditors of the company could not afterwards collect the difference between that and par; 139 U. S. 96. This decision has been much criticised. The same court said subsequently, in 144 U. S. 104, that "the trust arising in favor of creditors by subscription to the stock of a corporation cannot be defeated by a stipulated payment of such a subscription nor by any device short of actual payment in good faith." While any settlement might be good between the corporation and the stockholders it is unavailing against creditors. As against creditors, a corporation cannot give away its stock or distribute it among shareholders, without receiving a fair equivalent therefor; 139 U. S. 417.

A contract by which directors of a street-railway company, acting in the name of a third person, are to construct the road, and divide between them the stock and bonds not required therefor, is fraudulent, and bonds issued pursuant thereto are void; 82 Fed. Rep. 355.

A corporation has no power, in the absence of statutory authority, to increase or diminish its capital stock; 105 U. S. 148; 6 Pick. 23; 73 Ala. 325; 37 Fed. Rep. 508.

As to overissue of corporation shares, see 36 Cent. Law J. 52; OVERISSUE.

*Transfer.* A certificate of stock is transferable on the books of the company by the owner in person or by his attorney under written authority, which is commonly executed in blank and which may be filled up by the transferee; Ang. & A. Corp. § 564; Beach, Priv. Corp. 648; 34 N. Y. 30; 50 Pa. 67. A transfer in blank is deemed sufficient in some jurisdictions to pass the legal title to the stock subject to the claims of the company upon the registered stockholders; 2 Ames, B. & N. 784; 76 N. Y. 365; 10 Ala. 82; in other cases such a transfer has been held to give the holder merely an equitable interest; 3 How. 483; 5 Biss. 181. Prof. Ames is of opinion that the true view is that such a transfer does not pass the legal title, but that it passes the equitable interest, coupled with an irrevocable power of attorney to acquire the legal title; 2 Ames, B. & N. 784. This irrevocable power may, in some cases, by the doctrine of estoppel, be acquired by the delivery of the certificate from one who has no such power himself; 48 Cal. 99; 14 Nev. 362; 86 Pa. 80; 46 N. Y. 325. A seal is not necessary; 10 Mass. 476; though usually employed.

Shares of stock are non-negotiable instruments, but through the doctrine of estoppel, stock certificates, with a power to transfer them, can be dealt in with nearly the same immunity as bills and notes; Dos Passos, Stock Brokers 596; and the same writer is of opinion that the time has come

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for the court to receive evidence of the general usage of the business world, so as to raise stock certificates to the dignity of negotiable instruments; *id.* 597; but see 2 W. N. C. (Pa.) 322, where evidence of such a usage was rejected; see, also, 38 Pa. 98. Professor Ames says (2 Bills & Notes 784): "Whether the custom of merchants will ever lead the courts to give those instruments (certificates of stock) the quality of negotiability may be an open question; but that they have not done so is clear." See 28 N. Y. 600; 86 Pa. 83; 14 Am. L. Reg. N. S. 163, n. In 11 Wall. 369, the court said that certificates, "although neither in form or character negotiable paper, approximate it as nearly as practicable."

In case of the sale of the stock this power of attorney becomes irrevocable; 14 Md. 299; but if such a power of attorney is forged or is made by a person not competent to make it, the corporation is liable for allowing the transfer; 14 Md. 299. See 86 Pa. 80; 123 Mass. 110. A company may refuse to allow a transfer until satisfied of the party's right to make it; L. R. 9 Eq. 181; 52 Pa. 232; 5 S. C. 379.

A company is bound to require the surrender of the old certificate before allowing a transfer, and may refuse to act till it is surrendered; 21 Ohio St. 221; where a certificate cannot be found the company may refuse a new one or to make a transfer without proper indemnity, unless it be a clear case of loss; 56 Tex. 269.

In a joint stock corporation, each stockholder, whether by purchase or original subscription, has the right, unless restrained by the charter or articles of association, to sell and transfer his shares, and, by transferring them, to introduce others in his stead; 131 U. S. 246.

In a wrongful refusal to transfer the party may apply for a *mandamus* to make the transfer, or sue in equity for a decree of transfer, or for damages if a transfer is impossible, or bring an action at law for damages.

It is said that the rules for the protection of *bona fide* purchasers are based on estoppel, which extends not only as against previous owners, but against the corporation itself. It is said that the doctrine is being extended and that it may in time render certificates of stock more negotiable than negotiable instruments themselves; Cook, St. & Stockh. § 416; but it is also held that, as a certificate of stock is not negotiable either in form or character, whoever takes it, does so subject to its equities and burdens like every non-negotiable paper; and though ignorant of such equities and burdens, his ignorance does not enable him to hold it discharged therefrom; 134 U. S. 401.

English courts will not follow the American rule as to the negotiability of certificates transferred in blank, and a purchaser is not protected till the transfer is made on the books of the company; L. R. 23 Ch. D. 830; even after deposit of the certificate with the company for transfer, and its acceptance by the company the owner may reclaim the stock; 64 L. T. Rep. 456.

Where the registered owner of shares delivered his certificate to a broker with a blank transfer signed by him, and the broker improperly deposited the certificate and blank transfer with a third party as security for his debt; and the third party filled up the blank transfer and had the stock transferred on the books of the company, which latter had no notice of any irregularity, it was held that such third party had acquired no title to the shares as against the owner; 64 L. J. Ch. 473.

A business corporation cannot make it a condition of transferring stock that the holder shall first have offered it to the directors, and shall have paid all his indebtedness to the corporation; 118 Mo. 447.

The unregistered pledgee of stock has priority over a subsequent attaching creditor; 43 S. W. Rep. (Tex.) 896; the same rule obtains in New York, Pennsylvania, New Jersey, South Carolina, Kentucky, Louisiana, Minnesota, and most other states except Connecticut; and in the federal courts, see Cook, St. & Stockh. § 487; 5 Fed. Rep. 369; 15 *id.* 494; but see 5 Blatch. 59.

Stock certificates may be attached in a state other than the home state of the company; 79 Fed. Rep. 228.

*Preferred stock* entitles the holder to a priority in the dividends or earnings, over common stock. *Guaranteed* stock is the same thing; 8 R. I. 310.

A corporation may issue preferred stock, in the absence of any prohibition; 86 Fed. Rep. 930; [1897] 1 Ch. 361; 31 Mich. 76; 78 N. Y. 159; provision therefore is often contained in the by-laws. If there is no provision in the charter or the law, unanimous consent of stockholders is required; Lind. Comp. 396; 31 Mich. 76. After a company has been organized, and all or a part of the stock issued, preferred stock cannot be issued against the objection of minority holders of common stock; 4 De G. J. & S. 672; 78 N. Y. 159; Cook, St. & Stockh. § 268; its issue will be enjoined in such case; 32 L. J. Ch. 711. But see 2 De G. & S., where an injunction was refused at the suit of five dissenting stockholders, the court declining, however, to declare the issue legal. An objecting stockholder must seek relief promptly; 78 N. Y. 159; 13 Fed. Rep. 152. Legislative power to issue preferred stock may be granted subsequently to the organization of the corporation; 10 Bush 69; 35 Vt. 536. The terms or provision under which preferred stock is issued are matters of contract, to be gathered from the charter, by-laws, votes of stockholders, or directors, etc.; 17 Wall. 96; L. R. 20 Eq. 556; 134 N. Y. 197; 78 Va. 501.

There is no condition implied in a memorandum of association of a company that all shareholders are to be on an equality and a company whose memorandum



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and original articles do not authorize the issue of preference shares, can alter its articles so as to do so; [1897] 1 Ch. 361.

The holder of preferred stock is not a creditor of the corporation; 22 Wall. 136; 78 Fed. Rep. 624; 77 Me. 445; 24 N. E. Rep. (Ohio) 496; 61 L. J. Rep. 621; creditors have a priority over preferred stockholders; 108 U. S. 389; 55 Vt. 110. Preferred stock cannot be given a lien on the property; 1 Ohio 321. But it seems to have been held that a mortgage to secure preferred stock is valid. See 78 Va. 501; 24 N. E. Rep. (Ohio) 486.

Preferred stockholders are entitled to dividends only from net earnings; 31 Mich. 76; 108 U. S. 389; Moraw. Pr. Corp. 457; an engagement to pay dividends when not earned, or out of capital, is void; L. R. 22 Ch. D. 349; 63 Pa. 136; though they may be paid out of gross earnings, if the statute so directs; 78 Va. 501.

But dividends may be paid though the company have a floating debt; 79 Me. 461; but see 55 Vt. 110. The directors may ordinarily exercise a reasonable discretion as to declaring dividends, even though there be net earnings applicable thereto; 119 U. S. 296; but if they act oppressively, equity will interfere; 79 Me. 411.

Undeclared dividends (arrears of net earnings) pass with the transfer of preferred stock to the transferee; Cook, St. & Stockh. § 275; 24 Hun 360.

In the absence of anything to the contrary, preferred stock shares equally with common, upon a dissolution of the corporation; L. R. 5 Eq. 510; otherwise, if provided by the charter, a statute, or by the contract; L. R. 20 Eq. 59. See 33 N. J. Eq. 181, where a preference was given by statute.

Where the memorandum of association provided that preference shares should receive "out of the net profits of each year" a dividend of ten per cent., it was held that they were not entitled to cumulative dividends; [1896] 2 Ch. 203.

In the absence of anything to the contrary, dividends will be taken to be cumulative; 77 Pa. 321; 84 N. Y. 157; L. R. 3 Eq. 356; 1 De G. & J. 606.

As to a peculiar issue of deferred stock, see 39 Leg. Int. 98 (S. C. Pa.). The term is sometimes used in contra-distinction to preferred stock to indicate stock which receives a dividend only after the payment of a dividend on preferred stock.

"*Special* stock" is issued by corporations in Massachusetts. It is limited to two-fifths of the actual capital; it is subject to redemption at a fixed time; the holder is entitled to a half-yearly dividend, as upon a debt; the holders are not liable for the debts of the company, and the general stockholders are liable for all the debts until the special stock is redeemed. See Cook, St. & Stockh. §§ 13, 276.

Interest bearing stock has been recognized by the courts. The contract to pay interest is lawful only when interest is to be paid out of net earnings; 40 Pa. 237; 89 Mass. 572; and in this view is merely a species of preferred stock.

See DIVIDENDS; VOTING TRUST; OVERISSUE; STOCKHOLDER; CORPORATIONS; FOUNDERS' SHARES; PARTNERS.

**English Law.** In reference to the investment of money, the term "stock" implies those sums of money contributed towards raising a fund whereby certain objects, as of trade and commerce, may be effected. It is also employed to denote the moneys advanced to government, which constitute a part of the national debt, whereupon a certain amount of interest is payable. Since the introduction of the system of borrowing upon interminable annuities, the meaning of the word "stock" has become gradually changed; and, instead of signifying the security upon which loans are advanced, it has for a long time signified the principal of the loans themselves. In this latter sense we speak of the sale, purchase, and transfer of stock; Moz. & W. See Cavanaugh, Money Securities.

Stock, in England, signifies a number of paid-up shares, so united that the owner may subdivide it and transfer it in large or small quantities, irrespective of the number and par value of the shares; Cook, St. & Stockh. § 12. Stock can only exist in the paid-up state; L. R. 7 H. L. 717.

Debenture stock "is merely borrowed capital consolidated into one mass for the sake of convenience. Instead of each lender having a separate bond or mortgage, he has a certificate entitling him to a certain sum, being part of one large loan." Lindl. Companies 195. It has no connection with *stock* as commonly used in this country. See Simonson, Deb. & Deb. St.

**Descents.** A metaphorical expression which designates in the genealogy of a family the person from whom others are descended: those persons who have so descended are called branches. See 1 Roper, Leg. 103; 2 Belt. Suppl. Ves. 307; BRANCH; DESCENT; LINE; STIRPES.

**Farm Stock.** See FENCES; RUNNING AT LARGE.

**STOCK ASSOCIATION.** A joint stock company (*q. v.*).

**STOCK-BROKER.** See BROKER.

**STOCK CERTIFICATE.** See STOCK.

**STOCK EXCHANGE.** A building or room in which stock-brokers meet to transact their business of purchasing or selling stocks.

A voluntary association (usually unincorporated) of persons who, for convenience in the transaction of business with each other, have associated themselves to provide a common place for the transaction of their business. See Dos Passos, St. Brok. 14; Biddle, St. Brok. 40, 43; 2 Brewst. 571; 2 Daly 329. It is usually not a corporation, and in such case it is not a partnership. In the absence of a statute its real estate is held by all the members in

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the same way as partnership real estate. At common law, all the members had to be joined in a suit; Dicey, Parties, 2d Am. ed. 148, 266; 44 Conn. 259; though actions have been sustained against the exchange as a body; 2 Brewst. 571; 9 W. N. C. (Pa.) 441.

The members may make such reasonable regulations for the government of the body as they may think best; see 24 Barb. 570; such rules bind the members assenting to them; 4 Abb. Pr. N. S. 162; but their personal assent must appear; 16 N. Y. 112; it may be inferred from circumstances, as from their admissions and acting as members; L. R. 5 Eq. 63; 25 Mo. 593; and a member is bound by a by-law passed during his membership, whether he votes for it or not; 8 W. N. C. (Pa.) 464. It is said that the courts will prevent the interference with a member's rights in an unincorporated association where the latter is acting under a by-law which is unreasonable or contrary to public policy: Dos Passos, St. Brok. 36; 4 Abb. Pr. N. S. 162; 47 Wisc. 670; but seé 80 Ill. 134.

*Stock Exchange, seat in.* Members of a stock exchange are entitled to what is known as a seat. Seats are held subject to the rules of the exchange. They are a species of incorporeal property—a personal, individual right to exercise a certain calling in a certain place, but without the attributes of descendibility or assignability, which are characteristic of other species of property; Dos Passos, St. Brok. 87; Biddle, St. Brok. 50. There has been much controversy as to whether a seat can be reached by an execution. A late writer considers the following as settled: "1. In the disposition of a seat or the proceeds thereof, the members of the exchange will be preferred to outside creditors. 2. The seat is not the subject of seizure and sale on attachment and execution. 3. The proceeds of the seat, in the hands of the exchange, are capable of being reached, after members' claims have been satisfied, to the same extent and in the same manner as any other money or property of a debtor. 4. A person owning a seat in the exchange can be compelled, by proceedings subsequent to execution, or under the direction of a receiver, to sell his seat to a person acceptable to the exchange, and devote the proceeds to the satisfaction of his judgment debts." Dos Passos, St. Brok. 96. See 5 W. N. C. (Pa.) 36; 94 U. S. 525; 20 Alb. L. J. 414; 9 Reporter 305; 78 Cal. 351. In 142 U. S. 1, it was held that a seat in a stock exchange is property, and passes to assignees in bankruptcy subject to the rules of the stock board. See 105 U. S. 126; 89 N. Y. 328; 109 *id.* 593; 110 Ill. 146.

Stock exchange rules usually provide that seats are liable first to pay the members' debts to a fellow-member, or a firm of which the latter is a member; and also for arbitration committees to settle differences between members; 180 Pa. 289.

A regular register of all the transactions is kept by an officer of the association, and questions arising between the members are generally decided by an arbitration committee. The official record of sales is the best evidence of the price of any stock on any particular day. The stocks dealt in at the sessions of the board are those which are placed on the list by a regular vote of the association; and when it is proposed to add a stock to the list, a committee is appointed to examine into the matter, and the board is generally guided by the report of such committee.

See Brodhurst, Law & Pr. of Stock Exchange (London).

**STOCK-JOBBER.** A dealer in stock; one who buys and sells stock on his own account on speculation.

**STOCKHOLDER.** One who has property interests in the assets of a corporation and who is entitled to take part in its control and receive its dividends. 67 Fed. Rep. 816. The word includes all members having a direct financial interest in the business of the corporation with power to participate in the profits and in the conduct of its affairs, though they hold no shares; 52 Mo. App. 194. The government may be a stockholder, and when it assumes this relation, it divests itself to that extent of its sovereign character; the same is true of a state; Field, Corp. § 52; and of a municipal corporation, if it has legislative power; *id.* At common law the members of a corporation are not liable for the debts of a corporation: 10 Wall. 575; 24 Cal. 540; Thomp. Liab. of Stockh. § 4; nor liable on their subscriptions, it is said, until the full capital stock is subscribed; 6 Wash. 184. After shares are legally full paid, no further payments can be required; 63 Mass. 192; 24 Cal. 540; unless provided by statute, as is done to a certain extent in some states. The holders of full-paid stock in an insolvent national bank are liable to creditors for a further assessment to the extent of the par value of the stock.

The legislature cannot, after the purchase of stock, impose any additional liability unless it has reserved the power to alter the charter. Statutes have been passed in many states by which stockholders are liable under certain circumstances. The statutes are too various to be treated here. They may be liable in equity when they have assets of the corporation which they ought not to retain. So they may be liable when they have subscribed to the capital stock of the corporation which they have not paid in. The capital stock in such cases is usually said to be a trust fund for the benefit of creditors; 91 U. S. 56. The cases in which this doctrine has most frequently been applied have arisen out of suits brought to compel stockholders to pay the amounts unpaid upon their stock subscriptions.

The original holder of stock in a corporation is liable for unpaid instalments of stock without an express promise to pay, and a contract between him and the corpora-

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tion or its agent limiting his liability is void as to creditors for the assignee in bankruptcy of the corporation. Representations made to the stockholder by an agent of the corporation as the non-assessability of stock beyond a certain per cent. of its par value, constitute no defence to an action against the stockholder to enforce payment of the amount subscribed. The legal effect of the word "non-assessable" in the certificate is at most a stipulation against further assessments after the face value of the stock is paid; 91 U. S. 45. The transferee of stock, when the transfer was duly registered, is liable in the same way upon his implied promise; 91 U. S. 65. So where the holder of shares had procured a transfer to his name, he was held liable for unpaid instalments, though he held the stock only as collateral security for debts due him by the transferror of the stock; 96 U. S. 328. Where certificates of stock had on their face a condition that the residue of eighty per cent. unpaid to the stock was to be paid on the call of the directors, when ordered by a vote of a majority of the stockholders, it was held that the absence of a call was no defence to an action for the residue by an assignee of the corporation in bankruptcy; 3 Biss. 417. Agreements of members among themselves that stock shall be considered as "fully paid" are invalid; L. R. 15 Eq. 407. A corporation may, however, take in payment of its shares any property which it may lawfully purchase; Thomps. Liab. of Stockh. § 134; Moraw. Priv. Corp. 425; and stock issued therefor as full paid will be so considered; 7 Cent. L. J. 430 (C. C. U. S.).

A call by the proper authorities is ordinarily held to be necessary to fix the liability of a stockholder for unpaid instalments; 43 N. J. L. 442; 21 Ill. 276; L. R. 1 Ch. App. 535; but it is held that a suit may be brought without a call; 67 N. Y. 300; and when a receiver has been appointed the call is made by a decree of the court; 105 U. S. 143.

"Ever since the case of Sawyer *v.* Hoag, 17 Wall. 610, it has been the settled doctrine of this court that the capital stock of an insolvent corporation is a *trust fund* for the payment of its debts; that the law implies a promise by the original subscribers of stock, who did not pay for it in money or other property, to pay for the same when called upon by creditors; and that a contract between themselves and the corporation that the stock shall be treated as fully paid and non-assessable, or otherwise limiting their liability therefor, is void as against creditors." 139 U. S. 417. Cases to the same effect are 99 N. C. 501; 76 Ga. 360; 139 U. S. 118; 144 *id.* 104; 146 *id.* 618; 148 *id.* 603; but in 139 *id.* 96 it was said, quoting from Sawyer *v.* Hoag, that the capital stock of a corporation is a trust fund only *sub modo*. In 150 U. S. 371, the expression "trust fund" was qualified by a statement that it had not been intended "to convey the idea that there was any direct and express trust attached to the property." In 154 Ill. 44, it was called a *quasi*-trust fund, and Pomeroy [Eq. Jur. 1046] says that such assets do not in any true sense constitute a trust and are called so only through analogy or metaphor.

In an able article in 34 Am. L. Reg. 448 [1895], George Wharton Pepper strongly objects to the expression "trust fund" and considers that the trust theory is untenable. He quotes Mr. Justice Bradley in 102 U. S. 148, where he says that the conception is at war with notions which we derive from English law with regard to the nature of corporate bodies.

The same writer is of the opinion that the expression "trust fund" is one which is applied by American courts to the judicial recognition of the demand of the commercial world, which is in substance that the liability of a stockholder shall be unlimited up to the par value of his shares and he shall not be entitled to any legal principle which would entitle him to advantage against corporate creditors.

The trust fund doctrine as to the assets of an insolvent corporation appears to have been first announced by Judge Story in 3 Mas. 308. Judge Thompson considers it "the only doctrine worthy of respect": 5 Thomp. Corp. § 5115. It was repudiated in 14 N. E. Rep. (Ind.) 810; 21 S. E. Rep. (N. C.) 951; 17 S. E. Rep. (Ala) 525.

A holder of stock in trust is subject to assessment; 44 Conn. 582; L. R. 9 Eq. 175, 363 (but the *cestui que trust* is not: *id.*; even if he is a trustee of the corporation itself; 18 N. Y. 226; 46 Pa. 48); but it is otherwise as to the holder of national bank stock; R. S. § 5152; if his name appears on the books as trustee; 36 Fed. Rep. 868. It is held that a *cestui que trust* is bound to indemnify his trustee; L. R. 18 Eq. 16; but this cannot be generally true.

A pledgee who has transferred the stock to his own name is liable to assessment; 96 U. S. 328; but not, it is held, when he has placed it in the name of an irresponsible third party; 111 U. S. 479.

A pledgee of national bank stock is not liable for assessments, except by estoppel; 86 Fed. Rep. 1006; 58 *id.* 666.

Where stock stands in the name of an agent, either the principal or the agent may be assessed; Cook, St. & Stockh. § 249.

Where one has been induced by fraud to buy national bank stock, takes a transfer, and, upon discovering the fraud, takes steps, at once, to rescind the transaction, he is not liable to assessment except as to one who extended credit to the bank without notice of the fraud; 83 Fed. Rep. 449.

A corporate creditor cannot proceed directly against stockholders to recover unpaid suscriptions till he shall have obtained a judgment against the corporation and an execution thereon shall have been returned unsatisfied; 95 U. S. 628; 35 N. J. Eq. 501; 55 Wis. 598. The remedy may be in some states by garnishment under the judgment against the company; but

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more commonly it is by bill in equity and a receiver. It is held that the remedy of a creditor against a stockholder is in equity alone; 53 Ala. 191; 101 U. S. 216. In equity the court decrees a call and the receiver collects the amount. The court may decree payment in full, leaving the stockholders to seek contribution among themselves; Cook, St. & Stockh. § 211.

In an action to enforce the payment of an assessment on unpaid stock, on behalf of creditors, a stockholder cannot set off a claim against the corporation; 139 U. S. 417; L. R. 1 Ch. 528; 110 Ill. 316; otherwise, if the corporation itself sues; L. R. 19 Eq. 449. In New York there is a right of set-off at law against a corporation creditor, but not in equity; 43 Hun 362.

A subscriber cannot set up against an action for calls that the corporation was not lawfully organized, if he is a director and was one of the original incorporators; 18 N. Y. L. J. (Dec. 9, 1897); s. c. 22 N. Y. App. Div. 1.

The better opinion is said to be that the statute of limitation begins to run only when a call has been made and payment thereunder is due; Cook, St. & Stockh. § 195; or from the order of court making the assessment; 145 U. S. 507. It is held to run from the date of an assignment for creditors by the company; 7 Atl. Rep. (Pa.) 611; and in 50 N. W. Rep. (Ia.) 891, when the subscription is made; so also 41 Hun 545; though where a creditor sues it does not run till he secures judgment; 36 Hun 334.

Statutes in various states provide for a forfeiture of stock for non-payment of subscriptions, and a sale. This right does not exist without a statute; nor can it be created by a mere by-law; but it may be by the consent of the stockholder if expressed on the face of his certificate; Cook, St. & Stockh. § 122; the remedy by forfeiture, when given, is in addition to the ordinary common-law remedies; *id.* § 124. See Thomp. Liab. of Stockh.; 31 Am. Rep. 88; 15 Am. L. Reg. N. S. 648.

In order to constitute one a shareholder, it is not necessary that a certificate should have been issued to him; 32 Ind. 393; 46 Mo. 248.

A married woman, under the common-law disabilities, cannot be a competent party to an original subscription for shares of a corporation, or to a transfer to her of such shares, so as to make her a shareholder; 38 Fed. Rep. 700.

Where a director is required to be the holder of a certain number of shares as a qualification, he is presumed, on winding up, to have been the holder of that number of shares; [1892] 2 Ch. 158.

A railroad corporation purchasing the stock of a competing corporation cannot obtain control of its affairs, divert the income of its business, refuse business which would enable it to pay its interest, and then institute proceedings in equity to enforce the interest-bearing obligations for the avowed purpose of obtaining control of its property to the injury of the minority stockholders. The controlling company will become, for all practical purposes, the corporation which it controls, and bears the same trust relations to the minority stockholders of the latter that usually exists between stockholders of a corporation and the corporation itself; Farmers' L. & T. Co. *v.* N. Y. & No. R. Co., 54 Alb. L. J. 311 (Ct. of App. N. Y.).

The holders of a majority of the stock of a corporation may legally control the company's business, prescribe its general policy, make themselves its agents, and take reasonable compensation for their services. But, in thus assuming the control, they also take upon themselves the correlative duty of diligence and good faith. They cannot lawfully manipulate the company's business in their own interests to the injury of other stockholders. They cannot by their votes in a stockholders' meeting lawfully authorize its officers to lease its property to themselves, or to another corporation formed for the purpose and exclusively owned by them, unless such lease is made in good faith and is supported by an adequate consideration; and, in a suit properly prosecuted to set aside such a contract, the burden of proof, showing fairness and adequacy, is upon the parties claiming thereunder. All doubts will be resolved in favor of the corporation for whom such stockholders assumed to act; 17 Fed. Rep. 48, and note by Dr. Francis Wharton.

It is said that a stockholder may deal with his company at arm's length as a stranger might; 184 Pa. 102. See PREFERENCE.

The rights of a stockholder are to attend stockholders' meetings, to participate in the profits of the business, and to require that the corporate property and funds shall not be diverted from their original purposes, and if the company becomes insolvent, to have its property applied to the payment of its debts. For the invasion of these rights by the officers of a company, a stockholder may sue at law or in equity, according to the nature of the case. All remedies for injury to the property or rights of such a corporate body must be prosecuted in the name of the company; all demands against the company must be prosecuted against it by name. But where the officers and managers of a company, by fraud and collusion with third persons, are sacrificing, or are about to betray or sacrifice, the interests of the corporation, a stockholder may, for such breaches of trust and conspiracy, call the guilty parties to an account in a court of equity; 2 Woods 323, per Bradley, J.

A shareholder may interpose and set the machinery of law in motion for the protection of corporate rights or the redress of corporate wrongs, when the corporate management, after proper demand, fails to act in the matter; 36 Fed. Rep. 627; but equity will not entertain a bill by stockholders to remedy wrongs committed by

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the officers of the corporation, where such stockholders have not applied to the corporate authorities to remedy such wrongs; 87 Tenn. 771; 31 W. Va. 798; 127 U. S. 489; 54 Fed. Rep. 985. A stockholder may maintain an action to restrain the corporation from acts in excess of its corporate authority; 75 Ia. 722; but he cannot maintain a bill to enjoin the wasting of corporate property unless the corporation itself refuses to bring the action, in which case it must be made a party defendant; 54 Fed. Rep. 216. A corporation is a necessary party to a suit by stockholders for the enforcement of its rights; 149 U. S. 473.

It has been held that if a corporation has power to reduce its capital stock, it may do so by purchasing a portion of its own shares; 48 Vt. 266; 17 N. Y. 507; *contra*, 56 N. H. 262; but it is held to be *ultra vires* for a corporation to dispose of any part of its property other than its surplus or net profits, in the purchase of shares of its own stock; 84 Fed. Rep. 393, per Bradford, J. A corporation cannot buy its own stock if the rights of creditors are thereby prejudiced; 104 Ill. 26; 8 Bradw. 554; but apart from the rights of creditors, it is held in some states that such a transaction is lawful; 14 S. E. Rep. (N. C.) 501; 39 Fed. Rep. 89; 84 Ill. 145; 104 Mass. 37. Accepting its own stock in payment of land sold by it is not necessarily invalid; 20 Atl. Rep. (N. J.) 854; where the company is perfectly solvent; 8 Bradw. 554. In England it is held that a corporation cannot purchase its own shares; 12 App. Cas. 409; and a stockholder may enjoin such purchase; L. R. 4 Ch. Div. 327.

The books of a corporation are said to be "the common property of all the stockholders;" 105 Pa. 111; and are subject to their inspection for proper purposes and at proper times; 51 Fed. Rep. 61; 40 N. J. Eq. 392; the right may be enforced by mandamus; 105 Pa. 111. Mandamus will be granted, at the discretion of the court, which "will be exercised with great discrimination and care;" 70 N. Y. 220; and will not be granted where the applicant seeks to "accomplish personal or speculative ends;" 70 N. Y. 220; or to "gratify idle curiosity;" 9 Mich. 328; or at the "caprice of the curious or suspicious;" 105 Pa. 111. The petition should aver a demand for inspection and a refusal by the corporation; 6 D. R. (Pa.) 266. The stockholder may take off a list of stockholders; *id.* The statutory right of a creditor or a member of a company to inspect the register of its mortgages carries with it the right to take copies; [1897] 1 Ch. 130. See RECORDS; PRODUCTION OF BOOKS.

A stockholder has no right, by the inherent powers of a court of equity, to bring suit to wind up the business of a corporation; 60 How. 280.

A suit in equity may be maintained by a creditor of a corporation against a stockholder only in the courts of the state in which the corporation is created, and the corporation is a necessary party defendant; 86 Fed. Rep. 45.

**STOCK NOTES.** This term has no technical meaning and may as well apply to a note given on the sale of stock which the bank had purchased or taken in the payment of doubtful debts as to a note given on account of an original subscription to stock. 12 Ill. 402.

**STOCK ORDER.** The order in chancery to prevent drawing out a fund in court to the prejudice of an assignee or lienholder.

**STOCKS. In Criminal Law.** A machine, commonly made of wood, with holes in it, in which to confine persons accused of or guilty of crime.

It was used either to confine unruly offenders by way of security, or convicted criminals for punishment. This barbarous punishment had been generally abandoned in the United States.

**STOLEN GOODS.** See RECENT POSSESSION of STOLEN GOODS; RECEIVER OF STOLEN GOODS.

**STOP, LOOK, AND LISTEN.** One crossing a railroad or street railway track in Pennsylvania is guilty of contributory negligence in law if he does not first stop, look, and listen. It is an absolute and unbending rule of public policy. 172 Pa. 383. See GRADE CROSSING.

**STOPPAGE IN TRANSITU.** A resumption by the seller of the possession of goods not paid for, while on their way to the vendee and before he has acquired actual possession of them. 15 Me. 314.

Chancellor Kent has defined the right of stoppage *in transitu* to be that which the vendor has, when he sells goods on credit to another, of resuming the possession of the goods while they are in the possession of a carrier or middleman, in the transit to the consignee or vendee, and before they arrive into his actual possession, or the designation he has appointed for them, on his becoming bankrupt and insolvent; 2 Kent 702.

The right of stoppage *in transitu* is an equitable extension recognized by the courts of common law, of the seller's lien for the price of goods of which the buyer has acquired the property, but not the possession. This right is paramount to any lien created by usage or by agreement between the carrier and the consignee, for a general balance of account, but not to the lien of the carrier for freight; 131 Mass. 457.

For most purposes, the possession of the carrier is considered to be that of the buyer; but by virtue of this right, which is an extension of the right of lien, the vendor may reclaim the possession before they reach the vendee, in case of the insolvency of the latter; 4 Gray 336; 2 Caines 98; 8 M. & W. 341, which gives a history of the law.

The vendor, or a consignor to whom the vendee is liable for the price; 3 East 93;

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6 *id.* 17; 13 Me. 103; 1 Binn. 106; or a general or special agent acting for him; 9 M. & W. 518; 5 Whart. 189; 13 Me. 93; 43 N. H. 589; 105 Mass. 275; see 4 Gray 367; 1 Hill N. Y. 302; 5 Mass. 157; 123 *id.* 12; may exercise the right.

The vendor can bring suit for the price of the goods after he has caused them to be stopped *in transitu*, and while they are yet in his possession, provided he be ready to deliver them upon payment of the price; 1 Camp. 109; but the right of the vendor after stoppage exceeds a mere lien; for he may resell the goods; 6 Mod. 152.

There need not be a manual seizure: it is sufficient if a claim adverse to the buyer be made during their passage; 2 B. & P. 457; 9 M. & W. 518; 13 Me. 93; 5 Denio 333.

The goods sold must be unpaid for, either wholly or partially; 15 Me. 314; 2 Exch. 702. As to the rule where a note has been given, see 2 M. & W. 375; 7 Mass. 453; 4 Cush. 33; 7 Pa. 301; where there has been a pre-existing debt, 4 Camp. 31; 16 Pick. 475; 3 Paige, Ch. 373; 1 Binn. 106; 1 B. & P. 563; where there are mutual credits, 7 Dowl. & R. 126; 16 Pick. 467; where the vendee gives a draft, 62 Hun 376. The vendee must be insolvent; 4 Ad. & E. 332; 20 Conn. 54; 8 Pick. 198; 14 Pa. 51. 102 N. C. 390; 63 Ala. 243; 84 Mich. 612. A seller cannot stop goods in transit simply because the buyer absconded before they reached him, where the buyer's insolvency is not shown; 15 So. Rep. (Ala.) 340.

The goods must be in transit; 3 Term 466; 15 B. Monr. 270; 16 Pick. 474; 20 N. H. 154. Where goods sold are shipped by rail and a transfer company, under a previous general order of the buyer, receives the goods at the depot to convey them to the buyer's place of business, the goods are still in transit and the seller may still exercise his right of stoppage; 48 Mo. App. 521. In order to preclude the right the goods must have come actually into the hands of the vendee or some person acting for him; 2 M. & W. 632; 1 Pet. 386; 3 Mas. 107; 23 Wend. 611; 54 Fed. Rep. 306; or constructively, as, by reaching the place of destination: 9 B. & C. 422; 3 B. & P. 320, 469; 7 Mass. 457; 20 N. H. 154; 2 Curt. C. C. 259; 3 Vt. 49; 102 N. C. 390; or by coming into an agent's possession; 4 Camp. 181; 7 Mass. 453; 4 Dana 7; 38 Pa. 254; see 22 Conn. 473; 17 N. Y. 249; 7 Cal. 213; 53 Mo. App. 139; or by being deposited for the vendee in a public store or warehouse; 5 Denio 631; 7 Pa. 301; 4 Camp. 251; 113 N. C. 36; or by delivery of part for the whole; 14 M. & W. 28; 14 B. Monr. 324.

The right can be defeated, where there is no special legislation on the subject, only by a transfer of the bill of lading; 37 U. S. App. 266; but the assignment, unindorsed, of a bill of lading will not defeat the right, if the goods are still in transit; 7 U. S. App. 544. The right expires when the goods have been delivered; *id.*

Where goods are in the hands of a carrier, they may be stopped, although the purchaser has handed to the shipping agent the bills of lading received by him from the vendor and received a bill of lading for them, and the purchaser is himself a passenger on the vessel on which they are shipped; L. R. 15 App. Cas. 391.

The delivery of goods at the buyer's store which was at the time in the possession of the sheriff under an attachment, is not a delivery to the consignee; 85 Tex. 254. See 160 Pa. 527.

Where there is no contract to the contrary, express or implied, the employment of a carrier by a vendor of goods on credit constitutes all middlemen into whose custody they pass for transportation and delivery, agents of the vendor; and until the complete delivery of the goods, they are deemed *in transitu;* 21 Ohio St. 281. The right cannot be superseded by an attachment at the suit of a general creditor, levied while the goods are *in transitu;* 50 Miss. 500, 590. If the vendor attach the goods while in transit, his right of stoppage will be destroyed; 15 Conn. 335. Where goods are to be delivered a part at a time, and various deliveries are so made, the right to stop the remaining portion is not lost; nor will the fact that the entire lot of goods was transferred on the books of the warehouse affect the right; 106 Mass. 76; 17 Wend. 504. The right of stoppage *in transitu* is looked upon with favor by the courts; 2 Eden 77; 21 Ohio St. 281.

The effect of the exercise of this right is to repossess the parties of the same rights which they had before the vendor resigned his possession of the goods sold; 1 Q. B. 389; 10 B. & C. 99; 14 Me. 314; 5 Ohio 98; 20 Conn. 53; 10 Tex. 2; 19 Am. Rep. 87.

See, generally, Benjamin; Story; Long, on Sales; Parson, on Contracts; Cross, Lien; Whittaker, Stopp. in Tr.; 5 Wait, Action & Def. 612; 32 Cent. L. J. 364.

**STORE.** To keep for safe custody. 3 N. Y. 122; 16 Barb. 119. A place where goods are sold at a profit. 15 So. Rep. (Miss.) 87.

**STORE-HOUSE.** A building for the storage of goods, grain, food-stuffs, etc. A livery-stable has been held a store-house. 35 S. W. Rep. (Ky.) 1028.

**STORE ORDERS.** In some states the maintaining of general supply stores by companies or individual employers is forbidden. Thus, in New Jersey and Tennessee it is unlawful for any manufacturer, firm, or corporation, who owns or controls a store for the sale of general goods or merchandise in connection with their business, to attempt to control their employes in the purchase of goods at such stores, by withholding the payment of wages longer than the usual time. In Maryland, the statute applies to railways and mines only; in Pennsylvania only to mining and manufacturing corporations. In some other states (Ohio, Indiana, Iowa, Kansas, Missouri, and Washington), the company may have such stores, but it is made a penal offence to compel or coerce an employe

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to deal at such company stores or with any particular person or corporation.

In some states (Ohio, Virginia, and Indiana) the prohibition is only against selling goods to employes at a higher profit than to others, or than to cash customers, or at prices higher than their market value; and debts thus incurred are made not collectible, or (in Ohio) the employe may recover back double such excess in price.

But in Illinois and West Virginia, statutes forbidding certain corporations to maintain company stores have been held invalid; 33 W. Va. 179; 10 S. E. Rep. 285; 31 N. E. Rep. 395; but see 48 Pac. Rep. (Col.) 512, where it was held that the legislature might prohibit the issuance of store orders in payment of wages. See Stimson, Lab. Laws § 24; LIBERTY OF CONTRACT; POLICE POWER.

**STORES.** The supplies for the subsistence and accommodation of a ship's crew and passengers. Under the words stores, tackle, apparel, etc., will not pass. 2 Stark. 105.

**STOUTHRIEFF. In Scotch Law.** Formerly this word included in its signification every species of theft accompanied with violence to the person; but of late years it has become the *cox signata* for forcible and masterful depredation within or near the dwelling-house; while robbery has been more particularly applied to violent depredation on the highway, or accompanied by house-breaking. Alison, Prin. Scotch Law 227.

**STOWAGE. In Maritime Law.** The proper arrangement in a ship of the different articles of which a cargo consists, so that they may not injure each other by friction, or be damaged by the leakage of the ship.

The master of the ship is bound to attend to the stowage, unless by custom or agreement this business is to be performed by persons employed by the merchant; Abb. Shipp. 13th ed. 391; Pardessus, *Dr. Com.* n. 721.

Merchandise and other property must be stored under deck, unless a special agreement or established custom and usage authorizes their carriage on deck. See SEAWORTHY.

**STRADDLE.** See OPTION.

**STRAND.** The shore or bank of a sea or river. Cowel. That portion of the land lying between ordinary high and low water mark. 47 N. Y. Supp. 280.

**STRANDING. In Maritime Law.** The running of a ship or other vessel on shore; it is either accidental or voluntary.

*Accidental* stranding takes place where the ship is driven on shore by the winds and waves and remains stationary for some time.

*Voluntary* stranding takes place where the ship is run on shore either to preserve her from a worse fate or for some fraudulent purpose. Marsh. Ins. b. 1, c. 12, s. 1.

It is of great consequence to define accurately what shall be deemed a stranding; but this is no easy matter. In one case, a ship having run on some wooden piles, four feet under water, erected in Wisbeach river, about nine yards from shore, which were placed there to keep up the banks of the river, and having remained on these piles until they were cut away, was considered by Lord Kenyon to have been stranded; Marsh. Ins. b. 7, s. 3. In another case, a ship arrived in the river Thames, and upon coming up to the pool, which was full of vessels, one brig ran foul of her bow and another vessel of her stern, in consequence of which she was driven aground, and continued in that situation an hour, during which period several other vessels ran foul of her. As to this, Lord Kenyon told the jury that, unskilled as he was in nautical affairs, he thought he could safely pronounce to be no stranding; 1 Camp. 131; 3 *id.* 431; 4 Maule & S. 503; 5 B. & Ald. 225; 4 B. & C. 736; 7 *id.* 224. See PERILS OF THE SEA.

When a vessel takes the ground in the ordinary course of navigation, from a natural deficiency of water, or from the ebb of the tide, it is not a stranding; 11 C. B. 876; 73 E. C. L. 875; 2 Sumn. 197. But where a ship was fastened at the pier of a dock basin against the advice of the master, and when the tide ebbed, took the ground and fell over on her side, in consequence of which, when the tide rose, she filled with water, it was held to be a stranding; 4 M. & S. 77. See, also, 5 B. & A. 225; 72 E. C. L. 455; 1 E. & B. 456.

It may be said, in general terms, that in order to constitute a stranding, the ship must be in the course of prosecuting her voyage when the loss occurs; there must be a settling down on the obstructing object; and the vessel must take the ground by reason of extraordinary casualty, and not from one of the ordinary incidents of a voyage. Arn. Ins. §§ 297, 318. And see Phill. Ins.; 31 N. Y. 106; 88 Am. Dec. 242; 42 *id.* 188; 13 Ohio 66.

**STRANGER.** A person born out of the United States; but in this sense the term alien is more properly applied until he becomes naturalized.

A person who is not privy to an act or contract: example, he who is a *stranger* to the issue shall not take advantage of the verdict; Brooke, Abr. *Record*, pl. 3; Viner, Abr. 1. And see Com. Dig. *Abatement* (H 54). See 118 N. Y. 156.

When a man undertakes to do a thing, and a stranger interrupts him, this is no excuse; Com. Dig. *Condition* (L 14). When a party undertakes that a stranger shall do a certain thing, he becomes liable as soon as the stranger refuses to perform it; Bac. Abr. *Conditions* (Q 4).

**STRATAGEM.** A deception either by words or actions, in times of war, in order to obtain an advantage over an enemy.

Stratagems, though contrary to morality,

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have been justified unless they have been accompanied by perfidy, injurious to the rights of humanity, as in the example given by Vattel of an English frigate, which during a war between France and England appeared off Calais and made signals of distress in order to allure some vessel to come to its relief, and seized a shallop and its crew who had generously gone out to render it assistance. Vattel, *Droit des Gens*, liv. 3, c. 9, § 178.

**STRATOCRACY.** A military government; government by military chiefs of an army.

**STRAW BAIL.** See BAIL.

**STRAW MEN.** See MEN OF STRAW.

**STRAW SHOES.** See MEN OF STRAW.

**STREAM.** A current of water. A body of water having a continuous flow in one direction. 34 L. R. Sc. 174. The right to a water-course is not a right in the fluid itself, so much as a right in the current of the stream. 2 Bouvier, Inst. n. 1612. The owner of the land on both sides of a navigable stream, above the ebb and flow of the tide, is the owner of the bed of the stream, and entitled to all the ice that forms within the extent of his lands; 14 Chi. L. News 83. See RIVER; WATER-COURSE; ICE.

**STREET.** A public thoroughfare or highway in a city or village. It differs from a country highway; 21 Alb. L. J. 45; 4 S. & R. 106; 11 Barb. 399. It means the whole surface and so much of the depth as is or can be used, not unfairly, for the ordinary purposes of a street. L. R. 4 Q. B. D. 121. A street is not an easement, but a dedication to the public of the occupation of the surface for passing and repassing; L. R. 3 Ch. 306; 1 Q. B. D. 703. See HIGHWAY.

A street, besides its use as a highway for travel, may be used for the accommodation of drains, sewers, aqueducts, water, and gas-pipes, lines of telegraph, and for other purposes conducive to the general police, sanitary, and business interests of a city; 17 Barb. 435; 2 R. I. 15; 106 Ill. 337; 29 Hun 245; 79 Ind. 491. Its use belongs, from side to side and end to end, to the public; 73 Ind. 193. A street may be used by individuals for the lading and unlading of carriages, for the temporary deposit of movables or of materials and scaffoldings for building or repairing, provided such use shall not unreasonably abridge or incommode its primary use for travel; 6 East 427; 3 Camp. 230; Hawk. Pl. Cr. c. 76, s. 49; 4 Ad. & E. 405; 4 Ia. 199; 1 Den. 524; 1 S. & R. 219; 107 N. Y. 360; 59 Ia. 65; 58 Me. 56; 36 L. R. A. 305. As to playing organs on a street, see [1897] 1 Q. B. 84. The mere fact that a person is engaged in what is known as play on a public street does not necessarily make him a trespasser; 10 U. S. App. 546. A sidewalk which is part of a street may be excavated for a cellar, pierced by an aperture for the admission of light, or overhung by an awning. But if the highway becomes more unsafe and a passenger is injured by reason thereof, the individual so using the street will be responsible for the damages; 18 N. Y. 79; 3 C. & P. 262; 23 Wend. 446; 6 Cush. 524. See 107 Mass. 234; 66 Ia. 219; 104 N. Y. 268. But an individual has no right to have an auction in a street; 13 S. & R. 403; or to keep a crowd of carriages standing therein; 3 Camp. 230; or to attract a disorderly crowd of people to witness a caricature in a shop-window; 6 C. & P. 636. Such an act constitutes a nuisance; Ang. High. c. 6. An encroachment upon a street, the dedication and acceptance of which is established, is nothing more or less than a nuisance, which cannot be aided by lapse of time; 84 Va. 337. In a suit by abutting owners to enjoin obstruction, no other parties defendant are necessary than the alleged trespasser; 54 Fed. Rep. 925.

The owners of lands adjoining a street are not entitled to compensation for damages occasioned by a change of grade or other lawful alteration of the street; 2 B. & A. 403; 1 Pick. 417; 4 N. Y. 195; 33 Atl. Rep. 756; 14 Mo. 20; 2 R. I. 154; 6 Wheat. 593; 20 How. 135; 75 Mo. 213; 75 Wis. 9; 100 Ind. 545; unless such damages result from a want of due skill and care or an abuse of authority; 5 B. & Ald. 837; 16 N. Y. 158. See EMINENT DOMAIN.

Under the statutes of several of the states, assessments are levied upon the owners of lots specially benefited by opening, widening, or improving streets, to defray the expense thereof; and such assessments have been adjudged to be a constitutional exercise of the taxing power; 4 N. Y. 419; 8 Wend. 85; 18 Pa. 26; 21 *id.* 147; 3 Watts 293; 23 Conn. 189; 5 Gill 383; 27 Mo. 209; 4 R. I. 230; Ang. High. c. 4. See Dill. Mun. Corp. As to what notice to an owner is necessary to create a lien on his property for street improvements, see 40 Pac. Rep. 1042.

SEE RAILROAD; HIGHWAY; POLES; WIRES; NUISANCE; OBSTRUCTING A STREET.

**STREET RAILWAY.** See RAILROADS.

**STREPITUS.** Estrepement. Spelman.

**STRICT CONSTRUCTION.** See CONSTRUCTION; INTERPRETATION.

**STRICT SETTLEMENT.** A settlement of lands to the parent for life, and after his death to his first and other sons in tail, with an interposition of trustees to preserve the contingent remainders.

**STRICTISSIMI JURIS** (Lat. the most strict right or law). In general, when a person receives an advantage, as the grant of a license, he is bound to conform strictly to the exercise of the rights given him by it, and in case of a dispute it will be strictly construed. See 3 Stor. C. C. 159.

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**STRICTUM JUS** (Lat.). Mere law, in contradistinction to equity.

**STRIKE.** A combined effort by workmen to obtain higher wages or other concessions from their employers, by stopping work at a preconcerted time. Where this is peaceably effected without positive breach of contract, it is not unlawful, but it sometimes amounts to conspiracy. Most of the decisions bear upon questions arising more or less *indirectly* from the strike.

A conspiracy to obtain from a master mechanic money which he is under no legal obligation to pay, by inducing his workmen to leave him and by deterring others from entering his employment, or by threatening to do this, so that he is induced to pay the money demanded, is an illegal conspiracy; 106 Mass. 1. See 9 Neb. 390.

It is no answer to a suit against a common carrier for failure to deliver goods with reasonable promptness, that a strike among their employes prevented; 20 N. Y. 48; 18 Ill. 488. But otherwise if the employes are discharged and afterwards interfere unlawfully with the business of the road; 15 Alb. L. J. 39; Cooley, Torts 640, n. Where a railroad company receives freight for shipment, it is not liable for delay in its delivery which is caused by a strike of its employes, accompanied by violence and intimidation of such a character as cannot be overcome by the company or controlled by the civil authorities when called upon; 81 Ga. 792; 74 Tex. 8; 84 Ill. 36.

In L. R. 6 Eq 555, the president and secretary of a trades-union, and a printer employed by them, were restrained by injunction from posting placards and publishing advertisements, urging workmen to keep away from plaintiff's factory, where a strike against the reduction of wages was in progress; but in L. R. 10 Ch. 142, this case was overruled.

An attempt has been made to derive some of the authority for the use of an injunction in such cases to an extent not before recognized in the settled principles of equity jurisprudence from the English Judicature Act of 1873 as a consequence of the union of law and equity procedure. In 20 Ch. Div. 501, it is said that "the courts have interpreted this act as giving them power to restrain one man from persuading another to break his contract with a third person, when the object of such persuasion is the malicious injury to the third person."

Where a trades-union ordered a strike and posted pickets to persuade workmen from entering the employ of the plaintiff, such conduct was held to come within the terms of the act prescribing a penalty against every person who, with a view to compel any other person to abstain from doing, or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority . . . watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place." [1896] 1 Ch. 811.

The circuit court of the United States had jurisdiction to restrain the unlawful acts of persons engaged in a strike where they interfere with the operations of interstate commerce or with the transmission of the mails, and may enforce its injunction by proceedings in contempt which are not open to review on *habeas corpus* in the supreme court or any other court; 158 U. S. 564.

A "boycott" by the members of trades-unions or assemblies is unlawful, and may be enjoined; but in such suits a federal court has no jurisdiction over defendants who are citizens of the same state with the complainant, nor can the association be used as a body or its members who are not parties to the record be enjoined; 72 Fed. Rep. 695.

There is no authority for issuing an injunction to prevent one individual from quitting the personal service of another; "equity will not compel the actual affirmative performance by an employe of merely personal services, any more than it will compel an employer to retain in his personal service one who, no matter for what cause, is not acceptable to him for service in that character." 63 Fed. Rep. 310 (Harlan, J).

A display of force by strikers against laborers who wish to work, such as surrounding them in large numbers, applying opprobrious epithets to them, and urging them in a hostile manner not to go to work, though no force be actually used, is as much intimidation as violence itself. Such conduct will be restrained by injunction, and the actors will be liable in damages to the employer of the laborers. Where new men employed to take the place of strikers are on their way to work, their time cannot be lawfully taken up and their progress interfered with by the strikers on any pretence or under any claim of right to argue or persuade them to break their contracts. Where a bill has been filed against strikers for an injunction and for damages for injuries caused by their illegal conduct, the plaintiff has a right to proceed with the case after the strike is over, for the purpose of recovering damages, and it is improper for a judge to express from the bench an opinion that the case should have been dropped; 182 Pa. 236. See BOYCOTT; COMBINATION; CONSPIRACY; INJUNCTION; LABOR UNION; MALICE; RESTRAINT OF TRADE.

**STRIKING A DOCKET. In English Practice.** Entering the creditor's affidavit and bond in bankruptcy. 1 Deac. Bank. 106.

**STRIKING A JURY. In English Practice.** Where, for nicety of the matter in dispute, or other cause, a special

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jury is necessary, upon motion and rule granted thereon, the sheriff is to attend the prothonotary or proper officer with the book of freeholders, and to take indifferently forty-eight of the principal freeholders, when the attorneys on each side, being present, are to strike off twelve respectively, and the remaining twenty-four are returned. 3 Bla. Com. 357. Essentially the same practice prevails in New York, Pennsylvania, and other states; Tr. & H. Pr. § 636. See JURY; Graham, Pr. 277. In some of the states a *special* or *struck* jury is granted as of course upon the application of either party; but more generally it must appear to the court that a fair trial cannot be otherwise had, or that the intricacy and importance of the case require it. One of the parties being a citizen of color, the judge cannot properly direct a special jury to be impanelled, one-half of whom are of African descent; 3 Baxt. 373; 100 U. S. 313. The statutory method of striking is held to be mandatory; 26 Wis. 423; 78 Pa. 303. See Abb. N. Y. Dig. tit. Trial §§ 196–208; Thomp. & Merr. Jur. § 14.

**STRIKING OFF THE ROLL.** Removing the name of a solicitor from the rolls of the court and thereby disentitling him to practise. See DISBAR.

**STRIP.** The act of spoiling or unlawfully taking away anything from the land, by the tenant for life or years, or by one holding an estate in the land less than the entire fee. Pub. St. Mass. [1882] 1295.

**STRUCK. In Pleading.** A word essential in an indictment for murder, when the death arises from any wounding, beating, or bruising. 1 Bulstr. 184; 5 Co. 122; Cro. Jac. 655; 6 Binn. 179.

**STRUCK JURY.** See STRIKING A JURY.

**STRUCK OFF.** A term applied to a case which the court, having no jurisdiction over, and not being able to give judgment, order to be taken off the record. This is done by an entry to that effect.

As to the meaning of the words as used at an auction sale, see KNOCKED DOWN.

**STRUCTURE.** That which is built or constructed;—an edifice or building of any kind. Poles connected by wires for the transmission of electricity; 19 Ore. 61; a mine or pit; 66 Cal. 271; a railroad track; 46 Conn. 213; see 42 Fed. Rep. 470 (*contra*, 35 Ohio St. 559); are structures. Swings or seats are not; 55 Cal. 159. See MECHANICS' LIEN.

**STRUMPET.** A harlot, or courtesan. Jacob, Law Dict.

**STUDENTS.** Students living in a place merely for the purpose of attending college have not such residence as will entitle them to vote there. 71 Pa. 302; 40 N. E. Rep. (N. Y.) 769, Affg. 31 N. Y. Supp. 1043; *contra*, 10 Mass. 488. See McCr. Elect. § 84; CHANCELLOR'S COURTS IN THE TWO UNIVERSITIES; DOMICIL.

**STUFF GOWN.** The professional robe worn by barristers of the outer bar; viz. those who are not queen's counsel. Brown.

**STULTIFY** (Lat. *stultus*, stupid). To make one out mentally incapacitated for the performance of an act.

It has been laid down by old authorities; Littleton § 405; 4 Co. 123; Cro. Eliz. 398; that no man should be allowed to stultify himself, *i. e.* plead disability through mental unsoundness. This maxim was soon doubted as law; 1 Hagg. Eccl. 414; 2 Bla. Com. 292; and has been completely overturned; 2 Kent 451.

**STUMPAGE.** The sum agreed to be paid to an owner of land for trees standing upon his land, the purchaser being permitted to enter upon the land and to cut down and remove the trees; in other words it is the price paid for a license to cut. 67 Mo. 478.

**STUPRUM** (Lat.). **In Roman Law.** The criminal sexual intercourse which took place between a man and a single woman, maid, or widow, who before lived honestly. Inst. 4. 18. 4; Dig. 48. 5. 6; 50. 16. 101.

**STURGEON.** See ROYAL FISH.

**SUABLE.** Capable of being, or liable to be, sued. A suable cause of action is the matured cause of action. 82 N. Y. 218.

**SUB-AGENT.** A person appointed by an agent to perform some duty, or the whole of the business relating to his agency.

A sub-agent is generally invested with the same rights, and incurs the same liabilities in regard to his immediate employers, as if the latter were the real principal. To this general rule there are some exceptions: for example, where, by the general usage of trade or the agreement of the parties, sub-agents are ordinarily or necessarily employed to accomplish the ends of the agency, there, if the agency is avowed and the credit is exclusively given to the principal, the intermediate agent may be entirely exempted from all liability to the sub-agent. The agent, however, will be liable to the sub-agent unless such exclusive credit has been given, although the real principal or superior may also be liable; Story, Ag. § 386. When the agent employs a sub-agent to do the whole or any part of the business of the agency, without the knowledge or consent of his principal, either express or implied, the latter will only be entitled to recover from his immediate employer, and his sole responsibility is also to him. In this case the superior or real principal is not responsible to the sub-agent, because there is no privity between them; Story, Ag. §§ 13, 217, 387.

Where, by an express or implied agree-

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ment of the parties, or by the usages of trade, a sub-agent is to be employed, a privity exists between the principal and the sub-agent, and the latter may justly maintain his claim for compensation both against the principal and his immediate employer, unless exclusive credit is given to one of them; and in that case his remedy is limited to that party; 1 Livermore, Ag. 64; Mich. Ag. 690; 6 Taunt. 147. See AGENT.

**SUB CONDITIONEM.** Upon condition.

**SUB-CONTRACT.** A contract by one who has contracted for the performance of labor or service with a third party for the whole or part performance of that labor or service. 9 M. & W. 710; 3 Gray 362; 17 Wend. 550. See INDEPENDENT CONTRACTOR.

**SUB-CONTRACTOR.** One who has entered into a contract, express or implied, for the performance of an act with the person who has already contracted for its performance. Phill. Mech. Liens § 44; 101 N. C. 611. See 127 Ind. 257.

**SUB DISJUNCTIONE.** In the alternative. Fleta.

**SUB JUDICE.** Under or before a judge or court; under judicial consideration; undetermined. 12 East 409.

**SUB-LEASE.** A lease by a tenant to another person of a part of the premises held by him; an under-lease. See LEASE.

**SUB MODO** (Lat.). Under a qualification. A legacy may be given *sub modo*, that is, subject to a condition or qualification.

**SUB NOMINE.** In the name of.

**SUB PEDE SIGILI** (Lat.). Under the foot of the seal; under seal. This expression is used when it is required that a record should be certified under the seal of the court.

**SUB POTESTATE** (Lat.). Under, or subject to, the power of another: as, a wife is under the power of her husband; a child is subject to that of his father; a slave to that of his master.

**SUB SALVO ET SECURO CONDUCTO.** Under safe and secure conduct. 1 Strange 430.

**SUB SILENTIO** (Lat.). Under silence; without any notice being taken. Sometimes passing a thing *sub silentio* is evidence of consent. See SILENCE.

**SUB SPE RECONCILIATIONIS.** Under hope of reconcilement. 2 Kent 127.

**SUB SUO PERICULO.** At his own risk.

**SUB-TENANT.** An under-tenant.

**SUBALTERN.** An officer who exercises his authority under the superintendence and control of a superior.

**SUBDITUS.** A vassal; a dependent; one under the power of another. Spelman.

**SUBDIVIDE.** To divide a part of a thing which has already been divided. For example, when a person dies leaving children, and grandchildren, the children of one of his own who is dead, his property is divided into as many shares as he had children, including the deceased, and the share of the deceased is subdivided into as many shares as he had children.

**SUBINFEUDATION.** The act of an inferior lord by which he carved out a part of an estate which he held of a superior, and granted it to an inferior tenant to be held of himself.

It was an indirect mode of transferring the fief, and resorted to as an artifice to elude the feudal restraint upon alienation. This was forbidden by the statute of Quia Emptores, 18 Ed. I.; 2 Bla. Com. 91; 3 Kent 406. See Cadw. Gr. Rents § 7; Chal. R. P. 18; QUIA EMPTORES; FEUDAL LAW; TENURE.

**SUBJECT.** An individual member of a nation, who is subject to the laws. This term is used in contradistinction to *citizen*, which is applied to the same individual when considering his political rights.

In monarchical governments, by subject is meant one who owes permanent allegiance to the monarch. See Greenl. Ev. § 286; Phill. Ev. 732; Morse, Citizenship; ALLEGIANCE; CITIZENSHIP; NATURALIZATION.

**SUBJECT-MATTER.** The cause; the object; the thing in dispute.

It is a fatal objection to the jurisdiction of the court when it has not cognizance of the subject-matter of the action: as, if a cause exclusively of admiralty jurisdiction were brought in a court of common law, or a criminal proceeding in a court having jurisdiction of civil cases only; 10 Co. 68, 76; 8 Mass. 87. In such case, neither a plea to the jurisdiction nor any other plea would be required to oust the court of jurisdiction. The cause would be dismissed by the court.

**SUBJECT TO INSURANCE.** A provision in a charter-party, that the freight should be payable, subject to insurance, does not make the insurance by the ship-owner a condition precedent to his right to recover the freight, but means that the insurance premium is to be deducted from the freight. 27 L. J. Ex. 392.

**SUBJECTION** (Lat. *sub*, under, *jacio*, to put, throw). The obligation of one or more persons to act at the discretion or according to the judgment and will of others. *Private* subjection is subjection to the authority of private persons. *Public* subjection is subjection to the authority of public persons.

**SUBMARINE TELEGRAPHS.** See TELEGRAPH.

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**SUBMISSION** (Lat. *submissio*,—*sub*, under, *mittere*, to put,—a putting under). Used of persons or things. A putting one's person or property under the control of another. 10 Barb. 218. A yielding to authority. A citizen is bound to submit to the laws, a child to his parents, a guardian to his ward. A victor may enforce the submission of his enemy.

Every consent involves a submission, but it does not follow that a mere submission involves a consent. 9 C. & P. 722.

**In Maritime Law.** Submission on the part of the vanquished, and complete possession on the part of the victor, transfer property as between belligerents; 1 Gall. 532.

**In Practice.** An agreement, parol (oral or written) or sealed, by which parties agree to submit their differences to the decision of a referee or arbitrators. It is sometimes termed a reference; Kyd, Arb. 11; 3 M. & W. 816; 6 Watts 359; 16 Vt. 663; 4 N. Y. 157.

It is the authority given by the parties to the arbitrators, empowering them to inquire into and determine the matters in dispute.

It may be *in pais*, or by rule of court, or under the various statutes; 1 Dev. 82.

It may be oral, but this is inconvenient, because open to disputes; by written agreement not under seal (in Louisiana and California the submission must be in writing; 5 La. 133; 2 Cal. 92); by indenture, with mutual covenants to abide by the decision of the arbitrator; by deed-poll, or by bond, each party executing an obligation to the other conditioned to be void respectively upon the performance of the award; Caldw. Arb. 16; 6 Watts 357. A parol submission followed by a valid award, though not in writing, may be binding and conclusive upon the parties, if the arbitrators act fairly, but before a party is so bound, the agreement to arbitrate must be duly established; 97 Ala. 52.

An offer to arbitrate not accepted by the other party cannot affect his right to sue; 67 Mo. App. 559; where a submission was provided for in a lease, and by failure of the parties to agree upon arbitrators, nothing had been done and suit was brought, the action could be defeated by an offer at the trial to proceed with the arbitration; 12 App. Div. N. Y. 421. A statutory provision for arbitration has been held not to be exclusive of the common-law right to arbitrate; 50 Neb. 858. See also, as to the effect of statutory provisions upon common-law arbitration, 119 N. Y. 475; 80 Ala. 118.

*When to be made.* A submission may be made at any time of causes not in court, and at common law, where a cause was depending, submission might be made by rule of court before the trial, or by order of *nisi prius* after it had commenced, which was afterwards made a rule of court; 2 B. & Ald. 395; 3 S. & R. 262; 4 Halst. 198.

*Who may make.* Any one capable of making a disposition of his property or release of his right, or capable of suing or being sued, may make a binding submission to arbitration; but one under civil or natural incapacity cannot be bound by his submission; Russ. Arb. 20; 2 P. Wms. 45; 9 Ves. 350; 8 Me. 315; 2 N. H. 484; 8 Vt. 472; 16 Mass. 396; 5 Conn. 367; 1 Barb. 584; 2 Rob. Va. 761; 6 Munf. 458; Paine 646; 5 How. 83.

In general, in cases of incapacity of the real owner of property, as well as in many cases of agency, the person who has the legal control of the property may make submission, including a *husband* for his wife; 5 Ves. 846; a *parent* or *guardian* for an infant; Freem. 62, 139; 11 Me. 326; 12 Conn. 376; 3 Caines 253 (but not a *guardian ad litem*; 9 Humphr. 129); a *trustee* for his *cestui que trust*; 3 Esp. 101; an *attorney* for his client; 1 Ld. Raym. 246; 12 Ala. 252; 9 Pa. 101; 2 Hill, N. Y. 271; 4 T. B. Monr. 375; 7 Cra. 436 (but see 6 Weekl. Rep. 10); an *agent* duly authorized for his principal; 8 B. & C. 16; 8 Vt. 472; 11 Mass. 449; 5 Green N. J. 38; 29 N. H. 405; 8 N. Y. 160; an *executor* or *administrator* at his own peril, but not thereby necessarily admitting assets; 20 Pick. 584; 6 Leigh 62; 5 T. B. Monr. 240; 5 Conn. 621; 1 Barb. 419; 3 Harr. N. J. 442; *assignees* under bankruptcy and insolvency laws, under the statutory restrictions, stat. 6 Geo. IV. c. 16, and state statutes; the right being limited in all cases to that which the person acting can control and legally dispose of; 6 Mass. 78; 6 Munf. 453; 4 T. B. Monr. 240; 21 Miss. 133; but not including a *partner*, for a partnership; 1 Cr. M. & R. 681; 1 Pet. 221; 19 Johns. 137; 2 N. H. 284; 5 Gill & J. 412; 12 S. & R. 243; Lind. Partn. 129, 272; 3 Kent 49; the *administratrix* of a public contractor may join in a submission to arbitration of a controversy arising out of the contract; 9 App. D. C. 360.

*What may be* included in a submission. Generally, any matter which the parties might adjust by agreement, or which may be the subject of an action or suit at law, except perhaps actions (*qui tam*) on penal statutes by common informers; for crimes cannot be made the subject of adjustment and composition by arbitration, this being against the most obvious policy of the law; 5 Wend. 111; 2 Rawle 341; 7 Conn. 345; 6 N. H. 177; 16 Miss. 298; 16 Vt. 450; 10 Gill & J. 192; 5 Munf. 10; 120 Mass. 403; 59 Me. 121; 70 Mo. 417; including a debt certain on a specialty, any question of law, the construction of a will or other instrument, any personal injury on which a suit will lie for damages, although it may be also indictable; 9 Ves. 367; 8 Me. 119, 288; 6 Pick. 148. All controversies of a civil nature, including disputes concerning real estate, may be the subject of a submission for arbitration; 35 Kan. 668.

An agreement to refer future disputes will not be enforced by a decree of specific performance, nor will an action lie for

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refusing to appoint an arbitrator in accordance with such an agreement; 2 B. & P. 135; 2 Stor. 800; 15 Ga. 473. It is considered against public policy to exclude from the tribunals of the state disputes the nature of which cannot be foreseen; 4 Bro. C. C. 312, 315. See 31 Pa. 306.

*Effect of.* A submission of a case in court works a discontinuance and a waiver of defects in the process; 18 Johns. 22; 10 Yerg. 439; 2 Humphr. 516; 5 Gray 492; 4 Hen. & M. 363; 5 Wisc. 421; 4 N. J. 647; 41 Me. 355; 30 Vt. 610; 2 Curt. C. C. 28; and the bail or sureties on a replevin bond are discharged; 1 Pick. 192; 4 Green N. J. 277; 1 Ired. 9; 3 Ark. 214; 2 B. & Ad. 774. But see 6 Taunt. 379; 10 Bingh. 118. But this rule has been modified in England by stat. 17 & 18 Vict. c. 125, § 11; 8 Exch. 827.

The submission which defines and limits, as well as confers and imposes, the duty of the arbitrator must be followed by him in his conduct and award; but a fair and liberal construction is allowed in its interpretation; 1 Wms. Saund. 65; 11 Ark. 477; 3 Pa. 144; 13 Johns. 187; 2 N. H. 126; 2 Pick. 534; 3 Halst. 195; 1 Pet. 222. If general, it submits both law and fact; 7 Ind. 49; if limited, the arbitrator cannot exceed his authority; 11 Cush. 87.

The statutes of many of the states of the United States provide for submissions by the parties before a justice of the peace, in which case the award will be enforced as if it had been made under rule of court; and statutes also regulate submissions made under rule of court.

*Revocation of* a submission may take place at any time previous to the award, though it be expressed in the agreement to be irrevocable. The remedy of the injured party is by an action for breach of the agreement; Morse, Arb. & Aw. 230; 8 Co. 81; 4 B. & C. 103; 12 Wend. 578; 12 Mass. 49; 20 Vt. 198; 26 Me. 251, 459; 3 Day 118; 23 Pa. 393; 4 Sneed 462; 6 Dana 307; 126 Ill. 72; 35 Fed. Rep. 22. See also 36 *id.* 408; 111 N. Y. 310; 82 Cal. 42; 59 Minn. 290. A submission by deed must be revoked by deed; 8 Co. 72, and cases above.

A submission under rule of court is generally irrevocable, by force of statutory provisions, both in England and the United States; 5 Burr. 497; 12 Mass. 47; 4 Me. 459; 1 Binn. 42; 6 N. H. 36; 4 Conn. 498; 5 Paige 575; 3 Halst. 116; 3 Ired. 333; 19 Ohio 245. Where there is a contract of agreement, upon sufficient consideration, and rights have accrued to either party so that the *status quo* cannot be restored, the submission is not revocable; 6 D. R. Pa. 131, where it was held that a submission under the Pennsylvania compulsory arbitration act could not be revoked although some proceedings were waived. A right of revocation must be exercised before the publication of the award; 49 Neb. 280; but where the arbitration agreement provides for a written award, it may be revoked after the arbitrators have communicated to strangers their views, but before they have signed an award; *id.* 280.

A submission at common law is generally revoked by the *death* of either party (unless it be stipulated otherwise), or of the arbitrator, or his refusal to act; 2 B. & Ald. 394; 40 N. H. 130; but see 15 Pick. 79; 3 Halst. 116; 2 Gill & J. 479; 3 Swan 90; 15 Ga. 473; by *marriage* of a *feme sole*, and the husband and wife may then be sued on her arbitration bond; 5 East 266. It is not revoked by the bankruptcy of the party or by the death of the arbitrator after publication of the award; 4 B. & Ald. 250; 9 B. & C. 629; 21 Ga. 1. A submission in a pending action at law falls where the award fails for misconduct of the arbitrators; 74 Miss. 305.

As to arbitration as a condition precedent, see 11 Harv. L. Rev. 234; JURISDICTION; ARBITRATOR.

**SUBMISSION BOND.** The bond by which the parties agree to submit the matter in controversy to arbitration, and to abide by the award of the arbitrator. See SUBMISSION.

**SUBNOTATIONS** (Lat.). **In Civil Law.** The answers of the prince to questions which had been put to him respecting some obscure or doubtful point of law. See RESCRIPT.

**SUBORNATION OF PERJURY. In Criminal Law.** The procuring another to commit legal perjury, who in consequence of the persuasion takes the oath to which he has been incited. Hawk. Pl. Cr. b. 1, c. 69, s. 10.

To complete the offence, the false oath must be actually taken, and no abortive *attempt* to solicit will complete the crime; 2 Show. 1; 5 Metc. Mass. 241; Clark, Cr. L. 330.

But the criminal solicitation to commit perjury, though unsuccessful, is a misdemeanor at common law; 2 East 17; 6 *id.* 464; 1 Hawk. Pl. C. 435; 2 Bish. N. Cr. L. § 1197; 26 U. C. Q. B. 297. In fact it has been said: "There appears to have been a period in our law when the unsuccessful solicitation was deemed to constitute, without more, the full subornation of perjury; for as such it and other indictable attempts corruptly to influence a witness are treated of in some of the old books." 2 Bish. N. Cr. L. § 1197. In order to constitute the crime the false swearing procured must be itself perjury; 40 La. Ann. 460. As to what constitutes perjury, see that title. An attempt at subornation of perjury may be shown in evidence at the trial of the cause to which the attempt relates against the guilty party. So also concealment of facts or documents such as a will, accounts, etc., which were in the power of the party to produce and which presumably he would produce; 186 Pa. 197; L. R. 5 Q. B. 314, approved in 130 Mass. 76. See also 103 Ill. 485; 56 Wis. 156; 82 Pa. 537.

For a form of an indictment for an

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attempt to suborn a person to commit perjury, see 2 Chitty, Cr. Law 480. There must be knowledge that the testimony is false on the part of both, he who solicits and he who is solicited; 2 Bish. N. Cr. L. § 1197 *a*; 10 Sawy. 135; 124 Ill. 17; 19 Fed. Rep. 912.

Provision is made for the punishment of this crime when committed against the administration of justice by the federal government; R. S. §§ 5392, 5393.

**SUBPŒNA** (Lat. *sub*, under, *pœna*, penalty). **In Practice.** A process to cause a witness to appear and give testimony, commanding him to lay aside all pretences and excuses, and appear before a court or magistrate therein named, at a time therein mentioned, to testify for the party named, under a penalty therein mentioned. This is called distinctively a *subpœna ad testificandum*.

On proof of service of a subpœna upon the witness, and that he is material, an attachment may be issued against him for a contempt, if he neglect to attend, as commanded.

**In Chancery Practice.** A mandatory writ or process directed to and requiring one or more persons to appear at a time to come and answer the matters charged against him or them. The writ of subpœna was originally a process in the courts of common law, to enforce the attendance of a witness to give evidence; but this writ was used in the court of chancery for the same purpose as a citation in the courts of civil and canon law, to compel the appearance of a defendant, and to oblige him to answer upon oath the allegations of the plaintiff.

It was invented by John Waltham, bishop of Salisbury, and chancellor to Rich. II., under the authority of the statutes of Westminster II. and 13 Edw. I. c. 34, which enabled him to devise new writs; Cruise, Dig. t. 11, c. 1, § 12. See Vin. Abr. *Subpœna*; 1 Swanst. 209; Spence, Eq. Jur.

**SUBPŒNA AD TESTIFICANDUM.** See SUBPŒNA.

**SUBPŒNA DUCES TECUM.** **In Practice.** A writ or process of the same kind as the *subpœna ad testificandum*, including a clause requiring the witness to bring with him and produce to the court books, papers, etc., in his hands, tending to elucidate the matter in issue. 2 Bla. Com. 382.

This is the only method in most cases, of obtaining the production of a document in the hands of a person not a party to the action. The use of such processes seems to be, as suggested by Lord Ellenborough, C. J., "essential to the very existence and constitution of a court of common law"; 9 East 483, where he states that such writs cannot be traced earlier than the time of Charles II., but it is impossible to conceive that the courts should not have immemorially acted upon written as well as oral evidence, and if so, there must have been some method of requiring the production of the former other than the voluntary favor of those in whose custody it might be.

It can only be used to compel the production of books, papers, accounts, and the like which are comprehended under the term documentary evidence, and not to bring in court such things as stove patterns, for example; 3 Fed. Rep. 12; 48 *id.* 191.

The writ may issue to a party to the action where he is competent as a witness notwithstanding a statute providing for an order for production to enable an inspection by the adverse party; 8 How. Pr. 24; *id.* 222; *contra*, 7 *id.* 261; 23 N. J. Eq. 212.

The writ is compulsory and must be obeyed by the party to whom it is addressed; 4 Dowl. 273; 7 *id.* 693; 15 Fed. Rep. 712; and it is a question for the court whether there is any valid reason why the paper shall not be produced and upon what conditions; *id.*; 2 Jones & Sp. 28; 5 Sm. & M. 198. That the papers are private is not of itself ground for refusal; 9 Mo. App. 261; 14 Gray 240. He must bring them into court for its inspection, though he need not permit them to be given in evidence, if this would prejudice his rights; 10 Pick. 9.

"No witness, however, who is not a party to a suit, can be compelled to produce his title-deeds to any property, or any document the production of which might tend to criminate him, or expose him to any penalty or forfeiture; 2 Taunt. 115; 21 How. Pr. 50; but a witness is not entitled to refuse to produce a document in his possession only because its production may expose him to a civil action (3 Q. B. D. 618), or because he has a lien upon it." Steph. Dig. Ev. art. 118.

This is stated as the English rule, but in this country it is said that the weight of authority confines the excuse for not producing the document to the exposure to penalty or forfeiture or criminal prosecution; 10 Pick. 9.

A custodian of public documents will not be required to bring them into court under a *subpœna duces tecum* where official copies can be had; 1 Yeates 430; 2 *id.* 260; or where their production would result in injury to the public; 2 S. & R. 23; 7 Dowl. 693. Papers which are confidential communications are protected as oral statements of the same character would be, as, for example, papers of a client in the hands of his attorney; 4 Vt. 612; 9 M. & W. 609. "Although a paper should be in the legal custody of one man, yet if a *subpœna duces tecum* is served on another who has the means to produce it, he is bound to do so;" Lord Ellenborough in 1 Campb. 17.

Telegrams are not privileged, and the officers of a telegraph company must produce them under a *subpœna duces tecum* without respect to rules of the company to the contrary; 3 Dill. 566; 15 Fed. Rep. 712; 72 Mo. 83; or notwithstanding statutes

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forbidding the disclosure of such messages; 72 Mo. 83; 2 Pars. Sel. Cas. 74. Corporations generally may be required to produce their books and papers which are essential to the rights of litigants; L. R. 9 C. P. 27; 15 Fed. Rep. 718. See an extended note on this subject in 15 Fed. Rep. 718. See DISCOVERY; PRODUCTION OF DOCUMENTS.

**SUBREPTIO** (Lat.). **In Civil Law.** Obtaining gifts of escheat, etc., from the king by concealing the truth. Bell, Dict.; Calv. Lex. *Subripere.*

**SUBREPTION. In French Law.** The fraud committed to obtain a pardon, title, or grant, by alleging facts contrary to truth.

**SUBROGATION.** The substitution of another person in the place of the creditor, to whose rights he succeeds in relation to the debt. That change which puts another person in the place of the creditor, and which makes the right, the mortgage, or the security which the creditor has pass to the person who is subrogated to him,—that is to say, who enters into his right. Domat, Civ. Law, pt. i. l. iii. t. i. § vi.

It is the substitution of another person in place of the creditor, so that the person substituted will succeed to all the rights of the creditor, having reference to a debt due him. It is independent of any mere contractual relations between the parties to be affected by it, and is broad enough to cover every instance in which one party is required to pay a debt for which another is primarily answerable, and which in equity and conscience ought to be discharged by the latter; 117 Ind. 551.

It is a legal fiction by force of which an obligation extinguished by payment made by a third party is considered as continuing to subsist for the benefit of this third person, who makes but one and the same person with the creditor in the view of the law.

Subrogation gives to the substitute all the rights of the party for whom he is substituted; 4 Md. Ch. Dec. 253. Among the earlier civil-law writers, the term seems to have been used synonymously with *substitution*; or, rather, *substitution* included subrogation as well as its present limited signification. See Domat, Civ. Law, *passim*; Pothier, Obl. *passim*. The term *substitution* is now almost altogether confined to the law of devises and chancery practice. See SUBSTITUTION.

The word subrogation is originally found only in the civil law, and has been adopted, with the doctrine itself, thence into equity; but in the law as distinguished from equity it hardly appears as a term, except perhaps in those states where, as in Pennsylvania, equity is administered through the forms of law. The doctrine of marshalling assets is plainly derived from the Roman law of subrogation or substitution; and although the word is, or, rather, has been used sparingly in the common law, many of the doctrines of subrogation are familar to the courts of common law.

It is one thing to decide that a surety is entitled, on payment, to have an assignment of the debt, and quite another to decide that he is entitled to be subrogated or substituted as to the equities and securities to the place of the creditor, as against the debtor and his co-sureties: Story, Eq. Jur. § 493; 2 McLean 451; 1 Dev. Ch. 137.

*Convention* subrogation results, as its name indicates, from the agreement of the parties, and can take effect only by agreement. This agreement is, of course, with the party to be subrogated, and may be either by the debtor or creditor. La. Civ. Code 1249.

"The doctrine of subrogation is derived from the civil law (43 Pa. 518). In this country, under the initial guidance of Chancellor Kent, its principles have been more widely developed than in England (44 Mo. 338). It is treated as the creature of equity, and is so administered as to secure real and essential justice without regard to form (*id.*), and is independent of any contractual relations between the parties to be effected by it (6 Neb. 219). It is broad enough to include every instance in which one party pays a debt for which another is primarily answerable, and which in equity and good conscience should have been discharged by the latter (33 Gratt. 527; 43 Conn. 244." See 117 Ind. 551). Sheld. Subr. § 1; Har. Subr. 1, 22.

Subrogation does not take place until the payment of the whole debt; 22 U. S. App. 54.

A principle which lies at the bottom of the doctrine is that the person seeking it must have paid the debt under grave necessity to save himself a loss. The right is never accorded to a volunteer; 124 U. S. 534; Sheld. Subr. § 240; 14 N. J. Eq. 234; 52 Pa. 522; Spears, Eq. 37; in which is a statement of the doctrine by Johnson, Ch., of which Miller, J., said in 124 U. S. 549: "This is perhaps as clear a statement of the doctrine on this subject as is to be found anywhere."

But under the Louisiana code the payment of a mortgage debt by an ordinary creditor subrogates him to the rights of the mortgagee; 49 La. Ann. 1046; so also of a grantee of the premises who has paid the mortgage in good faith relying on representations that there were no junior liens; 14 Utah 482; but a mortgagee, who, for his own convenience, with knowledge of the facts, accepts several mortgages in discharge of the original one, is not entitled to subrogation; 50 Neb. 601.

Where a bank lent money to a contractor to be used in carrying out his contract and some of it was used by him for paying laborers and material men, the bank was not entitled to subrogation to the claims of the latter; 71 Fed. Rep. 228. As to subrogation to rights of labor, etc., claims, see 42 S. W. Rep. (Tenn.) 53; RECEIVER.

Persons are not entitled to the right of subrogation where such alleged right arises

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from tortious conduct of their own. A person who invokes the doctrine of subrogation must come into court with clean hands; 148 U. S. 573.

*Legal* subrogation takes place to its full extent—

*First*, for the benefit of one who being himself a creditor pays the claim of another who has a preference over him by reason of his liens and securities. For in this case, it is said, it is to be presumed that he pays for the purpose of securing his own debt; and this distinguishes his case from that of a mere stranger. Domat, Civ. Law. And so, at common law, if a junior mortgagor pays off the prior mortgage, he is entitled to demand an assignment thereof; 56 Pa. 76; 36 Me. 577.

*Second*, for the benefit of the purchasers of an immovable, who uses the price which he paid in paying the creditors to whom the inheritance was mortgaged.

*Third*, for the benefit of him who, being held with others or for others for the payment of the debt, has an interest in discharging it.

Subrogation takes place for the benefit of co-promisors or co-guarantors, as between themselves, and for the benefit of sureties against their principals. But between co-guarantors and co-promisors subrogation benefits him who pays the debt only to the extent of enabling him to recover from each separately his portion of the debt. As against his co-sureties, the surety increasing the value of their joint security is entitled to subrogation only to the amount actually paid; 6 Ind. 857; 12 Gratt. 642. Any arrangement by one co-surety with the principal enures to the benefit of all the co-sureties; 26 Ala. N. S. 280, 728.

If one tenant pays a mortgage, tax lien, or other incumbrance upon the property, he may be subrogated to such lien to secure contribution from his co-tenants. A person who has lent money to a debtor for the purpose of discharging a debt may be subrogated by the debtor to the creditor's rights, and if the party who has agreed to advance the money for the purpose employs it himself in paying the debt and discharging the incumbrance on land given for its security, he is not to be regarded as a volunteer. After such an agreement with the debtor, he is not a stranger in relation to the debt, but he may in equity be entitled to the benefit of the security which he has satisfied with the expectation of receiving a new mortgage or lien upon the land for the money paid; 180 Pa. 522.

When a mortgage is taken upon land with the understanding that it shall be a first lien thereon, and that the money lent is to be applied by the mortgagee to the payment of a prior lien, and it is so applied, the mortgagee is subrogated to the rights of the prior incumbrancer when it is equitable to do so, although there was an antecedent second mortgage of which the subsequent mortgagee had no actual knowledge or notice; 3 Kan. App. 636.

Most of the cases of subrogation so called in the common law arise from transactions of principals and sureties. Courts of equity have held sureties entitled, upon payment of the debt due by their principal to the creditor, to have the full benefit of all the collateral securities, both of a legal and equitable nature, which the creditor has taken as an additional pledge for his debt; Story, Eq. Jur. § 499; Har. Subr. 221.

"A surety who completes a contract with the United States on the contractor's default is subrogated to the rights which the United States might assert against a fund created by the retention of 10 per cent. of the sums estimated from time to time as the value of the work done, in order to insure its completion; and this right relates back to the making of the contract, and is superior to any equitable lien asserted by a bank for moneys advanced to the contractor without the surety's knowledge before he began to complete the work." 17 Sup. Ct. Rep. 142.

Where the creditor's right to subrogation depends on the existence in the surety of the rights to which subrogation is sought, after the surety has parted with the thing given him for his protection, the creditor can have no subrogation; 156 U. S. 400.

It is a settled rule that in all cases where a party only secondarily liable on an obligation is compelled to discharge it, he has a right in a court of equity to stand in the place of the creditor, and be subrogated to all his rights against the party previously liable; 4 Johns. Ch. 123; 4 Pick. 505; 3 Stor. 392; 1 Gill & J. 346; 10 Yerg. 310. This is clearly the case where the surety takes an assignment of the security; 2 Me. 341.

If a surety on a debt secured by mortgage pays the debt, he is entitled to the mortgage as security; 2 Sim. 155. In all cases, the payment must have been made by a party liable, and not by a mere volunteer; 3 Paige, Ch. 117; 2 Brock. 252; 4 Bush 471; 124 U. S. 534; see 87 Ky. 667; but it will be applied whenever the person claiming its benefits has paid a debt for which another was primarily answerable, and which he was compelled to pay in order to protect his own rights or save his own property; 29 W. Va. 480; 124 U. S. 534. The creditor must have had his claim fully satisfied; 1 Gill & J. 347; and the surety claiming subrogation must have paid it; 6 Watts 221; 3 Barb. Ch. 625; 11 Ired. 118; 13 Ill. 68; and is subrogated, where he has paid to redeem a security, only to the amount he has paid, whatever be the value of the security; 19 Miss. 632; 11 Gratt. 522. But giving a note is payment within this rule; 8 Tex. 66. One who advances money to the mortgage creditor of his debtor, in the payment of interest accumulations on the mortgage debt, becomes legally subrogated, *pro tanto* to the mortgage creditor's right; 44 La. Ann. 537. When a mortgagor fails to protect junior incumbrancers against a prior lien when it is his duty to do so, they may pay it and be



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subrogated to the rights of the holder thereto; 120 U. S. 287. The surety after paying the debt is entitled to enforce every security which the creditor has against the principal; 82 Va. 65.

To prevent a satisfaction when a surety pays the money to the creditor, to preserve the security for the benefit of the surety so paying, it must be assigned to a trustee, and in no other way can it be kept alive; 101 N. C. 589.

Judgment obtained against the principal and surety does not destroy the relation as between themselves; 2 Ga. 239; 11 Barb. 159. If a judgment is recovered against a debtor and surety separately for the same amount, the surety can enforce the judgment against his principal when assigned to him after he paid the amount of the judgment; 10 Johns. 524; 3 Rich. Eq. 139.

A surety in a judgment to obtain a stay o fexecution is not entitled to be substituted on paying the judgment, as against subsequent creditors; 5 W. & S. 352. Nor can the surety be subrogated, although he has paid a judgment, if he has sued his principal and failed to recover; 8 Watts 384.

If a judgment is recovered and the sureties pay, they are entitled to be subrogated; 1 W. & S. 155; 14 Ga. 674; 5 B. Monr. 398; 3 Sandf. Ch. 431; even where a mortgage had been given them, but which turned out to be invalid; 4 Hen. & M. 436. This seems to be contradicted in 8 Gratt. 343.

Entry of satisfaction on a judgment does not destroy subrogation, if the entry was not made at the instance of the surety; 20 Pa. 41.

Where the surety has become liable on the contract of his principal, when the principal fails to perform the contract, the surety may pay and be subrogated; 3 Gill & J. 243; 15 N. H. 119; thus, where the surety was held on a bond which he was obliged to pay; 1 Ired. Eq. 340; 22 Vt. 274; and this even where the bond was given to the United States to pay duties on goods belonging to a third person; 4 Rand. 438. And where the bond was given for the payment of the price of land, he was allowed to sell the land; 2 D. & B. 390; 2 B. Monr. 50.

But it is said the mere payment does not *ipso facto* subrogate him; 6 W. & S. 190.

If the surety be also a debtor, there will be no substitution, unless expressly made; 2 Pa. 296; and the person who claims a right of subrogation must have superior equities to those opposing him; 3 Pa. 200.

Sureties of a surety, and his assignee, are entitled to all the rights of the surety, and to be substituted to his place as to all remedies against the principal or his estate; 5 Barb. 398; 22 Vt. 274.

A surety cannot compel the creditor to exhaust his security before coming on the surety; 37 N. J. L. 370.

The debt of the acceptor of a bill is not extinguished by the payment of the bill by the indorser or drawer; for the same rights will remain against him, in their favor, which the holder had himself, unless he is a mere accommodation acceptor; Story, Bills § 422. See a limitation in 19 Barb. 562.

But if payment is made by an indorser who had not received due notice, it is at his own risk, and he can ordinarily have no recourse over to third persons; Chitty, Bills, c. 9; Har. Subr. 174.

An accommodation acceptor is not entitled on payment to a security given to an accommodation indorser; 1 Dev. Eq. 205.

An accommodation indorser who is obliged to pay the note is subrogated to the collateral securities; 12 La. Ann. 733. This subrogation in the civil law operates for the benefit of a holder by intervention (*i. e.* who pays for the honor of the drawer).

Payment of a note by an indorser actually bound, produces the legal effect of subrogating him to the rights of the last holder; 40 La. Ann. 351.

This species of subrogation (by indorsement) is to be distinguished from that which a surety on a note has when he is compelled to pay. Such surety is entitled to the benefit of all the securities which the holder has; 4 Ired. Eq. 22; 22 Pa. 68; 7 N. H. 286.

In the civil law, an agent who buys goods for his principal with his own money is so far subrogated to the principal's rights that if he fails the agent may sell his goods as if they were his own; Cour. de Cass. Nov. 14, 1810.

An insurer of real property is subrogated to the rights of the insured against third parties who are responsible for the loss at common law; 2 B. & C. 254; 13 Metc. 99; 73 N. Y. 399; 39 Me. 253; 25 Conn. 265. And it is well settled in Pennsylvania, New York, New Jersey, and Illinois, that the mortgagee cannot, after payment of his debt by the underwriter, enforce his claim against the mortgagor, but that the underwriter is subrogated to the rights of the mortgagee; 17 Pa. 253; 70 N. Y. 19; 52 Ill. 442; 2 Dutch. 541; 45 Me. 354. So in Canada; 1 Low. Can. 222. The contrary view, however, has been consistently maintained in Massachusetts; 7 Cush. 1; 10 Allen 283.

But an insurance company is not subrogated to the rights of a mortgagee who has paid the premiums himself, so as to demand an assignment of the mortgage before paying his claim when the buildings were burned; 2 Gray 216; 8 Hare 216.

The insurer upon paying to the assured the amount of the loss, total or partial, of the goods insured, becomes, without any formal assignment or any express stipulation to that effect in the policy, subrogated in a corresponding amount to the assured's right of action against the carrier or other person responsible for the loss, and in a court of admiralty may assert in his own name that right of the shipper; 129 U. S. 397. As between a common carrier of goods and an under-

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writer upon them, the liability to the owner for their loss is primarily upon the carrier, while the liability of the insurer is only secondary; 150 U. S. 99.

Ordinarily as between the insurer, claiming subrogation, and the insured, the amount of the recovery against the person whose tort caused the loss represents the entire loss suffered by the insured; 165 Pa. 428.

Under a statute directing, through its standard form of insurance policy, the subrogation of the insurer to the rights of the insured against the party primarily responsible for the loss, such subrogation is a legal right, which must prevail unless a stronger equity be shown against it; and, where the insured recovers a judgment against such party, the insurer is subrogated to his rights therein; 165 Pa. St. 423; 35 W. N. C. 519.

"An insurance company which has paid a loss upon partnership goods is not prevented, by the subsequent death of one of the partners and the resulting dissolution of the firm, from maintaining a suit in admiralty in the partnership name to recover the amount of the loss from the carrier." 78 Fed. Rep. 155.

An insurer upon paying a loss to the assured can take nothing by subrogation but the rights of the assured, and if the assured has no right of action, none passes to the insurer; 139 U. S. 223; 150 *id.* 99.

The doctrine of subrogation does not apply to life insurance; 25 Conn. 265; 79 N. Y. 72. But see 3 Dill. 1; 43 Vt. 536.

An executor who is liable for the default of another is entitled to be subrogated to whatever compensation he has a right to; 93 Ky. 695.

An original stockholder compelled to pay calls on stock after its assignment, is entitled to be subrogated to the rights of the corporation against the delinquent assignee only upon clear proof of acceptance of the transfer by the latter; 35 Fed. Rep. 19.

In the civil law, whoever paid privileged debts, such, for example, as the funeral expenses, had by subrogation the prior claim: *Eorum ratio prior est creditorum quorum pecunia ad creditoris privilegios pervenit.* Dig. *de reb. anc. jud. pos.* l. 24, § 3.

So, if during the community of goods arising from the relation of husband and wife an annuity which was due from one of them only was redeemed by the money belonging to both, the other was subrogated *pleno jure* as to that part of the claim; Pothier, Obl. pt. 3, c. 1, art 6, § 2.

In the civil law, the consignee of goods who pays freight is said to be subrogated to the rights of the carrier and forwarder; Cour. de Cass., 7th Dec. 1826. The common law does not recognize this right as a subrogation. But see LIEN.

In marshalling assets, where a mortgagee has a lien on two funds, if he satisfy himself out of one which is mortgaged to a junior mortgagee so as to extinguish the fund, the junior mortgagee is subrogated to the other fund; 4 Sandf. Ch. 510.

This right of subrogation is a personal right, but may be assigned; 3 Pa. 300; and the creditors of the surety may claim the benefit of the right; 8 Pa. 347; 22 Miss. 87. As to which of two parties liable for the debt shall be subrogated, see 23 Vt. 169.

Where one is subrogated to a mortgage, it is not necessary that it be assigned to him; 45 Vt. 525; though such assignment would only strengthen his position; 10 Minn. 376. The right of subrogation to a prior incumbrance is sometimes enforced by a court of equity by compelling the holder of it to assign it to the party entitled to subrogation; 51 N. Y. 333; 61 Pa. 16. One who is liable to contribute to the payment of a prior lien on property on which he holds security, who is obliged to pay the whole of such claim to protect his own interest, may be subrogated thereto for the purpose of compelling contribution from the other persons liable for a part thereof; 61 Vt. 516.

The creditor need not be made a party to a bill to obtain subrogation; 10 Yerg. 310. See LIEN; MARSHALLING ASSETS.

**SUBSCRIBE.** To write underneath; 45 Ind. 218; to affix a signature; 16 N. Y. S. 104; see 45 N. H. 481. It may sometimes be construed to mean to give consent to or to attest. 24 L. J. Q. B. 171.

**SUBSCRIBING WITNESS.** One who subscribes his name to a writing in order to be able at a future time to prove its due execution. An attesting witness.

In order to make a good subscribing witness, it is requisite he should sign his name to the instrument himself, at the time of its execution, and at the request or with the assent of the party; 6 Hill 303; 11 M. & W. 168; 1 Greenl. Ev. § 969 *a*; 5 Watts 399.

**SUBSCRIPTIO.** That kind of imperial constitution which was granted in answer to the prayer of a petitioner who was present. Calvinus.

**SUBSCRIPTION** (Lat. *sub*, under, *scribo*, to write). The placing a signature at the bottom of a written or printed engagement; or it is the attestation of a witness by so writing his name; but it has been holden that the attestation of an illiterate witness by making his mark is a sufficient subscription. 2 Ves. Sen. 454; 3 P. Wms. 253.

The act by which a person makes an agreement over his signature in writing, to furnish a sum of money for a particular purpose; as, a subscription to a charitable institution, a subscription for a book, for a newspaper, and the like.

One who subscribes, agreeably to the statute and by-laws of a chartered company, acquires a right to his shares, which is a sufficient consideration to make the subscription obligatory on him; but otherwise where the organization was not yet

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effected; 87 Pa. 332; 90 *id.* 169. A subscription for the payment of certain sums of money to a contemplated corporation, to be formed for a purpose for which the subscribers were to derive benefits, may be enforced by the corporation when formed; and no formal acceptance of the subscription or notice of such acceptance is necessary to make it binding; 140 Ill. 248. The question, how far voluntary subscriptions for charitable objects are binding, is not thoroughly settled.

A subscription of a certain sum towards paying off a church debt made long after the debt was contracted and the church built, is without consideration and cannot be enforced; 17 C. C. R. (Pa.) 614. A mere subscription for a charitable object cannot be enforced; 112 N. Y. 517; 117 *id.* 601; 11 Mass. 113; 121 *id.* 528; 93 Ill. 475; 57 Ia. 307. A gratuitous subscription to promote the object for which a corporation is established, cannot be enforced unless the promisee has, in reliance on the promise sued on, done something or incurred or assumed some liability or obligation; it is not sufficient that others were led to subscribe by the subscription sought to be enforced; 121 Mass. 528; 117 N. Y. 601; 57 Ia. 307. The consideration which supports the promise of a subscriber to an enterprise is expenditure by the promisee on the faith of the subscription and not advantage to be gained by the promisor; 41 Ill. App. 259; 57 Ia. 307; 69 *id.* 134. See 41 Ohio St. 527. Until liability has been incurred or acts have been done on the strength of the subscription, it may be withdrawn, and it is revoked by the insanity or death of the subscriber; 96 Ill. 177; 93 *id.* 475; 77 Pa. 328.

It has been held that the subscription, to be binding, should be a promise to some particular person or committee; and there should be an agreement on the part of such person or committee to do something on their part: as, to provide materials or erect a building; 11 Mass. 114; 24 Vt. 189; 9 Barb. 202; 9 Gratt. 633; 4 Me. 382; 1 N. Y. 581.

If advances were fairly authorized, and have been made on the strength of the subscriptions, it will be deemed sufficient to make them obligatory; 12 Mass. 190; 14 *id.* 172; 1 Metc. Mass. 570; 5 Pick. 228; 19 *id.* 73; 4 Ill. 198; 2 Humph. 335; 2 Vt. 48; 5 Ohio 58; they form a consideration for each other; 37 Pa. 210.

The subscriptions to a common object are not usually *mutual* or really *concurrent*, and can only be held binding on grounds of public policy. See 4 N. H. 533; 6 *id.* 164; 7 *id.* 435; 5 Pick. 506; 2 Vt. 48; 9 *id.* 289; 5 Ohio 58.

Payment by a subscriber of a part of his subscription which was not legally enforcible does not make the residue of the subscription valid; 112 N. Y. 517.

**SUBSCRIPTION LIST.** A list of subscribers to some agreement with each other or a third person.

The subscription list of a newspaper is an incident to the newspaper, and passes with the sale of the printing materials; 2 Watts 111.

**SUBSELLIA.** Lower seats or benches occupied by the *judices* and by inferior magistrates when they sat in judgment, as distinguished from the *tribunal* of the prætor. Calvin.

**SUBSEQUENT ACTION.** A second action commenced after the issue of a writ, but before judgment obtained in a first action, is held to be a subsequent action. 51 L. J. Q. B. 279.

**SUBSEQUENT CONDITION.** See CONDITION.

**SUBSIDY. In English Law.** An aid, tax, or tribute granted by parliament to the king for the urgent occasions of the kingdom, to be levied on every subject of ability, according to the value of his lands or goods. Jacob, Law Dict.

**In International Law.** The assistance given in money by one nation to another to enable it the better to carry on a war, when such nation does not join directly in the war. Vattel, liv. 3, § 82. See NEUTRALITY.

Aid given by the government to some commercial enterprise, as to a steamship line. See SUGAR BOUNTY.

**SUBSOIL.** The word includes, *prima facie*, all that is below the actual surface, down to the centre of the earth. 17 L. J. C. P. 162. It is a wider term than mines, quarries, or minerals; 2 L. R. Ir. 339.

**SUBSTANCE** (Lat. *sub*, under, *stare*, to stand). That which is essential: it is used in opposition to form.

It is a general rule that on any issue it is sufficient to prove the substance of the issue. For example, in a case where the defendant pleaded payment of the principal sum and all interest due, and it appeared in evidence that a gross sum was paid, not amounting to the full interest, but accepted by the plaintiff as full payment, the proof was held to be sufficient; 2 Stra. 699; 1 Phil. Ev. 161.

**SUBSTANTIAL DAMAGES.** Damages, assessed by the verdict of a jury, which are worth having, as opposed to nominal damages (*q. v.*).

**SUBSTANTIVE.** Dependent upon itself. 29 Me. 89.

**SUBSTITUTE.** One placed under another to transact business for him. In letters of attorney, power is generally given to the attorney to nominate and appoint a substitute.

Without such power, the authority given to one person cannot, in general, be delegated to another, because it is a personal trust and confidence, and is not, therefore, transmissible. The authority is given to him to exercise his judgment and discretion, and it cannot be said that the trust and confidence reposed in him shall

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be exercised at the discretion of another; 2 Ves. 645. But an authority may be delegated to another when the attorney has express power to do so; T. Jones 110. See Story, Ag. § 13.

**SUBSTITUTED EXECUTOR.** One appointed to act in the place of another executor, upon the happening of a certain event.

**SUBSTITUTED SERVICE.** Service of process upon another than the person upon whom it should be made, where the latter is impossible. Hunt, Eq. pt. i. ch. 2, § 1; Lush. Pr. 867. But an order must be obtained from the court to allow of substituted service, the application for which must be supported by affidavit; Moz. & W.

It is usually applied to cases where property is within the jurisdiction (*q. v.*) of the court and process of some sort or notice of the proceeding is required to be given out of the jurisdiction; and so in divorce proceedings where service on the respondent outside of the jurisdiction is necessary or permitted by the rules.

**SUBSTITUTES. In Scotch Law.** Where an estate is settled on a long series of heirs, substituted one after another, in tailzie, the person first called in the tailzies is the institute; the rest, the heirs of tailzie, or the substitutes. Erskine, Inst. 3. 8. 8. See TAILZIE.

**SUBSTITUTIO HÆREDIS.** See HÆRES.

**SUBSTITUTION** (Lat. *substitutio*). **In Civil Law.** The putting of one person in the place of another, so that he may, in default of ability in the former, or after him, have the benefit of a devise or legacy. Direct substitution is merely the institution of a second legatee in case the first should be either incapable or unwilling to accept the legacy. *Fidei commissary substitution* is that which takes place when the person substituted is not to receive the legacy after the first legatee, and, consequently, must receive the thing bequeathed from the hands of the latter. Merlin, *Répert.* See SUBROGATION.

**SUBTERRANEAN WATERS.** Subterranean streams, as distinguished from subterranean percolations, are governed by the same rules, and give rise to the same rights and obligations, as flowing surface streams; 25 Pa. 528; 2 H. & N. 186. But see 12 M. & W. 374. The owner of the land under which a stream flows can, therefore, maintain an action for the diversion of it, if such diversion took place under the same circumstances as would have enabled him to recover, if the stream had been wholly above ground; 25 Pa. 528; 45 *id.* 518; 5 H. & N. 982; 1 Sawy. 270. But in order to bring subterranean streams within the rules governing surface streams, their existence and their course must be, to some extent, known or notorious; 20 Conn. 533; 45 Pa. 518; and it must be proved that there was a well defined and discerned stream, and not merely a percolation; 161 Pa. 283. Where there is nothing to show that the waters of a spring are supplied by any defined flowing stream, the presumption will be that they have their source in the ordinary percolations of water through the soil; 42 Cal. 303. As these percolations spread themselves in every direction through the earth, it is impossible to avoid disturbing them without relinquishing the necessary enjoyment of the land; the law does not therefore forbid their disturbance; 79 Pa. 81.

The question has arisen how far one has the right to gather in his well or reservoir water which otherwise would have percolated through the soil of his property. It is suggested by Judge Cooley as a satisfactory principle, that it may lawfully be done for the actual use of the proprietor inasmuch as the waters belong to no one until they are collected and they may be appropriated by the one who collects and puts them to use; but one will not be permitted to dig a hole to injure his neighbor; 14 Alb. L. J. 68. The writer just cited considers it impracticable to apply to subterranean waters percolating through the soil the same rules which are used to regulate the rights of the proprietor in a running stream. "Such a rule," he adds, "would raise questions of unreasonable use and cause difficulties both of evidence and application that would make the right of such waters more troublesome than valuable." *Id.* This precise question was considered in an English case, Acton *v.* Blundell, 12 M. & W. 324, by Tindal, C. J., who drew a distinction between such cases and those which concerned surface streams, and held the defendant liable in damage for drawing off a supply of water from a well used to run a mill, by a coal-pit three quarters of a mile from the well. This case was afterward referred to as making for the first time a distinction between underground and surface waters; 7 Exch. 282, 300; it is recognized as settling the rule in England, and is followed in many of the American courts; 7 H. L. Cas. 349; 2 El. & El. 445; 12 Q. B. 753; 4 Comst. 195; 12 Ohio St. 310; 62 Me. 175; 38 Vt. 473; 25 Conn. 593. See Ang. Waters § 114, where the cases are collected.

But it is held that subterranean waters, flowing in known, definite channels, are subject to the same rule as surface waters; 161 Pa. 283; 17 L. R. Ir. 459; otherwise they may be drained; 7 H. L. C. 349; 50 Barb. 316; 62 Me. 175 (though done with malice; 72 N. Y. 39; [1895] A. C. 557; but see 50 N. H. 439); but not, it is held, if the supply of water in surface streams on the land of adjoining owners is thereby diminished; L. R. 6 Ch. 483. See 141 N. Y. 521; 8 Wash. 144; 65 N. W. Rep. (N. D.) 911. As between two corporations pumping water from their respective premises for sale, one cannot complain of the diversion of perco-

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lating water by the other; 53 N. Y. S. 10.

See Ang. Waterc. § 109; Gould, Waters 280; Bainbr. Mines 85; LAND. As to a prescriptive claim to direct such waters, see 20 Conn. 533; 32 Vt. 724.

**SUBTRACTION** (Lat. *sub*, away, *traho*, to draw). The act of withholding or detaining anything unlawfully.

The principal descriptions of this offence are: (1) Subtraction of suit, and service, consisting of a withdrawal of fealty, suit of court, rent, or customary services, from the lord or landlord; 2 B. & C. 827. (2) Of titles. (3) Of conjugal rights. (4) Of legacies, which is the withholding of legacies by an executor. (5) Of church rates, a familiar class of cases in England, consisting in the refusal to pay the amount of rate at which any individual parishioner has been assessed for the necessary repairs of the parish church. Brown, Dict.

**SUBTRACTION OF CONJUGAL RIGHTS.** See RESTITUTION OF CONJUGAL RIGHTS.

**SUBVENTION.** A subsidy; a grant, usually from the government. See SUBSIDY.

**SUCCESSION. In Louisiana.** The right and transmission of the rights and obligations of the deceased to his heirs. The estate, rights, and charges which a person leaves after his death, whether the property exceed the charges or the charges exceed the property, or whether he has left only charges without property. The succession not only includes the rights and obligations of the deceased as they exist at the time of his death, but all that has accrued thereto since the opening of the succession, as also of the new charges to which it becomes subject. That right by which the heir can take possession of the estate of the deceased, such as it may be.

*Irregular succession* is that which is established by law in favor of certain persons or of the state in default of heirs either legal or instituted by testament.

*Legal succession* is that which is established in favor of the nearest relations of the deceased.

*Testamentary succession* is that which results from the constitution of the heir, contained in a testament executed in the form prescribed by law. See HEIR; DESCENT; Pothier, *des Successions*; Toullier, l. 3, tit. 1.

**In Common Law.** The mode by which one set of persons, members of a corporation aggregate, acquire the rights of another set which preceded them. This term in strictness is to be applied only to such corporations; 2 Bla. Com. 430.

**In Scotch Law.** "Heritable rights descend by succession to the heir properly so called; movable rights to the executors, who are sometimes said to be heirs in movables. Succession is either by special destination, which descends to those named by the proprietor himself, or legal, which devolves upon the persons whom the laws mark out for successors, from the presumption that the proprietor would have named them had he made a destination. The first is in all cases preferred to the other, as presumption must yield to truth." Ersk. Prin. III. 8. 1.

**SUCCESSION DUTY.** A duty payable, in England, under the Succession Duties Act of 16 & 17 Vict. c. 51, amended by 22 & 23 Vict. c. 21, upon succession to property. An excise or duty upon the right of a person to receive property by devise or inheritance from another under the regulations of the state. 45 S. W. Rep. (Mo.) 245. It is of the nature of the collateral inheritance tax of Pennsylvania, and like the English legacy duty, which is levied on a sliding scale, according as the successor is more or less nearly related to the decedent. See Brown, Dict. See LEGACY DUTY; TAX.

**SUCCESSOR.** One who follows or comes into the place of another.

This term is applied more particularly to a sole corporation, or to any corporation. The word heir is more correctly applicable to a common person who takes an estate by descent. 12 Pick. 322; Co. Litt. 8 *b*.

A person who has been appointed or elected to some office after another person.

Where electrotype plates belonged to two firms and "their heirs and successors," and they passed to one of the firms, and thence to one of its members, who sold them to a third firm, the latter was held not a "successor." 164 Mass. 457.

**SUCCINCT.** Brief, compressed, terse; hence, compressed in narrow shape; concise. 2 Ind. App. 549.

**SUCKEN, SUCHEN. In Scotch Law.** The whole of the lands restricted to a mill,—that is, whose tenants are bound to grind there. The possessors of these lands are called suckeners. Bell, Dict.

**SUDDER. In Hindu Law.** The chief seat of government contra-distinguished from *mofussil*, or interior of the country. Whart.

**SUE.** To commence or to continue legal proceedings for the recovery of a right. See 11 Fed. Rep. 251; ACTION; SUIT.

**SUED OUT.** A summons is not sued out till it passes from the clerk to a proper officer with a *bona fide* intention to have it served. 14 So. Rep. (Ala.) 333.

**SUERTE. In Spanish Law.** A small lot of ground. 5 Tex. 83.

**SUFFER.** To approve; to consent to; to permit and not to hinder. 19 Conn. 505; 17 Blatchf. 330. See PERMIT.

**SUFFERANCE.** Consent given one from a failure to object; negative permission; toleration; allowance.

See ESTATE BY SUFFERANCE.

**SUFFICIENTLY.** In a statute requiring the carrier to sufficiently water and

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feed live stock in transit the word is not too indefinite to carry a penalty. 24 S. W. Rep. (Tex.) 837.

**SUFFRAGAN** (L. Lat. *suffraganeus*). A titular bishop ordained to assist the bishop of the diocese in his spiritual functions, or to take his place. The number was limited to two to each bishop by 26 Hen. VIII. c. 14. So called because by his suffrage ecclesiastical causes were to be judged. T. L.

**SUFFRAGE.** Vote; the act of voting.

Participation in the suffrage is not of right, but is granted by the state on a consideration of what is most for the interest of the state; Cooley, Const., 2d ed. 752; 1 MacArth. 169; 11 Blatch. 200. The grant of suffrage makes it a legal right until it is recalled, and it is protected by the law as property is. The states establish rules of suffrage except as shown below. Suffrage is never a necessary accompaniment of state citizenship, and the great majority of citizens are always excluded from it. On the other hand, suffrage is sometimes given to those who are not citizens; as has been done by no less than twelve of the states, in admitting persons to vote, who, being aliens, have merely declared their intentions to become citizens.

By the constitution of the United States the qualifications for electors of members of the house of representatives are to be the same as those for the most numerous branch of the state legislature. The fifteenth amendment provides that "the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color, or previous condition of servitude." The fourteenth amendment was intended mainly to effect the same object by a voluntary action on the part of the state, but was practically superseded by the fifteenth amendment.

It has been said that the constitution of the United States confers the right to vote upon no one. That right comes to the citizens of the United States when they possess it at all, under state laws. But the fifteenth amendment confers upon them a new exemption; from discrimination in elections on account of race, color, or previous condition of servitude; 92 U. S. 214, 542. See Cooley, Const., 2d ed. 14; Hare, Am. Const. L. 524; ELECTION; VOTER; CIVIL RIGHTS.

**SUGAR BOUNTY.** The appropriation of money by the act of March 2, 1895, to be paid to certain manufacturers and producers of sugar is within the power of congress. 163 U. S. 427.

**SUGGESTIO FALSI** (Lat.). A statement of a falsehood. This amounts to a fraud whenever the party making it was bound to disclose the truth.

The following is an example of a case where chancery will interfere and set aside a contract as fraudulent, on account of the *suggestio falsi*; a purchaser applied to the seller to purchase a lot of wild land, and represented to him it was worth nothing, except for a sheep pasture, when he knew there was a valuable mine on the lot, of which the seller was ignorant. The sale was set aside; 2 Paige, Ch. 390. See CONCEALMENT; MISREPRESENTATION; REPRESENTATION; SUPPRESSIO VERI.

**SUGGESTION. In Practice.** Information. It is applied to those cases where, during the pendency of a suit, some matter of fact occurs which puts a stop to the suit in its existing form, such as death or insolvency of a party; the counsel of the other party announces the fact in court or enters it upon the record: the fact is usually admitted, if true, and the court issues the proper order thereupon. See 2 Sell. Pr. 191.

In wills, when suggestions are made to a testator for the purpose of procuring a devise of his property in a particular way, and such suggestions are false, they generally amount to a fraud; Bac. Abr. *Wills* (G 3).

**SUGGESTIVE INTERROGATION.** A phrase which has been used by some writers to signify the same thing as *leading question*. 2 Bentham, Ev. b. 3, c. 3. It is used in the French law.

**SUI GENERIS.** Of its own kind or class.

**SUI HÆREDES. In Civil Law.** One's own heirs; proper heirs. Inst. 2, 19, 2.

**SUI JURIS** (Lat. of his own right). Possessing all the rights to which a freeman is entitled; not being under the power of another, as a slave, a minor, and the like.

To make a valid contract, a person must, in general, be *sui juris*. Every one of full age is presumed to be *sui juris*. Story, Ag. 10.

**SUICIDE** (Lat. *suus*, himself, *cædere*, to kill). Self-destruction.

This was once regarded by the common law as exclusively a felonious act; of late, however, it has been often treated as the result of insanity, to be followed by all the legal consequences of that disease, so far as it is practicable. That suicide may be committed by a person in the full enjoyment of his reason, there can be no doubt; nor can there be any doubt that it is often the result of unquestionable insanity. Between the two kinds of suicide here indicated, the medical jurist is obliged to discriminate, and in performing this duty the facts on the subject should be carefully considered.

The instinct of self-preservation is not so strong as to prevent men entirely from being tired of life and seeking their own destruction. They may have exhausted all their sources of enjoyment, their plans of business or of honor may have been frustrated, poverty or dishonor may be staring them in the face, the difficulties

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before them may seem utterly insurmountable, and, for some reason like these, they calmly and deliberately resolve to avoid the evil by ending their lives. The act may be unwise and presumptuous, but there is in it no element of disease. On the other hand, it is well known that suicidal desires are a very common trait of insanity,—that a large proportion of the insane attempt or meditate self-destruction. It may be prompted by a particular delusion, or by a sense of irresistible necessity. It may be manifested in the shape of a well-considered, persistent intention to seize upon the first opportunity to terminate life, or of a blind, automatic impulse acting without much regard to means or circumstances. As the disease gives way and reason is restored, this propensity disappears, and the love of life returns.

Besides these two forms of the suicidal propensity, there are other phases which cannot be referred with any degree of certainty to either of them. Persons, for instance, in the enjoyment of everything calculated to make life happy, and exhibiting no sign of mental disease, deliberately end their days. Another class, on approaching a precipice or a body of water, are seized with a desire, which may be irresistible, to take the fatal plunge. Many are the cases of children who, after some mild reproof, or slight contradiction, or trivial disappointment, have gone at once to some retired place and taken their lives. Now, we are as little prepared to refer all such cases to mental disease as we are to free voluntary choice. Every case, therefore, must be judged by the circumstances accompanying it, always allowing the benefit of the doubt to be given to the side of humanity and justice.

By the common law, suicide was treated as a crime, and the person forfeited all chattels real or personal, and various other property; 4 Bla. Com. 190. This result can be avoided by establishing the insanity of the party; and in England, of late years, courts have favored this course whenever the legal effect of suicide would operate as a punishment. On the other hand, where the rights and interests of other parties are involved, the question of insanity is more closely scrutinized; and ample proof is required of the party on whom the burden of proof lies.

To be guilty of this offence, the deceased must have had the will and intention of committing it, or else he committed no crime; but he also has been so considered who occasions his own death whilst maliciously attempting to kill another; Hawk. Pl. Cr. b. 1, c. 27, s. 4. As he is beyond the reach of human laws, he cannot be punished. The English law, indeed, attempted to inflict a punishment by a barbarous burial of his body, and by forfeiting to the king the property which he owned which would belong to his relations; Hawk. Pl. Cr. c. 9; 4 Bla. Com. 189; but forfeiture in this species of felony, as in other kinds, has been wholly abolished by the Felony Act of 1870, 33 & 34 Vict. c. 23; 4 Steph. Com. 62; one who kills another at his request incurs the same guilt as if not requested; 8 C. & P. 418; so of killing one in a duel; 3 East 581; 31 Ga. 411; in Massachusetts, an attempt to commit suicide is not punishable, but one who, in attempting it, kills another, commits an indictable homicide; 123 Mass. 422; one who counsels a suicide which is committed in his presence is guilty as principal; 8 C. & P. 418; 70 Mo. 412; 13 Mass. 359; Russ. & R. 528.

Evidence of an intention to commit suicide is material in a murder case, where deceased was found dead under circumstances not inconsistent with the theory of suicide; 157 Mass. 180.

See FELO DE SE; SELF-DESTRUCTION; INSURANCE; PERSUADE.

In regard to wills made just before committing suicide, the prevalent doctrine on this point, both in the United States and in England, is that the act of self-destruction may not necessarily imply insanity, and that if the will is a rational act, rationally done, the sanity of the testator is established; 7 Pick. 94; 1 Hagg. Eccl. 109; 2 Harring. 583; 2 Eccl. 415; 46 La. Ann. 773.

It has been held that when the owner of a deposit receipt gives it to another, the gift to take effect at the death of the donor, under such circumstances that the jury find it to have been done in contemplation of suicide, it is not a good *donatio mortis causa;* [1896] 2 I. R. 204.

In regard to life insurance, it is the law of England, at present, that in every case of intentional suicide, whatever may have been the mental condition, the policy becomes void; 3 Mann. & G. 437; 38 L. J. N. S. Ch. 53. In 1 F. & F. 22, the court told the jury the question was, did the assured know he was throwing himself out of the window. If he did, no recovery could be had under the policy. Otherwise, if he did not. Such appears to be the rule in Ohio, Maryland, and Massachusetts; 4 Ins. L. J. 159; 42 Md. 414; 102 Mass. 227; and, it is said, in Germany, Holland, and France; 6 Ins. L. J. 719; May, Ins. § 312. But, although it has been a much vexed question, the American cases generally construe the phrases "die by his own hand," "commit suicide," or "die by suicide," as including only criminal acts of self-destruction, and not acts not done under the control of the will; Biddle, Ins. 831; 54 Me. 224; 4 Seld. 299; 15 Wall. 580; 7 Heiks. 567; Law of Suicide in Life Ins., by William Shrady, 1869. But the supreme court has decided that a condition in the policy that it shall be void if the insured should die by suicide, "sane or insane," avoids the policy, notwithstanding he was of unsound mind and wholly unconscious of the act; 93 U. S. 284; 64 Vt. 78; and the same has been held with reference to a provision in a policy against suicide, "felonious or otherwise, sane or insane;" 34 Wis. 389; 75 Ia. 346; by his "own act or intention, whether sane or insane;" 70 Mo. 27; or "die by his

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own hand, sane or insane;" 65 Mich. 199; or "shall die by his own hand or act, sane or insane;" 65 N. Y. 233; but death by the suicide of the insured, although insane, is not "death by his own hand," whereby the policy is to be void in that event; 38 U. S. App. 37; and the provision in a policy that if the insured shall "die by his own hand while insane," the insurer shall pay the amount of the premiums and interest, applies only in case the self-destruction is intentional; but where the insured killed himself while incapable of knowing the effect of his act, the whole amount of the policy can be recovered; 87 Ky. 541; or if death is accidental; 29 Fed. Rep. 198; and the same is held with respect to the death of the "insured by his own hand, sane or insane;" 7 Chi. L. N. 421.

The words "felonious or otherwise," used in a policy, are held equivalent to "sane or insane;" 25 Fed. Rep. 315; but not the words, "die by his own hand or act, voluntary or otherwise;" 1 McArth. 632; or the words, "under any circumstances die by his own hand;" 40 Ohio St. 217.

A by-law of an insurance company making a certificate void if a member, "sane or insane," should take his life, is valid as to a prior certificate which provided that any violation of "the requirements of the laws now in force or hereafter to be enacted," should render the certificate null and void; 71 Ala. 436.

The full amount of the policy is recoverable under a statute which provides that suicide shall be no defence to an action on an insurance policy, unless it was contemplated at the time of obtaining the policy that the suicide, whether sane or insane, shall only be entitled to recover the amount of the premiums paid; 50 Fed. Rep. 511. Where a statute provides that "all companies, after having received three annual premiums, are estopped from defending on any other ground than fraud," . . . the defendant may set up the defence of suicide; 134 Pa. 45.

Where the insured, while insane and unable to realize the consequences of his act, and without intending thereby to take his life, cuts his throat, his death comes within the terms in the policy providing that death shall be by "external, violent, and accidental means;" 74 Mich. 592.

Where one secured a policy of life insurance, and, being financially embarrassed, killed himself in order to secure money for the payment of his debts, the policy was held void, although it was silent as to suicide; 169 U. S. 139; but if a policy is made payable to the wife of the insured, she may recover on it although her husband committed suicide; 39 Atl. Rep. (Pa.) 52. Where suicide was the defence to an action on an insurance policy, it was not error to charge that "the law does not presume murder; it must be proved;" and, if the evidence is equal as between murder and suicide, the jury must find for the defendant; 84 Fed. Rep. 411; and in an action on such a policy where the evidence is conflicting and quite evenly balanced as to whether death was caused by the intentional or accidental act of the deceased, it will be presumed that death resulted from accident; 47 Fed. Rep. 272. It has been said that the question is not precisely whether a party is insane or not, but whether he understood the physical nature and consequences of his act, and had sufficient will to make the act voluntary; 10 Am. L. Reg. N. S. 101, 679. See 150 U. S. 468; Wharton, Mental Unsoundness; Phill. Ins.

The burden of showing a suicide rests with the company; 46 Ill. App. 307; 71 Hun 146; 46 La. Ann. 1189. In making the proof necessary to establish the liability of an insurer, the plaintiff is entitled to the presumption that a sane man would not commit suicide, as well as of other rules of law established for the guidance of courts and juries in the investigation and determination of facts; 150 U. S. 468; and while proofs of loss, stating suicide as the cause of death, are admissible, they are not conclusive; 24 L. R. A. 589; and, where the defence is fraud, suicide may be shown to be the agency by which the fraud was accomplished, although by the policy suicide was no defence; 123 N. Y. 85.

**SUIT** (L. Lat. *secta;* from Lat. *sequi*, to follow. French, *suite*). **In Practice.** An action.

It is more general than "action," which is almost exclusively applied to law, and denotes any legal proceeding of a civil kind brought by one person against another. 84 Me. 72; 83 Ia. 471.

*Suit* is a generic term. of comprehensive signification, and applies to any proceeding in a court of justice in which the plaintiff pursues, in such court, the remedy which the law affords him for the redress of an injury or the recovery of a right. 10 Ill. App. 333.

The word suit in the twenty-fifth section of the Judiciary Act of 1789 applies to any proceeding in a court of justice in which the plaintiff pursues in such court the remedy which the law affords him. An application for a prohibition is, therefore, a suit; 2 Pet. 449. According to the Code of Practice of Louisiana, art. 96, a suit is a real, personal, or mixed demand made before a competent judge, by which the parties pray to obtain their rights and a decision of their disputes. In that acceptation, the words suit, process, and cause are in that state almost synonymous. See SECTA; Steph. Pl. 427; 3 Bla. Com. 395; 1 Chitty, Pl. 399; Wood, Civ. Law, b. 4, p. 315; 4 Mass. 263; 18 Johns. 14; 4 Watts 154; 3 Story, Const. § 1719. In its most extended sense, the word suit includes not only a civil action, but also a criminal prosecution, as, indictment, information, and a conviction by a magistrate; Hamm. N. P. 270. Suit is applied to proceedings in chancery as well as in law; 1 Sm. Ch. Dec. 26; and is, therefore, more general than *action*, which is almost exclusively applied to matters of law; 10 Paige, Ch. 516.

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The witnesses or followers of the plaintiff. 3 Bla Com. 295. See SECTA.

*Suit of court*, an attendance which a tenant owes to his lord's court. Cowel.

*Suit covenant*, where one has covenanted to do suit and service in his lord's court.

*Suit custom*, where service is owed time out of mind.

*Suithold*, a tenure in consideration of certain services to the superior lord.

The following one in chase; as, fresh suit.

A petition to a king, or a great person, or a court.

**SUIT SILVER.** A small sum of money paid in lieu of attendance at the court barons. Cowel.

**SUITE** (French). Those persons who by his authority *follow* or attend an ambassador or other public minister.

In general, the suite of a minister are protected from arrest, and the inviolability of his person is communicated to those who form his suite; Vattel, lib. 4, c. 9, § 120. See 1 Dall. 177; Baldw. 240; AMBASSADOR.

**SUITOR.** One who is a party to a suit or action in court. One who is a party to an action. In its ancient sense, suitor meant one who was bound to attend the county court; also one who formed part of the *secta*.

**SUITORS' FUND IN CHANCERY. In England.** A fund consisting of moneys which, having been paid into the court of chancery, are placed out for the benefit and better security of the suitors, including interest from the same. By stat. 32 & 33 Vict. c. 91, sec. 4, the principal of this fund, amounting to over £3,000,000, was transferred to the commissioners for the reduction of the national debt. Moz. & W.

**SUM.** The sense in which it is most commonly used is "money"; a quantity of money or currency; any amount indefinitely, a sum of money, a small sum, or a large sum. 96 U. S. 368.

**SUMMARY ACTIONS. In Scotch Law.** Those which are brought into court not by summons, but by petition, corresponding to summary proceedings in English courts. Bell; Brown.

**SUMMARY CONVICTION.** A phrase applied to proceedings which result in the sentence of an accused person without jury trial. At common law it was applied only in cases of contempt. Such proceedings are now frequently provided for by statute, either for trial by a court without a jury, or a final disposition of criminal cases by the committing magistrate. Such statutes are, in derogation of the right of trial by jury, secured by the state and federal constitutions and therefore must provide a right of appeal to a court having a jury. They usually apply only to lesser offences and to hardened offenders.

Summary proceedings as enumerated by Blackstone comprehend: 1. All trials of offences and frauds contrary to the laws of the excise and other branches of revenue which are to be determined by the commissioners of the respective departments and justices of the peace in the country; such convictions are absolutely necessary for due collection of the public money. 2. Convictions before justices of the peace in order to inflict divers petty, pecuniary mulcts and corporal penalties for such disorderly offences as common swearing, drunkenness, vagrancy, idleness, etc. 3. Attachments for contempt and the subsequent proceedings thereon. 4 Bla. Com. 280. See SUMMARY PROCEEDING; CONVICTION.

**SUMMARY JURISDICTION.** The jurisdiction of a court to give a judgment or make an order itself forthwith. See CONTEMPT.

**SUMMARY PROCEEDING.** A form of trial in which the ancient established course of legal proceedings is disregarded, especially in the matter of trial by jury, and, in the case of the heavier crimes, presentment by a grand jury. See 8 Gray 329.

In no case can the party be tried summarily unless when such proceedings are authorized by legislative authority, except perhaps in cases of contempts; for the common law is a stranger to such a mode of trial; 4 Bla. Com. 280. See 2 Kent 73; 2 Conn. 819; 37 Me. 172; 4 Hill 145; 8 Gray 329; 4 Dev. 15; 10 Yerg. 59. See Gill & Doug. Sum. Jur.

The term summary proceedings is applied to proceedings under statute for enabling landlords promptly to dispossess tenants who hold over after default in payment of rent, or after expiration of the term. See PROCEEDING.

**SUMMING UP. In Practice.** The act of making a speech before a court and jury, after all the evidence has been heard, in favor of one of the parties in the cause, is called summing up. When the judge delivers his charge to the jury, he usually sums up the evidence in the case. See CHARGE; OPENING AND CLOSING.

**SUMMON. In Practice.** To notify the defendant that an action has been instituted against him, and he is required to answer to it at a time and place named. This is done by a proper officer either giving the defendant a copy of the summons, or leaving it at his house, or by reading the summons to him.

**SUMMONEAS. In Old Practice.** A writ by which a party was summoned to appear in court.

**SUMMONERS.** Petty officers who cite men to appear in any court.

**SUMMONS. In Practice.** The name of a writ commanding the sheriff, or other authorized officer, to notify a party to appear in court to answer a complaint made against him and in the said writ spe-

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cified, on a day therein mentioned. 3 Bla. Com. 279.

**SUMMONS AND ORDER. In English Practice.** In this phrase the summons is the application to a common-law judge at chambers in reference to a pending action, and upon it the judge or master makes the order. Moz. & W.

**SUMMONS AND SEVERANCE.** See SEVERANCE.

**SUMMUM JUS** (Lat.). Extreme right, strict right. See MAXIMS, *Summum jus*, etc.

**SUMPTUARY LAWS.** Laws relating to the expenses of the people, and made to restrain excess in apparel, food, furniture, etc.

They originated in the view that luxury is, in some of its degrees, opposed to public policy, and that the state is bound to interfere against it. Montesquieu, *Esprit des Lois*, b. 7, c. 2, 4, and Tacitus, Ann. b. 2, ch. 33, b. 3, ch. 52.

In England, in 1336, it was enacted, 10 Edw. III. c. 3, that inasmuch as many mischiefs had happened to the people of the realm by excessive and costly meats, by which, among other things, many who aspired in this respect beyond their means were impoverished and unable to aid themselves or their liege lord in time of need, all men were forbidden to have served more than two courses at a meal, each of but two sorts of victual, except on the principal feasts of the year, and then only three courses were allowed. 4 Com. 170. Subsequent statutes, 1363, 1463, 1482, regulated the dress, and to some extent the diet, of the people, with careful regard to their rank. The substance of these statutes will be found in Knight's History of Eng. p. 272. They were repealed by 1 Jac. I. c. 25. An act of 30 Car. II. c. 3, which ordered the dead to be buried in woollen shrouds; was not repealed until 53 Geo. III. c. 108.

In modern times legislation is not resorted to in respect to this object; but the subject is frequently discussed in connection with the laws for the prevention or punishment of intemperance. See POLICE POWERS.

**SUNDAY.** The first day of the week. In some of the New England states it begins at sunset on Saturday, and ends at the same time the next day. But in other parts of the United States it generally commences at twelve o'clock on the night between Saturday and Sunday, and ends in twenty-four hours thereafter; 6 Gill & J. 268. See 4 Strobh. 493 (a very learned case); 37 Mo. 466; 39 Me. 193; 3 Cush. 137. The *Sabbath*, the *Lord's day*, and *Sunday*, all mean the same thing; 6 Gill & J. 268; 89 Ga. 341.

The stat. 5 & 6 Edw. V. c. 3, enacted that Sunday should be strictly observed as a holy day, provided that in case of necessity it should be lawful to labor, ride, fish, or work at any kind of work. The Book of Sports (1618) declared that, after divine service, the people should not be disturbed from any lawful recreation. The stat. 29 Car. II. c. 7, provided that no tradesman, artificer, workman, laborer, or other person whatsoever, should exercise any worldly business, etc., upon the Lord's day, works of necessity and charity alone excepted. It also forbade the execution of legal process on that day. This has been followed substantially in America, with a tendency to greater strictness. This includes all business, public or private, done in the ordinary calling of the person; 5 B. & C. 406; ordinary calling means that which the ordinary duties of the calling bring into continued action; 7 B. & C. 596; 55 Ga. 245. Many statutes except those who observe the seventh day; others do not; and such legislation is constitutional; 52 Pa. 126; 69 N. Y. 557; 122 Mass. 40; the fact that an individual believes the seventh day is the Sabbath, but does not observe it as such, does not bring him within the exception; 26 Neb. 464. Jews are bound to observe the civil regulations for keeping Sunday; 52 Pa. 125. In New York writs against Jews cannot be made returnable on Saturday; 39 N. Y. S. 254. Cases of necessity are determined by the moral fitness of the work; 34 Pa. 409. Charity includes everything which proceeds from a sense of moral duty, or a feeling of kindness and humanity, and is intended wholly for the comfort and relief of another, and not for one's own pleasure and benefit; 118 Mass. 197. Necessity may arise out of particular occupations; 23 How. 219; 14 Wall. 494; 25 Tex. App. 597; but not when it is a work of mere convenience or profit; 97 Mass. 404; 30 Ind. 476. Shaving a man is not a work of necessity; 54 Mo. App. 310; 23 Wkly. Law Bul. 450; 140 Pa. 89; 143 Mass. 28. See *infra*. Reaping a field of oats on Sunday in order to prevent the loss thereof is a work of necessity; 42 Ill. App. 594. Running street railways on Sunday is illegal; 54 Pa. 401; *contra*, 72 N. Y. 196; 14 Reptr. 364 (Ky. Ct. of App.); and see 55 Ga. 126. When statutes forbid travelling on Sunday, there can be no recovery for injuries from defective streets; 117 Mass. 64; 51 Me. 423; 47 Vt. 32; but see 39 Wisc. 21; unless the party was travelling from motives of necessity or charity; 121 Mass. 301; 84 Me. 433; as riding to a funeral or for health; 36 Atl. Rep. (Me.) 1048; or walking for exercise; 65 Me. 34. But in actions for torts against individuals by common carriers, it is no defence that the injury occurred upon Sunday; 26 Pa. 342; 48 Ia. 652; 116 Ind. 566; *contra*, 124 Mass. 387. Most of the cases are otherwise; Big. L. C. Torts 711; see 125 U. S. 555, and the law in Massachusetts was altered in 1877.

Except as to judicial acts, which are void when done on Sunday; 1 W. Bl. 526; 140 U. S. 118; 41 Kan. 336; see DIES NON; the common law makes no distinction between Sunday and any other day. The Eng-

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lish cases decided after the act of Charles II., *supra*, merely avoided contracts made in pursuance of one's ordinary calling; see 1 Cr. & J. 180; 31 Barb. 41; 4 M. & W. 270; but in most of the states contracts made on Sunday are invalid; see 35 Me. 143; 19 Vt. 358; 6 Watts 231; 3 Wisc. 343: and if not executed, cannot be enforced: 87 Ga. 482; 84 Me. 11; 97 Ala. 700; 98 Mich. 117. In New York any business but judicial may be done on Sunday; 44 Barb. 618. Generally speaking executory contracts made on Sunday will not be enforced, while executed contracts will not be disturbed; 78 Pa. 473; 105 Mass. 399; 57 Ga. 179; 47 N. J. Eq. 201; but see 2 Ohio St. 388; 13 Kans. 529, as to executory contracts. Delivery on Sunday passes title against the vendor; 26 Cal. 514; 13 Ind. 203; but see 12 Mich. 378; a church subscription on Sunday is valid in Pennsylvania; 12 Reptr. 665; and Michigan; 21 Alb. L. J. 293. See 62 Ind. 365. A contract of sale made on Sunday is not saved from being a Sunday contract by the fact that the purchase-money was not paid until Monday; 56 Conn. 383. A contract dated on Sunday may be shown to be erroneously dated; 97 Mass. 166; and it may be shown that a contract bearing a secular date was actually dated on Sunday; 48 Me. 198; but not against a *bona fide* holder without notice; 48 Ia. 228. When a contract takes effect on delivery, the date is not material; 6 Bush 185; 43 Ia. 297; and a note executed on Sunday but delivered on another day is valid; 24 Vt. 189; 35 Me. 143; a contract made on Sunday may be ratified; 7 Gray 164; 24 Vt. 317; 79 Ia. 101; see 87 Ga. 482; but see 11 Ala. 885; but only by an express agreement and not by mere acquiescence; 79 Fed. Rep. 826; a will executed on Sunday is valid; 9 Allen 118; 1 Am. L. Rev. 750 (N. H.); 124 Ind. 36. A contract for an advertisement in a Sunday paper is invalid; 24 N. Y. 358; *contra*, 52 Mo. 474. A verdict in a homicide case submitted to the jury on Saturday may be received and the jury discharged on Sunday; 163 U. S. 662. Laws requiring all persons to refrain from their ordinary callings on Sunday have been held not to encroach on the religious liberty of the people; Cooley, Const. Lim., 2d ed. 584, 725; they may be sustained as police regulations; 8 Pa. 312; 33 Mich. 279; 40 Ala. 725.

Under an act making it unlawful to open a shop on Sunday, for the sale of goods, etc., a barber cannot be convicted; 38 Pac. Rep. (Wash.) 1001.

A statute forbidding barbers to carry on their trade on Sunday is constitutional, under the police power; 149 N. Y. 195; s. c. 31 L. R. A. 689; notwithstanding the act allows barbers in the cities of New York and Saratoga to work till one o'clock; but in Illinois (43 N. E. Rep. 1108), it is held that an act forbidding barbers to work at their trade on Sunday is a taking of property without due process of law; and that it is not a proper exercise of the police power. See, also, 44 Pac. Rep. (Cal.) 843.

Any act forbidding railroad trains to run on Sunday does not constitute a regulation of, and an obstruction to, interstate commerce, and is valid; 88 Va. 95; 163 U. S. 299; 24 W. Va. 783; 90 Ga. 396; but an act forbidding all manner of servile labor on Sundays, etc., is held to be void, so far as it affects interstate traffic; 65 How. Pr. 72. The running of trains is within the prohibition of a statute which punishes any person who labors in his calling on Sunday, or employs his servants in so doing, except in works of necessity or charity; 24 W. Va. 783; but it has been held that running an excursion train on Sunday is a work of necessity; 30 S. W. Rep. (Ky.) 878; so is delivery of milk to customers; 49 Pac. Rep. (Kan.) 87.

Acts have been passed forbidding baseball playing on Sunday. The cases differ as to their constitutionality. See 56 Alb. L. J. 202; 57 *id.* 258.

No one is bound to do work in performance of his contract on Sunday, unless the work by its very nature or by express agreement is to be done on that day and can be then done without a breach of law; 18 Conn. 181; 6 Johns. 326; 10 Ohio 426; 7 Blackf. 479.

Sundays are computed in the time allowed for the performance of an act: 10 M. & W. 331; but if the last day happen to be a Sunday, it is to be excluded, and the act must, in general, be performed on Monday; 3 Pa. R. 201; 3 Chitty, Pr. 110; 133 U. S. 299; 147 *id.* 47. Notes and bills, when they fall due on Sunday, are payable on Saturday, unless a statute provides otherwise. The indorsement of a note creates a new contract, and is an act within the statute prohibiting secular business on Sunday; 84 Me. 111. See, as to the origin of keeping Sunday as a holiday, Story, Pr. Notes § 220; Story, Bills § 223. See, generally, 17 Am. L. Reg. N. S. 285; 3 Rep. Am. Bar Association (1880); 2 Am. L. Rev. 226; 21 Alb. L. J. 424 (Sabbath-breaking); 28 Am. L. Reg. 137, 209, 273; 32 Am. Rep. 557; 30 *id.* 417; 17 *id.* 122 (legality of labor on Sunday); 3 *id.* 371, n.; 54 Pa. 401; 3 Cr. L. Mag. 632 (Sabbath-breaking; works of necessity). The Massachusetts law on this subject depends more on its peculiar legislation and customs than any general principles of justice or law; 23 How. 209.

As to execution of legal process on Sunday, see DIES NON.

See HOLIDAY; POLICE POWER.

**SUNKEN WRECK.** Where part of the frame of a ship was sunk beneath the surface of the sea and partially imbedded in the ground, as was also a quantity of iron ore that formed a part of the cargo of the ship, it was held to be a sunken wreck within the meaning of the collision clause of a policy of insurance; [1893] Prob. 348.

**SUPER ALTUM MARE** (Lat.). Upon the high sea. See HIGH SEAS.

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**SUPER-JURARE.** A term anciently used, when a criminal, who tried to excuse himself by his own oath or that of one or two witnesses, was convicted by the oaths of many more witnesses. Moz. & W.

**SUPER PRÆROGATIVA REGIS.** A writ which formerly lay against the king's tenant's widow for marrying without the royal license. Fitzh. N. B. 174.

**SUPER STATUTO.** A writ that lay against the king's tenant, holding in chief, who aliened the king's land without his license.

**SUPER STATUTO FACTO POUR SENESCHAL ET MARSHAL DE ROY.** A writ which lay against a steward or marshal for holding plea in his court, or for trespass or contracts not made or arising within the king's household. Whart.

**SUPER STATUTO VERSUS SERVANTES ET LABORATORES.** A writ which lay against him who kept any servants who had left the service of another contrary to law.

**SUPER VISUM CORPORIS** (Lat.). Upon view of the body. When an inquest is held over a body found dead, it must be *super visum corporis*. See CORONER; INQUEST.

**SUPERCARGO. In Maritime Law.** A person specially employed by the owner of a cargo to take charge of and sell to the best advantage merchandise which has been shipped, and to purchase returning cargoes and to receive freight, as he may be authorized.

Supercargoes have complete control over the cargo and everything which immediately concerns it, unless their authority is either expressly or impliedly restrained; 12 East 381. Under certain circumstances they are responsible for the cargo; 4 Mass. 115; see 1 Gill & J. 1; but the supercargo has no power to interfere with the government of the ship; 3 Pardessus, n. 646.

**SUPERFICIARIUS** (Lat.). **In Civil Law.** He who has built upon the soil of another, which he has hired for a number of years or forever, yielding a yearly rent. This is not very different from the owner of a lot on ground-rent in Pennsylvania. Dig. 43. 18. 1.

**SUPERFICIES** (Lat.). **In Civil Law.** Whatever has been erected on the soil.

**SUPERFLUOUS LANDS.** Lands acquired by a railroad company under its statutory powers and not required for the purpose of the undertaking. See 10 Jur. Rev. 281.

Slips of land above and below a tunnel; 51 L. J. Q. B. 172; land under arches which carry a railway; 48 L. J. Ch. 258; mines under a surface required or which may be required for the undertaking; 46 L. J. Q. B. 509; are not superfluous lands; but the whole of the land beyond the boundary wall of a railway is superfluous, even though that wall be also a retaining wall thicker at the base than at the surface, and though part of such land would be within a line drawn on the surface vertically above the line of the footings of the wall; 52 L. J. Ch. 198.

**SUPERFŒTATION.** The conception of a second embryo during the gestation of the first, or the conception of a child by a woman already pregnant with another, during the time of such pregnancy.

This doctrine, though doubted, seems to be established by numerous cases; 1 Beck, Med. Jur. 193; Cassan, Superfœtation; New York Medical Repository; 1 Briand, *Méd. Lég. prem. partie*, c. 8, art. 4; 1 Foderé, *Méd. Lég.* § 299; Buffon, *Hist. Nat. de l'Homme, Puberté.*

**SUPERINDUCTIO** (Lat.). **In the Civil Law.** A species of obliteration. Dig. 28. 4. 1. 1.

**SUPERINSTITUTION.** The institution of one upon another, as where two persons are admitted and are instituted to the same benefice, under adverse titles. Cowel.

**SUPERINTENDENT.** One who has the power of direction and control over the acts or labor of others. See MASTER AND SERVANT.

**SUPERINTENDENT REGISTRAR.** An officer who superintends the registration of births, deaths, and marriages in England and Wales. Whart.

**SUPERIOR.** One who has a right to command; one who holds a superior rank: as, a soldier is bound to obey his superior.

In estates, some are superior to others: an estate entitled to a servitude or easement over another estate is called the superior or dominant, and the other the inferior or servient estate. 1 Bouvier, Inst. n. 1612.

**SUPERIOR AND VASSAL. In Scotch Law.** A feudal relation corresponding with the English lord and tenant.

**SUPERIOR COURT.** A term applied collectively to the three courts of common law at Westminster: namely, the king's bench, the common pleas, the exchequer; and so in Ireland.

It denotes a court of intermediate jurisdiction between the courts of inferior or limited jurisdiction and the courts of last resort.

**In American Law.** A court of intermediate jurisdiction between the inferior courts and those of last resort. See the several states.

**SUPERNUMERARII** (Lat.). **In Roman Law.** Those advocates who were not *statuti*, which title see.

The *statuti* were inscribed in the matriculation books, and formed a part of the college of advocates in each jurisdiction.

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The supernumeraries were not attached to any bar in particular, and could reside where they pleased: they took the place of advocates by title as vacancies occurred in that body.

**SUPERONERATIO** (L. Lat. *superonerare*). Surcharging a common: *i. e.* putting in beasts of a number or kind other than the right of common allows. It can only be of a common appendant or appurtenant. Bracton 229. Fleta, lib. 4, c. 23, § 4, gives two remedies, novel disseisin and writ of admeasurement, by which latter remedy no damages are recovered till the second offence. Now, distraining, trespass, and case are used as remedies. 3 Sharsw. Bla. Com. 238.

**SUPERONERATIONE PASTURA.** A writ that formerly lay against him who was impleaded in the county court for the surcharge of a common for his cattle and the cause was removed into one of the superior courts.

**SUPERSEDEAS** (Lat. that you set aside). **In Practice.** The name of a writ containing a command to stay the proceedings at law.

An auxiliary process designed to supersede the enforcement of the judgment of the court below, brought up by writ of error for review. 102 U. S. 249. Originally it was a writ directed to an officer, commanding him to desist from enforcing the execution of another writ which he was about to execute, or which might come in his hands. In modern times the term is often used synonymously with a "stay of proceedings," and is employed to designate the effect of an act or proceeding which of itself suspends the enforcement of a judgment; 98 Cal. 306.

It is granted on good cause shown that the party ought not to proceed; Fitzh. N. B. 236. There are some writs which, though they do not bear this name, have the effect to supersede the proceedings: namely, a writ of error when bail is entered operates as a supersedeas; and a writ of *certiorari* to remove the proceeding of an inferior into a superior court has, in general, the same effect; 8 Mod. 373; 6 Binn. 461. But under special circumstances, the *certiorari* has not the effect to stay the proceeding, particularly where summary proceedings, as to obtain possession under the landlord and tenant law, are given by statute; 6 Binn. 460. See Bacon, Abr.; Comyns, Dig. Yelv. 6, n.

**SUPERSTITIOUS USE. In English Law.** When lands, tenements, rents, goods, or chattels are given, secured, or appointed for and toward the maintenance of a priest or chaplain to say mass; for the maintenance of a priest or other man to pray for the soul of any dead man in such a church or elsewhere; to have and maintain perpetual obits, lamps, torches, etc., to be used at certain times to help to save the souls of men out of purgatory; in such cases the king, by force of several statutes, is authorized to direct and appoint all such uses to such purposes as are truly charitable; Bac. Abr. *Charitable Uses and Mortmain* (D); Duke, Char. Uses 105; 6 Ves. 567; 4 Co. 104.

The doctrine has no recognition in this country; 18 W. N. C. (Pa.) 276; 108 N. Y. 30; and a bequest to support a Catholic priest, and perhaps certain other uses in England, would not be considered as superstitious uses; 1 Pa. 49; 8 *id.* 327; 17 S. & R. 378; 1 Wash. C. C. 224. Yet many of the *superstitious uses* of the English law would fail to be considered as charities, and would undoubtedly come under the prohibition against perpetuities. See CHARITIES; CHARITABLE USES; 1 Jar. Wills, ch. ix. In England there are three classes of persons who have been held obnoxious to the law against superstitious uses: 1. Roman Catholics. 2. Protestant dissenters. 3. Jews. Their various disabilities have been almost wholly removed, and Catholics and Jews have been put on the same footing as Protestant dissenters in reference to their schools and places of religious worship; Lew. Tr., 9th ed. 110. See MASSES.

**SUPERVISOR.** An overseer; a surveyor.

An officer whose duty it is to take care of the highways.

The chief officer of a town or organized township in the states of Michigan, Illinois, Wisconsin, and Iowa. He has various duties assigned him by the statutes as a town officer, and likewise represents his town in the general assembly, or county board of supervisors. See BOARD OF SUPERVISORS.

**SUPERVISORS OF ELECTION.** Persons appointed and commissioned by the United States circuit judge to supervise the registration of voters and the holding of elections for representatives in congress under Rev. Stat. §§ 2011-2031. The law for the appointment of supervisors was repealed by the act of Feb. 8, 1894, 28 Stat. L. 36. As to what was the registration of voters under this act, see REGISTRATION. While this legislation was in force it was held that in case of a question as to what political organization should be recognized by the court in appointing supervisors, the body which was recognized by the last state convention of the party should be considered as its representative organization; subject, however, to modification by change of circumstances; 9 Fed. Rep. 14.

The legislation of congress in vesting the appointment of supervisors in the courts was constitutional, and in the exercise of its supervisory power over elections for senators and representatives, new duties may be imposed by congress on the officers of election and new penalties for breach of duty; 100 U. S. 371, 399. See ELECTION.

**SUPPLEMENTAL.** That which is added to a thing to complete it.

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**SUPPLEMENTAL ANSWER.** One filed in chancery for the purpose of correcting, adding to, and explaining an answer already filed. Sm. Ch. Pr. 334. In New York and states having similar practice it is an additional answer to the complaint. It may be to allege a release after issue joined; 3 Misc. Rep. 54; or to set up facts excusing non-payment where the defence of payment was relied on, until the time of trial; 53 N. W. Rep. (Minn.) 708.

**SUPPLEMENTAL BILL. In Equity Practice.** A bill brought as an addition to an original bill to supply some defect in its original frame or structure which cannot be supplied by amendment. See 1 Paige, Ch. 200; 15 Miss. 456; 22 Barb. 161; 14 Ala. N. S. 147. It may be brought by a plaintiff or defendant; 2 Ball & B. 140; 1 Sto. 218; and as well after, as before, a decree; 3 Md. Ch. Dec. 306; 1 Macn. & G. 405; Story, Eq. Pl. § 338; 41 Fed. Rep. 725; but must be within a reasonable time; 2 Halst. Ch. 465.

If there has been a change of interest in a pending equity suit, the proper method to introduce another party or to substitute one party for another, is by a supplemental bill or by an original bill in the nature of a supplemental bill; 24 U. S. App. 113.

A supplemental bill in the nature of a bill of review cannot be entertained where no new facts pertinent to the litigation are discussed except such as were known to the complainants at the date of the original decree; 27 U. S. App. 204.

It may be filed when a necessary party has been omitted; 6 Madd. 369; 4 Johns. Ch. 605; 85 Tenn. 171; to introduce a party who has acquired rights subsequent to the filing of the original bill; 3 Ia. 472; when, after the parties are at issue and witnesses have been examined, some point not already made seems to be necessary, or some additional discovery is found requisite; 1 Paige 200; when new events referring to and supporting the rights and interests already mentioned have occurred subsequently to the filing of the bill; Story, Eq. Pl. 336; 5 Beav. 253; for the statement only of facts and circumstances material and beneficial to the merits, and not merely matters of evidence; 3 Sto. 299; when, after a decision has been made on the original bill, it becomes necessary to bring other matter before the court to get the full effect of it; Story, Eq. Pl. § 336; when a material fact, which existed before the filing of the bill, has been omitted, and it can no longer be introduced by way of amendment; 2 Md. Ch. Dec. 303; Mitf. Ch. Pl. 55, 61, 325; but only by special leave of court, when it seeks to change the original structure of the bill and introduce a new and different case; 4 Sim. 76, 628; 4 Paige, Ch. 259. Where, after a final decree, a person who has succeeded to the interest of the complainant in such manner as to entitle him to the full benefit of the decree, finds it necessary to invoke further action to obtain such benefit, he may file a supplemental bill in the original suit; 41 Fed. Rep. 725; but when an executor is substituted as a party in place of his decedent, he need not file a supplemental pleading; 83 Fed. Rep. 85. After a decree disposing of the issues, the filing of a new bill by other parties, involving other issues, although connected with the subject-matter of the original litigation, is to be considered a new litigation, although styled a "supplemental bill" and permitted to be filed in the original cause, and the complainant in the original cause is entitled to notice, and will not be bound without it; 162 U. S. 329. And a supplemental bill filed upon leave granted and notice, which makes an essentially different case from that contemplated in the order granting leave to file it, will be ordered to be taken from the files; 32 Atl. Rep. (N. J.) 261.

The bill must be in respect to the same title, in the same person as the original bill; Story, Eq. Pl. 339; and no relief can be had under it upon a cause of action, which did not exist when the original bill was filed; 57 Ill. App. 339; 19 So. Rep. (Fla.) 625. If the original bill shows no title to relief, a supplemental bill cannot be filed based on facts afterwards occurring; but if the original bill is well founded, a supplemental bill may be filed showing a further title to relief; 74 Fed. Rep. 67; 66 *id.* 385. After a decree has been directed for complainant, a stranger will not be permitted to file a supplemental bill based on his purchase of the cause of action, until a decree is actually entered in the original cause; 72 *id.* 325. A bill by a surviving partner, to settle the partnership affairs, is separate, and distinct from a bill to subject real estate of the deceased partner to firm debts, and the statute of limitations cannot be avoided by styling the second suit a supplemental bill; 158 U. S, 128. When a patent was assigned to a stranger pending a suit for infringement, the assignee cannot obtain the benefit of the suit brought by the assignor, by a supplemental bill, but he may do it by an original bill in the nature of a supplemental bill; 58 Fed. Rep. 404. In a suit to remove a cloud from a title, a decree establishing such title in the complainant, which carries a right to possession, a supplemental bill may be filed to enforce that right; 150 U. S. 401.

It must state the original bill, and the proceedings thereon; and, when it is occasioned by an event which has occurred subsequently to the original bill, it must state that event and the consequent alteration with regard to the parties. In general, the supplemental bill must pray that all defendants appear and answer the charges it contains; Story, Eq. Pl. § 343. In the English supreme court of judicature, amendments of the pleadings may now be allowed at any stage of the proceedings in an action.

**SUPPLEMENTARY PROCEEDINGS.** Proceedings supplementary to an

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execution, directed to the discovery of the debtor's property and its application to the debt for which the execution is issued. They are purely statutory, and the statute limits the power of the courts to existing rights and things *in esse* at the time of their institution; 18 N. Y. L. J. 1517. The New York statute entitles the judgment creditor to an order of examination "upon proof . . . that the judgment debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment, etc." And where it appears from the examination "that the judgment debtor has, in his possession or under his control, money or other personal property belonging to him," the judge may order such money to be paid over and such other personal property to be delivered up; such proceedings are directed against property which, at the time of the order for his examination, the judgment debtor has in his possession or under his control, or which is actually due to him. No property subsequently acquired, no future earnings of any kind, and no earnings for personal services rendered within sixty days preceding such order, if necessary for the use of his family, can be reached; *id.*; 2 Abb. N. C. 357; 16 How. Pr. 549. They do not affect money coming to the debtor, unless it is actually due when the order is obtained; *id.*; 11 Abb. N. S. 384; 1 Hilt. 505; 3 N. Y. St. 287; or earnings due after the service of the order; 3 Abb. N. S. 264; or the salary of a public officer, while in the hands of a disbursing officer in common with other money; 57 How. Pr. 215, 217; 3 N. Y. St. 287. Proof as to the possession or control by the judgment debtor must be clear; 22 How. Pr. 3; and doubts whether the money was earned before or after the order should be resolved in favor of the debtor; 16 How. Pr. 549. If the debtor have a family dependent upon him, he may, if necessary, have sixty days' back earnings exempt; Code Civ. Proc. N. Y. § 2463; and this is held to be a humane provision which should be construed liberally in favor of the debtor; 19 Hun 394. But this does not include money received by a saloon-keeper in his business; 21 App. Div. N. Y. 190.

The return of an execution unsatisfied is sufficient to authorize a resort to supplementary proceedings; 51 Pac. Rep. (Wash.) 352; 42 Misc. Rep. 87.

The appointment of a receiver in such proceedings dissolves a partnership of which the judgment debtor is a member; 38 Atl. Rep. (N. J.) 959.

Where the judgment is against a married woman she may be examined as to her separate estate; [1892] 2 Q. B. 626.

The enforcement of orders in such proceedings is by treating the defendant as in contempt, and a debtor is liable thereto for collecting rent; 13 App. Div. N. Y. 312; or drawing out a savings bank deposit held in trust for another; 18 N. Y. L. J. 1520.

An act (1879) which enables the plaintiff to examine the defendant on oath as to his property, fraudulently concealed, is unconstitutional, because no one is obliged to give evidence which may incriminate himself; 97 Pa. 147.

**SUPPLETORY OATH. In Ecclesiastical Law.** An oath given by the judge to the plaintiff or defendant upon half proof, as by one witness, already made. The oath added to the half proof enables the judge to decide. It is discretionary with the judge; Stra. 80; 3 Sharsw. Bla. Com. 370*.

**SUPPLICATIO** (Lat.). **In Civil Law.** A petition for pardon of a first offence; also, a petition for reversal of judgment; also, equivalent to *duplicatio*, which is our rejoinder. Calvinus, Lex.

**SUPPLICAVIT** (Lat.). **In English Law.** The name of a writ issuing out of the king's bench or chancery for taking sureties of the peace: it is commonly directed to the justices of the peace, when they are averse to acting in the affair in their judicial capacity. 4 Bla. Com. 233.

**SUPPLICIUM** (Lat.). **In Civil Law.** A corporal punishment ordained by law; the punishment of death: so called because it was customary to accompany the guilty man to the place of execution and there offer *supplications* for him.

**SUPPLIES. In English Law.** Extraordinary grants to the king by parliament to supply the exigencies of the state. Jacob.

Means of provision or relief; stores.

**SUPPLY CLAIMS.** See MORTGAGE; RECEIVERS.

**SUPPORT.** The right of support is an easement which one man, either by contract or prescription, enjoys, to rest the joists or timbers of his house upon the wall of an adjoining building owned by another person. 3 Kent 435. See Washb. Easem.

A right to the support of one's land so as to prevent its falling into an excavation made by the owner of adjacent lands.

This support is of two kinds, *lateral* and *subjacent*. Lateral support is the right of land to be supported by the land which lies next to it. Subjacent support is the right of land to be supported by the land which lies under it. See LATERAL SUPPORT; MINES AND MINING.

Support is also generally used to mean articles for the sustenance of the family, as food, etc. 19 Kan. 389. See FAMILY.

**SUPPRESS.** To put a stop to when actually existing. The word does not extend to preventing by suppressing what may lead to a thing. 34 L. J. M. C. 9.

**SUPPRESSIO VERI** (Lat.). Concealment of truth.

In general, a suppression of the truth when a party is bound to disclose it vitiates a contract. In the contract of insurance, a knowledge of the facts is required to en

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able the underwriter to calculate the chances and form a due estimate of the risk; and, in this contract perhaps more than any other, the parties are required to represent everything with fairness; 1 W. Bla. 594.

*Suppressio veri*, as well as *suggestio falsi*, is a ground to rescind an agreement, or at least not to carry it into execution; 1 Ball & B. 241; 3 Munf. 232; 1 Pet. 383; 2 Paige, Ch. 390; 1 Story, Eq. Jur., 13th ed. § 204. See CONCEALMENT; MISREPRESENTATION; REPRESENTATION; SUGGESTIO FALSI.

**SUPPRESSION OF EVIDENCE.** Where evidence in an equity case on letters patent is taken out of order, the court will usually entertain a motion to suppress it, though where no harm can result, it is sometimes allowed to stand till the hearing. If no such motion be made, the testimony will stand; Rob. Pat. § 1128; when the evidence is filed that which is inadmissible will sometimes be stricken out on motion; *id.*; but more commonly it stands over for final hearing. Where, in equity, in a patent case, a witness not named in the answer, testified to prior use, it will be considered at the hearing unless a motion be made to suppress it, even though it was taken under objection; 6 Fish. 452.

**SUPRA PROTEST.** Under protest. See ACCEPTANCE; ACCEPTOR; BILLS OF EXCHANGE; PROTEST; PAYMENT UNDER.

**SUPREMACY.** Sovereign dominion, authority, and pre-eminence; the highest state. In the United States the supremacy resides in the people, and is exercised by their constitutional representatives, the president and congress. See SOVEREIGNTY.

**SUPREME.** That which is superior to all other things.

**SUPREME COURT.** A court of superior jurisdiction in many of the states of the United States.

The name is properly applied to the court of last resort, and is so used in most of the states. In nearly all the states there is a supreme court, but in one or two there is a court of appellate jurisdiction from the supreme court.

See the articles on the respective states; UNITED STATES COURTS.

**SUPREME COURT OF ERRORS.** An appellate tribunal, and the court of last resort, in the state of Connecticut. See CONNECTICUT.

**SUPREME COURT OF THE UNITED STATES.** See UNITED STATES COURTS.

**SUPREME JUDICIAL COURT.** An appellate tribunal, and the court of last resort, in the states of Maine, Massachusetts, and New Hampshire. See those titles.

**SUPREME POWER.** The highest authority in the state. Ruth. Nat. L. b. 2, c. 4, p. 67.

**SURCHARGE.** To put more cattle upon a common than the herbage will sustain or than the party hath a right to do. 3 Bla. Com. 237. In case of common without stint it could only happen when insufficient herbage was left for the lord's own cattle; 1 Rolle, Abr. 399. The remedy was by distraining the beasts beyond the proper number; an action of trespass which must have been brought by the lord of the manor; an action on the case, or a writ of admeasurement of pasture. 2 Sharsw. Bla. Com. 238, n.

**In Equity Practice.** To prove the omission of an item from an account which is before the court as complete, which should be inserted to the credit of the party surcharging; Story, Eq. Jur. § 525; 2 Ves. 565; 11 Wheat. 237. It is opposed to *falsify*, which see. Leave to surcharge and falsify is granted in preference to opening an account, in case of an account stated by the parties or reported by an auditor, where the party obtaining the liberty would be concluded by the account were it not granted. See ACCOUNT; AUDITOR.

**SURETY.** A person who binds himself for the payment of a sum of money, or for the performance of something else, for another. See SURETYSHIP.

**SURETY COMPANIES.** See INSURANCE; TRUST COMPANIES.

**SURETY OF THE PEACE.** See PEACE.

**SURETYSHIP.** An undertaking to answer for the debt, default, or miscarriage of another, by which the surety becomes bound as the principal or original debtor is bound.

It is an accessory promise by which a person binds himself for another already bound, and agrees with the creditor to satisfy the obligation, if the debtor does not. 43 La. Ann. 738. It differs from guaranty in this, that suretyship is a primary obligation to see that the debt is paid, while guaranty is a collateral undertaking, essentially in the alternative, to pay the debt if the debtor does not pay it; 24 Pick. 252. And accordingly a surety may be sued as a promisor to pay the debt, while a guarantor must be sued specially on his contract; 8 Pick. 423. The subjects are, however, nearly related, and many of the principles are common to both. See GUARANTY. There must be a principal debtor liable, otherwise the promise becomes an original contract; and, the promise being collateral, the surety must be bound to no greater extent than the principal. Suretyship is one of the contracts included in the statute of frauds; 29 Car. II. c. 3.

The contract must be supported by a consideration, like every other promise. Without that, it is void, apart from the statute of frauds, and whether in writing or not; 4 Taunt. 117; 17 Pa. 469; 43 Ill. App. 584; 36 Kans. 205.

Kent, C. J., divides secondary undertak-



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ings into three classes: 1. Cases in which the guaranty or promise is collateral to the principal contract, but is made at the same time and becomes an essential ground of the credit given to the principal or direct debtor. Here there is not, and need not be, any other consideration than that moving between the creditor and original debtor. 2. Cases in which the collateral undertaking is subsequent to the creation of the debt, and was not the inducement to it, though the subsisting liability is the ground of the promise without any distinct and unconnected inducement. Here there must be some further consideration shown, having an immediate respect to such liability; for the consideration for the original debt will not attach to this subsequent promise. 3. When the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracting parties. The two first classes of cases are within the statute of frauds; the last is not; 8 Johns. 29. This classification has been reviewed and affirmed in numerous cases; 21 N. Y. 415; 15 Pick. 159.

The rule that the statute does not apply to class third has, however, been doubted; and it appears to be admitted that the principle is there inaccurately stated. The true test is the nature of the *promise*, not of the *consideration*; 50 Pa. 39; 94 E. C. L. R. 885. But see *infra*.

A simpler division is into two classes. Where the principal obligation exists before the collateral undertaking is made. Where there is no principal obligation prior in time to the collateral undertaking. In the last class the principal obligation may be contemporaneous with or after the collateral undertaking. The first class includes Kent's second and third, the second includes Kent's first, to which must be added cases where the guaranty referring to a present or future principal obligation does not share the consideration thereof, but proceeds on a distinct consideration. Moreover, there are other original undertakings out of the statute of frauds and valid though by parol, besides his third class. These are where the credit is given exclusively to the promisor though the goods or consideration pass to another. Under this division, undertakings of the first class are original: 1. When the principal obligation is thereby abrogated. 2. When without such abrogation the promisor for his own advantage apparent on the bargain undertakes for some new consideration moving to him from the promisee. 3. Where the promise is in consideration of some loss or disadvantage to the promisee. 4. Where the promise is made to the principal debtor on a consideration moving from the debtor to the promisor; Theob. Sur. 37, 49. The cases under these heads will be considered separately.

*First*, where the principal obligation is pre-existent, there must be a new consideration to support the promise; and where this consideration is the discharge of the principal debtor, the promise is original and not collateral, as the first requisite of a collateral promise is the existence of a principal obligation. This has been held in numerous cases. The discharge may be by agreement, by novation or substitution, by discharge on final process, or by forbearance under certain circumstances; 4 B. & P. 124; 21 N. Y. 412; 8 Gray 233.

But the converse of this proposition, that where the principal obligation remains, the promise is collateral, cannot be sustained, though there have been repeated dicta to that effect; Browne, Stat. Fr. § 193; 12 Johns. 291; denied in 21 N. Y. 415; 7 Ala. N. S. 54; 33 Vt. 132.

The main question arising in cases under this head is whether the debtor is discharged; and this is to a great extent a question for the jury. But if in fact the principal debt is discharged by agreement and the new promise is made upon this consideration, then the promise is original, and not collateral; 1 Allen 405.

But where there is an existing debt, for which a third party is liable to the promisee, and the promisor undertakes to be responsible for it, still the contract need not be in writing if its terms are such that it effects an extinguishment of the original liability; 160 Mass. 225.

A discharge of the debtor from custody, or surrender of property taken on an execution, is a good discharge of the debt; 11 M. & W. 857; 9 Vt. 137; 4 Dev. 261; 21 N. Y. 415; 34 Barb. 97.

Where the transaction amounts to a sale of the principal debt in consideration of the new promise, the debtor is discharged, and the promise is original; 3 B. & C. 855. So where a purchaser of goods transfers them to another, who promises the vendor to pay for them, this is a substitution and an original promise; 5 Taunt. 450; 9 Cow. 266; 11 Ired. 298; 21 Me. 545.

A mere forbearance to press the principal debt is not such a discharge of the debtor as will make the promise original; 1 Sm. L. C. 387; 21 N. Y. 412; 13 B. Monr. 356; but where the forbearance is so protracted as to discharge the debtor, it may be questioned whether the promise does not become original; 33 Vt. 132.

*Second*, the promise will be original if made in consideration of some new benefit moving from the promisee to the promisor; 3 Dutch. 371; 4 Cow. 432; Bull. N. P. 281.

*Third*, the promise is original where the consideration is some loss to the promisee or principal creditor; but it is held in many such cases that the loss must also work some benefit to the promisor; 6 Ad. & E. 564; 3 Strobh. Eq. 177; 20 N. Y. 268. As to merely refraining from giving an execution to the sheriff, see 14 Me. 140.

There have been decisions which hold that the mere relinquishment of a lien by the plaintiff takes the case out of the statute; 7 Johns. 464; 1 McCord 575. It would seem that a surrender of a lien

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merely is not sufficient consideration; 3 Metc. 396; but it must appear that the surrender is in some way beneficial to the promisor, as when he has an interest in the property released; 77 N. Y. 91; 45 Ind. 180; 5 Cush. 488.

The rule is well settled that when the leading object of a promisor is to induce a promisee to forego some lien, interest, or advantage, and thereby to confer on the promisor a privilege or benefit which he would not otherwise possess or enjoy, an agreement made under such circumstances and upon such a consideration is a new, original, and binding contract, although the effect of it may be to assume the debt and discharge the liability of another; 6 Maule & S. 204; 1 Gray 391. The advantage relinquished by the promisee must directly enure to the benefit of the promisor, so as in effect to make it purchase by the promisor; 5 Cush. 488; 12 Johns. 291. It is stated in many cases (under classes third and fourth, above) that the promise is original where the consideration moves to the promisor. The true test, however, must be found not in the consideration, but in the nature of the promise. Wherever the new promisor undertakes for his own default; where his promise is virtually to pay his own debt in a peculiar way, or if, by paying the debt, he is really discharging a liability of his own, his promise is original. The only case in which consideration can affect the terms of the promise is where the consideration of the promise is the extinguishment of the original liability; 17 Mass. 229; 18 Tex. 446; 22 How. 28.

*Fourth*, the promise is original if made on a consideration moving from the debtor to the promisor; 10 Johns. 412; 9 Cal. 92; 30 Ala. N. S. 599; 5 Me. 31; 1 Gray 391; 22 How. U. S. 28; 32 Neb. 269.

For the rule in a class of cases quite analogous, see 9 Ill. 40; 3 Conn. 272.

Where the guaranty relates to a contemporaneous or future obligation, the promise is original, and not suretyship, (*a*) if credit is given exclusively to the promisor, (*b*) if the promise is merely to indemnify.

In the first of these cases the question to whom credit was given must be ultimately for the jury in each case. If there is any primary liability, and the creditor resorts to the principal debtor first, the promise is collateral. Thus, if the promisor says, "Deliver goods to A, and I will pay you," there is no primary obligation on the part of A, and the promise is original; 3 Metc. 396. But if he says, "I will see you paid," or, "I promise you that he will pay," the promise would be collateral; 1 H. Bla. 120; 7 Fed. Rep. 477; 3 Col. 176; 13 Gray 613; 148 Pa. 220 (where it was left to the jury to decide whether it was an original undertaking).

A promise to indemnify merely against contingent loss from another's default is original; 15 Johns. 425. A doubt is expressed by Browne, Stat. of Frauds § 158, whether the fact that mere indemnity is intended, makes the promise original, because in many cases—those where the indemnity is against the default of a third person—there is an implied liability of that person, and the promise is collateral thereto. Now, there are three classes of cases. *First*, it is clear that where the indemnity is against the promisor's default or debt he is already liable without his promise; and to use this as a defence and make the promise collateral thereto would be using the law as a cover to a fraud; 1 Conn. 519; 46 Me. 41; 6 Bingh. 506; 10 Johns. 42; 17 Pick. 538. *Second*, so where the only debt against which indemnity is promised is the promisee's, this, being not the debt of another, but of the promisee, is clearly not within the statute, but the promise is original. And even if the execution of such a promise would discharge incidentally some other liability, this fact does not make the promise collateral; 18 M. & W. 561; 1 Gray 391; 25 Wend. 243; 10 Gill & J. 404; 31 Vt. 142. *Third*, but where there is a liability implied in another person, and the promise refers to his liability or default, and if executed will discharge such liability or default, the promise would seem on reason to be collateral and binding like a suretyship for future advances—that is, when accepted; 9 Ired. 10; 1 Ala. 1; 1 Gill & J. 424; 10 Ad. & E. 453; 4 Barb. 131. But in many cases the rule is broadly stated that a promise to indemnify merely is original; 8 B. & C. 728 (overruled, 10 Ad. & E. 453); 1 Gray 391; 10 Johns. 242 (overruled, 4 Barb. 131); 1 Ga. 294; 10 N. H. 175; 1 Conn. 519; 5 Me. 504. In other cases the distinction is made to rest on the fact that the engagement is made to the debtor; 9 Gray 76; 11 Ad. & E. 438; and in other cases, on the futurity of the risk or liability; 12 Mass. 297.

The last ground is untenable; future guarantees binding when accepted or acted upon, and those against torts are expressly to the contrary. The first ground is too broad, as shown above; and the second seems to ignore the clear primary liability of the principal debtor.

It is said that "a mere promise of indemnity which is not collateral to any liability on the part of another, either express or implied, is not within the statute, and such a case illustrates the rule that when there is no principal, the promise need not be in writing. On the other hand, when the promise to indemnify is in fact a promise to pay the debt of another, then clearly such promise is within the statute, and the fact that it is in form a promise to indemnify will make no difference." Brandt, Sur. & Guar. § 59. See 4 B. & S. 414.

When the principal obligation is void, voidable, not enforceable, or unascertained, the promise is original, there being in this case no principal obligation to sustain the promise as collateral; Browne, Stat. Fr. § 156. It may be questionable, however, whether the promise will in such case be original unless the promisor knows the

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principal liability to be void or voidable; Burge, Surety 6; but this question may be settled by the principle that where credit is given to the principal, notwithstanding his obligation is void or voidable, the promise of the surety is collateral; 4 Bingh. 470; 7 N. H. 368; but if no such credit is given or implied, the promise is collateral. See 15 N. Y. 576; 33 Ala. N. S. 106; 6 Gray 90. Such would be the guaranty of an infant's promise; 7 N. H. 368; and this is accordingly so held; 20 Pick. 467 (but see 11 Allen 365, *contra*, as to the promise of a father to pay the debt of a minor son); 4 Me. 521; though a distinction has been made in the case of a married woman; 4 Bingh. 470; 84 Pa. 135; 43 Ind. 103; but the promise is collateral where the married woman has separate property which she can charge with the payment of her debts, and the credit is given exclusively to her; 6 Ga. 14.

Where the liability is unascertained at the time of the promise, the promise is original; as the liabilities must concur at the time of the undertaking to make a guaranty; Browne, Stat. Fr. § 196; 1 Salk. 27; *contra*, Ambl. 330. Under this head would come a promise to pay damages for a tort, there being no principal liability until judgment; 1 Wils. 305; or where the liability rests upon a future award; 2 Allen 417; and liability upon indefinite executory contracts in general. It is, however, said that the liability may be prospective at the time the promise is made. See Huffcut's Ans. Contr. 72.

The promise is clearly original where the promisor undertakes for his own debt. The rule is, unless the promisor himself or his property is ultimately to be made liable in default of the principal debtor, the statute does not apply; Browne, Stat. Fr. § 177. Thus, an engagement by one who owes the principal debtor to retain the principal debt, so that it may be attached by trustee or garnishee process, is not a collateral promise; 9 Pick. 306; 63 Barb. 321; 50 Ia. 310.

So an agreement by a purchaser to pay part of the purchase-money to a creditor of the vendor is an agreement to pay his own debt; 55 Miss. 365; 2 Lea 543; 49 Ia. 574; 58 Ill. 232; or to pay a debt due a promisee by a third person out of moneys owing by a promisor to such third person; 32 Ohio 415; 9 Cow. 266; 58 Ill. 233; or for the application of a fund due a promisor by a third party; 86 Pa. 147; 18 How. 31. Such an agreement is a trust, or an original promise.

*Under the statute of frauds.* At common law, a contract of guaranty or suretyship could be made by parol; but by the statute of frauds, 29 Car. II. c. 3, "no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or by some person thereunto lawfully authorized:" so that under the statute all contracts of guaranty and suretyship must be in writing and signed. The words debt and default in the statute refer to contracts; 2 East 325; and debt includes only pre-existing liability; 12 Mass. 297; miscarriage refers to torts; 2 B. & Ald. 613. Torts are accordingly within the statute, and may be guaranteed against; 2 B. & Ald. 613; 2 Day 457; though this has been doubted in regard to future torts; 1 Wils. 305. Perhaps a guaranty against future torts might be open to objections on the ground of public policy. But the unchallenged contracts of modern indemnity companies would seem to show that such an objection would not prevail.

A guaranty of indemnity to a surety is within the statute of frauds; 45 Ill. App. 155.

The doctrine that a future contingent liability on the part of the principal is not within the statute; 1 Salk. 27; 12 Mass. 297; is not tenable; and it is clear, both by analogy and on authority, that such a liability may support a guaranty, although such cases must be confined within very narrow limits, and the mere fact of the contingency is a very strong presumption that the promise is original; Browne, Stat. Fr. § 196; 6 Vt. 668; 88 Ill. 561.

Where the promise is made to the debtor, it is not within the statute; Reed, Stat. Fr. 76; 7 Halst. 188; 2 Den. 162. "We are of opinion that the statute applies only to promises made to the person to whom another is answerable;" 11 Ad. & E. 446; 1 Gray 391. The word *another* in the statute must be understood as referring to a third person, and not to a debt due from either of the contracting parties; 6 Cush. 552. False and deceitful representations of the credit or solvency of third persons are not within the statute; Browne, Stat. Fr. § 181; 4 Camp. 1.

The English rule required the consideration to be expressed; 5 East 10. It could not be proved by parol; 4 B. & Ald. 595. But by 19 & 20 Vict. no such promise shall be deemed invalid by reason only that the consideration does not appear in writing or by necessary inference from a written instrument; 7 C. B. N. S. 361. The rule varies in different states, and in some states is settled by statute. See Brandt, Sur. & Guar. § 82. In some states there are statutes similar to the English statutes. In other states the consideration is required by statutes to be expressed. Of states where statutes are silent, some have accepted and some rejected the English construction of statutes of frauds in Wain *v.* Walters, 5 East 10, *supra*.

The courts lay hold of any language which implies a consideration; 21 N. Y. 31. So where the guaranty and the matter guaranteed are one simultaneous transaction, both will be construed in connection, and the consideration expressed in the latter applied to the support of the former.

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if these are words of reference in the guaranty ; 36 N. H. 73.

*Formation of the obligation.* In construing the language of the contract to decide whether it constitutes an original promise or a guaranty, it is difficult to lay down a general rule : the circumstances of particular cases vary widely. See GUARANTY ; [1894] 1 Q. B. 288. One test is if the promisor is totally unconnected with the transaction except by means of his promise to pay the loss, the contract is a guarantee ; if he is to derive some benefit from it, his contract is an indemnity." *Id.* The word guaranty or surety may or may not indicate correctly the contract, and the circumstances of the case may make an indorser liable as a guarantor or surety, without any words to indicate the obligation ; 24 Wend. 456.

In general, if a promissory note is signed or indorsed when made by a stranger to the note he becomes a joint promisor and liable on the note ; 44 Me. 433 ; 9 Cush. 104 ; 14 Tex. 275 ; 20 Mo. 571 ; and this will be true if indorsed after delivery to the payee in pursuance of an agreement made before the delivery ; 7 Gray 284 ; but parol evidence may be introduced to show that he is a surety or guarantor ; 23 Ga. 368 ; 89 Ill. 550. If the third party indorses after delivery to the payee without any previous agreement, he is merely a second indorser ; 11 Pa. 466 ; 82 N. C. 313 ; and he is liable as a maker to an innocent holder ; 20 Mo. 591. But it was held otherwise where the signature was on the face of the note ; 19 N. H. 572 ; and the same is held where he signs at inception of the note, in pursuance of a custom, leaving a blank for the payee's signature above his name ; 12 La. Ann. 517. In Connecticut, such an indorser is held to guaranty that the note shall be collectible when due ; 46 Conn. 410. The time of signing may be shown by parol evidence ; 9 Ohio 139.

A payee or subsequent party who executes a guarantee upon a bill or note is not liable as indorser ; 3 Stew. 319 ; 19 Me. 359 ; 2 Const. 225 ; *contra*, 31 Ga. 210 ; 20 Vt. 499.

It has been held that a third person indorsing a blank at the making of the note may show his intention by parol ; 11 Mass. 436 ; but not if he describes himself as guarantor, or if the law fixes a precise liability to indorsements in blank ; 2 Hill, N. Y. 80. But this has been doubted ; 33 E. L. & E. 282. In New York the cases seem to take the broad ground that an indorser in blank, under all circumstances, is an indorser merely, and cannot be made a guarantor or surety ; 1 N. Y. 324. See 95 U. S. 90.

The consideration to support a parol promise to pay the debt of another must be such as would be good relating to the payment of that particular debt or of any other of equal amount ; 33 Md. 373. It need not be necessarily a consideration distinct from that of the principal contract. An executed or past consideration to the principal is not sufficient ; 121 Mass. 116 ; 51 Miss. 482.

The giving of new credit where a debt already exists has been held a sufficient consideration to support a guaranty of the old and new debt ; 15 Pick. 159 ; 15 Ga. 321 ; but the weight of authority would seem to require that there should be some further consideration ; Reed, Stat. Fr. 70 ; 1 Pet. 476 ; 3 Johns. 211 ; 7 Harr. & J. 457. A consideration that will take a case out of the statute of frauds must be such a consideration as will make the collateral debt, agreed to be paid, the debt of the promisor. It must be an original undertaking ; 45 Ill. App. 155.

Forbearance to sue the debtor is a good consideration, if definite in time ; 92 Ind. 337 ; 45 Wis. 466 ; 1 Kebl. 114 ; or even if of considerable ; Cro. Jac. 683 ; or reasonable time ; 3 Bulstr. 206 ; 4 Wash. 148. But there must be an actual forbearance, and the creditor must have had a power of enforcement ; 4 East 465. But the fact that it is doubtful whether such a power exists, does not injure the consideration ; 5 B. & Ad. 123. Forbearance has been held sufficient consideration even where there was no well-grounded claim ; 18 L. J. C. P. 222 ; 34 Pa. 60 ; *contra*, 3 Pick. 83. A short forbearance, or the deferment of a remedy, as postponement of a trial, or postponement of arrest, may be a good consideration ; and perhaps an agreement to defer indefinitely may support a guaranty ; 4 Johns. 257 ; 6 Conn. 81. A mere agreement not to push an execution is too vague to be a consideration ; 4 McCord 409 ; and a postponement of a remedy must be made by agreement as well as in fact ; 3 Cush. 85 ; 6 Conn. 81 ; 11 C. B. 172.

The contract of suretyship may be entered into absolutely and without conditions, or its formation may be made to depend on certain conditions precedent. But there are some conditions implied in every contract of this kind, however absolute on its face. In the case of bonds, as in other contracts of suretyship, it is essential that there should be a principal, and a bond executed by the surety is not valid until executed by the principal also. One case, 10 Co. 100 *b*, sometimes cited to the contrary, is not clear to the point. The argument that the surety is bound by his recital under seal fails, especially in all statute bonds, where one important requisite of the statute, that the bond should be executed by the principal, fails ; 2 Pick. 24 ; 4 Beav. 383.

Where the surety's undertaking is conditional on others joining, and this condition is known to the creditor, he is not ordinarily liable until they do so ; 4 B. & Ad. 440 ; 53 Ind. 321 ; 4 Biss. 283 ; 35 Miss. 518 ; 124 Ill. 200 ; *contra*, if the obligee is ignorant of the condition ; 2 Metc. Ky. 608 ; 16 Wall. 1 ; 61 Me. 505. So the surety is not bound if the signatures of his co-sureties are forged, although he has not made his signature expressly conditional on theirs : 2 Am. L. Reg. 349 ; but see 8 *id.* N. S. 665. Where a bond to a sheriff ; 1 La. 41 ; and

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an administration bond; 119 Ind. 503; were signed in expectation by the party signing that other sureties would sign, and the bond was delivered without such other signatures, the surety was held liable. If a condition upon which a surety signs be known to the creditor and be not complied with, the surety is not liable; 30 Ga. 93.

The acceptance of the contract by the promisee by words or by acts under it is often made a condition precedent to the attaching of the liability of the surety. The general rule is that where a future guaranty is given, absolute and definite in amount, no notice of acceptance is necessary; but if it is contingent and indefinite in amount, notice must be given; 4 Me. 521; 8 Conn. 438; 16 Johns. 67; but the promisee has a reasonable time to give such notice; 8 Gray 211.

A distinction is to be made between a guaranty and an offer to guaranty. No notice of acceptance is requisite when a guaranty is absolute; 3 N. Y. 212; 2 Mich. 511; but an offer to guaranty must have notice of acceptance; and till accepted it is revocable; 12 C. B. N. S. 784; 6 Dow. H. L. C. 239; 32 Pa. 10; and where acceptance is required, it may be as well implied by acts as by words; as, by receiving the written guaranty from the promisor; 8 Gray 211; or by actual knowledge of the amount of sales under a guaranty of the purchase-money; 28 Vt. 160.

The rule requiring notice is said to be based upon "the nature and definition of a contract, which requires the assent of a party to whom a proposal is made, to be signified to the party making it, in order to constitute a binding promise. . . . The rule proceeds upon the ground that the case in which it applies is an offer or proposal on the part of the guarantor, which does not become binding as an obligation until accepted by the party to whom it is made; that, until then, it is inchoate and incomplete and may be withdrawn by the proposer." 104 U. S. 159. When the guaranty is contemporaneous with the principal contract, notice is unnecessary; 121 Ind. 465; 26 S. W. Rep. Tex. 941; so, where there has been a precedent request; 27 N. E. Rep. Ind. 318; *contra*, 9 Pa. 320. See 34 Am. L. Reg. & Rev. 257. Notice must be given of an offer to guarantee advances to be made by another to a third party, in order to bind the guarantor; 1 M. & S. 557. Knowledge that a guaranty is being acted upon is sufficient in the case of guaranties of existing debts, or of contemporaneous debts; 104 U. S. 159. But in case of guaranties of the repayment of future advances, the cases are in conflict as to whether notice is necessary. That notice is necessary, see 104 U. S. 159; that it is generally unnecessary, see 3 N. Y. 203; 46 Mich. 70; that it is necessary where the amount of the proposed advance is uncertain, but unnecessary where it is certain, see 112 Ind. 293. See, generally, Huffcut's Ans. Contr. 27. One who, as surety, executes a bond with another, conditioned for the payment of the moneys advanced the other, is not entitled to notice of the acceptance of the bond by the obligee; 34 Fed. Rep. 104.

Where a contract of guaranty is signed by the guarantor without any previous request of the other party, and in his absence and for no other consideration between them, except future advances to be made to the principal debtor, there must be an acceptance of the guaranty by the other party in order to complete the contract; 115 U. S. 527; 84 Fed. Rep. 605; 110 Pa. 285, 366.

*Construction and extent of obligation.* The liability of a surety cannot exceed, in any event, that of the principal, though it may be less. The same rule does not apply to the remedies, which may be greater against the surety. But, whatever may be the liability imposed upon the surety, it is clear that it cannot be extended by implication beyond the terms of the contract. His obligation is *strictissimi juris*, and cannot be extended beyond the precise terms of the contract; 10 Johns. 180; 2 Pa. 27; 9 Utah 260. Sureties are never held responsible beyond the clear and absolute terms and meaning of their undertakings, and presumptions and equities are never allowed to enlarge, or in any degree to change, their legal obligations; 21 How. 66. And this rule has been repeatedly reaffirmed; 11 N. Y. 598; 29 Pa. 460; 2 Wall. 235. "It is quite true, that in one sense, the contract of a surety is *strictissimi juris*, and it is not to be extended beyond the express terms in which it is expressed. The rule, however, is not a rule of construction of a contract, but a rule of application of the contract after the construction of it has been ascertained. Where the question is as to the meaning of the language of the contract, there is no difference between the contract of the surety and that of anybody else; 47 N. Y. Supp. 48.

The remedies against the surety may be more extensive than those against the principal, and there may be defences open to the principal, but not to the surety,—as, infancy or coverture of the principal,—which must be regarded as a part of the risks of the surety; 30 Vt. 122.

The liability of the surety extends to and includes all securities given to him by the principal debtor, the converse of the rule stated below in the case of collateral security given to the creditor; 26 Vt. 388. Thus a creditor is entitled in equity to the benefit of all securities given by the principal debtor for the indemnity of his surety; 18 Mo. 136. If the surety receives money from the principal to discharge the debt, he holds it as trustee of the creditor; 6 Ohio 80.

A payment made by the principal before the claim is barred by the statute of limitations, keeps the debt alive as to the surety, otherwise, if made after the statute has run; 114 U. S. 528.

In the common case of bonds given for the faithful discharge of the duties of an office, it is of course the rule that the bond

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covers only the particular term of office for which it is given, and it is not necessary that this should be expressly stated; nor will the time be extended by a condition to be bound "during all the time A (the principal) continues," if after the expiration of the time A holds over merely as an acting officer, without a valid appointment; 3 Sandf. 403. The circumstances of particular cases may extend the strict rule stated above, as in the case of officers annually appointed. Here, although the bond recites the appointment, if it is conditioned upon his faithful accounting for money received before his appointment, the surety may be held; 9 B. & C. 35; 9 Mass. 267. But the intention to extend the time, either by including past or future liabilities, must clearly appear; 4 B. & P. 175. See 101 Cal. 483; 76 Md. 136. Generally the recital cannot be enlarged and extended by the condition; Theob. Surety 66. And where the recital sets forth an employment for twelve months, this time is not controlled by a condition, "from time to time annually, and at all times thereafter during the continuance of this employment," although the employment is actually continued beyond the year; 2 B. & Ald. 431; 7 Gray 1.

So the obligation may cease by a change in the character of the office or employment; 3 Wils. 530; but an alteration in the character of the obligees, by taking in new partners, does not necessarily terminate the obligation; 10 B. & C. 122. But where an essential change takes place, as the death of the obligee, the obligation, is terminated, although the business is carried on by the executors; 1 Term 18. Where one becomes surety for two or either of them, the obligation is terminated by the death of one of the principals; 1 Bingh. 452; but this is where the obligation is essentially personal; and where a bond for costs was given by two as "defendants," the surety was not discharged by the death of one; 5 B. & Ald. 261. So a surety for a lessee is not liable for rent after the term, although the lessee holds over; 1 Pick. 332.

If the law provides that a public officer shall hold over until a successor is appointed, the sureties on the official bond are liable during such holding over; 37 Miss. 518; 2 Metc. Mass. 522; *contra*, in the case of officers of corporations; 7 Gray 1; but the liability of such surety extends only for such reasonable time as would enable the successor to be appointed; 40 La. Ann. 241. And this provision is not controlled by an alteration of the law extending the term but leaving the provision intact; 15 Gratt. 1. But when the term of an office created by statute or charter is not limited, but merely directory for an annual election, it seems the surety will be liable, though after the year, until his successor is qualified; 3 Del. Ch. 225.

In bonds, the penalty is the extreme amount of liability of the surety; but various circumstances may reduce the liability below this; 3 Cow. 151; 6 Term 303. If the engagement of the surety is general, the surety is understood to be obligated to the same extent as his principal, and his liability extends to all the accessories of the principal obligation; 14 La. Ann. 183.

A surety on a cashier's bond is not liable for money collected by the cashier as an attorney-at-law, and not accounted for to the bank; 4 Pick. 314. So also where one was surety, and the bond was conditioned on the accounting by the principal for money received by him in virtue of his office as parish overseer, the surety was held not liable for money borrowed by the principal for parochial purposes; 7 B. & C. 491. But a surety on a collector's bond is liable for his principal's neglect to collect, as well as failure to pay over; 6 C. & P. 106.

As the surety is only liable to the obligations fairly intended at the execution of the bond, he cannot be held for a breach of new duties attached to his principal's office; 4 Pick 314; or if any material change is made in the duties; 2 Pick. 223. A surety on an official bond is said to be liable generally for the faithful performance of duties imposed upon the officer, whether by laws enacted before or after the execution of the bond, where such duties are properly within the scope of the office; Brandt, Sur. & Guar. § 548.

If one guarantees payment for services, and the promisee partly performs the services, but fails of completing them from no fault of his own, the guarantor is liable to the amount of the part-performance; 12 Gray 445.

A bond for faithful performance of duties renders the sureties responsible for ordinary skill and diligence, as well as for integrity; 12 Pick. 303.

A continuing guaranty up to a certain amount covers a constant liability of that amount; but if the guaranty is not continuing, the liability ceases after the execution of the contract to the amount limited; 3 B. & Ald. 593.

A guaranty may be continuing or may be exhausted by one act. It is said that there is no general rule for determining the question; Brandt, Sur. & Guar. § 156. The general principle may be thus stated: When by the terms of the undertaking, by the recitals in the instrument, or by a reference to the custom and course of dealing between the parties, it appears that the guaranty looked to a future course of dealing for an indefinite time, or a succession of credits to be given, it is to be deemed a continuing guaranty, and the amount expressed is to limit the amount for which the guarantor is to be responsible, and not the amount to which the dealing or whole credit given is to extend; 7 Pet. 113; 3 B. & Ald. 593. Thus, a guaranty for *any* goods to one hundred pounds is continuous; 12 East 227; or for "any debts not exceeding," etc.; 2 Camp. 413; or, "I will undertake to be answerable

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for *any* tallow not exceeding," etc., but "without the word *any* it might perhaps have been confined to one dealing;" 3 Camp. 220. The words, "I do hereby agree to guaranty the payment of goods according to the custom of their trading with you, *in the sum of* £200," are held to constitute a continuing guaranty; 6 Bingh. 244; so of the words, "I agree to be responsible for the price of goods purchased at any time, to the amount of," etc.; 1 Metc. Mass. 24. The words "answerable for the amount of five sacks of flour" are clearly not continuous; 6 Bingh. 276. The court will look at the surrounding circumstances, in order to determine; L. R. 4 C. P. 595.

The contracts of guaranty and suretyship are not negotiable or assignable, and in general can be taken advantage of only by those who were included as obligees at the formation of the contract; 3 McLean 279. See GUARANTY. Accordingly, the contract is terminated by the death of one of several obligees; 4 Taunt. 673; or by material change, as incorporation; 3 B. & P. 34. But where a bond is given to trustees in that capacity, their successors can take advantage of it; 12 East 399. The fact that a stranger has acted on a guaranty does not entitle him to the benefits of the contract; 20 Vt. 499; and this has been held in the case of one of two guarantees who acted on the guaranty; 3 Tex. 199. A guaranty is not negotiable, whether made by a payee or subsequent party to a bill or note; 8 Watts 361.

It is held that a guaranty addressed to no one in particular may be acted on by any one; 22 Vt. 160; but the true rule would seem to be that in such cases a party who had acted on the contract might show, as in other contracts, that he was a party to it within the intention at the making; the mere fact that no obligee is mentioned does not open it to everybody.

In an action against sureties for violation of a bond by the principals, it is not necessary to allege any violation on the part of the sureties; 31 Pac. Rep. (Cal.) 158.

The rule of construction applied to ordinary sureties is not applicable to the bonds of fidelity and casualty companies; any doubtful language should be construed most strongly against the surety and in favor of the indemnity which the insured had reasonable ground to expect; 22 U. S. App. 439.

*Enforcement of the obligation.* As the surety cannot be bound to any greater extent than the principal, it follows that the creditor cannot pursue the surety until he has acquired a full right of action against the principal debtor. A surety for the performance of any future or executory contract cannot be called upon until there is an actual breach by the principal. A surety on a promissory note cannot be sued until the note has matured, as there is no debt until that time. All conditions precedent to a right of action against the principal must be complied with. Where money is payable on demand, there must have been a demand and refusal. But it is not necessary that the creditor should have exhausted all the means of obtaining his debt. In some cases it may be requisite to notify the surety of the default of the debtor, or to sue the debtor; but this depends upon the particular conditions and circumstances of each case, and cannot be considered a condition precedent in all cases. Even where the creditor has a fund or other security to resort to, he is not obliged to exhaust this before resorting to the surety; he may elect either remedy, and pursue the surety first. But if the surety pay the debt, he is entitled to claim that the creditor should proceed against such fund or other security for his benefit; 4 Jones, Eq. 212; 33 Ala. N. S. 261. And if the creditor having received such collateral security, avail himself of it, he is bound to preserve the original debt; for in equity the surety will be entitled to subrogation; 38 Pa. 98. A judgment against the principal may be assigned to the surety upon payment of the debt; 1 Metc. 489; 4 Jones, Eq. 262; 77 Hun 580. But an assignment of the debt must be for the whole; the surety cannot pay a part and claim an assignment *pro tanto;* 39 N. H. 150.

In general, it is not requisite that notice of the default of the principal should be given to the surety, especially when the engagement is absolute and for a definite amount; 14 East 514. The guarantor on a note is not entitled to notice as an indorser; 33 Ia. 293; 74 Pa. 351, 445; 56 Mo. 272. Laches in giving notice to the surety upon a draft of the default of the principal can only be set up as a defence in an action against the surety, in cases where he has suffered damage thereby, and then only to the extent of that damage; 3 N. Y. 203; it is no defence to an action against a surety on a bond that the plaintiff knew of the default of the principal, and delayed for a long time to notify the surety or to prosecute the bond; 1 Zabr. 100. Mere passive delay in prosecuting a remedy against a principal does not release a surety; 37 Minn. 431; 30 S. C. 177; 99 N. C. 531; not even if prolonged until the statute of limitations has run; 69 Fed. Rep. 798. Sureties on a supersedeas bond are not entitled to have a suit thereon stayed till attached lands of the principal are sold and the security exhausted; 57 Fed. Rep. 909.

A judgment against a principal is at least *prima facie* evidence against the surety, though he was not notified of the action; 66 Fed. Rep. 265.

*Discharge of obligation.* The obligation may be discharged by acts of the principal, or by acts of the creditor. Payment, or tender of payment, by the one, and any act which would deprive the creditor of remedies which in case of default would enure to the benefit of the surety, are instances of discharge. In the first place, a payment by the debtor would of course operate to discharge the liability. The only questions

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which can arise upon this point are, whether the payment is applicable to the payment in question, and as to the amount. Upon the first of these, this contract is governed by the general rule that the debtor can apply his payment to any debt he chooses. The surety has no power to modify or direct the application, but is bound by the election of the principal; 2 Bingh. N. C. 7. If no such election is made by the debtor, the creditor may apply the payment to whichever debt he sees fit; 7 Wheat. 20; 1 Pick. 386. This power, however, only applies to voluntary payments, and not to payments made by process of law; 10 Pick. 129. A surety on a promissory note is discharged by its payment, and the note cannot be again put in circulation; 13 Cush. 163; so also, extension of time by the holder of a note at the request of one maker without the knowledge of the other who signed as a surety, releases the latter though the holder did not know of the relation between the two makers at the time the note was given; 23 U. S. App. 280.

Where one of two sureties to a contract assented to a change which altered his liability to his prejudice, it was held that the other surety was released but the former was bound for the whole liability; 17 U. S. App. 442, 463. Whatever will discharge the surety in equity will be a defence at law; 7 Johns. 337; 2 Pick. 223.

A release of the principal debtor operates as a discharge of the surety; [1893] A. C. 313; though the converse is not true; 17 Tex. 128; [1893] App. Cas. 313; 63 Ill. 272; unless the obligation is such that the liability is joint only, and cannot be severed. But if the creditor, when releasing the principal, reserves his remedies against the surety, the latter is not discharged; L. R. 7 C. P. 9; 4 Ch. App. Cas. 204; and "a creditor who is fully indemnified is not discharged by the release of the principal." Brandt, Sur. & Guar. § 147. The release of one of several sureties is said to release the others only so far as the one released would have been liable for contribution to the co-sureties; 47 Ala. 390; but see 32 Ind. 438. Other cases hold such a release to be a discharge of the co-sureties; 40 Ind. 225; 2 Ala. 694. When the discharge of one surety varies the contract; 2 Head 613; or increases the risk of the co-sureties, they are released also.

Fraud or alteration avoids a contract of suretyship. Fraud may be by the creditor's misrepresentation or concealment of facts. Unless, however, the contract between the debtor and creditor is unusual, the surety must *ask* for information; 12 Cl. & F. 109; 15 W. Va. 21. The creditor has been held bound to inform a surety of debtor's previous default; 33 Pa. 358; L. R. 7 Q. B. 666; *contra*, 21 W. R. 439; 91 Ill. 518; though not of his mere indebtedness; 17 C. B. N. S. 482. But to accept a surety relying on the belief that there are no unusual circumstances increasing his risk, knowing that there are such, and neglecting to communicate them, is fraud; 36 Me. 179; 31 N. Y. 518. The fraud must be practised on the surety; 9 Ala. 42. The forgery of the signature of a surety on a constable's bond will release another surety, signing the same upon the representation that such signature is genuine; 37 Ill. App. 490.

Any material alteration in the contract without the assent of the surety, or change in the circumstances, will discharge the surety; even though trivial, or to the advantage of the surety; 164 U. S. 238; 3 B. & C. 605. Such are the cases where the sureties on a bond for faithful performance are released by a change in the employment or office of the principal; 6 C. B. N. S. 550. But it seems that an alteration by the legislature in an official's duties will not discharge surety as long as they are appropriate to his office; 36 N. Y. 459. If the principal and obligee change the terms of the obligation without the consent of the surety, the latter is discharged; 4 Wash. C. C. 26. A change in the amounts of payments to be made under the principal contract releases the surety who had no knowledge of the change and did not consent; 61 Fed. Rep. 77.

If the creditor, without the assent of the surety, gives time to the principal, the surety is discharged; 3 Y. & C. 187; 2 B. & P. 61; 8 Bingh. 156. So where he agrees with the principal to give time to the surety; L. R. 7 Ch. App. 142. But not if without consideration; 46 Ill. App. 418; 144 U. S. 97; nor does the reducing the rate of interest on a debt and allowing it to run along after maturity on payment of interest, without any binding contract for an extension for a definite time; 148 Ill. 654. And not where a creditor reserves his rights against the surety; 16 M. & W. 128; 4 H. L. C. 997. The rule applies where a state is a creditor; 75 N. C. 515.

The contract must be effectual, binding the creditor as well as the debtor; and it is not enough that the creditor merely forbears to press the debtor; 5 Gray 457; 15 Ind. 45. See, also, 17 Johns. 176; 9 Tex. 615; 9 Cl. & F. 45; 37 S. C. 463; 98 N. C. 111; 84 Va. 772; 71 Tex. 241; 140 U. S. 220. Mere forbearance or delay of a creditor in enforcing his rights against the principal does not release the surety, who may, if he chooses, pay the debt, and, becoming subrogated to the creditor's rights, control the claim to his own satisfaction; 45 La. Ann. 814.

The receipt of interest on a promissory note, after the note is overdue, is not sufficient to discharge the surety; 6 Gray 319; nor is taking another bond, as collateral security to the original, having a longer time to run: 41 N. Y. 474.

As a requisite to the binding nature of the agreement, it is necessary that there should be some consideration: 2 Dutch. 191; 30 Miss. 424; a part payment by the principal is held not to be such a consideration; 31 *id.* 664. Prepayment of interest is a good consideration; 30 *id.* 432; but not an agreement to pay usurious interest, where the whole sum paid can be recovered

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back; 10 Md. 227; though it would seem to be otherwise if the contract is executed, and the statutes of usury only provide for a recovery of the excess; 2 Patt. & H. 504.

It has been questioned how far the receipt of interest in advance shows an agreement to extend the time: it may undoubtedly be a good consideration for such an agreement, but does not of itself constitute it. At the most it may be said to be *prima facie* evidence of the agreement; 30 Vt. 711; 1 Y. & C. 620.

The surety is not discharged if he has given his assent to the extension of the time; 6 Bosw. 600; 16 Pa. 112. Such assent by one surety does not bind his co-surety; 10 N. H. 318; and subsequent assent given by the surety without new consideration, after he has been discharged by a valid agreement for delay, will not bind him; 12 N. H. 320. He need not show notice to the creditor of his dissent; 12 Ga. 271.

Where one surety consents to a change in the original contract and the other does not, the former is bound and the latter is not; 61 Fed. Rep. 77.

The burden of showing a surety's consent to an alteration in the contract is on the plaintiff, when set up by him; 61 Fed. Rep. 77.

Where an execution against a principal is not levied, or a levy is postponed without the consent of the surety, he is discharged from his liability as surety, unless he has property of the principal in his hands at the time; if he has property in his hands liable for the principal's debts, the creditors of the principal may insist on an application of the property to the payment of their debts; 9 B. Monr. 235. A creditor must not only fail, but negligently fail, to enforce a lien, in order to exonerate sureties; 87 Ia. 56. Marriage of the principal and creditor discharges the surety, destroying the right of action; 30 Ark. 667.

If the creditor releases any security which he holds against the debtor, the surety will be discharged; 8 S. & R. 452; 23 Fed. Rep. 573; 80 Ill. 122; 84 Ind. 594; but if the security only covers a part of the debt, it would seem that the surety will be released only *pro tanto*; 9 W. & S. 36; 127 Mass. 386; so of an execution levied and afterwards relinquished; the surety is discharged to the extent to which he has been injured; 50 Ala. 340; 23 Cal. 94; but the surety is not discharged unless he is injured by the release of the levy; 2 G. & J. 243; 88 Pa. 157. Nor will it matter if the security is received after the contract is made; Brandt, Sur. & Guar. § 426; *contra*, 1 Drewry 333. A creditor who has the personal contract of his debtor, with a surety, and has also or takes afterwards property from the principal as a pledge or security for his debt, is to hold the property fairly and impartially for the benefit of the surety as well as himself, and if he parts with it without the knowledge or against the will of the surety he shall lose his claim against the surety to the amount of the property so surrendered, in equity; 43 Me. 381; 8 Pick. 121; 4 Johns. Ch. 129; 5 N. H. 353; or at law; 8 S. & R. 457. The fact that other security, as good as, or better than, that surrendered, was substituted for it, will not preclude the surety from availing himself of the discharge; 15 N. H. 119; 80 Ill. 122.

A creditor who has given up a lien on the debtor's property must prove that the surety was not injured thereby; 23 Fed. Rep. 573. If the relinquishment of the lien materially alters the contract, the surety is wholly discharged; 1 Q. B. Div. 669; when the creditor has, by way of compromise, given up a lien of doubtful validity, and applied the money received, as far as it would go, in payment of the principal debt, the creditor must show that an attempt to realize on the property against which the lien existed would have been successful; 67 Ia. 44. But a creditor is not under any obligation to take active steps to obtain a lien by execution. Generally, where a creditor has, by negligence, lost security held by him for the debt or undertaking, the surety is discharged. In some cases he has been held to diligence in realizing on such security; in other cases his inaction has been held not to discharge the surety; Brandt, Sur. & Guar. § 440.

But a surety is not discharged by the fact that the creditor has released or compounded with his co-surety; much less if his co-surety has been released by process of law. The only effect of such a release or composition is that the surety is then not liable for the proportion which would properly fall on his co-surety; 6 Ves. 605. This at least is the doctrine in equity; although it may be questioned whether it would apply at law where the obligation is joint; 4 Ad. & E. 675.

But if the obligation is joint and several, a surety is not released from his proportion by such discharge of his co-surety; 31 Pa. 460.

The death of a surety on a bond conditioned for the repayment of advances to the principal does not terminate the liability, and his estate is liable for advances made after his death; 34 Fed. Rep. 111.

*Rights of surety against principal.* Until default, the surety has, in general, no rights against the principal, except the passive right to be discharged from the obligation on the conditions stated before. But after default on the part of the principal, and before the surety is called upon to pay, the latter has a remedy against the further continuance of the obligation, and he cannot in all cases compel the creditor to proceed against the debtor; but the English courts of equity allow him to bring a bill against the debtor, requiring the latter to exonerate him; 2 Bro C. C. 579. So a surety for a debt which the creditor neglects or refuses to enforce by proper proceedings for that purpose, may, by bill

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in equity, bring both debtor and creditor before the court, and have a decree to compel the debtor to make payment and discharge the surety; 3 E. D. Smith 432; and in courts having full equity powers there can be no doubt of the right of a surety, after a debt has become due, to file a bill to compel the principal debtor to pay, whether the surety has himself been sued or not; 2 Md. Ch. Dec. 442; 4 Johns. Ch. 128; 107 Ill. 241; 41 N. J. Eq. 519. Where there is an accrued debt and the surety's liability is admitted, he has a right to compel the principal to relieve him, by paying off his debt. In sustaining such an action he need not prove that the creditor has refused to sue the principal debtor; 31 L. R. Ir. 181.

The surety, after payment of the debt, may recover the amount so paid of the principal, the process varying according to the practice of different courts; 2 Term 104; 4 Me. 200; 1 Pick. 121; 13 Ill. 68. A promise to pay the surety is implied, where there is no express promise; 70 Ala. 326; and assumpsit will lie; 6 M. & W. 153. But before a surety can recover of his principal because of his suretyship, he must have first paid the debt of his principal or some part of it; 41 Neb. 516. But he may pay the debt before it is due, without the request of the principal, and, after it is due, sue the principal; 47 Ind. 85; 125 *id.* 432.

And such payment refers back to the original undertaking, and overrides all intermediate equities, as of the assignee of a claim against the surety assigned by the principal before payment; 28 Vt. 391.

The payment must not be voluntary, or made in such a manner as to constitute a purchase; for the surety, by purchasing the claim, would take the title of the creditor, and must claim under that. By an involuntary payment is intended only a payment of a claim against which the surety cannot defend. It is not necessary that a suit should be brought. But a surety who pays money on a claim which is absolutely barred has no remedy against the principal; 3 Rand. 490.

A surety, having in his hands funds or securities of the principal, may apply them to the discharge of the debt; 10 Rich. Eq. 557; but where the fund is held by one surety he must share the benefit of it with his co-surety; 3 Jones, Eq. 170; 28 Vt. 65. But a surety who has security for his liability may sue the principal on his implied promise, unless it was agreed that he should look to the security only; 4 Pick. 444. A surety need not account to his co-surety for the simple indebtedness by himself to the principal; 77 N. Y. 280.

Payment of a note by a surety by giving a new note is sufficient payment, even if the new note has not been paid when the suit is commenced; 14 Pick. 286; 3 N. H. 366; *contra*, where judgment had been rendered against the surety; 3 Md. 47; or by conveyance of land; 9 Cush. 213.

If the surety pays too much by mistake, he can recover only the correct amount of the principal; 1 Dane, Abr. 197. If a surety discharges his obligation for a less sum than its full amount, he can only claim against the principal the actual sum paid; 4 Tex. Civ. App. 526; with interest; 82 Mo. 660; and costs; 12 W. Va. 611.

Extraordinary expenses of the surety, which might have been avoided by payment of the money, or remote and unexpected consequences, are never considered as coming within the contract; 17 Mass. 169; 5 Rawle 106. Costs incurred and paid by the surety in litigating in good faith the claim of the creditor can be recovered of the principal; 30 Vt. 467; 5 Barb. 398; 12 W. Va. 611; but not so if the litigation is in bad faith; 24 Barb. 546; 26 W. Va. 412; or where the surety, being indemnified for his liability, incurred expenses in defending a suit contrary to the expressed wishes of the principal, and after being notified by him that there was no defence to such action; 22 Conn. 299. A surety cannot recover indirect or consequential damages from the principal; Brandt, Sur. & Guar. § 213; or damages for the sacrifice of his property; 1 Hayw. 130; or for his failure in business due to his incurring the liability in question; 17 Mass. 169.

Joint sureties who pay the debt of the principal may sue jointly for reimbursement; 8 Metc. Mass. 169; 63 Vt. 609; and if each surety has paid a moiety of the debt, they have several rights of action against the principal; 20 N. H. 418.

*Bail.* "When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge, and if that cannot be done at once they may imprison him until it can be done. They may exercise their rights in person or by an agent. They may pursue him into another state, arrest him on the Sabbath, and, if necessary, may break and enter his house for that purpose." 16 Wall. 371; 85 Fed. Rep. 959.

*Rights of surety against creditor.* It is not quite clear whether a surety can enforce any remedies on the part of the creditor before actual payment by the surety; and, of course, as connected with this, what is the effect of a request by the surety to the creditor to proceed against the debtor, and neglect or refusal to comply by the creditor. The objection to discharging the surety on account of such neglect is the fact that the surety may pay the debt and at once become subrogated to all the rights of the creditor; 6 Md. 210. But where there are courts in the exercise of full equity powers, the surety may insure a prompt prosecution either by discharging the obligation and becoming by substitution entitled to all the remedies possessed by the creditor, or he may coerce the creditor to proceed (by an application to a court of equity); 2 Johns. Ch. 554; 3 Sto. 393; though in the latter case he

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would probably be required to indemnify the creditor against the consequences of risk, delay, and expense; 2 Md. Ch. Dec. 442. The same indemnity would in general be required where a request is made: but it has been held that a simple request to sue the principal debtor, without a tender of expenses, or a stipulation to pay them, or an offer to take the obligation and bring suit, is sufficient to discharge the surety, unless the creditor at the time of the notice expressly puts his refusal to sue on the ground of the trouble and expense, and offers to proceed if that objection be removed; 18 Pa. 460. A creditor is not bound to make use of active diligence against a principal debtor on the mere request of a surety; 13 Ill. 376. There must be an express declaration by the surety that he would otherwise hold himself discharged; 29 Ohio St. 663; 90 Pa. 363.

There is a line of cases which hold that if the surety, after the principal debt is due, calls upon the creditor to bring suit against the principal who is then solvent, and the creditor fails to do so, and the principal becomes insolvent, the surety is discharged; Brandt, Sur. & Guar. § 239; 17 Johns. 386; 8 S. & R. 110; 2 Col. 614. So where the creditor has sufficient mortgage security, and, after request to sue and refusal, the property depreciates in value; 25 N. Y. 552. The request to sue must be clear and distinct; Brandt, Sur. & Guar. § 240; and must be made after the debt matures; 44 Pa. 105. That such request must be in writing, see 76 Mo. 70. The great majority of cases hold that the surety cannot be discharged by a request to the creditor to sue, etc.; Brandt, Sur. & Guar. § 242; 79 Ill. 62; 25 Neb. 448; 2 McLean 451.

In an able opinion in 4 Del. Ch. 258, Bates, Ch., reviews the cases and sustains this view. He points out that the contrary decision in 17 Johns. 386 was made by the casting vote of a lay senator, against the opinion of Kent, C. J., and that, while followed in New York, it has not been favorably regarded even there.

The surety who pays the debt of the principal in full is entitled to have every advantage which the creditor has in pursuing the debtor, and for this purpose may have assignment of the debt, or be subrogated either in law or equity; 39 N. H. 150. Whether the remedy will be by subrogation, or whether the suit must be in the name of the creditor, will depend upon the rules of practice in the different states; 38 Pa. 98. The right of subrogation does not depend upon any contract or request by the principal debtor, but rests upon principles of equity; 1 N. Y. 595; 4 Ga. 343; and, though originating in courts of equity, is now fully recognized as a legal right; 11 Barb. 159. In equity, payment of a debt by a surety does not extinguish it, but operates as an assignment to the surety, with all the creditor's rights; 100 Mo. 250. A surety may apply to the court by motion to compel the assignment of a judgment against him and his principal on his offer to pay the judgment; 77 Hun 580.

A surety of a defaulting government contractor who completes the work may sue to recover a balance due his principal in his own name. 27 Ct. Cls. 185.

*Rights of surety against co-surety.* The co-sureties are bound to contribute equally to the debt they become liable to pay when their undertaking is joint, or joint and several, not separate and successive; 3 Pet. 470; but the creditor may recover the whole amount of one surety; 1 Dana 355. To support the right of contribution, it is not necessary that the sureties should be bound by the same instrument; 30 Minn. 508; 14 Ves. 160. But where two sureties are bound by separate and distinct agreements for distinct amounts, although for equal portions of the same debt, there is no right of contribution between them; 3 Pet. 470. The right of contribution rests only on the principle of equity, which courts of law will enforce, that where two persons are subject to a common burden it shall be borne equally between them: 66 N. Y. 225; in such cases the law raises an implied promise from the mutual relation of the parties; 3 Allen 566. If contribution would, as between co-sureties, be inequitable, it will not be awarded; 24 Miss. 581. The right of a surety to seek contribution arises on making payment which discharges the sureties from action; 71 Miss. 426. Where a surety pays the debt of his principal, he cannot enforce contribution from one who signed simply as his surety; 62 Conn. 459.

It is not necessary that the co-sureties should know of the agreements of each other, as the principle of contribution rests only on the equality of the burden, and not on any privity; 2 B. & P. 270; 23 Pa. 294; 61 Ala. 440; but a volunteer is not entitled to contribution; there must be a contract of suretyship; 56 Pa. 80. See 22 Am. L. Reg. 529 (a full article).

A surety may compel contribution for the costs and expenses of defending a suit, if the defence were made under such circumstances as to be regarded as prudent; 23 Vt. 581; see 83 N. C. 183; 7 Ill. App. 192; this has been held to include attorney fees; 87 Tenn. 226 (see 68 Tex. 423); whether the attorney employed was successful or not; 45 Mich. 584. And where the suit is defended at the instance or request of the co-surety, costs would be a subject of contribution, both on equitable grounds and on the implied promise; 1 Mood. & M. 406.

A claim for contribution extends to all securities given to one surety; 30 Barb. 403. If one of several sureties takes collaterals from the principal, they will enure to the benefit of all; 3 Dutch. 503. Where one of several sureties is secured by mortgage, he is not bound to enforce his mortgage before he pays the debt or has reason to apprehend that he must pay it, unless the mortgagor is wasting the estate; and if the mortgagor be squandering the mortgaged property, and the surety secured by the mortgage fails to enforce his rights, he

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is chargeable between himself and his co-sureties with the fair vendible value of the mortgaged property at a coercive sale; 11 B. Monr. 399. The surety in a suit for contribution can recover only the amount which he has actually paid. Any reduction which he has obtained must be regarded as for the benefit of all the co-sureties; 12 Gratt. 642. And see 11 B. Monr. 297. But he is not obliged to account for a debt due by him to the principal; 10 W. N. C. (Pa.) 225.

The right of contribution may be controlled by particular circumstances; thus, where one becomes surety at the request of another, he cannot be called on to contribute by the person at whose request he entered into the security; 37 N. H. 567.

One of several co-sureties cannot obtain contribution against the others until he has actually paid more than his own share, but he is entitled to a declaration of his right to contribution, and to a prospective order that on paying his own share he shall be indemnified against further liability; [1893] 2 Ch. 514.

The relation between co-sureties may be shown by parol evidence; 12 N. Y. 462; 43 Ind. 126; 62 Ga. 73.

A surety who is fully indemnified by his principal cannot recover contribution from his co-surety for money paid by him, but must indemnify himself out of the means placed in his hands; 21 Ala. N. S. 779, n. A co-surety has the same responsibility for keeping alive securities in favor of his co-surety, from whom he claims contribution, as a creditor has on behalf of sureties; 8 J. & Sp. 424. Ordinarily any indemnity, by way of a lien on property, obtained by one surety, after he became such, enures to the benefit of all, and if he lose it by his neglect, it bars contribution. See Brandt, Sur. & Guar. § 271.

The remedy for contribution may be either in equity or at law. The result reached either in law or in equity is the same, with one important exception: in the case of the insolvency of one of the sureties. In such cases the law takes no notice of the insolvency, but awards the paying surety his due proportion as if all were solvent. But equity does not regard the insolvent surety, but awards contribution as if he had never existed; 68 Tex. 423; 7 Dana 307; 6 B. & C. 689. One surety cannot by injunction arrest the proceedings at law of his co-surety against him for contribution unless he tenders the principal and interest due such co-surety, who has paid the principal, or alleges that he is ready and willing to bring the same into court to be paid to him as a condition of the court's interference; 4 Gill 225. Where surety has been compelled to pay the debt of his principal, and one of his co-sureties is out of the jurisdiction of the court, and others are within it, the surety who has paid is at liberty to proceed in a suit in equity for contribution against those co-sureties only who are within the jurisdiction, by stating the fact in his bill, and the defendants will be required to make contribution without regard to the share of the absent co-surety; 59 Vt. 365; 6 Ired. Eq. 115. See, generally, 1 Lead. Cas. Eq. *100. A bill in equity will lie, by one surety against a co-surety, before the principal debt is paid, to compel him to contribute. A surety who consents to the creditor's giving time to the principal loses his right of contribution as against one who does not consent; 8 Yerg. 158. In equity, in proceeding for contribution, it must be shown that the principal was insolvent; 2 Dana 296; but not at law; 34 Ala. 529; 50 Ind. 158; *contra*, 7 Dana 307; 99 N. C. 559.

The statute of limitations does not run as against a surety claiming contribution until his own liability is ascertained; [1893] 2 Ch. 514. It runs against partial payments on the debt, from the time he pays the creditor more than his proportion of the debt; 77 Wis. 435.

*Conflict of laws.* The contract of suretyship, like other contracts, is governed by the *lex loci contractus;* but the *locus* is not necessarily the same as that of the principal contract. Thus, the contract made by the indorser of a note is, not to pay the note where it is payable, but that if not paid there he will pay it at the place where the indorsement is made; 12 Johns. 142; 13 Mass. 20. The *lex loci* applies as well to the interest as to the principal amount. A question has been made in the case of bonds for faithful performance given by public officers; and in these it has been held that the place of performance is to be regarded as the place of making the contract, and sureties are bound as if they made the contract at the seat of the government to which the bonds are given. And under this rule the obligation of all on the bond is governed by the same law, although the principal and sureties may sign in different states; 6 Pet. 172. A letter of guaranty written in the United States and addressed to a person in England must be construed according to the laws of England; 1 How. 161. See BOND; GUARANTY; OFFER; PROMISSORY NOTES.

**SURFACE WATERS.** Waters of a casual and vagrant character, which ooze through the soil or diffuse or squander themselves over the surface, following no definite course; 34 Minn. 489. They are waters which, though customarily and naturally flowing in a known direction and course, have nevertheless no banks or channel in the soil; and include waters which are diffused over the surface of the ground and are derived from rains and melting snows, occasional outbursts of water which in time of freshet or melting of snows descended from the mountains and inundate the country, and the moisture of wet, spongy, springy, or boggy ground. See 44 Ohio St. 282; 62 Wis. 114; 108 Mass. 221; 86 N. Y. 147.

Where water, whether coming from springs or rains or melting snows, has flowed over lands of the complainant, in a well-

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defined channel, for a period of time so long that the memory of men runneth not to the contrary, to and upon lands of an adjoining proprietor, the court will, by its mandatory injunction, require such adjoining proprietor to remove any obstruction placed upon his lands to prevent such water from flowing to and over his lands; 48 N. J. Eq. 409. The natural flowage of water from an upper estate to a lower one is a servitude which the owner of the latter must bear, though the flowage be not in a natural water course with well defined banks; 95 Mich. 586. See 97 Mich. 282.

Overflow from a river in time of high water is surface water; 9 Ind. App. 56; but the superabundant waters of a river at times of ordinary floods, spreading beyond its banks, but forming one body and flowing within their accustomed boundaries in such floods, are not surface waters which a riparian owner may turn off as he will; 62 Fed. Rep. 129. In agricultural land the natural flow of water from lands of a higher upon those of a lower level cannot be made the subject of an action of damages; but a different rules applies in towns and cities; 8 W. & S. 40; 5 Super. Ct. Pa. 502.

**SURGEON.** One who applies the principles of the healing art to external diseases or injuries, or to internal injuries or malformations, requiring manual or instrumental intervention. One who practises surgery.

This definition is imperfect, it being impossible to define the term surgeon or surgery. The term *surgery*, or *chirurgery*, comes from two Greek words signifying *the hand* and *work*, meaning a manual procedure by means of instruments, or otherwise, in the healing of injuries and the cure of disease. The practice of *medicine*, in contradistinction to the practice of *surgery*, denotes the treatment of disease by the administration of drugs or other sanative substances. There cannot be a complete separation between the practice of medicine and surgery as they are developed by modern science, and understood by the most learned in the profession of medicine: the principles of both are the same throughout, and no one is qualified to practise either who does not completely understand the fundamental principles of both.

The general principles of law defining the civil responsibilities of physicians and surgeons are the same as those that apply to and govern the conduct of lawyers, shipbuilders, and other classes of men whose employment requires them to transact business demanding special skill and knowledge; 27 N. H. 468; Whart. & Stille, Med. Jur. 750. The surgeon does not warrant or insure as to the result, ordinarily; 7 C. & P. 81. The surgeon or physician may bind himself by an express contract to cure; 27 N. H. 468; 2 Ld. Raym. 909.

Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable, fair, and competent degree of skill; 8 C. & P. 475. This degree of skill is what is usually termed *ordinary* and reasonable; Story, Bailm. 433. In addition to the application of ordinary skill in the treatment of disease and injuries, the physician and surgeon undertake to give to their cases ordinary care and diligence, and the exercise of their best judgment; McClel. Malp. 18, 32; 5 B. & Ald. 820; 15 Greenl. 97. See PHYSICIAN.

**SURMISE. In Ecclesiastical Law.** An allegation in a libel. Phill. Ecc. Law 1445. Formerly where a defendant pleaded a local custom it was necessary for him to surmise, that is to suggest, that such custom should be certified to the court by the mouth of the reporter. Without such a surmise the issue was to be tried by the country as other issues of fact. 1 Burr. 251.

**SURNAME.** A name which is added to the Christian name. In modern times these have become family names. They are called surnames, because originally they were written *over the name* in judicial writings and contracts. See NAME.

**SURPLUS.** That which is left from a fund which has been appropriated for a particular purpose; the remainder of a thing; the overplus; the residue. See 18 Ves. 466. It has an appropriate application to personal property or money, but, when used in a will, may include real estate; 86 N. Y. 210; 131 *id.* 227. See SAVINGS BANKS; RESERVE.

**SURPLUSAGE. In Accounts.** A greater disbursement than the charges amount to. A balance over. 1 Lew. 219.

**In Pleading.** Allegations of matter wholly foreign and impertinent to the cause. All matter beyond the circumstances necessary to constitute the action is surplusage; 5 East 275; 2 Johns. Cas. 52; 16 Tex. 656. Generally, matter of surplusage will be rejected and will not be allowed to vitiate the pleading; Co. Litt. 303 *b*; 2 Saund. 306, n. 14; 7 Johns. 462; 1 Root 456; 21 N. H. 535; as new and needless matter stated in an innuendo; 7 Johns. 272; even if repugnant to what precedes; 10 East 142; but if it shows that the plaintiff has no cause of action, demurrer will lie; 2 East 451; 2 W. Bla. 842; 3 Cra. 193. Where the whole of an allegation is immaterial to the plaintiff's right of action, it may be struck out as surplusage; 1 Mas. 57. Matter laid under a videlicet, inconsistent with what precedes, may be rejected as surplusage; 4 Johns. 450; and when the unnecessary matter is so connected with what is material that it cannot be separated, the whole matter may be included in the traverse; Dy. 365; 2 Saund. 206 *a*, n. 21; and the whole must be proved as laid; 1 Ohio 483; Steph. Plead. 422.

**SURPRISE. In Equity Practice.** The act by which a party who is entering into a contract is taken unawares, by which sudden confusion or perplexity is created, which renders it proper that a court of equity should relieve the party so surprised. 1 Story, Eq. Jur. § 120, n.

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The situation in which a party is placed without any default of his own, which will be injurious to his interests. 8 Mart. La. N. S. 407.

Mr. Jeremy, Eq. Jur. 366, 383, note, seems to think that the word surprise is a technical expression, and nearly synonymous with fraud. It is sometimes used in this sense when it is deemed presumptive of, or approaching to, fraud. 1 Fonbl. Eq. 123; 8 Ch. Cas. 56, 74, 103, 114.

**In Law.** The general rule is that when a party or his counsel is taken by surprise, in a material point or circumstance which could not have been anticipated, and when want of skill, care, or attention cannot be justly imputed, and injustice has been done, a new trial should be granted; Hill, New Tri. 521. Surprise may be good ground for a new trial in criminal as in civil cases; 10 E. L. & E. 105; but in neither case is surprise arising after verdict sufficient to warrant an application to the discretion of the court; 2 Parker 673. Nor will a new trial be granted where the ground of the surprise is evidence which was clearly within the issues presented by the pleadings; 1 Tex. Civ. App. 343; or unless one made application for a postponement of the trial in order that he might repair the injury done him by the unexpected testimony; 57 Ark. 60. See NEW TRIAL; PLEADING.

**SURREBUTTER. In Pleading.** The plaintiff's answer to the defendant's rebutter. It is governed by the same rules as the replication. See 6 Com. Dig. 185; 7 *id.* 389.

**SURREJOINDER. In Pleading.** The plaintiff's answer to the defendant's rejoinder. It is governed in every respect by the same rules as the replication. Steph. Pl. 77; 7 Com. Dig. 389. See PLEADING.

**SURRENDER.** A yielding up of an estate for life or years to him who has an immediate estate in reversion or remainder, by which the lesser estate is merged in the greater by mutual agreement. Co. Litt. 337 *b*. See 90 Cal. 507.

The deed by which the surrender is made.

A surrender is of a nature directly opposite to a release; for, as the latter operates by the greater estate descending upon the less, the former is the falling of a less estate into a greater, by deed. A surrender immediately divests the estate of the surrenderor, and vests it in the surrenderee, even without the assent of the latter; Shepp. Touchst. 300.

The technical and proper words of this conveyance are, surrender and yield up; but any form of words by which the intention of the parties are sufficiently manifested will operate as a surrender; 1 Term 441; Com. Dig. *Surrender* (A).

The surrender may be express or implied. The latter is when an estate incompatible with the existing estate is accepted, or the lessee takes a new lease of the same lands; 16 Johns. 28; 1 B. & Ald. 50. See 94 U. S. 389; 52 Ia. 347; LANDLORD AND TENANT.

To yield; render up. 48 Minn. 13.

**SURRENDER OF A PREFERENCE.** The surrender by a preferred creditor, to the assignee in bankruptcy, of all that he has received under such preference, as a necessary step, under the bankrupt law, to obtaining a dividend of the estate. 1 Dill. 544.

**SURRENDER OF CRIMINALS.** The act by which the public authorities deliver a person accused of a crime, and who is found in their jurisdiction, to the authorities within whose jurisdiction it is alleged the crime has been committed. In England the crown has the option of either surrendering or refusing to surrender a British subject accused of an extradition offence in a foreign country; [1896] 1 Q. B. 280. See EXTRADITION; FUGITIVE FROM JUSTICE.

**SURRENDER TO USES OF WILL.** Formerly a copyhold interest would not pass by will unless it had been surrendered to the use of the will. By 55 Geo. III. this is no longer necessary; 1 Steph. Com. 639.

**SURRENDEREE.** One to whom a surrender has been made.

**SURRENDEROR.** One who makes a surrender; as, when the tenant gives up the estate and cancels his lease before the expiration of the term. One who yields up a freehold estate for the purpose of conveying it.

**SURROGATE** (Lat. *surrogatus*, from *subrogare*, or *surrogare*, to substitute). **In English Law.** A deputy or substitute of the chancellor, bishop, ecclesiastical or admiralty judge, appointed by him. He can grant licenses, hold courts, and adjudicate cases, to the same extent and with the same authority as his principal, provided his grant of powers has been coextensive with those possessed by his principal. The office has arisen by usage, but is sanctioned by canon 128, and recognized by statute.

**In American Law.** A term used in some states to denote the judge to whom jurisdiction of the probate of wills, the grant of administration and of guardianship is confided. In some states he is called surrogate, in others, judge of probate, register, judge of the orphans' court, etc. He is ordinarily a county officer, with a local jurisdiction limited to his county.

**SURROGATE'S COURT.** In the United States, a state tribunal, with similar jurisdiction to the *court of ordinary*, *court of probate*, etc., relating to matters of probate, etc. See 2 Kent 409; NEW YORK.

**SURVEY.** The act by which the quantity of a piece of land is ascertained; the paper containing a statement of the

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courses, distances, and quantity of land is also called a survey.

A survey made by authority of law, and duly returned into the land office, is a matter of record, and of equal dignity with the patent; 3 A. K. Marsh. 226. See 3 Me. 126; 14 Mass. 149; 1 Harr. & J. 201; 39 Fed. Rep. 66; 1 Dev. & B. 76; and is not open to any collateral attack in the courts; 158 U. S. 253. Where a survey was made in good faith and has been unchallenged for over fifteen years, whatever doubts may exist as to its correctness must be resolved in favor of the title as patented; 133 U. S. 198.

In construing maps of official surveys, courts give effect to the meaning expressed by their outlines, as well as by their language; 114 Mo. 13.

By survey is also understood an examination; and in this sense it is constantly employed in insurance and in admiralty law.

**SURVEY OF A VESSEL.** A public document looked to both by underwriters and owners as affording the means of ascertaining at the time and place the state and condition of the ship and other property at hazard.

**SURVEYOR OF THE PORT.** A revenue officer appointed for each of the principal points of entry, whose duties chiefly concern the importations at his station and the determination of their amount and valuation. U. S. R. S. § 2627.

**SURVIVOR.** The longest liver of two or more persons.

There is no presumption as to survivorship in England; 8 H. L. C. 183; see [1892] P. 142; or Scotland: Ersk. III. 8. 1; a child, who, when last heard of six years before, had consumption, is presumed to have died before his father; 95 Ia. 611. See DEATH.

In cases of partnership, the surviving partner is entitled to have all the effects of the partnership, and is bound to pay all the debts owing by the firm; Gow, Partn. 157. He is, however, bound to account for the surplus to the representatives of his deceased partners, agreeably to their respective rights. See PARTNERSHIP.

A surviving trustee is generally vested with all the powers of all the trustees, and the surviving administrator is authorized to act for the estate as if he had been sole administrator.

The right of survivorship among joint-tenants has been abolished, except as to estates held in trust in many states. For the statutes and the present condition of the law in the United States, see Demb. Land Tit. 27. See ESTATES OF JOINT-TENANCY. In Connecticut it never existed; 1 Swift, Dig. 102; Washb. R. P.; nor has it ever been recognized in Ohio, Kansas, Nebraska, or Idaho; Demb. Land Tit. 198. As to survivorship among legatees, see 1 Turn & R. 413; 3 Russ. 217.

**SUS' PER COLL'. In English Law.** In the English practice, a calendar is made out of attainted criminals, and the judge signs the calendar with their separate judgments in the margin. In the case of a capital felony it is written opposite the prisoner's name, "let him be hanged by the neck," which, when the proceedings were in Latin, was "*suspendatur per collum*," or, in the abbreviated form, "sus' per coll'." 4 Bla. Com. 403.

**SUSPENDER. In Scotch Law.** He in whose favor a suspension is made. In general, a suspender is required to give caution to pay the debt in the event it shall be found due. Where the suspender cannot, from his circumstances, procure unquestionable security, the lords admit juratory caution; but the reasons of suspension are in that case to be considered with particular accuracy at passing the bill. Ersk. Inst. 4. 3. 6.

**SUSPENSE.** When a rent, profit *à prendre*, and the like, are, in consequence of the unity of possession of the rent, etc., of the land out of which they issue, not *in esse* for a time, they are said to be in suspense, *tunc dormiunt;* but they may be revived or awakened. Co. Litt. 313 *a*.

**SUSPENSION.** A temporary stop of a right, of a law, and the like.

In times of war the right of *habeas corpus* may be suspended by lawful authority.

There may be a suspension of an officer's duties or powers when he is charged with crimes; Wood, Inst. 510. As to an attorney or solicitor, see DISBAR. The Stock Exchange and many corporations provide for the suspension as well as expulsion of members under certain circumstance; 47 Wisc. 670; 2 Brews. 571. See Dos Passos, St. Brok.; EXPULSION; AMOTION; STOCK EXCHANGE.

Suspension of a right in an estate is a partial extinguishment, or an extinguishment for a time. It differs from an extinguishment in this: a suspended right may be revived; one extinguished is absolutely dead; Bac. Abr. *Extinguishment* (A).

The suspension of a statute for a limited time operates so as to prevent its operation for the time; but it has not the effect of a repeal; 3 Dall. 365. For *plea in suspension*, see PLEA; ABATEMENT. Pleas in suspension are not specifically abolished in England by the Judicature Acts, though Ord. xix. rule 13, directs that no plea or defence shall be pleaded in abatement. Mox. & W.

**In Ecclesiastical Law.** An ecclesiastical censure, by which a spiritual person is either interdicted the exercise of his ecclesiastical function or hindered from receiving the profits of his benefice. It may be partial or total; for a limited time, or forever, when it is called deprivation or amotion. Ayliffe, Parerg. 501.

**SUSPENSION, PLEAS IN.** See PLEAS; SUSPENSION.

**SUSPENSION OF A RIGHT.** The act by which a party is deprived of the exercise of his right for a time.

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When a right is suspended by operation of law, the right is revived the moment the bar is removed; but when the right is suspended by the act of the party, it is gone forever. See 1 Rolle, Abr. *Extinguishment* (L, M).

**SUSPENSION OF ARMS.** An agreement between belligerents, made for a short time or for a particular place, to cease hostilities between them. See ARMISTICE; TRUCE.

**SUSPENSIVE CONDITION.** One which prevents a contract from going into operation until it has been fulfilled.

**SUSPENSORY CONDITIONS.** Conditions precedent in a contract which merely suspend the operation of a promise till they are fulfilled. They differ from those conditions precedent the non-fulfilment of which works a breach of the contract. Tiff. Sales 153. See 171 U. S. 312.

**SUSPICION.** The act of suspecting, or the state of being suspected; imagination, generally of something ill; distrust, mistrust, doubt. 66 Ga. 348.

**SUTLER.** A man whose employment is to sell provisions and liquor to a camp.

By the articles of war no sutler is permitted to sell any kind of liquor or victuals, or to keep his house or shop open for the entertainment of soldiers, after nine at night, or before the beating of the reveille, or upon Sundays during divine service or sermon, on penalty of being dismissed all future sutling; all sutlers are subject to orders according to the rules and discipline of war.

**SUUS HÆRES.** See HÆRES.

**SUZERAIN** (Norman Fr. *suz*, under, and *re* or *rey*, king). A lord who possesses a fief whence other fiefs issue. A tenant *in capite* or immediately under the king. Note 77 of Butler & Hargrave's notes, Co. Litt. l. 3.

**In International Law.** The word has no clear or precise signification. It has been extended to the Mussulman world, and to the control of European Powers through their colonies over imperfectly civilized people; 12 L. Quart Rev. 223; [1896] P. 122.

**SWAIN-GEMOTE.** See COURT OF SWEINMOTE.

**SWEAR.** To take an oath administered by some officer duly empowered.

One may swear who is not duly sworn; and in such case the oath is not administered, but self-imposed, and the swearer incurs no legal liability thereabout; 33 Fed. Rep. 168. See JURY; OATH.

To use such profane language as is forbidden by law. This is generally punished by statutory provisions in the several states. See 7 Lea 410; 85 N. C. 528. See BLASPHEMY.

**SWEDEN.** A country of northern Europe. The government is a limited monarchy, hereditary in the male line. The king is the sole executive, but he is required to consult with the council of state.

The legislative power is vested in a legislature called the Diet, divided into an upper and lower chamber. The members in the former are elected every nine years and their numbers are apportioned to the population. The latter are elected for three years. It represents towns and rural districts by apportionment based on population. The Diet assembles every year. The king has a veto power. There are a supreme court, three royal courts of justice, a court of military justice, an admiralty court, and a minor judiciary. The king is required to be a member of the Lutheran church.

**SWEEPSTAKES.** The sum of the stakes for which the subscribers agree to pay for each horse nominated. 61 Fed. Rep. 889. A free handicap sweepstake is not a stake race; *id.* See HORSE-RACE.

**SWINDLER.** A cheat; one guilty of defrauding divers persons. 1 Term 748.

Swindling is usually applied to a transaction where the guilty party procures the delivery to him, under a pretended contract, of the personal property of another, with the felonious design of appropriating it to his own use; 2 Russ. Cr. 130; 2 Mass. 406; as where a purchaser tendered a twenty-dollar gold-piece in payment for goods, supposing it was a silver dollar and the seller knowing his mistake returned him change for a dollar, the offence was held to be swindling; 25 S. E. Rep. (Ga.) 318.

The terms cheat and swindler are not actionable unless spoken of the plaintiff in relation to his business; Odg. Lib. & Sl. 61; 6 Cush. 185; 10 How. Pr. 128. The words "you are living by imposture," spoken of a person with the intention of imputing that he is a swindler, are not actionable *per se*; 8 C. B. 142. See LIBEL.

**SWITZERLAND.** A republic of Europe. The legislative and executive functions are vested in a federal assembly of two chambers, a state council of forty-four members chosen by the cantons, two for each, and the national council of one hundred and forty-seven deputies chosen by representation for three years. The chief executive authority is deputed to a federal council of seven members chosen by the federal assembly. The president and vice-president of the federal council, who are elected for the term of one year, are the first magistrates of the republic.

The Bundesgericht consists of nine members elected for six years by the federal assembly; it adjudicates in the last instance all points in dispute between the federal governments and the individual cantons, and is a high court of appeal. It is divided into a civil and criminal court.



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**SWORN BROTHERS. In Old English Law.** Persons who, by mutual oaths, covenanted to share in each other's fortunes.

**SWORN CLERKS IN CHANCERY.** Officers who had charge of records, and performed other duties in connection with the court of chancery. Abolished in 1842.

**SYB AND SOM.** A Saxon form of greeting, meaning peace and safety. T. L.

**SYLLABUS.** An abstract; a head note. The brief statement of the point or points decided, prefixed to the printed report of a case. The head note of a reported case is a thing upon which much skill and thought is required to express in clear, concise language the principle of law to be deduced, or the decision to which it is prefixed, or the facts and circumstances which bring the case in hand within the same principle or rule of law or of practice. 17 C. B. 459. See COPYRIGHT; INFRINGEMENT; PARAGRAPH.

**SYLVA CÆVUA. In Ecclesiastical Law.** Wood of any kind which was kept on purpose to be cut, and which being cut grew again from the stem or root. 4 Reeve, Hist. Eng. L. 90.

**SYMBOLIC DELIVERY.** The delivery of some thing as a representation or sign of the delivery of some other.

Where an actual delivery of goods cannot be made, a symbolical delivery of some particular thing, as standing for the whole, will vest the property equally with an actual delivery; 1 Pet. 445; 8 How. 399; 6 Md. 10; 19 N. H. 419; 39 Me. 496; 11 Cush. 282; 3 Cal. 140. See 1 Sm. L. C. 33.

**SYNALLAGMATIC CONTRACT. In Civil Law.** A contract by which each of the contracting parties binds himself to the other: such are the contracts of sale, hiring, etc. Pothier, Obl. 9.

**SYNDIC. In French Law.** The assignee of a bankrupt. So in Louisiana.

One who is chosen to conduct the affairs and attend to the concerns of a body corporate or community. In this sense the word corresponds to director or manager. Rodman Notes to *Code de Com.* p. 351; La. Civ. Code. art. 429; Dalloz, Dict. *Syndic.*

**SYNDICATE.** A university committee. A combination of persons or firms united for the purpose of enterprises too large for individuals to undertake; or a group of financiers who buy up the shares of a company in order to sell them at a profit by creating a scarcity. Moz. & W.

An association of individuals, formed for the purpose of conducting and carrying out some particular business transaction, ordinarily of a financial character, in which the members are mutually interested. 84 Md. 456. It is said to be, as respects the persons composing it, a partnership. *Id.* But this is rather too broadly expressed. See 40 L. R. A. 216; PROMOTERS.

**SYNDICOS** (Gr. σύν, with, δικη, cause). One chosen by a college, municipality, etc., to defend its cause. Calv. Lex. See SYNDIC.

**SYNGRAPH** (Gr. σύν, with. γράφω, to write). A deed, bond, or other instrument of writing, under the hand and seal of all the parties. It was so called because the parties *wrote together.*

Formerly such writings were attested by the subscription and crosses of the witnesses; afterwards, to prevent frauds and concealments, they made deeds of mutual covenant in a script and rescript, or in a *part* and *counterpart*, and in the middle between the two copies they wrote the word *syngraphus* in large letters, which, being cut through the parchment and one being delivered to each party, on being afterwards put together proved their authenticity.

Deeds thus made were denominated *syngraphs* by the canonists, and by the common-lawyers *chirographs.* 2 Bla. Com. 296.

**SYNOD.** An ecclesiastical assembly, which may be general, national, provincial, or diocesan.

**SYNODALES TESTES.** See SIDESMEN.

# T.

**T.** Every person convicted of felony short of murder, and admitted to benefit of clergy, was at one time marked with this letter upon the brawn of the thumb. Abolished by 7 & 8 Geo. IV. Whart. Dict.

**TABELLA** (Lat.). **In Civil Law.** A small table on which votes were often written. Cicero, in Rull. 2. 2. Three tables were given to the judges, one with the letter A for *Absolutio*, one with C for *Condemnatio*, and one with N. L. for *Non Liquet*, not proven. Calvinus, Lex.

**TABELLIO. In Roman Law.** An officer among the Romans, who reduced to writing, and into proper form, agreements, contracts, wills, and other instruments, and witnessed their execution.

The term tabellio is derived from the

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Latin *tabula, seu tabella*, which, in this sense, signified those tables or plates covered with wax which were then used instead of paper. 8 Toullier, n. 53.

*Tabelliones* differed from notaries in many respects: they had judicial jurisdiction in some cases, and from their judgments there were no appeals. Notaries were then the clerks or aiders of the *tabelliones;* they received the agreements of the parties, which they reduced to short *notes;* and these contracts were not binding until they were written *in extenso*, which was done by the *tabelliones*. Jacob, Law Dict. *Tabellion.*

**TABLE-RENTS.** Rents paid to bishops and other ecclesiastics, appropriated to their table or housekeeping. Jacob.

**TABLEAU OF DISTRIBUTION. In Louisiana.** A list of creditors of an insolvent estate, stating what each is entitled to. 4 Mart. La. N. S. 535.

**TABLES.** A synopsis in which many particulars are brought together in a general view. See LIFE TABLES. As to the law of the Twelve Tables, see CODE.

**TABULA IN NAUFRAGIO** (Lat. a plank in a wreck). **In English Law.** A figurative term used to denote the power of a third mortgagee, who, having obtained his mortgage without any knowledge of a second mortgage, may acquire the first incumbrance, and squeeze out and have satisfaction before the second. 2 Ves. Ch. 573; Beach, Eq. Jur. 383; TACKING.

**TABULÆ. In Civil Law.** Contracts and written instruments of all kinds, especially wills. So called because originally written on tablets and with wax. Calvinus.

**TAC.** A kind of customary payment by a tenant. Blount, Ten. 155.

**TAC FREE.** Free from payments, etc.: *e. g.* "*tac free de omnibus propriis porcis suis infra metas de C*," *i. e.* paying nothing for his hogs running within that limit. Jacob.

**TACIT** (from Lat. *taceo*, to be silent). That which, although not expressed, is understood from the nature of the thing or from the provision of the law; implied.

**TACIT LAW.** A law which derives its authority from the common consent of the people without any legislative enactment. 1 Bouvier, Inst. 120.

**TACIT RELOCATION. In Scotch Law.** The tacit or implied renewal of a lease when the landlord instead of warning a tenant has allowed him to continue without making a new agreement. Bell, Dict. *Relocation.*

**TACIT TACK.** See TACIT RELOCATION.

**TACITURNITY.** In Scotland this signifies laches in not prosecuting a legal claim, or in acquiescing in an adverse one. Moz. & W.

**TACK. In Scotch Law.** A contract of location by which the use of land or any other immovable subject is set to the lessee or tacksman for a certain yearly rent, either in money, the fruits of the ground, or services. Ersk. Inst. 2. 6. 8. This word is nearly synonymous with lease.

**TACKING. In English Law.** The union of securities given at different times, so as to prevent any intermediate purchaser's claiming title to redeem or otherwise discharge one lien which is prior, without redeeming or discharging other liens also which are subsequent, to his own title. Jeremy, Eq. Jur. 188–191; 1 Story, Eq. Jur., 13th ed. § 412.

It is an established doctrine in the English chancery that a *bona fide* purchaser without any notice of a defect in his title at the time of the purchase may lawfully buy any statute, mortgage, or incumbrance, and if he can defend by those at law his adversary shall have no help in equity to set those incumbrances aside, for equity will not disarm such a purchaser. And as mortgagees are considered in equity as purchasers *pro tanto*, the same doctrine has extended to them, and a mortgagee who has advanced his money without notice of any prior incumbrance may, by getting an assignment of a statute, judgment, or recognizance, protect himself from any incumbrance subsequent to such statute, judgment, or recognizance, though prior to his mortgage; that is, he will be allowed to *tack* or unite his mortgage to such old security, and will by that means be entitled to recover all moneys for which such security was given, together with the money due on his mortgage, before the prior mortgagees are entitled to recover anything; 2 Cruise, Dig. t. 15, c. 5, s. 27; 1 Vern. 188. The source and origin of the English doctrine is the case of Marsh *v.* Lee, 2 Ventr. 337; 1 Ch. Cas. 162; 1 Wh. & T. L. C. Eq. 611, notes. This case and the doctrine founded upon it has been the subject of severe criticism; Langd. Eq. Pl. 191. Lord Ch. J. Holt is said to have been one of the first to benefit by the right of tacking; see Holt *v.* Mill, 2 Vern. 279.

Tacking was abolished by sec. 7 of the Vendor and Purchaser Act, stat. 37 & 38 Vict. c. 78, but that section is repealed by sec. 129 of the Land Title and Transfer Act of 38 & 39 Vict. c. 87; Moz. & W. See 1 Pingr. Mortg. § 477.

In England a mortgagee who holds several distinct mortgages under the same mortgagor, redeemable, not by express contract, but only by virtue of the equity of redemption, may, within certain limits and against certain persons, consolidate them, that is, treat them as one, and decline to be redeemed as to any, unless he is redeemed as to all; 6 App. Cas. 698. See Brett's L. Cas. Mod. Eq. 216. It is there termed consolidation of mortgages, and the principle is laid down that the courts lean

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against any extension of the doctrine; 6 App. Cas. 698, which is cited as the leading case, and as practically overruling L. R. 4 Eq. 537, which was overruled in 14 Ch. D. 699.

The high-water mark of the doctrine is said to be at the present day represented by Vint *v.* Padget, where it was held that if mortgages of different lands to secure different debts are made to, or come into the hands of, the same person, the mortgagee cannot redeem either without redeeming both, or he may enforce the payment of the amount of both debts out of the land covered by either; and this is true though he bought the mortgages with notice of an outstanding second mortgage; 2 De G. & J. 611. This case is said to have been cited but not approved in [1896] App. Cas. 187, affirming [1895] 1 Ch. 51, which affirmed [1894] 2 Ch. 328, where it was held that when the owner of different properties mortgages them to different persons, and the mortgages afterward become united under one title, the holder of the mortgages has a right to refuse to be redeemed as to one without payment of all, not only as against the mortgagor, but also as against a person in whom the equities of redemption of all the properties have been vested by one deed, whether from the mortgagor or mesne assignee, although the assignment is made before the mortgages become united in title.

This doctrine is inconsistent with the laws of the several states, which require the recording of mortgages; and does not exist to any extent in the United States; 1 Caines, Cas. 112; 2 Pick. 517; 12 Conn. 195; 14 Ohio 318; 11 S. & R. 208; Walk. Mich. 175; 37 Vt. 375; 1 Johns. Ch. 399; Bisph. Eq. § 159. A rule apparently analogous may, however, be found in those cases where a mortgage is given to secure future advances, and where the mortgagee is allowed to recover sums subsequently advanced, as against a *mesne* mortgage; Bisph. Eq. § 159, where the cases are collected; but the future advances to be protected must be without notice of the intervening incumbrance; *id.*; 7 Cra. 45; 5 Johns. Ch. 320; unless the advances are made under a binding agreement; 7 Conn. 387; 24 Pa. 372; 21 N. J. Eq. 87; and the recording of the latter is a sufficient notice; 17 Ohio 371; 7 Cra. 45.

To tack different adverse possessions to make up the period of bar, the persons holding such possessions must be connected by priority of title or claim; 36 W. Va. 445; and where several persons enter upon land in succession, the several possessions cannot be tacked together so as to make a continuity of possession under the law of adverse title, unless there is priority of estate, or the several titles are connected; 24 Or. 239.

**TAIL.** See ESTATE TAIL.

**TAILAGE.** See TALLAGE.

**TAILZIE.** A term chiefly used in the case of a land estate, which is settled on a long series of heirs substituted one after another; whereas heirs pointed out in contracts of marriage, or in bonds containing clauses of substitution, are more commonly called heirs of provision. Ersk. Prin. III. 8. 8.

**TAINT.** A conviction of felony, or, the person so convicted. Cowel. See ATTAINT.

**TAKE.** A technical expression which signifies to be entitled to: as, a devisee will take under the will.

To seize: as, to take and carry away, either lawfully or unlawfully.

In an indictment for larceny, a charge that defendant did feloniously take implies a trespass; 47 Minn. 449. Under a statute making it an offence to take up and use a horse without the consent of the owner, the taking a horse bridled, saddled, and hitched to a tree will not constitute the offence. 7 Tex. Cr. Rep. 115.

The word may be synonymous with arrest; 9 Gray 267; but take and steal were held not to be synonymous; 12 Conn. 229. It has been held equivalent to require. 29 Ala. 542. A devisee takes under a will only when the possession and control of the devisor has ceased. 41 N. J. L. 70. In its usual signification the word taken implies a transfer of dominion, possession, or control. *Id.*

To choose: *e. g. ad capiendas assisas*, to choose a jury.

To obtain; *e. g.* to take a verdict in court, to get a verdict.

**TAKE UP.** An indorser or acceptor is said to take up, or retire, a bill when he discharges the liability upon it. In such a case, the indorser would hold the instrument with all his remedies intact; while the acceptor would extinguish all the remedies on it. One who accepts a lease is also said to take it up.

**TAKING.** The act of laying hold upon an article, with or without removing the same. See LARCENY; ROBBERY.

It implies a transfer of possession, dominion, or control. A thing is not taken unless such a change of status is effected. In trespass, trover, or replevin the taking is not accomplished until the goods are within the power or control of the defendant. See CONVERSION; TRESPASS; TROVER; REPLEVIN.

See EMINENT DOMAIN.

**TALE. In English Law.** The ancient name of the declaration or count. 3 Bla. Com. 293.

**TALES** (Lat. *talis*, such, like). A number of jurors added to a deficient panel sufficient to supply the deficiency. 36 Pac. Rep. (Cal.) 221. See 3 Hun 479.

A list of such jurymen as were of the tales, kept in the king's bench office in England.

**TALES DE CIRCUMSTANTIBUS** (Lat. a like number of the bystanders)

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A sufficient number of jurors selected from the bystanders to supply a deficiency in the panel.

The order of the judge for taking such bystanders as jurors.

Whenever from any cause the panel of jurors is insufficient, the judge may issue the above order, and the officer immediately executes it; see 2 Hill S. C. 381; Coxe N. J. 283; 1 Blackf. 65. See JURY.

**TALITER PROCESSUM EST.** "So it has proceeded;" words formerly used in pleading, by which a defendant, in justifying his conduct by the process of an inferior court, alleged the proceedings in such inferior court. Steph. Pl., 5th ed. p. 369; Moz. & W.

**TALLAGE, or TALLIAGE** (Fr. *tailler*, to cut). **In English Law.** A term used to denote subsidies, taxes, customs, and, indeed, any imposition whatever by the government for the purpose of raising a revenue. Bacon, Abr. *Smuggling*, etc. (B); Fort. *De Laud.* 26; Madd. Exch. c. 17; Co. 2d Inst. 531.

**TALLAGIUM** (perhaps from Fr. *taille*, cut off). A term including all taxes. Co. 2d Inst. 532; *Stat. de tal. non concedendo, temp.* Edw. I.; Stow, Annals 445; 1 Sharsw. Bla. Com. 311*. Chaucer has talaigiers for "tax-gatherers."

**TALLY** (Fr. *tailler;* It. *tagliare*, i. e. *scindere*, to cut off). A stick cut into two parts on each whereof is marked, with notches or otherwise, what is due between debtor and creditor. Hence the tallier of the exchequer is now called the teller. Lex. Constit. 205; Cowel. One party must have one part, and the other the other, and they must match. Tallies in the exchequer were abolished by 23 Geo. III. c. 82, and were ordered to be destroyed in 1834. They were thereupon used in such quantities to heat the stoves in the house of lords that it is supposed they were the cause of the fire which destroyed both houses of parliament.

There was the same usage in France. *Dict. de l'Acad. Franc.*; Pothier, Obl. pt. 4, c. 1, art. 2, § 8; 2 Reeves, c. 11, p. 253.

**TALMUD.** A work which embodies the civil and canonical law of the Jewish people. A new edition of this work is now (1898) in course of publication in English, in which the original text is edited, formulated, and punctuated by Rodkinson.

**TALZIE.** See TAILZIE.

**TAME.** Domesticated; reclaimed from a natural state of wildness. See ANIMAL.

**TANGIBLE PROPERTY.** That which may be felt or touched: it must necessarily be corporeal, but it may be real or personal.

**TANISTRY** (*a thanis*). **In Irish Law.** A species of tenure founded on immemorial usage, by which lands, etc., descended, *seniori et dignissimo viro sanguinis et cognominis, i. e.* to the oldest and worthiest man of the blood and name. Jacob, Law Dict.

**TANTEO. In Spanish Law.** Preemption. White, N. Recop. b. 2, t. 2, c. 3.

**TANTO. In Mexican Law.** The right enjoyed by an usufructuary of the property, of buying property at the same price at which the owner offers it to any other person, or is willing to take from another. Civil Code, Mex. art. 992.

**TARDE VENIT** (Lat.). **In Practice.** The name of a return made by the sheriff to a writ, *when it came into his hands too late* to be executed before the return day.

The sheriff is required to show that he has yielded obedience to the writ, or give a good excuse for his omission; and he may say, *quod breve adeo tarde venit quod exequi non potuit.* It is usual to return the writ with an indorsement of *tarde venit.* Com. Dig. *Return* (D 1).

**TARIFF.** Customs, duties, toll, or tribute payable upon merchandise to the general government is called tariff; the rate of customs, etc., also bears this name, and the list of articles liable to duties is also called the tariff. As to the meaning of terms, see 79 Fed. Rep. 313. See also COURT OF APPRAISERS OF THE UNITED STATES; RECIPROCITY; TAX.

As to the present act and when it went into effect, see STATUTE.

**TAVERN.** A place of entertainment; a house kept up for the accommodation of strangers. Webster. Originally, a house for the retailing of liquors to be drunk on the spot. Webster. A house licensed to sell liquors in small quantities. 11 Ore. 288.

In almost all the states the word has come to mean the same as inn, with no particular reference to the sale of liquors. See 2 Kent 597*, note *a*; 84 Ala. 451. Tavern has been held to include "hotel"; 46 Mo. 598; *contra*, 7 Ga. 296.

For the liability of tavern-keepers, see Story, Bailm. § 7. See Wandell, Inns 91; INN.

**TAX.** A pecuniary burden imposed for the support of the government. 17 Wall. 322. The enforced proportional contribution of persons and property, levied by the authority of the state for the support of government, and for all public needs. 58 Me. 591; Cooley, Tax. 1. Burdens or charges imposed by the legislative power of a state upon persons or property, to raise money for public purposes. 20 Cal. 318. A sum or rate imposed by governmental authority for a public object or purpose. 150 Pa. 118; 107 Mo. 464. A tax is a demand of sovereignty; a toll is a demand of proprietorship; 15 Wall. 278. Taxes are not "debts"; 20 Cal. 318: 23 Atl. Rep. (Pa.) 799; 34 S. C. 541; nor do they embrace local assessments; 92 Ky. 89; 60 Conn. 112; 2 Wash. 667; nor are fees required by a statute for filing articles of incorporation a tax; 49 Ohio St. 504.

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Taxes differ from subsidies, in being certain and orderly, and from forced contributions, etc., in that they are levied by authority of law, and by some rule of proportion which is intended to insure uniformity of contribution, and a just apportionment of the burdens of government; Cooley, Tax. 2. See 51 Pa. 9. No matter how equitable a tax may be, it is void unless legally assessed; 3 Cush. 567; and, on the other hand, the injustice of a particular tax cannot defeat it when it is demanded under general rules prescribed by the legislature for the general good; Cooley, Tax. 3.

Taxes are classified as *direct*, which includes "those which are assessed upon the property, person, business, income, etc., of those who pay them; and *indirect*, or those which are levied on commodities before they reach the consumer, and are paid by those upon whom they ultimately fall, not as taxes, but as part of the market price of the commodity." Cooley, Tax. 61. The latter includes duties upon imports and stamp duties levied upon manufactures; *ibid.* The term "direct taxes" in the federal constitution is used in a peculiar sense, and such taxes are perhaps limited to capitation and land taxes; 3 Dall. 171; 7 Wall. 433; 8 *id.* 533.

Direct taxes within the meaning of the constitution are only capitation taxes and taxes on real estate; 102 U. S. 586.

It was suggested by Oliver Ellsworth and Roger Sherman in a letter to the governor of Connecticut, and afterwards by Madison, that a state might collect and pay its *quota* of any federal direct tax and so prevent a federal collection. The same view appears as a *dictum* in the opinion of the supreme court of the United States by Fuller, C. J., in the Income Tax Case. See 34 Am. L. Reg. N. S. 733.

By a majority of one, after a re-argument, it was held that the income tax law of 1894 was a direct tax and unconstitutional. The first decision left the constitutional question in doubt, the court being equally divided; 157 U. S. 429. On re-argument before a full court the decision was by a majority of one only. The points settled by the opinion of the court were, substantially, these: Direct taxes must be apportioned among the several states in accordance with numbers. Taxes on real estate are direct taxes, and taxes on the rent or income of real estate are the same. Taxes on personal property or on the income of personal property are likewise direct taxes. The act of 1894, so far as it falls on the income of real estate and of personal property, is a direct tax on the property and therefore void, because not apportioned according to representation; 158 U. S. 601.

States may tax circulating notes of national banks and United States legal tender notes and other notes used as currency; gold, silver, or other coin are subject to taxation as money; U. S. R. S. § 236. See 4 Wheat. 316; 9 *id.* 739; 2 Black. 620; 2 Wall. 200; 6 *id.* 594; 7 *id.* 16; the provisions of this act do not change existing laws.

Where an act directs a corporation to retain a percentage of interest due on its indebtedness and to pay it to the state, it is a tax on the bondholder; 134 U. S. 232; an act which directs employers of aliens to retain a certain sum from their daily wages and pay it to the state is a tax on the alien and void; 82 Fed. Rep. 257.

The state may undoubtedly require the payment of taxes *in kind*, that is, in products, or in gold or silver bullion, etc.; Cooley, Tax. 12 See 20 Cal. 318; 7 Wall. 71.

*Legacy and inheritance taxes* are constitutional, and are not arbitrary; they are not prohibited by the equal protection of the laws given by the federal constitution; they are taxes not on property, but on the succession, which is not a natural right but a privilege, and may be conferred subject to conditions; 170 U. S. 283. But an act taxing only estates over $20,000 was held unequal and therefore void; 53 Ohio St. 314. See an article by Luther E. Hewitt in 34 Am. Law Reg. N. S. 179.

The power to tax is vested entirely in the legislative department. No matter how oppressive taxation may be, the judiciary cannot interfere on that account; 8 Wall. 533; 18 *id.* 206; 47 Miss. 367. See 83 Ala. 608. It can only check excess of authority. The right to lay taxes cannot be delegated by the legislature to any other department of the government; 52 Mo. 133; 47 Cal. 456; 4 Bush 464; except that municipal corporations may be authorized to levy local taxes; Cooley, Tax. 62; 49 Mo. 559, 574; 73 Pa. 448.

The constitutional guaranty which declares that no person shall be deprived of property, etc., except by the judgment of his peers or the law of the land does not necessarily apply to the collection of taxes; 23 Ga. 566; Cooley, Tax. 37; Miller, Const. 105; taxes have been said to be recoverable, not only without a jury, but without a judge; 6 T. B. Monr. 641. Though differing from procedure in courts of justice, the general system of procedure for the levy and collection of taxes established in this country is due process of law; 104 U. S. 78; 96 *id.* 97.

Taxes become a lien on property only by statute; 55 N. J. L. 58; 18 Fed. Rep. 344; 19 Wall. 659. There are many taxes which may be levied without notice to the taxpayer; 111 U. S. 701.

A sovereign power has the unlimited power to tax all persons or property within its jurisdiction; 20 Wall. 46; 66 N. C. 361. But its power is limited to such as is within its jurisdiction; 153 U. S. 628; but when a person is resident within a state, his personal property may be taxed wherever it is; 16 Pick. 572; 3 Ore. 13; personal property may be separated from its owner and he may be taxed on its account, at the place where it is, although not the place of his own domicil; 141 U. S. 18; and the stock of a foreign corporation may be taxed to the resident owner. 82 N. C. 420.

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a franchise tax on a foreign corporation covering all contracts made in a state, does not apply to a contract of a corporation signed by its local agent and by the other party within the state and stipulating that the contract is not valid unless countersigned by its manager in the state and approved at its home office in another state, even if it is to be performed within the state; 169 U. S. 81. See 2 App. Div. N. Y. 590. The mere right of a foreign creditor to receive from his debtor within the state the payment of his demand cannot be subjected to taxation within the state; 15 Wall. 300. See *supra*. Shares in a corporation are the shares of the stockholder wherever he may have his domicil, and can only be taxed by the jurisdiction to which his person is subject; 16 Pick. 572; 49 Pa. 526; subject to the qualification that a foreign corporation must always accept the privilege of doing business in a state on such terms as the state may see fit to exact; Cooley, Tax. 16. Under a statute providing for taxation of all personal property within the state owned by non-residents, a tax cannot be imposed on choses in action, owned by a non-resident and left with an attorney in the state for collection, nor on municipal bonds so owned and temporarily on deposit in a bank in the state for safekeeping; 59 Ind. 472. Where the legal title to choses in action is in a trustee, they are subject to taxation at his domicil; 17 S. E. Rep. (Ga.) 61.

Tangible personal property situate within a state may be taxed there without regard to the residence of the owner; 48 N. Y. 390; 52 Pa. 140; and the real estate of a non-resident may be taxed where it is situated; 4 Wall. 210; 16 Mass. 208.

It is the general rule to assess personalty to the owner where he has his domicil; 17 Nev. 383; and sometimes, wherever it may be located in the state, either to the owner, his agent, or person having charge of it, whether the owner is a resident or not; 66 Pa. 446; 85 N. Y. 359; and this rule is sometimes applicable to choses in action; 69 Mo. 454; vessels are usually assessed at the port where registered; 58 N. Y. 242; 17 How. 713; ferryboats, where owned; 57 Ala. 62; property in a partnership, usually where the business is carried on; 24 Vt. 9; and where one carries on a business at a place other than his domicil, it is held to be proper to assess the property to one in charge of the business; 88 Ill. 170. Personalty in the hands of a trustee is assessed to him at his domicil; 10 Ohio St. 431; but sometimes to the beneficiary, if a resident of the state; 124 Mass. 193; and if the fund is in charge of a court, in the jurisdiction in which it is controlled; 39 N. J. 653. The personalty of a decedent is sometimes assessed to the estate at the place of *situs*, if the decedent was a non-resident, or at his last domicil, if a resident; 24 Ia. 436; and sometimes to the personal representative at his domicil; 39 N. J. 650; and continues to be so assessed until distributed; 53 Mich. 554. The personalty of persons under guardianship is sometimes assessed where the ward has his domicil; 38 Pa. 157; or to the guardian; 80 Ky. 71; and this would probably be the rule if the guardian, living in the state, had possession of the property, and the ward were a non-resident; 38 Pa. 157. The place for the assessment of the personalty of a corporation is its principal office, unless otherwise directed by statute; 60 Me. 196. It is customary for the states to tax so much of the property of foreign corporations as lies within the state limits.

Shares in a corporation are properly assessed as the owner's personal estate in the jurisdiction to which his person is subject, whether the corporation be foreign or domestic; 49 Pa. 526; 16 Pick. 572; but the state may give stock, held by individuals, any *situs* for the purpose of taxation; 59 Md. 185; and it may provide that the shares of stockholders shall be assessed at the place of corporate business and the tax paid by the corporation for its members; 57 Md. 31. A tax laid in California upon corporate stock, owned exclusively by a non-resident, and with all its property in another state, was held void; 22 Fed. Rep. 602.

A tax imposed by a state upon tangible property within its limits, the owner of which is a non-resident, is not a personal charge against the owner, but must be enforced against the property; 11 N. Y. 563; 5 Met. 73; and such personalty cannot be taxed unless it has an actual *situs* within the state so as to be under the protection of its laws; 50 Ga. 387. See ROLLING STOCK.

The rule or fiction of law that personal property, more especially choses in action, has no *situs* away from the domicil of the owner at which it is deemed to be present, originated, according to Savigny, in Rome, and acquired the designation of *mobilia personam sequuntur*; but its applicability to property was never held to extend beyond Roman territory. Subsequently it became a device of international comity which, it is declared in 12 Vt. 152, was subsequently "adopted from considerations of general convenience and policy and for the benefit of commerce." It was never invented with a view to its being used as a rule to govern and define the application and scope of taxation, nor was it intended to have any other meaning than that, for the purpose of the sale and distribution of property, any act, agreement, or authority which is sufficient in law where the owner resides, shall pass the property in the place where the property is, more especially to facilitate the distribution of decedents' estates by enabling owners to dispose of their property without embarrassment from their ignorance of the laws of the country where it is; David A. Wells in 52 Pop. Sci. Monthly 356.

Two states cannot tax at the same time the same property, nor can a state tax property and interests lying outside of its jurisdiction; 7 Wall. 262.

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As to foreign-held bonds, "the power of taxation of a state is limited to persons, property, and business within her jurisdiction; all taxation must relate to one of these subjects." 15 Wall. 300.

"Bonds issued by a railroad company are property in the hands of the holders, and when held by non-residents of the state in which the company was incorporated, they are property beyond the jurisdiction of the state." 15 Wall. 300.

As to the *situs* of choses in action, see 11 Harv. Law Rev. 95.

It has been held in Indiana that life insurance policies are not taxable as personal property, such tax being against public policy; 55 Alb. L. J. 294. Patent rights are not taxable; 29 L. R. A. (Ky.) 786; so in New York court of appeal in a case yet unreported (Oct. 15, 1898); and in Pennsylvania; 151 Pa. 265; and Tennessee.

A *poll* or capitation tax is so called because it is a tax on the poll or person merely, without regard to property or other circumstances; 18 Fed. Rep. 135; 61 N. C. 21. It is used in some states, as Pennsylvania, to establish a qualification for voting. It was abolished in Massachusetts and in Delaware (by the constitution of 1898) and a registration fee adopted in its stead. See REGISTRATION. It is a direct tax within the meaning of the federal constitution; 7 Wall. 433; 8 *id.* 533; and cannot be laid by the United States except in proportion to population; 102 U. S. 587. The domicil of the taxable is the place of the imposition of the poll tax; 23 N. J. L. 517. One person cannot have two domicils for the purpose of taxation; 4 Mass. 534; nor can one be abandoned until another is acquired; 132 *id.* 89. See DOMICIL.

A state may bind itself by a contract, *based upon a consideration*, to refrain from exercising the right of taxation in a particular case; 15 Wall. 460; 16 *id.* 244; 6 Conn. 223; s. c. 16 Am. Dec. 46, n.

The agencies selected by the federal government for the exercise of its functions cannot be taxed by the states: for instance, a bank chartered by congress as the fiscal agent of the government; 4 Wheat. 316; the loans of the United States; 2 Wall. 220; 7 *id.* 16, 26; see 134 U. S. 594; the bonds or obligations of the United States for the payment of money; 134 U. S. 594; 133 *id.* 660; on United States revenue stamps; 101 Mass. 329; the salary of a federal officer; 16 Pet. 435; the property of the United States; 133 U. S. 496. But government agencies are only exempt from state taxation so far as it interferes with their efficiency in performing the functions by which they serve the government; 125 U. S. 530. On the other hand, the federal government cannot tax the corresponding agencies of the states; 12 Wall. 418; 105 Mass. 49; including the salary of a state officer; 11 Wall. 113; and a state municipal corporation; 17 Wall. 322; but railroad corporations are not included in this exemption; 9 Wall. 579. For a letter from Taney, C. J., to Secretary Chase protesting against a tax on the salaries of judges, see 157 U. S. 701. The states have no power to tax the operations of the Union Pacific R. R. Company, which was chartered by congress, but may tax its property; 18 Wall. 5; nor have they power to tax franchises conferred by congress, without its permission; 127 U. S. 1.

A state tax on telegraphic messages sent out of the state is unconstitutional as a regulation of interstate commerce, and so taxes on government messages are void, as burdens upon the agencies of the federal government; 4 Morr. Transcr. 447; see 127 U. S. 640; a state tax on freights transported from state to state is a regulation of commerce, and therefore void; 15 Wall. 232. A statute taxing a telegraph company upon its property within the state, at such a proportion of the whole value of its capital stock as the length of its lines within the state bears to the length of all its lines everywhere, deducting the value of its real estate and machinery subject to local taxation within the state, is constitutional; 163 U. S. 1.

A state has power to tax all property having a *situs* within its limits, whether employed in interstate commerce or not; 145 U. S. 1; 141 U. S. 18.

A state tax upon the gross receipts of a railroad company is not repugnant to the federal constitution, although they are made up in part from articles transported from state to state; there is a distinction between a tax upon freights carried between states and a tax upon the fruits of such transportation after they have become mingled with the other property of the carrier; 15 Wall. 284; nor is such a tax a tax upon exports or imports or upon interstate transportation; *id.*

The federal constitution provides that no state shall, without consent of congress, (1) lay any imposts or duties on exports or imports, except what may be necessary for executing its inspection laws. See 8 Wall. 123; (2) lay any duties of tonnage. Under this clause a tax on vessels at a certain sum per ton is forbidden; 20 Wall. 577. The states cannot tax the commerce which is regulated by congress; 4 Wheat. 316; but a tax may be laid upon merchandise in the original packages that has been the subject of commerce and has been sold by the importer; 5 Wall. 475; 8 *id.* 110. See TONNAGE; COMMERCE; ORIGINAL PACKAGE.

The constitution of the United States does not profess in all cases to protect property from unjust and oppressive taxation by the states. That is left to the state constitutions and state laws; 143 U. S. 192.

No tax is valid which is not laid for a public purpose; Miller, Const. 104, n.; 20 Wall. 655; 58 Me. 590; 2 Dill. 353; such are (according to Cooley, Tax. 81); to preserve the public order; to make compensation to public officers, etc.; to erect, etc., public buildings; to pay the expenses

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of legislation, and of administering the laws, etc.; also, to provide secular instruction; Cooley, Tax., 2d ed. 119–124; 104 U. S. 81; but not in a school founded by a charitable bequest, though a majority of the trustees were to be chosen (but from certain religious societies) by the inhabitants of the town; 103 Mass. 94. A town may tax itself for the erection of a state educational institution within its limits; 12 Allen 500. The support of public charities is a public purpose, and money raised by taxation may be applied to private charitable institutions. Taxation for the purpose of giving or loaning money to private business enterprises is illegal; 111 Mass. 454; 60 Me. 124. In some cases, governments have applied public funds to pay equitable claims (upon which no legal right exists), such as for the destruction of private property in war, or for loss incurred in a contract for the construction of a public work; Cooley, Tax. 91. Taxes may be levied for the construction and repair of canals, railroads, highways, roads, etc.; Cooley, Tax. 94; and the construction of a free bridge in a city; 58 Pa. 320; and for the payment of the public debt, if lawfully incurred; and for protection against fire; 104 U. S. 81. Taxation to provide municipal gas and water works is lawful; 43 Ga. 67; 27 Vt. 70; and for the preservation of the public health; 31 Pa. 175; Cooley, Tax. 101. Municipalities may pay money by way of bounties to those who volunteer as soldiers in time of actual or threatened hostility; 50 Pa. 150; 52 Me. 590; but not to provide amusements for the people, or to celebrate the declaration of independence, etc.; 1 Allen 103; 2 Den. 110; though the purchase and support of public parks is lawful; Cooley, Tax. 61, 129, 615.

The power of taxation is limited to public purposes; 69 Pa. 352; 92 Cal. 324. A railroad is a public purpose; 16 Wall. 667. See 168 U. S. 651. A statute providing for a special tax on corporations to establish free scholarships in a state university is unconstitutional; 45 S. W. Rep. (Mo.) 245, where the cases as to what is a public purpose are collected. So of loans to aid in rebuilding parts of a city destroyed by fire; 111 Mass. 454; 23 S. C. 57; a city water plant; 38 S. W. Rep. (Ky.) 826; loans by cities in aid of private manufacturing enterprises; 60 Me. 124; 20 Wall. 655; aid of private educational enterprises; 24 Wis. 350; 103 Mass 94; though no tuition fee is charged; 6 Sup. Ct. Pa. 1; a bounty for growing forest trees; 107 Mo. 464. Public purpose in this connection "has no relation to the urgency of the public mind, or to the extent of the public benefit to follow." 20 Mich. 452.

It is an essential rule of taxation that the purpose for which a tax is levied "should be one which in an especial manner pertains to the district within which it is proposed that the contribution shall be collected. . . . A state purpose must be accomplished by a state taxation, a county purpose by a county taxation, etc." Cooley, Tax. 104.

Apportionment, which is a necessary element of taxation, is a matter of legislation; Cooley, Tax. 175. Judge Cooley classifies the taxes as specific, *ad valorem*, and those apportioned by special benefit. He suggests as general principles, that while the districts are discretionary, the basis of apportionment must be applied throughout the district and cannot embrace persons or property outside of it. There may be a diversity in methods of collection; the tax does not fail because the rule of apportionment cannot in all cases be enforced, and exemptions, though permissible, must not be in the nature of special and invidious discriminations against individuals.

While perfect equality is unattainable, only statutes based upon false and unjust principles or producing gross inequality will justify the interposition of the courts; 5 Allen 426. See 57 Pa. 433; 73 *id.* 370; 3 Bland, Ch. 186; 85 Ky. 413. The 14th amendment of the constitution of the United States was not intended to compel the states to adopt an iron rule of equality or prevent classification; it is enough that there is no discrimination in favor of one as against another of the same class; 148 U. S. 657. The scope of the 14th amendment is treated in 113 U. S. 27 and 118 *id.* 56. It is carried into effect by R. S. §§ 1977, 1979.

A tax is uniform when it operates with the same effect in all places where the subject of it is found, and is not wanting in such uniformity because the thing is not equally distributed in all parts of the United States; 112 U. S. 580. Accordingly a different rule of taxation may be prescribed for railroad companies from that for individuals; 92 U. S. 575.

"The whole argument of a right under the federal constitution to challenge a tax law on the ground of inequality in the burdens resulting from the operation of the law is put at rest by the decision in Bell's Gap R. R. Co. *v.* Pa. (134 U. S. 232)." 167 U. S. 461.

There may be a tax upon occupations even if it duplicates taxes; Cooley, Tax. 385. They are usually by way of license, as distinguished from a tax upon the business authorized by the license to be carried on; 50 Ga. 530.

Such taxes have been laid on bankers, auctioneers, lawyers; 12 Mo. 268; 23 Gratt. 464; clergymen; 29 Pa. 226; peddlers, etc. See 5 Wall. 462 as to federal license taxes.

Tax on a bicycle under a municipal ordinance of Chicago was held to be void as a license, because it was not an occupation tax under the charter. As a tax, it was not imposed according to assessed valuation, not being uniform in its operation, but was objectionable as double taxation because all pleasure vehicles were already taxed; 56 Alb. L. J. 129.

There is a wide difference between a tax or assessment prescribed by a legislative

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body, and one imposed by a municipal corporation, and a still wider difference where the assessment is the act of mere functionaries with authority derived from municipal ordinances; 170 U. S. 45.

It is generally agreed that the authority to require property specially benefited to bear the expense of local improvements is a branch of the taxing power. Whether it shall be paid out of the general treasury, or assessed upon abutting property or other property especially benefited, and, if in the latter mode, whether the assessment shall be upon all property found to be benefited, or only upon abutters, according to frontage or area, are considered to be questions of legislative expediency; 2 Dill. Mun. Corp. § 752, quoted in 18 Sup. Ct. Rep. 525.

The distinction between taxes and municipal assessments frequently arises in cases involving the construction of agreements by tenants to pay taxes. In such a case it was held in Illinois that an assessment for sidewalk and street improvements was not a tax within such agreement; 167 Ill. 215; but it was held that the term tax may be so used in legal instruments as to render it a debatable question whether it includes local assessments or not; 13 App. Div. N. Y. 140.

A legislature can authorize a city or town to tax its inhabitants only for public purposes; 150 Mass. 592; 113 U. S. 1; 37 Wis. 400; 114 Ill. 659.

Municipal assessments made for local improvements, though resting for their foundation upon the taxing power, are distinguishable in many ways from taxes levied for general state or municipal purposes. A local assessment upon the property benefited by a local improvement may be authorized by the legislature, but such an assessment must be based upon benefits received by the property owner over and above those received by the community at large. The legislature may make provision for ascertaining what property will be specially benefited and how the benefits shall be apportioned. The assessments may be made upon all the property specially benefited according to the exceptional benefit which each parcel of property actually and separately receives. Where the property is urban and plotted into blocks with lots of equal depth, the frontage rule of assessment is generally, but not always, a competent one for the legislature to provide. This rule is, in the long run, a just one, especially as to sidewalks, sewers, grading, and paving. See 30 Mich. 24; but see *contra*, 82 Pa. 360. The legislature may, under some circumstances, authorize the assessment of the lots benefited, in proportion to their area (but see 35 Mich. 155). Whether it is competent for the legislature to declare that the whole of an improvement of a public nature shall be assessed upon the abutting property, and other property in the vicinity, is in doubt. The earlier cases so held; but since many state constitutions have made provision for equality of taxation, several courts have held that the cost of a local improvement can be assessed upon particular property only to the extent that it is especially and particularly benefited, and that as to the excess, it must be borne by the public. See 82 Pa. 360; 69 *id.* 352; 18 N. J. Eq. 519.

As to *exemptions* from taxation: In the absence of any constitutional provision, the right to make exemptions is included in the right to apportion taxes; 73 Pa. 449; 24 Ind. 391; and when made on grounds of public policy they may be recalled; 13 Wall. 373; 47 Cal. 222; and all exemptions are strictly construed; 18 Wall. 225; 127 Pa. 435; being in derogation of the sovereign and common right; 132 U. S. 174, 190; they are not favored by the courts: 76 N. Y. 64; property exempted from taxation must be of a public nature and for a public purpose. Where the general use is of a public nature the right to exemption is not impaired by the fact that part of the property is used for producing revenue, as in the case of a public library, and statutory exemption is not impaired by the fact that part of a library building is a theatre or hall occasionally let to outside parties; 23 Misc. Rep. 1.

An exemption of "institutes of purely public charity" was held to include private institutions of purely public charity not administered for private gain; 86 Pa. 306; essential features of a public use are that it is not confined to privileged individuals but open to the indefinite public; 86 Pa. 306. The residence of a clergyman is not exempt as a "building for religious worship," because it contains one room set apart as a religious chapel; 12 R. I. 19. See 34 Am. L. Reg. N. S. 169.

Immunity from taxation is not in itself transferable. It must be considered as a personal privilege not extending beyond the immediate grantee, unless otherwise expressly declared; 130 U. S. 637.

It has been held that the legislature of a state may grant to a corporation a perpetual exemption from taxation; 13 Vt. 525; 11 Conn. 251; 24 Miss. 386; but privileges which may exempt a corporation from the burdens common to individuals do not necessarily flow from their charter, but must be expressed in it or they do not exist; Marshall, C. J., in 4 Pet. 514. As to exemption from taxation by charter grant, see 35 Cent. Law J. 172.

Equity will restrain the collection of taxes illegally imposed, but there must be some equitable ground for relief besides the illegality of the tax; 139 U. S. 658. Such ground may be liability to irreparable injury or to vexatious litigation; 113 *id.* 525. Where there is a statutory remedy, it is exclusive; but if the statute leaves open to judicial inquiry all jurisdictional questions, the decision of an administrative board does not preclude a resort to judicial remedies; 168 *id.* 239. If a remedy is provided, as by a board of equalization, redress there must first be sought; 86 Fed. Rep. 200.

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Federal courts may issue a mandamus against counties or municipal corporations, to compel the levy of a tax to pay their judgments; 86 Fed. Rep. 264.

Rolling stock continuously used in a state acquires a *situs* therein for taxation, and even though it is used exclusively in interstate commerce, it may be subjected in the state to an equal property tax; 29 Fed. Rep. 658; 18 Wall. 5. It is within the legislative power to establish a *situs* for personal property elsewhere than at the place in which it is found, and rolling stock used continuously in two states may have a *situs* in each, but can be taxed in each only upon a fair proportion of the value; 29 Fed. Rep. 658. The continuous use in one state necessary for taxation is not prevented by frequent change of cars from one road to another and the fact that the identical cars are not continuously used in one state; *id.* For the purpose of taxation the *situs* of rolling stock is where it is habitually used; 39 Am. & Eng. Ry. Cas. (Ariz.) 543. It has also been held that its *situs* for the purpose of taxation is the place where the manager or agent would be taxed in contemplation of law; 39 Ia. 56. In Maryland rolling stock is taxable only at the home office of the company; 50 Md. 274.

The valuation of rolling stock may be apportioned by the court for taxation among the counties through which the road runs, with an assignment to each county of a share proportionate to the length of the road therein; 84 N. C. 504. Rolling stock held under a car trust company is taxable where the car trust association has its place of business; 24 Am. & Eng. R. Cas. 626.

See PROPERTY; SURPLUS; MERGER.

**TAX DEED.** An instrument whereby the officer of the law undertakes to convey the title of the rightful proprietor to the purchaser at a tax sale, or sale of the land for non-payment of taxes.

This deed, according to the principles of the common law, is simply a link in the chain of the grantee's title. It does not *ipso facto* transfer the title of the owner, as in grants from the government or deeds between man and man. The operative character of it depends upon the regularity of the anterior proceedings. The deed is not the title itself, nor even evidence of it. Its recitals bind no one. It creates no estoppel upon the former owner. No presumption arises upon the mere production of the deed that the facts upon which it is based had any existence. When it is shown, however, that the ministerial officers of the law have performed every duty which the law imposed upon them, every condition essential in its character, then the deed becomes conclusive evidence of the title in the grantee, according to its extent and purport. See Blackw. Tax Titles 430.

The legislature may make a tax deed *prima facie* evidence of title in the purchaser, but cannot make it conclusive evidence of his title to the land; 148 U. S. 172.

**TAX LEVY.** The total sum to be raised by a tax. Also the bill, enactment, or measure of legislation by which an annual or general tax is imposed.

**TAX LIEN.** A statutory lien in favor of the state or municipality, upon the lands of a person charged with taxes, binding the same either for the taxes assessed upon the specific tract of land, or for all the taxes due from the individual, and which may be foreclosed for non-payment, by judgment of a court or sale of the land.

**TAX SALE.** A sale of lands for the non-payment of taxes assessed thereon.

The power of sale does not attach until every prerequisite of the law has been complied with; 9 Miss. 627. The regularity of the anterior proceedings is the basis upon which it rests.

There are important details connected with the auction itself and the duties of the officer intrusted with the conducting thereof. The sale must be a *public*, and not a *private*, one. The sale must take place at the precise time and place fixed by the law or notice.

A tax sale is vitiated by a failure to give the notice required by law of the place where the sale will occur; 69 Tex. 103.

The sale must be made to the highest bidder. This is the rule in Pennsylvania; but in most of the states the highest bidder is he who will pay the taxes, interest, and costs due upon the tract offered for sale for the least quantity of it. The sale must be for cash and must be according to the parcels and descriptions contained in the list and the other proceedings.

When a tract of land is assessed against tenants in common, and one of them pays the tax on his share, the interest of the other may be sold to satisfy the residue of the assessment.

Where several parcels of land belonging to the same person are separately assessed, each parcel is liable for its own specific tax and no more.

A tax sale is void if any portion of the tax for which it was made was illegal; 96 Mich. 144; 33 Fla. 356. See 127 U. S. 326.

**TAX TITLE.** The title by which one holds land which he purchased at a tax sale. That species of title which is inaugurated by a successful bid for land at a collector's sale of the same for the non-payment of taxes, completed by the failure of those entitled to redeem within the specified time, and evidenced by the deed executed to the tax purchaser, or his assignee, by the proper officer. Black's L. Dict.

It is not a derivative title. If valid, it is a breaking up of all other titles, and is antagonistic to all other claims to the land; 85 Ia. 247; but in Pennsylvania tax sales do not always cut out existing liens.

The owner of land can acquire a tax

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title by purchasing it at a tax sale; 75 Ia. 250.

To make out a valid tax title there must be a substantial compliance with the provisions of the law authorizing the sale; 148 U. S. 172.

**TAXABLE.** That may be taxed.

**TAXATION.** The process of taxing or imposing a tax. Webster, Dict.

**In Practice.** Adjustment. Fixing the amount: *e. g.* taxation of costs. 3 Chitty, Gen. Pr. 602.

**TAXATION OF COSTS. In Practice.** Fixing the amount of costs to which a party is entitled.

It is a rule that the jury must assess the damages and costs separately, so that it may appear to the court that the costs were not considered in the damages; and when the jury give costs in an amount insufficient to answer the costs of the suit, the plaintiff may pray that the officer may tax the costs, and such taxation is inserted in the judgment. This is said to be done *ex assensu* of the plaintiff, because at his prayer. Bac. Abr. *Costs* (K). The costs are taxed in the first instance by the prothonotary or clerk of the court. See 2 Wend. 244; 1 Pick. 211. A bill of costs, having been once submitted to such an officer for taxation, cannot be withdrawn from him and referred to another; 2 Wend. 252. See COSTS.

**TAXING OFFICER.** An officer in each house of parliament, whose duty it is to tax the costs incurred by the promoters or opponents of private bills. May, Parl. Pr. 843.

**TAXT-WARD.** An annual payment formerly made to a superior in Scotland, instead of the duties due him under the tenure of ward-holding. Whart.

**TEACHER.** See SCHOOLS.

**TEAM.** Two or more horses, oxen, or other beasts harnessed together for drawing; 60 Ia. 462; with the vehicle to which they are customarily attached; 32 Barb. 291; 31 N. Y. 655, where the word was construed in reference to an exemption law. It may mean a vehicle with animals drawing it and used for loads instead of persons. 41 Conn. 477. A horse driven with other horses unharnessed; 57 N. H. 29; and a single horse; 15 Barb. 568; are held teams.

**TEAM WORK.** Work done by a team as a substantial part of a man's business. 49 Vt. 375. It has been held to extend to other than agricultural work, as hauling coals; 9 Q. B. D. 636, overruling 8 Q. B. D. 1. A covenant to provide team work does not oblige a lessee to find the instruments necessary for its performance; *id.*

**TEAMSTER.** One who drives horses in a wagon for the purpose of carrying goods for hire. 16 Nev. 416; 34 Cal. 306. He is liable as a common carrier. Story, Bailm. § 496. A teamster is a laborer; 25 N. E. Rep. (Ind.) 272. See CARRIER.

**TECHNICAL.** That which properly belongs to an art.

In the construction of contracts it is a general rule that technical words are to be taken according to their approved and known use in the trade in which the contract is entered into or to which it relates, unless they have manifestly been understood in another sense by the parties; 2 B. & P. 164. See CONSTRUCTION.

**TEDDING.** Spreading. Tedding grass is spreading it out after it is cut in the swath. 10 East 5.

**TEDING-PENNY.** A small tax to the sheriff from each tithing toward the charge of keeping courts, etc. Cowel.

**TEEP.** A promissory note given by a native banker or money lender to *zemindars* to enable them to furnish government with security for the payment of their rents. Whart.

**TEIND COURT. In Scotch Law.** A court which has jurisdiction of matters relating to *teinds* (*q. v.*).

**TEINDS. In Scotch Law.** Tithes.

**TELEGRAPH.** An apparatus, or a process for communicating rapidly between distant points, especially by means of preconcerted visible signals representing words or ideas, or by means of words and signs transmitted by electro-magnetism. Webster, Dict. The term, as generally used, applies distinctively to the electro-magnetic telegraph.

In the United States all telegraph lines are operated by companies, either under the authority of general laws, or by express charter; Scott & J. Telegr. § 3. The telegraph is an instrument of commerce; 127 U. S. 411; 122 *id.* 347; and telegraphic communication between states is interstate commerce; 127 U. S. 640. Telegraph companies are *quasi*-public agencies, and their rights, duties, and obligations are matters arising under the general law. Questions arising in connection with them are not controlled in the federal courts by state decisions; 156 *id.* 210; 148 *id.* 92. An indictment of a telegraph operator in Connecticut who transmitted a message to New Jersey directing a bet on a horse-race, was upheld under a statute prohibiting betting on horse races, and the statute was held not to be in violation of the commerce clause in the constitution; 40 Atl. Rep. (Conn.) 179. Exclusive franchises may be granted, but will not be implied; 11 Pet. 420; 11 Leigh 42. By a federal statute, companies are authorized to construct their lines upon any public road or highway, and across navigable streams, but so as not to interfere with their public use or navigation; 46 Me. 483. The telegraph is a public use authorizing the exercise of the right of eminent domain; 43 N. J. L. 381. Under the general police power, municipal corporations may regulate the manner in

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which the lines are to be constructed in cities, so as not to interfere with the comfort and safety of the inhabitants; Scott & J. Telegr. § 54. But the power of the municipality is to regulate, not to prohibit; 42 U. S. App. 686; and in the absence of evidence that a proposed method of laying the wires by a company will impede or endanger the use of the streets by the public, a court of equity will enjoin the town from interfering with the wires; 19 Am. L. Reg. N. S. 325. Unless under the sanction of legislative enactment the erection of telegraph posts or the laying of tubes in any highway is a nuisance at common law; 9 Cox, C. C. 174; 30 Beav. 287. See POLES; WIRES.

It has been generally held that the obligations of telegraph companies are not the same as those of common carriers of goods; 41 N. Y. 544; 45 Barb. 274; 18 Md. 341; 15 Mich. 525; see Laws. Carr. 3; but this language has been thought to be too broad, and it has been said that these companies are common carriers of messages, subject to all the rules which are in their nature applicable to all classes of common carriers; Shearm. & R. Negl. § 554. The better opinion would seem to be that since these companies perform a *quasi*-public employment, under obligations analogous to those of common carriers, the rules governing the latter should be applied to them, but modified to meet the changed conditions of the case; 1 Daly 547; 35 Pa. 298; 13 Allen 226; 58 Ga. 433. They were held to be common carriers in 17 C. B. 3; 13 Cal. 422; 3 U. S. App. 30. They resemble common carriers in that they are instruments of commerce and exercise a public employment, and must serve all customers alike, but they are not common carriers in that their duties are different and are performed in different ways, and they are not subject to the same liabilities; 154 U. S. 14, citing 21 Wall. 264; 105 U. S. 460. They are not bailees. They cannot contract with their employers against their own negligence, although they can make reasonable rules limiting the measure of their responsibility. What is reasonable must be determined with reference to public policy; 21 Wall. 264.

Due and reasonable care is required of telegraph companies in the performance of their duties; 13 Allen 226; 78 Pa. 238; 48 N. Y. 132; 15 Mich. 525; and the necessity for such care is made the greater by the delicacy of the instrument and the skill required to manage it; 15 Mich. 525; 60 Ill. 421.

Telegraph companies may limit their liability by notice to the sender of the message; 35 Ind. 429; 74 Ill. 168; 30 How. Pr. 413; 113 Mass. 299; 17 C. B. 3. A company may make reasonable rules relative to its business, and thereby limit its liability. A rule that the company will not be responsible for the correct transmission of despatches, beyond the amount received therefrom, unless repeated at an additional expense, is reasonable; 11 Neb. 87; 154 U. S. 1; 17 C. B. 3; 17 U. C. Q. B. 470; 15 Mich. 525; whether the sender read the contract or not; 78 Pa. 238; 137 Mass. 463; but such regulations were held void in 60 Ill. 421; 74 *id.* 168; 79 Me. 493; 37 Ohio St. 301; 38 Kan. 679, 685; which cases are cited but not approved in 154 U. S. 1; but no regulations or device will avail to avoid liability in case of negligence or fraud; 34 Wis. 471; 37 Mo. 472; nor from injury which the repetition would not have prevented; 70 Ill. App. 275; nor is the company relieved from liability for delay in delivery not referable to any mistake in the tenor of the telegram; 50 Pac. Rep. (Nev.) 438; nor where the company failed to put the message on its transit; 18 Md. 341; and failure to transmit and deliver a message correctly is *prima facie* evidence of negligence; 53 Ark. 434. Such regulations have been held not to apply to the receiver of the message; 35 Pa. 298; 169 Ill. 610; but the cases on this point are very conflicting; they may be found collected in 61 Am. St. Rep. 214.

The current of authority favors the rule that the usual conditions in the blanks of telegraph companies exempt them only from the consequences of errors arising from causes beyond their control, whether the message be repeated or unrepeated; 78 Pa. 238; 27 Ia. 433; 1 Col. 230; 5 S. C. 358; 95 U. S. 655; 2 Am. L. Rev. 615. See 107 N. C. 449. Notice of regulations must be brought home to the sender of the despatch, if they are to be regarded as incorporated in his contract; 1 Daly 547. His signature to the printed conditions is sufficient evidence of knowledge, and he will not be heard to say that he did not read them; 113 Mass. 299; 15 Mich. 525; see 85 Tenn. 529; 97 N. C. 57; they are part of the contract; 154 U. S. 1.

Telegraph companies are not allowed to show any preference in the transmission of despatches, except as regulated by statute; 23 Ind. 377; 56 Barb. 46. They may refuse to send obscene messages, but they cannot judge of the good or bad faith of the senders in the use of language not in itself immoral; 57 Ind. 495. They may refuse to communicate a message which is to furnish the means of carrying on an illegal business; and this, regardless of the motive by which they are actuated in refusing to communicate the message; 84 Ky. 664; they need not supply reports to bucket shops; *id.*; nor supply market or stock reports; Crosw. Electr. § 291.

In England, it is held that the receiver of a message, not being party to the contract for despatching it, can claim no rights under it: L. R. 4 Q. B. 706; 3 C. P. Div. 1, 62; Poll. Torts 522; so in Canada; 23 U. C. C. P. 150; but in the United States the right of action in such cases has been conceded; 1 Am. L. Reg. 685; Crosw. Electr. § 462; and this right has been based upon the "misfeasance" of the company upon which the receiver acted to his injury; 35 Pa. 298; 52 Ind. 1. There is no liability in tort to the sender where there

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is an express contract; Crosw. Electr. § 458; except perhaps in cases where the stipulations on the telegraph blanks are considered rather as regulations of the business than as contracts; *id.* If the sender of the message is the agent of the addressee, either disclosed or undisclosed, the latter may maintain an action against the company; 110 Ill. 408; whether the company had knowledge of the fact or not; Crosw. Electr. § 454.

Telegraph companies are bound to receive and transmit messages from other companies, but are not held responsible for their defaults; 45 N. Y. 744. But a recent text writer is of opinion that they are not, at common law, bound to receive messages for points not on their own lines; Crosw. Electr. § 445. In many states statutes provide otherwise; see *id.* § 385; but if a company accepts a message for transmission over a connecting line, it is liable to the same extent as over its own lines; 2 Tex. Civ. App. 429; 1 Daly 554; but it is held that its only obligation in such case is to deliver the message correctly to the connecting line; 16 U. C. Q. B. 530; 18 *id.* 60.

They may not unjustly discriminate in their rates, although they may make different rates to different customers if the conditions of the business require it; 62 N. W. Rep. 506.

A railroad company cannot grant a telegraph company the exclusive right to establish telegraph lines along its way, such contracts being void as in restraint of trade; 11 Fed. Rep. 1.

Employes of telegraph companies cannot refuse to answer questions as to messages transmitted by them; and they must, if called upon, produce such messages; 20 L. T. N. S. 421; 15 Fed. Rep. 712; 3 Dill. 567; 72 Mo. 83; 70 Cal. 683; an operator may be required to testify to the contents of a telegram addressed and delivered to a defendant on trial under indictment; 58 Me. 267; 7 W. Va. 544; 3 Dill. 567. And even when a statute forbids the divulging of the contents of a telegram, it has been held not to apply when the testimony of an operator is required in a court of justice; 2 Pars. Eq. Cas. 274. See Allen, Tel. Cas. 496, n. The power of the court to compel the local manager of a company to search for and produce private telegrams has been enforced in Missouri by *subpœna duces tecum*, notwithstanding a statute similar to that referred to above; 72 Mo. 83; 58 Me. 267; 15 Fed. Rep. 712; 70 Cal. 683; 55 Ia. 168. The doctrine of these decisions has been severely criticised, but they have not been overruled; Cooley, Const. Lim., 6th ed. 371, note; 18 Am. L. Reg. N. S. 65. See 5 So. L. Rev. 473.

The Home Secretary of England has the power to order telegrams to be detained and opened for reasons of state or public justice, which power is exercised by express warrant under his signature, by statute.

In estimating the measure of damages for the failure to transmit a message properly, the general rules upon the subject of damages *ex contractu* are applied; Gray, Com. by Tel. 80; 98 Mass. 232; 18 U. C. Q. B. 60; 15 Gratt. 122. Where a telegraph company is sued for negligence in transmitting a message, the measure of damages, unless special damages are alleged and proved, is the sum paid for transmission; 71 Wis. 46. Speculative damages are not recoverable for error in transmitting a message; 39 Kan. 580. Unless the despatch shows on its face the importance of the matter to which it relates, or information on this point is communicated to the company's agents, only nominal damages can be recovered for the default of the company; 9 Bradw. 283; 29 Md. 232; 21 Minn. 155; 45 N. Y. 744; 16 Nev. 222. If the sender of a cipher message does not inform the company of the nature of the transaction to which it relates, or what might happen if it were not correctly transmitted, he can recover only the sum paid for sending it, in case of a mistake in its transmission or delivery; 154 U. S. 1; 131 Ill. 575; 34 Wis. 471; 16 Nev. 222; 32 Fl. 527; either nominal damages or the cost of sending it, at most; 178 Pa. 377. Abbreviations in a telegram may render it unintelligible; but if they represent well-known trade abbreviations which the operator may be presumed to understand, the company will be put on information and become liable for negligence in its transmission; 33 Ill. 400; 68 Ga. 299; if the abbreviations are understood by the company, it is not a cipher despatch, and the company is liable for negligent alteration in transmission; 87 Tenn. 554; 75 Tex. 535. Orders to agents to buy and sell stocks, though briefly expressed, have been held to impart information sufficiently as to their importance; 55 Pa. 262; 60 Ill. 421; 44 N. Y. 263; *contra*, 29 Md. 232. And the company is liable for the losses sustained, the fluctuations in the market being the measure of damages; *supra*. See, also, 41 Ia. 458; 27 La. Ann. 49. If the default of the company arises from the dishonesty of some third person, the company will not be held liable for such remote damages; 30 Ohio St. 555; 60 N. Y. 198. As to mental suffering as an element of damages, see MENTAL SUFFERING.

It is for the jury to decide whether the failure of a telegraph company to transmit a message whereby a physician was prevented from early attendance, was the proximate cause of an injury resulting from a surgical operation, there being evidence to show that the operation might have been avoided had the surgeon reached the patient earlier; 83 Fed. Rep. 992.

A company is bound to use reasonable efforts to ascertain where the persons are to whom a message is sent and to deliver the same; 9 Bradw. 283.

The leading principle as to delivery is that the message is to be delivered to the person primarily and not to the place, and if the person cannot be found at the speci-

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fied place it may be negligence for the company to leave the telegram at the place without making further efforts to find the person; Crosw. Electr. § 412; 82 Tex. 561; 39 Fed. Rep. 181. And the message should not be left at the office till called for; 62 Ind. 371. Delivery at a hotel is sufficient. If the addressee is absent from his residence or place of business the company must use reasonable efforts to find him; 9 Ill. App. 283.

It has been held that the delivery of a message to a telegraph company for transmission raises an inference that it was received by the addressee; 7 Allen 556.

Where a telegraph message, sent from a place outside of the state, is to be delivered in a state, the contract between the sender and the telegraph company is to be performed there, and will be construed in accordance with the laws of the state of delivery; 70 Ill. App. 275.

Where a telegraph operator accepts a telegram for transmission, the fact that there is no office at the place to which it is to be sent does not relieve the company from its liability for failure to transmit and deliver; 69 Miss. 658. If a telegram is addressed to X, "in care of Y," the company may deliver it to Y, without being guilty of any negligence even if it fails to reach X; 77 Tex. 245; 30 S. W. Rep. 70.

A telegraph company has the right to choose its own agencies for the delivery of its messages, and may refuse to deliver telegrams by telephone and to receive telephone messages to be telegraphed; 46 N. E. Rep. (Ill.) 731. But where the company permits its employes to receive, by telephone, messages for transmission, it consents to send a message so received; 49 S. W. Rep. (Tex.) 138.

A telegraph company was not negligent in not delivering a warning message before the person to whom it was addressed was killed by his pursuers, where it could have delivered the message only by sending out messengers to watch for his arrival; 81 Fed. Rep. 676.

A contract may be made and proved in court by telegraphic despatches; 20 Mo. 254; 41 N. Y. 544; 103 Mass. 327; L. R. 6 Ex. 7; and the same rules apply in determining whether a contract has been made by telegrams as in cases of a contract made by letter; 36 N. Y. 307; 31 U. C. Q. B. 18; 4 Dill. 431; 20 Q. B. D. 640. Real estate may be leased or sold by telegram if the despatch was duly signed; 4 Bush 261. Contracts by telegraph satisfy the statute of frauds in England; Chit. Contr., 13th ed. 15. Messages are instruments of evidence, and are governed by the same rules as other writings; Scott & J. Telegr. § 340; the original message is said to be the best evidence: if this cannot be produced, then a copy should be produced; *id.* § 341; see 40 Wisc. 440; 127 Ill. 652. As to which is the original, is said to "depend upon which party is responsible for its transmission across the line, or, in other words, whose agent the telegraph company is. The first communication in a transaction, if it is all negotiated across the wires, will only be effective in the form in which it reaches its destination." 29 Vt. 140. See 36 N. Y. 307; 40 Wisc. 440. See on this subject, an article in 14 Cent. L. J. 262. See CIPHER.

The signature of a clerk of a telegraph company to a despatch was held to be sufficient, under the statute of frauds, where the original instructions had been signed by the party; Gray, Com. by Tel. 138; 54 Md. 138; 11 Col. 103; L. R. 5 C. P. 295. See 6 U. C. C. P. 221.

Statutes in Oregon, Washington, and Nevada provide that when any notice, information, or intelligence, written or otherwise, is required to be given, it may be given by telegraph, and powers of attorney or other instruments in writing duly proved or acknowledged for record may, with the proper certificate, be sent by telegraph and the telegraph copy recorded; and so of checks, due bills, promissory notes, and bills of exchange. And in the same states writs and processes in legal proceedings can be transmitted by telegraph.

Notice of issue of an injunction may be transmitted by telegraph; 13 Ch. D. 110; 59 Ill. 58; 35 N. J. Eq. 422.

By act of congress of July 24, 1866, any telegraph company organized under the laws of any state is granted the right, under certain restrictions, to construct and operate lines through and over any portion of the public domain, and along any of the military or post roads of the United States, and under or across navigable streams or waters, provided that they do not obstruct their navigation, or interfere with ordinary travel; R. S. § 5263.

A telegraph company acquires no right, under this act, to occupy the public streets of a city without compensation; 148 U. S. 92; 156 U. S. 210. See 71 Wis. 560. This act, so far as it declares that the erection of telegraph lines shall, as against state interference, be free to all who accept its terms and conditions, and that a telegraph company of one state shall not, after accepting them, be excluded by another state from prosecuting its business within her jurisdiction, is a legitimate regulation of commerce and is appropriate legislation to execute the powers of commerce over the postal service; 96 U. S. 1. It applies equally to telephone companies. The privileges granted must be exercised subject to the police power of the state, provided regulations are not oppressive and such as show an intent to control and perhaps defeat the company's existence; 85 Fed. Rep. 19. Since this act a railroad company, operating a post road over which interstate commerce is carried, cannot grant to a telegraph company the sole right to construct a line over its right of way so as to exclude other companies which have accepted the provisions of the said act, the lines of which would not obstruct the business of the first company; 160 U. S. 1.

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Cables laid across navigable streams or waters must not obstruct navigation; 20 U. S. App. 247.

*Submarine telegraph* lines are subordinate to navigation and must be so laid and maintained as not to interfere therewith, and the company is liable in damages to vessels injured by them; 59 Fed. Rep. 365; 43 *id.* 85; 60 N. Y. 510; but in England injury resulting from submarine telegraph lines is held to be a question of negligence; 15 C. B. N. S. 759. See 15 Am. L. Rev. 211.

An opinion of the attorney-general given at the request of the secretary of state in January, 1898, holds that, in the absence of legislation, the president may control the landing of foreign submarine cables, either preventing it, if necessary, or permitting it on conditions demanded by the public interest.

See, generally, Allen, Telegraph Cases; Scott & Jarnagin, Telegraphs; Sherman & Redfield, Negligence; 35 Amer. & Eng. Corp. Cas. 1–94; 26 Wkly. Law Bul. 147; COMMERCE; EVIDENCE; POLES; WIRES.

**TELEPHONE.** An instrument for transmitting spoken words. See 105 Ind. 261.

In law the owners and operators of telephones are in much the same position as telegraph companies. There appears to be no distinction between telephonic and telegraphic communication; 6 Q. B. Div. 244, approved in 62 Wis. 32; 66 Md. 410; 53 N. J. L. 341; 42 Fed. Rep. 273. They have been called "common carriers of articulate speech," that is to say, even though their liabilities do not in all respects resemble the liabilities of ordinary common carriers, yet, like common carriers, they are engaged in a semi-public occupation, and have duties and privileges accordingly; 24 Alb. L. J. 283; 22 *id.* 363. They are subject to the rules governing common carriers; 2 C. C. A. 1; 50 Fed. Rep. 677, affirming 47 *id.* 633; and are bound to furnish equal facilities to all persons or corporations belonging to the classes which they undertake to serve; 50 Fed. Rep. 677. See 61 Vt. 241; 76 N. W. Rep. (Neb.) 171; even to a rival company; 3 U. S. App. 30.

Statutes in some states provide that telephone companies shall serve all who apply as subscribers. Prior to the passage of such acts there was much litigation as to whether they could refuse their service under any circumstances. It was held that telephone companies are bound to furnish equal facilities to all telegraph companies; 66 Md. 399; see, also, 47 Fed. Rep. 633; 23 *id.* 539; 36 Ohio St. 296; but in 49 Conn. 352, the court held otherwise, upon the ground that the telephone company, a local company, was restricted under its license on the patents used by it and must be considered as doing business only within the lines of such restriction. Telephone companies are bound to furnish telephones to private individuals under ordinary circumstances; 105 Ind. 250. See 114 Pa. 592.

It has been held that the remedy against a subscriber for refusal to pay is to bring suit for the amount due; 17 Neb. 126.

It has been held that a telephone company must transmit despatches impartially for all who choose to send them; and may make no discriminations in favor of or against particular individuals. So a contract between a telephone company and the owner of patented telephone instruments, that in the use of such instruments by the telephone company discriminations should be made against certain telegraph companies was declared void; 36 Ohio St. 296.

In England, a message sent by telephone has been held to come within a statute placing the transmission of telegraphic messages and telegrams under the control of the postmaster-general, though the telephone was not invented or contemplated in 1869; 6 Q. B. Div. 244. Where the lessees of a tramway discharged electricity into the ground by uninsulated wires and the current interfered with the instruments of a telephone company; the tramway company was held liable; 68 L. T. 283. But an injunction will not lie at the suit of a telephone company to restrain an electric railway company from permitting the escape of electricity from its wires, where it appears that the former could obviate the trouble by the use of a return wire, and at a less expense than any the railway company could adopt; 42 Fed. Rep. 273.

A telephone company may enjoin the proprietor of a hotel from permitting his boarders to use an instrument in the hotel, for their private business, though they may use it to call for a carriage and such like; 32 Am. L. Rev. 736 (S. C. of D. C.).

A telephone company maintaining a line between different cities and towns with public stations therein is required to maintain a messenger service to notify persons at a reasonable distance when they are wanted, and is liable for the negligence of its messengers and a regulation to the contrary is void; 42 N. E. Rep. (Ind.) 1035. Such a company is also liable in damages to a traveller, who, during an electric storm, comes in contact with one of its wires, charged with electricity from the atmosphere, and is injured thereby; 3 U. S. App. 205.

An affidavit taken over the telephone has been made the basis of an attachment, but the question how far a telephone may be used for such purpose is at this date (1898) by no means settled. So far as indicated by litigation on the subject, the matter seems to turn upon the thorough identification of the voice; 56 Alb. L. J. 233.

A statute fixing the maximum rates which telephone companies may charge is constitutional; 105 Ind. 250. The power to determine what compensation it may exact is a legislative not a judicial function; 76 N. W. Rep. (Neb.) 171; and the power of state control is not lost by reason of the fact that the company's lines extend

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into another state; 118 Ind. 194. As to admissibility of telephone communications as evidence, see 24 Wkly. Law Bul. 245.

See, generally, 35 Am. & E. Corp. Cas. 1-94; 42 U. S. App. 686. See RATES.

**TELLER** (*tallier*, one who keeps a tally). An officer in a bank or other institution. A person appointed to receive votes. A name given to certain officers in the English exchequer.

The duties of tellers in banks consist of the receiving of all sums of money paid into the bank, and the paying of all sums drawn out. The position ranks next in importance to that of cashier. The authority of a teller to certify that a cheque is "good," so as to bind the bank, has been denied; 9 Metc. 306; but is supported by the weight of decisions; 39 Pa. 92; 52 N. Y. 96; Morse, Bk. 201. See OFFICERS.

**TEMPERANCE.** It has no fixed legal meaning as contradistinguished from its usual import. It is habitual moderation in regard to the indulgence of the natural appetites and passions; restrained or moderate indulgence; moderation; as temperance in eating and drinking; temperance in the indulgence of joy or mirth. Web. Dict. in 84 Cal. 123. See LIQUOR LAWS.

**TEMPEST.** A violent or furious storm; a current of wind rushing with extreme violence, and usually accompanied with rain or snow. 29 U. C. C. B. 84. See ACT OF GOD; LIGHTNING.

**TEMPLE.** See INNS OF COURT.

**TEMPORAL LORDS.** See PEERS; PARLIAMENT.

**TEMPORALITIES.** Revenues, lands, tenements, and lay fees which bishops have from livery of the king, and in virtue of which they sit in parliament. 1 Rolle, Abr. 881.

**TEMPORALITY.** The laity.

**TEMPORARY.** That which is to last for a limited time. Approved in 70 Ill. 399. See PERMANENT.

**TEMPORIS EXCEPTIO** (Lat.). **In Civil Law.** A plea of lapse of time in bar of an action, like our statute of limitations.

**TEMPUS** (Lat.). Time in general. A time limited; a season: *e. g. tempus pessonis*, mast time in the forest.

**TEMPUS SEMESTRE. In Old English Law.** The period of six months or half a year consisting of one hundred and eighty-two days. Cro. Jac. 166.

**TEMPUS UTILE** (Lat.). **In Civil Law.** A period of time which runs beneficially: *i. e.* feast-days are not included, nor does it run against one absent in a foreign country, or on business of the republic, or detained by stress of weather. But one detained by sickness is not protected from its running; for it runs where there is power to act by an agent as well as where there is power to act personally; and the sick man might have deputed his agent. Calvinus.

**TENANCY.** The state or condition of a tenant; the estate held by a tenant.

**TENANT.** (Lat. *tenere*, to hold). One who holds or possesses lands or tenements by any kind of title, either in fee, for life, for years, or at will. In a popular sense, he is one who has the temporary use and occupation of lands or tenements which belong to another, the duration and other terms of whose occupations are usually defined by an agreement called a lease, while the parties thereto are placed in the relation of landlord and tenant. See LANDLORD AND TENANT; 5 M. & G. 54.

The term is applied generally in connection with the names of the various estates in land to indicate the person entitled to a particular estate, as tenant in common, by the curtesy, in dower, in fee, for life, in severalty, at sufferance, in tail, at will, for years, from year to year, and joint tenants. See the several titles relating to these estates. *Tenant of the demesne* is one who is tenant of a *mesne* lord; Hamm. N. P. 392. *Tenant by the manner* is one who has a less estate than the fee in the land which remains in the deversion. He is so called because in avowries and pleadings it is specially shown in what manner he is tenant in contradistinction to veray tenant, who is called simple tenant. See Hamm. N. P. 393; VERAY. As to *tenant paravail*, see PARAVAIL. See ESTATE; LEASE; NOTICE TO QUIT.

**TENANT RIGHT.** In leases from the crown, corporations, or the church, it is usual to grant a further term to the old tenants in preference to strangers; and as this expectation is seldom disappointed, such tenants are considered as having an ulterior interest beyond their subsisting term; and this interest is called the *tenant right*. Bacon, Abr. *Leases and Terms for Years* (U).

**TENANT TO THE PRÆCIPE.** See RECOVERY.

**TENDER.** (Lat. *tendere*, to offer). An offer to deliver something, made in pursuance of some contract or obligation, under such circumstances as to require no further act from the party making it to complete the transfer.

*Legal tender*, money of a character which by law a debtor may require his creditor to receive in payment, in the absence of any agreement in the contract or obligation itself. See LEGAL TENDER.

**In Contracts.** It may be either of money or of specific articles.

*Tender of money* must be made by some person authorized by the debtor; 2 Maule & S. 86; to the creditor, or to some person properly authorized, and who must have capacity to receive it; 1 Camp. 477; 14 S.



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& R. 307; 11 Me. 475; 1 Gray 600 (but necessity will sometimes create exceptions to this rule; thus any one may make a tender for an idiot; 1 Inst. 206 *b*; an uncle, although not appointed guardian, has been permitted to make a tender on behalf of an infant whose father was dead; 1 Rawle 408); in lawful coin of the country; 5 Co. 114; 13 Mass. 235; 4 N. H. 296; or paper money which has been legalized for this purpose; 2 Mas. 1; as, U. S. treasury notes or "greenbacks;" 12 Wall. 457; 27 Ind. 426; or foreign coin made current by law; 2 Nev. & M. 519; but a tender in bank notes will be good if not objected to on that account; 2 B. & P. 526; 9 Pick. 539; 1 Johns. 476; 1 Rawle 408; 6 Harr. & J. 53. He who tenders must be ready to pay or have within his reach the means to pay and actually offer to pay; 10 East 101; 5 Esp. 48; 5 N. H. 440. The money need not always be brought forward as well as offered, especially if the party to whom the offer is made refuses to receive it; 2 M. & S. 86; 6 Pick. 356. The person making the tender need not have the money in his possession; 2 C. & P. 77; 12 E. C. L. 35. A refusal to accept a check for the sole reason that it was insufficient in amount, is a waiver of all objection to the form of the tender; 12 Colo. 480. A corporation is not bound to tender a certificate before it can maintain an action on a subscription for its stock; 46 Minn. 463. As to what has been held objection, see 2 Caines 116; 13 Mass. 235; 5 N. H. 296; 10 Wheat. 333. The exact amount due must be tendered; 5 Mass. 365; 41 Vt. 66; 29 Ia. 480; though more may be tendered, if the excess is not to be handed back; 5 Co. 114; 4 B. & Ad. 546; and asking change does not vitiate unless objection is made on that account; 1 Camp. 70; 5 Dowl. & R. 289; see 140 Ill. 123; and the offer must be unqualified; 1 M. & W. 310; 9 Metc. 162; 20 Wend. 47; 18 Vt. 224; 1 Wisc. 141. A tender accompanied with conditions which the party has no right to impose is of no avail; 94 Ala. 488. Though a conditional tender is not good, a tender under a protest, reserving the right of the debtor to dispute the amount due, is a good tender, if it does not impose any conditions on the creditor; [1892] 1 Ch. 1. Where a decree directed complainant to pay defendant, or into court, a certain sum, and defendant thereupon to deliver to the complainant, or into court, certain stock, held that the tender of the same with interest coupled with a demand for the surrender of the stock and a settlement of the pending appeal was bad as a conditional tender and did not stop the running of the interest; 86 Fed. Rep. 16. One who makes a tender in order to stop the running of the interest must show that he has kept on hand, so as to be constantly ready and able to pay, the amount of the tender in lawful money at any time the creditor should elect to take it; *id.* See 74 Fed. Rep. 52.

When a larger sum than is due is tendered, it is not necessary that the debtor pay or keep good the whole amount: for, although the tender of money is supposed to be an admission by the debtor that the entire sum tendered is due and payable, yet it is not *conclusive* evidence to that effect; 24 Ind. 250. But where tender was made after suit brought, and the amount supposed by defendant to be due was paid into court, it was decided that the full amount must be paid over to the plaintiff, notwithstanding a much less sum was found by arbitrators to be due; 82 Pa. 64.

It is said that the amount must be stated in making the offer; 30 Vt. 577. It must be made at the *time* agreed upon; 1 Saund. 33 *a*, n.; 5 Pick. 187, 240; but may be given in evidence in mitigation of damages, if made subsequently, before suit brought; 1 Saund. 33 *a*, n.; statutes have been passed in many of the states, permitting the debtor to make a tender at any time before trial, of the amount he admits to be due, together with all costs accrued up to date of tender, and compelling plaintiff, in case he do not recover more than the sum tendered, to pay all costs subsequently incurred. See 53 Fed. Rep. 153; 45 Ill. App. 151. In Pennsylvania, by statute of 1705, in case of a tender made before suit, the amount tendered must in the event of a suit be paid into court; 10 S. & R. 14; otherwise, the plea of tender is a nullity. If so paid, tender is a good plea in bar, and if followed up, protects the defendant; 66 Pa. 158. Tender may be made after suit brought by paying the amount tendered into court with the costs up to the time of payment; 1 T. & H. Pr. 744. At common law the tender of a mortgage debt on the day it falls due and at the appointed place discharges the mortgage; but if made after the maturity of the debt, it must be kept good, in order to have that effect; 86 Ill. 431; 27 Me. 237; 50 Cal. 650; but in New York and Michigan mere tender is sufficient to discharge the mortgage; 21 N. Y. 343; 12 Mich. 270. It must be at a suitable hour of the day, during daylight; 7 Me. 31; at the *place* agreed upon, or, if no place has been agreed upon, wherever the person authorized to receive payment may be found; 2 M. & W. 223; and, in general, all the conditions of the obligation must be fulfilled. Where a chattel mortgage runs to several mortgagees jointly, to secure a joint debt, a tender to either mortgagee is good; 53 Minn. 23. The money must have been actually produced and offered, unless the circumstances of the refusal amount to a waiver; 3 C. & P. 342; 15 Wend. 637; 6 Pick. 356; 1 Wisc. 141; or at least be in the debtor's possession ready for delivery; 5 N. H. 440; 3 Pa. 381. As to what circumstances may constitute a waiver, see 2 Maule & S. 86; 1 A. K. Marsh. 321; 57 Conn. 105. An actual tender is dispensed with if the party is ready and willing to pay it, but is prevented by the other's declaring that he will not receive it; 94 Ala. 488. Presence of the debtor with the money ready for delivery

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is enough, if the creditor be absent from the appointed place at the appointed time of payment; 4 Pick. 258; or if the tender is refused; 18 Conn. 18.

A tender may be made in the case of unliquidated damages, but it must be kept good, especially where there is a dispute as to the amount due; 44 Ill. App. 615.

*Tender of specific articles* must be made to a proper person, by a proper person, at a proper time; 2 Pars. Contr. 158. The *place* of delivery is to be determined by the contract, or, in the absence of specific agreement, by the situation of the parties and circumstances of the case; 7 Barb. 472; for example, at the manufactory or store of the seller on demand; 2 Den. 145; at the place where the goods are at the time of sale; 7 Me. 91; 3 W. & S. 295; 6 Ala. N. S. 326; 1 Wash. C. C. 328; the creditor's place of abode, when the articles are portable, like cattle, and the time fixed; 4 Wend. 377; 2 Pa. 63; 1 Me. 120. When the goods are cumbrous, it is presumed that the creditor was to appoint a place; 5 Me. 192; 3 Dev. 78; or, if he fails to do so upon request, the debtor may appoint a place, giving notice to the creditor, if possible; 13 Wend. 95; 1 Me. 120. Whether a request is necessary if the creditor be without the state, see 5 Me. 192; 2 Greenl. Ev. § 611. The articles must be set apart and distinguished so as to admit of identification by the creditor; 4 Cow. 452; 7 Conn. 110; 1 Miss. 401. It must be made during daylight, and the articles must be at the place till the last hour of the day; 19 Vt. 587; 5 T. B Monr. 372; unless waived by the parties.

**In Pleading.** If made before action brought; 5 Pick. 106; 55 N. J. L. 41; tender may be pleaded in excuse; 2 B. & P. 550; 5 Pick. 291; it must be on the exact day of performance; 1 Saund. 33 *a*, n.; and if a tender is relied on as a defence, it must be pleaded; 7 D. C. 66. It cannot be made to an action for general damages when the amount is not liquidated; 2 Burr. 1120; as, upon a *contract*; 2 B. & P. 234; *covenant* other than for the payment of money; 1 Ld. Raym. 566; *tort*; 2 Stra. 787; or *trespass*; 2 Wils. 115. It may be pleaded, however, to a *quantum meruit*; 1 Stra. 576; accidental or involuntary *trespass*, in the United States; 13 Wend. 390; 2 Conn. 659; 36 Me. 407; *covenant* to pay money; 7 Taunt. 486.

The effect of a tender is to put a stop to accruing damages and interest, and to entitle the defendant to judgment for his costs; 3 Bingh. 290; 3 Johns. Cas. 243; 17 Mass. 389; 10 S. & R. 14; 9 Mo. 697; and it may be of effect to prevent interest accruing, though not a technical tender; 5 Pick. 106.

It admits the plaintiff's right of action as to the amount tendered; 1 Bibb 272; 14 Wend. 221; 2 Dall. 190; 28 Neb. 587; at the date of the suit; 48 Mo. App. 185; but nothing more, and does not prevent the making of any defence inconsistent with the admissions of the original contract or cause of action, as to any claim beyond that of the sum tendered; 110 N. Y. 101; 74 Ia. 436. The benefit may be lost by a subsequent demand and refusal of the amount due; 5 B. & Ad. 630; 24 Pick. 168; but not by a demand for more than the sum tendered; 22 Vt. 440; or due; 3 Q. B. 915.

See LEGAL TENDER; PAYMENT INTO COURT.

A plea of tender, if defective, should be demurred to, and plaintiff cannot question its sufficiency after accepting the money paid into court under such plea; 98 Ala. 638.

**TENDER OF AMENDS.** See AMENDS.

**TENEMENT** (from Lat. *teneo*, to hold). Everything of a permanent nature which may be holden.

House, or homestead. Jacob. Rooms let in houses.

Property held by a tenant. 37 W. Va. 778.

In its most extensive signification, tenement comprehends everything which may be *holden*, provided it to be of a *permanent* nature; and not only lands and inheritances which are holden, but also rents and profits *à prendre* of which a man has any frank tenement, and of which he may be seised *ut libero tenemento*, are included under this term; Co. Litt. 6 *a*; 2 Bla. Com. 17; 1 Washb. R. P. 10. In its technical sense it will include an advowson; 3 Atk. 460; 4 Bing. 290; tithes; 1 Stra. 100; 6 Ad. & El. 388; a dignity; 30 Ch. Div. 136; 2 Salk. 509. It includes a wharf; 14 Abb. Pr. 372. The word *tenements* simply, without other circumstances has never been construed to pass a fee; 10 Wheat. 204. See 1 B. & Ad. 161; Com. Dig. *Grant* (E 2), *Trespass* (A 2).

**TENEMENTAL LAND.** Land distributed by a lord among his tenants, as opposed to the demesnes which were occupied by himself and his servants. 2 Bla. Com. 90.

**TENENDAS** (Lat.). **In Scotch Law.** The name of a clause in charters of heritable rights, which derives its name from its first words, *tenendas prædictas terras*, and expresses the particular tenure by which the lands are to be holden. Erskine, Inst. b. 2, t. 3, n. 10.

**TENENDUM** (Lat.). That part of a deed which was formerly used in expressing the tenure by which the estate granted was holden; but since all freehold tenures were converted into socage, the tenendum is of no further use even in England, and is, therefore, joined to the *habendum* in this manner,—to have and to hold. The words "to hold" have now no meaning in our deeds. 2 Bla. Com. 298. See HABENDUM.

**TENERI** (Lat.). That part of a bond where the obligor declares himself to be held and firmly bound to the obligee, his heirs, executors, administrators, and assigns, is called the *teneri*. 3 Call 356.

**TENET** (Lat. he holds). **In Pleading.** A term used in stating the tenure in an action for waste done during the tenancy.

When the averment is in the *tenet*, the plaintiff on obtaining a verdict will recover

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the place wasted, namely, that part of the premises in which the waste was exclusively done, if it were done in a part only, together with treble damages. But when the averment is in the *tenuit*, the tenancy being at an end, he will have judgment for his damages only. 2 Greenl. Ev. § 652.

**TENNESSEE.** The name of one of the United States of America.

It was originally a part of North Carolina. In April, 1784, North Carolina passed an act ceding to the United States, upon certain conditions, all her territory west of the Appalachian or Alleghany Mountains. Before the cession was accepted by congress, it was repealed by another act passed in October, 1784. In December, 1789, the legislature again ceded the territory to the United States; and the cession was accepted by congress by act, April 2, 1790. A convention was called, and a constitution established on February 6, 1796. Tennessee was admitted by an act approved June 1, 1796. Prior to this time a legislature had been elected, the state government organized, and many important laws enacted.

The constitution of 1796 was not submitted to the people for ratification. The authority of the convention established it as the constitution of the state. A new constitution went into effect in 1835. Amendments were ratified in 1853 and 1866. The present constitution was framed, submitted to the people, and ratified in 1870, and went into effect May 5, 1870.

THE LEGISLATIVE POWER.—*The Legislature* is styled "the General Assembly." It consists of a senate and house of representatives. The number of senators is not to exceed one-third the number of representatives. The number of representatives is not to exceed seventy-five, until the population of the state is a million and a half, and never to exceed ninety-nine.

THE EXECUTIVE POWER.—*The Governor* must be thirty years of age, a citizen of the United States, and a citizen of the state seven years next before his election. The supreme executive power is vested in him. He is not eligible more than six years in any term of eight. He has the ordinary powers of the chief executive magistrate of the American states, including the veto power and the power to grant reprieves and pardons, after conviction, except in cases of impeachment.

THE JUDICIAL POWER.—The judicial power is vested in one supreme court, in such inferior courts as the legislature may establish, and in the judges thereof, and in justices of the peace, and corporation courts. *The Supreme Court* is composed of five judges. Its jurisdiction is appellate only. The judges are elected for eight years.

A *Court of Chancery Appeals* has been created by act of the General Assembly of 1895, having jurisdiction of appeals from the chancery courts, etc. It consists of three judges. Appeals lie to it only as to points of law, and its jurisdiction is appellate only.

The court of general original jurisdiction is *the Circuit Court*; it also has general appellate jurisdiction. The state is divided into nineteen judicial circuits. The people of each circuit elect the judge thereof, for the term of eight years.

*The Chancery Court* has general original jurisdiction of all cases of an equitable nature where the demand exceeds fifty dollars. There are some cases of an equitable nature in which the circuit and county courts have concurrent jurisdiction with the chancery courts. The state is divided into twelve chancery districts, in each of which a chancellor is elected by the people, for eight years. An appeal lies to the supreme court from all its decisions.

*The County Court* is divided into a *Quarterly Court* and a *Monthly Court*. The quarterly court is held each quarter in each county in the state by one-half of the justices of the county, and has a police jurisdiction. The monthly county court is held on the first Monday in each month in each county. The county court has jurisdiction of the probate of wills, the granting of administrations, the partition of estates, the appointment of guardians, and the general administration of decedents' estates. There are some cases in which its jurisdiction is concurrent with that of the circuit and chancery courts.

**TENOR.** A term used in pleading to denote that an exact copy is set out. 1 Chitty, Cr. Law 235; 1 Mass. 203; 1 East 180.

The tenor of an instrument signifies the true meaning of the matter therein contained. Cowel. In Scotland an action for proving the purport of a lost deed is called the action of proving the tenor.

**In Chancery Pleading.** A certified copy of records of other courts removed into chancery by *certiorari*. Gresl. Ev. 309.

**TENORE INDICTAMENTI MITTENDO.** A writ whereby the record of an indictment and the process thereupon was called out of another court into the Queen's bench. Reg. Orig. 69; Whart.

**TENSE.** A term used in grammar to denote the distinction of time.

The acts of a court of justice ought to be in the present tense; but the acts of the party may be in the perfect tense; and the continuances are in the perfect tense; 1 Mod. 81. The contract of marriage should be made in language of the present tense; 6 Binn. 405. See 1 Saund. 393, n. 1.

**TENT.** A pavilion; or canvas house enclosed with walls of cloth and covered with the same material. 2 Tex. App. 222.

**TENTERDEN'S ACT, LORD.** The statute of George IV. c. 14, § 6, which provides that no action shall be brought whereby to charge any person upon any representation given concerning the character, credit, etc., of another, or to the intent that another person may obtain credit, unless such representation be made in writing, signed by the party to be charged therewith. See FRAUDS, STATUTE OF.

**TENUIT** (Lat. he held). A term used in stating the tenure in an action for waste done after the termination of the tenancy. See TENET.

**TENURE** (from Lat. *tenere*, to hold). The mode by which a man holds an estate in lands.

Such a holding as is coupled with some service, which the holder is bound to perform so long as he continues to hold.

The thing held is called a tenement; the occupant, a tenant; and the manner of his holding constitutes the tenure. Upon common-law principles all lands within the state are held directly or indirectly from the king, as lord paramount or supreme proprietor. To him every occupant of land owes fidelity and service of some kind, as the necessary condition of his occupation. If he fails in either respect, or dies without heirs upon whom this duty may devolve, his land reverts to the sovereign as ultimate proprietor. In this country, the people in their corporate capacity represent the state sovereignty; and every man must bear true allegiance to the state, and pay his share of the taxes required for her support, as the condition upon which alone he may hold land within her boundaries; Co. Litt. 65 a; 2 Bla. Com. 105; 4 Kent 47.

In the earlier ages of the world the condition of land was probably *allodial*, that is, without subjection to any superior, —every man occupying as much land found unappropriated as his necessities

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required. Over this he exercised an unqualified dominion; and when he parted with his ownership the possession of his successor was equally free and absolute. An estate of this character necessarily excludes the idea of any tenure, since the occupant owes no service or allegiance to any superior as the condition of his occupation. But when the existence of an organized society became desirable to secure certain blessings only by its means to be acquired, there followed the establishment of governments, and a new relation arose between each government and its citizens,—that of protection on the one hand and dependence on the other,—necessarily involving the idea of service to the state as a condition to the use and enjoyment of lands within its boundaries. This relation was of course modified according to the circumstances of particular states; but throughout Europe it early took the form of the feudal system. See ALLODIUM.

The principal species of tenure which grew out of the feudal system was the tenure by *knight's service* (*q. v.*). Many arbitrary and tyrannical incidents or lordly privileges were attached to this tenure, which was abolished by statute 12 Charles II. c. 24, which declared that all such lands should thenceforth be held in free and common socage.

Tenure *in socage* is where a tenant holds his tenement by any certain service, in lieu of all other services, so that they be not services of chivalry or knight's service: as, to hold by fealty and twenty shillings rent, or by homage, fealty, and twenty shillings rent, or by homage and fealty without any rents, or by fealty and a certain specified service, as, to plough the lord's land for three days. Littleton 117; 2 Bla. Com. 79. See SOCAGE.

Other tenures have grown out of the two last mentioned species of tenure, and are still extant in England, although some of them are fast becoming obsolete.

Among these are tenures by *copyhold* and in *frankalmoigne*, in *burgage* and *gavelkind*, and *grand* and *petit serjeanty*; but their nature, origin, and history are explained in the several articles appropriated to those terms.

Tenures were distinguished, according to the quality of the service, into *free* or *base*; the former were such as were not unbecoming a soldier or a freeman to perform, as, to serve the lord in the wars; while the latter were only considered fit for a peasant, as to plough the land, and the like. They were further distinguished with reference to the person from whom the land was held, as a tenure in *capite*, where the holding was of the person of the king, and tenure in *gross*, where the holding was of a subject. By the statute of *Quia Emptores*, 18 Edw. I., it was provided that if any tenant should alien any part of his land in fee, the alienee should hold immediately of the lord of the fee, and should be charged with a proportional part of the service due in respect of the quantity of land held by him. The consequence of which was that upon every such alienation the services upon which the estate was originally granted became due to the superior lord, and not to the immediate grantee; 4 Term 443; 4 East 271; Crabb, R. P. § 735.

In the United States every estate in fee-simple is held as absolutely and unconditionally as is compatible with the state's right of eminent domain. Many grants of land made by the British government prior to the revolution created socage tenures, which were subsequently abolished or modified by the legislatures of the different states. Thus, by the charter of Pennsylvania, the proprietary held his estate of the crown in free and common socage, his grantees being thereby also authorized to hold of him directly, notwithstanding the statute of *Quia Emptores*. The act of Pennsylvania of November 27, 1779, substituted the commonwealth in place of the proprietaries as the ultimate proprietor of whom lands were held. Pennsylvania titles are allodial not feudal; 44 Pa. 492. In New York there was supposed to have been some species of military tenure introduced by the Dutch previously to their surrender to the English, in 1664; but the legislature of that state in 1787 turned them all into a tenure in free and common socage, and finally, in 1830, abolished this latter tenure entirely, and declared that all lands in that state should thenceforth be held upon a uniform allodial tenure.

See Parliamentary Report (1870) on Tenures in the countries of Europe.

**TENURE OF OFFICE.** By R. S. § 1765, etc., it was provided that federal officers appointed with the consent of the senate should only be removed during their terms with like consent or by a new appointment made by the consent of the senate; but it did not apply to certain suspensions during a recess of the senate. The law was repealed by act of March 3, 1887. See, as to the effect of the repeal, 167 U. S. 324; OFFICE.

**TERCE. In Scotch Law.** A life-rent competent by law to widows who have not accepted of special provisions in the third part of the heritable subjects in which the husband died infeft. It thus corresponds to *dower*.

**TERM. In Estates.** The limitation of an estate: as a term for years, and the like. The word *term* does not merely signify the term specified in the lease, but the estate, also, and interest that passes by that lease: and therefore the *term* may expire during the continuance of the time: as by surrender, forfeiture, and the like. 2 Bla. Com. 145; 8 Pick. 339.

**In Practice.** The space of time during which a court holds a session. Sometimes the term is a monthly, at others it is a quarterly period, according to the constitution of the court.

The whole term is considered as but one day: so that the judges may at any time during the term revise their judgments. In the computation of the term, all adjournments are to be included; 9 Watts 200. Courts are presumed to know judicially when their terms are required to be held by public law; 4 Dev. 427. A term of the circuit court may extend from the beginning of one term to the opening of the succeeding statutory term, and the beginning of another term in another district of the same circuit does not necessarily end the term of the first court; 37 U. S. App. 129. A court has power to extend the term until a trial can be concluded; 21 Pa. 109. In England Hilary term began January 3d, and ended February 12th; Easter term began the Wednesday fortnight after Easter Sunday and ended the Monday next after Ascension Day; Trinity term began the Friday next after Trinity Sunday and ended the Wednesday fortnight after; Michaelmas term began October 9th and ended November 28th. The long vacation was formerly from August 10th to October 24th, and to October 28th, in chancery; now it is from August 13th to October 23d. By the Judicature

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Acts (*q. v.*), the division of the legal year into the four terms of Hilary, Easter, Trinity, and Michaelmas has been abolished, so far as relates to the administration of justice.

**TERM FEE. In English Practice.** A certain sum which a solicitor is entitled to charge to his client, and the client to recover, if successful, from the unsuccessful party; payable for every term in which any proceedings subsequent to the summons shall take place. Whart. Lex.

**TERM FOR YEARS.** An *estate for years* and the *time* during which such estate is to be held are each called a term: hence the term may expire before the time, as, by a surrender.

See ESTATE FOR YEARS.

**TERM IN GROSS.** An estate for years which is not held in trust for the party entitled to the land on the expiration of the term.

**TERM PROBATORY.** In an ecclesiastical suit, the time during which evidence may be taken. Cootes' Eccl. Pr. 240.

**TERMINUS** (Lat.). A boundary or limit, either of space or time. A bound, goal, or borders parting one man's land from another's. It is used also for an estate for a term of years: *e. g.* "*interesse termini.*" 2 Bla. Com. 143. See TERM.

*Terminus a quo.* The starting-point of a private way is so called. Hamm. N. P. 196.

*Terminus ad quem.* The point of termination of a private way is so called. In common parlance, the point of starting and that of termination of a line of railway are each called the terminus.

**TERMOR.** One who holds lands and tenements for a term of years, or life. Littleton § 100; 4 Tyrwh. 561.

**TERMS, TO BE UNDER.** A party is said to be *under terms*, when an indulgence is granted to him by the court in its discretion, on certain conditions. Thus, when an injunction is granted *ex parte*, the party obtaining it is put *under terms* to abide by such order as to damages as the court may make at the hearing. Moz. & W.

**TERRA EXTENDENDA.** A writ addressed to an escheator, that he inquire and find out the true yearly value of any land, etc., by the oath of twelve men, and to certify the extent into the chancery. Reg. Orig. 293; Whart.

**TERRA HYDATA.** Land subject to the payment of hydage. Seld.

**TERRA LUCRABILIS.** Land gained from the sea or enclosed out of a waste. Cowel.

**TERRA NOVA.** Land newly converted from wood ground or arable. Cowel.

**TERRA PUTURA.** Land in forests, held by the tenure of furnishing food to the keepers therein. 4 Inst. 307.

**TERRA TESTAMENTALIS.** Gavelkind land, being disposable by will. Spelm.

**TERRÆ DOMINICALES REGIS.** The demesne lands of the crown.

**TERRAGES.** An exemption from all uncertain services. Cowel.

**TERRE-TENANT.** One who has the actual possession of land; but, in a more technical sense, he who is seised of the land; and in the latter sense the owner of the land, or the person seised, is the terre-tenant, and not the lessee. 4 W. & S. 256; Bac. Abr. *Uses and Trusts.* It has been holden that mere occupiers of the land are not terre-tenants. See 16 S. & R. 432; 3 Bla. Com. 91, 328; 114 Pa. 146.

*Contribution among Terre-tenants.* The question whether purchasers, at different times, of land bound by an incumbrance created by the grantor, stand in equal equity as regards this incumbrance, and if so, must each contribute proportionately to its discharge, has been settled in England in the affirmative, following the rule laid down in the Year Books and repeated in Coke's Reports: 2 Wms. Saund. p. 10, n.; 3 Rep. 14 *b*. In this country, the opposite view has been taken: 1 Johns. Ch. 447; 5 *id.* 235; 10 S. & R. 450; 20 Pa. 222. See Lecture before Phila. Law Acad. 1863, by G. W. Biddle, LL.D.

**TERRIER. In English Law.** A roll, catalogue, or survey of lands, belonging either to a single person or a town, in which are stated the quantity of acres, the names of the tenants, and the like.

One of the old records in the office of the recorder of deeds of Philadelphia County is still called the *Germantown Terrier*. In it will be found the Latin Dedication of Pastorius, quoted by Whittier, in the Pennsylvania Pilgrim.

By the ecclesiastical law, an inquiry is directed to be made from time to time of the temporal rights of the clergymen of every parish, and to be returned into the registry of the bishop: this return is denominated a terrier. 1 Phill. Ev. 602.

**TERRITORIAL COURTS.** The courts established in the territories of the United States. See UNITED STATES COURTS.

**TERRITORIAL PROPERTY.** The land and water over which the state has jurisdiction and control whether the legal title be in the state itself or in private individuals. Lakes and waters wholly within the state are its property and also the marginal sea within the three-mile limit, but bays and gulfs are not always recognized as state property.

**TERRITORIAL WATERS.** It is difficult to draw any precise conclusion as to the distance to which a state may lawfully extend its exclusive dominion over the sea adjoining its territories, and beyond those portions of the sea which are embraced by harbors, etc., over which it has unquestioned jurisdiction. All that can reasonably be asserted is that it ex-

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tends as far as may be requisite for its safety, and for some lawful end. According to the current of modern authority, it extends as far as a cannon shot will reach —*i. e.* a marine league ; 1 Kent 29 ; this limit was fixed when that was the range of a cannon ; 41 Ohio St. 81 ; it is said that it can be extended as the range of cannon increases ; Hall. Int. L. 157. It may be extended for protection in time of war, or for revenue purposes ; 139 U. S. 240 ; 41 Fed. Rep. 109. It has been said that the United States can attach to its coast an extent into the sea beyond the reach of cannon shot ; 1 Kent 29 ; and congress has recognized this limit by legislation as to captures made within a marine league of the shore ; *id.*

State legislation in Massachusetts which extends the territorial limit of a state three miles seaward from the shore is valid ; 139 U. S. 240 ; *i. e.* it may extend its territorial limits and the boundaries of its counties to the extent of the limits of the United States. So of a California act relating to a crime committed within the same limit ; 60 Fed. Rep. 42. Parliament "may extend the realm how far soever it may please ;" 2 Ex. D. 152. Under the Behring Sea Arbitration, it was decided that the United States cannot protect seals in the open sea beyond the three-mile limit.

It would not be unreasonable for the United States to assume control of the waters on the coast included within distant headlands, as from Cape Ann to Cape Cod, Nantucket to Montauk Point, and from the latter to the Capes of the Delaware ; 1 Kent 30.

"As between nations, the minimum limit of the territorial jurisdiction of a nation over tide waters is a marine league from the coast, and bays wholly within its territory which do not exceed two marine leagues at the mouth are within this limit." 139 U. S. 240. The Gulf of Mexico is part of the Atlantic Ocean ; 121 U. S. 67 ; but, on the other hand, the exclusive right of the British crown to the Bristol Channel, to the channel between Ireland and Great Britain, and between Scotland and Ireland, is uncontested ; 1 Phill. Int. L. § 189 ; and Chesapeake Bay and Delaware Bay are not a part of the high sea ; 1 Whart. Int. L. § 28 ; Narragansett Bay is claimed, by usage, to be within the jurisdiction of Rhode Island ; 16 Wall. 522 ; 9 R. I. 419 ; and Conception Bay in Newfoundland, though more than 20 miles wide at its mouth and nearly 50 miles long, is British territory ; 2 App. Cas. 394. It is probable that the Delaware and Chesapeake bays are the property of the United States, and England claims complete jurisdiction over the bays of Chaleur, Fortune, and Conception, and some other bays of Newfoundland, as closed seas ; Snow, Int. Law 27. The Zuyder Zee and Hudson's Bay are probably parts of the territory of the nations which surround them ; while the bays of Fundy and Chaleur are public ; 3 Whart. Int. L. 28, 304, 305*a*. The claim of Russia to sovereignty over the Pacific Ocean north of the 51st degree of latitude has been considered by the United States as against the rights of other nations ; 1 Kent 29. See 1895 Rep. Society for Reform and Codif. of the Laws, 17th meeting ; 5 Eng. Rul. Cas. 946 ; PILOT ; JURISDICTION.

**TERRITORY.** A part of a country separated from the rest and subject to a particular jurisdiction.

A portion of the country subject to and belonging to the United States which is not within the boundary of any state or the District of Columbia.

The constitution of the United States, art. 4, s. 3, provides that the congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property of the United States ; and nothing in this constitution shall be construed so as to prejudice any claims of the United States or of any state.

The United States has supreme sovereignty over a territory, and congress has full and complete legislative authority over its people and government ; 136 U. S. 1.

Congress possesses the power to erect territorial governments within the territory of the United States : the power of congress over such territory is exclusive and universal, and their legislation is subject to no control, unless in the case of ceded territory, as far as it may be affected by stipulations in the cessions, or by the ordinance of 1787, under which any part of it has been settled ; Story, Const. § 1322 ; Rawle, Const. 237 ; 1 Kent 243, 359 ; 1 Pet. 511. Congress has plenary legislative power over the territories of the United States, and upon the admission of a territory into the Union, may, if it so desires, effect a collective naturalization of its foreign-born inhabitants as citizens of the United States ; 143 U. S. 135.

The power of the United States to acquire territory by any means known to international law would seem to be beyond question. An interesting historical reference to the subject was made by Henry Hitchcock in an address before the University of Michigan in 1889.

"It is a matter of history that when Mr. Jefferson, in 1803, purchased the Louisiana territory from France, his own belief was that he had (in his own words) 'done an act beyond the constitution,' and he was not only anxious that the acquisition of Louisiana should be sanctioned and the future annexation of Florida authorized by an amendment to the constitution, but privately submitted to his party friends the draft of such an amendment, though in his message to congress submitting the treaty for ratification he did not mention the constitutional difficulty. But the popularity of the measure secured the ratification of the treaty and all necessary legislation to enforce it without further question. Twenty-five years later, the

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question was presented in the supreme court in the American Insurance Company *v.* Canter, with reference to the validity and effect of the treaty of 1819, by which Spain had ceded Florida to the United States. Marshall answered it in these brief words: 'The constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently that government possesses the power of acquiring territory, either by conquest or by treaty;' 1 Peters 511, 542."

In the case of the Alaska liquor laws the question was recently (1898) before the circuit court of appeals in the ninth circuit, and it was held as a "well-established doctrine" that "the territories of the United States are entirely subject to the legislative authority of congress. They are not organized under the constitution, nor subject to its complex distribution of the powers of government as the organic law, but are the creation, exclusively, of the legislative department, and subject to its supervision and control. . . . It [congress] may legislate in accordance with the special needs of each locality, and vary its regulations to meet the conditions and circumstances of the people. . . . In a territory all the functions of government are within the legislative jurisdiction of congress, and may be exercised though a local government or directly;" 86 Fed. Rep. 456, citing 16 How. 164; 101 U. S. 129; 114 *id.* 15; 136 *id.* 1; 141 *id.* 174; 152 *id.* 1.

When New Mexico was conquered by the United States it was only the allegiance of the people that was changed, their relation to each other and their property rights remained unchanged. The executive of the United States properly established a provincial government which ordained laws and instituted a judicial system, which continued in force until modified by the direct action of congress or by the territorial government established by it; 20 How. 176. See the articles on the various territories; 12 Harv. L. Rev. 205; STATE; SOVEREIGNTY.

**TERROR.** The state of the mind which arises from an event or phenomenon that may serve as a prognostic of some catastrophe; affright from apparent danger.

See RIOT; ROBBERY; PUTTING IN FEAR.

**TERTIUS INTERVENIENS** (Lat.). **In Civil Law.** One who, claiming an interest to the subject or thing in dispute in action between other parties, asserts his right to act with the plaintiff, to be joined with him, and to recover the matter in dispute, because he has an interest in it; or to join the defendant, and with him oppose the interest of the plaintiff, which it is his interest to defeat. He differs from the intervenor, or him who interpleads in equity. 4 Bouvier, Inst. n. 3819, note.

**TEST.** Something by which to ascertain the truth respecting another thing. 7 Pa. 428.

**TEST ACT.** The act of 25 Car. II. c. 2, by which it was enacted that all persons holding any office, civil or military (excepting some very inferior ones), or receiving pay from the crown, or holding a place of trust under it, should take the oath of allegiance and supremacy, and subscribe a declaration against transubstantiation, and receive the sacrament according to the usage of the Church of England, under a penalty of £500 and disability to the office. 4 Bla. Com. 59. Abolished 9 Geo. IV. c. 17, so far as taking the sacrament is concerned, and a new form of declaration substituted. Mozl. & W.

**TESTA DE NEVIL.** An ancient and authentic record in two volumes, in the custody of the queen's remembrancer in the exchequer, said to be compiled by John de Nevil, a justice itinerant, in the eighteenth and twenty-fourth years of Henry III. Cowel.

**TESTACY.** The state or condition of leaving a will at one's death, as opposed to intestacy.

**TESTAMENT. In Civil Law.** The appointment of an executor or testamentary heir, according to the formalities prescribed by law. Domat, liv. 1, tit. 1, s. 1.

At first there were only two sorts of testaments among the Romans,—that called *calatis comitiis*, and another called *in procinctu*. (See below.) In the course of time, these two sorts of testament having become obsolete, a third form was introduced, called *per æs et libram*, which was a fictitious sale of the inheritance to the heir apparent. The inconveniences which were experienced from these fictitious sales again changed the form of testament; and the prætor introduced another, which required the seal of seven witnesses. The emperors having increased the solemnity of these testaments, they were called written or solemn testaments, to distinguish them from nuncupative testaments, which could be made without writing. Afterwards military testaments were introduced, in favor of soldiers actually engaged in military service.

A *testament calatis comitiis*, or made in the comitia,—that is, the assembly of the Roman people,—was an ancient manner of making wills used in times of peace among the Romans. The comitia met twice a year for this purpose. Those who wished to make such testaments caused to be convoked the assembly of the people by these words, *calatis comitiis*. None could make such wills that were not entitled to be at the assemblies of the people. This form of testament was repealed by the law of the Twelve Tables.

A *civil testament* is one made according to all the forms prescribed by law, in contradistinction to a military testament, in making which some of the forms may be dispensed with. Civil testaments are more ancient than military ones; the former were in use during the time of Romulus, the latter were introduced during the time of Coriolanus. See *Hist. de la Jurisp. Rom. de M. Terrasson*, p. 119.

A *common testament* is one which is made jointly by several persons. Such testaments are forbidden in Louisiana, Civ. Code of La. art. 1735, and by the laws of France, Code Civ. 968, in the same words, namely: "A testament cannot be made by the same act, by two or more persons, either for the benefit of a third person, or under the title of a reciprocal or mutual disposition."

A *testament ab irato* is one made in a gust of passion or hatred against the presumptive heir, rather than from a desire to benefit the devisee. When the facts of unreasonable anger are proved, the will is annulled as unjust and as not having been freely made. See AB IRATO.

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A *mystic testament* (called a solemn testament, because it requires more formality than a nuncupative testament) is a form of making a will which consists principally in enclosing it in an envelope and sealing it in the presence of witnesses.

A *nuncupative testament* was one made verbally. See NUNCUPATIVE WILL.

An *olographic testament* is one which is written wholly by the testator himself. In order to be valid, it must be entirely written, dated and signed by the hand of the testator. It is subject to no other form. See La. Civ. Code, art. 1581.

**TESTAMENTARY.** Belonging to a testament; as, a testamentary gift; a testamentary guardian.

**TESTAMENTARY CAPACITY.** Mental capacity sufficient for making a valid will. As to what constitutes, see WILLS; UNDUE INFLUENCE; 12 Am. L. Reg. 385.

**TESTAMENTARY CAUSES.** Causes relating to probate of testaments and administration and accounts upon the same. They are enumerated among ecclesiastical causes by Lord Coke. 5 Co. 1. See JUDICATURE ACTS.

**TESTAMENTARY GUARDIAN.** A guardian appointed by last will of a father to have custody of his child and his real and personal estate till he attains the age of twenty-one. In England, the power to appoint such guardian was given by 12 Car. II. c. 34. The principles of this statute have been generally adopted in the United States.

**TESTAMENTARY PAPER.** An instrument in the nature of a will; an unprobated will.

**TESTAMENTARY POWER.** The power to make a will is neither a natural nor a constitutional right, but depends wholly upon statute. 100 Mass. 234. Such power has been expressly conferred by statute in most of the states, in some cases unrestricted, in others with various restrictions by reason of dower and homestead rights, and for other reasons; 3 Jarm. Wills 721, 731.

**TESTAMENTI FACTIO** (Lat.). **In the Civil Law.** The ceremony of making a testament, either as testator, heir, or witness.

**TESTATE.** The condition of one who leaves a valid will at his death.

**TESTATOR.** One who has made a testament or will.

See DEVISOR; DURESS; FEME COVERT; IDIOT; WILL.

**TESTATRIX.** A woman who has made a will or testament.

**TESTATUM** (Lat.). The name of a writ which is issued by the court of one county to the sheriff of another county in the same state, when the defendant cannot be found in the county where the court is located: for example, after a judgment has been obtained, and a *ca. sa.* has been issued, which has been returned *non est inventus*, a *testatum ca. sa.* may be issued to the sheriff of the county where the defendant is. See Viner, Abr. *Testatum* 259.

**In Conveyancing.** That part of a deed which commences with the words "This indenture witnesseth."

**TESTE MEIPSO.** (Lat.). **In Old English Law and Practice.** A solemn formula of attestation by the sovereign, used at the conclusion of charters, and other public instruments, and also of original writs, out of chancery. Spelm.

**TESTE OF A WRIT. In Practice.** The concluding clause, commencing with the word *witness*, etc. A signature in attestation of the fact that a writ is issued by authority. A writ which bears the teste is sometimes said to be *tested*.

The act of congress of May 8, 1792, directs that all writs and process issuing from the supreme or a circuit court shall bear teste of the chief justice of the supreme court, or, if that office be vacant, of the associate justice next in precedence; and that all writs of process issuing from a district court shall bear teste of the judge of such court, or, if the said office be vacant, of the clerk thereof. See R. S. §§ 911, 912.

**TESTES.** Witnesses.

**TESTIFY.** To give evidence according to law. A witness testifying in regard to conversations had with a party must state either the language used, or the substance of it. The *impression* left upon his mind by the conversation is not evidence. 33 Md. 135.

**TESTIMONIAL PROOF. In Civil Law.** A term used in the same sense as *parol evidence* is used at common law and in contradistinction to *literal proof*, which is written evidence.

**TESTIMONIUM CLAUSE.** That clause of a deed or instrument with which it concludes.

**TESTIMONY.** The statement made by a witness under oath or affirmation.

The statement of a witness under oath; yet it need not necessarily be made to a judicial tribunal. Thus, a deposition may contain testimony, although never used in the cause pending; 134 Ind. 35. It is a species of evidence by means of witnesses; 43 La. Ann. 1078, 1194.

Testimony and evidence are synonymous, but evidence includes testimony, as well as all other kinds of proof. It seems settled, both in England and this country, that a prisoner may be convicted on the testimony of an accomplice alone, though the court may, at its discretion, advise an acquittal unless such testimony is corroborated on material points; Tay. Ev. 830–832. See 11 Harv. L. Rev. 169; Whart. Cr. Ev. § 441. See EVIDENCE; EXPERTS.

**TESTIS.** A witness. *Testari:* to be a witness, bear witness to; to be witnessed, shown, certified. Anderson, L. Dict.

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**TESTMOIGNE.** This is an old and barbarous French word, signifying, in the old books, evidence. Comyns, Dig. *Testmoigne.*

**TEXAS.** The name of one of the states of the American Union.

It was a province of Mexico until 1836, when the inhabitants established a separate republic. On March, 1845, the congress of the United States, by a joint resolution, submitted to the new republic a proposition providing for the erection of the territory of Texas into a new state, and for its annexation under the name of the state of Texas. This proposition was accepted by the existing government of Texas on the 23d of June, 1845, and was ratified by the people in convention on the 6th of July. On the 29th of December following, by a joint resolution of congress, the new state was formally admitted into the Union. The present constitution of the state was adopted by a convention, on November 24, 1875, and was voted upon and accepted by the people on February 17, 1876.

THE LEGISLATIVE POWER.—The legislative power of the state is vested in a senate and house of representatives. The senate consists of thirty-one members, and cannot be increased above this number. The house of representatives, at the adoption of the constitution, consisted of ninety-three members, but may be increased after any apportionment upon the ratio of not more than one representative for every fifteen thousand inhabitants; *provided*, the number never exceeds one hundred and fifty.

The regular sessions of the legislature take place biennially. Extra sessions may be called by the governor at any time.

THE EXECUTIVE POWER.—The executive department of the state consists of a governor, lieutenant-governor, secretary of state, comptroller, treasurer, commissioner of general land office, and attorney-general.

*The Governor* is elected at the time and places of elections for members of the legislature, for two years.

*A Lieutenant-Governor* is chosen at every election for governor, who succeeds the governor in case of vacancy.

THE JUDICIAL POWER.—The judicial power is vested in one supreme court, in courts of civil appeals, in courts of criminal appeals, in district courts, in county courts, in commissioners' courts, in courts of justices of the peace, and in such other courts as may be established by law.

*The Supreme Court* consists of a chief justice and two associate justices, any two of whom form a quorum, and the concurrence of two judges is necessary to the decision of a case.

The supreme court has appellate jurisdiction only, co-extensive with the limits of the state; it only extends to questions of law arising in civil cases of which the courts of civil appeals have appellate but not final jurisdiction. It and the judges thereof have the power to issue writs of mandamus, and all other writs necessary to enforce its jurisdiction.

*The Courts of Civil Appeals* are composed of a chief justice and two associate justices, elected for six years. The state is divided into five supreme judicial districts, in each of which is held a court of civil appeals. The appellate jurisdiction of these courts extends to civil cases within the respective districts where the district court has original or appellate jurisdiction; where the county court has original jurisdiction, and where it has appellate jurisdiction when the amount in controversy exceeds one hundred dollars.

The *Court of Criminal Appeals* consists of three judges, who have the same qualifications as judges of the supreme court; they are elected for six years. This court has appellate jurisdiction in all criminal cases to enforce its own jurisdiction.

*District Courts.* The state is divided into fifty-five judicial districts, each having one judge. It has original jurisdiction in criminal cases of the grade of felony; of all suits in behalf of the state to recover penalties, forfeitures, and escheats; of all cases of divorce; in cases of misdemeanor involving official misconduct; of all suits to recover damages for slander or defamation of character; of all suits for the trial of title to land, and for the enforcement of liens thereon; of all suits for trial to right of property levied on by virtue of any writ of execution, sequestration, or attachment, when the property levied on shall be equal to or exceed in value five hundred dollars; and of all suits, complaints, or pleas whatsoever, without regard to any distinction between law and equity, when the matter in controversy shall be valued at or amount to five hundred dollars exclusive of interest; of contested elections. It has appellate jurisdiction and general control in probate matters over the county courts, and original jurisdiction and general control, over executors, administrators, guardians, and minors, under such regulations as may be prescribed by the legislature.

The *County Courts* have exclusive original jurisdiction in civil cases when the matter in controversy is between two hundred and five hundred dollars in value, and concurrent jurisdiction with the district court when the amount exceeds five hundred dollars and is less than one thousand dollars; it also has certain appellate jurisdiction over justices' courts. The judges of these courts are elected in each county by the qualified voters for a term of two years.

**TEXTUS ROFFENSIS.** An ancient manuscript containing many of the Saxon laws, and the rights, customs, tenures, etc., of the church of Rochester, drawn up by Ernulph, bishop of that see from 1114 to 1124. Cowel.

**THAINLAND. In Old English Law.** The land which was granted by the Saxon kings to their thains or thanes was so called.

**THANE. In Saxon Law.** A word which sometimes signifies a nobleman, at others a freeman, a magistrate, an officer, or minister. A tenant of the part of the king's lands called the king's "thaneage." *Termes de la Ley.*

**THAVIES INN.** See INNS OF COURT.

**THE.** An article which particularizes the subject spoken of. "Grammatical niceties should not be resorted to without necessity; but it would be extending liberality to an unwarrantable length to confound the articles 'a' and 'the.' The most unlettered persons understand that 'a' is indefinite but 'the' refers to a certain object." 2 Binn. 516, per Tilghman, C. J. It will not be construed as equivalent to "this"; 24 S. W. Rep. (Tex.) 290.

**THEATRE.** A house for the exhibition of dramatic performances. 121 Pa. 225. See 4 St. L. 126.

An edifice used for the purpose of dramatic, operatic, or other representations, plays, or performances for admission to which entrance money is received. The word does not import necessarily anything but the stage on which the actors play and the room in which the acting is done and seen. 56 Ga. 477. Although the term has an extended signification and comprehends a variety of performances, yet it is conceived that all which it does legitimately comprehend partake more or less of the character of the drama. 22 Ala. 73. A music hall is not a theatre: 21 Q. B. D. 569. Theatrical performances may include negro minstrel performances; 4 Lea 312; but not tumbling or fencing; 6 T. R. 286. Where a statute prohibits the obstruction of passage-ways in a theatre, it should be literally construed, and does not give

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the proprietor any discretion to allow persons to stand in the passage-ways, even though the number be not so great as to prevent free exit in case of danger; 14 Daly 125. That a number of seats for a performance were sold after knowledge that the seats were filled is sufficient proof to sustain a judgment, in the absence of evidence that such sale was in opposition to defendant's wishes; *id.* A theatre ticket is a mere license to enter the house and witness the performance and may be revoked at the pleasure of the manager; 12 Gray 221; 51 N. Y. 246; 13 M. & W. 838; but see 93 Pa. 234, where it was held that the purchaser of a particular seat in a theatre acquired more than a mere license; that his right was more in the nature of a lease, entitling him to peaceful ingress and egress and exclusive possession of the designated seats during the performance.

Spectators may express their feelings by applause or hissing, but if any number of persons come to a theatre with a preconcerted design of making a disturbance, though no personal violence is offered, they are guilty of a riot; Wandell, Theatres 238.

A visitor is entitled to a seat. This right depends on the nature of his ticket. If it is for a reserved seat, he has a right to that particular seat; if not reserved, then to any one which he may find unoccupied and which has not been previously sold to another; 10 Phila. 180. A return check given to one after the performance commences may be transferred by the spectator to some other person; 12 Cent. L. J. 359; but the holder of a return check cannot transfer the same if the original ticket of admission was non-transferable; Wandell, Theatres 246. The proprietor has the right to annex to tickets of admission the condition that they shall not be transferable, and if transferred, that they shall be worthless; 19 Abb. N. C. 301; for a license is personal to the licensee and is not salable nor transferable; 51 N. Y. 250. It has been held that the proprietor is not liable to a patron for property left in his private box which was stolen; 39 N. Y. Supp. 1039.

**THEFT.** A popular term for larceny. Acts constituting embezzlement or swindling may be properly so called. 21 Tex. App. 133. See 1 *id.* 68.

**In Scotch Law.** The secret and felonious abstraction of the property of another for sake of lucre, without his consent. Alison, Cr. Law 250.

**THEFT-BOTE.** The act of receiving a man's goods from the thief, after they had been stolen by him, with the intent that he shall escape punishment. This is an offence punishable at common law by fine and imprisonment. Hale, Pl. Cr. 130.

**THELONMANNUS.** The toll-man or officer who receives toll. Cowel.

**THELUSSON ACT.** The stat. 39 & 40 Geo. III., passed in consequence of objections to a Mr. Thelusson's will for the purpose of preventing the creation of perpetuities. See PERPETUITY; 4 Ves. 221.

**THEME.** The power of jurisdiction over naifs or villeins and their suits, offspring, lands, goods, and chattels. Co. Litt. 116 *a*.

**THEMMAGIUM.** A duty or acknowledgment paid by inferior tenant in respect of theme or team. Cowel.

**THEN.** As an adverb, means "at that time," referring to a time specified, either past or future. 16 S. C. 329. See 128 Mass. 40. It may also denote a contingency and be equivalent to "in that event." 20 N. J. L. 505; it may sometimes mean "soon after"; 8 Hun 43; or "further". 2 Jarm. 595. In a will it has been held to import the time at which the class described is to be ascertained; 3 Ves. 486; but see 17 Beav. 417.

**THEN AND THERE.** Words of reference, and when the time and place have once been named with certainty, it is sufficient to refer to them afterwards by these words. 24 N. H. 146. Where an averment merely declares a legal conclusion, the words "then and there" need not be repeated to it. 78 Me. 74.

**THENCE.** In surveying, and in description of land by courses and distances, this word preceding each course given, imports that the following course is continuous with the one before it. 141 Mass. 66; 6 N. E. Rep. 702.

**THEOCRACY.** A species of government which claims to be immediately directed by God.

**THEOWES, THEOWMEN, THEWS.** Slaves, captives, or bondmen. Spelm. Feuds.

**THEREUPON.** Without delay or lapse of time. 133 Mass. 205. See 47 Kan. 340. Immediately. 9 L. J. Ex. 272; 6 M. & W. 492. See 3 Q. B. 79, where the terms thereupon and thereby are distinguished.

**THEREWITH.** As used in the reform act; 2 W. IV. c. 45; referring to house, etc., the clause *that any land occupied therewith*, has reference to time and not to locality. 22 L. J. C. P. 38; 50 *id.* 117.

**THESAURUS, THESARIUM.** A treasure.

**THESAURUS INVENTUS.** Treasure-trove (*q. v.*).

**THESMOTHETE.** A law-maker; a law-giver.

**THIEF.** One who has been guilty of larceny or theft. The term covers both compound and simple larceny. 1 Hill 25.

**THINGS.** By this word is understood every object, except man, which may become an active subject of right. *Code du Canton de Berne*, art. 332. In this sense it is opposed, in the language of the law, to

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the word persons. See CHOSE; PROPERTY; RES.

**THINGUS. In Saxon Law.** A thane or nobleman; knight or freeman. Cowel.

**THINK.** To believe, to consider, to esteem. 59 Ia. 414.

**THIRD-BOROW. In Old English Law.** A constable. Lombard, Duty of Const. 6; 28 Hen. VIII. c. 10.

**THIRD-NIGHT-AWN-HINDE.** By the laws of St. Edward the Confessor, if any man lay a third night in an inn, he was called a "third-night-awn-hinde," and his host was answerable for him if he committed any offence. The first night he was reckoned a stranger; the second night a guest; and the third night an awn-hinde. Bract. l. 3; Whart.

**THIRD PARTIES.** A term used to include all persons who are not parties to the contract, agreement, or instrument of writing by which their interest in the thing conveyed is sought to be affected. 1 Mart. La. N. S. 384.

But it is difficult to give a very definite idea of *third persons;* for sometimes those who are not parties to the contract, but who represent the rights of the original parties, as executors, are not to be considered third persons. See 1 Bouvier, Inst. n. 1335.

**THIRD PENNY.** Of the fines and other profits of the county courts (originally, when those courts had superior jurisdiction, before other courts were created) two parts were reserved to the king, and a third part or *penny* to the earl of the county. See Kennett, Paroch. Antiq. 418.

**THIRLAGE. In Scotch Law.** A servitude by which lands are astricted or thirled to a particular mill and the possessors bound to grind their grain there, for the payment of certain multures and sequels as the agreed price of grinding. Erskine, Inst. 2. 9. 18.

**THIS.** When referring to different things before expressed, "this" refers to the thing last mentioned, and "that" to the thing first mentioned. 66 Pa. 251. It is a simple word of relation and its ordinary grammatical meaning will not be extended so as to include something else than that to which it relates. 14 Q. B. D. 720.

**THOLED AN ASSIZE.** A plea in bar in Scotland in a criminal case to the effect that the accused has once been tried for the offence charged. 35 Am. L. Reg. 629.

**THOROUGHFARE.** A street or way opening at both ends into another street or public highway, so that one can go through and get out of it without returning. It differs from a *cul de sac*, which is open only at one end.

Whether a street which is not a thoroughfare is a highway seems not fully settled; 1 Ventr. 189. In a case tried in 1790 where the *locus in quo* had been used as a common street for fifty years, but was no thoroughfare, Lord Kenyon held that it would make no difference; for otherwise the street would be a trap to make people trespassers; 11 East 375. This decision in several subsequent cases was much criticised, though not directly overruled; 5 Taunt. 126; 5 B. & Ald. 456; 3 Bingh. 447; 1 Camp. 260; 4 Ad. & E. 698. But in a recent English case the decision of Lord Kenyon was affirmed by the unanimous opinion of the court of queen's bench. The doctrine established in the latter case is that it is a question for the jury on the evidence, whether a place which is not a thoroughfare is a highway or not; 14 E. L. & E. 69. And see 28 *id.* 30. The United States authorities seem to follow the English; 8 Allen 242; 24 N. Y. 559 (overruling 23 Barb. 103); 87 Ill. 189; s. c. 29 Am. Rep. 49 and note; *contra*, 2 R. I. 172. See HIGHWAY; STREET.

**THOUSAND.** This word may by custom or usage of trade acquire a peculiar meaning, as when applied to rabbits it has been held to denote one hundred dozen; 3 B. & Ad. 728.

**THREAD.** A figurative expression used to signify the central line of a stream or watercourse. See FILUM AQUÆ; WATERCOURSE; RIVER.

**THREAT.** A menace of destruction or injury to the lives, character, or property of those against whom it is made. To extort money under threat of charging the prosecutor with an unnatural crime has been held to be robbery; 1 Park. Cr. R. 199; but to extort money or other valuable thing by threat of prosecution for passing counterfeit money, or any prosecution except that for an unnatural crime, is not robbery; 7 Humph. 45; though it is a criminal offence; 11 Mod. 137; 2 Dall. 399, n. It must be under such circumstances as to operate, to some extent at least, on the mind of the one whom it is expected to influence. The meaning of the word implies that it is a menace of some kind, which in some manner comes to the knowledge of the one sought to be affected; 84 Ia. 473. See THREATENING LETTER.

**In Evidence.** Menace. See CONFESSION.

**THREATENING LETTER.** Sending threatening letters to persons for the purpose of extorting money is said to be a misdemeanor at common law. 4 Bla. Com. 126. The threat must be of a nature calculated to overcome a firm and prudent man; but this rule has reference to the general nature of the evil threatened, and not to the probable effect of the threat on the mind of the particular party addressed; 1 Den. Cr. Cas. 512. The party who makes a threat may be held to bail for his good behavior. See Com. Dig. *Battery* (D).

By act of congress of Sept. 26, 1888, the sending of any postal card or mail matter with threatening language on the outside

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thereof is forbidden and made punishable by fine and imprisonment; R. S. 1 Supp. 621. Postal cards held within the act were: One from a creditor threatening to "place the claim with our law agency for collection;" 40 Fed. Rep. 664; demanding payment and threatening to place it in the hands of a lawyer for collection; *id.* Held not within the act: notice that a debt is past due and that a collector has called several times; *id.*; and notice that rent was due and if not paid would be placed in the hands of an officer; 51 *id.* 817. Extraneous evidence is not admissible to show that the language of a postal card on its face threatening or abusive, was not so intended by the sender, and not so understood by the recipient; 2 Mo. App. Repr. 980.

Statutes exist in many of the United States, though they vary somewhat in their provisions, some of them requiring the threatening to have been done "maliciously," others "knowingly." The indictment for this offence need not specify the crime threatened to be charged, for the specific nature of the crime which the prisoner intended to charge might intentionally be left in doubt; 3 Heisk. 262; 8 Barb. 547. The threat need not be to accuse before a judicial tribunal; 2 M. & R. 14; 30 Mich. 460. A person whose property has been stolen has himself no power to punish the thief without process of law, and cannot claim the right to obtain compensation for the loss of his property by maliciously threatening to accuse him of the offence, or to do an injury to his person or property, with intent to extort property from him; 24 Me. 71; 128 Mass. 55. A mere threat that the prosecutor would be indicted or complained of has been held to be within the statute, even though no distinct crime was spoken of in the letter, because of the likelihood of threatening letters being written with as much disguise and artifice as possible, but still being sufficient to accomplish the purpose intended; 68 Me. 473; 68 Mo. 66. See 3 Cr. L. Mag. 720; WHIPPING.

**THREE-DOLLAR PIECE.** A gold coin of the United States, of the value of three dollars.

The three-dollar piece was authorized by the seventh section of the act of Feb. 21, 1853. 10 Stat. at L. It is of the same fineness as the other gold coins of the United States. The weight of the coin is 77.4 grains.

The three-dollar piece is a legal tender in payment of any amount; R. S. § 3511.

**THREE-MILE LIMIT.** See SEAL FISHERIES; TERRITORIAL WATERS.

**THRESHING MACHINE.** The term includes the horse power by means of which the separator is propelled. 15 Neb. 428.

**THROAT. In Medical Jurisprudence.** The anterior part of the neck. Dunglison, Med. Dict.; 1 Chitty, Med. Jur. 97, n.

The word *throat*, in an indictment which charged the defendant with murder by cutting the throat of the deceased, does not mean, and is not to be confined to, that part of the neck which is scientifically called the throat, but signifies that which is commonly called the throat. 6 C. & P. 401.

**THRITHING.** The third part of a county consisting of three or more hundreds. Cowel. Corrupted to the modern "riding," which is still used in Yorkshire. 1 Bla. Com. 116.

**THROUGH.** It has been held to be equivalent to "over" in a statute providing for laying out the road through certain grounds; 119 Ill. 147; and it may mean within; 18 Sup. Ct. Rep. 788.

**THURINGIAN CODE.** See CODE.

**TICK.** Credit: as, if a servant usually buy for the master upon tick, and the servant buy something without the master's order, yet if the master were trusted by the trader he is liable; 3 Kebl. 625; 10 Mod. 111.

**TICKET.** A railroad ticket may be a receipt or voucher, rather than a contract; 5 L. R. A. 818; 77 Mo. 663; 41 Ohio St. 560; it is the evidence of a contract, but does not constitute the whole contract; 34 Am. & Eng. R. R. Cas. 219; Wheeler, Carriers 263; 15 Pac. Rep. (Kan.) 899; it may contain some condition or limitation which becomes a part of the contract; 13 Hun 359; 113 Pa. 519; 1 Harv. Law Rev. 17. The actual contract may be shown by parol testimony; 143 U. S. 60; 80 Ia. 92. The purchaser of a railroad ticket has a right to rely upon the statements of the agent; 21 Oreg. 121; 52 Fed. Rep. 197; 106 Mass. 153. Agents at intermediate stations and gatekeepers cannot vary the terms of the contract; 137 Mass. 293; 63 Md. 106.

A ticket good between two designated stations, upon trains which stop at such points, entitles the holder thereof to ride from intermediate stations to either of said stations, or from such stations to intermediate stations, regardless of conditions in the ticket to the contrary; 26 S. E. Rep. (Ga.) 358. But where a ticket provided that it should be forfeited if used for any other station than the one named, it was held that a passenger who rode on it to a point beyond the station named, paying his fare for the additional distance, was liable for the fare for the entire distance travelled; [1895] 1 Q. B. 862. One who takes the wrong train by mistake can leave it at the first stopping-place, without payment of fare; this rule does not apply to one who has a season ticket and takes a train believing that it is good on that train; 40 N. E. Rep. (Mass.) 20. Where a mileage book purchased by one person is sold to another who presents it, the conductor cannot take it up, but may collect full fare; 55 Alb. L. J. 164. As between a conductor and a passenger, a ticket is conclusive as to the right of the latter to travel; 15 Ill. App. 100; 50 Fed. Rep. 496;

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15 Ind. App. 366. As a rule a passenger has a right to presume that a ticket agent will perform his whole duty and is not bound to examine his ticket to see that it is correct, unless put upon his inquiry; 70 Fed. Rep. 585; 166 Pa. 4; 77 Ga. 678. When a carrier has notified a connecting carrier that it will not recognize the tickets of the latter, it may refuse to accept such tickets; 157 U. S. 225.

A ticket defaced by a passenger so as to be unintelligible, may be refused; 76 Md. 207. A carrier may specify upon what trains a ticket is good; 61 Vt. 378; or charge fare for the actual distance travelled, if a passenger takes a wrong train; 40 Ind. 37; it must stop at a station for which it has sold a ticket; 79 Va. 130. A purchaser for value and without notice, of a ticket fraudulently obtained from a carrier, acquires no title thereto; 36 Ohio St. 647. A passenger who accepts a ticket and signs it is bound by the conditions expressed in it; 133 U. S. 146; 47 Ind. 79; if such conditions are reasonable; 100 U. S. 24; but not if he is unable to read, and no explanation is made by the agent who sells it; 23 Fed. Rep. 765; or if he is misled by the carrier: 30 N. W. Rep. (Ind.) 424. There is no presumption that the passenger has read a notice on his ticket; 12 Gray 388; 48 N. Y. 212. See 60 Fed. Rep. 624; but see 46 L. J. C. P. 768.

Where the conditions of a ticket are such that an innocent holder thereof may use it, it is the subject of embezzlement; 43 N. E. Rep. (Mass.) 499.

A passenger having lost his ticket cannot show by others that he purchased it; 14 Lea 128. The rule which requires the production of a ticket is reasonable; 97 Mich. 433; 15 N. Y. 455; 31 Ill. App. 435; [1896] 1 Q. B. 253; reasonable time to produce one should be given; 31 Ill. App. 435; a conductor is not bound to search the pockets of a passenger to find his ticket; 14 Lea 128. A passenger may be required to exhibit his ticket before entering a train; 1 Ill. App. 472, 449; 2 Tex. App. 206; and if he exhibits his ticket and demands a seat he has a right to a seat before he surrenders it; 53 Mo. 317.

A passenger cannot stop over at an intermediate station unless such right is conferred by his contract; 51 Cal. 425; 24 N. J. L. 435; 13 Hun 359; 34 Md. 532. A purchaser of a limited ticket over connecting lines is only bound to make a continuous trip over the part of the route covered by each coupon of the ticket, but must complete the trip within the time limited in the ticket; 43 Ark. 529; 67 Ill. 393; 18 L. R. A. 55.

When a carrier furnishes facilities, it may require a passenger to purchase a ticket before entering a train; 75 Ill. 125; 53 Me. 279; 17 Mo. App. 158; 46 Ind. 293; 132 Mass. 116. It must keep a ticket office open for a reasonable time before the departure of trains; 90 Ia. 562; 67 Ill. 316; 15 Minn. 496.

A statute regulating the issuance and taking up of tickets by carriers is an exercise of the police power; 63 Ind. 552; and does not impair the obligation of contracts nor interfere with commerce between the states; *id.*

A statute limiting the sale of passage tickets and tickets for sleeping accommodations on vessels and railway trains to authorized agents is not in violation of the provisions of the constitution of the United States prohibiting the depriving of citizens of the rights of liberty, property, or the equal protection of the law, nor does it confer a special privilege upon any class of persons; 145 U. S. 263; 18 N. Y. L. J. 1541; 149 Ill. 600; 57 Minn. 345; 63 Ind. 552; 14 Phila. 384; nor does it create a monopoly; 50 N. Y. S. 56; but see Tiedm. Lim. Pol. Pow. 293.

The Michigan supreme court holds that a railroad company cannot be compelled to sell mileage books at a flat two-cent rate; the company's right to fix its tolls is a vested right which the state must pay for if it takes it away; Asso. Press Despatch, Oct. 8, 1898.

A ticket sold at a reduced rate on condition that it is not transferable is not valid in the hands of a transferee; 43 S. W. Rep. (Tex.) 901.

The holder of a ticket from Trenton to Elmira was injured in Pennsylvania through defendant's negligence; it was held that his right to recover was governed by the law of Pennsylvania; 176 Pa. 45.

See BAGGAGE; PASSENGER; COMMON CARRIERS OF PASSENGERS; INTERSTATE COMMERCE COMMISSION; RATES.

**TICKETS OF LEAVE.** Licenses to be at large, granted to convicts for good conduct, but recallable upon subsequent misconduct. Whart. Dict. See PRISONER. As to a similiar practice in the United States, see PAROLE.

**TIDE LANDS.** Lands covered and uncovered by the flow and ebb of the tide. The United States may grant, for appropriate purposes, titles or rights in the soil below high-water mark of tide waters. But they have never done so by general laws, and, unless in some case of international duty or public exigency, have acted upon the policy of leaving the administration and disposition of the sovereign rights in navigable waters, and in the soil under them, to the control of the states, respectively, when organized and admitted into the Union; 153 U. S. 273.

The words "public lands," as used in legislation, mean such as are subject to sale or other disposal under general laws, and not tide lands; 92 U. S. 761; 125 U. S. 618. Tide lands are not subject to the location of land scrip under the act of 1872; 153 U. S. 273, 287.

**TIDE-WATER.** Water which flows and reflows with the tide. All arms of the sea, bays, creeks, coves, or rivers, in which the tide ebbs and flows, are properly denominated tide-waters.

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The term tide-water is not limited to water which is salt, but embraces, also, so much of the water of fresh rivers as is propelled backwards by the ingress and pressure of the tide; 5 Co. 107; 108 Mass. 436; which might be said to be within the ebb and flow; 7 Pet. 324. The flowing, however, of the waters of a lake into a river do not constitute such a river a tidal or, technically, navigable river; 20 Johns. 98.

The bed or soil of all tide-waters belongs, in England, to the crown, and in this country to the state in which they lie; and the waters themselves are public; so that all persons may use the same for the purpose of navigation and fishery, unless restrained by law; 5 B. & A. 304; 1 Macq. Hou. L. 49; 152 U. S. 1. See 22 Or. 410; *id.* 438. In England, the power of parliament to restrain or improve these rights is held to be absolute; 4 B. &. C. 598. In this country, such a power is subject to the limitations of the federal constitution; and while both the general and state governments may adopt measures for the improvement of navigation; 4 Rawle 9; 9 Conn. 436; and the states may grant private rights in tide-waters, provided they do not conflict with the public right of navigation; 21 Pick. 344; yet neither the general nor the state governments have the power to destroy or materially impair the right of navigation. See BRIDGE; FISHERY; RIVER; RIPARIAN PROPRIETORS; TERRITORIAL WATERS; WHARF.

**TIE.** When two persons receive an equal number of votes at an election, there is said to be a tie. Neither is elected. When the votes are given on any question to be decided by a deliberative assembly, and there is a tie, the question is lost. See MAJORITY.

**TIEL.** An old manner of spelling *tel:* such as, nul tiel record, no such record.

**TIEMPO INHABIL. In Louisiana.** A time when a man is not able to pay his debts.

**TIERCE.** A liquid measure, containing the third part of a pipe, or forty-two gallons.

**TIGNI IMMITTENDI** (Lat.). **In Civil Law.** A servitude which confers the right of inserting a beam or timber from the wall of one house into that of a neighboring house, in order that it may rest on the latter and that the wall of the latter may bear this weight. Dig. 8. 2. 36; 8. 5. 14.

**TIMBER.** The body, stem, or trunk of a tree, or the larger pieces or sticks of wood which enter the frame-work of a building or other structure, excluding the plank, boards, shingles, or lath which may be used to complete the structure. 47 Wis. 192. The term now seems to include all sorts of wood from which any useful articles can be made or which may be used to advantage in any class of manufacture or construction; 14 Fed. Rep. 824. Railroad ties are held to be timber; 52 Wis. 393; fence rails are not; 43 Tex. 374; nor are trees, when suitable only for firewood; 51 Me. 417.

A federal act of 1897 makes it a penal offence to set fire to timber on the public domain.

**TIMBER TREES.** Oak, ash, elm, in all places, and, by local custom, such other trees as are used in building; 2 Bla. Com. 281; also beech, chestnut, walnut, cedar, fir, aspen, lime, sycamore, and birch trees; 6 George III. ch. 48; and also such as are used in the mechanical arts; Lewis, Cr. L. 506. Timber-trees, both standing, fallen, and severed and lying upon the soil, constitute a portion of the realty, and are embraced in a mortgage of the land; 1 Washb. R. P. 13; 19 Me. 53; and pass, by a judicial sale under such mortgage, to the purchaser; 1 Wall. 53; 54 Me. 313; 1 Den. 554; 61 Pa. 294. Some contracts for the sale of timber trees are contracts for the sale of an interest in lands; 10 N. Y. 117; 53 Pa. 206; 119 Ind. 7; and, as such, within the statute of frauds; 33 Pa. 266; 50 Ohio St. 57. The better action for damages for cutting and carrying away timber trees seems to be that of trespass *quare clausum fregit et de bonis asportatis* (unless otherwise designated by statute); 2 Greenl. 173, 387. See WASTE; SALE; TREE.

**TIME.** The measure of duration. Lapse of time often furnishes a presumption, stronger or weaker according to the length of time which has passed, of the truth of certain facts, such as the legal title to rights, payment of or release from debts.

Time in Great Britain, in any statute or legal instrument, means, by statute, Greenwich mean time, and in Ireland, Dublin time. The only standard of time recognized by the courts is the meridian of the sun; not any arbitrary standard; 84 Ga. 159; 3 H. & N. 866.

The general rule of law is that the performance of a contract must be completed at or within the time fixed by the contract; Leake, Contr., 3d ed. 772. Wherever, in cases not governed by particular customs of trade, the parties bind themselves to the performance of duties within a certain number of days, they have to the last minute of the last day to perform their obligations; 6 M. & G. 593. See PERFORMANCE.

Generally, in computing time, the first day is excluded and the last included; 4 T. B. Monr. 464; 26 Ala. N. S. 547; see 2 Harr. Del. 461; 5 Blackf. 319; 16 Ohio 408; 10 Rich. 395; 12 Colo. 285; excluding the day on which an act is done, when the computation is to be made from such an act; 15 Ves. Ch. 248; 16 Cow. 659; 1 Pick. 485; 19 Mo. 60; including it, according to Dougl. 463; 417; 15 Mass. 193; 18 How. 151; except where the exclusion will prevent forfeiture; 2 Camp. 294; 4 Me. 298. The rule which excludes the *terminus a*

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*quo* is not absolute, it may be included when necessary to give effect to the obvious intention; 147 U. S. 640. Time from and after a given day excludes that day; 1 Pick. 485; 1 N. & M'C. 565; 153 Pa. 465. But see 94 U. S. 560. A policy of insurance includes the last day of the term for which it is issued; L. R. 5 Exch. 296. Particular words, *e. g. at, on,* or *upon* a certain time, will be construed according to a reasonable interpretation of the contract; 10 A. & E. 370. The use of the word *until* generally implies an intention to exclude the day to which it refers, except it appears otherwise from the context; 10 Neb. 524; 120 Mass. 94; 37 Am. Dec. 692; *till* is held to include the day referred to; 16 Barb. 352.

Sunday is a *dies non*, and a power that maybe exercised up to and including a given day of the month may generally, when that day happens to be Sunday, be exercised on the succeeding day; 133 U. S. 299; 147 *id.* 47. Sunday is said to be included in the computation when the time exceeds days and excluded when less than seven; 2 Mich. N. P. 108. See SUNDAY; DIES NON.

Deeds, bills of exchange, letters, and other written instruments are generally construed to have been made and issued at the time of their date, but the execution of a deed may be averred and proved according to the fact; 10 Exch. 40. Courts will always adopt that construction in the computation of time which will uphold and enforce, rather than destroy, *bona fide* transactions and titles, and whenever it is necessary to prevent a forfeiture or to effectuate the clear intention of the parties, the *dies a quo* will be included; otherwise it will be excluded; 5 Dak. 325.

The construction of contracts with regard to the time of performance is the same in equity as at law; but in case of mere delay in performance, a court of equity will in general relieve against the legal consequences and decree specific performance upon equitable terms notwithstanding the delay, if the matter of the contract admits of that form of remedy. In such cases it is said that in equity time is not considered to be of the essence of the contracts; L. R. 3 Ch. 67. Ordinarily time is not of the essence of the contract, but it may be made so by express stipulation of the parties; see 128 U. S. 403; or it may be so by implication, because of the nature of the property involved; 144 U. S. 394; or because of the avowed object of the seller or purchaser; 134 U. S. 68; 144 *id.* 394; or from the nature of the contract itself; or by one party giving the other notice that performance must be made within a certain reasonable time fixed in the notice; 2 Ohio St. 326; 5 C. E. Green 367; time is always of the essence of unilateral contracts; 51 N. Y. 629; 35 Md. 352; 50 Ill. 298. Completion of a contract within a reasonable time is sufficient, if no time is stipulated; 122 U. S. 300.

In determining whether stipulations as to the time of performance of a contract of sale are conditions precedent, the court will seek to discover the real intention of the parties in deciding whether time is of the essence of the contract; Benj. Sales § 593. If a thing sold is of greater or less value according to the lapse of time, stipulations with regard to it must be literally complied with both at law and in equity; 42 Barb. 320; 10 Allen 239. As to whether in English bicycle law requiring the use of a lamp "during the period between one hour after sunset and one hour before sunrise," has led to a controversy as to whether this is local or Greenwich time; see 58 Alb. L. J. 103. See YEAR.

**In Pleading.** A point in or space of duration at or during which some fact is alleged to have been committed.

In *criminal actions*, both the day and the year of the commission of the offence must appear; but there need not be an express averment, if they can be collected from the whole statement; 5 S. & R. 315. The prosecutor may give evidence of an offence committed on any day which is previous to the finding of the indictment; 5 S. & R. 316; but a day subsequent to the trial must not be laid; Add. Pa. 36.

In *mixed and real actions*, no particular day need be alleged in the declaration; 3 Chitty, Pl. 620; Gould, Pl. c. 3, § 99.

*In personal actions*, all traversable affirmative facts should be laid as occurring on some day; Steph. Pl. 292; but no day need be alleged for the occurrence of negative matter; Com. Dig. *Pleader* (C 19); and a failure in this respect is, in general, aided after verdict; 13 East 407. Where the cause of action is a trespass of a permanent nature or constantly repeated, it should be laid with a *continuando*, which title see. The day need not, in general, be the actual day of commission of the fact; 12 Johns. 287; 3 N. H. 299; if the actual day is not stated, it should be laid under a *videlicet*; Gould, Pl. c. 3, § 63. The exact time may become material, and must then be correctly laid; 10 B. & C. 215; 4 S. & R. 576; 1 Stor. 528; as, the time of execution of an executory written document; Gould, Pl. § 67. The defence must follow the time laid in the declaration, if time is not material; 1 Chitty, Pl. 509; 1 Saund. 14, 82; need not when it becomes material; 2 Saund. 5 *a*, *b* (n. 3); or in pleading matter of discharge; 2 Burr. 944; 2 Stra. 944; or a record; Gould, Pl. § 83.

**TIME BARGAIN.** An agreement to buy or sell stock at a future time or within a fixed time at a certain price. See FUTURES; OPTION; MARGIN.

**TIME IMMEMORIAL.** Time beyond legal memory.

See 14 L. R. A. 120, n.; OLD STYLE; REGNAL YEARS; PRESCRIPTION; MEMORY; LIMITATIONS; MONTH; DAY; STATUTE.

**TIME-TABLES.** See PUNCTUALITY.

**TIPPLING-HOUSE.** A place where spirituous liquors are sold and drunk in violation of law. Sometimes the mere

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selling is considered as evidence of keeping a tippling-house. 47 Ill. 370.

A public drinking-place, where liquor or other intoxicating drink is sold, to be drunk on the premises. 1 Colo. App. 289.

**TIPSTAFF.** An officer appointed by the marshal of the court of king's bench, to attend upon the judges with a kind of rod or *staff tipped* with silver.

In the United States, the courts sometimes appoint an officer who is known by this name, whose duty it is to attend on the court. Similar officers employed in the courts of Pennsylvania are so called.

**TITHES. In English Law.** A right to the tenth part of the produce of lands, the stock upon lands, and the personal industry of the inhabitants. These tithes are raised for the support of the clergy. Almost all the tithes of England and Wales are now commuted into rent charges, under 6 & 7 Will. IV. c. 71, and the various statutes since passed; 3 Steph. Com. 731. In the United States there are no tithes.

**TITHING. In English Law.** Formerly, a district containing ten men, with their families. In each tithing there was a tithingman, whose duty it was to keep the peace, as a constable now is bound to do.

**TITHINGMAN. In Saxon Law.** The head or chief of a decennary of ten families; he was to decide all lesser causes between neighbors. Now tithingmen and constables are the same thing. Jacob, Law Dict.

In New England, a parish officer to keep good order in church. Webster, Dict.

**TITLE. Estates.** The means whereby the owner of lands hath the just possession of his property. Co. Litt. 345; 2 Bla. Com. 195. See 1 Ohio 349. This is the definition of title to lands only.

A *bad* title is one which conveys no property to the purchaser of an estate.

A *doubtful* title is one which the court does not consider to be so clear that it will enforce its acceptance by a purchaser, nor so defective as to declare it a bad title, but only subject to so much doubt that a purchaser ought not to be compelled to accept it; 1 J. & W. 568; 9 Cow. 344.

A *good* title is that which entitles a man by right to a property or estate, and to the lawful possession of the same.

A *marketable* title is one which a court of equity considers to be so clear that it will enforce its acceptance by a purchaser.

The doctrine of marketable titles is purely equitable and of modern origin; Atk. Tit. 26. At law every title not bad is marketable; 5 Taunt. 625; 6 *id.* 263; 1 Marsh. 258. See 2 Pa. L. J. 17.

There are several stages or degrees requisite to form a complete title to lands and tenements. The lowest and most imperfect degree of title is a *presumptive title* or the *mere possession*, or actual occupation of the estate, without any apparent right to hold or continue such possession: this happens when one man disseises another. The next step to a good and perfect title is the *right of possession*, which may reside in one man while the actual possession is not in himself, but in another. This right of possession is of two sorts: an *apparent* right of possession, which may be defeated by proving a better, and an *actual* right of possession, which will stand the test against all opponents. The mere *right of property*, the *jus proprietatis*, without either possession or the right of possession. 2 Bla. Com. 195.

Title to real estate is acquired by two methods, namely, by *descent* and by *purchase*. See these words.

Title to personal property may accrue in three different ways: by *original acquisition*; by *transfer by act of law*; by *transfer by act of the parties*.

Title by original acquisition is acquired by *occupancy*, see OCCUPANCY; by *accession*, see ACCESSION; by *intellectual labor*. See PATENT; COPYRIGHT; TRADE-MARK.

The title to personal property is acquired and lost by transfer by act of law, in various ways: by *forfeiture*; *succession*; *marriage*; *judgment*; *insolvency*; *intestacy*. See those titles.

Title is acquired and lost by transfer by the act of the party, by *gift*, *by contract or sale*. See those titles.

In general, possession constitutes the criterion of title of *personal* property (*q. v.*), because no other means exist by which a knowledge of the fact to whom it belongs can be attained. A seller of a chattel is not, therefore, required to show the origin of his title, nor, in general, is a purchaser, without notice of the claim of the owner, compellable to make restitution; but it seems that a purchaser from a tenant for life of personal chattels will not be secure against the claims of those entitled in remainder; Cowp. 432; 1 Bro. C. C. 274.

As an exception to the rule that possession is the criterion of title of property may be mentioned the case of ships, the title of which can be ascertained by the register; 15 Ves. Ch. 60; 17 *id.* 251; 8 Price 256.

To convey a title, the seller must himself have a title to the property which is the subject of the transfer. But to this general rule there are exceptions. See SALE.

**In Legislation.** That part of an act of the legislature by which it is known and distinguished from other acts; the name of the act. While the title of a statute cannot be used to add to or take from the body thereof, yet in cases of doubt, it may be referred to as a help to the interpretation; 143 U. S. 457. See CONSTRUCTION.

Formerly the title was held to be no part of a bill, though it could be looked to when the statute was ambiguous; 3 Wheat. 610; 31 Wisc. 431; see 144 U. S. 550; 143 *id.* 447; 9 Q. B. D. 104; but it could not enlarge or restrain the provisions of the act itself; 5 Wall. 107. In later years constitutional provisions have required that the title of every legislative act shall correctly indicate



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the subject-matter of the act; Cooley, Const. Lim. 172. The object of this was mainly to prevent surprise in legislation. An act must have but one general object, which is fairly indicated by the title; a title may be general if it does not cover incongruous legislation; Endl. Interp. Stat. 59; 7 Ind. 681; 50 N. Y. 553; the use of the words "other purposes" have no effect; 22 Barb. 642; 3 Colo. App. 223. It is said that the courts will construe these provisions liberally rather than embarrass legislation by a construction, the strictness of which is unnecessary to the attainment of the beneficial purposes for which they were adopted; Cooley, Const. Lim. 178. In construing an act, the court will strike from it all that relates to the object not indicated by the title, and sustain the rest if it is complete in itself; *id.* 181; 92 Ala. 94. These provisions are usually considered mandatory, though they were held to be directory in 4 Cal. 388; 6 Ohio N. S. 187. In Pennsylvania, where an act of assembly is entitled a supplement to a former act, and the subject thereof is germane to that of the original act, its subject is sufficiently expressed; 77 Pa. 429; 88 *id.* 42.

See a paper in Rep. Am. Bar Association (1882) by U. M. Rose.

**Personal Relations.** A distinctive appellation denoting the rank to which the individual belongs in society. See RANK; NOBILITY.

Titles are assumed by foreign princes, and among their subjects they may exact these marks of honor; but in their intercourse with foreign nations they are not entitled to them as a matter of right; Wheat. Int. Law, 3d Eng. ed. § 159.

**In Pleading.** The right of action which the plaintiff has. The declaration must show the plaintiff's title, and if such title be not shown in that instrument the defect cannot be cured by any of the future pleadings. Bacon, Abr. *Pleas*, etc. (B 1).

**In Rights.** The name of a newspaper, a book, and the like. See TRADE-MARK.

**TITLE, COVENANTS FOR.** See COVENANT.

**TITLE DEEDS.** Those deeds which are evidences of the title of the owner of an estate. The person who is entitled to the inheritance has a right to the possession of the title-deeds; 1 Carr. & M. 653. As to a lien created by deposit of title-deeds, see LIEN.

**TITLE INSURANCE.** See INSURANCE.

**TITLE OF A CAUSE.** The peculiar designation of a suit, consisting usually of the name of the court, the venue, and the parties. The method of arranging the names of the parties is not everywhere uniform. The English way, and that formerly in vogue in this country, and still retained in many of the states, is for the actor in each step of the cause to place his name first, as if he were plaintiff in that particular proceeding, and his adversary's afterwards. Thus the case of Upton *v.* White would, if taken from a county court to the supreme court on a writ of error by defendant, be entitled White *v.* Upton. In New York and many other states which have enacted codes of procedure, the rule now is that the original order of names of parties is retained throughout. See AD SECTAM.

**TITLE OF ENTRY.** The right to enter upon lands. Cowel. See ENTRY.

**TITULARS OF ERECTION.** Persons who in Scotland, after the Reformation, obtained grants from the crown of the monasteries and priories then erected into temporal lordships. These grants were called "lords of erection" (*q. v.*) and "titulars of the teinds." Bell.

**TITULUS. In the Civil Law.** Title; the source or ground of possession.

**In Ecclesiastical Law.** A temple or church.

**TO.** A term of exclusion, unless by necessary implication it is manifestly used in a different sense; 13 Me. 201; 69 *id.* 514; 84 *id.* 460.

An order extending the time for signing a bill of exceptions to a certain day, is inclusive of such day; 75 Md. 126; but "from" an object "to" an object excludes the terminus referred to; 84 Me. 459; 52 *id.* 252. See FROM.

**TO WIT.** That is to say; namely; scilicet; videlicet.

**TOBACCO.** In Iowa, Tennessee, Nebraska, and North Dakota the manufacture or sale of cigarettes and cigarette paper is absolutely prohibited. In Indiana, Minnesota, Maine, and Wisconsin the sale or gift of cigarettes, or any substitute therefor, to any minor is forbidden. In West Virginia, Nevada, and Maryland the method adopted is to impose a special license fee for selling cigarettes or cigarette paper at retail. In Washington a license is required and the sale is prohibited to minors under eighteen years of age. In Missouri any city or village is authorized to prohibit the sale to minors. In Iowa an act prohibiting the sale of cigarettes within the state by all persons save jobbers doing an interstate business, was held unconstitutional, so far as it amounts to a regulation of interstate commerce; 73 N. W. Rep. (Ia.) 1014. See ORIGINAL PACKAGE.

**TOBACCONIST.** Any person, firm, or corporation whose business it is to manufacture cigars, snuff, or tobacco in any form. Act of Congress, July 13, 1866, § 9.

**TOFT.** A place or piece of ground on which a house formerly stood, which has been destroyed by accident or decay. 2 Broom & H. Com. 17.

**TOGATI** (Lat.). **In Roman Law.** Under the empire, when the *toga* had ceased

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to be the usual costume of the Romans, advocates were nevertheless obliged to wear it whenever they pleaded a cause. Hence they were called *togati*.

**TOKEN.** A document or sign of the existence of a fact.

Tokens are either public or general, or privy tokens. They are either true or false. When a token is false and indicates a general intent to defraud, and is used for that purpose, it will render the offender guilty of the crime of cheating; 12 Johns. 292; but if it is a mere privy token, as, counterfeiting a letter in another man's name, in order to cheat but one individual, it would not be indictable; 9 Wend. 182; 1 Dall. 47. In England, this name is given to pieces of metal, made in the shape of money, passing among private persons by consent at a certain value. 2 Chitty, Com. Law 182. They are no longer permitted to pass as money.

**TOKEN-MONEY.** See TOKEN.

**TOLERATE.** To allow so as not to hinder; to permit as something not wholly approved of; to suffer; to endure. 17 Blatchf. 330.

**TOLERATION.** In some countries, where religion is established by law, certain sects who do not agree with the established religion are nevertheless permitted to exist; and this permission is called toleration. They are permitted and allowed to remain rather as a matter of favor than a matter of right. By the Toleration Act of 1 W. & M. c. 18, and subsequent statutes down to the 35 & 36 Vict. c. 26, enabling any person to take any degree (other than a divinity degree) in the universities of Oxford, Cambridge, or Durham, the disabilities of the Roman Catholics, Jews, and Dissenters have been almost wholly removed; 2 Steph. Com. 707. See CATHOLIC EMANCIPATION ACT.

In the United States there is no such thing as toleration; all men have an equal right to worship God according to the dictates of their consciences. See CHRISTIANITY; RELIGION: RELIGIOUS TEST.

**TOLERATION ACT.** The statute 1 W. & M. exempting Protestant dissenters from the penalties of certain laws. Brown.

**TOLL.** A sum of money for the use of something, generally applied to the consideration which is paid for the use of a road, bridge, or the like, of a public nature.

The compensation paid to a miller for grinding another person's grain. Cited 93 U. S. 458.

The rate of taking toll for grinding is regulated by statute in most of the states. See 2 Washb. R. P.; 6 Q. B. 31. See RATES.

A state has no power to regulate tolls upon a bridge connecting it with another state without the assent of congress and without the concurrence of such other state in the proposed tariff; 125 U. S. 1.

To bar, defeat, or take away: as, to toll an entry into lands is to deny or take away the right of entry.

To *toll* the statute of limitation is to show facts which remove its bar of the action.

**TOLL-TRAVERSE.** A toll for passing over a private man's ground; a toll for passing over the soil of another or over soil which though now a public highway was once private and which was dedicated subject to a toll. It can be claimed by prescription. 87 L. J. Q. B. 209; 3 Q. B. 521.

**TOLLBOOTH.** A prison; a custom-house; an exchange; also the place where goods are weighed; a place where merchants met; a local tribunal for small civil cases held at the Guild Hall, Bristol. Whart.

**TOLLS.** In a general sense, tolls signify any manner of customs, subsidy, prestation, imposition, or sum of money demanded for exporting or importing of any wares or merchandise, to be taken of the buyer. Co. 2d Inst. 58.

**TOLT.** A writ whereby a cause depending in a court baron was taken and removed into a county court. O. N. B. 4.

**TOMBSTONE.** A gift or bequest to keep perpetually, a tombstone in repair offends against a rule as to perpetuities and is void, but such a condition to that effect attached to a bequest to a charity in case of failure to comply with condition is good. L. R. 3 Ch. 252. See MONUMENT.

**TON.** Twenty hundredweight, each hundredweight being one hundred and twelve pounds avoirdupois. See MEASURE.

**TONNAGE.** The capacity of a ship or vessel.

This term is most usually applied to the capacity of a vessel in tons as determined by the legal mode of measurement; in England reckoned according to the number of tons burden a ship will carry, but here to her internal cubic capacity; and, as a general rule, in the United States the official tonnage of a vessel is considerably below the actual capacity of the vessel to carry freight. 40 N. Y. 259.

The duties paid on the tonnage of a ship or vessel.

For the rule for determining tonnage in the United States, see R. S. § 4150 *et seq.*

A foreign built vessel purchased by a citizen of the United States and brought into the waters thereof is not so taxable; 166 U. S. 110.

The constitution of the United States provides art. 1, s. 10, n. 2, that no state shall, without the consent of congress, lay any duty on tonnage; 12 Wall 204; 94 U. S. 238. But a municipal corporation situated on a navigable river can, consistently with the constitution of the United States, charge and collect from the owner of licensed steamboats, which moor at a wharf constructed by it, wharfage proportioned to their tonnage; 95 U. S. 80; 45 Ia. 196. See COMMERCE.

The duty of tonnage prohibited by the constitution is a charge upon a vessel according to its tonnage as the instrument of commerce, for the privilege of entering or leaving a port or navigating public waters. 119 U. S. 543.

**TONNAGE-RENT.** Rent reserved by a mining lease consisting of a royalty on every ton of minerals.

**TONNAGE TAX.** See TONNAGE; OYSTERS.

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**TONNAGIUM.** A custom or impost upon wines and other merchandise exported or imported. Cowel.

**TONNETIGHT.** The quantity of a ton in a ship's freight or bulk. Cowel.

**TONTINE INSURANCE.** See INSURANCE.

**TOOK AND CARRIED AWAY.** Technical words necessary in an indictment for simple larceny. Bac. Abr. *Indictment* (G 1). See CEPIT ET ASPORTAVIT; LARCENY.

**TOOLS.** The implements which are commonly used by the hand of one man in some manual labor, necessary for his subsistence. 18 S. Car. 241. It includes patterns used in manufacturing; 51 N. W. Rep. (Ia.) 1149; a mill-saw; 1 Fairf. 135; an instrument called a billy and jennie; 2 Vt. 402; a gin and grist mill; 66 Tex. 494; a threshing machine; 23 Ia. 359. As used in exemption laws, it includes any instrument necessary for the prosecution of trade, including a lathe; 99 Cal. 202; sewing machines; 50 Minn. 327; a piano; 69 Ill. 337; a violin; 2 Allen 395; a cornet; 123 Mass. 95; a gun; 18 Tex. 581; a net and boat; 1 Th. & C. 444; cheese vats, presses, and knives; 27 Kan. 270; the surgical instruments of a physician; 3 Abb. Pr. 416; and the office furniture of a lawyer; 73 Ia. 111; an iron safe used by an insurance agent; 38 S. W. Rep. (Tex.) 71; 87 Colo. 292. It does not include the apparatus of a printing office; 10 Pick. 423. See TRADE; EXEMPTION.

**TORRENS SYSTEM.** A name commonly applied to the system of government registration of titles to land, so called from Sir Robert Torrens. The subject is treated under LAND TITLE AND TRANSFER. A Massachusetts act passed since that title was written is referred to under REGISTRATION. See 36 L. R. A. 105.

**TORT** (Fr. *tort*, from Lat. *torquere*, to twist, *tortus*, twisted, wrested aside). A private or civil wrong or injury. A wrong independent of contract. 1 Hill. Torts 1. The breach of a legal duty. Big. Torts 3. In admiralty it includes wrong suffered in consequence of the negligence or malfeasance of others, where the remedy at common law is by an action on the case; 46 Fed. Rep. 738; 10 App. Dec. 469.

The right of action is very broad in France. Thus:

"Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le reparer.

"Chacun est responsable du dommage qu'il a causé non seulement par son fait, mais encore par sa négligence ou par son imprudence." Civil Code of France, secs. 1382, 1383.

The law recognizes certain rights as belonging to every individual, such as the right to personal security, to liberty, to property, to reputation, to the services of a daughter or servant, to the companionship of a wife, etc. Any violation of one of these rights is a tort. In the like manner the law recognizes certain duties as attached to every individual, as the duty of not deceiving by false representations, of not persecuting another maliciously, of not using your own property so as to injure another, etc. The breach of any of these duties coupled with consequent damages to any one is also a tort. Underhill, Torts 4.

The performance of an act forbidden by a statute or the omission or failure to perform any act specifically imposed by law, is generally equivalent to an act done with intent to cause wrongful injury; Poll. Torts 28. No action will lie for doing that which the legislature has authorized, if it be done without negligence: *id.* 121.

The word torts is used to describe that branch of the law which treats of the redress of injuries which are neither crimes nor arise from the breach of contracts. All acts or omissions of which the law takes cognizance may in general be classed under the three heads of *contracts*, *torts*, and *crimes*. *Contracts* include agreements and the injuries resulting from their breach. *Torts* include injuries to individuals, and *crimes* injurious to the public or state. 1 Hill. Torts 1.

This division of the redress of injuries by civil suit into actions of tort and actions of contract is not thoroughly accurate. For often the party injured has his election whether he will proceed by tort or by contract, as in the case of a fraudulent sale or the fraudulent recommendation of a third person; 10 C. B. 83; 24 Conn. 392. But for general usage this division has been found sufficient, and is universally adopted; Cooley, Torts 2.

As the same act may sometimes constitute the breach of a contract as well as a tort, so the same act may often constitute a tort and also a crime. For a tort may amount to, or may be likely to lead to, a breach of the peace, and thus become a matter of public concern. The torts which are usually at the same time crimes are assault, libel, and nuisance. In such cases it is the general rule of law that a public prosecution and a private action for damages can both be maintained either at the same or at different times; 1 B. & P. 191; 3 Bla. Com. 122. See 28 Fla. 90.

As to the doctrine of the merger of a tort in a crime, see MERGER.

The infringement of a right of the violation of a duty are necessary ingredients of a tort. If neither of these is present the act is not a tort, although damage may have resulted. Hence the maxim: *Ex damno sine injuria non oritur actio.*

A street railway company not having the right of eminent domain, is liable for special injury to another's property by the lawful operation of its works on its own land; the case of the negligent operation of a power-house; 182 Pa. 475. Where a corporation has no right of eminent domain, the operation of its works, causing special physical injury to another's property, is held an actionable nuisance; in the case of a gas

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company; 89 Pa. 257; and the case of a natural oil pipe company; 153 Pa. 366.

A wrongful or malicious intent is an essential element in some torts. As, for example, deceit, slander, and libel, malicious prosecution, and conspiracy. In general, however, it may be stated as a prominent distinction between torts and crimes, that in the former the party's intent is immaterial, while in prosecutions for the latter a criminal purpose must always be alleged and proved; Cooley, Torts 688. Thus one may be made liable in damages for what is usually called a mere accident. So insane persons and minors, under the age of discernment, are in general liable for torts. See MALICE.

A tort sounding in exemplary damages is one when there is an evasion of some right of person or property, maliciously, violently, wantonly, or with reckless disregard of social or civil obligations; 35 S. C. 493.

In general, it may be said that whenever the law creates a right, the violation of such right will be a tort, and wherever the law creates a duty, the breach of such duty coupled with consequent damage will be a tort also. This applies not only to the common law, but also to such rights and duties as may be created by statute; Cooley, Torts 650.

Torts may also arise in the performance of the duties of a ministerial officer, when such duties are due to individuals and not to the state; Cooley, Torts 876; but the act of a British officer in excess of his authority (burning certain barracoons in Africa and releasing slaves therefrom), when approved by the government, becomes an "act of state" and is not a ground of action against him; 2 Ex. 167.

As to torts committed against property or in the relations of master and servant, husband and wife, parent and child, bailor and bailee, landlord and tenant, mortgagor and mortgagee, see these several titles.

In order to maintain an action of tort the relation of cause and effect between the act and the injury must be clearly shown. The damage must not be remote or indirect. See CAUSA PROXIMA, etc.

All who aid, advise, command, or countenance the commission of a tort, or approve of it after it is done, are liable, if done for their benefit, in the same manner as if done with their hands; 61 Vt. 399; but where two or more are acting lawfully together to make an arrest, one is not liable for the unlawful act of another done in furtherance of the common purpose, without his concurrence; 76 Ia. 612.

A child injured before birth has no right of action for the tort; 138 Mass. 14; 28 L. R. (Ir.) 69; 30 Chic. Leg. N. 333. Where there are several wrongdoers, each is liable for the entire damage; all are equal. But where the injured party has elected to sue one or more and obtains judgment, he cannot sue the others, even though his judgment remains unsatisfied; L. R. 7 C. P. 547; but it is held generally in this country that a judgment without satisfaction is not a bar; Cooley, Torts 138; 11 Harv. L. Rev. So a recovery by a husband for injuries sustained to himself is not a bar to a subsequent action for injuries to his wife sustained at the same time, as a result of the same negligence; 29 S. W. Rep. 78; but judgment is held to be a bar if satisfaction has been tendered; 39 Atl. Rep. (Md.) 502; *contra*, 12 Lea 598; 1 Barb. 379. But the recovery of damages for the killing of one horse is a bar to the recovery of damages for another, killed at the same time and place; 9 Tex. Civ. App. 6.

A party injured cannot generally maintain an action for the injury if caused in any degree by his own contributory negligence. See NEGLIGENCE.

When a workman employed by a shipowner is injured by the combined negligence of himself and those in charge of the ship, he may recover half damages; 87 Fed. Rep. 849.

Where a tort is committed partly on land and partly on water, the question whether admiralty has jurisdiction over it is determined by the locus of the damage and not that of the origin of the tort; as where the plaintiff working in the hold of a vessel was injured by a piece of lumber negligently sent down through a chute by a person working on the pier, it was held to be a case of admiralty jurisdiction; 69 Fed. Rep. 646.

**TORTFEASOR.** A wrong-doer; one who commits or is guilty of a tort. See JOINT TORTFEASOR.

**TORTURE.** The rack, or question, or other mode of examination by violence to the person, to extort a confession from supposed criminals, and a revelation of their associates. It is to be distinguished from punishment, which usually succeeds a conviction for offences; as it was inflicted *in limine*, and as part of the introductory process leading to trial and judgment. It was wholly unknown to the common and statute law of England, and was forbidden by Magna Charta, ch. 29; 4 Bla. Com. 326.

It prevailed in Scotland, where the civil law which allowed it obtained: Dig. 48. 18. It was, however, declared contrary to the claim of right, and was expressly prohibited; 7 Anne, c. 21, § 5, A. D. 1708. Several instances of its infliction may be found in Pitcairn's Criminal Trials of Scotland.

Although torture was confessedly contrary to the common law of England, it was, nevertheless, often employed as an instrument of state to wring confessions from prominent criminals,—especially in charges of treason. It was usually inflicted by warrant from the privy council. Jardine, Torture 7, 15, 42.

Mr. Jardine proves from the records of the privy council that the practice was not infrequent during the time of Elizabeth, and continued to the close of the reign of the first two Stuarts. There is positive evidence that Guy Fawkes was directed to

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be tortured in regard to the Gunpowder Plot, in the warrant in the king's handwriting authorizing the commissioners, of whom Coke was one, to examine him upon the rack, "using the gentler tortures first, *et sic per gradus ad ima tenditur*;" 1 Jardine, Cr. Tr. Int. 17; 2 *id.* 106.

An attempt to torture a person to extort a confession of crime is a criminal offence. 2 Tyl. 380. See QUESTION; PEINE FORTE ET DURE; MUTE.

This absurd and cruel practice has never obtained in the United States, except in a few instances in New York under the Dutch rule.

**TOTAL LOSS.** See LOSS; and also a recent English case where it was held by the house of lords that a ship is totally lost when she goes to the bottom, no matter whether she is brought up again or not; [1898] A. C. 593. See 12 Harv. L. Rev. 218.

Under a policy insuring against "absolute total loss only," a partial loss cannot be converted into a constructive total loss, and evidence of abandonment is immaterial; 5 U. S. App. 179.

**TOTIDEM VERBIS.** In so many words.

**TOTIES QUOTIES** (Lat.). As often as the thing shall happen.

**TOTTED.** A good debt to the crown, *i. e.* a debt paid to the sheriff, to be by him paid over to the king. Cowel; Moz. & W. See FOREIGN APPOSER.

**TOUCH AND STAY.** Words frequently introduced in policies of insurance, giving the party insured the right to stop and stay at certain designated points in the course of the voyage. A vessel which has the power to touch and stay at a place in the course of the voyage must confine herself strictly to the terms of the liberty so given; for any attempt to trade at such a port during such a stay, as, by shipping or landing goods, will amount to a species of deviation which will discharge the underwriters, unless the ship have also liberty to trade as well as to touch and stay at such a place; 1 Marsh. Ins. 275.

**TOUJOURS ET UNCORE PRIST** (L. Fr.). Always and still ready. This is the name of a plea of tender: as, where a man is indebted to another, and he tenders the amount due, and afterwards the creditor brings a suit, the defendant may plead the tender, and add that he has always been and is still ready to pay what he owes, which may be done by the formula *toujours et uncore prist*. He must then pay the money into court; and if the issue be found for him the defendant will be exonerated from costs, and the plaintiff made liable for them; 3 Bouvier, Inst. n. 2923. See TOUT TEMPS PRIST; TENDER.

**TOUR D'ECHELLE.** In French Law. A right which the owner of an estate has of placing ladders on his neighbor's property to facilitate the reparation of a party-wall or of buildings which are supported by that wall. It is a species of servitude. *Lois des Bât.* part 1, c. 3, sect. 2, art. 9, § 1.

The space of ground left unoccupied around a building for the purpose of enabling the owner to repair it with convenience: this is not a servitude, but an actual corporeal property.

**TOURN.** See SHERIFF'S TOURN.

**TOUT TEMPS PRIST** (L. Fr. always ready). A plea by which the defendant signifies that he has always been ready to perform what is required of him. The object of the plea is to save costs: as, for example, where there has been a tender and refusal. 3 Bla. Com. 303. So, in a writ of dower, where the plea is detinue of charters, the demandant might reply, *always ready*; Rast. Entr. 229 *b*. See TOUJOURS ET UNCORE PRIST.

**TOW-BOATS.** According to the weight of authority, the owners of steamboats engaged in the business of towing are not common carriers; Lawson, Carriers 8. So held in 2 N. Y. 204; 18 Pa. 40; 14 Bush 698; 12 Fed. Rep. 446; 94 U. S. 494; 95 *id.* 297. See TOWAGE; *contra*, 5 Jones N. C. 174; 11 La. 46.

**TOWAGE.** The act of towing or drawing ships and vessels, usually by means of a small steamer called a tug.

Towage service is confined to vessels who have received no injury or damage; 9 Fed. Rep. 53.

Where towage is rendered in the rescue or relief of a vessel from imminent peril, it becomes *salvage* service, entitled to be compensated as such; 6 N. Y. Leg. Obs. 223. A tug sometimes called towing or tow-boat, while not held to the responsibility of a common carrier, is bound to exercise reasonable care and skill in everything pertaining to its employment; 9 Fed. Rep. 614; 57 *id.* 667; 84 Fed. Rep. 500; 14 U. S. App. 39; *id.* 503; 24 U. S. App. 49. Proof of a loss suffered by tow does not raise a presumption of negligence on the part of the tug. 14 Wall. 406; 57 Fed. Rep. 667. See TOW-BOATS; TUGS; SALVAGE.

Where two vessels, each in charge of a tug, came in collision from the faulty navigation of the tugs, whose masters gave directions to the vessels which were obeyed, the tugs alone were held liable; 11 U. S. App. 129. In every contract of towage there is an implied engagement that each party will use proper skill and diligence. Tugs cannot abandon their tows for slight causes; 13 *id.* 489; 14 *id.* 410. See TUG.

That which is given for towing ships in rivers. *Guidon de la Mer*, c. 16; Pothier, *Des Avaries*, n. 147; 2 Chitty, Com. Law. 16.

The burden of proving that a contract of towage was at the owner's risk, is on the tug; 54 Fed. Rep. 1010; 18 *id.* 178; 34 *id.* 292.

**TOWARD.** The word has been held to mean not simply "to" but to include "about." 6 Tex. App. 565. See TO.

**TOWN.** A term of somewhat varying

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signification, but denoting a division of a country next smaller in extent than a county.

It is generic, and includes cities; 132 Ind. 54; 117 Cal. 451.

In Pennsylvania and some other of the Middle states, it denotes a village or city. In the New England states, it is to be considered for many purposes as the unit of civil organization,—the counties being composed of a number of towns. Towns are regarded as corporations or *quasi*-corporations; 13 Mass. 193. In New York and Wisconsin, towns are subdivisions of counties; and the same is true of the *townships* of most of the Western states. In Ohio, Michigan, and Iowa, they are called townships. In Illinois it is synonymous with village; 119 U. S. 680. In England, the term *town* or *vill* comprehends under it the several species of cities, boroughs, and common towns. 1 Bla. Com. 114.

**TOWN CAUSE. In English Practice.** A cause tried at the sittings for London and Middlesex. 3 Steph. Com., 11th ed. 556.

**TOWN-CLERK.** A principal officer who keeps the records, issues calls for town meetings, and performs generally the duties of a secretary to the political organization.

**TOWN-MEETING.** A legal assembly of the qualified voters of the town held at stated intervals or on call.

**TOWN-PLAT.** The acknowledgment and recording of a town-plat vests the legal title to the ground embraced in the streets and alleys in the corporation of the town; therefore it is held that the proprietor who has thus dedicated the streets and alleys to the public cannot maintain trespass for an injury to the soil or freehold. The corporation alone can seek redress for such injury; 11 Ill. 554; 13 *id.* 54, 308. This is not so, however, with a highway; the original owner of the fee must bring his action for an injury to the soil; 13 Ill. 54. See HIGHWAY. If the streets or alleys of a town are dedicated by a different mode from that pointed out by the statute, the fee remains in the proprietor, burdened with the public easement; 18 Ill. 312. See DEDICATION.

**TOWNSHIP.** The public lands of the United States are surveyed first into tracts called townships, being in extent six miles square. The subdivisions of a township are called sections, each a mile square and containing six hundred and forty acres; these are subdivided into quarter-sections, and from that into lots of forty acres each. This plan of subdividing the public lands was adopted by act of congress of May 18, 1796.

**TOXICOLOGY.** The science of poisons (*q. v.*).

**TRACING.** A tracing is a mechanical copy or *fac simile* of an original, produced by following its lines, with a pen or pencil, through a transparent medium, called tracing paper. 18 Fed. Rep. 540.

**TRACT.** A lot, piece, or parcel of land, of greater or less size, the term not importing in itself any precise dimensions. 28 N. J. L. 45.

**TRADAS IN BALLIUM.** You deliver to bail. The name of a writ which might be issued in behalf of a party who upon the writ *de odio et atia* had been found to have been maliciously accused of a crime. 1 Reeve, Eng. L. 252.

**TRADE.** Any sort of dealings by way of sale or exchange; commerce, traffic. 101 U. S. 231; 47 Kan. 89. The dealings in a particular business: as, the Indian trade; the business of a particular mechanic; hence boys are said to be put apprentices to learn a trade: as, the trade of a carpenter, shoemaker, and the like. Bac. Abr. *Master and Servant* (D 1). Trade differs from art.

In exemption laws it is usually confined to the occupation of a mechanic; 44 Conn. 93; but in its broader sense it is generally construed as equivalent to any occupation, employment, handicraft, or business; 101 U. S. 231; 47 Kan. 89. One cannot by multiplying his pursuits claim cumulatively several exemptions, but the fact that he carries on two or more pursuits concurrently does not deprive him of all exemptions, but the article exempted must belong to his principal business; 27 Kan. 532.

The term is also construed in cases arising under the "anti-trust" act forbidding trusts and combinations in restraint of trade, and it is held in that connection to have the broader sense; 47 Kan. 89, where the definition of the word is much discussed. The word is held to apply to the business of insurance; *id.*; 33 S. W. Rep. (Tex.) 710; of a telegraph company; 3 Exch. Div. 108; transportation of merchandise for hire; 2 Gall. 4; 7 Cra. 113; a blacksmith, who also builds wagons; 32 Mich. 59; a harness-maker, painter, and carriage-builder; 9 Allen 156; a dealer in ice who was also a farmer; 7 Gray 67; a tinner who owned and partly supported himself by playing a cornet; 123 Mass. 194; a saddle and harness-maker; 26 S. W. Rep. (Tex.) 859; keeping a home for working girls even though it appeared that no profits were made; 25 Ch. Div. 206; but maintaining a private lunatic asylum is held not a trade; 2 Ad. & El. 161. See TOOLS; EXEMPTION; RESTRAINT OF TRADE; TRADER; TRADESMAN.

**TRADE, RESTRAINT OF.** See RESTRAINT OF TRADE.

**TRADE DOLLAR.** See DOLLAR.

**TRADE-MARK.** A symbol, emblem, or mark, which a tradesman puts upon or attaches in some way to the goods he manufactures or has caused to be manu-

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factured, so that they may be identified and known in the market. Brown, Trade-Marks, 2d ed. § 87.

"A particular mark or symbol used by a person for the purpose of indicating that the article to which it is affixed is sold or manufactured by him or his authority, or that he carries on business at a particular place." 35 L. J. Ch. 61.

Broadly defined, a trade-mark is a mark by which the wares of the owner are known in trade. 12 Fed. Rep. 707.

The office of a trade-mark is to point out distinctly the origin or ownership of the article to which it is affixed; or, in other words, to give notice who was the producer; 138 U. S. 537; 128 *id.* 598; 139 *id.* 540.

It may consist of a name, a device, or a peculiar arrangement of words, lines, or figures, or any peculiar mark or symbol not theretofore in use, adopted and used by a manufacturer, or a merchant for whom goods may be manufactured, to designate them as those which he has manufactured or sells. It may be put either upon the article itself or its case, covering, or wrapper, and is assignable with the business; 86 Ky. 331.

It may be in any form of letters, words, vignettes, or ornamental design. Newly-coined words may form a trade-mark; Brown, Trade-Marks 151.

The exclusive right to a trade-mark or device rests not on invention, but on such use as makes it point out the origin of the claimant's goods and must be early enough for that, but absolute priority of invention is not required; 85 Fed. Rep. 774.

Property in a trade-mark is acquired by the original application to some species of merchandise manufactured of a symbol or device not in actual use, designating articles of the same kind or class; 13 Wall. 222.

The ownership of trade-marks is considered as a right of property; Upton, Trade-Marks 10. It is on this ground that equity protects by injunction against their infringement. Proof of fraud is not necessary, the mere fact of violating a right of property being sufficient; 1 De G. J. & S. 185.

Trade names should be distinguished from trade-marks. A trade-mark owes its existence to the fact that it is affixed to a commodity; a trade name is more properly allied to the good will of a business; Browne, Tr. Marks § 91. The same author divides the latter into classes: 1. of men, their business or their pseudonyms; 2. places famed for manufactures, etc.; 3. coaches and other vehicles for the transportation of passengers or merchandise.

The *trade name* of a firm, a corporate name, and the name of a publication, though not strictly trade-marks, are nevertheless a species of property of the same nature as trade-marks, and will be protected in like manner; 33 Am. Rep. 335; 9 *id.* 331. See NAME.

So a tradesman may adopt a fictitious name, and sell his goods under it as a trade-mark, and the property right he thus acquires in the fanciful name will be protected; 6 Thomp. & C. 133.

Equity will protect a corporation in the exclusive possession of its name. State authorities will ordinarily not grant a charter to a new corporation under the name of an existing corporation. But equity will not restrain a corporation of the state of the *forum* from the use of its corporate name at the suit of a foreign corporation; Thomp. Corp. §§ 296, 7903; 142 Ill. 494. See 10 L. R. A. 758.

In a bill by the "Sun Life Assurance Company," long established in London, to enjoin the "Sun Life Assurance Company of Canada" from doing business under that name in London, it was held that the defendant's use of its full name was lawful, but that the use of the "Sun Life" alone could be enjoined; [1894] 1 Ch. 537.

The names of hotels and stores are protected; 21 Cal. 448; L. R. 13 Ch. D. 512; 3 Sandf. 725: as, the "Mechanic's Store," against "Mechanical Store"; 42 Pac. Rep. (Cal.) 142.

In the following the titles of newspapers and periodicals have been protected (the name in italics being held to infringe): Hagerstown Almanac—*Hagerstown Town and Country Almanac;* 50 Md. 591; The Real John Bull—*The Old Real John Bull;* Cox, Man. 33; Minnie—*Minnie Dale* and *Minnie Dear Minnie;* 2 K. & J. 123; 8 De G. M. & G. 1; Payson, Dunton & Scribner's National System of Penmanship—*Independent National System of Penmanship;* 21 Hun 559; Our Young Folks—*Our Young Folks' Illustrated Paper;* Fed. Cas. 10, 603; Birthday Scripture Textbook—*The Children's Birthday Textbook;* L. R. 14 Eq. 431; Chatterbox—*Chatterbook;* 31 Fed. Rep. 154; 21 *id.* 189; 27 *id.* 22; The United States Investor—*The Investor;* 72 *id.* 603; Social Register—*Howard's Social Register;* 60 *id.* 270; Good Things of Life—*Spice of Life;* 2 N. Y. S. 643; Bell's Life in London and Sporting Chronicle—*Penny Bell's Life and Sporting News;* 1 Giff. 98; The National Police Gazette—*The United States Police Gazette;* 2 Abb. Pr. N. S. 459; The Times—*Times;* 25 Sol. Jour. 742.

Protection has been refused in the following cases:

Old Sleuth Library—*New York Detective Library;* 129 N. Y. 38, 619, reversing 13 N. Y. S. 79; Electric World—*Electric Age;* 14 N. Y. S. 803; Good Things of Life—*The Spice of Life;* 9 N. Y. S. 846; The New North West—*The Northwest News;* 11 Ore. 322; Republican New Era—*New Era;* 8 Paige 75; Splendid Misery or East End and West End, by C. H. Hazlewood—*Splendid Misery,* by the author of Lady Audley's Secret, Vixen, etc., published as a serial in periodicals; 18 Ch. D. 76; Mail—*Morning Mail;* 54 L. J. Ch. 1059; Morning Post—*Evening Post;* 37 Ch. D. 449; The Canadian Bookseller—*The Canada Bookseller and Stationer;* 27 Ont. 325; Punch—*Punch and Judy;* 39 L. J. Ch. 57;

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The American Grocer—*The Grocer*; 51 How. Pr. 402.

Where the title of a book shows that it is adopted for unfair competition with another work, though the conflicting titles are not identical, it will be restrained; 84 Fed. Rep. 224.

The names of springs are protected, even against those who are rightfully selling the genuine product under the true name; 24 Am. Rep. 395; 45 N. Y. 291; 95 Ky. 502; 78 Fed. Rep. 469; but there are other cases in which an injunction against the honest use of a geographical name has been refused; 13 Wall. 311; 54 Ill. 439; 75 Pa. 467; 128 *id.* 1. While a geographical name is not a good trade-mark, technically speaking, yet where one has been used to indicate the goods of a particular maker, no one else may employ such name even truthfully in a geographical sense, in connection with the sale of the same class of goods; L. R. 5 H. L. 508; 64 L. T. 748; Fed. Cas. 13, 784; 90 N. Y. 457; 28 Atl. Rep. 788. A manufacturer will be protected in the use of a geographical name as against one who does not carry on business in the district; 35 Fed. Rep. 896; 86 Ky. 331; 31 N. Y. S. 102; so of "Chicago Waists" as against one who makes similar waists in a different state; 83 Fed. Rep. 213.

See a note on geographical names in 17 C. C. A. 657.

A number of competing millers in Minneapolis can maintain a joint bill on behalf of themselves and others similarly situated, to enjoin a grocer from selling flour made in Wisconsin, and marked with his own name and the word "Best Minnesota Patent, Minneapolis, Minn."; 86 Fed. Rep. 608, reversing 82 *id.* 816.

Generic names, or names merely descriptive of an article, are not valid trade-marks; Browne, Trade-Marks § 34. Thus: Clubhouse Gin; 7 Bos. 222; Desiccated Codfish; 3 Daly 53; Liebig's Extract of Meat; 28 How. Pr. 206; Cough Remedy; 122 Mass. 139; Rock and Rye; 82 N. Y. 630.

Nor can the name of the party be a valid trade-mark, as others may, under some circumstances, use the same name; but see *infra*.

No property can be acquired in words, marks, or devices which denote the mere nature, kind, and quality of articles; 101 U. S. 51; L. R. 17 Eq. 29; see 35 Fed. Rep. 150; 128 U. S. 598; 138 *id.* 537; and where a device, mark, or symbol is adopted for any purpose other than a reference to, or indication of its ownership, it cannot be sustained as a valid trade-mark; 150 U. S. 460.

Numerals can be used as trade-marks; 12 Fed. Rep. 717; *contra*, 81 Ky. 73; but not if they indicate quality or grade; 138 U. S. 537; and the same is true of letters when used as trade-marks. See 138 U. S. 587.

Marks that simply indicate the quality of articles do not constitute a valid trade-mark; so of words, etc., which indicate the peculiar excellence of goods, for instance "Ne Plus Ultra" for needles; 13 L. T. N. S. 746; "Nourishing" Stout; L. R. 17 Eq. 59. Words which indicate the purpose and character of medicines or articles cannot be exclusive property for a trade-mark, thus: "Cramp" Cure; 46 Fed. Rep. 625; "Microbe Killer;" 77 Tex. 530. Words which are simply descriptive of the quality or appearance of an article or the place where it was manufactured cannot be monopolized as a trade-mark; 139 U. S. 540. Thus, "Acid Phosphate;" 35 Fed. Rep. 524; "Cherry Pectoral;" 7 Daly 9.

The color of a label or package does not constitute a valid trade-mark. See 149 U. S. 562; 37 Ch. Div. 112; nor can a form of package be a trade-mark; 138 N. Y. 245; 4 Hughes 449.

The following are instances of valid trade-marks: "Celluloid;" 47 Fed. Rep. 712; "Kaiser," beer; 74 *id.* 222; "Royal Baking Powder;" 70 *id.* 376; "Bromo-Caffeine;" 142 N. Y. 467; "La Favorita," flour; 128 U. S. 514; "Star," shirts; 51 Fed. Rep. 829; "Saponifier," soap; 79 *id.* 87; "Vulcan," matches; 139 N. Y. 364; "Ideal," pens; 130 *id.* 301; "Elk." cigars; 37 Fed. Rep. 359; "Bromidia;" 50 *id.* 106; "Swans Down," complexion powder; 85 *id.* 774; "Moxie," nerve food; 33 Fed. Rep. 138; "Charter Oak," for a stove; 16 Blatchf. 376; "Nickle In," cigars; 63 Hun 330; "Valvoline," lubricating oil; 38 Fed. Rep. 922; "Tin Tag," tobacco; 28 Fed. Rep. 434; "Sapolio," soap; 55 How. Pr. 37; "Syrup of Figs," of a medicinal preparation; 7 U. S. App. 588.

The following have been held invalid: "Instantaneous," tapioca; 65 Fed. Rep. 505; "Black Package Tea;" 138 N. Y. 244; "International Banking Company;" 122 N. Y. 65; "Sarsaparilla and Iron;" 100 Cal. 672; "Taffy Tolu," chewing gum; 35 Fed. Rep. 150; "Imperial," beer; 20 C. C. A. 405; acid phosphate; 35 Fed. Rep. 524; "Goodyear Rubber Company;" 128 U. S. 598; "Snowflake," as applied to bread; 67 Ga. 561.

A few instances may be given of the use of words which have been held to infringe existing trade-marks:

Shrimpton & Hoover is infringed by *Shrimpton Turvey*; 18 Beav. 164; Julicks by *Josephs*; L. J., Notes of Cases (1867), 134; Stephens' by *Steelpen's* for ink; 16 L. T. N. S. 145; Cocoaine by *Cocoine*; 3 Keyes 594; The Hero by *The Heroine*; 7 Phila. 39; Bovilene by *Bovina*; 2 Daly 521; Hostetter & Smith by *Holsteter & Smyte*; 1 Dill. 329; Cuticura soap by *Curative* (the package being also imitated); 75 Fed. Rep. 676; but "No-to-bac" is not infringed by "Baco-Curo;" 82 Fed. Rep. 105.

In technical trade-mark cases, if the plaintiff proves that the defendant has used his trade-mark or a colorable imitation of it, he has established his right to relief.

Numerous cases have arisen where a party, by imitating the labels and packages used in connection with an article

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already on the market, has attempted to "pass off" his spurious goods on the public as the real article. In this country this is usually called *unfair competition;* in England, *passing off*, and in France, *concurrence déloyale.* The doctrine has been thus stated: The grounds on which unfair competition in trade will be enjoined are either that the means used are dishonest, or that, by false representation or imitation of a name or device, there is a tendency to create confusion in the trade, and work a fraud upon the public, by inducing it to accept a spurious article; 83 Fed. Rep. 30.

The only difference between such cases and technical trade-mark cases lies in the proof required to make out a case. Where a technical trade-mark is imitated there is a presumption of an intent to deceive the public. Where a label or style of package is imitated, it is necessary to show by evidence an intent to deceive the public and to steal the plaintiff's market. This intent may be shown by proof of actual deception, but it may be inferred from an examination of the real and spurious labels, etc.

Under this doctrine will come most of the cases referred to above where geographical names were used. In this class of cases it is held that it is not necessary to show actual deception. That the defendant's method of doing business tends to deceive the public, or that there is a probability of deception, is sufficient; 52 Mo. App. 10; 56 Fed. Rep. 830; 76 *id.* 959; 96 U. S. 245.

A fraudulent intent is presumed whenever a false statement is used in order to approximate the mark of the competitor; 77 Fed. Rep. 180; 74 *id.* 225; and also when a word identical with or resembling an important word is placed in the same position on a label or wrapper of the same shape; 26 Fed. Rep. 410; 41 N. W. Rep. 56; or catch words are printed in conspicuous type; L. R. 5 H. L. 508.

If the intent to deceive is established, it will be inferred that the mark is calculated to deceive; 52 Mo. App. 10; L. R. 18 Eq. 138.

The placing of spurious goods upon the market is *prima facie* evidence of damage to the plaintiff; 5 D. G. & S. 126; 6 Hare 325.

It is not necessary to prove that any customer or plaintiff had been deceived; it is sufficient to show that defendant knowingly put it in the power of retail dealers to deceive their customers; 70 Mo. App. 424. The fact that the defendants, who formerly used a label not imitative of complainant's, adopted a new one much resembling his, shortly after a former infringer of complainant's trade-mark came into their employ, is most suggestive of an intentional imitation; 74 Fed. Rep. 225. The similarity must be such as to mislead the ordinary purchaser; 150 U. S. 460. The test of infringement is whether the alleged infringing article is so dressed up as to be likely to deceive persons of ordinary intelligence, exercising the slight care ordinarily used, into purchasing one man's goods for the goods of another; 80 Fed. Rep. 105.

Cases of passing off frequently involve the use of a person's own name on his goods.

It is generally said that every man has an inherent, natural right to the free employment of his own name in his business; 78 Fed. Rep. 472; 64 *id.* 841; 76 *id.* 959; 77 *id.* 181; 70 *id.* 1017; 22 *id.* 41; 13 Beav. 209; 7 *id.* 84; 63 How. Pr. 453; 147 Ill. 462; 39 N. Y. S. 903; 80 Fed. Rep. 889; 6 L. R. A. 823. But the doctrine has its limitations. Where one uses his own name to identify the origin of his goods which are made at a particular place, no other person by the same name will be permitted to use his name on his own goods if he does it in such a way as to injure the trade and business of another, or so as to represent his goods as the goods of another; 6 L. R. A. (Fla.) 823; 122 Mass. 139. And one who uses his name in competition with an established business carried on by another of the same name, must avoid putting up his goods in such a way as to resemble the goods of the other; 80 Fed. Rep. 889. And one is not entitled to use his name as part of the name of a corporation in order to compete with another of the same name; 70 Fed. Rep. 1017; 78 Fed. Rep. 473; 37 N. Y. S. 203; 66 Fed. Rep. 56. One who uses his name will be protected against the use of that name, even by a person bearing it, in such form as to constitute a false representation of the origin of the goods; 22 Fed. Rep. 41. One cannot use his own name to deceive the public; 64 Fed. Rep. 841; 1 Ch. App. 192. One may trade honestly in his own name, but he must be careful not to trade under his own name in such a manner as to take away that which lawfully belongs to another; he must be careful not to deceive; 4 R. P. C. 215.

One should not, it is submitted, be allowed to lend his name to a firm for the purpose of competing with another of the same name, for, it being settled that he cannot lend it to a corporation (which is merely an association with limited liability), there is no reason why he should associate himself with others under a partnership and lend his name to the concern.

Where the long and successful use of a trade-mark or name is clearly established, the fact that the owner has recognized and permitted the limited use thereof by another which does not appear to have misled anybody, is not sufficient to defeat the owner's right to prevent others from using it; 85 Fed. Rep. 774.

A party may affect his right to a trade-mark by non-use, by a forbearance in suing protectively, and by adopting a new one. But the question of abandonment is always a question of intention; Brown, Trade-Marks 536; equity, however, will

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not in general refuse an injunction on account of delay in seeking relief where the proof of infringement is clear, even though the delay may be such as to preclude the party from any right to an account for past profits; 31 L. T. 285; 45 L. Jour. 505.

An injunction against the use of terms which cannot be protected as trade-marks, will not be granted, where the defendant has persistently warned the public that it has no connection with the plaintiff; 128 U. S. 598. But it is obvious that such a "warning" might be a more efficient cause of injury to the plaintiff.

A foreigner selling medicinal preparations in his own country, under a registered trade-mark, has no common-law right to such trade-mark here, as against a domestic firm which had an established business under a similar trade-mark, adopted in good faith, before the other had sold any goods in this country; 52 Fed. Rep. 455.

Where a patent was obtained for a medical preparation called "Castoria," under which it had attained a large sale, upon the expiration of the patent, the word "Castoria" became the property of the public; 84 Fed. Rep. 955 (C. C. A.).

So of a patented article of manufacture to which the name "Linoleum" had been given; 7 Ch. Div. 834; and of a patented article known as "Granite"; 33 N. Y. Suppl. 443. See PATENT.

Trade-mark treaties with various countries will be found in the official gazette of the patent office.

An act of March 3, 1881, provides for the registration of trade-marks, if the article is used in commerce with foreign nations or Indian tribes. It reserves to the owner all common-law rights; R. S. § 4946. The general trade-mark act of congress was declared unconstitutional in 100 U. S. 82.

In England all trade-marks must be registered, and after five years the registration is conclusive evidence of the title.

The members of a voluntary union of cigar-makers are entitled to protection in the exclusive use of a label to designate the exclusive product of their labor, though they are only employed for wages; 43 S. W. Rep. 180; *contra*, 144 Pa. 235; and so in a recent decision by the Vice-Chancellor in New Jersey, holding an act unconstitutional.

The courts will not grant relief where there is a false representation, calculated to deceive the public, as to the manufacture of an article, and the place where it is manufactured; 96 Cal. 518. See *supra*. Where a complainant uses a geographical name to represent untruthfully the place of his manufacture he cannot obtain relief; 108 U. S. 218; 128 Mass. 477; 8 Fed. Rep. 29; 70 *id.* 376; [1891] 2 Ch. 166.

A trade-mark is not subject to execution, unless under authority of statute; 20 N. Y. Sup. 462.

See Brown, Trade Marks; as to unfair competition, 4 Harv. L. Rev. 321, by Grafton D. Cushing.

**TRADE NAME.** See TRADE-MARK.

**TRADE SECRETS.** An employe who, in consideration of an increase in his wages, agrees not to reveal the secrets of his master's trade which are revealed to him, has no right to reveal the secrets so obtained, for his own private use, or reveal them to others. In such case equity will interfere to protect the master; 165 Pa. 24. See PRIVACY; INJUNCTION.

**TRADER.** One who makes it his business to buy merchandise, or goods and chattels, and to sell the same for the purpose of making a profit. See 80 N. C. 481; 76 Me. 500. The *quantum* of dealing is immaterial, when an intention to deal generally exists; 2 C. & P. 135; 1 Term 572. The principal question is whether the person has the intention of getting a living by his trading; if this is proved, the extent or duration of the trading is not material; 3 Camp. 233.

Questions as to who is a trader most frequently arise under the bankrupt laws; and the most difficult among them are those cases where the party follows a business which is not that of buying and selling principally, but in which he is occasionally engaged in purchases and sales.

A farmer who, in addition to his usual business, occasionally buys a horse not calculated for his usual occupation, and sells him again to make a profit, and who in the course of two years had so bought and sold five or six horses, two of which had been sold, after he had bought them, for the sake of a guinea profit, was held to be a trader; 1 Term 537, n.; 1 Price 20. Another farmer, who bought a large quantity of potatoes, not to be used on his farm, but merely to sell again for a profit, was also declared to be a trader; 1 Stra. 513. See 5 B. & P. 78; 11 East 274. A butcher who kills only such cattle as he has reared himself is not a trader, but if he buy them and kill and sell them with a view to profit, he is a trader; 4 Burr. 21, 47. A brickmaker who follows the business for the purpose of enjoying the profits of his real estate merely is not a trader; but when he buys the earth by the load or otherwise, and manufactures it into bricks, and sells them with a view to profit, he is a trader; 7 East 442; 3 C. & P. 500; so is a brewer; 47 Minn. 71; and one who is engaged in the manufacture and sale of lumber is a trader; 1 B. R. 281: so is one engaged in buying and selling goods for the purpose of gain, though but occasionally; 2 *id.* 15; but the keeper of a livery stable is not; 3 N. Y. Leg. Obs. 282; nor is one who buys and sells shares; 2 Ch. App. 466.

**TRADES UNIONS.** See LABOR UNION.

**TRADESMAN.** In England, a shopkeeper; in the United States, a mechanic or artificer of any kind, whose livelihood depends on the labor of his hands; 4 Pa. 472; a farmer is not a tradesman; 33 L. J. M. C. 80; a laundryman is not; 5 D. R. (Pa.) 43.

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**TRADING PARTNERSHIP.** See PARTNERSHIP.

**TRADING STAMPS.** The current name for a scheme which consists of "an agreement between a number of merchants and a corporation that the latter shall print the names of the former in its subscribers' dictionary and circulate a number of copies of the book, and that the merchants shall purchase of the corporation a number of so-called trading stamps, to be given to purchasers with their purchases, and by them preserved and pasted in the books aforesaid until a certain number have been secured, when they shall be presented to the corporation in exchange for the choice of certain articles kept in stock by the corporation." 56 Alb. L. J. 488. In a case brought upon an act of congress of February 17, 1873, which forbids the sale of real estate or any article of merchandise or taking of payment with a promise to give any article or thing, in consideration of the purchase by any person of any other article or thing, etc., it was held that the business was nothing more nor less than a gaming device; *id.*

**TRADITIO BREVIS MANUS** (Lat.). **In Civil Law.** The delivery of a thing by the mere consent of the parties.

**TRADITIO LONGA MANU.** A species of delivery which takes place where the transferor places the article in the hands of the transferee. Mackeld. Rom. L. § 284.

**TRADITION** (Lat. *trans*, over, *do*, *dare*, to give). The act by which a thing is delivered by one or more persons to one or more others.

The delivery of possession by the proprietor with an intention to transfer the property to the receiver. Two things are, therefore, requisite in order to transmit property in this way: the *intention* or *consent* of the former owner to transfer it, and the *actual delivery* in pursuance of that intention.

Tradition is either real or symbolical. Real tradition takes place where the *ipsa corpora* of movables are put into the hands of the receiver. *Symbolical tradition* is used where the thing is incapable of real delivery, as, in immovable subjects, such as lands and houses, or such as consist *in jure* (things incorporeal), as, things of fishing, and the like. The property of certain movables, though they are capable of real delivery, may be transferred by symbol. See DELIVERY; SYMBOLICAL DELIVERY.

**TRADITOR.** A traitor; one guilty of treason. Fleta, lib. 1, c. 21, 8.

**TRAFFIC.** Commerce; trade; sale or exchange of merchandise, bills, money, and the like. The passing of goods or commodities from one person to another for an equivalent in goods or money; and a trafficker is one who traffics or a trader, a merchant. 44 Ohio St. 673.

**TRAFFIC RATES.** See RATES.

**TRAHENS.** The drawer of a bill. Story, Bills § 12.

**TRAIL-BASTON.** See JUSTICE OF TRAIL-BASTON.

**TRAIN.** A number of cars coupled together and moving from point to point, under an impetus imparted by a locomotive which had been detached, is a train. 164 Mass. 23.

**TRAIN-WRECKING.** A conviction is not justified, where no actual wrecking occurred, unless the intention of the defendant to do so is shown; 21 S. E. Rep. 591. The indictment need not specify the passengers who were endangered; 13 S. W. Rep. 783. See CRIMES.

**TRAITOR.** One guilty of treason. See TREASON.

**TRAITOROUSLY. In Pleading.** A technical word, which is essential in an indictment for treason in order to charge the crime, and which cannot be supplied by any other word or any kind of circumlocution. Having been well laid in the statement of the treason itself, it is not necessary to state every overt act to have been traitorously committed.

**TRAMP.** One who roams about from place to place, begging or living without labor or visible means of support; a vagrant. Many of the states have recently adopted suitable legislation upon the subject, corresponding to the English vagrant acts. The object of these statutes is accomplished by arresting offenders and setting them to work on municipal improvements, or hiring them out to private employers, for a limited time, in Delaware for a month, for which they receive food, lodging, and reasonable wages. In some states the punishment is by imprisonment. It is doubtful if mere vagrancy was indictable at common law; 1 Bish. Cr. L. § 515. Where there is no statutory definition of vagrancy, it will depend upon the common-law meaning; 90 Mich. 3.

**TRANSACT.** In common parlance, equivalent to carry on, when used with reference to business. 8 Mont. 140.

**TRANSACTIO** (Lat.). **In the Civil Law.** The settlement of a suit or matter in controversy, by the litigating parties between themselves without referring it to arbitration. Halifax, Civil Law b. 3, c. 8, no. 14.

**TRANSACTION** (from Lat. *trans*, and *ago*, to carry on). The doing or performing of any business; the management of an affair. 91 Tenn. 173. The term transaction is a broader one than contract; 70 Cal. 113.

**In Civil Law.** An agreement between two or more persons, who, for the purpose of preventing or putting an end to a lawsuit, adjust their difference, by mutual consent, in the manner which they agree

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on. In Louisiana this contract must be reduced to writing. La. Civ. Code, art. 3038.

To transact, a man must have the capacity to dispose of the things included in the transaction. In the common law this is called a compromise. See COMPROMISE.

**TRANSCRIPT.** A copy of an original writing or deed.

**TRANSCRIPT OF RECORD.** The printed record as made up in each case for the supreme court of the United States is so called.

**TRANSFER** (Lat. *trans*, over, *fero*, to bear or carry). The act by which the owner of a thing delivers it to another person, with the intent of passing the rights which he has in it to the latter. See 16 Neb. 238; 1 Ala. 669; STOCK.

**TRANSFERABLE.** The word includes every means by which property may be passed from one person to another. 17 Ch. Div. 9.

**TRANSFEREE.** He to whom a transfer is made.

**TRANSFEROR.** One who makes a transfer.

**TRANSGRESSION** (Lat. *trans*, over, *gressus*, a stepping). The violation of a law.

**TRANSGRESSIONE. In Old English Law.** A writ or action of tresspas.

**TRANSHIPMENT.** The act of taking the cargo out of one ship and loading it in another.

When this is done from necessity, it does not affect the liability of an insurer on the goods; Abbott. Shipp. 240. But when the master transhipps goods without necessity, he is answerable for the loss of them by capture by public enemies; 1 Gall. 443.

**TRANSIENT.** Within the meaning of a poor-law a "transient person" is not exactly a person on a journey from one place to another, but rather a wanderer ever on the tramp. 51 Vt. 423. A transient foreigner is one who visits the country, without the intention of remaining; 10 Tex. 170. A doctor's office is not merely "transient," where he rents it by the year, and there keeps regular hours on three certain days per week; 7 D. R. Pa. 413.

**TRANSIRE.** A warrant for the custom-house to let goods pass; a permit. See for a form of a *transire*, Hargr. L. Tr. 104.

**TRANSITIVE COVENANT.** An obligation which binds not only the covenantor, but also his representatives.

**TRANSITORY ACTION.** An action the cause of which might have arisen in one place or county as well as another.

In general, all personal actions, whether *ex contractu*; 5 Taunt. 25; 2 Johns. Cas. 335; 3 S. & R. 500; or *ex delicto*; 1 Chitty, Pl. 243; are transitory; and may be maintained in a state other than the one in which the injuries were inflicted, where the cause of action is grounded on the principles of the common law, recognized in both states; 68 N. W. Rep. (Wis.) 664.

Such an action may at common law be brought in any county which the plaintiff elects. See JURISDICTION; LOCAL ACTIONS.

**TRANSITUS** (Lat.). A transit. See STOPPAGE IN TRANSITU.

**TRANSLATION.** The reproduction in one language of what has been written or spoken in another.

In pleading, when a libel or an agreement written in a foreign language must be averred, it is necessary that a translation of it should also be given.

"Making a translation [of a contract in a foreign language] is not a mere question of trying to find out in a dictionary the words which are given as the equivalent of the words of the document; a true translation is the putting into English that which is the exact effect of the words used under the circumstances. To get at this in the present case you must get the words in English which in business have the equivalent meaning of the words in Brazilian, as used in Brazil, under the circumstances. Therefore you want a competent translator, competent to translate in that way, and if the words in Brazil had in business a particular meaning different from their ordinary meaning, you would want an expert to say what was that meaning. Amongst those experts you might want a Brazilian lawyer—and a Brazilian lawyer for that purpose would be an expert." [1891] 1 Q. B. 82, per Lord Esher, M. R.

In evidence, when a witness is unable to speak the English language so as to convey his ideas, a translation of his testimony must be made. In that case an interpreter should be sworn to translate to him, on oath, the questions propounded to him, and to translate to the court and jury.

See INTERPRETER.

The bestowing of a legacy which had been given to one, on another: this is a species of ademption; but it differs from it in this, that there may be an ademption without a translation, but there can be no translation without an ademption. Bacon, Abr. *Legacies* (C).

The transfer of property; but in this sense it is seldom used. 2 Bla. Com. 294.

**In Ecclesiastical Law.** The removal from one place to another; as, the bishop was translated from the diocese of A to that of B.

**In the Civil Law,** translation signifies the transfer of property. *Clef des Lois Rom.*

See COPYRIGHT.

**TRANSMISSION** (Lat. *trans*, over, *mitto*, to send). **In Civil Law.** The right which heirs or legatees may have of passing to their successors the inheritance

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or legacy to which they were entitled, if they happen to die without having exercised their rights. Domat, liv. 3, t. 1, s. 10; 4 Toullier, n. 186.

**TRANSPORTATION** (Lat. *trans*, over, beyond, *porto*, to carry). **In English Law.** A punishment inflicted by virtue of sundry statutes; it was unknown to the common law. 2 H. Blackst. 223.

**TRANSVAAL.** A Republic of South Africa. The president is elected for five years, and has a council of four members. The legislature is in a dual chamber, the first Volksraad and second Volksraad. The Dutch Reformed Church is the dominant religion.

**TRAVAIL.** The act of child-bearing. A woman is said to be in her travail from the time the pains of child-bearing commence until her delivery. 5 Pick. 63.

**TRAVELLER.** One who passes from place to place, whether for pleasure, instruction, business, or health; 47 Ala. 45; 5 C. B. N. S. 442; 10 *id.* 429. The term is used to designate those who patronize inns; the distance which they travel is not material; 35 Conn. 185.

The question whether one is or is not a *bona fide* traveller is one of fact; [1893] 1 Q. B. 522. One would be a traveller if he came abroad from any legitimate motive and needed refreshment, but not if he came abroad merely to go to a public house and obtain a drink; 17 C. B. N. S. 539. Walking for exercise is not travelling; 14 Allen 475. Within the meaning of a policy of insurance, one who has been carried by a steamboat and walked eight miles from the landing to his home is not, whilst walking, a traveller by public or private conveyance; 16 Wall. 336. Within the meaning of a law allowing a person travelling to carry concealed weapons, the travelling must be on a journey beyond the ordinary habit, business, or duties of a person, and beyond the circle of his friends and acquaintances; 53 Ala. 520; 42 Tex. 464. See SUNDAY.

**TRAVERSE** (L. Fr. *traverser*, to turn over, to deny). To deny; to put off.

**In Civil Pleading.** To deny or controvert anything which is alleged in the previous pleading. Lawes, Pl. 116. A denial. Willes 224. A direct denial in formal words: "Without this, that, etc." (*absque hoc*). 1 Chitty, Pl. 523, n. *a*. A traverse may deny all the facts alleged; 1 Chitty, Pl. 525; or any particular material fact; 20 Johns. 406.

A *common traverse* is a direct denial, in common language, of the adverse allegations, without the *absque hoc*, and concluding to the country. It is not preceded by an inducement, and hence cannot be used where an inducement is requisite: 1 Saund. 103 *b*.

A *general traverse* is one preceded by a general inducement and denying all that is last before alleged on the opposite side, in general terms, instead of pursuing the words of the allegation which it denies; Pepper, Pl. 17. Of this sort of traverse the replication *de injuria sua propria absque tali causa*, in answer to a justification, is a familiar example; Steph. Pl. 171.

A *special traverse* is one which commences with the words *absque hoc*, and pursues the material portion of the words of the allegation which it denies; Lawes, Pl. 116. It is regularly preceded by an inducement consisting of new matter; Steph. Pl. 188. A special traverse does not complete an issue, as does a common traverse; 20 Viner, Abr. 339.

A traverse upon a traverse is one growing out of the same point or subject-matter as is embraced in a preceding traverse on the other side; Gould, Pl. c. 7, § 42, n. It is a general rule that a traverse well intended on one side must be accepted on the other. And hence it follows, as a general rule, that there cannot be a traverse upon a traverse if the first traverse is material. The meaning of the rule is that when one party has tendered a material traverse the other cannot leave it and tender another of his own to the same point upon the inducement of the first traverse, but must join in that first tendered; otherwise the parties might alternately tender traverses to each other in unlimited succession, without coming to an issue; Gould, Pl. c. 7, § 42. The rule, however, does not apply where the first traverse is immaterial, nor where it is material if the plaintiff would thereby be ousted of some right or liberty which the law allows; Cro. Eliz. 99, 418; Bacon, Abr. *Pleas* (H 4).

**In Criminal Practice.** To put off or delay the trial of an indictment till a succeeding term. More properly, to deny or take issue upon an indictment. 4 Bla. Com. 351.

**TRAVERSE JURY.** See JURY.

**TREASON. In Criminal Law.** This word imports a betraying, treachery, or breach of allegiance. 4 Bla. Com. 75. In England, treason was divided into high and petit treason. The latter, originally, was of several forms, which, by 25 Edw. III. st. 5, c. 2, were reduced to three: the killing by a wife, of her husband; by a servant, of his master; and the killing of a prelate by an ecclesiastic owing obedience to him. These kinds of treason were abolished in 1828. In America they were unknown; here treason means high treason.

"*Treason* it has been said is not felony but a grade of crime by itself." 29 N. J. L. 453, 464.

The constitution of the United States, art. 3, s. 3, defines treason against the United States to consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. By the same article of the constitution, no person shall be convicted of treason unless on the testimony of two witnesses to the

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same overt act, or on confession in open court.

It is "the only crime defined by the constitution. . . . The clause was borrowed from an ancient English statute, enacted in the year 1352. Previous to the passage of that statute there was great uncertainty as to what constituted treason. Numerous offences were raised to its grade by arbitrary construction of the law. The statute was passed to remove this uncertainty and to restrain the power of the crown to oppress the subject by constructions of this character. It comprehends all treason under seven distinct branches. The framers of our constitution selected one of these branches, and declared that treason against the United States should be restricted to the acts which it designates. 'Treason against the United States,' is the language adopted, 'shall consist only in levying war against them, or adhering to their enemies, giving them aid and comfort.'" No other acts can be declared to constitute the offence. Congress can neither extend, nor restrict, nor define the crime. Its power over the subject is limited to prescribing the punishment. Field, J., in 4 Sawy. 465.

By the same article of the constitution, no "attainder of treason shall work corruption of blood except during the life of the person attainted." Every person owing allegiance to the United States who levies war against them, or adheres to their enemies giving them aid and comfort within the United States or elsewhere, is guilty of treason; R. S. § 5331. The penalty is death, or, at the discretion of the court, imprisonment at hard labor for not less than five years and a fine of not less than ten thousand dollars; and every person convicted of treason is rendered incapable of holding any office under the United States; R. S. § 5332.

The term *enemies*, as used in the constitution, applies only to subjects of a foreign power in a state of open hostility with us. To constitute a "levying of war" there must be an assemblage of persons with force and arms to overthrow the government or resist the laws. All who aid in the furtherance of the common object of levying war against the United States, in however minute a degree, or however remote from the scene of action, are guilty of treason; 4 Sawy. 457.

Treason may be committed against a state; 1 Story 614; 11 Johns. 549.

See, generally, 3 Story, Const. § 1796; Sergeant. Const. c. 30; Cooley, Const. Lim. 380; Rawle, Const.; Bish. Cr. Law; 20 Wall. 92; 16 *id.* 147; 92 U. S. 202; 93 *id.* 274.

As to the Law of Treason under the Roman Empire, see 22 Law Mag. and Rev. 33; 15 Cr. Law Mag. 191; 46 Alb. Law J. 345.

**TREASURE.** A thing hidden or buried in the earth which no one can prove as his property, and which is discovered by chance. La. Civ. C. art. 3423, par. 2.

**TREASURE TROVE.** Found treasure.

This name is given to such money or coin, gold, silver, plate, or bullion, which, having been hidden or concealed in the earth, or other private place, so long that its owner is unknown, has been discovered by accident. Should the owner be found, it must be restored to him; and in case of not finding him, the property, according to the English law, belongs to the king. In the latter case, by the civil law, when the treasure was found by the owner of the soil he was considered as entitled to it by the double title of owner and finder; when found on another's property, one-half belonged to the owner of the estate and the other to the finder; when found on public property, it belonged one-half to the public treasury and the other to the finder. *Lecons du Dr. Rom.* §§ 350–352. This includes not only gold and silver, but whatever may constitute riches: as vases, urns, statues, etc.

If the owner is known it is not technically treasure-trove; 74 Me. 456. The crown is *prima facie* entitled to treasure trove and there need not be an inquest to inform the crown of its rights; 41 W. R. 294.

**TREASURER.** An officer intrusted with the treasures or money either of a private individual, a corporatiou, a company, or a state. See OFFICER; SURETYSHIP.

**TREASURER OF THE UNITED STATES.** An officer is appointed by the president by and with the advice and consent of the senate. He is required to give bond, with sufficient sureties, approved by the secretary of the treasury and the first comptroller, in the sum of $150,000, payable to the United States, for the faithful performance of the duties of his office and for the fidelity of the persons by him employed.

His principal duties are—to receive and keep the moneys of the United States, and disburse the same upon warrants drawn by the secretary of the treasury, countersigned by either comptroller and recorded by the register; to take receipts for all moneys paid by him; to render his account to the first comptroller quarterly, or oftener if required, and transmit a copy thereof, when settled, to the secretary of the treasury; to lay before each house, on the third day of every session of congress, fair and accurate copies of all accounts by him from time to time rendered to and settled with the first comptroller, and a true and perfect account of the state of the treasury; to submit at all times to the secretary of the treasury and the comptroller, or either of them, the inspection of the moneys in his hands. R. S. §§ 301–311. See DEPARTMENT.

**TREASURER'S REMEMBRANCER.** He whose charge was to put the lord treasurer and the rest of the judges of the exchequer in remembrance of such things as were called on and dealt in for the sovereign's behoof. There is still one in Scotland. Whart.

**TREASURY.** The place where treasure is kept; the office of a treasurer. The term is more usually applied to the public than to a private treasury. The

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word is held not to be understood in the sense of locality as descriptive of a particular building, but whenever andwhe ever moneys are in the official custody of the treasurer or subject to his direction they are to be considered as in the state treasury. 10 Mich. 86. See DEPARTMENT.

**TREASURY CHEST FUND.** A fund in England originating in the unusual balances of certain grants of public money, and which is used for the purpose of banking and loan companies by the commissioners of the treasury. Whart.

**TREASURY NOTES.** The treasury notes of the United States payable to holder or to bearer at a definite future time are negotiable commercial paper, and their transferability is subject to the commercial law of other paper of that character. Where such a paper is overdue a purchaser takes subject to the rights of antecedent holders to the same extent as in other paper bought after its maturity; 21 Wall. 138. See LEGAL TENDER.

**TREATY.** A compact made between two or more independent nations with a view to the public welfare. Treaties are for a perpetuity, or for a considerable time. Those matters which are accomplished by a single act and are at once perfected in their execution are called agreements, conventions, and pactions.

*Personal* treaties relate exclusively to the persons of the contracting parties, such as family alliances, and treaties guaranteeing the throne to a particular sovereign and his family. As they relate to the persons, they expire of course on the death of the sovereign or the extinction of his family.

*Real* treaties relate solely to the subject-matters of the convention, independently of the persons of the contracting parties, and continue to bind the state, although there may be changes in its constitution or in the persons of its rulers. Boyd's Wheat. Int. Law § 29.

On the part of the United States, treaties are made by the president, by and with the consent of the senate, provided two-thirds of the senators present concur. Const. art. 2, s. 2, n. 2.

No state shall enter into any treaty, alliance, or confederation; Const. art. 1, s. 10, n. 1; nor shall any state, without the consent of congress, enter into any agreement or compact with another state or with a foreign power; *id.* art. 1, sec. 10, n. 2.

A treaty is declared to be the supreme law of the land, and is, therefore, obligatory on courts; 1 Cra. 103; 1 Paine 55; 124 U. S. 190; 119 *id.* 407; whenever it operates of itself without the aid of a legislative provision; but when the terms of the stipulation import a contract, and either of the parties engages to perform a particular act, the treaty addresses itself to the political, not to the judicial, department, and the legislature must execute the contract before it can become a rule of the court; 2 Pet. 314. A treaty is a law of the land whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined; 148 U. S. 472. So an award by arbitrators under a treaty between the United States and another nation, by which the contracting nations agree that the decision of the tribunal of arbitration shall be a final settlement of all questions submitted, becomes the supreme law of the land and is as binding on the courts as an act of congress; 75 Fed. Rep. 513, reversing 45 *id.* 575.

It need hardly be said that a treaty cannot change the constitution or be held valid if it be in violation of that instrument. A treaty may supersede a prior act of congress, and an act of congress may supersede a prior treaty; and this is true both of treaties with Indians and foreign nations; 11 Wall. 620; 8 Op. Atty-Gen. 354; 43 Fed. Rep. 17; 55 *id.* 80; 148 U. S. 427; 149 *id.* 698; 18 Sup. Ct. Rep. 340.

A treaty providing that aliens may inherit lands is controlling, though in conflict with the laws of a state; 71 N. W. Rep. (Ia.) 204.

The question whether the United States is justified in disregarding its engagements with another nation is not one for the determination of the courts; 130 U. S. 581.

Treaties should be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them; 133 U. S. 258.

So far as a treaty can be made the subject of judicial cognizance in the courts of this country, it is subject to such acts as congress may pass for its enforcement, modification, or repeal; 124 U. S. 190; 130 *id.* 238, 581, 143 *id.* 570.

Treaties are agreements between nations of a general nature bearing upon political or commercial questions, and are distinguished from conventions which are agreements relating to minor or specific subjects, such as consular conventions and postal conventions. The right to negotiate treaties is one of the tests of sovereignty. The king is usually the treaty-making power in a monarchy, though in modern times more or less restricted, and in a republic, the chief executive or some part of the legislature. After treaties have been negotiated and signed they must be ratified by the proper authorities of each state. Treaties usually provide for their own termination, but independently of that it has been held that when a treaty becomes dangerous to the life or incompatible with the independence of a state or a permanent obstacle to the development of its constitution or the rights of its people, it can be abdicated, and also when the condition of affairs which formed the basis of the treaty has become so modified by time that its execution has become contrary to the nature of things and the original intention of the parties; 22 Ct. Cls. 408. When war is declared between two states all treaties of specific relations between them cease. Snow, Int. L. 73. A

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treaty with a state is considered by the United States as abrogated when such state is conquered by or incorporated into another state. But England has taken an opposite position. War may affect existing treaties in various ways, but only those binding upon one or both belligerents; where they expressly provide for matters that relate only to a condition of war, they are not affected. Such was the Geneva Convention, 1864, as to the treatment of the wounded. Similarly those which create some permanent state affairs by an act done once for all; *e. g.* the settlements made by the Treaty of Vienna, 1815. So of a treaty ceding territory. But treaties which regulate commercial and social relations between the belligerents are at least suspended and possibly annulled by a war between them. That which relates to a continuous course of conduct, binding upon one or more belligerents and one or more third powers, will be continued, suspended, or annulled, according to the provisions. Risley, Law of War 85. But the practice has been so various and inconsistent that there is no basis for any general rule as to the effect of war on treaties; *id.* On breach of a treaty by one party to it, the other may declare a breach, or waive the breach and let the treaty remain in force; 1 Kent 175. Unless otherwise stipulated the breach of any one article of a treaty is a violation of the whole; *id.* Private rights may be sacrificed by treaty, for the public safety, but the government should compensate the individuals whose rights are affected; 1 Kent 167; 8 Dall. 199.

As affecting the rights of contracting governments, a treaty is binding from the date of its signature, and the exchange of signatures has a retroactive effect, confirming the treaty from its date; but a different rule prevails when the treaty operates on individual rights; 9 Wall. 32.

The law of the interpretation of treaties is substantially the same as in the case of other contracts; Wools. Int. L. 185. See 22 Ct. Cls. 1.

See Herstlet, collection of Commercial Treaties; PRECEDENCE; SIGNATORY.

**TREATY OF PEACE.** A treaty of peace is an agreement or contract made by belligerent powers, in which they agree to lay down their arms, and by which they stipulate the conditions of peace and regulate the manner in which it is to be restored and supported. Vattel, b. 4, c. 2, § 9.

Peace may be restored between belligerents by the cessation of hostilities; by the submission of one belligerent to another; and by a treaty of peace between the belligerents; 3 Phill. Int. L. 772; a formal declaration that war has ceased is not necessary; *id.* The belligerents may agree that possession shall be restored as it was before the war, that is, according to the *status quo ante bellum;* or that they shall remain as they were at the end of the war, which is expressed by the formula, *uti possidetis* (*q. v.*).

Overtures of peace may be made by either belligerent; or by a neutral; or by a state acting as a passive ally of either belligerent; or a neutral power may act as a mediator or interpose its good offices; 3 Phill. Int. L. 775.

Peace renders unlawful every act of force or violence between the states, and a capture, though made by a person ignorant of the completion, must be restored; 3 Phill. Int. L. 777; but it is said not to bind the subjects of the belligerent states until it is notified to them; Vattel 24. Where a period has been fixed by the treaty of peace for the cessation of hostilities, there is a difference of opinion as to whether a capture made before that period, but with knowledge of the peace, is lawful; that it is, see 1 Kent *172; 3 Phill. Int. L. 779. Where a capture was made before the period fixed for a cessation of hostilities, and in ignorance of the peace, and after the period, but in ignorance of the peace, there was a recapture, the recapture was held unlawful; the intervention of peace barred the title of the owner; 1 Kent 173; 6 C. Rob. 188.

**TREBLE COSTS. In English Practice.** The taxed costs and three-fourths the same added thereto. It is computed by adding one-half for double costs, and in addition one-half of one-half for treble costs. 1 Chitty, Pr. 27.

**In American Law.** In Pennsylvania the rule is different: when an act of assembly gives treble costs, the party is allowed three times the usual costs, with the exception that the fees of the officers are not to be trebled when they are not regularly or usually payable by the defendant; 2 Rawle 201.

And in New York the directions of the statute are to be strictly pursued, and the costs are to be trebled; 2 Dunl. Pr. 731.

**TREBLE DAMAGES.** See MEASURE OF DAMAGES.

**TREBUCKET.** The name of an engine of punishment, said to be synonymous with *tumbrel.*

**TREE.** A woody plant, which in respect of thickness and height grows greater than any other plant.

A woody plant, the branches of which spring from, and are supported upon, a trunk or body. It may be young or old, small or great; 70 Miss. 411.

Trees are part of the real estate while growing and before they are severed from the freehold; but as soon as they are cut down they are personal property. Some trees are timber trees, while others do not bear that denomination. See TIMBER.

Trees belong to the owner of the land where they grow; but if the roots go out of one man's land into that of another, or the branches spread over the adjoining estates, such roots or branches may be cut off by the owner of the land into which they thus grow; Rolle 394; 6 Ves. Ch. 109; 78 Cal. 611. See 107 Mass. 234; Wood, Nuis. § 112.



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When the roots grow into the adjoining land, the owner of such land may lawfully claim a right to hold the tree in common with the owner of the land where it was planted; but if the branches only overshadow the adjoining land, and the roots do not enter it, the tree wholly belongs to the owner of the estate where the roots grow; 1 Ld. Raym. 737. See 1 Pick. 224; 6 N. H. 430. When the tree grows directly on the boundary-line, so that the line passes through it, it is the property of both owners, whether it be marked as a boundary or not; 12 N. H. 454; 83 Ia. 301; 34 Barb. 547; 38 Vt. 115. As to sales of standing timber, see 8 Harv. L. Rev. 367; SALE. See TIMBER TREES; NUISANCE.

An electric company may, in the observance of a statute, trim trees, if necessary, but not so as to do unnecessary damage; Crosw. Electr. 209; 39 La. Ann. 996. The subject is regulated by statute in Connecticut, Maryland, Michigan, New Hampshire, and Vermont.

Where the branches of a tree growing upon the land of one person overhang that of his neighbor, one may, without notice, cut off so much of a tree as overhangs his land, if he can do so without going upon the land of the owner, and such owner cannot acquire, either by prescription or the statute of limitations, the right to overhang his neighbor's land; [1895] App. Cas. 1, affg. [1894] 3 Ch. 1; and where a tree stands on the dividing line between adjoining lots, either owner may cut off branches or roots extending over his own land; 65 Conn. 365, distinguishing 11 *id.* 177; but it has been held that an injunction will lie to restrain an adjoining owner of a rural lot from destroying a tree growing on the division line; 35 W. N. C. Pa. 364. The owner of land on which a partially decayed tree is permitted to stand in such position that by falling it would damage the house of another, is liable for damages caused by its falling after he has been notified that it was dangerous; 4 App. Div. N. Y. 198.

**TRESAILE, or TRESAYLE.** The grandfather's grandfather. 1 Bla. Com. 186.

**TRESPASS.** Any misfeasance or act of one man whereby another is injuriously treated or damnified. 7 Conn. 125.

Any unlawful act committed with violence, actual or implied, to the person, property, or rights of another.

Any unauthorized entry upon the realty of another to the damage thereof.

The word is used oftener in the last two somewhat restricted significations than in the first sense here given. In determining the nature of the act, neither the amount of violence or the intent with which it is offered, nor the extent of the damage accomplished or the purpose for which the act was committed, are of any importance: since a person who enters upon the land of another without leave, to lead off his own runaway horse, and who breaks a blade of grass in so doing, commits a trespass; 2 Humphr. 325; 6 Johns. 5.

It is said that *some* damage must be committed to make an act a trespass. It is undoubtedly true that damage is required to constitute a trespass *for which an action will lie*; but, so far as the tort itself is concerned, it seems more than doubtful if the mere commission of an act affecting another, without legal authority, does not constitute trespass, though until damage is done the law will not regard it, inasmuch as the law does not regard trifles.

The distinction between the different classes of trespass is of importance in determining the nature of the remedy.

A trespass committed with force is said to be done *vi et armis*; one committed by entry upon the realty, *by breaking the close*.

**In Practice.** A form of action which lies to recover damages for the injury sustained by the plaintiff, as the immediate consequence of some wrong done forcibly to his person or property, against the person committing the same.

The action lies for *injuries to the person* of the plaintiff, as, by assault and battery, wounding, imprisonment, and the like; 9 Vt. 352; 6 Blackf. 375.

It lies, also, for forcible injuries to the person of another, whereby a direct injury is done to the plaintiff in regard to his rights as parent, master, etc.; 2 Caines 292; 8 S. & R. 86. It does not lie for mere non-feasance, nor where the matter affected was not tangible.

An action of trespass at common law will lie in a state court by the owner of one vessel against the owner of another for damages by fire at a wharf; 128 U. S. 132.

The action lies for *injuries to personal property*, which may be committed by the several acts of unlawfully striking, chasing if alive, and carrying away to the damage of the plaintiff, a personal chattel; 1 Wms. Saund. 84; Cro. Jac. 362; of which another is the owner and in possession; 5 Vt. 97; and for the removal or injury of inanimate personal property; 13 Pick. 139; 5 Johns. 348; of which another has the possession, actual or constructive; 21 Pick. 369; 13 Johns. 141; 6 W. & S. 323; without the owner's assent. A naked possession or right to immediate possession is sufficient to support this action; 7 Johns. 535; 17 S. & R. 251; 11 Mass. 70; 10 Vt. 165.

An action lies for an unintentional act of trespass, even if there is no malice; 19 Johns. 38; but a man who accidentally shoots another, without negligence, is not liable in an action of trespass; [1891] 1 Q. B. 86. See 153 U. S. 39; TRESPASSER.

The action lies also for *injuries to the realty* consequent upon entering without right upon another man's land (breaking his close). The inclosure may be purely imaginary; 1 D. & B. 371; but reaches to the sky and to the centre of the earth; 19 Johns. 381.

In an action of trespass, or trespass on the case, on land, the courts cannot try the title to the land; 86 Fed. Rep. 269. An action for trespass on land is a local action and can be brought only within the state in which the land lies; 158 U. S. 105.

An injunction will lie to restrain a trespass when the injury is irreparable, or when the trespass is a continuing one, as by cutting trees on forest land; 84 Fed. Rep. 546; Pom. Eq. Jur. 165, § 1357. See INJUNCTION.

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**The plaintiff** must be in possession with some title; 5 East 485; 9 Johns. 61; 4 Watts 377; 4 Pick. 305; 31 Pa. 304; 5 Harring. 320; 11 Ired. 417; see 45 Mo. App. 270; though mere title is sufficient where no one is in possession; 1 Wend. 466; 1 Vt. 485; as in case of an owner to the centre of a highway; 4 N. H. 36; and mere possession is sufficient against a wrongdoer; 9 Ala. 82; or a stranger; 38 Minn. 122; 71 Wis. 276; and the possession may be by an agent; 8 M'Cord 423; but not by a tenant; 8 Pick. 235; other than a tenant at will; 15 Pick. 102. But a person holding lands under a contract of sale without any possessory rights before payment, cannot maintain an action; 95 Mich. 140.

An action will not lie unless some damage is committed; but slight damage only is required; 2 Johns. 357; 65 Vt. 673. Some damage must have been done to sustain the action; 2 Bay 421; though it may have been very slight: as, breaking glass; 4 Mass. 140; 50 Ark. 65; 11 Colo. 228.

The action will not lie where the defendant has a justification sufficient to excuse the act committed, though he acted without authority from the owner or the person affected; 8 Law Rep. 77. See JUSTIFICATION; TRESPASSER. Accident may in some cases excuse a trespass; 7 Vt. 62; 4 M'Cord 61; 12 Me. 67.

*The declaration* must contain a concise statement of the injury complained of, whether to the person, personal or real property, and it must allege that the injury was committed *vi et armis* and *contra pacem*. See CONTINUANDO.

*The plea* of not guilty raises the general issue, and under it the defendant may give in evidence any facts which show that the property was not in possession of the plaintiff rightfully as against the defendant at the time of the injury, or that the injury was not committed by the defendant with force.

Other matters must, in general, be pleaded specially. See TRESPASS QUARE CLAUSUM. Matters in justification, as, authority by law; 4 Mo. 1; defence of the defendant's person or property, taking a distress on premises other than those demised, etc.; 1 Chitty, Pl. 439; custom to enter; 4 Pick. 145; right of way; 7 Mass. 385; etc., must be specially pleaded. In trespass at common law the declaration need not describe the close on which the trespass was committed; 43 Ill. App. 180.

*Judgment* is for the damages assessed by the jury when for the plaintiff, and for costs when for the defendant.

See JUSTIFICATION.

**TRESPASS DE BONIS ASPORTATIS** (Lat. *de bonis asportatis*, for goods which have been carried away).

A form of action brought by the owner of goods to recover damages for unlawfully taking and carrying them away. 1 Me. 117. It is no answer to the action that the defendant has returned the goods; 1 Bouvier, Inst. n. 36 (H).

**TRESPASS FOR MESNE PROFITS.** A form of action supplemental to an action of ejectment, brought against the tenant in possession to recover the profits which he has unlawfully received during the time of his occupation. 3 Bla. Com. 205; 4 Burr. 1668. See MESNE PROFITS.

**TRESPASS ON THE CASE.** The form of action by which a person seeks to recover damages caused by an injury unaccompanied with force or which results indirectly from the act of the defendant. It is more generally called, simply, case. See CASE.

**TRESPASS QUARE CLAUSUM FREGIT** (Lat. *quare clausum fregit*, because he had broken the close). The form of action which lies to recover damages for injuries to the realty consequent upon entry without right upon the plaintiff's land.

*Close* means the interest a person has in any piece of ground, whether enclosed or not; when the plaintiff had not an interest in the soil, but an interest in the profits only, trespass may be maintained; 2 Wheat. Selw. [1840].

Mere possession is sufficient to enable one having it to maintain the action; 12 Wend. 488; 22 Me. 350; 133 Ind. 147; 61 Vt. 119; except as against one claiming under the rightful owner; 6 N. H. 9; 2 Ill. 181; 7 Mo. 333; 8 Utah 406; and no one but the tenant can have the action; 19 Wend. 507; except in case of tenancies at will or by a less secure holding; 8 Pick. 333. It cannot be maintained if defendant was in possession of the *locus in quo* at the time of the alleged trespass, and for some years before; 148 Pa. 65. See CLOSE.

The action lies where an animal of the defendant breaks the plaintiff's close, to his injury; 7 W. & S. 367; 31 Pa. 328.

**TRESPASS TO TRY TITLE.** The name of the action used in South Carolina for the recovery of the possession of real property and damages for any trespass committed upon the same by the defendant.

**TRESPASS VI ET ARMIS** (Lat. *vi et armis*, with force and arms). The form of action which lies to recover damages for an injury which is the immediate consequence of a forcible wrongful act done to the person or personal property; 2 Const. 294. It is distinguished from case in this, that the injury in case is the indirect result of the act done. See CASE.

**TRESPASSER.** One who does an unlawful act, or a lawful act in an unlawful manner, to the injury of the person or property of another. Any act which is injurious to the property of another renders the doer a trespasser, unless he has authority to do it from the owner or custodian; 14 Me. 44; or by law; 2 Conn. 700; 10 Johns. 138; 13 Me. 250; 6 Ill. 401; and in this latter case any defect in his authority, as, want of jurisdiction by the court; 11

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Conn. 95; 3 Cow. 206; defective or void proceedings; 16 Me. 33; 2 Dev. 370; misapplication of process; 6 Monr. 296; 14 Me. 312; renders him liable as a trespasser.

So, too, the commission of a legal act in an illegal manner, as, the execution of legal process illegally; 2 Johns. Cas. 27; abuse of legal process; 16 Ala. 67; exceeding the authority conferred by the owner; 13 Me. 115; or by law; 13 Mass. 520; 10 S. & R. 399; renders a man a trespasser. A ministerial officer, where it is his duty to act, cannot be made a trespasser; 137 U. S. 43; and acting in obedience to process regular on its face, and issued by a tribunal having jurisdiction and power to issue the process, is not liable for its regular enforcement, although errors may have been committed by the tribunal which issued it; 142 U. S. 293. See FALSE IMPRISONMENT.

In all these cases where a man begins an act which is legal by reason of some authority given him, and then becomes a trespasser by subsequent acts, he is held to be a trespasser *ab initio* (from the beginning), *q. v.*

A person may be a trespasser by ordering such an act done as makes the doer a trespasser; 14 Johns. 406; or by subsequently assenting, in some cases; 1 Rawle 121; or assisting, though not present; 2 Litt. 240.

It seems that a verdict for the plaintiff in *quare clausum fregit* does not operate as an estoppel in a subsequent action of ejectment; 31 Pa. 381.

**TRESPASSER AB INITIO.** A term applied to denote that one who has commenced a lawful act in a proper manner, has performed some unlawful act, or some lawful act in an unlawful manner, so connected with the previous act that he is to be regarded as having acted unlawfully from the beginning. See 6 Carpenters' Case, 8 Co. 146; s. c. 1 Sm. L. C. *216; Webb's Poll. Torts. See AB INITIO.

**TRIAL.** **In Practice.** The examination before a competent tribunal, according to the laws of the land, of the facts put in issue in a cause, for the purpose of determining such issue. 4 Mas. 232.

The examination of the matter of fact in issue in a cause. The decision of the issue of fact; Steph. Pl. 77; 22 Or. 167.

"Trial," as used in the acts of congress of July 27, 1866, and March 2, 1867, appropriately designates a trial by the jury of an issue which will determine the facts in an action at law; and "final hearing," in contradistinction to hearings upon interlocutory matters, the hearing of a cause upon its merits by a judge sitting in equity; 113 Mass. 343; 19 Wall. 214.

*Trial by certificate* is a mode of trial allowed by the English law in those cases where the evidence of the person certifying is the only proper criterion of the point in dispute.

*Trial by grand assize* is a peculiar mode of trial allowed in writs of right. See ASSIZE; GRAND ASSIZE.

*Trial by inspection or examination* is a form of trial in which the judges of the court upon the testimony of their own senses decide the point in dispute.

This trial takes place when, for the greater expedition of a cause, in some point or issue being either the principle question or arising collaterally out of it, being evidently the object of sense, the judges of the court, upon the testimony of their own senses, shall decide the point in dispute. For where the affirmative or negative of a question is matter of such obvious determination, it is not thought necessary to summon a jury to decide it,—who are properly called in to inform the conscience of the court in respect of dubious facts; and, therefore, when the fact from its nature must be evident in the court either from ocular demonstration or other irrefragable proof, there the law departs from its usual resort, the verdict of twelve men, and relies on its judgment alone.

Judges of courts of equity frequently decide facts upon mere inspection. The most familiar examples are those of cases where the plaintiff prays an injunction on an allegation of piracy or infringement of a patent or copyright; 5 Ves. Ch. 709, and the cases there cited.

To insure fairness, this mode of trial must be in public; the parties to the suit, or, in a criminal trial, the prisoner, must be present; but the continuance of the trial and the taking of testimony during the brief absence of the prisoner from the court-room on business connected with the trial, has been held not to be error; 25 Alb. L. J. 303; 43 N. Y. 1; but the absence of the trial judge from the court-room for any considerable time during the trial of a cause or the arguments to the jury without the consent of the parties is a material error for which the judgment will be reversed and a new trial ordered; 95 Wis. 558. Suggestions by the trial judge to the jury that in default of agreement they be kept to the end of the term, to save expense to the county, are ground for reversal; 35 S. W. Rep. (Tex.) 1080. There ought to be no communication between a judge and a jury after the latter have retired unless in open court and if practicable, in the presence of counsel. 4 U. S. App. 290. See PRESENCE.

It is within the discretion of the trial court to allow the introduction of evidence out of the usual order, and in the absence of gross abuse its exercise of this discretion is not reviewable; 160 U. S. 70. It is also discretionary with the court to admit evidence to prove a point after the testimony is closed; 10 U. S. App. 98; and to refuse to allow the examination of witnesses for the purpose of elaborating previous testimony; 16 U. S. App. 80.

Where objection is made in a criminal trial to comments on facts not in evidence or exaggerated expressions of the prosecuting officer, the court should interfere and put a stop to them if they are likely to be prejudicial to the accused; 150 U. S. 118.

An objection of disorderly conduct of a

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trial is within the sound discretion of the trial court; and it is only when such discretion has been abused to the prejudice of the complaining party that the appellate court will interfere; 27 U. S. App. 663.

It is generally held that the prosecuting attorney has the power to enter a *nolle prosequi* in a criminal case without the consent of the court; 23 Colo. 466. It is properly said, however, that "the power is not unlimited."

The stages in a criminal prosecution: (1) The inauguration or preliminary stage, when the indictment is absolutely under the control of the prosecuting officer; (2) The trial of the cause and its incidents, during which the court has control, and the power of the prosecuting officer is suspended; and (3) The period between the verdict of the jury and sentence by the court; when the pardoning power of the governor attaches. State *v.* Moise (La.), 18 So. Rep. 943, 1895. Accordingly, the power of the district attorney to enter a *nolle prosequi* is subject to the following limitations: (1) After the jury has been impanelled and the charge read, he cannot discontinue if the defendant insists upon a verdict; and (2) After verdict and refusal to grant a new trial, he cannot dismiss the prosecution without the leave of the court. 18 So. Rep. (La.) 942; 34 Am. L. Reg. N. S. 7.

*Trial at nisi prius.* Originally, a trial before a justice in eyre. Afterwards, by Westm. 2, 13 Edw. I. c. 30, before a justice of assize; 3 Bla. Com. 353. See NISI PRIUS.

*Trial by the record.* This trial applies to cases where an issue of *nul tiel* record is joined in any action.

The trial by record is not only in use when an issue of this kind happens to arise for decision, but it is the only legitimate mode of trying such issue; and the parties cannot put themselves upon the country; Steph. Pl., And. ed. 171; 2 Bla. Com. 330.

*Trial by wager of battel.* See WAGER OF BATTEL.

*Trial by wager of law.* See OATH DECISORY; WAGER OF LAW.

*Trial by witnesses* is a species of trial by witnesses, or *per testes*, without the intervention of a jury. This is the only method of trial known to the civil law.

In England, when a widow brings a writ of dower and the tenant pleads that the husband is not dead, this, being looked upon as a dilatory plea, is in favor of the widow, and, for greater expedition, allowed to be tried by witnesses examined before the judges; and so, says Finch, shall no other case in our law; Finch, Law 423. But Coke mentions others: as, to try whether the tenant in a real action was duly summoned; or, the validity of a challenge to a juror: so that Finch's observation must be confined to the trial of direct and not collateral issues.

*Trial at bar.* A species of trial now seldom resorted to, and, as to civil causes, abolished by the Judicature Act, 1875, was one held before all the judges of one of the supreme courts of Westminster, or before a quorum representing the full court. The celebrated case of Reg. *v.* Castro, otherwise Tichborne *v.* Orton, L. R. 9 Q. B. 350, was a trial at bar; Brown, Dict. See POSTULATION; OPEN COURT; PUBLIC TRIAL; WITNESS.

See, for an elaborate article on the conduct of counsel at trial, 45 Cent. L. J. 292.

**TRIAL LIST.** A list of cases marked down for trial for any one term.

**TRIBUNAL.** The seat of a judge; the place where he administers justice. The whole body of judges who compose a jurisdiction. The jurisdiction which the judges exercise.

The term is Latin, and derives its origin from the elevated seat where the tribunes administered justice.

Any court, forum, or judicial body. Anderson's L. Dict.

**TRIBUNAUX DE COMMERCE. In French Law.** Certain courts composed of a president, judges, and substitutes, which take cognizance of all cases between merchants, and of disagreements among partners. Appeals lie from them to the courts of justice. Brown, Dict.

**TRIBUTARY.** All streams flowing directly or indirectly into a river. [1895] 1 Q. B. 237.

**TRIBUTE.** A contribution which is sometimes raised by the sovereign from his subjects to sustain the expenses of the state. It is also a sum of money paid by one nation to another under some pretended right. Wolff § 1145.

**TRIENNIAL ACT.** An act limiting the duration of every parliament, unless sooner dissolved,

**TRIGAMUS. In Old English Law.** One who has been thrice married; one who, at different times and successively, has had three wives.

**TRIGILD. In Saxon Law.** A triple payment, three times the value of a thing paid as compensation or satisfaction.

**TRINEPOS** (Lat.). **In Roman Law.** Great-grandson of a grandchild.

**TRINEPTIS** (Lat.). Great-granddaughter of a grandchild.

**TRINITY HOUSE.** See ELDER BRETHREN.

**TRINITY SITTINGS.** See LONDON AND MIDDLESEX SITTINGS.

**TRINITY TERM.** See TERM.

**TRINIUMGELDUM.** An extraordinary offence, consisting of three times nine, or twenty-seven times the single geld or payment. Spelm.

**TRINKETS.** Small articles of personal adornment or use when the object is

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essentially ornamental. 28 L. J. C. P. 626. See JEWELRY.

**TRINODA NECESSITAS** (Lat.). The threefold necessary public duties to which all lands were liable by Saxon law,—viz. for repairing bridges, for maintaining castles or garrisons, and for expeditions to repel invasions. 1 Bla. Com. 263.

**TRIORS. In Practice.** Persons appointed according to law to try whether a person challenged to the favor is or is not qualified to serve on the jury. They do not exceed two in number, without the consent of the prosecutor and defendant, or unless some special case is alleged by one of them, or when only one juror has been sworn and two triors are appointed with him. Co. Litt. 158 *a*; Bacon, Abr. *Juries* (E 12).

The method of selecting triors is thus explained. Where the challenge is made to the first juror, the court will appoint two indifferent persons to be triors; if they find him indifferent, he shall be sworn and join the triors in determining the next challenge. But when two jurors have been found impartial and have been sworn, then the office of the triors will cease, and every subsequent challenge will be decided upon by the jurymen. If more than two jurymen have been sworn, the court may assign any two of them to determine the challenges. To the triors thus chosen no challenges can be admitted.

The triors examine the juryman challenged, and decide upon his fitness; 3 Park. Cr. Cas. 467. Their decision is final. They are liable to punishment for misbehavior in office; 4 Sharsw. Bla. Com. 353; 15 S. & R. 156; 21 Wend. 509. The office is abolished in many of the states, the judge acting in their place; 23 Ga. 57; 43 Me. 11; 98 U. S. 157.

The lords also chosen to try a peer, when indicted for felony, in the court of the Lord High Steward, *q. v.*, are called triors. Moz. & W.

**TRIPARTITE.** Consisting of three parts: as, a deed *tripartite*, between A of the first part, B of the second part, and C of the third part.

**TRIPLICATIO** (Lat.). **In Civil Law.** The reply of the plaintiff (*actor*) to the rejoinder (*duplicatio*) of the defendant (*reus*). It corresponds to the surrejoinder of common law. Inst. 4. 14; Bracton, G. l. 5, t. 5, c. 1.

**TRIPLICATION.** A pleading in admiralty, second in order after a replication; now obsolete. See PLEADING.

**TRISTIS SUCCESSIO.** See HÆREDITAS LUCTUOSA.

**TRITAVUS** (Lat.). **In Roman Law.** The male ascendant in the sixth degree. For the female ascendant in the same degree the term is *tritavia*. In forming genealogical tables this convenient term is still used.

**TRITHING** (Sax. *trithinga*). The third part of a county, consisting of three or four hundreds.

A court within the circuit of the trithing, in the nature of a court-leet, but inferior to the county court. Camd. 102. The ridings of Yorkshire are only a corruption of trythings. 1 Bla. Com. 116; Spelm. Gloss. 52.

**TRIUMVIRI CAPITALES, or TRESVIRI, or TRESVIRI. In Roman Law.** Officers who had charge of the prison, through whose intervention punishments were inflicted. Sallust, *in Catilin.*

**TRIVIAL.** Of small importance. It is a rule in equity that a demurrer will lie to a bill on the ground of the triviality of the matter in dispute, as being below the dignity of the court. 4 Bouvier, Inst. n. 4237. See MAXIMS, *De minimis*, etc.

**TRONAGE.** A customary duty or toll for weighing wool: so called because it was weighed by a common *trona*, or beam. Fleta, lib. 2, c. 12.

**TROVER** (Fr. *trouver*, to find). **In Practice.** A form of action which lies to recover damages against one who has, without right, converted to his own use goods or personal chattels in which the plaintiff has a general or special property.

A generic name, applied to those torts, arising from the unlawful conversion of any particular piece of personal property owned by another; 35 S. C. 475.

In form it is a fiction: in substance, a remedy to recover the value of personal chattels *wrongfully* converted by another to his own use. 1 Burr. 31.

The action was originally an action of trespass on the case where goods were *found* by the defendant and retained against the plaintiff's rightful claim. The manner of gaining possession soon came to be disregarded, as the substantial part of the action is the *conversion* to the defendant's use; so that the action lies whether the goods came into the defendant's possession by *finding or otherwise*, if he fails to deliver them upon the rightful claim of the plaintiff. It differs from *detinue* and *replevin* in this, that it is brought for damages and not for the specific articles; and from *trespass* in this, that the injury is not necessarily a forcible one, as trover may be brought in any case where trespass for injury to personal property will lie; but the converse is not true. In case possession was gained by a trespass, the plaintiff by bringing his action in this form waives his right to damages for the taking, and is confined to the injury resulting from the conversion; 17 Pick. 1; 17 Me. 434.

The *action lies* for one who has a *general* or absolute property; Bull. N. P. 33; 25 Me. 220; 23 Ga. 484; together with a right to immediate possession; 1 Ry. & M. 99; 22 Pick. 585; 19 N. H. 419; 6 Houst. 344; see 82 Ill. 409; 97 Mass. 37; 105 Ind. 81; as, for example, a vendor of property sold upon condition not fulfilled; 1 Meigs 76; or a *special* property, including actual possession as against a stranger; 2 Saund. 47; 6 Johns. 195; 15 Mass. 242; 4 Blackf. 395; as, for example, a sheriff holding under rightful process; 7 Johns. 32; 2 Murph. 19; a mortgagee in possession; 5 Cow. 323; a simple bailee; 15 Mass. 252; Wright, Ohio 744; see 76 N. C. 402; 95 Pa. 243; 61 Ga.

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147; or even a finder merely; 9 Cow. 670; 2 Ala. 320; and including lawful custody and a right of detention as against the general owner of the goods or chattels; 8 Wend. 445; 3 Blackf. 419. An executor or administrator is held an absolute owner by relation from the death of the decedent; 2 Greenl. Ev. § 641; 7 Metc. 503; and he may maintain an action for a conversion in the lifetime of the decedent; T. U. P. Charlt. 261; 6 Mass. 394; and is liable for a conversion by the decedent; 1 Hayw. 21, 308, 362.

Trustees having title to chattels with an immediate right of possession may sue in trover for the chattels, although they may never have taken actual possession, but have allowed the goods to remain in the occupation of their *cestui que trust*; [1891] 2 Ch. 172.

The property affected must be some personal chattel; 3 S. & R. 513; specifically set off as the plaintiff's; 4 B. & C. 948; 3 Pick. 38; including title deeds; 2 Yeates 537; a copy of a record; 11 Pick. 492; money, though not tied up; 4 E. D. Smith 162; negotiable securities; 3 B. & C. 45; 3 Johns. 432; 1 Root 125, 221; 3 Vt. 99; 27 Ala. N. S. 228; animals *feræ naturæ*, but reclaimed; 10 Johns. 102; trees and crops severed from the inheritance; 3 Mo. 137, 393; 15 Mass. 204; 4 Cal. 184. It will lie by a surviving partner to recover possession of the firm assets as against the representatives of the deceased partners; 17 R. I. 679. It will not lie for property in custody of the law; 9 Johns. 381; if rightfully held; see 2 Ala. 576; or to which the title must be determined by a court of peculiar jurisdiction only; 1 Cam. & N. 115; or where the bailee has lost the property, or had it stolen, or it has been destroyed by want of due care; 2 Ired. 98. Unless an actual conversion by bailee be shown, an action of trover against him will not lie without a previous demand for the goods; 79 Ga. 134. See CONVERSION.

There must have been a conversion of the property by the defendant; 8 Ark. 204. And a waiver of such conversion will defeat the action; 20 Pick. 90. Non-delivery of goods by a vessel is not a conversion of the goods; 35 U. S. App. 369. See CONVERSION; 15 Am. L. Rev. 363; 6 So. L. Rev. 822.

The declaration must state a rightful possession of the goods by the plaintiff; Hempst. 160; but need not show the nature or evidence of plaintiff's title; 91 Mich. 414; it must describe the goods with convenient certainty, though not so accurately as in detinue; Bull. N. P. 32; 5 Gray 12; must formally allege a finding by the defendant, and must aver a conversion; 12 N. Y. 313. It is not indispensable to state the price or value of the thing converted; 2 Wash. Va. 192; and where there is an actual conversion of property, demand before action is not necessary; 155 Mass. 376; 107 Mo. 665.

*The plea* of not guilty raises the general issue.

*Judgment*, when for the plaintiff, is that he recover his damages and costs, or, in some states, in the alternative, that the defendant restore the goods or pay, etc.; 19 Ga. 579; when for the defendant, that he recover his costs. The measure of damages is the value of the property at the time of the conversion, with interest; 26 Ala. N. S. 213; 30 Vt. 307; 19 Mo. 467. 133 Mass. 158, 273; see 6 Houst. 344; 64 Vt. 286.

**TROY WEIGHT.** See MEASURES; WEIGHT.

**TRUCE. In International Law.** An agreement between belligerent parties by which they mutually engage to forbear all acts of hostility against each other for some time, the war still continuing. Burlamaqui, N. & P. Law 1.

There is said to be no authoritative distinction between a truce and an armistice; perhaps the latter is generally considered a truce of a restricted character, limited as to the forces and the local area to which it applies. It may be entered into by a general or an admiral in command of an army or fleet; while a general truce can be entered into only by a commander-in-chief and requires the ratification of the state for its validity; Risley, Law of War 153.

Truces are of several kinds: *general*, extending to all the territories and dominions of both parties; and *particular*, restricted to particular places; as, for example, by sea, and not by land, etc. *Id.* They are also *absolute*, *indeterminate*, and *general*; or *limited* and *determined* to certain things: for example, to bury the dead. *Id.* See 1 Kent 159; Halleck, Int. Law 654.

A particular or partial truce may be made by a subordinate commander; a general truce only by the sovereign power or by its authority; 1 Kent *159.

During the continuance of a truce, either party may do within his own territory or the limits prescribed by the armistice, whatever he could do in time of peace, *e. g.* levy and march troops, collect provisions, receive reinforcements from his allies, or repair the fortifications of a place not actually besieged; but neither party can do what the continuance of hostilities would have prevented him from doing, *e. g.* repair fortifications of a besieged place; and all things, the possession of which was especially contested when the truce was made, must remain in their antecedent places; Hall, Int. Law 500; Vattel, *Dr. des Gens* §§ 245, 251; Boyd's Wheat. Int. Law § 403.

**TRUCE OF GOD** (Law L. *treuza Dei*; Sax. *treuge* or *trewa*, from Germ. *treu*; Fr. *trêve de Dieu*). In the middle ages, a limitation of the right of private warfare introduced by the church. This truce provided that hostilities should cease on holidays, from Thursday evening to Sunday evening of each week, the whole season of Advent and Lent, and the octaves of great festivals. The penalty for breach

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of the truce was excommunication. The protection of this truce was also extended constantly to certain places, as, churches, convents, hospitals, etc., and certain persons, as, clergymen, peasants in the field, crusaders, and, in general, all defenceless persons. It was first introduced into Acquitaine in 1041, and into England under Edward the Confessor. 1 Rob. Charles V. App. n. xxi.

**TRUCK ACTS.** See LIBERTY OF CONTRACT; POLICE POWER.

**TRUE.** That only is true which is conformable to the actual state of things. In that sense, a statement is untrue which does not express things exactly as they are. But in another and broader sense, the word "true" is often used as a synonym of honest, sincere, not fraudulent. 111 U. S. 345.

**TRUE BILL. In Practice.** Words indorsed on a bill of indictment when a grand jury, after having heard the witnesses for the government, are of opinion that there is sufficient cause to put the defendant on his trial. Formerly the indorsement was *Billa vera* when legal proceedings were in Latin; it is still the practice to write on the back of the bill *Ignoramus* when the jury do not find it to be a true bill; the better opinion is that the omission of the words a true bill does not vitiate an indictment; 11 Cush. 473; 13 N. H. 488. See GRAND JURY.

**TRUE COPY.** A true copy, does not mean an absolutely exact copy but means that the copy shall be so true that anybody can understand it. 51 L. J. Ch. 905.

**TRUE, PUBLIC, AND NOTORIOUS.** These three qualities used to be formally predicted in the libel in the ecclesiastical courts, of the charges which it contained, at the end of each article, severally. Whart.

**TRUST.** A right of property, real or personal, held by one party for the benefit of another.

A trust is merely what a use was before the statute of uses. It is an interest resting in conscience and equity, and the same rules apply to trusts in chancery now which were formerly applied to uses; 10 Johns. 506. A trust is a use not executed under the statute of Hen. VIII.; 3 Md. 505. The words *use* and *trust* are frequently used indifferently. See 3 Jarm. Wills, 6th Am. ed. *1139–1140.

Trust implies two estates or interests,—one equitable and one legal; one person as trustee holding the legal title, while another as the *cestui que trust* has the beneficial interest. 48 Minn. 174.

Sometimes the equitable title of the beneficiary, sometimes the obligation of the trustee, and, again, the right held, is called the trust.

But the right of the beneficiary *is in* the trust; the obligation of the trustee *results from* the trust; and the right held is the *subject-matter* of the trust. Neither of them is the trust itself. All together they constitute the trust.

An equitable right, title, or interest in property, real or personal, distinct from its legal ownership.

A personal obligation for paying, delivering, or performing anything where the person trusting has no real right or security, for by that act he confides altogether to the faithfulness of those intrusted.

An obligation upon a person, arising out of a confidence reposed in him, to apply property faithfully and according to such confidence. Tiedm. Eq. Jur. § 253; 4 Kent 295; 1 Saunders, Uses & Tr. 6; 3 Bla. Com. 431.

A late writer shows clearly the distinction between the *fidei commissa* and a trust, that in the former there was no separation of the equitable and legal title, but there was simply a request, which afterwards became a duty imposed upon the *gravatus* to convey the inheritance to another person, either immediately or after a certain event; whereas, in the trust, the perfect ownership is decomposed into its constituent elements of legal title and beneficial interest, which are vested in different persons at the same time. Besides the *fidei commissa* arose out of testamentary dispositions; whereas English trusts, until the statute of wills, were created only by conveyances *inter vivos*; Bisph. Eq. 893, § 50. See 15 How. 367.

*Active* or *special trusts* are those in which the trustee has some duty to perform, so that the legal estate must remain in him or the trust be defeated.

*Express trusts* are those which are created in express terms in the deed, writing, or will. The terms to create an express trust will be sufficient if it can be fairly collected upon the face of the instrument that a trust was intended. Express trusts are usually found in preliminary sealed agreements, such as marriage articles, or articles for the purchase of land; in formal conveyances, such as marriage settlements, terms for years, mortgages, assignments for the payment of debts, raising portions, or other purposes; and in wills and testaments, when the bequests involve fiduciary interests for private benefit or public charity. They may be created even by parol; 6 W. & S. 97; except so far as forbidden by the statute of frauds.

A written instrument though inefficacious as a will, from a want of compliance with statutory requisitions, may yet operate as a declaration of a trust; 149 U. S. 608.

*Implied trusts* are those which, without being expressed, are deducible from the nature of the transaction as matters of intent, or which are superinduced upon the transaction by operation of law, as matters of equity, independently of the particular intention of the parties. The term is used in this general sense, including *constructive* and *resulting* trusts (*q. v.*), and also in a more restricted sense, excluding those classes.

Implied trusts do not come within the statute of frauds; 66 Pa. 237.

*Constructive* trusts are those which arise purely by construction of equity, and are entirely independent of any actual or presumed intention of the parties. Such trusts have not, technically, any element

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of fraud in them; Bisp. Eq. § 91. Under this branch of trusts it has been said that "wherever one person is placed in such relation to another, by the act or consent of that other, or the act of a third person, or the law, that he becomes interested for him, or interested with him in any subject of property or business; he is prohibited from acquiring rights in that subject antagonistic to the person with whose interest he has become associated." 1 Lead. Cas. Eq. 62. The rule as to such trusts applies not only to persons standing in a direct fiduciary position towards others, such as trustees, attorneys, etc., but also to those who occupy any position out of which a similar duty ought in equity and good morals to arise: as against partners; 4 Seld. 236; tenants in common, 72 Pa. 442; mortgagees; 43 Mo. 231; as against agent, buying goods with the principal's money; 6 Mackey 421; Bisp. Eq. § 93.

If one obtains a title to land by artifice or concealment, equity will enforce a trust in favor of the party justly entitled thereto; 145 U. S. 317. Whoever comes into possession of trust property, with notice of the trust, is bound to the execution of the trust; 25 Ill. 73.

A trustee who buys at his own sale, even if public, will still be considered, at the option of the *cestui que trust*, a trustee. See 1 Lead. Cas. Eq. 248. This is not upon the ground of fraud, but of public policy. See 13 Allen 419. So if a person obtains from a trustee trust property without paying value for it, although without notice of the trust, he will in such case be held a trustee by construction; Bisp. Eq. § 95; Tiedm. Eq. Jur. § 312. And in case of a contract for the sale of land, equity considers the vendor as a trustee of the legal title for the purchaser; *ibid.*

A *passive* or *dry* or *simple* trust is one which requires the performance of no duty by the trustee to carry out the trust, but by force of which the mere legal title rests in the trustee.

As to *executory* and *executed trusts*, see those titles.

An executed trust is one explicitly declared in writing, duly signed, stating the conditions upon which the legal title is held, and the final intention of the creditor, so that the trustee can carry that intention into effect. 115 Ind. 423.

Trusts may also be distinguished as *public* and *private* trusts. The former are constituted for the benefit either of the public at large or some particular portion of it answering to a particular description; while the latter are those wherein the beneficial interest is vested absolutely in one or more individuals who are, or may be within a certain time, definitely ascertained. Bisp. Eq. § 59.

A trust arises when property has been conferred upon one person and accepted by him for the benefit of another. The former is a trustee, and holds the legal title, and the latter is called the *cestui que trust*, or beneficiary. In order to originate a trust, two things are essential,—*first*, that the ownership conferred be connected with a right, or interest, or duty for the benefit of another; and, *second*, that the property be accepted on these conditions.

The modern trust includes not only those technical *uses* which were not executed by the statute of uses, but also equitable interests which never were considered uses, and did not, therefore, fall within the provisions of this statute. These equitable interests, in common with the unexecuted uses, received the name of trusts; Bisp. Eq. § 52. The statute of uses provided that where one was seized to the use of another, the *cestui que use* should be deemed to be in lawful seizin and possession of the same estate in the land itself as he had in the use.

A trust which at the time of its creation is a passive trust will be executed by this statute, although the word *trust* instead of *use* is employed. But where a trust which has once been active becomes passive, such a trust is not necessarily executed by the statute. If the mere fact that the trustee had active duties to perform was the only circumstance that prevented the statute from operating, the trust will be executed when the active duties have ceased. But if the non-execution of the trust by the statute did not originally and solely depend upon the activity of the trust, the fact that the trust has ceased to be active will not of itself cause the statute to apply; but the trustee is then bound to convey the legal estate at the request of the *cestui que trust*; and after a great lapse of time, and in support of long-continued possession on the part of the person holding the beneficial interest, such a conveyance will be presumed; Bisp. Eq. § 55. A bequest of personalty to a trustee for the use and benefit of another, without words of restriction, vests the absolute property of the fund in the beneficiary; 83 Fed. Rep. 19.

When active duties are to be performed by the trustee, it will, generally, not be executed; Bisp. Eq. § 56; 5 Wall. 119, 168; though where there was a separate use for a *feme sole* not in contemplation of marriage, it was held that as this separate use was void, the trust fell, although the trustee had active duties to perform; 70 Pa. 201. Where an estate is given in trust to pay one-half the income to each of two persons, it is not a gift of one-half the principal to be held for each, but of all to be held jointly for both, and it should remain intact until the period of distribution arises; 119 Pa. 52; 105 *id.* 121.

Before the statute of frauds, a trust, either in regard to real or personal estate, might have been created by parol as well as by writing. The statute required all trusts as to real estate to be in writing; 4 Kent 305; Adams, Eq., 8th ed. 27.

Trusts as to partnership interests in real estate are not within the statute of uses and trusts. See 111 N. Y. 423.

No particular form of words is requisite

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to create a trust. The court will determine the intent from the general scope of the language; Beach, Eq. Jur. § 161; 10 Johns. 496; 4 Kent 305; 127 U. S. 300.

The facts, however, to warrant the inference of a trust, must be more than loose and general declarations; but, on the other hand, parol declarations will not be received to contradict the inference of a trust in land fairly deducible from written declarations; 5 Johns. Ch. 2.

A party who acquires title to property wrongfully may be adjudged a trustee *ex maleficio* in respect to that property; 151 U. S. 1.

A trust, as to personal property, may be proved by parol evidence; 1 Hare 158; 3 Bla. Com. 431; 148 Mass. 289; and parol evidence is admissible against the face of a deed itself to show all the facts out of which a resulting trust arises; 37 W. Va. 507. A *cestui que trust* cannot, generally, hold the beneficial enjoyment of property free from the rights of his creditors; 1 Sm. L. C. 119; though a limitation over to another in case of the insolvency of the *cestui que trust* is valid; Bisp. Eq. 61; 5 Wall. 441. See SPENDTHRIFT.

Equity will follow trust moneys as far as they can be identified; 19 U. S. App. 256; but the right fails when the means of ascertainment fail; 22 Pa. 16. See EARMARK.

Trust funds held for a charitable object are not liable for the torts of a trustee; 120 Pa. 624.

If a trustee dies, or fails or refuses to execute or accept the trust, or no trustee is named, the trust does not for that reason fail. It is a settled rule that the court of chancery will provide a trustee or attend to the execution of the trust; 10 Sim. 256; Adams, Eq. 36.

Trusts are interpreted by the ordinary rules of law, unless the contrary is expressed in the language of the trust; 15 Ind. 269; 3 Des. 256.

The rules for the devolution of equitable estates are the same as those for the descent of legal titles, and fall under the operation of the various intestate acts: Bisp. Eq. § 60. If the legal title to real estate cannot be taken by an alien, the beneficial ownership cannot be enjoyed by him; 5 How. 270. In some states, as New York, Michigan, and Louisiana, the operation of trusts has been much narrowed; Bisp. Eq. § 56.

An assignment in trust for the benefit of creditors is valid without assent on the part of the creditors; 25 Wash. L. Rep. 822; *contra*, in England, [1897] 2 Q. B. 19; and in Massachusetts; 3 Mass. 144. In [1897] 2 Q. B. 19, it was held that an assignment in trust for particular persons is irrevocable, while one for creditors in general is revocable. See TRUSTEE.

As to those combinations of capital now known as "Trusts," see RESTRAINT OF TRADE.

Since the title RESTRAINT OF TRADE was in print the supreme court has handed down a decision in United States *v.* Joint Traffic Association. The court was of opinion that the contract in suit was substantially the same as that involved in the Trans-Missouri Case, 166 U. S. 200; and also that the latter case had decided that the contract involved was in restraint of trade. It further held that the anti-trust act is valid and a proper exercise of the powers of congress.

**TRUST COMPANY.** The business of such companies consists largely in the administration of trusts of various kinds, and particularly those arising under corporate mortgages. It is a common practice for them to become surety on bonds in legal proceedings and in various other ways, and they usually also transact a safe deposit business. See SAFE DEPOSIT COMPANIES. As to the administration of trusts by such companies in England, see 5 L. Quart. Rev. 395. It has been held in the orphans' court of Philadelphia that an act was unconstitutional which permits an accountant to pay a trust company for becoming surety on his official bond, and charges the cost to the estate.

**TRUST DEED.** A deed given to a trustee for the purpose of securing a numerous class of creditors, as the bondholders of a railroad corporation, with power to sell on failure of the payment of their bonds, notes, or other claims.

It is the practice in many states to secure loans by a trust deed instead of a mortgage.

**TRUST FUND DOCTRINE.** See STOCKHOLDER.

**TRUSTEE.** A person in whom some estate, interest, or power in or affecting property of any description is vested for the benefit of another.

One to whom property has been conveyed to be held or managed for another.

To a certain extent, executors, administrators, guardians, and assignees are trustees, and the law of trusts so far is applicable to them in their capacity of trustees; Hill, Trust. 49.

Trusts are not strictly cognizable at common law, but solely in equity; 16 Pet. 25.

Any reasonable being may be a trustee. The United States or a state may be a trustee; 15 How. 367; 15 Fla. 455, 690; 37 Fed. Rep. 743. So may a corporation; 7 Wall. 1; Perry, Trusts § 42.

"Whoever is capable of taking the legal title or beneficial interest in property may take the same trust for others." Perry, Trusts § 39. Non-resident natural persons are not disqualified from acting as trustee; 4 Am. Ry. Rep. 291; an act which declares such person disqualified is in conflict with the federal constitution; 27 Fed. Rep. 146, *arguendo*; 3 N. E. Rep. (Ind.) 1093; 52 Fed. Rep. 857; but this constitutional provision does not extend to foreign corporations.

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A foreign corporation may be a trustee; Cook, Stock, etc. § 513.

A foreign corporation must comply with local statutes; 68 Ill. App. 666; *contra*, 49 Pac. Rep. (Wash.) 1068; 37 Atl. Rep. (R. I.) 948. See 150 Mass. 271; 147 *id.* 224. In 68 Fed. Rep. 412, where a statute of Illinois declared any trust unlawful when vested in a foreign trust company unless it had complied with certain requirements of the statute, it was held that a trust under a railroad mortgage vested in such a company merely a naked legal title, while the beneficial title was in the bondholders; and that the court would enforce the security by a judicial sale. But a non-resident trust company was removed as trustee under an Illinois railroad mortgage; 173 Ill. 439.

A mortgage upon railroad property in Illinois executed to a foreign trust corporation as trustee, to secure bonds made payable outside of the state, is not prohibited by the laws or public policy of that state; 28 Fed. Rep. 169.

The legislature of a state alone has the power to accept a bequest to the state in trust; 69 Conn. 64.

The trustee of a railroad mortgage represents the bondholders who are bound by his assent; 65 Fed. Rep. 351. See MORTGAGE; INTERVENTION.

A trustee after having accepted a trust cannot discharge himself of his trust or responsibility by resignation or a refusal to perform the duties of the trust; but he must procure his discharge either by virtue of the provisions of the instrument of his appointment, or by the consent of all interested, or by an order of a competent court; 4 Kent 311.

Trustees are not allowed to speculate with the trust property, or to retain any profits made by the use of the same, or to become the purchasers upon its sale. See TRUST. If beneficial to the parties in interest, the purchase by the trustee may be retained or confirmed by the court. And the trustee may be compelled to account for and pay over to the *cestui que trust* all profits made by any use of the trust property; 4 Kent 438. A trustee cannot become a purchaser at his own sale, without special permission; 127 U. S. 589. A purchase by a trustee of trust property for his own benefit is not absolutely void, but voidable; and may be confirmed by the parties interested either directly or by long acquiescence; 143 U. S. 224.

A court of equity never allows a trust to fail for want of a trustee; 5 Paige, Ch. 46; 6 Whart. 571; 5 B. Monr. 113; 2 How. 188; 75 Ia. 429. See 116 Ind. 139.

Whenever it becomes necessary, the court will appoint a new trustee, and this though the instrument creating the trust contain no power for making such appointment. The power is inherent in the court; 7 Ves. Ch. 480; 2 Sandf. Ch. 336; 1 Beav. 467; 85 Me. 79. See 44 N. J. Eq. 349. So the court may create a new trustee on the resignation of the former trustee; 11 Paige, Ch. 314; 3 Barb. Ch. 76; Hill, Trust. 190. A court will not allow a trust to fail or to be defeated by the refusal or neglect of the trustee to execute a power, if such a power is so given that it is reasonably certain that the donor intended it to be exercised; 85 Va. 966.

The power of equity to remove a trustee and to substitute another in his place is incidental to its paramount duty to see that trusts are properly executed, and may properly be exercised whenever his continuance in office would be detrimental to the trust, and even if for no other reason than that human infirmity would prevent the co-trustees or their beneficiaries from working in harmony, and although charges against him are either not made out or are greatly exaggerated; 167 U. S. 310. A trustee is entitled to all reasonable expenses in carrying out the trust and all expenses reasonably necessary for the security, protection, and preservation of the property as well as for the prevention of a failure of the trust; 142 *id.* 326.

The mere naming a person trustee does not constitute him such. There must be an acceptance, express or implied; see 14 Wall. 139; as the acceptance is essential to the vesting of title in the trustee; 119 Mo. 572. But if the person named trustee does not wish to be held responsible as such, he should, before meddling with the duties of a trustee, formally disclaim the trust; 7 Gill & J. 157; 1 Pick. 370.

Ordinarily, no writing is necessary to constitute the acceptance of a trust in writing; 12 N. H. 432.

The duties of trustees have been said, in general terms, to be: "to protect and preserve the trust property, and to see that it is employed solely for the benefit of the *cestui que trust*." Bisp. Eq. § 138.

He must take possession of the trust property, and call in debts, and convert such securities as are not legal investments. Personal securities are not legal investments although the investment was made by the testator himself; 40 N. Y. 76; 18 Pa. 303; unless, by the terms of the trust, they are allowed; Bisp. Eq., 5th ed. (1893) § 139.

He will not be liable for the failure of a bank in which he has deposited trust funds, unless he has permitted them to be there for an unreasonable length of time; 29 Beav. 211; or has deposited them in his own name; 119 Ind. 593; as he must not mix them with his own funds; 8 Pa. 431; 41 Ala. 709. The addition of the word "trustee" to the signature of the drawer of a check constitutes such notice of a trust as to put the payee upon inquiry; 26 App. Div. N. Y. 615.

Investments by executors contrary to the requirements of the will, upon mere personal security, are at their risk; 48 N. J. Eq. 559. A trustee is personally liable for trust funds invested in personal securities; 2 Con. Sur. 458, and if invested in his own business, or for his own benefit, he be-

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comes an insurer of the fund; 85 Me. 129; and is guilty of neglect if he loans money on an unsecured note; 36 S. C. 822. See 9 L. R. A. 279.

A trustee should not invest trust funds in trade or speculation; nor in bank stock, or stock of public companies; 4 Barb. 626; 18 Pa. 303; but see 9 Pick. 446; or in personal securities; 2 Con. Sur. (N. Y.) 458; he may invest in mortgages.

A trustee, though remunerated for his services, is not liable to the trust estate for loss caused by the thefts of a servant employed by him, where he has exercised due care in the selection of the servant; [1893] 1 Ch. 71.

Ordinarily the law will not permit a trustee to contract with his *cestui que trust* for a pecuniary advantage; to do so, he must first dissolve the fiduciary relation; 128 Ill. 480; and every such contract is open to suspicion; 70 Ind. 508.

A writer has deduced the following rules as to investments by trustees (18 Am. L. Reg. N. S. 210): Where there is no express power of sale in the instrument creating a trust, and none is necessarily implied, and the discretion of the trustee is the sole restriction upon investments, he will generally be protected where he has acted *bona fide* and with reasonable diligence and prudence. But in a state where the trustee is protected from loss which may arise from certain specified and so-called legal investments, the rule is much more stringent, and extraordinary care and diligence are required of the trustee as well as *bona fides*, and it is dangerous to invest trust funds in any other securities than those thus indicated.

But where there is no express power of sale given, and where none such can necessarily be implied from the nature of the trustee's duties, the only safe means of changing an insecure investment, left so by the creator of the trust, is to make the change under the direction of the proper court, and if done without such authority, the trustee will be liable to the *cestui que trust* for breach of trust.

Where there is no such power of sale and the trustee leaves unchanged an investment made by the testator and loss ensues, he will generally be protected if acting with *bona fides*, even in cases where, if there had been a power of sale and he had neglected to sell, he would have been liable under the first rule laid down above.

A trustee will not be surcharged for a loss which has occurred to the estate if he has exercised common skill, prudence, and caution, but he will be held responsible for supine negligence or wilful default; 182 Pa. 407. Where a trustee held on to mortgages on agricultural land in hopes that an apparently temporary depression would pass away, it was held that he had committed only an error of judgment and was not liable for loss; [1896] 1 Ch. 323.

An act of 1896 in England provides that if a trustee acts honestly and reasonably, he may be relieved wholly or partly from personal liability for loss through investments; [1897] 1 Ch. 536.

The office and duties of trustees being matters of personal confidence, they are not allowed to delegate these powers unless such a power is expressly given by the authority by which they were created; and where one of several trustees dies, the trust, as a general rule, in the United States, will devolve on the survivor, and not on the heirs of the deceased; 3 Mer. 412; 11 Paige, Ch. 314; but a trustee may appoint an agent where it is usual to do so in the ordinary course of business; 10 Pa. 285; 8 Cow. 543. Where a trustee has delegated his trust, there is no question of primary and secondary liability in respect of a breach of trust, but all are equally liable; 68 Law T. 18.

While the law allows any person named as trustee to disclaim or renounce, he cannot, if he has by any means accepted and entered upon the trust, rid himself of the duties and responsibilites after such acceptance, except by a legal discharge by competent authority; 4 Johns. Ch. 136; 1 My. & K. 195. Disclaimer of a trust may be established by acts, or by non-action long continued; 119 Mo. 572. Where trustees who hold church property have seceded from the church, and also been expelled, they have divested themselves of all control of the church property and cannot maintain a bill to enjoin any one from doing anything which affects the property; 5 Super. Ct. Pa. 475.

The trustee is in law generally regarded as the owner of the property, whether the same be real or personal; Hill, Trust. 229. Yet this rule is subject to material qualifications when taken in connection with the doctrines of powers and uses, and the legislation of the several states; 1 How. 134; 4 Kent 321.

The quality and continuance of the estate of a trustee will be determined by the purpose and exigency of the trust, rather than by the phraseology employed in the description of the estate conveyed; and, therefore, if the language be that the estate goes to the trustee and his heirs, it may be limited to a shorter period, if thereby the purposes of the creation of the trust are satisfied; 8 Hare 156; 4 Den. 385.

Where there are several trustees, they are considered to hold as joint-tenants, and on the death of any one the property remains vested in the survivor or survivors; and on the death of the last, the property, if personal (at common law), went to the heir or personal representative of the last-deceased trustee. But the rule as to trust property going to heirs and executors is changed in most of the states, so that in theory the court of chancery assumes the control, and it appoints a new trustee on the decease of former trustees. If power be committed to two or more trustees, it is regarded as coupled with an interest, and will still exist in the surviving trustee on the death of any or all of the co-trustees. 2 Prob. Rep. Ann. (Ind.) 23.

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If the power is confided to several trustees, *nominatim*, it imports a personal discretion or confidence of a personal nature, and on the death of one of these donees the power dies with him and cannot he exercised by the survivors; *id.*; 13 Sim. 91; 4 Kent 311; Beach, Eq. Jur. § 240.

Each trustee has equal interest in and control over the trust estate; and hence, as a general rule, they cannot (as executors may) act or bind the trust separately, but must act jointly; 4 Ves. Ch. 97; 3 Ark. 384; 8 Cow. 544; 20 Me. 504; 11 Barb. 527.

Unlike joint executors, joint trustees cannot act separately, but must join both in conveyances and receipts; for one cannot sell without the others, or receive more of the consideration-money or be more a trustee than his partner. The trust having been given to the whole, it requires their joint act to do anything under it. They are not responsible for money received by their co-trustees, if the receipt be given for the mere purposes of form. But if receipts be given under circumstances purporting that the money, though not received by both, was under the control of both, such a receipt shall charge, and the consent that the other shall misapply the money, particularly where he has it in his power to secure it, renders him responsible; 11 S. & R. 71.

A trustee is, generally, not responsible for the conduct of his co-trustee; see 2 Lead. Cas. Eq. 858; where several trustees join in a receipt, *prima facie*, all will be considered to have received the money, but one of them may show that he did not in fact receive the money, but joined in the receipt for conformity; Bisp. Eq. § 146. A trustee who stands by and sees a fraud on the trust committed by his co-trustee will be held responsible for it; 17 Pa. 268. But trustees are not liable for the conversion of money collected by their co-trustee, in course of administration of the trust, without their knowledge or consent; 72 Hun 272.

Where there are several trustees, all must concur in any business of the trust; otherwise if it be a public trust, where the acts of a majority are binding; Bisp. Eq. § 147.

A trustee may come into equity to obtain advice and assistance in the execution of his trust; Hill, Trust. 298.

One trustee may be held responsible for losses which he has *enabled* a co-trustee to cause, though there was no actual participation by him; 18 Ohio 509; 5 How. 233. It is the duty of each trustee to carry out the trust, and a trustee cannot relieve himself of the duty by agreement with his co-trustees to look after only certain parts of the trust property; 147 U. S. 557.

Where the legal estate is vested in trustees, all actions at law relative to the trust property must be brought in their name, but the trustee must not exercise his legal powers to the prejudice of a *cestui que trust*, and third persons must take notice of this limitation of the legal rights of a trustee; 2 Vern. 197.

The trustee (and also his personal representatives to the extent of any property received from the trustee) is responsible in suit for any breach of trust, and will be compelled to compensate what his negligence has lost of the trust estate. He is not only chargeable with the principal and income of the trust property he has received, but is liable for an amount equal to what, with good management, he might have received; and this includes interest on a sum he has needlessly allowed to remain where it earned no interest; 2 Beav. 430; 4 Russ. 195.

A court of equity has power to remove a trustee, independently of any statutory provisions or of directions contained in the instrument of appointment; 8 Ind. App. 27. The rule as to the right of a trustee to contribution from his co-trustee for loss by a breach of trust for which both are equally to blame, does not apply where one of the trustees is also a *cestui que trust* and has received an exclusive benefit by the breach of trust; in that case the rule to be applied is that under which the share or interest of a *cestui que trust* who has assented to, and profited by a breach of trust has to bear the whole loss; and the trustee who is a *cestui que trust* must, therefore, indemnify his co-trustee to the extent of his share or interest in the trust estate, and not merely to the extent of the benefit he has received; [1896] 1 Ch. D. 685.

On the death of a trustee, the legal title passes to his heirs, and it becomes their duty to care for trust property, or have a new trustee appointed; 113 Mo. 188.

Commissions upon the corpus of a trust estate are never allowed except when the fund is in course of distribution; 161 Pa. 457; except under extraordinary circumstances; *id.*

**TRUSTEE PROCESS.** A legal process used in the New England states, and similar to the garnishee process of others.

All goods, effects, and credits so intrusted or deposited in the hands of others that the same cannot be attached by ordinary process of law, may, by an original writ or process, the form of which is given by the statute, be attached in whose hands or possession soever they may be found, and they shall, from the service of the writ, stand bound and be held to satisfy such judgment as the plaintiff may recover against the principal defendant; Cushing, Trustee Pr. 2. It is issued as part of the original writ.

**TUB.** A measure containing sixty pounds of tea, and from fifty-six to eighty-six pounds of camphor. Jacob.

**TUB-MAN. In Old English Law.** A barrister who has a pre-audience in the exchequer, and also one who has a particular place in court, is so called.

**TUCKER ACT.** The act of March 3, 1887, relating to the jurisdiction of the court of claims. Garl. & Ralston, Fed. Pr. 413. See UNITED STATES COURTS.

**TUG.** A steam vessel built for towing; practically synonymous with *towboat*.

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Tugs are subject to the ordinary rules of navigation touching collisions. Where a schooner was being towed by a tug lashed to her port side, the fact that the schooner had a pilot on board did not make the tug the mere servant of the schooner, so as to exempt the tug from responsibility; 11 Fed. Rep. 319; 93 U. S. 302.

A tug is not a common carrier or insurer, and is bound only to reasonable care and skill; 80 Fed. Rep. 153; 68 Pa. 51; 94 U. S. 494. See TOWBOAT.

A tug and tow while being slowly navigated are held not to blame in a collision with a steam ship in a fog, although they do not stop where there are indications of danger. It is not subject to the same rule as two steam ships approaching each other under like circumstances; [1897] P. 28. A contribution in general average cannot be had against a steam tug for casting off the tow of barges in order to save the tug; the tug and barges do not constitute a single maritime adventure; 167 U. S. 599. Towage contracts are within admiralty jurisdiction; 5 Bened. 720. See TOWAGE.

**TUMBREL.** An instrument of punishment made use of by the Saxons, chiefly for the correction of scolding women by ducking them in water, consisting of a stool or chair fixed to the end of a long pole.

**TUMULTUOUS PETITIONING.** Under stat. 13 Car. II. st. 1, c. 5, this was a misdemeanor, and consisted in more than twenty persons signing any petition to the crown or either house of parliament for the alteration of matters established by law in church or state, unless the contents thereof had been approved by three justices, or the majority of the grand jury at assizes or quarter sessions. No petition could be delivered by more than ten persons. 4 Bla. Com. 147; Moz. & W.

**TUN.** A measure of wine or oil, containing four hogsheads.

**TUNGREVE.** A reeve or bailiff. Spelman, Gloss.

**TUNNEL.** A municipal corporation, authorized by law to improve a street by building on the line thereof a tunnel under a navigable river, incurs no liability for damages unavoidably caused to adjoining property by obstructing the street or river, unless such liability be imposed by statute. 99 U. S. 635.

**TURBARY.** In English Law. A right to dig turf; an easement. It cannot be dug for sale; Noy 145.

**TURKEY.** An empire of Europe and Asia. The supreme legislative and executive power is exercised by the Sultan through a Grand Vizier and the Sheikhu 'l-Islam, who presides over the 'ulema, a corporate body comprising the chief judges, theologians, and jurists. The Grand Vizier is President of the Mejliss-i-Khass or Privy Council of thirteen members. The laws are based on the precepts of the Koran interpreted by the Mufti. Next in importance to the Koran is the Multeka or code formed of the supposed opinions of Mahomet and the sentences of his immediate successors. Another code of laws is the Cannon-nameh, drawn up by Solyman the Magnificent. Foreigners residing in Turkey are, in matters of landed property, subject to Ottoman law, otherwise they are under the laws of their respective countries and are tried by a tribunal presided over by their consul. Cases between persons of different nationalities are tried in the court of the defendant. Cases between foreigners and Turkish subjects are tried in Ottoman courts, a Dragoman of the foreign consulate being present and a sentence against a foreigner being carried out through his consulate.

**TURN, or TOURN.** See SHERIFF'S TOURN.

**TURNKEY.** A person under the superintendence of a jailor, whose employment is to open and fasten the prison-doors and to prevent the prisoners from escaping.

It is his duty to use due diligence; and he may be punished for gross neglect or wilful misconduct in permitting prisoners to escape.

**TURNOUT.** A short side-track on a railroad which may be occupied by one train while another is passing on the main track; a siding. 19 Atl. Rep. (Pa.) 356. See RAILROAD.

**TURNPIKE.** See TURNPIKE ROAD.

**TURNPIKE-ROAD.** A road or highway over which the public have the right to travel upon payment of toll, and on which the parties entitled to such toll have the right to erect gates and bars to insure its payment. 6 M. & W. 428; 85 Ky. 244.

Turnpike-roads are usually made by corporations under legislative authority; and, the roads being deemed a public use, such corporations are usually armed with the power to take private property for their construction. The title to the soil remains in the owners of the adjoining land; 27 N. J. L. 76; and, after the franchise for the construction of the turnpike has expired, the road reverts to the public; 104 Pa. 583; 10 Nev. 155. The legislature may authorize the conversion of an existing highway into a turnpike-road; 18 Conn. 32; 3 Barb. 159; without any pecuniary equivalent to the owner of the fee, such road still remaining a public highway; 2 Ohio St. 419; but no matter how bad the condition of a public road, its condition is no justification to a turnpike company for taking it as the line of a turnpike; 128 Pa. 621. A turnpike-road being a highway, any obstruction placed thereon renders the author of it liable as for a public nuisance; 16 Pick. 175; 8 Wend. 555.

A turnpike company cannot be deprived of its road or its franchise by the extension of the limits of a municipal corporation to include the road; 132 Ind. 80. It

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is held that municipal authorities may require the grade of a turnpike within its limits to be changed to conform to that of a street; 39 N. J. L. 500; and the municipality may require the turnpike to be kept in repair, but the city is not liable for a failure to do so; 32 N. J. L. 548; and a municipality may, by legislative authority, tax itself in aid of a turnpike company; 1 Wall. 175; 20 Gratt. 661; 41 Conn. 211.

A statute attempting to authorize a court, without a jury, to declare a turnpike-road abandoned and its franchise forfeited because the road has been out of repair for six months, violates the constitution guaranty of trial by jury and against the deprivation of property without due process of law; 50 Ohio St. 568.

Turnpike companies, so long as they continue to take toll, are bound to use ordinary care in keeping their roads in suitable repair, and for any neglect of this duty are liable to action on the case for the damages to any person specially injured thereby; 6 Johns. 90; 10 Pick. 35; see 29 Atl. Rep. (Pa.) 721; and to an indictment on the part of the public; 4 Ired. 16; 10 Humphr. 97; 26 Ala. N. S. 88; 1 Harr. N. J. 222; 9 Barb. 161; 2 Gray 58.

Travellers are liable for toll though they avoid the gates; 2 Root 524; 10 Vt. 197; but not for travel between the gates without passing the same; Elliot, Roads 70; 2 B. Monr. 30; 10 Ired. 30; 11 Vt. 381. In an action by a company to enforce the statutory penalty for illegally passing its tollgate, it is no defence that the road was not in good condition; 95 Mich. 372. Exemptions from toll are construed most liberally in favor of the community; Ang. High. § 359; and are usually created by special statute in relation to different kinds of vehicles; 24 N. Y. 658; going to or from mills; 15 Johns. Ch. (N. Y.) 510; in favor of husbandry; 24 N. J. L. 205; going to church; 2 B. & Ald. 206; ordinary domestic business of family concerns; 12 Vt. 212. Mail coaches are subject to toll, but may not be delayed for non-payment; 2 W. & S. 163.

A turnpike company authorized to collect toll from designated carriages, etc., may collect toll from bicycles, although the amount of toll cannot be exactly determined by the method designated for other vehicles; 167 Pa. 582; a contrary result has recently been reached in New Jersey in a case noted in the public press.

A "shunpike" is a road or turnpike laid out by an individual or by the selectmen of the town to facilitate the evasion of toll by travellers upon a turnpike road and will entitle the turnpike company to an action on the case for the damages, or to an injunction ordering the same to be closed; Elliot, Roads, p. 74; 10 N. H. 133; 18 Conn. 451; 1 Johns. Ch. 315; 36 S. W. Rep. 979; unless made necessary by the lay of the land and the wants of the community; 11 Pet. 420. And such company has been held entitled to compensation for the injury to their franchise by a highway which intersects their road at two distinct points and thereby enables travellers to evade the payment of tolls, though such highway be regularly established by the proper authorities to meet the necessities of public travel; 1 Barb. 286.

**TURPIS CAUSA** (Lat.). A base or vile consideration, forbidden by law, which makes the contract void: as, a contract the consideration of which is the future illegal cohabitation of the obligee with the obligor.

**TURPITUDE** (Lat. *turpitudo*, from *turpis*, base). Everything done contrary to justice, honesty, modesty, or good morals, is said to be done with turpitude.

**TUTELA** (Lat.). A power given by the civil law over a free person to defend him when by reason of his age he is unable to defend himself. Women by the civil law could only be tutors of their own children. A child under the power of his father was not subject to tutelage, because not a free person, *caput liberum*.

*Legitima tutela* was where the tutor was appointed by the magistrate.

**TUTELAGE.** See TUTELA.

**TUTEUR OFFICIEUX. In French Law.** A person whose duties are analogous to those of a guardian in English law; he must, however, be over fifty years of age, and appointed with the consent of the parents, or, in their default, of the *conseil de famille*, and is only appointed for a child over fifteen years of age.

**TUTEUR SUBROGE. In French Law.** The title of a second guardian appointed for an infant under guardianship; his functions are exercised in case the interests of the infant and his principal guardian conflict. Code Nap. 420; Brown, Dict.

**TUTOR. In Civil Law.** One who has been lawfully appointed to the care of the person and property of a minor.

By the laws of Louisiana, minors under the age of fourteen years, if males, and under the age of twelve years, if females, are, both as to their persons and their estates, placed under the authority of a tutor. Above that age, and until their majority or emancipation, they are placed under the authority of a curator.

**TUTOR ALIENUS** (Lat.) **In English Law.** The name given to a stranger who enters upon the lands of an infant within the age of fourteen, and takes the profits.

He may be called to an account by the infant and be charged as guardian in socage; Littleton, s. 124; Co. Litt. 89 *b*, 90 *a*.

**TUTOR PROPRIUS** (Lat.). The name given to one who is rightly a guardian in socage, in contradistinction to a *tutor alienus*.

**TUTORSHIP.** The power which an individual, *sui juris*, has to take care of the

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person of one who is unable to take care of himself. Tutorship differs from curatorship. See PROCURATOR; PROTUTOR.

**TUTRIX** (Lat.). A woman who is appointed to the office of a tutor.

**TWELFHINDI.** The highest rank of men in the Saxon government, who were valued at 1,200*s*. For any injury done to them, satisfaction was to be made according to their worth. Cowel; Whart. Dict.

**TWELVE-DAY WRIT.** A writ for summary procedure on bills of exchange and promissory notes. Whart.

**TWELVE TABLES, LAWS OF THE.** Laws of ancient Rome, composed in part from those of Solon and other Greek legislators, and in part from the unwritten laws and customs of the Romans. See CODE; 1 Kent 522.

**TWELVEMONTH,** in the singular, includes the whole year, but in the plural, twelve months of twenty-eight days each. 6 Co. 62; Bish. Writt. Laws 97. See MONTH.

**TWICE IN JEOPARDY.** See JEOPARDY.

**TWYHINDI.** The lower order of Saxons, valued at 200*s*. Cowel. See TWELFHINDI.

**TYBURN TICKET. In English Law.** A certificate given to the prosecutor of a felon to conviction. By the 10 & 11 Will. III. c. 23, the original proprietor or first assignee of such certificate is exempted from all and all manner of parish and ward offices within the parish or ward where the felony shall have been committed; Bacon, Abr. *Constable* (C).

**TYPEWRITING.** In the administration of the post-office department typewriting is treated as writing, and letter postage is charged therefor. So in some states where wills are required to be "in writing" a typewritten paper is treated as sufficient. Such is a constant practice in Delaware. A typewritten memorial presented to the house of commons (1897) was refused, and it is not to be received in British courts or in some British offices. Typewriting is not used between the state department and foreign legations, nor in the important original documents of the department. It is expressly legalized by statute in New York, by all state and municipal officers in all records (March 23, 1894); in Connecticut, for taking evidence in courts of common pleas in the same way as stenographers (May 7, 1895); in Oregon for wills (April 17, 1896); while in Pennsylvania it is more comprehensively declared to be of equal force with writing except for signatures (June 18, 1895). The implication from these few statutes and the instances given, where as mere matter of conservative custom, uncontrolled by law, its use is not permitted, are entirely insufficient to countervail the fact of its general, it may be said universal, use without question as a substitute for and equivalent of writing, indicated by the fact that a diligent search of digests, law dictionaries, and encyclopedias and annotated cases fails to disclose any judicial rejection of it.

**TYRANNY.** The violation of those laws which regulate the division and the exercises of the sovereign power of the state. It is a violation of its constitution. See DESPOTISM.

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**UBERRIMA FIDES** (Lat. most perfect good faith). A phrase used to express the perfect good faith, concealing nothing with which a contract must be made; for example, in the case of insurance, the insured must observe the most perfect good faith towards the insurer. 1 Story, Eq. Jur. § 317. See GOOD FAITH.

**UBI JUS, IBI REMEDIUM.** See MAXIM; REMEDY.

**UDAL.** Allodial. See ALLODIUM.

**UKAAS, UKASE.** The name of a law or ordinance emanating from the czar of Russia.

**ULNAGE.** Alnage. See ALNAGER.

**ULTIMATE FACTS.** Facts in issue as opposed to probative or evidential facts, the latter being such as serve to establish or disprove the issue. 2 Utah 379.

**ULTIMATUM** (Lat.). The last proposition made in making a contract, a treaty, and the like: as, the government of the United States has given its *ultimatum*, has made the last proposition it will make to complete the proposed treaty. The word also means the result of a negotiation, and it comprises the final determination of the parties concerned in the object in dispute.

**ULTIMUM SUPPLICIUM** (Lat.). The last or extreme punishment; the penalty of death.

**ULTIMUS HÆRES** (Lat.). The last or remote heir; the lord. So called in contradistinction to the *hæres proximus*

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and the *hæres remotior*. Dalr. Feud. Pr. 110.

**ULTRA MARE.** Beyond seas (*q. v.*).

**ULTRA VIRES.** The modern technical designation, in the law of corporations, of acts beyond the scope of their powers, as defined by their charters or acts of incorporation.

A term used to express the action of a corporation which is beyond the powers conferred upon it by its charter, or the statutes under which it was instituted. 13 Am. L. Rev. 632.

This doctrine is of modern growth; its appearance dates from about the year 1845, being first prominently mentioned in 10 Beav. 1 and 11 C. B. 775. See Green's Brice, *Ultra Vires* v 729.

The general rule is that a contract by which a railroad company renders itself incapable of performing its duties to the public or attempts to absolve itself from those obligations without the consent of the state, or a contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced, or rendered enforcible by the application of the doctrine of estoppel; but where the subject-matter of the contract is not foreign to the purposes for which the corporation is created, a contract embracing whatever may fairly be regarded as incidental to, or consequential upon, these things which the legislature has authorized, ought not, unless expressly prohibited, to be held, by judicial construction, to be *ultra vires*; 163 U. S. 564.

When acts of corporations are spoken of as *ultra vires*, it is not intended that they are unlawful, or even such as the corporation cannot perform, but merely those which are not within the powers conferred upon the corporation by the act of its creation, etc.; 63 N. Y. 68. A corporate act is said to be *ultra vires* when it is not within the scope of the powers of the corporation to perform it under any circumstances, or for any purpose; or, with reference to the rights of certain parties, when the corporation is not authorized to perform it without their consent; or, with reference to some specific purpose, when it is not authorized to perform it for that purpose, though fully within the scope of the general powers of the corporation, with the consent of the parties interested, or for some other purpose; 43 Ia. 48. See 35 L. J. Ch. 156; 125 Mass. 333; 37 Cal. 543.

As a general rule, such acts are void, and impose no obligation upon the corporation although they assume the form of contracts; inasmuch as all persons dealing with a corporation, especially in the state or country in which and under whose laws it was created, are chargeable with notice of the extent of its chartered powers. It is otherwise as to laws imposing restraints upon it not contained in its charter where the contract is made or the transaction takes place without the limits of the state or country under whose laws the corporation exists; 8 Barb. 233.

Perhaps the most general statement of the doctrine of *ultra vires* is that a contract of a corporation which is unauthorized by, or in violation of, its charter or other governing statute, or entirely outside of the scope of the purpose of its creation, is void in the sense of being no contract at all, because of a total want of power to enter into it; such a contract will not be enforced by any species of action in a court of justice; being void *ab initio*, it cannot be made good by *ratification*, or by any succession of *renewals*; and no *performance* on either side can give validity to the unlawful contract, or form the foundation of any right of action upon it; 5 Thomp. Corp. § 5968.

The artificial body—the corporation—is liable to be proceeded against by *quo warranto* for the usurpation of powers in its name by its officers and agents, and its charter may be taken away as a penalty for permitting such acts—the defence of a want of power to bind the corporation not being available in such cases, since it would lead to entire corporate irresponsibility; Moraw. Pri. Corp. § 649.

A corporation has all the capacities for engaging in transactions and for management which are given it expressly by its charter, etc., or impliedly given it by reasonable implication from the language thereof. Capacities or powers for management may be given by wide general language. Beyond these powers, they have no capacities or powers, and cannot legally engage in other transactions.

In the United States the defence of *ultra vires* interposed against a contract wholly or in part executed has very generally been looked upon with disfavor. The result has been that in some cases a liberal construction has been applied so as to destroy the foundation of the defence; in others the courts have allowed the recovery of the money paid, not upon the contract, but because of the money received and the benefits enjoyed; while in still another class of cases, the doctrine of estoppel *in pais* has been applied to exclude the defence. The courts may be said, generally, to be tending towards the doctrine—certainly so far as business corporations are concerned—that corporations are to be held liable upon executed contracts, where the contracts involved are not expressly or by necessary implication prohibited by their charters or the general law; Brice, *Ultra Vires* 729.

There is said to be a tendency of the courts, based upon the strongest principles of justice, to enforce contracts against corporations, although in entering into them they have exceeded their chartered powers, where they have received the consideration and the benefit of the contract; 7 Wall. 392; 98 U. S. 621; see 51 Fed. Rep. 1; 46 Kan. 524; and the rule that the charter of a corporation is to be construed strictly against the grantee does not



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apply to a case where the corporation seeks to repudiate contracts whereof it has enjoyed the benefits, or where such contracts are attacked by creditors after the corporation became insolvent; 57 Fed. Rep. 47; 47 *id.* 22. The doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong; 96 U. S. 258. The executed dealings of corporations should be allowed to stand for and against both parties, when good faith so requires; 22 N. Y. 258, 494; 63 N. Y. 62. Where a corporation has entered into a contract which has been fully executed on the other part, and nothing remains but the payment by the corporation of the consideration, it will not be allowed to set up that the contract was *ultra vires;* 83 Pa. 160. Corporations should be restricted so far as courts can, in the exercise of their powers, limit them; but the plea is not a gracious one, that a contract which they have deliberately made, and of which they have received the full benefit, is void for want of power in them to make it.

A contract of a corporation which is *ultra vires* is not voidable only, but wholly void; 160 U. S. 514, citing 139 *id.* 24. The *ultra vires* contracts of corporations when *malum in se* or *malum prohibitum* will not be enforced,—but as to contracts not thus objectionable justice requires that the doctrine of *ultra vires* should be limited, and when a corporation, *ultra vires*, leases its property and the lessee has occupied the same, the lessee is liable for the rent for the time of his occupation; though, as to the public, such lease would be void: N. Y. Ct. of App., in 54 Alb. L. J. 389. It is a much disputed question whether unauthorized contracts neither *malum in se* nor *malum prohibitum*, or where the restriction is implied from the grant of specified powers, are absolutely void and non-enforcible, even where the other party has received the consideration for his promise. It is held in special English cases that *ultra vires* contracts are under no circumstances enforcible: 11 C. B. 775; L. R. 18 Q. B. 618; 7 Eng. & Ir. App. 652. It has also been held that where leases of railroads were made without legislative sanction they were void as between the parties, and no action could be maintained to recover the rent even during the occupation by the lessee under the lease; 101 U. S. 71; 118 U. S 290.

A corporation may not avail itself of the defence of *ultra vires* where a contract which it has entered into has been in good faith, fully performed by the other party, and the corporation has had the full benefit of the performance of the contract; 182 Pa. 206. As where a bank caused property owned by it to be conveyed by a deed, regular in form, to a worthless corporation organized by its own directors and then lent money to such corporation and took its notes and discounted them with strangers, by representing them as prime paper and on the strength of such corporation's apparent ownership of such property, it was held to be thereafter estopped as against the holders of the notes to assert that the conveyance was *ultra vires;* 73 Fed. Rep. 946.

In no way and through no channels, directly or indirectly, will courts allow an action to be maintained for the recovery of property delivered under an illegal contract, where, in order to maintain such recovery, it is necessary to have recourse to the contract; recovery must rest upon a disaffirmance of the contract and the recovery of what in justice should be recovered, but without breaking this rule. Where a sleeping-car company made a void lease of its property and business to another sleeping-car company, it was held that the value of the property transferred to the lessee when the lease took effect, with interest, could be recovered by the lessor, as that had substantially disappeared and could not now be returned. But that the value of contracts with railroad companies transferred by the lease and the value of the expired patents formed no part of the sum which the lessor was entitled to recover for the breaking up of its business by reason of the contract being adjudged illegal; 171 U. S. 138. See 8 Harv. L. Rev. 15.

It has been held *ultra vires* for a railway company to guarantee to the shareholders of a steam packet company a dividend upon capital; 10 Beav. 1; to engage in the coal trade; 6 Jur. N. S. 1006; for a company to assume the debt of another; 34 Vt. 144; or to make or indorse accommodation paper; 11 Ind. 104; or to engage as surety for another in a business in which it has no interest; 26 Barb. 568, or to guaranty, for accommodation, the obligations of another corporation; 57 Fed. Rep. 47; for one railroad company to unite with another like company, and both conduct their business under one management; 21 How. 441; or to run a line of steamboats in connection with its road; 39 Mo. 451; or for a mutual benefit society to undertake to pay the death losses of another insurance company; 70 Ia. 542; 87 *id.* 733; but a railway company may contract to carry beyond its own lines; Wood, Railr. 619; 54 Pa. 77; 96 U. S. 258; but see 29 Conn. 502. Where a corporation is incompetent to take real estate, a conveyance to it is only voidable; Morawetz, Corp., 2d ed. 678. A railroad company has implied authority to erect a refreshment room; L. R. 7 Eq. 116; a corporation authorized to erect a market has authority to purchase land for that purpose; Dill. Mun. Corp. § 447; where a corporation had authority to keep steam vessels for the purposes of a ferry, they could use these vessels, when otherwise unemployed, for excursion trips; 30 Beav. 40; 11 Allen 326. Corporations generally have authority to borrow money to carry out the objects for which they were created, and to execute their obligations therefor; Field, Corp. §

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249; including irredeemable bonds; 21 Am. L. Reg. N. S. 713; they may, generally, by virtue of implied powers, make promissory notes: 13 Am. L. Rev. 641; 15 Wall. 566; 35 N. Y. 505. Where a railroad company, without legislative authority, leased its road to three persons, for twenty years, this was held *ultra vires;* 101 U. S. 71. See LEASE. A railroad company cannot guarantee the expense of a musical festival; 131 Mass. 258; the same ruling applies to a company organized to manufacture and sell organs; *ibid.*

It is said to be now well settled that a power granted to a corporation to engage in certain business carries with it the authority to act precisely as an individual would act in carrying on such business, and that it would possess for this purpose the usual and ordinary means to accomplish the objects of its creation, in the same manner as though it were a natural person; Field, Corp. § 271. A manufacturing corporation may purchase a large tract of land for the purpose of erecting thereon its factories and residences for its employes, and contribute toward the establishment there of a church, a school, a free library, and a free bath for its employes; 17 Misc. Rep. 43. The contrary has just been decided in the Pullman's Company case in Illinois.

The doctrine of *ultra vires* ought to be reasonably understood and applied; and whatever may be fairly regarded as incidental to and consequential upon those things which are authorized by the charter of the company, ought not, unless expressly prohibited, to be held by judicial construction, to be *ultra vires;* 49 N. J. Eq. 217.

The result of the English authorities is, that corporations—certainly those for commercial purposes, and probably all corporations to which the doctrine applies—have by implication all capacities and powers which, being reasonably incidental to their enterprise or operations, are not forbidden, either expressly by their constating instruments or by necessary inference therefrom; Green's Brice, *Ultra Vires* 40. The American decisions seem to be tending towards this doctrine; *id.* note *a*. *Prima facie*, all the contracts of a corporation are valid, and it lies on those who impeach any contract to make out that it is void; 96 U. S. 267; 3 Macq. 382; 49 N. J. Eq. 217.

A court of equity, at the suit of the stockholders of the corporation, will restrain the commission of acts beyond the corporate power, by injunction operating upon the individual officers and directors as well as the corporation. This is now an acknowledged head of equity jurisdiction; Wood, R. R. 633; Redf. Railw. 400; 18 Wall. 626; 10 Beav. 1; creditors are said to have the same right in this respect as stockholders; 13 Am. L. Rev. 659.

Acquiescence for any considerable time in the exercise of excessive powers, after they come to the knowledge of the stockholders, would, however, be a decisive objection to such a remedy; 19 E. L. & E. 7.

In regard to municipal corporations, the rule is stricter against the validity of *ultra vires* contracts. See Dill. Mun. Corp. § 381.

It has been said that a corporation is liable for the negligence and other torts of its agents and servants, even when related to and connected with the acts of the corporation that are *ultra vires;* even if done in the execution of usurped powers and of purposes clearly *ultra vires;* Beach, Pr. Corp. § 444; but as to whether a corporation is liable for such wrongs by its agents as are beyond the scope of corporate authority, see L. R. 2 Q. B. 534; 7 H. & N. 172; 47 N. Y. 122.

**ULTRONEUS WITNESS.** A witness who offers his testimony without being regularly cited. Bell, Dict. *Evidence.*

**UMPIRAGE.** The decision of an umpire. 4 Lea 288.

**UMPIRE.** A third person appointed to decide between two other judges or referees who differ in opinion. 1 Harr. Del. 260. The jurisdiction of the umpire and arbitrators cannot be concurrent; Morse, Arb. & Aw. 241; if the arbitrators make an award, it is binding; if not, the award of the umpire is binding; T. Jones 167. If the umpire sign the award of the arbitrators, it is still their award, and *vice versa;* 6 Harr. & J. 403. He determines the issue submitted to the arbitrators on which they have failed to agree, which is his sole award; and neither of the original arbitrators is required to join in the award; 11 Allen 384; 75 Ill. 30. Arbitrators may appoint an umpire after their term of service has expired, if the time is not gone within which the umpire was to make his award; 2 Johns. 57. Subsequent dissent of the parties, without just cause, will have no effect upon the appointment; but they should have notice; 12 Metc. 293. If an umpire refuse to act, another may be appointed *toties quoties;* 11 East 367.

**UNA VOCE** (Lat.). With one voice; unanimously.

**UNADJUSTED.** Uncertain; not agreed upon. 43 Me. 214.

**UNALIENABLE.** Incapable of being transferred.

Things which are not in commerce, as, public roads, are in their nature unalienable. Some things are unalienable in consequence of particular provisions in the law forbidding their sale or transfer; as, pensions granted by the government. The natural rights of life and liberty are unalienable.

**UNANIMITY** (Lat. *unus*, one, *animus*, mind). The agreement of all the persons concerned in a thing, in design and opinion. See JURY: MAJORITY.

**UNASCERTAINED DUTIES.** Pay-

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ment in gross on an estimate as to amount. 5 Blatchf. 274.

**UNAVOIDABLE CASUALTY.** Events or accidents which human prudence, foresight, and sagacity cannot prevent. 6 U. S. App. 42; 3 Gray 325. If by any care, prudence, or foresight a thing could have been guarded against, it is not unavoidable; 50 Ga. 509. An *unavoidable accident* is synonymous with inevitable accident. See INEVITABLE ACCIDENT; ACT OF GOD; FORTUITOUS EVENT.

**UNBORN CHILD.** See EN VENTRE SA MERE; TORT; 12 Harv. L. Rev. 209.

**UNCERTAINTY.** That which is unknown or vague. See CERTAINTY.

**UNCIA TERRÆ** (Lat.). This phrase often occurs in charters of the British kings, and denotes some quantity of land. It was twelve *modii*, each *modius* possibly one hundred feet square. Mon. Ang. tom. 3, pp. 198, 205.

**UNCIARIUS HÆRES. In Civil Law.** An heir to one-twelfth of an estate or inheritance. Calv. Lex.

**UNCLE.** The brother of a father or mother. See AVUNCULUS; PATRUUS.

**UNCONSCIONABLE BARGAIN.** A contract which no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept, on the other. 2 Ves. 125; 4 Bouv. Inst. n. 3848. See USURY; EXPECTANCY; POST OBIT.

**UNCONSTITUTIONAL.** See CONSTITUTIONAL; STATUTE.

**UNCORE PRIST** (L. Fr. still ready). A plea or replication that the party pleading is still ready to do what is required. Used in connection with the words *tout temps prist*, the whole denotes that the party always has been and still is ready to do what is required, thus saving costs where the whole cause is admitted, or preventing delay where it is a replication, if the allegation is made out. 3 Bla. Com. 303.

**UNDE NIHIL HABET.** See DOWER.

**UNDEFENDED.** A term sometimes applied to one who is obliged to make his own defence when on trial, or in a civil cause. A cause is said to be undefended when the defendant makes default, in not putting in an appearance to the plaintiff's action; in not putting in his statement of defence; or, in not appearing at the trial either personally or by counsel, after having received due notice. Lush's Prac. 548.

**UNDER.** The term is sometimes used in its literal sense of "below in position," but more frequently in its secondary meaning of "inferior" or "subordinate." 8 How. 356.

**UNDER AND SUBJECT.** Words frequently used in conveyances of land which is subject to a mortgage, to show that the grantee takes subject to such mortgage. See MORTGAGE; 27 Am. L. Reg. N. S. 387, 401.

**UNDER CHAMBERLAINS OF THE EXCHEQUER.** Two officers who cleaved the tallies written by the clerk of the tallies and read the same. They also made searches for records in the treasury, and had the custody of the domesday book. Cowel.

**UNDERGROUND WATERS.** See SUBTERRANEAN WATERS.

**UNDERGROWTH.** A term applicable to plants growing under or below other greater plants. 70 Miss. 411.

**UNDERLEASE.** An alienation by a tenant of a part of his lease, reserving to himself a reversion; it differs from an assignment, which is a transfer of all the tenant's interest in the lease. 3 Wils. 234; W. Blackst. 766. And even a conveyance of the *whole* estate by the lessee, reserving to himself the rent, with a power of reentry for non-payment, was held to be not an assignment, but an underlease; 1 Stra. 405; Woodf. L. & T. 731. The transfer of a part only of the lands, though for the whole term, is an underlease; 2 Ohio 216; *contra*, 4 Bibb 538. See LEASE; ASSIGNMENT.

**UNDERLIE THE LAW.** In Scotch criminal procedure, an accused person, in appearing to take his trial, is said "to compear and underlie the law." Moz. & W.

**UNDERSTANDING.** It may denote an informal agreement or a concurrence as to its terms. 47 Wis. 507. A valid contract engagement of a somewhat informal character. 32 Minn. 238. In the law of contracts it is a loose and ambiguous term, unless accompanied by some expression to show that it constituted a meeting of the minds of the parties upon something respecting which they intended to be bound. 25 Conn. 529.

**UNDERSTOOD.** Agreed. 14 Gray 165. It falls short of alleging a distinct express contract; 19 S. C. 419.

**UNDERTAKING.** An engagement by one of the parties to a contract to the other, and not the mutual engagement of the parties to each other; a promise. 5 East 17; 2 Leon. 224; 4 B. & Ald. 595, followed in 28 Tex. App. 186. It does not necessarily imply a consideration; 3 N. Y. 335.

**UNDERTOOK.** Assumed; promised. This is a technical word which ought to be inserted in every declaration of assumpsit charging that the defendant undertook to perform the promise which is the foundation of the suit; and this though the promise be founded on a legal liability or would be implied in evidence. Bacon, Abr. *Assumpsit* (F); 1 Chitty, Pl. 88, note p.

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**UNDERWRITER.** The party who agrees to insure another on life or property, in a policy of insurance. He is also called the insurer.

The title is almost exclusively confined to insurers of marine risks, and is derived from the method of obtaining such insurance formerly in vogue, usually as follows: A premium having been agreed upon between the insured and an insurance broker, a statement of such premium and of the ship or cargo, and the voyage or time, was written at the head of a sheet which was laid on the broker's table. Then such merchants as were willing to insure such property on such terms subscribed their names to the statement above mentioned, stating the amount they were willing to insure; and so on until the desired amount of insurance was obtained. 1 Pars. Mar. Ins. 14.

**UNDERWRITING.** An agreement made in forming a company and offering its stocks or bonds to the public, that if they are not all taken up, the underwriter will take what remains. An underwriter is held liable in England on the stock subscribed for by him. See 42 Ch. D. 1.

*Underwriting contract.* An agreement to take shares in a company forming, so far as the same are not subscribed to by the public. Palmer, Company Precedents 107.

**UNDIVIDED.** Held by the same title by two or more persons, whether their rights are equal as to value or quantity, or unequal. See 16 Pick. 98.

**UNDUE INFLUENCE.** The use by one, in whom a confidence is reposed by another who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage of his weakness of mind, or of his necessities or distress. 94 Cal. 642; or to constrain him to do that which he would not have done without the exercise of such control. 50 N. J. Eq. 439.

That influence which compels one to do that which is against his will from fear, the desire of peace, or some feeling which is tantamount to force or fear. 95 Ala. 495; 86 Md. 494.

Influence gained by kindness and affection will not be regarded as undue, if no imposition or fraud be practised, even though it induce one to make an unequal and unjust distribution of his property, if such disposition is voluntarily made; 135 U. S. 167; 88 N. Y. 357; but the question of the boundary of legitimate influence must be determined by the consideration of the relation between the parties, the character, strength, and condition of each of them, and the application of sound sense to each given case; 44 N. J. Eq. 154; 82 Va. 225; the mental and physical condition of the testator, the provisions of the will itself; 98 Mo. 433; 117 Ill. 14; 23 App. Div. 411; 83 Fed. Rep. 33; and the conduct of the testator after its execution; 66 Pa. 283. The questions of capacity and undue influence are closely connected and must be considered together; 29 Ark. 151.

On principles of public policy, there is a presumption of undue influence in voluntary settlements between parent and child; 1 Ves. 401; 34 Beav. 457; 15 *id.* 278; guardian and ward; 10 L. R. Eq. 405; trustee and *cestui que trust;* 30 Beav. 39; legal adviser and client; 2 Atk. 25; or between one and his spiritual adviser; 2 L. C. Eq. 597, n.; s. c. 14 Ves. 273; and so there is said to be a presumption of undue influence in case of wills made where these relations exist between the parties; 14 Fed. Rep. 905; 88 N. Y. 371; but see 71 Hun 27, where it was held that undue influence could not be presumed from the fact that the beneficiary stood in a confidential relation to the testator. See 5 Misc. Rep. 68; 114 Mo. 35; 98 Ala. 267.

Undue influence will not invalidate a will if, at the time of making it, the testator's freedom of will was not overcome; 118 Pa. 259; 184 U. S. 47; but it is held that where it is exercised by any one, even if not a beneficiary, undue influence is ground for setting the will aside; 74 Cal. 52. See DURESS; FRAUD.

**UNFAIR COMPETITION.** See TRADE-MARK.

**UNGELD.** An outlaw. Toml.

**UNICA TAXATIO** (Lat.). The ancient language of a special award of *venire*, where of several defendants one pleads, and one lets judgment go by default, whereby the jury who are to try and assess damages on the issue are also to assess damages against the defendant suffering judgment by default. Lee, Dict.

**UNIFORM.** See GENERAL LAW.

**UNIFORMITY OF LAWS.** Commissions have been appointed by the legislatures of thirty-two states and territories who hold annual conferences in connection with the American Bar Association, chiefly on uniformity of law of negotiable instruments, divorce, and acknowledgments. See the recent reports of the American Bar Association. See ROLLING STOCK, as to an instance of uniform laws in almost all the states.

**UNIFORMITY OF PROCESS ACT.** An act providing for uniformity of process in personal actions in the courts of law at Westminster, 23d May, 1832. The improved system thus established was more fully amended by the Procedure Acts of 1852, 1854, and 1860, and by the Judicature Acts of 1873 and 1875.

**UNILATERAL CONTRACT. In Civil Law.** When the party to whom an engagement is made makes no express agreement on his part, the contract is called unilateral, even in cases where the law attaches certain obligations to his acceptance. La. Civ. Code, art. 1758. A loan

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of money and a loan for use are of this kind. Pothier, Obl. part 1, c. 1, s. 1, art. 2; *Lec. Elémen.* § 781.

**In the Common Law.** According to Professor Langdell, every binding promise not in consideration of another promise is a unilateral contract. For example, simple contract debts, bonds, promissory notes, and policies of insurance. A bilateral contract, which consists of two promises to give in exchange for and consideration of each other, becomes a unilateral contract when one of the promises is fully performed; Langdell, Sum. Cont. § 183.

**UNINTELLIGIBLE.** That which cannot be understood. See CONSTRUCTION.

**UNIO PROLIUM** (Lat. union of offspring). A species of adoption used among the Germans, which takes place when a widower having children marries a widow who also has children. These parents then agree that the children of both marriages shall have the same rights to their succession as those which may be the fruits of their marriage. *Lec. Elém.* § 187.

**UNION.** A popular term for the United States of America.

**In English Poor Law.** Two or more parishes that have been consolidated for the better administration of the poor law therein.

**UNION LABEL LAWS.** See TRADE-MARK.

**UNITED KINGDOM OF GREAT BRITAIN AND IRELAND.** The official title of the kingdom composed of England, Scotland, and Ireland. At the time of the union between England and Scotland, in 1707, Great Britain became the official name of the kingdom, and continued to be such until the union with Ireland, in 1801. In the act of union of January 1, 1801, the above title is made the official name of the kingdom.

The government is a hereditary constitutional monarchy, and the sovereign, with a ministry responsible to parliament, constitutes the executive. See EXECUTIVE POWER. The legislative power is vested in a parliament composed of a house of lords and a house of commons. The judicial power is vested in the house of lords, a court of appeal, and a high court of justice, together with various county courts and inferior courts, as to which more detailed statements will be found in the respective titles relating to them.

**UNITED STATES COMMISSIONERS.** Each circuit court of the United States may appoint, in different parts of the district for which it is held, as many discreet persons as it may deem necessary, who shall be called "commissioners of the circuit court," and shall exercise the powers which are or may be conferred upon them; R. S. § 627.

These officers are authorized to hold to security of the peace and for good behavior in cases arising under the constitution and laws of the United States; R. S. § 727. They have power to carry into effect, according to the true intent and meaning thereof, the award or arbitration, or decree of any consul, vice-consul, or commercial agent, to sit as judges or arbitrators in such differences as may arise between the captains and crews of vessels, application for the exercise of such power being first made by petition of such consul, etc.; R. S. § 728.

They have also power to take bail and affidavits when required or allowed in any circuit or district court of the United States; R. S. § 945. They may imprison or bail offenders; R. S. § 1010; may discharge poor convicts imprisoned; R. S. § 1042; may administer oaths and take acknowledgments; R. S. § 1778; may institute proceedings under the civil rights laws; R. S. 1 Supp. 68; may issue warrants for the arrest of foreign seamen, in case of dispute or desertion; R. S. § 4079; may summon the master of a vessel in cases of seamen's wages; may apprehend fugitives from justice; R. S. § 5270.

The district court of the United States may appoint commissioners before whom appraisers of vessels or goods and merchandise seized for breaches of any law of the United States may be sworn; and such oaths so taken are as effectual as if taken before the judge in open court; R. S. § 570.

The court of claims has power to appoint commissioners, before whom examinations may be made upon oath of witnesses touching all matters pertaining to claims; R. S. §§ 1071, 1080.

**UNITED STATES COURTS.** Except in the case of impeachments the judicial power of the United States is vested by the constitution in a supreme court and such other inferior courts as may be from time to time established by congress. All the judges are appointed by the president, with the advice of the senate, to hold office during good behavior, and their compensation cannot be diminished during their terms of office. The judges, other than those of the supreme court, are circuit judges and district judges, by whom are held the inferior courts of law and equity. For a detailed statement of the territorial boundaries of the several districts and divisions of districts, see Garland & Ralston, Fed. Prac. ch. ii. Except in a few cases especially provided for, there is a district judge for each district, of which he must be a resident. The districts are grouped into nine circuits as follows: 1. Maine, New Hampshire, Massachusetts, Rhode Island. 2. Vermont, Connecticut, New York. 3. Pennsylvania, New Jersey, Delaware. 4. Maryland, Virginia, West Virginia, North Carolina, South Carolina. 5. Georgia, Florida, Alabama, Mississippi, Louisiana, Texas. 6. Kentucky, Ohio, Michigan, Tennessee. 7. Indiana, Illinois, Wisconsin. 8. Colorado, Nebraska, Minnesota, Kansas, North Dakota, South Dakota, Wyoming, Utah, Iowa, Missouri, Arkansas. 9. California, Oregon, Nevada, Idaho, Montana, Washington. Alaska and Arizona are assigned to the ninth circuit, and New Mexico and Oklahoma to the eighth, to which also the Indian Territory is assigned for the purpose of appeals. There are three circuit judges in the second, seventh, eighth, and ninth circuits, and two in each of the other circuits. They must reside in the circuit. One supreme court justice is allotted to each circuit by order of the supreme court; he is known as the circuit justice, and is a judge of the circuit court and circuit court

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of appeals of that circuit. He has no distinct commission as circuit judge and none is required; 1 Cra. 308.

All the courts appoint their own clerks; by act of August 13, 1888, no person may be appointed who is related to the judge by affinity or consanguinity within the degree of first cousin; R. S. 1 Supp. 614. Deputy clerks may also be appointed by the court, on the application of the clerk, removable at the pleasure of the appointing judges. Such deputies may do any act which the clerk may lawfully do; 20 Wall. 92; 1 Woods 209. Any federal judge who shall have served ten years may retire, at any time after reaching the age of seventy years, and receive his salary for life; R. S. § 714.

The judicial power under the constitution shall extend to:—1. Cases arising under the federal constitution, laws, or treaties. 2. Those affecting ambassadors and other public ministers and consuls. 3. Admiralty and maritime cases. 4. Controversies to which the United States is a party. 5. Those between two or more states. 6. Or between a state and a citizen of another state. (By the 11th amendment this grant of power was so limited as not to permit a state to be sued by citizens of another state, but a state may sue citizens of another state; 10 Wall. 553; 91 U. S. 667.) 7. Or between citizens of different states. 8. Or between a state or its citizens and foreign states, citizens, or subjects. This is construed to be an absolute grant of power; 1 Wheat. 308.

The nature of the federal government which distributes the functions of government between two powers, each being sovereign within its sphere, but operating within the same territorial jurisdiction and upon the same persons and property, makes necessary the adjustment of two classes of independent tribunals with great care, both in legislation and the administration of justice, to avoid conflicts of jurisdiction. That such have occurred is true, but their rare occurrence in more than a century bears testimony as well to the tact and discretion of the judiciary, federal and state, as to the perfection of the system which they administer under the constitution.

As respects criminal proceedings, the courts of each jurisdiction generally confine themselves to the administration of the laws of the government which created them. In civil cases, however, as the constitution has conferred jurisdiction upon the federal courts in cases, for example, where a citizen of one state sues a citizen of another state, it is manifest that the court which tries such a case must administer the laws of the state in which the action is brought, subject to the constitution of the United States in cases which conflict with its provisions.

In the organization of the federal system of courts, there were two objects to be accomplished. The first was to prevent a clashing between the state and United States courts, by imposing restrictions upon the United States courts. The second was to carry out the mandates of the constitution, by clothing the latter with all the powers necessary to execute its provisions. This organization was commenced by the act of 1789, familiarly known as the Judiciary Act; 1 Stat. at Large 921.

To accomplish the first object, the right to issue writs of *habeas corpus* was by the fourteenth section limited to cases arising under the federal constitution and laws; R. S. § 753. See HABEAS CORPUS.

This important restriction was intended to leave to the state authorities the absolute and exclusive administration of the state laws in all cases of imprisonment; and no instance has ever occurred in which this act has been disregarded. On the contrary, its observance has been emphatically enjoined and enforced; 21 How. 523. See 4 Dill. 323; 24 Am. L. Reg. 522. See *infra*.

By the thirty-fourth section of the same act (R. S. § 721), it was enacted that the laws of the several states, except where the constitution, treaties, or statutes of the United States should otherwise require or provide, were to be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they applied. This provision has received examination and interpretation in the following, among the many cases: 7 How. 40; 8 *id.* 169; 14 *id.* 504; 17 *id.* 476; 18 *id.* 502, 507; 20 *id.* 393, 584; 18 Wall. 71; 17 *id.* 44; 98 U. S. 176, 242, 470; 3 Wash. C. C. 313; 17 Fed. Rep. 721. In all cases depending upon the construction of a state statute, federal courts will follow the construction of the court of last resort of the state, when that construction is well settled, without respect to its original soundness; 9 Cra. 87; 100 U. S. 47; 60 Fed. Rep. 718; 22 *id.* 26; even when, in ignorance of a decision by the state court, the supreme court had construed the statute differently; 100 U. S. 47; or when, if it were an original question, the federal court would be of a different opinion; 154 *id.* 177.

And while the United States courts follow the interpretation given to the laws of the state by their highest tribunals, yet in case of conflicting decisions, or in the absence of decisions at the time of consideration by the United States courts, the rule is, of course, modified; 5 How. 139; 18 *id.* 599. In the leading case of Burgess *v.* Seligman the limitations of the doctrine were thus stated by Bradley, J.: "The federal courts have an independent jurisdiction in the administration of state laws, co-ordinate with, and not subordinate to, that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administra-

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tion of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the federal courts to exercise their own judgment, as they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the federal courts will lean toward an agreement of views with the state courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the state courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the states in controversies between citizens of different states was to institute independent tribunals, which, it might be supposed, would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication." 107 U. S. 20, approved *id.* 541. See, also, for a good statement of the doctrine, 134 *id.* 348. Ordinarily, they will follow the latest settled decisions; 1 Dill. 555; 6 Pet. 291; 2 Black 599. But a change of decision by a state court in regard to the construction of a statute will not be allowed to affect rights acquired under the former decision; 101 U. S. 677; 128 *id.* 538; otherwise, when no rights have been acquired under the former decision; 100 U. S. 47; 107 *id.* 20; 147 *id.* 91; or where the decision of the state court was made long after the rights in question accrued; 120 U. S. 759; 119 *id.* 680; 148 *id.* 393. The federal courts will not follow the decision of an inferior court; 2 Woods 395.

In controversies concerning the title to real property, the federal court always administers the law as if it were sitting as a local court; 17 Wall. 44; 98 U. S. 244; 89 Fed. Rep. 719; 153 U. S. 17. So also of statutes of limitation; 157 U. S. 177.

Questions of international law must be decided as matters of general law, uncontrolled by local decisions; 146 U. S. 657. Decisions of the state court on questions of local law, affecting solely the internal police of the state or the construction of a municipal ordinance, must control; 145 U. S. 421.

Local law or custom, established by repeated decisions of the highest courts of the state, becomes also the law governing courts of the United States sitting in that state; 125 U. S. 555; 185 *id.* 492. This is particularly true as to decisions which establish a rule of property, and the rule is observed even as to points upon which the states are at variance among themselves; 133 U. S. 670; 135 *id.* 457; 136 *id.* 223; 148 *id.* 60; and where the same statute receives a different interpretation in different states, each will be followed by the federal courts as the true interpretation for the particular state in question; 62 Fed. Rep. 868. The supreme court will follow the construction given by the state court to a state statute of limitations, even in a case decided the other way by the circuit court before the decision of the state court; 147 U. S. 647; and the lower federal courts will reverse their decision holding a state statute unconstitutional, when the state subsequently decides that it is constitutional, if a final decree had not been entered in the federal court; 64 Fed. Rep. 9. In 71 Fed. Rep. 443, however, the circuit court of appeals declined to follow the supreme court of Indiana where the decision of the latter was rendered after argument and before decision in the federal court. As to the organization or composition of a tribunal established by the fundamental law of the state, the settled course of decisions in its highest court is at least entitled to great weight; 120 U. S. 354.

The provision of § 721 making the state law the rule of decision embraces state rules of evidence in civil cases at common law; 1 Black 427; 18 Wall. 436; 98 U. S. 1; 16 Fed. Rep. 435; but not in equity cases; 3 Blatch. 11; it does not apply to questions of general jurisprudence; 147 U. S. 101; or of general commercial law; 18 How 520; 16 Pet. 1; 2 Fed. Rep. 285, 843; 4 Biss. 473; 100 U. S. 239; see COMMERCIAL LAW (but they should have due weight given to them; 52 Fed. Rep. 191); or to the general principles of equity; 13 How. 271; 12 *id.* 361; or to criminal cases; *id.*; or questions of a general nature, not based upon a local statute; 100 U. S. 213; 107 *id.* 109. It is sometimes said, somewhat vaguely, that questions of general law are to be uncontrolled by decisions of the state courts, except to give them such weight as may be deemed proper, with due respect to their character as co-ordinate tribunals. It is difficult to deduce from the cases any general rule or principle, but

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among cases thus held to be questions of general law are:—what is or is not a navigable stream; 67 Fed. Rep. 285; whether a carrier may stipulate for exemption from liability for its own negligence; 52 *id.* 903; whether two employes of the same master are fellow-servants; 149 U. S. 368. In the section last referred to, the word "laws" does not include the decisions of the local tribunals, for these are only evidence of what the laws are; 16 Pet. 1.

If a contract when made is valid under the laws of the state as then interpreted by the courts of the state, subsequent decisions putting a different interpretation upon such laws are not binding on the federal courts as to that contract; 1 Wall. 175; 16 *id.* 678. And where contracts are based upon laws then believed to be constitutional, there being at the time no adjudication on such laws in the state courts declaring them invalid, the federal courts will not follow subsequent decisions of state courts thereon, but will construe such statute for themselves; 19 Wall. 66.

In clothing the United States courts with sufficient authority to carry out the mandates of the constitution, their powers are made in certain cases to transcend those of the state courts; various provisions exist for the removal of causes from the state to the federal courts. See REMOVAL OF CAUSES.

And while the rule is thoroughly settled that remedies in the courts of the United States are, at common law or in equity, according to the essential nature of the case, uncontrolled in that particular by the practice of the state courts; 129 U. S. 45, 46; yet an enlargement of equitable rights by the state statute may be administered by federal courts as well as by the courts of the state; and when the case is one of a remedial proceeding, essentially of an equitable character, there can be no objection to the exercise of the jurisdiction; 21 Wall. 503, 520; 110 U. S. 15, 25; 121 *id.* 552, 557.

The original jurisdiction of the circuit court in certain cases, and the appellate jurisdiction of the supreme court to review the decisions of state courts, depend upon the existence in the case of what is termed a *federal question*. This is a question arising in a litigated case, and necessary to its decision, involving the construction of the constitution, or a law or treaty of the United States.

If, from the questions involved in a case, it appears that some title, right, privilege, or immunity, on which the recovery depends, will be defeated by one construction of the constitution, or of a law or treaty of the United States, or sustained by the opposite construction, the case will be one arising under the constitution or laws of the United States, and involves a federal question; 115 U. S. 257; 114 *id.* 641; 112 *id.* 416; 111 *id.* 462.

The supreme court has no jurisdiction of a writ of error to review the judgment of a state court unless a real, and not a fictitious, federal question is involved; 142 U. S. 79; 147 *id.* 531; 6 Wall. 258; and where it does not appear from the record that a federal question was actually presented or in any way relied on before final judgment below, the supreme court is without jurisdiction; 116 U. S. 54; as it must appear on the record that it was raised and decided, or that its decision was necessary to the judgment or decree rendered; 114 U. S. 133; 91 *id.* 578; 111 *id.* 200; 171 *id.* 38. See 142 *id.* 254. If another question, not federal, has also been raised and decided against the same party, and the decision of the latter question is sufficient to sustain the judgment, the supreme court will not review it; 171 *id.* 38; 150 *id.* 633. It has been held that federal questions are involved in suits brought by corporations created by acts of congress; 115 U. S. 2; to determine the validity of a railroad consolidation authorized by act of congress; 111 U. S. 449; to enjoin the erection of a bridge across a navigable river authorized by act of congress; 13 Blatch. 479; whether full faith and credit were given to a judgment in another state; 146 U. S. 157; where the supreme court of a state failed to give proper effect to a decree of the circuit court of the United States; 152 *id.* 327; where a federal officer is sued in trespass to real estate which he claims to have possession for and under authority of the United States; 147 *id.* 508. So, of course, are suits for infringement of patents and copyrights, cases in which it is claimed that a state law is invalid because in conflict with the constitution or laws of the United States, or as depriving one of some right, privilege, or immunity thereby guaranteed, and criminal prosecutions for violations of federal laws.

The judicial power of the federal government is administered under existing laws, by four courts. The supreme court, which is created by the constitution, from which it derives its original jurisdiction; the circuit court of appeals; the circuit court; and the district court.

There are also various administrative tribunals, such as the court of claims; see *infra;* the interstate commerce commission; and the private land claims court; which titles see. There are also separate judicial systems provided by congress for the territories and the District of Columbia. The system of appeals, as at present organized, provides for the review of decisions on questions of law in most, if not all, of the federal tribunals either by the supreme court or the circuit court of appeals, as the case may be.

As to the *Senate* as a court of impeachment, see IMPEACHMENT.

*The Supreme Court* now consists of the chief justice and eight associates, of whom six constitute a quorum. They have precedence according to date of appointment, or, of two appointed at the same time, then according to their ages. In the absence of the chief justice, the associate

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first in precedence performs his duties. There is a single term which begins on the second Monday of October. In the absence of a quorum, any of the judges may adjourn from day to day for twenty days, but if at the expiration of that period no quorum attends, the business shall be set aside until the next appointed session. The clerk, marshal, and reporter are appointed by the court.

The jurisdiction is original and appellate, civil and criminal, defined by the constitution, which establishes the court; 11 Wheat. 467.

By the act of September 24, 1789, sect. 13, the supreme court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens, or between a state and citizens of other states, or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction. It shall have exclusively all such jurisdiction of suits or proceedings against ambassadors or other public ministers, or their domestics or domestic servants, as a court of law can have consistently with the law of nations; and original, but not exclusive, jurisdiction of all suits brought by ambassadors or other public ministers, or in which a consul or vice-consul is a party; R. S. § 687. The court has no jurisdiction except that given it by the constitution or law; 4 Cra. 93.

Many cases have occurred of controversies between states, amongst which may be mentioned that of Rhode Island *v.* Massachusetts, 4 How. 591, in which the attorney-general of the United States was authorized by act of congress, 11 Stat. at Large 382, to intervene; Missouri *v.* Iowa, 7 How. 660, and 10 How. 1; Alabama *v.* Georgia, 23 How. 505; Florida *v.* Georgia, 17 How. 478; Pennsylvania *v.* Wheeling & Belmont Bridge Company, 18 How. 421. See 136 U. S. 479; s. c. 163 *id.* 520; 147 *id.* 1; 148 *id.* 503; 165 *id.* 118; 12 Pet. 167. In a pending case the state of New Jersey on bill filed obtained a preliminary injunction against the enforcement by the state of Delaware of certain laws regulating fisheries in the river Delaware, the question involved being one of boundary.

To give jurisdiction a state must be a party on the record; 9 Wheat. 904; or substantially a party; 3 Dall. 411; it must have a direct interest in the controversy; 13 How. 518. A state may bring an original action against a citizen of another state, but not against one of its own; 10 Wall. 553. A question of boundary between states is within its original jurisdiction; 7 How. 660; 17 *id.* 478; 23 *id.* 505; 15 Pet. 233; 1 Kent 323, 350.

The court has no jurisdiction over questions of a political and not judicial nature; 6 Wall. 50; a state cannot maintain a bill to enjoin the president in his official duties; 4 Wall. 475. It has no original jurisdiction over suits brought by any other political communities than states; 7 Wall. 700. An Indian tribe cannot institute original proceedings in it; 5 Pet. 1. Service on the governor and attorney-general of a state is sufficient; 3 Dall. 320. The bill should be filed by the governor on behalf of the state; 24 How. 66. When a state is a party the practice in chancery is adopted; 17 How. 478. In cases of boundary a bill and cross-bill is the appropriate mode of procedure; 7 How. 660. Leave of the court to file a bill must first be obtained; 4 Wall. 497; Phil. Pr. 21; 17 How. 478.

In consequence of the decision in the case of Chisholm *v.* Georgia, where it was held that assumpsit might be maintained against a state by a citizen of another state, the eleventh article of the amendments of the constitution was adopted; 3 Dall. 378.

The supreme court has power to issue writs of prohibition to the district courts as courts of admiralty; and writs of mandamus to any inferior federal courts, or to persons holding office under the authority of the United States, where a state, or an ambassador or other public minister, or a consul, or vice-consul is a party; R. S. § 688. This does not apply to bankruptcy; 3 How. 292.

The supreme court has also the power to issue writs of *habeas corpus;* R. S. § 751; *scire facias*, and all other writs not especially provided for by statute, which may be necessary for the exercise of its jurisdiction and agreeable to the principles and usages of law; R. S. § 716; and the justices have, individually, the power to grant writs of *habeas corpus*, of *ne exeat*, and of injunction; R. S. §§ 717, 719, 752.

As to whether the grant of original jurisdiction to this court precludes a grant of jurisdiction over like cases to other courts, is a mooted question, not yet fully decided. See 2 Dall. 297; 1 Cra. 137; 11 Wheat. 467. In 111 U. S. 449, the court said: "We are unable to say that it is not within the power of congress" to grant such jurisdiction to the inferior courts; and in 123 *id.* 32, it is said that it is competent for congress to authorize suits by a state to be brought in the inferior federal courts. See 1 Garland & Ralston, Fed. Pr. 9.

Congress cannot vest in the supreme court original jurisdiction in a case in which the constitution has clearly not given that court original jurisdiction; 1 Cra. 137. See 5 Pet. 1, 284; 12 *id.* 657; 6 Wheat. 264; 9 *id.* 738.

The appellate jurisdiction was first regulated by the act of Sept. 24, 1789, but radical changes were effected in it by the act of March 3, 1891, which created the circuit court of appeals. See *infra*. The appellate jurisdiction now includes:

1. (1) "The final judgment" or decree in any suit in the highest court of a state in which a decision could be had where the validity of the treaty, or statute of, or authority exercised under, the United States is in question and the decision is against their validity. (2) Where the validity of a statute of, or authority exercised

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under, a state is in question on the ground of being repugnant to the constitution, treaties, or laws of the United States and the decision of the state court is in favor of its validity. (3) Where any title, right, privilege, or immunity is claimed under the constitution under any treaty or statute of, or commission held or authority exercised under, the United States and the decision of the state court is against such claim. The act of March 3, 1891, expressly provides that nothing contained in it shall affect this jurisdiction of the supreme court for the review of decisions of state courts.

2. The review on appeal or writ of error of decisions of the district and circuit courts of the United States in the following cases: (1) Cases in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the supreme court for decision. (2) Final sentences and decrees in prize causes. (3) Cases of conviction of a capital crime. (See 2 Supp. 541.) (4) Cases which involve the construction or application of the constitution of the United States. (5) Cases in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question. (6) Cases in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States.

In all cases in which the decision of the circuit court of appeals is not made final there is a writ of error or appeal to the supreme court, if taken within one year, and the matter in dispute exceeds one thousand dollars.

To give the supreme court jurisdiction in cases determined by the state court, the jurisdiction must appear from the record itself in the court below and the appellate court, and the point which gives jurisdiction must have been decided or necessary to the decision; 7 How. 744; 91 U. S. 578; 96 *id.* 432; the question need not have been raised in the subordinate court; 99 U. S. 291; the federal question must have been controlling in the cause; 98 U. S. 140. It need not appear that the state court erred in its judgment; it is enough if a federal question was in the case, as the ground of decision, and that the decision was adverse to the party claiming under the statute, etc.; 8 Wall. 44. No writ of error lies where the decision is in favor of the right, privilege, etc.; 4 Wall. 603; nor where a case is decided on general principles of commercial law; 98 U. S. 332. An allowance of the writ by a judge of the state or supreme court must first be obtained; 9 Wall. 779.

It is no objection to this appellate jurisdiction that one party is a state and the other a citizen of that state; 6 Wheat. 264. A writ of error is the foundation of this jurisdiction; 9 Wall. 779; no appeal can be taken from the state court; 22 How. 192; it applies as well to criminal as to civil suits; 7 Wall. 321; the judgment must be final; 91 U. S. 1, 487; 94 *id.* 514; 93 *id.* 320, 108. The writ of error issues to the highest court in which a decision of the cause can be had, though it be not the highest court of the state; 9 Wall. 659; 93 U. S. 274; 94 Mass. 201; if the record remains in the inferior court, the writ of error will issue to that court instead of to the appellate court; if the first writ of error does not succeed in reaching the record, a second will issue; 91 U. S. 143. The *criminal* jurisdiction of the supreme court is derived from the constitution and the act of September 24, 1789, sect. 13, which gives the supreme court exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics or domestic servants, as a court of law can have consistently with the law of nations. But the act of April 30, 1790, sections 25 and 26, declares void any writ or process whereby the person of any ambassador, or other public minister, their domestics or domestic servants, may be arrested or imprisoned; R. S. § 4063.

*The Circuit Court of Appeals.* This court was created by act of March 3, 1891, R. S. 1 Supp. 901. Its jurisdiction is appellate merely, and includes the right of review by appeal or writ of error of final decisions in the district courts and the existing circuit courts in all cases other than those in which the same act provides an appeal or writ of error direct to the supreme court. See *supra*. It may also of its own motion certify to the supreme court questions or propositions of law arising in a pending case "concerning which it desires the instruction of the supreme court for its proper decision;" and the decision thereon is binding on it. The supreme court may also in its discretion issue *certiorari* to the circuit court of appeals to secure the review and determination of any case pending before the latter court in which its decision would be final. This power may be exercised in cases of *habeas corpus;* 144 U. S. 47. These two provisions were designed to secure uniformity in the final decision of questions of law in the federal courts, and to avoid the disadvantage which would otherwise result from the existence of nine coordinate courts of last resort.

In each circuit the supreme court justice assigned thereto, and the circuit judges, are competent to sit in the circuit court of appeals, three of them being required to compose the court and two to constitute a quorum. In case it is necessary to make up a full court, one or more of the district judges of the circuit may be designated by the court to sit for the purpose of making a quorum, but no judge before whom a cause or question has been tried or heard in the district or circuit court can sit on the hearing thereof on error or appeal.

Among the subjects of jurisdiction which authorize an appeal or writ of error directly to the supreme court are all cases involving the construction or application

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of the constitution or the question whether any statute, state or federal, is contrary to the federal constitution; 68 Fed. Rep. 726; and in such cases the circuit court of appeals has no jurisdiction; 19 U. S. App. 233. In such case an appeal or writ of error can only be taken from a final judgment on the merits, and then the defeated party may elect to take the question of jurisdiction alone to the supreme court or the whole case on the merits to the circuit court of appeals; 141 U. S. 661; but if the case has been taken to the circuit court of appeals and the only question is that of jurisdiction of the court below, it will be dismissed for want of jurisdiction; 24 U. S. App. 571. A writ of error or appeal to the circuit court of appeals must be taken within six months, but one to the supreme court may be taken within two years after final judgment or decree; 73 Fed. Rep. 907.

In 155 U. S. 109, the court summarized the effect of the act of March 3, 1891, to establish circuit courts of appeals, thus:

(1) That if the jurisdiction of the circuit court is in issue and decided in favor of the defendant, as that disposes of the case, the plaintiff should have the question certified and take his appeal or writ of error directly to this court.

(2) That if the question of jurisdiction is in issue, and the jurisdiction sustained, and then judgment or decree is rendered in favor of the defendant on the merits, the plaintiff who has maintained the jurisdiction must appeal to the circuit court of appeals, where, if the question of jurisdiction arises, the circuit court of appeals may certify it.

(3) That if the question of jurisdiction is in issue, and the jurisdiction sustained, and judgment on the merits is rendered in favor of the plaintiff, then the defendant can elect either to have the question certified and come directly to this court, or to carry the whole case to the circuit court of appeals, and the question of jurisdiction can be certified by that court.

(4) That if in the case last supposed the plaintiff has ground of complaint in respect of the judgment he has recovered, he may also carry the case to the circuit court of appeals on the merits, and this he may do by way of cross-appeal or writ of error if the defendant has taken the case there, or independently, if the defendant has carried the case to this court on the question of jurisdiction alone, and in this instance the circuit court of appeals will suspend a decision upon the merits until the question of jurisdiction has been determined.

(5) That the same observations are applicable where a plaintiff objects to the jurisdiction, and is, or both parties are, dissatisfied with the judgment on the merits.

By act of February 18, 1895, jurisdiction is given to the circuit court of appeals to review, by appeal taken within thirty days, interlocutory orders "granting, continuing, refusing, dissolving, or refusing to dissolve an injunction" in all cases appealable to the circuit court of appeals on final decision; 28 Stat. L. 666. By act of January 20, 1897, jurisdiction of criminal cases, not capital, is withdrawn from the supreme court and conferred on the circuit court of appeals; 29 Stat. L. 492.

Under the act creating the court, it is required that a term of the circuit court of appeals be held annually in the several judicial circuits at the following places: In the first circuit, in Boston; in the second circuit, in New York; in the third circuit, in Philadelphia; in the fourth circuit, in Richmond; in the fifth circuit, in New Orleans; in the sixth circuit, in Cincinnati; in the seventh circuit, in Chicago; in the eighth circuit, in St. Louis; in the ninth circuit, in San Francisco; and in such other places in each of the circuits as the court may from time to time designate. In the eighth circuit a session is held at St. Paul.

*The Circuit Courts.* The circuit justice, circuit judge, and the district judge of the district compose the circuit court, which may be held by any one or two of them. Cases may be tried by each of the judges holding a circuit court, sitting apart. The circuit justice is required to attend at least one term of the circuit court in the district during every two years. When the district judge holds a circuit court with either of the other judges, the judgment, etc., shall be rendered in conformity with the opinion of the presiding judge.

In case all the judges are disqualified by interest, etc., from hearing any case, the papers are to be certified to the most convenient circuit. Whenever a circuit justice deems it advisable on account of disability, absence, interest, or the accumulation of business, or other cause, the judge of any other circuit court may be requested to hold the court. The power thus conferred is permissive and discretionary; the judge so requested may refuse the request; 7 Wall. 175. Each circuit court may appoint so many discreet persons as it may deem necessary to be commissioners of the circuit court. These officers are not officers of the court; 3 Blatch. 106. No marshal or deputy marshal may be appointed a commissioner.

The civil jurisdiction of the circuit court was originally conferred by the act of Sept. 24, 1789, which conferred jurisdiction concurrent with that of the state courts in all suits at law or in equity where the matter in dispute exceeded the sum or value of $500, where the United States were plaintiffs, an alien was a party, or the parties were citizens of different states. By the act of March 3, 1875, the jurisdiction was very much enlarged and the result was an over-crowding of the dockets of the federal courts, which continued to such an extent as to lead to the passage of the act of March 3, 1887, which increased the amount necessary to confer jurisdiction from $500 to $2,000, exclusive of both

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interest and costs, and provided also that in order to give jurisdiction, the defendant must be an inhabitant of the district in which the suit was brought. (See *infra.*) Under this act the jurisdiction covers: (1) Cases arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority. (2) Those in which the United States are plaintiffs or petitioners. (3) In which there is a controversy between citizens of different states. (4) Those between citizens of the same state claiming lands under grants of different states. (5) Cases between citizens of a state and foreign states, citizens or subjects. (6) Cognizance of all crimes and offences cognizable under the authority of the United States, except as otherwise provided by law; and concurrent jurisdiction with the district courts of the crimes and offences cognizable by them.

In the first of these classes the jurisdiction is dependent primarily on the nature of the controversy; in the fourth upon subject-matter; and in the second, third, and fifth on the character of the parties. The jurisdiction in the second and fourth classes is irrespective of amount; 160 U. S. 493; in the first, third, and fifth classes it is confined to cases in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000. They also have jurisdiction, irrespective of the amount in controversy, of cases arising under the patent and copyright laws, penalties and forfeitures under the laws of the United States, including violation of laws respecting copyrights, carriage of passengers in merchant vessels, the alien contract labor law, and some other special acts. The circuit courts also have jurisdiction, concurrent with the district courts, of cases arising under the civil rights and elective franchise laws, under R. S. §§ 1786, 1977, 1979, 1981, 2010.

Under the laws for the collection of duties on imports the circuit court has jurisdiction to review the decisions of the boards of general appraisers as to the rate of duty to be imposed on the imports; 26 Stat. L. 131.

By act of March 3, 1897, in a patent suit the defendant may be sued in any district where he has committed infringement *and* in which he has a "regular and established place of business."

The circuit court has no jurisdiction except such as the statutes confer; 19 How. 393; 1 Deady 300; 2 Dill. 406. The jurisdiction of the circuit courts in equity is coextensive with that of English courts of equity; it is not controlled by the jurisprudence of the state in which the circuit court is held; 2 Story 555; 13 How. 518; 7 Wall. 425. The circuit court has no jurisdiction over a suit between aliens; one party must be a citizen of the state; 5 Cra. 303; 3 Blatch. 244. Under this section the division of a state into two or more districts does not affect the jurisdiction of the circuit court on account of citizenship. The residence of a party in a different district of a state from that in which the suit is brought does not exempt him from the jurisdiction of the court: if he is found in the district where he is sued, he is not within the prohibition of this section; 11 Pet. 25; 1 Kent 350. A citizen of the United States who resides permanently in a state is a citizen of that state; 1 Pet. 476. A citizen of the District of Columbia (6 Wall. 280), or of a territory (1 Wheat. 91), cannot sue in the circuit court in cases where the jurisdiction depends upon citizenship. Nor can a suit be maintained when neither party is a citizen of the state where the suit is brought; 2 Pet. 556; 5 Blatch. 502. A corporation created by a state and doing business in the state is deemed to be a citizen of that state; 18 How. 404; 2 Woods 479; 13 Wall. 270; but see 14 Pet. 60; 6 Wheat. 450. If there are several plaintiffs or several defendants, each must be competent to sue or be sued, in order to maintain the jurisdiction; 11 Wall. 172; a colorable assignment for the purpose of bringing suit will not confer jurisdiction; 6 Wall. 280. The pleadings must show the facts, as to citizenship, necessary to maintain the jurisdiction; 13 Wall. 602.

Where persons constituting a Virginia corporation desired to bring certain litigation against Virginia parties in the federal court and organized a Pennsylvania corporation and conveyed certain property in Virginia to the latter without consideration, it was held to be a mere device to give jurisdiction to the federal court and that it was a fraud upon the court and would not confer jurisdiction; 160 U.S.327.

*The matter in dispute.* In actions to recover damages for torts, the sum laid in the declaration is the criterion as to the matter in dispute; 3 Dall. 358. The jurisdiction is not affected by a demand in the declaration of more than the jurisdictional amount; 1 Wash. C. C. 1. In ejectment, the value of the land should appear in the declaration; 4 Wash. C. C. 624; 8 Cra. 220; 1 Pet. C. C. 73; but though the jury do not find the value of the land in dispute, yet if evidence be given on the trial that the value exceeds the jurisdictional amount, it is sufficient to fix the jurisdiction; or the court may ascertain its value by affidavits; 1 Pet. C. C. 73. The amount stated in the declaration and not the amount stated in the prayer for judgment at its close is the test; 4 Dill. 239; where there are separate counts for separate causes of action, the "matter in dispute" is the aggregate of the sums claimed in all the counts; 2 Dill. 213. Jurisdiction cannot be conferred by joining in one bill against distinct defendants, claims, none of which reaches the jurisdictional amount; 164 U. S. 319. In the case of an insolvent building association it was held that the amount in controversy is the total fund, not the plaintiff's share of it; 60 Fed. Rep. 134.

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If the matter in dispute arise out of a local injury, for which a local action must be brought, in order to give the circuit court jurisdiction it must be brought in the district where the lands lie; 15 How. 233; 2 Black 485.

By act of February 16, 1875, ch. 77, 18 Stat. L. 315, it is provided that the circuit courts, in deciding admiralty causes, shall find the facts and the conclusions of law and state them separately. In finding the facts the court may by consent impanel a jury of not less than five and not more than twelve persons, to whom shall be submitted the issue of fact in the cause, as in cases of common law. The finding of the jury unless set aside shall stand as the finding of the court. The review of the judgment, etc., in the supreme court, upon appeal, is limited to the questions of law arising upon the record, and to such rulings of the circuit court, excepted to at the time, as may be presented by a bill of exceptions, prepared as in actions at law. The court in patent causes in equity may, under general rules of the supreme court, submit to a similar jury such questions of fact as the court may deem expedient, the finding of the jury to be treated as in cases of issues sent from chancery to a court of law. See 98 U. S. 440; 102 *id.* 218; 101 *id.* 6, 247.

*The Appellate Jurisdiction* formerly exercised by the circuit courts was abolished by the act of March 3, 1891.

When any cause, civil or criminal, of whatever nature, is removed into a circuit court, from a district court, on account of the disability of the judge of such district court, or by reason of his being concerned in interest therein, or having been of counsel for either party, or being so related to or concerned with either party to such cause, as to render it improper, in his opinion, for him to sit on the trial thereof, such circuit court shall have the same cognizance of such cause, and in like manner, as the said district court might have, or as said circuit court might have if the same had been originally and lawfully commenced therein; and shall proceed to hear and determine the same accordingly; R. S. § 637.

The circuit courts, as courts of equity, shall be deemed always open for the purpose of filing any pleading, or issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules, and other proceedings, preparatory to the hearing, upon their merits, of all causes pending therein. And any judge of a circuit court may upon reasonable notice to the parties make and direct and award at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules, and other proceedings whenever the same are not grantable of course, according to the rules and practice of the court; R. S. § 638.

The trial of issues of fact in the circuit courts shall be by jury, except in cases of equity and of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, and by the next section; R. S. § 648. See, also, R. S. 1 Suppl. 175; 100 U. S. 208.

A reference cannot be made to a referee without the consent of both parties; 15 Blatch. 402; 2 Paine 578. A circuit court cannot order a peremptory nonsuit; 14 How. 218; 23 *id.* 172. See NONSUIT.

Issues of fact in civil cases in any circuit court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorney of record, file a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury; R. S. § 649.

In the absence of an agreement, the court cannot try an issue of fact without a jury; 19 Wall. 81; in order to obtain a review of the case in the supreme court, the parties must file their written stipulation under this section; 12 Wall. 275. The finding is conclusive as to the facts as found; 101 U. S. 569.

Whenever in any civil suit or proceeding in a circuit court held by a circuit justice and a circuit judge or a district judge, or by a circuit judge and a district judge, there occurs any difference of opinion between the judges as to any matter or thing to be decided, ruled, or ordered by the court, the opinion of the presiding justice or judge shall prevail, and be considered the opinion of the court for the time being; R. S. § 650. See DIVISION OF OPINION.

When a final judgment or decree is entered in any civil suit or proceeding before any circuit court held by a circuit justice and a circuit judge or a district judge, or by a circuit judge and a district judge, in the trial or hearing whereof any question has occurred upon which the opinions of the judges were opposed, the point upon which they so disagreed shall, during the same term, be stated under the direction of the judges, and certified, and such certificate shall be entered of record; R. S. § 652.

If neither of the judges of a circuit court is present to open any session, the marshal may adjourn the court from day to day until a judge is present: Provided, that if neither of them attends before the close of the fourth day after the time appointed for the commencement of the session, the marshal may adjourn the court to the next regular term; R. S. § 671.

If neither of the judges of a circuit court be present to open and adjourn any regular or adjourned or special session, either of them may, by a written order, directed alternatively to the marshal, and, in his absence, to the clerk, adjourn the court from time to time, as the case may require, to any time before the next regular term; R. S. § 672.

*The District Courts* have jurisdiction as follows:—

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1. Of all crimes cognizable under the authority of the United States, committed within their respective districts, or upon the high seas, the punishment of which is not capital.

2. Of all suits for penalties and forfeitures incurred under any law of the United States.

3. Of all suits at common law brought by the United States, or by any officer thereof, authorized by law to sue.

4. Of all causes of action arising under the postal laws of the United States.

5. Of all suits in equity to enforce the lien of the United States upon any real estate for any internal revenue tax, or to subject to the payment of any such tax any real estate owned by the delinquent, or in which he has any right, title, or interest.

6. Of all civil causes of admiralty and maritime jurisdiction; and of all seizures on land and on waters not within admiralty and maritime jurisdiction; and of all prizes brought into the United States.

7. Of all suits brought by any lien for a tort "only" in violation of the law of nations, or of a treaty of the United States.

8. The district courts are constituted courts of bankruptcy, and shall have in their respective districts original jurisdiction in all matters and proceedings in bankruptcy. See INFRA.

Enumerating the seven classes first above stated prior to the passing of the present bankrupt act, Judge Thayer said that they were "substantially descriptive of the jurisdiction now exercised by the district courts; they have some other jurisdiction under laws to secure civil rights, and relating to the elective franchise; also certain special jurisdiction under other statutes not necessary to be now mentioned." Thayer, Jur. Fed. Courts § 6.

The district court has no other jurisdiction than that conferred upon it by congress, but it is not an inferior court, though of limited jurisdiction: 1 Hempst. 304: 55 Ind. 52; it is a court of record; 3 W. & S. 166.

The district court of a district has no jurisdiction to try a prisoner for a crime committed in another district; 4 Cra. 75.

Under the third head are embraced suits by all officers holding office under an act of congress, and appointed as required by the constitution; 2 Ben. 303; including the postmaster-general; 12 Wheat. 136; and a receiver of a national bank; 8 Ben. 357; 41 Fed. Rep. 401; 44 *id.* 642.

As to the extent of the admiralty jurisdiction, see ADMIRALTY.

Jurisdiction *in rem* is exclusive in the district courts, but the suit may be instituted in the district where the *res* is found, irrespective of where the injury for which satisfaction is sought occurred; 3 Cliff. 456. Where a lien exists by the maritime law of a foreign nation, our admiralty has jurisdiction to enforce it here, by comity, even though all the parties are foreigners; 9 Wall. 435.

An alien may sue the consul of his own nation in the district court to recover illegal fees; 1 Low. 77.

The district court has no powers as a bankrupt court, except those conferred upon it by statute; 38 How. Pr. 341. It has jurisdiction of two kinds: first, jurisdiction as a court of bankruptcy over the proceedings in bankruptcy, initiated by the petition and ending in the distribution of the assets and the discharge or refusal to discharge the bankrupt; secondly, jurisdiction as an ordinary court, of suits at law or in equity, brought by or against the assignee in reference to alleged property of the bankrupt, or to claims alleged to be due from or to him; 91 U. S. 516. An assignee in bankruptcy may sue in any district; 94 U. S. 558.

Proceedings on seizure for forfeiture of any vessel or cargo entering any port of entry which has been closed, or of goods and chattels coming from a state or section declared by proclamation of the president to be in insurrection, may be prosecuted in any district court into which the property so seized may be taken, and proceedings instituted; and the district court thereof shall have as full jurisdiction over such proceedings as if the seizure was made in that district; R. S. § 564.

Any district court may, notwithstanding an appeal to the supreme court, in any prize cause, make and execute all necessary orders for the custody and disposal of the prize property, and, in case of an appeal from a decree of condemnation, may proceed to make a decree of distribution, so far as to determine what share of the prize shall go to the captors, and what vessels are entitled to participate therein; R. S. § 565.

The trial of issues of fact in district courts, in all causes except in equity, admiralty, and bankruptcy, shall be by jury. In admiralty, in any matter of contract or tort arising upon or concerning any vessel of twenty tons burden or upwards, enrolled and licensed for the coasting trade, and at the time employed in the business of commerce and navigation between places in different states and territories upon the lakes and navigable waters connecting the lakes, the trial of issues of fact shall be by jury when either party requires it; R. S. § 566.

When any territory is admitted as a state, and a district court is established therein, all the records of the proceedings in the several cases pending in the court of appeal of said territory at the time of such admission, and all records of the proceedings in the several cases in which judgments or decrees had been rendered in said territorial court before that time, and from which writs of error could have been sued out or appeals could have been taken, or from which writs of error had been sued out or appeals had been taken and prosecuted to the supreme court, shall be transferred to and deposited in the district court for the said state; R. S. § 567.

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Upon the admission of a state, all cases of a federal character pending in the supreme court, etc., of the territory, are to be transferred into the federal courts; 8 Wall. 342. The United States has power to punish a crime committed against it in one of the territories, although such territory is admitted as a state pending the prosecution and before conviction; 74 Fed. Rep. 43.

The court may compel the delivery of the records by attachment; § 568. When any territory is admitted as a state, the district court has cognizance of all cases pending and undetermined in the superior court of such territory, from the judgments or decrees to be rendered in which writs of error or appeals lie to the supreme court; § 569. If the case pending was not of a federal character, this section does not cover it; 10 How. 72.

By § 572, the times of holding the sessions of the various district courts is provided for; and by § 573 it is provided that no action, etc., shall abate by reason of any act changing the time of holding any district court, but the action shall be deemed returnable to, pending in, and triable at the terms established next after the return day thereof.

The district courts, as courts of admiralty and as courts of equity, so far as equity jurisdiction has been conferred upon them, shall be deemed always open, for the purpose of filing any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules, and all other proceedings, preparatory to the hearing, upon their merits, of all causes pending therein. And any district judge may, upon reasonable notice to the parties, make, and direct, and award, at chambers, or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules, and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court; R. S. § 574.

By law, the district judge alone composes the court. He is a court wherever and whenever he pleases. No notice to parties is required; no previous order is necessary. The various *ex parte* orders which admiralty proceedings require, renders this informal mode of acting essential to justice and expedition. The judge will take care that neither party be injured by the orders which he makes *ex parte*, and where they are of course, it is convenient that they should be made without the formality of summoning the parties to attend. It does not seem to be a violent construction of such an act to consider the judge as constituting a court whenever he proceeds on judicial business; such seems to have been the practice in this and in other districts of the United States; 1 Brock. 382.

By § 578, it is provided that district courts shall hold monthly adjournments of their regular terms, for the trial of criminal cases, when their business requires it to be done.

A special term of any district court may be held at the same place where any regular term is held, or at such other place in the district as the nature of the business may require, and at such time and upon such notice as may be ordered by the district judge, and any business may be transacted at such special term which might be transacted at a regular term; R. S. § 581.

If the judge of any district court is unable to attend at the commencement of any term, the court may be adjourned by the marshal, by virtue of a written order directed to him by the judge, to the next regular term, or to any earlier day, as the order may direct; R. S. § 583.

Provision is made by § 587, in case of the disability of the district judge, for an order of the circuit judge or justice to the clerk, upon the request of the district attorney or marshal, to certify into the next circuit court to be held in the district, all suits and processes, civil and criminal; such order is to be duly published in one newspaper, published in the district, for thirty days, before the commencement of the session. This provision looks to the disability of the district judge, not to a vacancy by death; 1 Gall. 338. Pending the disability, all causes are to be certified in the same way; and, upon the removal of the disability, the causes are to be remanded; § 588. So if the district judge dies, undetermined cases are to be remanded; 1 Gall. 338.

During the disability, the circuit judge, and, in his absence, the circuit justice, exercises all the powers of a district judge; § 589. See 97 U. S. 146.

In case of the disability of a district judge to hold any stated or appointed term of the district court or the circuit court, the circuit judge or, in his absence, the circuit justice may designate the judge of some other district in the circuit to hold such district court; § 591.

Provision is made, in case of the accumulation of business in any district court, for the holding of a district court in such district by the district judge of some other district in the circuit, upon the designation of the circuit judge or, in his absence, the circuit justice, or in some cases of the chief justice; §§ 592, 593, 594, 595. Any circuit judge, whenever the public interests so require, may designate any district judge in his circuit to hold a district or circuit court, in the place or in the aid of any other district judge in the circuit; such district judge to act without additional salary; § 596; except in the cases of district judges holding court in the southern district of New York; § 597.

Whenever a district judge is interested in any suit, or has been of counsel therein, or is related to the parties, etc., he shall, upon the application of either party, order the proceedings to be certified to the next circuit court for the district; and if there be no circuit court therein, to the next circuit court for the state; and if there be

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no circuit court in the state, to the next convenient circuit court in an adjoining state; § 601.

In cases of vacancy all processes, etc., are to be continued to the next stated term after the qualification of a successor; § 602; except that in states having two or more districts, the judge of the other or either of the other districts may hold the district court, or the circuit in case of the absence or sickness of the other judges thereof; § 603.

*Provisions common to more than one court or judge.* The jurisdiction vested in the courts of the United States, in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several states.

First. Of all crimes and offences cognizable under the authority of the United States.

Second. Of all suits for penalties and forfeitures incurred under the laws of the United States.

Third. Of all civil causes of admiralty or maritime jurisdiction; saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it.

Fourth. Of all seizures under the laws of the United States, on land or on waters not within admiralty and maritime jurisdiction.

Fifth. Of all cases arising under the patent right or copyright laws of the United States.

Sixth. Of all matters and proceedings in bankruptcy.

Seventh. Of all controversies of a civil nature, where a state is a party, except between a state and its citizens, or between a state and citizens of other states, or aliens; R. S. § 711.

There is no common-law jurisdiction of crimes in the federal courts. See COMMON LAW, where the cases are cited.

State courts have concurrent jurisdiction by and against national banks; 7 Biss. 449; 49 Vt. 1; a citizen of the United States may sue in a state court a citizen of another state; 27 La. Ann. 229; so in the case of an action by an alien against a citizen of a state; 29 Ark. 637.

A state court has no jurisdiction in cases of offences against the laws of the United States; see 53 Pa. 112; 4 Blackf. 146; including perjury committed before a U. S. commissioner; 55 Ga. 192; 2 Woods 428. The federal courts have no jurisdiction over crimes except that conferred by acts of congress; 4 Sawy. 629; 2 Dall. 384.

The exclusive federal jurisdiction of suits for penalties, etc., contemplates those penalties of a public nature which may be sued for by the United States; 47 Md. 217. Suit may be brought in a state court by a party aggrieved to recover a penalty, although imposed by an act of congress; *ibid.*; but see *contra*, 74 Ill. 217.

A collector is liable in a state court at the suit of an informer entitled to a share in the proceeds of the condemnation of a vessel for smuggling, where the proceeds have been paid to the collector; 95 Mass. 301.

A state court has no jurisdiction over proceedings for an infringement of letters patent; 7 Johns. 144; nor in an action of assumpsit upon a *quantum valebat* to recover for the use of a patented device; 66 N. Y. 459; but a state court has jurisdiction to recover damages for fraud in the sale of letters patent, even though the question of the validity of the patent be involved incidentally; 103 Mass. 501; 24 Ia. 231; 15 Mich. 265; but see 40 Me. 430.

State courts have jurisdiction to adjudicate upon the common-law rights of authors in their literary productions; 47 N. Y. 532.

An assignee in bankruptcy may sue in a state court to collect the assets of the bankrupt; 119 Mass. 429; 8 Neb. 437; 72 N. Y. 159; 8 Fed. Rep. 83; but this must be done under the direction of the district court; 8 N. Y. 254. He can be sued in a state court; 69 N. C. 464. A state may sue a citizen of another state in a state court; 2 Hill, N. Y. 159, per Bronson, J.

By the act of March 1, 1875, § 3, it is provided: "That the district and circuit courts of the United States shall have, exclusively of the courts of the several states, cognizance of all crimes and offences against and violations of the provisions of this act [an act to protect all citizens in their civil and legal rights]; and actions for the penalty given by the preceding section may be prosecuted in the territorial, district, or circuit courts of the United States wherever the defendant may be found, without regard to the other party."

The supreme court and the circuit and district courts shall have power to issue writs of *scire facias*. They shall also have power to issue all writs not specifically provided for by statute which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law; R. S. § 716. By this section, congress only intended the power to issue such other writs in cases where jurisdiction already existed, and not where the jurisdiction was to be acquired by means of the writ to be issued; 3 Cliff. 28. This power embraces writs sanctioned by the usages of the common law, and also writs of execution in use in the state courts other than such as were conformable to the usage of common law; 10 Wheat. 51.

A mandamus cannot be granted when not necessary to the exercise of jurisdiction; 15 Wall. 427. A writ of *certiorari* is included in this provision; 5 Blatch. 303; but only when it can be issued *in aid* of a jurisdiction obtained over the subject of the suit in which it is issued; 3 Blatch. 166.

A writ of *supersedeas* comes within the meaning of the section; 94 U. S. 672; also, a writ of injunction, of subpœna, and attachments for witnesses; 4 Cra. C. C. 372; also, a writ of assistance; 21 Wall,



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289; a writ of inhibition; 3 Dall. 54. A writ of error *coram nobis* does not lie in the circuit court in a criminal case, either from its own judgment or the judgment of the district court; 3 Cliff. 28.

Writs of *ne exeat* may be granted by any justice of the supreme court in cases where they might be granted by the supreme court, and by any circuit justice or circuit judge in cases where they might be granted by the circuit court of which he is a judge. But no writ of *ne exeat* shall be granted unless a suit in equity is commenced, and satisfactory proof is made to the court or judge granting the same that the defendant designs quickly to depart from the United States; R. S. § 717.

Whenever notice is given of a motion for an injunction, the court may, if there appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion, and such order may be granted with or without security in the discretion of the court or judge; R. S. § 718.

The national courts cannot order temporary injunctions except on reasonable notice; 4 Biss. 78; 4 Dall. 1.

By § 719, a single supreme or a circuit court judge may grant an injunction; but a supreme court judge can hear cases only in his circuit, except by written consent of parties, and when it cannot be heard by the appropriate circuit or district judge. No district judge may issue an injunction in any case where a party has had reasonable time to apply to the circuit court for the writ; and the injunction so issued shall continue no longer than to the circuit court next ensuing.

The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy; R. S. § 720. This section is a positive inhibition against issuing any writ or any process whatever intended to stay proceedings in a state court; 6 Blatch. 362. An injunction cannot issue from a federal to a state court, except in bankruptcy; 91 U. S. 254; it may issue in cases of bankruptcy; 98 U. S. 240.

The jurisdiction in civil and criminal matters conferred on the district and circuit courts by the provisions of this title and of title "Civil Rights," and of title "Crimes," for the protection of all persons in the United States in their civil rights, shall be exercised in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object or are deficient in the provisions necessary to furnish suitable remedies, the common law as modified and changed by the constitution and statutes of the state wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the constitution and laws of the United States, shall govern the said courts, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty; R. S. § 722.

Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law; R. S. § 723. This section makes no change in the rule of equity which refuses a remedy when an adequate remedy exists at law; 2 Black 545.

By § 724, in the trial of actions at law, the courts may, on motion and due notice, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issues, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of chancery. If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of nonsuit, and if a defendant fails to comply with such order the court may, on motion, give judgment against him by default. See PRODUCTION OF DOCUMENTS.

An order to produce will be granted only in cases where a relief would be granted in equity by a bill of discovery; 2 Blatch. 301. A preliminary motion and notice are required; 20 How. 194; an *ex parte* affidavit in support of the motion is sufficient; Gilp. 306. The order may be made with leave to show cause at the trial; 3 Cliff. 201; but see 2 Cra. C. C. 427. See 2 Blatch. 23. The rule does not apply to a *subpœna duces tecum* to compel a witness to produce papers in his possession; 3 Dill. 506.

The said courts shall have power to impose and administer all necessary oaths, and to punish by fine or imprisonment at the discretion of the court contempt of their authority: Provided, that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts; R. S. § 725.

Whether this section can limit the powers of the supreme court may be doubtful, as that court derives its powers from the constitution; 19 Wall. 506.

All of the said courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law; R. S. § 726. See 1 W. & M. 368.

The district and circuit courts, and the commissioners of the circuit courts, shall have power to carry into effect the award, or arbitration, or decree of any consul, vice-consul, or commercial agent of any

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foreign nation, on petition of such consul, etc.; R. S. § 728.

The trial of offences punishable with death shall be had in the county where the offence was committed, where that can be done without great inconvenience; R. S. § 729. As to whether this section applies to crimes committed in a place within the exclusive jurisdiction of the United States, see 2 Mas. 91.

The final judgment of a court of the United States in cases of capital or otherwise infamous crime is not reviewable except on a writ of error; 159 U. S. 680.

The trial of all offences committed upon the high seas or elsewhere, out of the jurisdiction of any particular state or district, shall be in the district where the offender is found, or into which he is first brought; R. S. § 730. These are offences belonging naturally and properly to the maritime jurisdiction of the Union; Hemp. 446; a person is triable in the southern district of New York, who on a vessel owned by citizens of the United States has committed the offence on the high seas specified, has, on the arrival of the vessel at the quarantine in the eastern district, been delivered to the state authorities, and by them carried into the southern district and there delivered to the United States authorities, to whom a warrant to apprehend him was first issued; 19 Wall. 486.

Where any offence against the United States is begun in one judicial district and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district, in the same manner as if it had been actually and wholly committed therein; R. S. § 731. The phrase "judicial circuit" is used in the Rev. Stat. of 1878. See a discussion of this section in relation to United States *v.* Guiteau in the Amer. Law Review. The section does not permit the indictment in the District of Columbia of one who wrote a libel in Washington and sent it to Michigan for publication; 3 Dill. 116.

All pecuniary penalties and forfeitures may be recovered in the district where they accrue or where the offender may be found; R. S. § 732; and internal revenue taxes may be recovered in the district where the liability occurs or where the delinquent resides; § 733.

Proceedings on seizures made on the high seas may be prosecuted in any district into which the property is brought; § 734; 1 Mas. 360; 9 Cra. 289; 2 Wall. 383.

Proceedings for the condemnation of any property captured whether on the high seas or elsewhere may be prosecuted in any district where the same may be seized, or into which it may be taken and proceedings first instituted; R. S. § 735.

When there are several defendants in any suit in law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit was brought and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and non-joinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit; R. S. § 737.

Where four persons made a contract with a citizen of Ohio, and three of the four were citizens of Indiana, and suit was brought in the circuit court in Indiana, the non-joinder of the fourth was not ground for abatement; 21 How. 489.

If a party is a necessary party in equity, no decree can be made in his absence; 2 Woods 1.

By § 738 provision is made for service on absent defendants in suits in equity to enforce liens or claims against property within the district, by service of an order to appear, etc., if practicable, if not by advertising.

Proceedings under the act are proper, although suit was begun before it was passed; 99 U. S. 567. Personal service under this act should be secured whenever practicable, and resort had to constructive service by publication, only when the better mode is not practicable within a reasonable time and by the exercise of reasonable diligence; 2 Dill. 498. Shares of stock of a corporation of the district in which suit is brought, owned by a non-resident, are not "personal property within the district," and, therefore, service cannot be made in such a case by publication; 2 Woods 145.

In all courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as, by the rules of the said courts, respectively, are permitted to manage and conduct causes therein; R. S. § 747. The attorney, when retained, has the exclusive control of the management and conduct of the cause; 2 Sawy. 341.

The supreme, circuit, and district courts have power to issue writs of *habeas corpus;* R. S. § 751. The term used in the act is a generic term, and includes every species of the writ of *habeas corpus;* per Marshall, C. J., in 4 Cra. 95; and the extent of the jurisdiction is only such as is conferred by statute; *ibid.*

As to the use of this writ by the federal courts, see HABEAS CORPUS; also, 169 U. S. 284; 81 Fed. Rep. 359; 82 *id.* 422; 80 *id.* 99.

From the final decision of such circuit court, on writs of *habeas corpus* under R. S. § 763, an appeal may be taken to the supreme court, on such terms, and under such regulations and orders, as well for the custody and appearance of the person alleged to be in prison or confined or restrained of his liberty, as for sending up to the appellate tribunal a transcript of the

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petition, writ of *habeas corpus*, return thereto, and other proceedings as may be subscribed by the supreme court, or, in default thereof, by the court or judge hearing the cause; R. S. §§ 764, 765. See 3 Cliff. 440.

*The Territorial Courts.* In the territories, the judicial power is vested in a supreme court, consisting of a chief justice and associate justices, who hold their offices for a term of four years, district courts, probate courts, and justices of the peace. In Arizona, the judicial power was vested in a supreme court and such inferior courts as the legislative council may by law provide, and under this power district and probate courts and justices of the peace were provided for; and by act of Feb. 11, 1891, congress provided for district courts to be held by a justice of the supreme court. These territorial courts are not constitutional courts, that is, courts upon which judicial power is conferred by the constitution of the United States; but their powers and duties are conferred upon them by the acts of congress which created them. It is not necessary to specify these. For a detailed statement of the legislation on the subject, see 1 Garl. & Ralst. Fed. Pr. § 444. See, also, the titles on the several territories.

*District of Columbia.* The supreme court of the District of Columbia was established by act of March 3, 1863. The same act abolished the former circuit court, district court, and criminal court of the district. The supreme court consists of six justices (one of whom is designated the chief justice), appointed by the president of the United States, etc., who hold their offices during good behavior.

It has the same jurisdiction as circuit and district courts, and any judge may exercise the jurisdiction of a circuit or district court. It has jurisdiction of patent, copyright, divorce, and bankruptcy cases. Actions can be brought only against inhabitants of the district, or persons found therein. It has common law and chancery jurisdiction, according to the laws of Maryland on May 3, 1802. In cases within the jurisdiction of a justice of the peace, it has original jurisdiction only over cases involving more than fifty dollars. It has appellate jurisdiction from justices of the peace.

Any one of the justices may hold a criminal court for the trial of all crimes and offences arising within the district; R. S. 1 Supp. 279; 102 U. S. 378.

By act of Feb. 9, 1893, 27 Stat. L. 434, amended by act of July 30, 1894, 28 Stat. L. 160, there was established a court of appeals of the District of Columbia, consisting of a chief justice and two associates. It has jurisdiction of appeals from the supreme court of the district, including interlocutory orders, and from the commissioner of patents; but it has no power to review a judgment of the supreme court of the district on an appeal from a justice of the peace; 3 App. D. C. 317; except upon the question of the jurisdiction of that court; 4 *id.* 289. In cases where the matter in dispute is above five thousand dollars, the decisions of the court of appeals may be re-examined and affirmed, reversed, or modified by the supreme court of the United States.

*Court of Claims.* This court, as originally created by act of February 24, 1855, 10 Stat. L. 12, consisted of three judges; it now consists of a chief justice and four judges, who are appointed by the president, by and with the advice and consent of the senate, and hold office during good behavior; its sessions are held annually at Washington, beginning on the first Monday in December. Members of either house of congress are forbidden to practise in this court; R. S. §§ 1049–1058. A quorum consists of three judges, but the concurrence of three judges is necessary to any judgment; Act of June 23, 1874. Its jurisdiction extends throughout the United States; 1 Ct. Cl. 383.

"Before the establishment of the court of claims, claimants could only be heard by congress. That court was established in 1855 for the triple purpose of relieving congress, and of protecting the government by regular investigation, and of benefiting the claimants by affording them a certain mode of examining and adjudicating upon their claims. It was required to hear and determine upon claims founded upon any law of congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States. Originally it was a court merely in name, for its power extended only to the preparation of bills to be submitted to congress.

"In 1863 the number of judges was increased from three to five, its jurisdiction was enlarged, and, instead of being required to prepare bills for congress, it was authorized to render final judgment, subject to appeal to this court, and to an estimate of the secretary of the treasury of the amount required to pay each claimant. This court being of opinion that the provision for an estimate was inconsistent with the finality essential to judicial decisions, congress repealed that provision. Since then the court of claims has exercised all the functions of a court, and this court has taken full jurisdiction on appeal.

"The court of claims is thus constituted one of those inferior courts which congress authorizes, and has jurisdiction of contracts between the government and the citizens, from which appeal regularly lies to this court." Per Chase, C. J., 13 Wall. 136.

Its jurisdiction, by R. S. § 1059, extends to:—

First. All claims founded upon any law of congress, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the government of the United States, and all claims which may be referred to it by either house of congress.

Second. All set-offs counter-claims

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claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the United States against any person making claim against the government in said court.

Third. The claim of any paymaster, quartermaster, commissary of subsistence, or other disbursing officer of the United States, or of his administrators or executors, for relief from responsibility on account of capture or otherwise, while in the line of his duty, of government funds, vouchers, records, or papers in his charge, and for which such officer was and is held responsible.

Fourth. Of all claims for the proceeds of captured or abandoned property, as provided by the act of March 12, 1863, or by the act of July 2, 1864. The remedy given under the said acts was exclusive, and it was provided that its jurisdiction shall not extend to any claim against the United States growing out of the destruction or appropriation of or damage to property by the army or navy engaged in the suppression of the rebellion.

By the act of March 3, 1883, usually called the Bowman Act, it was provided that claims pending before committees of congress or executive departments might be referred to the court of claims for examination, and that the facts found, without judgment being entered should be reported to the committee or department respectively; 1 Supp. R. S. 403.

By act of March 3, 1887, known as the Tucker Act, additional jurisdiction was conferred upon the court of claims, which was thereby authorized to hear and determine all claims founded upon the constitution of the United States or any law of congress, except for pensions, or upon any regulation of an executive department, or any contract, express or implied, or for damages liquidated or unliquidated in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States if suable. The reference of such claims to the court by the departments or by committees of congress was authorized. By that act concurrent jurisdiction was given to the district courts where the claim did not exceed $1,000, and to the circuit courts where it did exceed $1,000, but did not exceed $10,000.

Prior to the passage of these acts, by R. S. § 1063, claims exceeding $3,000, or the decision of which would affect a class or furnish a precedent, might be referred to the court by the head of an executive department to be proceeded with as if begun by the claimant. See 12 Ct. Cl. 319, 470; 8 *id.* 326.

Under the act of Jan. 20, 1885, the court of claims was authorized to examine the French Spoliation claims, upon petition of the claimants, and to report their finding without binding either the claimant or congress; 1 Supp. R. S. 471; and the act of March 3, 1891, provided that the awards should not be paid until the court should certify that the personal representatives on whose behalf the award was made represent the next of kin, and excludes from benefit the creditors of bankrupt claimants; *id.* 925.

By act of March 3, 1891, the court was authorized to adjudicate claims for Indian depredations accruing since July 1, 1865; *id.* 913. Other claims of minor importance are placed within the jurisdiction of the court by special acts of which a list may be found in 1 Garl. & Ralst. Fed. Pr. § 376, n.

In the court of claims the government is liable for refusing to receive and pay for what it has agreed to receive and purchase; it is not liable on implied assumpsit for the torts of its officers, committed while in the service, and apparently for its benefit; 8 Wall. 269. The United States cannot be sued there upon equitable considerations only; the holder of a military bounty land warrant cannot recover compensation for the wrongful appropriation to others of the land ceded for his benefit; 9 Wall. 156.

To constitute an implied contract with the United States for the payment of money upon which an action will lie in the court of claims, there must have been some consideration moving to the United States, or they must have received the money charged with a duty to pay it over; or the claimant must have had a lawful right to it when it was received, as in the case of money paid by mistake. No such implied contract with the United States arises with respect to moneys received into the treasury as the proceeds of property forfeited and sold under that act; 95 U. S. 149.

The court has no jurisdiction of suits founded upon torts; 155 U. S. 163; 1 Garl. & Ralst. Fed. Pr. § 377; as a case of collision; 2 Ct. Cl. 210; an action to recover damages for illegal arrest and imprisonment; or destruction of property by a bombardment or the wrongful act of an officer of the United States; 8 Wall. 269; 12 *id.* 315; 1 Ct. Cl. 316.

This court has no jurisdiction of matters in equity; 9 Wall. 156; 27 Ct. Cl. 74; or of claims for damages for infringement of a patent right; 155 U. S. 163; or of suits to recover a military land warrant; 6 Wall. 573. The only judgment it can render is for money found due from the government; *id.*; 1 Ct. Cl. 233. The principle underlying this entire jurisdiction is that the United States cannot be sued in their own courts without their consent, and congress has absolute discretion to specify the cases, and contingencies in which the liability of the government is submitted to the courts, and they may not go beyond the letter of such consent; 155 U. S. 163.

Every specific assignment of a claim against the United States under a statute or treaty, whether presented to an executive department or prosecuted in the court of claims, is void unless assented to by it; 161 U. S. 72. Where the proceeds

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of land taken under such condemnation proceedings by the government were deposited in court and distributed by its order, the government, is not liable if they were paid to the wrong person; courts of the United States are not agencies of the federal government and the latter is not liable for their mistakes; 146 U. S. 388; nor is it liable where the register of the treasury cancels registered bonds without authority, nor for the nonfeasance or misfeasance or neglect of any of its officers; 148 U. S. 573.

No suit can be maintained against the United States under the Abandoned and Captured Property Act, if the property was neither captured, seized, nor sold, and the proceeds not paid into the treasury; 91 U. S. 577. Under this act, a pardoned rebel could recover, in the court of claims, if he brought suit within two years; 13 Wall. 144; but a person who did give aid and comfort to the rebellion, and who has not been pardoned until two years after the suppression of the rebellion, cannot obtain the benefit of the act; 22 Wall. 81.

Where a trust fund has been perverted by the fraud of an agent of the government, and gone into the hands of the United States, the owner of the fund may follow it and recover in the court of claims; in such a case, its sovereignty is in no wise involved; 96 U. S. 30.

It is said by Nott, J., in 6 Ct. Cl. 192, that it is a fact judicially established that the government of the United States holds itself, of nearly all governments, the least amenable to the law. See that case for a full discussion of the rights of aliens of various nationalities to sue in the court of claims.

Suits in this court are not suits at common law, and the provision in the constitution which preserves the right of trial by jury does not extend to such suits; the right to sue the government is a grant, and one of the conditions of the grant is that the government may set up and recover on counter-claims against the suitor; 12 Ct. Cl. 312.

All petitions and bills praying or providing for the payment of private claims against the government are, unless otherwise ordered, to be transmitted to the court of claims; § 1060.

By § 1061, in case of a set-off on behalf of the United States, the court shall determine the whole case and may enter a judgment on the set-off against the claimant. See 12 Ct. Cl. 312.

A demand by the United States of the proceeds of Indian trust bonds unlawfully converted to their own use by persons who had illegally procured and sold them, and become insolvent, is a proper subject of set-off; 16 Wall. 207. An alien who is a citizen or subject of a government which accords to citizens of the United States the right to prosecute claims against such government, in its courts, has the right to sue the United States, if his claim is otherwise within its ordinary jurisdiction; R. S. § 1068. This privilege is accorded to citizens of the United States by Great Britain; 11 Wall. 178; 16 *id.* 147; France; 6 Ct. Cl. 204, 221; Spain; *id.* 269; Belgium; 7 *id.* 517; Italy; 9 *id.* 254; Prussia; 5 *id.* 571; Switzerland; *id.* 687.

The limitation of suits is six years after the claim accrues, with an allowance for the ordinary disabilities; R. S. § 1069. No claimant, nor person through whom he claims title, is a competent witness; *id.* § 1079; but a complainant may be compelled to testify at the instance of a solicitor for the government; *id.* § 1080. One who claims as an officer without personal interests may testify; 96 U. S. 37.

As to war claims, see 13 Am. L. Reg. N. S. 265.

See UNITED STATES OF AMERICA; FEDERAL GOVERNMENT; JUDICIAL POWER; JURISDICTION

A bankruptcy act was passed by congress and approved by the president July 1st, 1898. It extends not only to corporations ordinarily speaking, but to limited or other partnership associations whose capital alone is responsible for the debts of the association.

A person shall be deemed insolvent within the act "whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts." Wage-earner shall include any person who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year.

The courts of bankruptcy are the district courts of the United States and of the territories, the supreme court of the District of Columbia, and the United States courts of the Indian Territory and of Alaska. They are invested with such jurisdiction in law and at equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms; to adjudge persons bankrupt who have had their principal place of business, resided, or had their domicil for the preceding six months, or the greater portion thereof, within their respective territorial jurisdictions, or who do not have their principal place of business, reside, or have their domicil within the United States, but have property within the jurisdiction of the court or have been adjudged bankrupts by competent courts of jurisdiction without the United States, and have property within their jurisdictions.

Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent,

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any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors; or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.

A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after (1) the date of the recording of the transfer, when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors, or for the purpose of giving a preference as in the act provided, or a general assignment for the benefit of his creditors, if by law such recording is required or permitted; or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property, unless the petitioning creditor have received actual notice of such transfer or assignment.

It would be a defence to prove that the party was not insolvent as defined in the act at the time the petition was filed against him, and upon such proof the proceedings shall be dismissed. The burden of proof is on the alleged bankrupt. He must appear in court with books and accounts, and submit to an examination in respect to his insolvency.

The petitioner in involuntary proceedings is required to give bond with two good and sufficient sureties who shall reside in the jurisdiction to be proved by the court, in such sums as the court shall direct, conditioned on the payment of damages and costs in case the petition is dismissed. If the petition is dismissed the respondent is allowed all costs, counsel fees, expenses, and damages, to be fixed by the court and covered by the bond.

The following classes except corporations are entitled to the benefits of the act as voluntary bankrupts:—

"Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company and any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act. Private bankers, but not national banks or banks incorporated under state or territorial laws, may be adjudged involuntary bankrupts."

A partnership during its continuance or after its dissolution and before its final settlement may be adjudged a bankrupt. The court which has jurisdiction of one of the partners may have jurisdiction of all the partnership assets, but separate accounts of the partnership and individual property should be kept and expenses divided between them as the court shall determine. The net proceeds of partnership property goes to partnership debts, and those of the individual estates to individual debts. Any surplus in either case to the other class of debts. Proof of claims of partnership debts may be allowed against individual estates and *vice versa*, and the court may marshal the assets of both estates so as to prevent preferences and secure an equitable distribution.

If one or more but not all of the partners are adjudged bankrupt the partnership property shall not be administered in bankruptcy unless by consent of the partners not adjudged bankrupts. The latter shall settle the partnership business as expeditiously as possible and account for the interest of the bankrupt partners. Any exemptions in force when the petition was filed in the state where the bankrupt had his domicil for six months or the greater portion thereof immediately preceding the filing of the petition are preserved.

Provision is made for a composition with creditors, but not until the bankrupt has been examined in open court or at a meeting of creditors and has filed his schedule of assets and list of creditors. If the application therefor has been accepted in writing by a majority in number and amount of proved creditors, and the consideration thereof and money to pay all prior debts and costs have been deposited subject to the order of the court, it may be presented to the court, which, after notice and a hearing, may confirm it.

A discharge may be applied for, but not until one month after, and within the ensuing twelve months from the adjudication of bankruptcy (with a further extension, by order of court for cause, of six months). No discharge shall be granted if the bankrupt has committed an offence punishable by imprisonment under the act; or, with fraudulent intent to conceal his condition, etc., has destroyed, concealed, or failed to keep proper books of account.

A discharge releases all debts except taxes due the United States or the state, county, district, or municipality in which the bankrupt resides; judgments on claims for fraud or for obtaining property by false pretences and wilful injuries to the person or property of another; and debts not scheduled (unless the creditor was unknown to the bankrupt or the creditor had knowledge of the proceedings); or created by fraud, embezzlement, etc., as an officer or trustee.

The right to a trial by jury is given in respect of the fact of insolvency and of the commission of an act of bankruptcy, upon the application of the respondent.

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The circuit court has jurisdiction of all controversies, as distinguished from proceedings in bankruptcy, between the trustee and any adverse claimant of his property. Suits by the trustee must be brought in the court where the bankrupt might have brought them, unless by consent of the proposed defendant. The circuit court has concurrent jurisdiction with the bankruptcy court of offences enumerated in the act.

The supreme court, the circuit court of appeals, and the supreme courts of the territories have appellate jurisdiction of controversies arising from which they have appellate jurisdiction in other like cases. The circuit courts of appeal have jurisdiction in equity to revise in matters of law the proceedings of the bankruptcy courts.

Appeals (but not to the supreme court) may be taken (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) granting or denying a discharge: (3) allowing or rejecting a claim of $500 or over. Such appeal must be taken within ten days.

An appeal may be taken thence to the supreme court (1) where the amount in controversy exceeds $2000, and the question is one which might have been taken from the highest court of the state to the supreme court; (2) where a justice of the supreme court shall certify that the question involved in the allowance or rejection of such claim is essential to a uniform construction of the act.

Controversies may be certified to the supreme court from other courts under existing laws.

In the computation of time the first day is excluded and the last included. The act provides for the appointment for two years of a reasonable number of referees, to whom all matters may be referred.

The creditors appoint one or three trustees at their first meeting, failing which the court shall do so. Their duties are, in substance, the same as those of assignees under the earlier bankrupt act.

The first meeting of creditors shall be held not less than ten nor more than thirty days after the adjudication. Subsequent meetings may be held when all creditors whose claims are allowed sign a written consent thereto. The court shall call a meeting whenever one-fourth of those who have proved their claims apply in writing. A final meeting shall be held when the estate is ready to be closed.

Any qualified person may file a petition in voluntary bankruptcy. Three or more creditors whose provable claims aggregate, above any securities, $500, or if all the creditors are less than twelve in number, then one whose claim exceeds such amount may petition in involuntary bankruptcy.

## UNITED STATES OF AMERICA.

The republic whose organic law is the constitution adopted by the people of the thirteen states which declared their independence of the government of Great Britain on the fourth day of July, 1776.

When they are said to constitute one nation, this must be understood with proper qualifications. Our motto, *E pluribus unum*, expresses the true nature of that composite body which foreign nations regard and treat with in all their communications with our people. No state can enter into a treaty, nor make a compact with any foreign nation. To foreigners we present a compact unity, an undivided sovereignty. No state can do a national act nor legally commit the faith of the Union.

In our interstate and domestic relations we are for some purposes one. We are, so far as our constitution makes us, one, and no further; and under this we are so far a unity that one state is not foreign to another. Art. 4, § 2. A constitution, according to the original meaning of the word is an organic law. It includes the organization of the government, the grant of powers, the distribution of these powers into legislative, executive, and judicial, and the names of the officers by whom these are exercised. And with these provisions a constitution, properly so-called, terminates. But ours goes further. It contains restrictions on the powers of the government which it organizes.

The writ of *habeas corpus*, the great instrument in defence of personal liberty against the encroachment of the government, shall not be suspended but in case of rebellion or invasion, and when the public safety requires it. No bill of attainder or *ex post facto* law shall be passed; no money shall be drawn from the treasury where there is not a regular appropriation; no title of nobility shall be granted; and no person holding office shall receive a present from any foreign government. Art. 1, § 9. To these, which are in the original constitution, may be added the *eleven* first amendments. These, as their character clearly shows, had their origin in a jealousy of the powers of the general government. All are designed more effectually to guard the rights of the people, and would properly, together with the restrictions in the original constitution, have a place in a bill of rights. Any act or law of the United States in violation of these, with whatever formality enacted, would be null and void, as an *excess* of power.

The restrictions on state sovereignty, besides those which relate to foreign nations, are that no state shall coin money, emit bills of credit, make anything but gold and silver a tender in the payment of debts, pass any bill of attainder or *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility. These prohibitions are absolute. In addition to these restrictions, the results of the rebellion of 1861-1865 caused the adoption of the 13th, 14th, and 15th amendments, which lay still further restrictions upon the power of the states, so far as relates to slavery and the regulation of the right of suffrage. The 13th amendment provides that neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to its jurisdiction, and confers power upon congress to enforce this article by appropriate legislation. The 14th amendment provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, and defines who shall be so considered; the 15th amendment specifically provides that the right of citizens of the United States to vote shall not be denied or abridged by the United States or any state on account of race, color, or previous condition of servitude.

Without the consent of congress no state shall lay any duties on imports or exports, or any duty on tonnage, or keep troops or ships of war in time of peace, or enter into any agreement or compact with another state, or engage in war unless actually invaded, or in imminent danger of being so.

What constitutes a duty on exports or imports has been a matter of frequent litigation in the supreme court. It has been finally decided that the term "import" as used in the constitution does not refer to articles imported from one state to another, but only to articles imported from foreign states; 8 Wall. 123; but the prohibition contained in those provisions of the constitution which ordain that congress shall have power to regulate commerce with foreign nations and among the several states; that no state shall levy any imposts or duties on imports or exports; that the citizens of

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each state shall be entitled to all the immunities and privileges of citizens of the several states, have been construed together by the supreme court; and various statutes of the different states have been declared unconstitutional because they violated them. Thus a statute allowing an additional fee to port-wardens for every vessel entering a port; 6 Wall. 31; a tax on passengers introduced from foreign countries; 7 How. 286; a tax on passengers going out of a state; 6 Wall. 35; a tax levied upon freight brought into or through one state into another; 15 Wall. 232; a tonnage tax on vessels entering the harbors of a state, either from foreign or domestic ports; 12 Wall. 204; 19 *id.* 581; 20 *id.* 577; 100 U. S. 434; have all been so decided. It is said that wherever subjects, in regard to which a power to regulate commerce is asserted, are in their nature national, or admit of one uniform system or plan of regulation, they are exclusively within the regulating control of congress. But the mere grant of the commercial power to congress does not forbid the states from passing laws to regulate pilotage. The power to regulate commerce includes various subjects, upon which there should be some uniform rule, and upon others different rules in different localities. The power is exclusive in congress in the former, but not so in the latter class; 12 How. 297. See COMMERCE.

Whatever these restrictions are, they operate on all states alike, and if any state laws violate them, the laws are void; and without any legislation of congress the supreme court has declared them so; 6 Cra. 100; 4 Wheat. 122, 518; 16 How. 304; cases *supra*; Cooley, Const. Lim. 729.

The United States have certain powers, the principal of which are enumerated in art. 1, § 8, running into seventeen specific powers. Others are granted to particular branches of the government: as, the treaty-making power to the president and senate. These have an equal effect in all the states, and so far as an authority is vested in the government of the Union or in any department of it, and so far as the states are prohibited from the exercise of certain powers, so far in our domestic affairs we are a unity.

The United States is a sovereign and independent nation vested with the entire control of international relations, and with all the powers of government necessary to maintain that control and make it effective; 149 U. S. 698; and see 130 *id.* 606.

Within these granted powers the sovereignty of the United States is supreme. The constitution, and the laws made in pursuance of it, and all treaties, are the supreme law of the land. Art. 6. And they not only govern in their words, but in their meaning. If the sense is ambiguous or doubtful, the United States, through their courts, in all cases where the rights of an individual are concerned, are the rightful expositors. For without the authority of explaining this meaning, the United States would not be sovereign.

In these matters, particularly in the limitation put on the sovereignty of the states, it has been sometimes said that the constitution executes itself. This expression may be allowed; but with as much propriety these may be said to be laws which the people have enacted themselves, and no laws of congress can either take from, add to, or confirm them. They are rights, privileges, or immunities which are granted by the people, and are beyond the power of congress or state legislatures; and they require no law to give them force or efficiency. The members of congress are exempted from arrest, except for treason, felony, and breach of the peace, in going to and returning from the seat of government. Art. 1, § 6. It is obvious that no law can effect this immunity. On these subjects all laws are purely nugatory, because if they go beyond or fall short of the provisions of the constitution, that may always be appealed to. An individual has just what that gives him,—no less and no more. It may be laid down as a universal rule, admitting of no exception, that when the constitution has established a disability or immunity, a privilege or a right, these are precisely as that instrument has fixed them, and can be *neither augmented nor curtailed* by any act or law either of congress or a state legislature. We are more particular in stating this principle because it has sometimes been forgotten both by legislatures and theoretical expositors of the constitution.

It has been justly thought a matter of importance to determine from what source the United States derive their authority. 4 Wheat. 402. When the constitution was framed, the people of this country were not an unformed mass of individuals. They were united into regular communities under state governments, and to these had confided the whole mass of sovereign power which they chose to intrust out of their own hands. The question here proposed is whether our bond of union is a compact entered into by the states, or the constitution is an organic law established by the people. To this question the preamble gives a decisive answer: *We, the people*, ordain and establish this constitution. The members of the convention which formed it were indeed appointed by the states. But the government of the states had only a *delegated power*, and, if they had an inclination, had no authority to transfer the allegiance of the people from one sovereign to another. The great men who formed the constitution were sensible of this want of power, and recommended it to the people themselves. They assembled in their own conventions and adopted it, acting in their original capacity as individuals, and not as representing states. The state governments are passed by in silence. They had no part in making it, and, though they have certain duties to perform, as, the appointment of senators, are properly not parties to it. The people in their capacity as sovereign made and adopted it; and it binds the state governments without their consent. The United States as a whole, therefore, emanates from the people, and not from the states, and the constitution and laws of the states, whether made before or since the adoption of that of the United States, are subordinate to it and the laws made in pursuance of it. See Fisher, Evolution of Const.

It has very truly been said that out of the mass of sovereiguty intrusted to the states was carved a part and deposited with the United States. But this was taken by the people, and not by the states as organized communities. The people are the fountain of sovereignty. The whole was originally with them as their own. The state governments were but trustees acting under a derived authority, and had no power to delegate what was delegated to them. But the people, as the original fountain, might take away what they had lent and intrust it to whom they pleased. They had the whole title, and, as absolute proprietors, had the right of using or abusing,—*jus utendi et abutendi*.

A consequence of great importance flows from this fact. The laws of the United States act directly on individuals, and they are directly responsible and not mediately through the state governments. This is the most important improvement made by our constitution over all previous confederacies. As a corollary from this, if not more properly a part of it, the laws act only on states through individuals. They are supreme over persons and cases, but do not touch the state: they act through them; 1 Wheat. 368. If a state passes an *ex post facto* law, or passes a law impairing the obligation of contracts, or makes anything but gold or silver a tender in payment of debts, congress passes no law which touches the state: it is sufficient that these laws are void, and when a case is brought before the court, it, without any law of congress, will declare them void. They give no person an immunity, nor deprive any of a right. Again: should a state pass a law declaring war against a foreign nation, grant letters of marque and reprisal, arm troops or keep ships of war in time of peace, individuals acting under such laws would be responsible to the United States. They might be treated and punished as traitors or pirates. But congress would and could pass no law against the state; and for this simple reason, because the state is sovereign. And it is a maxim consecrated in public law as well as common sense and the necessity of the case, that a sovereign is answerable for his acts only to his God and to his own conscience.

The constitution and laws made in pursuance of it,—that is, laws within their granted powers,—and all treaties, are the supreme law of the land, art. 6; and the judicial power, art. 3, § 1, gives to the supreme court the right of interpreting them. But this court is but another name for the United States, and this power necessarily results from their sovereignty; for the United States would not be truly sovereign unless their interpretation as well as the letter of the law governed. But this power of the court is confined to cases brought before them, and does not embrace principles independent of these cases. They have no power analogous to that of

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the Roman prætor of declaring the meaning of the constitution by edicts. Any opinion, however strongly expressed, has no authority beyond the reasoning by which it is supported, and binds no one. But the point embraced in the case is as much a part of the law as though embraced in the letter of the law or constitution, and it binds public functionaries, whether of the states or United States, as well as private persons; and this of necessity, as there is no authority above a sovereign to which an appeal can be made.

Another question of great practical importance arose at an early period of our government. The natural tendency of all concentrated power is to augment itself. Limitations of authority are not to be expected from those to whom power is intrusted; and such is the infirmity of human nature that those who are most jealous when out of power and seeking office are quite as ready practically to usurp it as any other. A general abrogation commonly precedes a real usurpation, to lull suspicion if for no other purpose. When the constitution was new, and before it had been fully considered, this diversity of opinion was not unnatural, and was the subject of earnest argument, but is, we think, now settled, and rightly, both on technical reasoning and on that of expediency. The question is between incidental and constructive or implied powers. The government of the United States is one of delegated power. No general words are used from which a general power can be inferred. Incidental and implied are sometimes used as synonymous; but in accurate reasoning there is a plain distinction between them, and the latter, in common use, comes nearer to constructive than to incidental.

The interpretation of powers is familiar to courts of justice, as a great part of landed property in England and much in this country is held under powers. A more frequent example is that of common agency, as every agent is created by a power. Courts whose professed object is to carry into effect the intentions of parties have, on this subject, established general rules. Among these no one is more immovably fixed than this, that the interpretation is strict and not liberal. 2 Kent 617; 4 *id.* 330. But this strictness does not exclude incidental powers. These are included in a general and express power, both in the common and technical use of language. To take a familiar example. A merchant of Philadelphia or Boston has a cargo of tea arrive at New York, and by letter authorizes his correspondent to sell it. This is the whole extent of the power. But it necessarily and properly includes that of advertising, of removing and exhibiting the goods, etc. But it would not authorize the sale of sugar, a horse, and much less a store or real estate. These powers are not incidental to the general power, nor included in it. Or we may take an example directly from the constitution itself. The United States has power "to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States." This includes the power to create and appoint all inferior officers and to do all subordinate acts necessary and proper to execute the general power: as, to appoint assessors, collectors, keepers, and disbursers of the public treasures. Without these subordinate powers the general power could not be executed. And when there is more than one mode by which this general power may be executed, it includes all. The agent is not confined to any one, unless a particular mode is pointed out. 4 Wheat. 410. All that the constitution requires is that it should be necessary and proper. One consequence of this doctrine is that there must be a power expressly granted as a stock to bear this incidental power, or otherwise it would be ingrafted on nothing.

A constructive power is one that is inferred, not from an express power, but from the general objects to be obtained from the grant, and, perhaps, in private powers sometimes from the general language in which they are granted. The broad distinction between them may be illustrated by two cases that came before the United States Court. The first is one we have already quoted, 4 Wheat. 317. The question in that case was whether the act incorporating the Bank of the United States was constitutional, or whether it lay beyond the limits of the delegated powers and was, therefore, merely void as usurped or an excess of power. The authority to create a corporation is nowhere expressly given, and if it exists it must be sought as incidental to some power that is specifically granted. The court decided that it was incidental to that of laying taxes as a keeper and disburser of the public treasure. This power could be executed only by the appointment of agents; and the United States might as well create an agent for receiving, keeping, and disbursing the public money as appoint a natural person or an artificial one already created. In the case of Osborn *v.* The United States Bank, 9 Wheat. 859, the general question was presented again, and reargued, and the court reaffirmed their former decision, but, more distinctly than before, adding an important qualification. They might not only create an artificial person, but clothe it with such powers and qualities as would enable it with reasonable convenience to perform its specific duties. The taxes are collected at one end of the country and paid out at another, and the bank instead of removing the specie might pay it where collected, and repay themselves by purchasing a bill of exchange in another place, and this could be conveniently and economically done only by a power of dealing in exchange generally, which when reduced to its last analysis is merely buying specie at one place and paying for it at another. It is in this way, and this only, that the bank got its general power of dealing in exchange,—that it is essential and proper to enable it to perform its principal duty, that of transferring the funds of the United States. Thus, the authority to create a bank is incidental to that of receiving, keeping, and paying out the taxes, and is comprehended under the specific power. The argument is principally derived from Hamilton's report on a bank, which proved satisfactory to Washington, as that of Chief-Justice Marshall has to the public at large.

This is very different from a constructive power which is inferred not as included in any special grant, but from the general tenor of the power and the general objects to be obtained. The objects of the constitution are stated in the preamble, and they are to promote the common weal. But this is followed by the grant of specific powers. And it is the dictate of common sense as well as technical reasoning that this object is to be obtained by the due exercise of these powers. Where these fall short, none are granted; and if they are inadequate, the same consequence follows. No one would infer from a power to sell a ship one to sell a store, though the interest of the principal would thereby be promoted. The general power to regulate commerce is useful, and it is given, and it may be carried to its whole extent by having incidental powers ingrafted upon it. A general power to regulate the descent and distribution of intestate estates and the execution and proof of wills would be on many accounts useful, but it is not granted. The utility of a power is never a question. It must be expressly granted, or incidental to an express power,—that is necessary and proper to carry into execution one expressly granted,—*or it does not exist*.

The other illustrative case is that of 16 Pet. 539. It will be found on a careful examination that in this a constructive power only is claimed. The only point involved in the case was the constitutionality of the statute of Pennsylvania under which Prigg was indicted as a kidnapper. The court decided this to be unconstitutional; and here its judicial functions properly terminated. But to arrive at this conclusion it was deemed necessary to determine that the general power of arresting and returning fugitives from labor and service was intrusted to the United States. It was not pretended that this power was expressly given, nor that it was incidental to any that was expressly given,—that is, conducive or proper to the execution of such a power. The court say that "in the exposition of this part of the constitution we shall limit ourselves to the considerations which appropriately and exclusively belong to it, without laying down any rules of interpretation of a more general nature." 16 Pet. 610. They do not, as in McCulloch's case, quote the express authority to which this is incidental; but a general argument is offered to prove that this power is most safely lodged with the United States, and that, therefore, it has been placed there *exclusively*. If the canon of criticism which we have endeavored to establish, and which is generally admitted, is correct, the existence of such a power cannot be inferred from its utility.

It will be seen, also, that this case stands in

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strong contrast with that of Martin *v.* Hunter, 1 Wheat. 304, in which the opinion was delivered by the same judge. This was on the validity of the twenty-fifth section of the Judiciary Act, authorizing an appeal from a final judgement of a state court to the supreme court of the United States; and perhaps in no case has the extent of the powers granted by the constitution been more fully and profoundly examined. In this case the court say that "the government of the United States can claim no powers which are not granted by the constitution; and the powers actually granted must be such as are *expressly given, or given by necessary implication*;"—that is to say, as the reasoning of the court in the whole opinion proves, such as are included in the express powers, and are necessary and proper to carry them into execution. Such was the uniform language of the court whenever the question was presented previously to the rebellion. The doctrine as now held, however, is somewhat broader, finding its exposition in the decision of the supreme court in the Legal Tender Cases, 12 Wall. 457. It is there said that it is not indispensable to the existence of any power claimed for the federal government that it can be found specified in the words of the constitution, or clearly and directly traceable to some one of the specified powers. Its existence may be deduced fairly from more than one of the substantial powers expressly defined, or from them all combined. It is allowable to group together any number of them and infer from them all that the power claimed has been conferred. Before any act of congress can be held to be unconstitutional, the court must be convinced that the means adopted were not appropriate or conducive to the execution of any or all of the powers of congress, or of the government,—not appropriate in any degree; and of the degree, the court is not to judge, but congress.

We have seen that the constitution of the United States and the laws made in pursuance of it are the supreme law of the land, and that of the true meaning of these the supreme court, which is nothing else than the United States, is the rightful expositor. This necessarily results from their sovereignty. But the United States government is one of delegated powers; and nothing is better established, both by technical reasoning and common sense, than this,—that a delegate can exercise only that power which is delegated to him. All acts beyond are simply void, and create no obligation. It is a maxim also of constitutional law that the powers of sovereignty not delegated to the United States are reserved to the states. But in so complex an affair as that of government, controversies will arise as to what is given and what is reserved,—doubts as to the dividing line. When this is the case, who is to decide? This is a difficulty which the convention did not undertake to settle.

To avoid all controversy as far as possible, the plainest words in granting powers to the United States were used which the language affords. Still further to preclude doubts, the convention added, at the close of the seventeen powers expressly given, this clause: "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States or in any department or officer thereof." Art. 1, § 8. This clause contains no grant of power. But in the Articles of Confederation, which was a compact between the states as independent sovereignties, the word EXPRESSLY was used; and a doubt troubled congress how far incidental powers were included. Articles of Confederation, art. 2. This clause was introduced to remove that doubt. It covered incidental, but not constructive, powers.

Strange as it may appear, both those who wished larger powers granted to the United States, and, in the language of that day, thought that things must be worse before they could be better, and those who honestly feared that too much power was granted, fixed their eyes on this clause; and perhaps no part of the constitution gave greater warmth to the controversy than this. To disarm the designing and counteract the fears of the timid, the tenth amendment was offered by the friends of the constitution. But so jealous were parties of each other that it was offered in the convention of Massachusetts by Governor Hancock, who favored and had the confidence of the opposition, though it was in the handwriting of Mr. Parsons, afterwards chief-justice. Life of Chief-Justice Parsons. That amendment is in these words: "The powers not delegated to the United States by the constitution, nor prohibited to the states, are reserved to the states respectively, or the people." Were the words of the original constitution and the amendment both stricken out, it would leave the true construction unaltered. Story, Const. § 1922. Both are equally nugatory in fact; but they have an important popular use. The amendment formally admits that certain rights are reserved to states, and these rights must be sovereign.

We have seen that, within their limited powers, the United States are the natural expositors of the constitution and laws; that when a case affecting individual rights arises, the supreme court stands for the United States, and that they have the sole right to explain and enforce the laws and constitution. But their power is confined to the facts before them, and they have no power to explain them in the form of an edict to affect other rights and cases. Beyond these powers the states are sovereign, and their acts are equally unexaminable. Of the separating line between the powers granted and the powers withheld, the constitution provides no judge. Between sovereigns there can be no common judge, but an arbiter mutually agreed upon. If that power is given to one party, that may draw all power to itself, and it establishes a relation not of equal sovereignties, but of sovereign and subject. On this subject the constitution is silent. The great men who formed it did not undertake to solve a question that in its own nature could not be solved. Between equals it made neither superior, but trusted to the mutual forebearance of both parties. A larger confidence was placed in an enlightened public opinion as the final umpire; and not until the war of the rebellion was this conflict between the two sovereignties finally settled by the *ultima ratio regum*. The status of the states and their political rights under the constitution have been considered at large by the supreme court in the case of Texas *v.* White, 7 Wall. 700. It is there held that authority to suppress rebellion is found in the constitutional power to suppress insurrection, and carry on war; authority to provide for the restoration of state governments under the constitution when suspended and overthrown is derived from the obligation of the United States to guarantee to every state in the Union a republican form of government. The unity of the states never was a purely artificial and arbitrary relation. It began among the colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form and character and sanction from the Articles of Confederation. By these the Union was solemnly declared to be perpetual; and when these articles were found to be inadequate to the exigencies of the country, the constitution was ordained "to form a more perfect union." But the perpetuity and indissolubility of the Union by no means imply the loss of distinct and individual existence, or of the right of self-government by the states. On the contrary, it may, not unnecessarily, be said that the preservation of the states and the maintenance of their government are as much within the design and care of the constitution as the preservation of the union and the maintenance of the national government. The constitution, in all its provisions, looks to an indestructible Union composed of indestructible states.

The United States is not a corporation under the New York statutes, in the sense that it will be exempted from an inheritance tax on personal property bequeathed to it by will; 163 U. S. 625.

If the nation comes down from its position of sovereignty and enters the domain of commerce, it submits itself to the same laws that govern individuals therein. It assumes the position of an ordinary citizen and it cannot recede from the fulfilment of its obligations; 74 Fed. Rep. 145, following 91 U. S. 398.

See SOVEREIGNTY; ARTICLES OF CONFEDERATION; STATE; TERRITORY; COMMERCE;

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CONSTITUTIONAL; titles of the several states; Fisher, Evol. of the Const.

**UNITY.** An agreement or coincidence of certain qualities in the title of a joint-estate or an estate in common.

In a joint-estate there must exist four unities: that of *interest*, that of *title*, and, therefore, their estates must be created by one and the same act; that of *time*, for their estates must be vested at one and the same period; and, lastly, the unity of *possession*: hence joint-tenants are seised *per my et per tout*, or by the *half* or *moiety* and by *all*: that is, each of them has an entire possession as well of every *parcel* as of the *whole*; 2 Bla. Com. 170. Coparceners must have the unities of interest, title, and possession. In tenancies in common, the unity of possession is alone required; 2 Bla. Com. 192. See ESTATE IN COMMON; ESTATE IN COPARCENARY; ESTATE OF JOINT-TENANCY; TENANT.

**UNITY OF POSSESSION.** This term is used to designate the possession by one person of several estates or rights. For example, a right to an estate to which an easement is attached, or the dominant estate, and to an estate which an easement incumbers, or the servient estate, in such case the easement is extinguished; 8 Mas. 172; see Cro. Jac. 121. But a distinction has been made between a thing that has its being by prescription, and one that has its being *ex jure naturæ*: in the former case unity of possession will extinguish the easement; in the latter, for example, the case of a watercourse, the unity will not extinguish it; Pothier, Contr. 166.

**UNIVERSAL AGENT.** One appointed to do all the acts which the principal can personally do, and which he may lawfully delegate the power to another to do. Such an agency may potentially exist; but it is difficult to conceive of its practical existence, since it puts the agent completely in the place of the principal; Story, Ag. § 21.

**UNIVERSAL LEGACY. In Civil Law.** A testamentary disposition by which the testator gives to one or several persons the whole of the property which he leaves at his decease. La. Civ. Code, art. 1606.

**UNIVERSAL PARTNERSHIP.** The name of a species of partnership by which all the partners agree to put in common all their property, *universorum bonorum*, not only what they then have, but also what they shall acquire. Pothier, *Du Contr. de Société*, n. 29. See PARTNERSHIP.

**UNIVERSAL REPRESENTATION. In Scotch Law.** The heir universally represents his ancestor, *i. e.* is responsible for his debts. Originally, this responsibility extended only to the amount of the property to which he succeeded; but afterwards certain acts on the part of the heir were held sufficient to make him liable for all the debts of the ancestor. Bell, Dict. *Passive Titles.*

**UNIVERSITAS JURIS** (Lat.). **In Civil Law.** A quantity of things of various kinds, corporeal and incorporeal, taken together as a whole, *e. g.* an estate. It is used in contradistinction to *universitas facti*, which is a whole made up of *corporeal* units. Mackeldey, Civ. Law § 149.

**UNIVERSITAS RERUM** (Lat.). **In Civil Law.** Several things not mechanically united, but which, taken together, in some legal respects are regarded as one whole. Mackeldey, Civ. Law § 149.

**UNIVERSITY.** The name given to certain societies or corporations which are seminaries of learning where youth are sent to finish their education. Among the civilians, by this term is understood a corporation. See CHANCELLOR'S COURTS IN THE TWO UNIVERSITIES; STUDENTS.

**UNJUST.** That which is done against the perfect rights of another; that which is against the established law; that which is opposed to a law which is the test of right and wrong. Hein. *Lec. El.* § 1080.

**UNKNOWN.** When goods have been stolen from some person unknown, they may be so described in the indictment; but if the owner be really known, an indictment alleging the property to belong to some person unknown is improper. 8 C. & P. 773; 12 Pick. 174.

In an indictment, where the name of the defendant is unknown, and he refuses to disclose it, he may be described as a person whose name is to the jurors unknown, but who is personally brought before them by the keeper of the prison; 7 Ired. 5; but an indictment against him as a person to the jurors unknown, without something to ascertain whom the grand jury meant to designate will be insufficient; R. & R. 480. The practice is to indict the defendant by a specific name, as, John N—— name, and if he pleads in abatement, to send in a new bill, inserting the real name, which he then discloses, by which he is bound. This course is in some states prescribed by statute; 5 Ia. 484.

**UNLAGE** (Sax.). An unjust law. Cowel.

**UNLAW. In Scotch Law.** A witness was formerly inadmissible who was not worth the king's *unlaw*,—*i. e.* the sum of £10 Scots, then the common fine for absence from court and for small delinquencies. Bell, Dict.

**UNLAWFUL.** That which is contrary to law.

See CONDITION; VOID.

**UNLAWFUL ASSEMBLY.** A disturbance of the public peace by three or more persons who meet together with an intent mutually to assist each other in the execution of some unlawful enterprise of a private nature, with force and violence.

An assembly of three or more persons:—1. With intent to commit a crime by open force. 2. With intent to carry out a common purpose, lawful or unlawful, in such a manner as to give firm and courageous persons in the neighborhood of such as-

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sembly reasonable grounds to apprehend a breach of the peace in consequence of it. Steph. Dig. Cr. Law, art. 75. If they move forward towards its execution, it is then a rout; and if they actually execute their design, it amounts to a riot; 4 Bla. Com. 140.

In England public meetings held for political purposes are not unlawful as such, but may, by their conduct when assembled, become unlawful, and will be so from the outset if held for purposes of sedition. In such cases all those who use seditious words or openly applaud those who use them will be participators in the unlawful assembly, but not those who attend a meeting which they suppose to be lawful and who take no part in the unlawful conduct. Magistrates and the police may use whatever force is necessary to disperse an unlawful assembly. The degree of force to be exercised will depend on the circumstances of each case; 9 C. & P. 431.

See RIOT; ROUT; PUBLIC MEETING.

**UNLAWFULLY.** Illegally; wrongfully. 92 N. Y. 584. See 97 N. C. 465. This word is frequently used in indictments in the description of the offence: it is necessary when the crime did not exist at common law, and when a statute, in describing an offence which it creates, uses the word; 1 Mood. C. C. 339; but is unnecessary whenever the crime existed at common law and is manifestly illegal; 1 Chit. Cr. L. *241.

**UNLIQUIDATED DAMAGES.** Such damages as are unascertained. In general, such damages cannot be set off. No interest will be allowed on unliquidated damages. See LIQUIDATED DAMAGES.

**UNMARRIED.** Its primary meaning is "never having been married;" 9 H. L. Cas. 601; 57 L. J. Ch. 576; but the term is a word of flexible meaning and it may be construed as not having a husband or wife at the time in question. 9 H. L. Cas. 601; 22 Beav. 328.

**UNQUES** (L. Fr.). Still; yet. This barbarous word is frequently used in pleas; as, *Ne unques* executor, *Ne unques* guardian, *Ne unques* accouple, and the like.

**UNSEATED LAND.** A phrase used in Pennsylvania to designate uncultivated land subject to taxation. A tract of land ceases to be unseated as soon as it is actually occupied with a view to permanent residence; 7 W. & S. 248; 5 Watts 382.

**UNSEAWORTHY SHIP.** See SEAWORTHINESS.

**UNSHIPMENT.** Throwing goods overboard protected in such manner that they may be recovered, may constitute unshipment. 1 Heisk. 146.

**UNSOLEMN WAR.** That war which is not carried on by the highest power in the states between which it exists, and which lacks the formality of a declaration. Grotius, *de Jure Bel. ac Pac.* l. 1, c. 3, § 4. A formal declaration to the enemy is now disused, but there must be a formal public act proceeding from a competent source; with us, it must be an act of congress; 1 Kent 55. See WAR.

**UNSOUND MIND, UNSOUND MEMORY.** See INSANITY.

**UNSOUNDNESS.** See SOUNDNESS.

**UNTIL.** When a charter continues the incorporation of a company until a day named, *until* is exclusive in its meaning, unless the context show that the contrary is intended; 17 N. Y. 502; 120 Mass. 94. It is inclusive of the date; 18 N. J. Eq. 315; 70 Ga. 717; *contra*, 118 Mass. 502; 91 N. Y. 681; 87 Ind. 189.

**UNTRUE.** *Prima facie* inaccurate, but not necessarily wilfully false. 3 B. & S. 929.

**UNWHOLESOME FOOD.** Food not fit to be eaten; food which if eaten would be injurious. See ADULTERATION; HEALTH; POLICE POWER.

**UNWRITTEN LAW.** See LEX NON SCRIPTA.

**UPLIFTED HAND.** When a man accused of a crime is arraigned, he is required to raise his hand, probably in order to identify the person who pleads. Perhaps for the same reason when a witness adopts a particular mode of taking an oath, as when he does not swear upon the gospel, but by Almighty God, he is to hold up his hand.

**UPPER BENCH.** The king's bench was so called during Cromwell's protectorate, when Rolle was chief-justice. 3 Bla. Com. 202.

**UPSET PRICE.** The price at which any subject, as lands or goods, is exposed to sale by auction, below which it is not to be sold. In a final decree in foreclosure, the decree should name an upset price large enough to cover costs and all allowances made by the court, receiver's certificates and interest, liens prior to the bonds, amounts diverted from the earnings, and all undetermined claims which will be settled before the confirmation and sale; 25 Fed. Rep. 232.

**URBAN SERVITUDES.** All servitudes are established either for the use of houses or for the use of lands. Those of the first kind are called urban servitudes, whether the buildings to which they are due be situated in the city or in the country. Those of the second kind are called rural servitudes.

The principal kinds of urban servitudes are the following: the right of support; that of drip; that of drain, or of preventing the drain; that of view or of lights, or of preventing the view or lights from being obstructed; that of raising buildings or walls, or of preventing them from being raised; that of passage; and that of drawing water. See 3 Toullier 441.

**URBS** (Lat.). A walled city. Often used for *civitas*. Ainsworth, Dict. It is

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the same as *oppidum*, only larger. *Urbs*, or *urbs aurea*, meant Rome. Du Cange. In the case of Rome, *urbs* included the suburbs. Dig. 50. 16. 2. pr. It is derived from *urbum*, a part of the plough by which the walls of a city are first marked out. Ainsworth, Dict.

**URUGUAY.** A republic of South America. The president is elected for four years, and is assisted by a council of ministers. The senate has nineteen members, elected for six years. The chamber of representatives of sixty-nine members is elected for three years. There is a high court of justice at Montevideo, a judge of commerce, etc.

**USAGE.** Uniform practice.

This term and custom are now used interchangeably, though custom seems to have been originally confined to local usages immemorially existing; Browne, Us. & Cust. 13.

A usage must be established; that is, it must be known, certain, uniform, reasonable, and not contrary to law; but it may be of very recent origin; 2 Greenl. Ev. § 251; 9 Pick. 426; 4 B. & Ald. 210; 69 Pa. 374; 80 Ill. 493; 49 N. Y. 464; 3 N. Dak. 107; 100 Ala. 355; and no usage is good which conflicts with an established principle of law; 85 Ala. 565; 159 Mass. 522. Parties who contract on a subject-matter concerning which known usages prevail incorporate such usages by implication into their agreements, if nothing is said to the contrary; 137 U. S. 30.

The usages of trade afford ground upon which a proper construction may be given to contracts. By their aid the indeterminate intention of parties and the nature and extent of their contracts arising from mere implications or presumptions, and acts of an equivocal character may be ascertained; and the meaning of words and doubtful expressions may become known; 13 Pick. 182; 5 Wheat. 326; 2 C. & P. 525; 1 N. & M'C. 519; 5 Ohio 436; 15 Ala. 123; 126 Ind. 176; 48 Fed. Rep. 921. Among commercial and business men in a locality, it need not be so ancient "that the memory of man runneth not to the contrary," nor that it should contain all the other elements of a common-law custom, as defined in the books; 3 Ind. App. 299. One seeking to avoid the effect of a notorious and uniform usage of trade must show that he was ignorant of it; 139 N. Y. 416.

A local usage must be one known to both contracting parties; 144 U. S. 476. See 75 Ala. 596; 54 Mich. 609; 65 Me. 105; 51 Wis. 224; 16 Mo. App. 383.

Modern English cases incline to extend the functions of usages, but in America the authorities vary greatly; Lawson, Us. & Cust. 25; 7 E. & B. 266; 32 Vt. 616; 10 W. N. C. (Pa.) 347.

See CUSTOM; Lawson; Browne, Us. & Cust.

**USAGE OF TRADE.** A course of dealing; a mode of conducting transactions of a particular kind. 115 Mass. 585.

**USANCE. In Commercial Law.** The time which, by usage or custom, is allowed in certain countries for the payment of a bill of exchange. Pothier, *Contr. du Change*, n. 15.

The time of *one*, *two*, or *three* months after the date of the bill, according to the custom of the places between which the exchanges run.

Double or treble is double or treble the usual time, and half usance is half the time. Where it is necessary to divide a month upon a half usance (which is the case when the usance is for one month or three), the division, notwithstanding the difference in the length of the months, contains fifteen days. Byles, Bills *80, *205.

**USE.** A confidence reposed in another, who was made tenant of the land, or terre-tenant, that he would dispose of the land according to the intention of the *cestui que use*, or him to whose use it was granted, and suffer him to take the profits. Plowd. 352; Gilb. Uses 1; Saund. Uses 2; 2 Bla. Com. 328.

A right in one person, called the *cestui que use*, to take the profits of land of which another has the legal title and possession, together with the duty of defending the same and of making estates thereof according to the direction of the *cestui que use*.

Uses have been said to have been derived from the *fidei commissa* of the Roman law; but see TRUST. It was the duty of a Roman magistrate, the prætor *fidei commissarius*, whom Bacon terms the particular chancellor for uses, to enforce the observance of this confidence. Inst. 2 23 2. They were introduced into England by the ecclesiastics in the reign of Edward III., before 1377, for the purpose of avoiding the statutes of mortmain; and the clerical chancellors of those times held them to be *fidei commissi*, and binding in conscience. To obviate many inconveniences and difficulties which had arisen out of the doctrine and introduction of uses, the Statute of 27 Henry VIII. c. 10, commonly called the Statute of Uses, or, in conveyances and pleadings, the statute for transferring uses into possession, was passed. It enacts that "when any person shall be seised of lands, etc., to the use, confidence, or trust of any other person or body politic, the person or corporation entitled to the use in fee-simple, fee-tail, for life, or years, or otherwise, shall from thenceforth stand and be seised or possessed of the land, etc., of and in the like estate as they have in the use, trust, or confidence; and that the estates of the persons so seised to the uses shall be deemed to be in him or them that have the use, in such quality, manner, form, and condition as they had before in the use." The statute thus executes the use,—that is, it conveys the possession to the use, and transfers the use to the possession, and, in this manner, making the *cestui que use* complete owner of the lands and tenements, as well at law as in equity; 2 Bla. Com. 333.

A modern use is an estate of right which is acquired through the operation of the statute of 27 Henry VIII. c. 10; and which, when it may take effect according to the rules of the common law is called the legal estate, and when it may not is denominated a use, with a term descriptive of its modification; Cornish, Uses 85.

The common-law judges decided, in the construction of this statute, that a use could not be raised upon a use; Dy. 155 (A); and that on a feoffment to A and his heirs to the use of B and his heirs in trust for C and his heirs, the statute executed only the first use, and that the second was a mere nullity. The judges also held that as the statute mentioned only such persons as

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were *seised* to the use of others, it did not extend to a terms of years, or other chattel interests, of which a termer is not seised but only possessed; 2 Bla. Com. 336. Tiedm. Eq. Jur. § 269. The rigid literal construction of the statute by the courts of law again opened the doors of the chancery courts; 1 Madd. Ch. Pr. 448.

Uses and trusts are often spoken of together by the older and some modern writers, the distinction being those trusts which were of a permanent nature and required no active duty of the trustee being called uses; those in which the trustee had an active duty to perform, as, the payment of debts, raising portions, and the like, being called *special* or *active* trusts, or simply trusts; 1 Spence, Eq. Jur. 448.

For the creation of a use, a consideration either *valuable*, as, money, or *good*, as relationship in certain degrees, was necessary; 3 Swanst. 591; 7 Co. 40; 17 Mass. 257; 14 Johns. 210. See RESULTING USE. The property must have been *in esse*, and such that seisin could be given; Cro. Eliz. 401. Uses were alienable, although in many respects resembling choses in action, which were not assignable at common law; 2 Bla. Com. 331; when once raised, it might be granted or devised in fee, in tail, for life, or for years; 1 Spence, Eq. Jur. 455.

The effect of the statutes of uses was much restricted by the construction adopted by the courts: it practically resulted, it has been said, in the addition of these words, *to the use*, to every conveyance; Will. R. P. 133. The intention of the statute was to destroy the estate of the feoffee to use, and to transfer it by the very act which created it to the *cestui que use*, as if the seisin or estate of the feoffee, together with the use, had, *uno flatu*, passed from the feoffor to the *cestui que use*. A very full and clear account of the history and present condition of the law of uses is given in 2 Wash. R. P. 91, 156. See, as to a use upon a use, Tud. L. Cas. R. Pr. 335. Consult Spence, Eq. Jur.; Bisph. Eq. See CHARITABLE USES; TRUSTS.

It is said that the word used is not derived from the Latin *usus* but comes from the Latin *opus;* 3 L. Quart. Rev. 115.

In its untechnical sense, the word use has been variously constructed; 20 Ind. 398; 59 Me. 582; 107 Mass. 290, 324; 11 Rich. 621; thus, "to use a port" means to enter it, so as to derive advantage from its protection; 48 N. Y. 624.

**In Civil Law.** A right of receiving so much of the natural profits of a thing as is necessary to daily sustenance. It differs from usufruct, which is a right not only to use, but to enjoy. 1 Bro. Civ. Law 184.

**USE AND OCCUPATION.** When a contract has been made, either by express or implied agreement, for the use of a house or other real estate, where there was no amount of rent fixed and ascertained, the landlord can recover a reasonable rent in an action of assumpsit for use and occupation; 2 Aik. 252; 4 Day 228; 13 Johns. 240, 297; 15 Mass. 270; 10 S. & R. 251. This is under the Stat. of Westm. 2. See 2 Harv. L. Rev. 377.

The action for use and occupation is founded not on a privity of estate, but on a privity of contract; Wood, L. & T. 1382; 3 S. & R. 500; therefore it will not lie where the possession is tortious; 2 N. & M'C. 156; 3 S. & R. 500; 6 Ohio 371; 149 U. S. 593; or where the party is in possession by the license of the owner; 48 Minn. 397. It will lie for the occupation of land in another state; 3 S. & R. 502.

**USEFUL.** That which may be put into beneficial practice. See PATENT.

**USEFULNESS.** Capabilities for use. The word pertains to the future as well as to the past. 11 S. W. Rep. (Tenn.) 943.

**USER.** The enjoyment of a thing.

**USES, STATUTE OF.** See TRUSTS; USE.

**USHER.** This word is said to be derived from *huissier*, and is the name of an inferior officer in some English courts of law. Archb. Pr. 25. The office of usher of the court of chancery was abolished in 1852.

**USQUE AD MEDIUM FILUM VIÆ** (Lat.). To the middle thread of the way. See AD MEDIUM FILUM; 7 Gray 22.

**USUAL TERMS.** A phrase in the common-law practice, which meant pleading issuably, rejoining gratis, and taking short notice of trial. When a defendant obtained further time to plead, these were the terms usually imposed. Wharton.

**USUCAPION, or USUCAPTION. In Civil Law.** The manner of acquiring property in things by the lapse of time required by law.

It differs from prescription, which has the same sense, and means, in addition, the manner of acquiring and losing, by the effect of time regulated by law, all sorts of rights and actions. Merlin, *Répert. Prescription.* See PRESCRIPTION.

**USUFRUCT. In Civil Law.** The right of enjoying a thing the property of which is vested in another, and to draw from the same all the profit, utility, and advantage which it may produce, provided it be without altering the substance of the thing. 18 Tex. 28; 79 Cal. 6.

*Perfect usufruct* is of things which the usufructuary can enjoy without altering their substance, though their substance may be diminished or deteriorated naturally by time or by the use to which they are applied; as, a house, a piece of land, animals, furniture, and other movable effects.

*Imperfect or quasi usufruct* is of things which would be useless to the usufructuary if he did not consume and expend them or change the substance of them; as, money, grain, liquors. In this case the alteration may take place; Pothier, *Tr. du Douaire*, n. 194.

**USUFRUCTUARY. In Civil Law.** One who has the right and enjoyment of a usufruct.

Domat points out the duties of the usu-

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fructuary, which are—to *make an inventory* of the things subject to the usufruct, in the presence of those having an interest in them; to *give security* for their restitution when the usufruct shall be at an end; *to take good care* of the things subject to the usufruct; *to pay all taxes* and claims which arise while the thing is in his possession as a ground rent; and to keep the thing in repair at his own expense.

**USURA MARITIMA.** See FŒNUS NAUTICUM.

**USURIOUS CONTRACT.** See USURY.

**USURPATION.** The unlawful assumption of the use of property which belongs to another; an interruption or the disturbing a man in his right and possession. Toml.

According to Lord Coke, there are two kinds of usurpation: *first*, when a stranger, without right, presents to a church and his clerk is admitted; and, *second*, when a subject uses a franchise of the king without lawful authority. Co. Litt. 277 *b*.

**In Governmental Law.** The tyrannical assumption of the government by force, contrary to and in violation of the constitution of the country.

**USURPED POWER. In Insurance.** An invasion from abroad, or an internal rebellion, where armies are drawn up against each other, when the laws are silent, and when the firing of towns becomes unavoidable. These words cannot mean the power of a common mob; 2 Marsh. Ins. 390. By an article of the printed proposals which are considered as making a part of the contract of insurance, it is provided that "no loss of damage by fire, happening by any invasion, foreign enemy, or any military or usurped power whatsoever, will be made good by this company."

**USURPER.** One who assumes the right of government by force, contrary to and in violation of the constitution of the country. Toul. *Droit. Civ*, n. 32.

One who intrudes himself into an office which is vacant, and ousts the incumbent without any color of title whatever; his acts are void in every respect; 33 Gratt. 513; 48 Me. 80.

**USURY.** The excess over the legal rate charged to a borrower for the use of money. Originally, the word was applied to all interest reserved for the use of money; and in the early ages taking such interest was not allowed. In the later Roman law, usury was sanctioned; and it is said that taking usury was not an offence at common law; Tyler, Usury 64; but see Ord. Usury 17.

Unless there is a law limiting the rate of interest that can be charged for money, there can be no usury; 31 Ark. 484; 91 Ga. 609; 148 Mass. 231. The enactment of a usury law cannot affect prior contracts; 76 Ga. 322; 34 Neb. 181. If a contract is usurious, no custom can legalize it; 85 Ala. 879. A note void for usury in its inception cannot be enforced by an innocent purchaser for value; 19 U. S. App. 455.

"The shifts and devices of usurers to evade the statutes against usury have taken every shape and form that the wit of man could devise, but none have been allowed to prevail. Courts have been astute in getting at the true intent of the parties and giving effect to the statute." 82 N. Y. 346.

There must be a loan in contemplation of the parties; 7 Pet. 109; 14 N. Y. 93; 6 Ind. 232; and if there be a loan, however disguised, the contract will be usurious, if it be so in other respects. Where a loan was made of depreciated bank-notes, to be repaid in sound funds, to enable the borrower to pay a debt he owed, dollar for dollar, it was considered as not being usurious; 1 Meigs 585. The *bona fide* sale of a note, bond, or other security at a greater discount than would amount to legal interest is not *per se* a loan, although the note may be indorsed by the seller and he remains responsible; 1 Ia. 80; 6 Ohio St. 19; 29 Miss. 212. But if a note, bond, or other security be made with a view to evade the laws of usury, and afterwards sold for a less amount than the interest, the transaction will be considered a loan; 15 Johns. 44; 12 S. & R. 46; 6 Ohio St. 19; and a sale of a man's own note indorsed by himself will be considered a loan. Usury cannot arise from the purchase from brokers of a note at a discount; 72 Hun 373. Nor is there usury in a transaction for the sale and repurchase of securities, where there is no loan; 122 U. S. 487. It is a general rule that a contract which in its inception is unaffected by usury can never be invalidated by any subsequent usurious transaction; 7 Pet. 109; 10 Md. 57. On the other hand, when the contract was originally usurious, and there is a substitution by a new contract, the latter will generally be considered usurious; 15 Mass. 96; but a note or other contract for the payment of money is not usurious and void for providing for the payment of more than the statutory interest after maturity; 22 Misc. Rep. 279.

There must be a contract for the return of the money at all events; for if the return of the principal with interest, or the principal only, depend upon a contingency, there can be no usury; 1 Wall. 604; but if the contingency extend only to interest, and the principal be beyond the reach of hazard, the lender will be guilty of usury if he receive interest beyond the amount allowed by law. Where the principal is put to hazard in insurances, annuities, and bottomry, the parties may charge and receive greater interest than is allowed by law in common cases, and the transaction will not be usurious; 2 Pet. 537. See 18 Wall. 375.

To constitute usury, the borrower must not only be obliged to return the principal at all events, but more than lawful interest: this part of the agreement must be made with full consent and knowledge of

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the contracting parties; 3 B. & P. 154. The fact that the usurious interest is paid in notes of another party, instead of money, is immaterial; 98 N. C. 244; 99 Ga. 291.

When the contract is made in a foreign country, the rate of interest allowed by the laws of that country may be charged, and it will not be usurious, although greater than the amount fixed by law in this; Story, Confl. of Laws § 292. Parties may contract for interest according to the place of the contract or the place of performance; 1 Wall. 298; 64 N. C. 33. Where there is no agreement made, the law of the place of the contract governs, in the absence of any intent to evade the usury laws; 72 N. Y. 472; 32 Ind. 16. A note made, dated, and payable in New York, without intent of maker that it should be elsewhere discounted, if negotiated in another state at a rate of interest lawful there, but excessive in New York, is usurious; Rorer, Int. St. Law 112; 77 N. Y. 573. See CONFLICT OF LAWS.

To constitute usury, both parties must be cognizant of the facts which make the transaction usurious; 44 Barb. 521; see 30 S. C. 61; but a mistake in law will not protect the parties; 9 Mass. 49; though a miscalculation will, it seems; 2 Cow. 770. If a contract be usurious in itself it must be taken to have been so intended; 100 N. C. 389. An agreement by a mortgagor to pay taxes on the mortgage debt is not necessarily usurious; 24 Md. 62; nor is a clause in a bill of exchange, providing attorney fees for collection; 34 Ind. 149; and so of a mortgage; 30 Ia. 131; and so of a note; 142 Ill. 589. See 80 Ga. 55. In some states the usurious excess above the lawful rate, alone, is void; 8 Phila. 84; Bisph. Eq. § 222.

A *bona fide* sale by one person of a bond of another, at an exorbitant rate of discount, is not illegal; 3 Stockt. 362. A sale of a note or mortgage for less than its face, with a guarantee of payment in full, is not usurious; 35 Barb. 484; nor is a contract to pay a bushel and a half of corn within a year, for the loan of a bushel; 12 Fla. 552. An agreement to pay interest on accrued interest is not invalid; 10 Allen 32; 55 N. Y. 621; but it has been held that compounding interest on a note is usurious; 76 N. C. 314; but see 46 Ill. App. 139.

Interest may be collected on coupons; 34 Neb. 181. See 36 *id.* 148; 5 Tex. Civ. App. 167.

The ordinary commissions allowed by the usages of trade may be charged without tainting a contract with usury; but it must plainly appear that the commissions are charged for other services, and are not merely a device to evade the law; 2 Pat. & H. 110. A bonus paid to an agent in addition to legal interest renders the loan usurious, when it enures to the benefit of the principal under the agent's contract; 153 U. S. 318. Commission may be charged by a merchant for accepting a bill; 18 Ark. 456; but a commission charged in addition to interest for advancing money is usurious; 12 La. Ann. 660. Where a banker discounts a bill payable in a distant place, he may charge the usual rate of exchange on that place; but if such charge be an excess of the usual rate it will be considered a device to cover usurious interest; 8 Ind. 58. See 93 U. S. 344. Where a gratuity is given to influence the making of a loan, it will be considered usurious; 7 Ohio St. 387. The fact that an agent, authorized to lend money for lawful interest, exacts for his own benefit, and without his principal's knowledge, more than the lawful rate, does not render the loan usurious; 58 Fed. Rep. 410; 116 U. S. 98. The burden of proof is on the person pleading usury; 22 Ga. 193; 57 Ark. 251; and where the contract is valid on its face, affirmative proof must be made that the agreement was corruptly made to evade the law; 97 U. S. 13. Where parties exchange their notes for mutual accomodation, and both or either are sold at a higher than the legal rate, they are usurious; Hill & D. 65.

The common practice of reserving the interest on negotiable paper at the time of making the loan is very ancient, and is sanctioned by law; Sewell, Banking. An agreement to pay annually in advance is not usurious; 36 Neb. 148; 49 Ill. App. 564.

The offence of taking usury is not condoned by the absence of *intent* to violate the statute; 50 N. Y. 437; but see 20 Wisc. 407.

The one who has contracted to pay usury may set up the defence; 55 Ind. 341; 17 Kans. 355; and so may his privies; 49 N. Y. 636; 47 Ala. 362; and his legal representatives; 100 Ala. 465; and his surety; 39 Ind. 106 (but see 50 Vt. 105; 35 N. J. L. 285); or a guarantor; 20 Me. 28; but one who buys an equity of redemption cannot set up the defence against the mortgage; 24 N. J. Eq. 120; nor can a second mortgagee set up usury as a defence to a prior mortgage; 17 Kans. 355 (but see 26 Ind. 94; 59 Barb. 239).

The defence of usury must be supported by clear proof; Perl. Int. 282; 57 Ill. 138; 36 Wisc. 390; 138 N. Y. 623; which may be extrinsic to the contract; 9 Pet. 418; an express agreement for usury need not be proved; 2 Pick. 145.

Usurious interest does not render a mortgage void; 92 Ga. 675; 81 *id.* 276; and where a loan is originally usurious, the defence of usury applies to all renewals; and when action is brought on any renewal note, no matter how remote, all payments of interest on such usurious loan may be applied on the principal; 39 Neb. 485; 24 *id.* 630; 37 Minn. 441; *id.* 182; and a second note renewing a former one, but including an additional sum, is usurious; 101 N. C. 99. National banks may charge interest at the rate allowed by the laws of the state, territory, or district where the bank is located, and no more, except that where, by the laws of any state, a different rate is limited for banks of issue organized under state laws, they may charge such rate. When no rate is fixed by the laws of the



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state, territory, or district, the bank may charge a rate not exceeding seven per centum, and such interest may be taken in advance. And the purchase, discount, or sale of a *bona fide* bill of exchange, payable at another place than the place of such purchase, at not more than the current rate of exchange for sight drafts, in addition to the interest, shall not be considered as usurious; R. S. § 5197.

The charging a rate of interest greater than is allowed when knowingly done shall be deemed a forfeiture of the entire interest. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid, provided such action is commenced within two years from the time the usurious action occurred; R. S. § 5198.

It is now conclusively settled that the penalty declared in R. S. § 5198 is superior to and exclusive of any state penalty; 91 U. S. 29; 72 Pa. 209; 44 Ind. 298; 115 Mass. 539; *contra*, 57 N. Y. 100. A national bank is not justified in charging a usurious rate of interest because the statutes of the state permit usurious interest to be taken only by certain specified banks; 11 Bank. Mag. 787. See also 141 U. S. 384; 3 U. S. App. 7; 18 Sup. Ct. R. 390.

See INTEREST. 9 L. R. A. 292.

**UTAH.** One of the states of the United States, to which it was admitted July 4, 1896, under the act of January 16, 1896.

The LEGISLATIVE POWER is vested in a Senate and House of Representatives.

The *Senate* consists of eighteen members chosen for four years. The *House of Representatives* consists of forty-five members chosen biennially.

Senators and representatives must be citizens of the United States, not under twenty-five years of age, residents of the state for three years, and of the district for one year.

The EXECUTIVE DEPARTMENT consists of a governor, secretary of state, state auditor, state treasurer, attorney general, and superintendent of public instruction. The governor is elected for four years. The governor, justices of the supreme court, and attorney-general constitute a board of pardons. The governor has power to grant respites or reprieves except in cases of treason or impeachment.

The JUDICIAL POWER is vested in the senate as a court of impeachment, a supreme court, district courts, justices of the peace, and such other courts as may be established by law.

The *Supreme Court* consists of three judges, but after 1905 the legislature may increase the number to five. The term of office is six years. It has original jurisdiction to issue writs of *mandamus*, *certiorari*, prohibition, *quo warranto*, and *habeas corpus*. Otherwise it has appellate jurisdiction only.

*District Courts.*—The state is divided into seven judicial districts, for each of which at least one, and not exceeding three judges, are chosen. These courts have original jurisdiction in all matters, civil and criminal, not prohibited by law, and appellate jurisdiction from all inferior courts.

**UTERINE** (Lat. *uterus*). Born of the same mother.

**UTFANGENETHEF, UTFANGTHEF.** The right of a lord to punish a thief dwelling out of his liberty, and committing theft without the same, if taken within the jurisdiction of the manor. Cowel. See INFANGENETHEF.

**UTI POSSIDETIS** (Lat. as you possess). A phrase used to signify that the parties to a treaty are to retain possession of what they have acquired by force during the war. Boyd's Wheat. Int. Law § 545.

A treaty which terminates a war may adopt this principle or that of the *status quo ante bellum* (*q. v.*), or a combination of the two. In default of any treaty stipulation, the former doctrine prevails. See TREATY OF PEACE.

**UTILITY.** See PATENT.

**UTRUBI. In Scotch Law.** An interdict as to movables, by which the colorable possession of a *bona fide* holder is continued until the final settlement of a contested right: corresponding to *uti possidetis* as to heritable property. Bell, Dict.

**UTTER. In Criminal Law.** To offer; to publish.

To utter and publish a counterfeit note is to assert and declare, directly or indirectly, by words or actions, that the note offered is good. It is not necessary that it should be *passed* in order to complete the offence of uttering; 2 Binn. 338; Cl. Cr. L. 301. It seems that reading out a document, although the party refuses to show it, is a sufficient uttering; Jebb, Cr. Cas. 282. The merely showing a false instrument with intent to gain a credit, when there was no intention or attempt made to pass it, it seems, would not amount to an uttering; Russ. & R. 200. Using a forged instrument in some way, in order to get money or credit upon it, *or by means of it*, is sufficient to constitute an uttering; 2 Den. Cr. Cas. 475.

The word *uttering*, used of notes, does not necessarily import that they are transferred as genuine; it includes any delivery of a note for value (as by a *sale* of the notes as spurious) with the intent that they should be passed upon the public as genuine; 1 Abb. U. S. 135.

The offence is complete when a forged instrument is offered; it need not be accepted; 2 Bish. Cr. L. § 605. Recording a forged deed is uttering it; 27 Mich. 386; so is bringing suit on a forged paper; 20 Gratt. 733. The legal meaning of the word *utter* is in substance to *offer*; Bish. Cr. L. § 607.

**UTTER BARRISTER. In English Law.** Those barristers who plead without the bar, and are distinguished from benchers, or those who have been readers and who are allowed to plead within the bar, as the king's council are. See BARRISTER.

**UXOR** (Lat.). **In Civil Law.** A woman lawfully married.

**UXORCIDE.** The killing of a wife by her husband; one who murders his wife. It is not a technical term of the law. Black, L. Dict.

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# V.

**VACANCY.** A place which is empty. The term is principally applied to cases where the office is not filled. As applied to an office, it has no technical meaning; 93 Cal. 153; 96 Ind. 374.

By the constitution of the United States, the president has the power to fill vacancies that may happen during the recess of the senate. See TENURE OF OFFICE; OFFICER; RESIGNATION; 1 So. L. Rev. N. S. 184.

**VACANT.** See OFFICER.

**VACANT POSSESSION.** A term applied to an estate which has been abandoned by the tenant: the abandonment must be complete in order to make the possession vacant, and, therefore, if the tenant have goods on the premises it will not be so considered. 2 Chitty, Bail. 177; 2 Stra. 1064.

A dwelling-house furnished throughout, from which the owner has removed for a season, intending to return and resume possession, was held not vacant, within the meaning of a policy of insurance; 81 N. Y. 184.

**VACANT SUCCESSION.** An inheritance for which the heirs are unknown.

**VACANTIA BONA. In Civil Law.** Goods without an owner. Such goods escheat.

**VACATE.** To annul; to render an act void: as, to vacate an entry which has been made on a record when the court has been imposed upon by fraud or taken by surprise.

**VACATION.** That period of time between the end of one term and beginning of another. During vacation, rules and orders are made in such cases as are urgent, by a judge at his chambers. See TERM.

**VACATION BARRISTER.** See BARRISTER.

**VACCARIA** (Lat. *vacca*, a cow). A dairy-house. Co. Litt. 5 *b*.

**VACCINATION.** The Vaccination Act of 1898 requires that every child born in England shall be vaccinated within six months of its birth. But if a parent within four months from the birth of the child satisfies two justices that he conscientiously believes that vaccination would be prejudicial to the health of the child, and delivers within seven days thereafter a certificate from such justices to the vaccination officer, he is exempted from the penalties provided in the act for noncompliance therewith. See 42 Sol. Jour. 815.

It is within the police power of the state to compel the vaccination of children attending the public schools; 167 Ill. 67; and an act requiring compulsory vaccination is not in conflict with the provisions of the federal constitution; 32 Atl. Rep. 348. Pupils may be excluded for refusing to be vaccinated during a smallpox scare; 162 Pa. 476; they may be denied admission to the schools; 32 N. Y. Suppl. 322; but it has been held that a rule of the board of health excluding a pupil who is not vaccinated is void in the absence of a statute authorizing it; 37 L. R. A. (Wis.) 157; 167 Ill. 67. See 25 L. R. A. 152; 28 *id.* 820; 47 Am. St. Rep. 546; POLICE POWER.

**VADIUM MORTUUM** (Lat.). A mortgage or *dead pledge;* it is a security given by the borrower of a sum of money, by which he grants to the lender an estate in fee, on condition that if the money be not repaid at the time appointed, the estate so put in pledge shall continue to the lender as dead or gone from the mortgagor. 2 Bla. Com. 257.

**VADIUM PONERE.** To take bail for the appearance of a person in a court of justice. Toml.

**VADIUM VIVUM** (Lat.). A species of security by which the borrower of a sum of money made over his estate to the lender until he had received that sum out of the issues and profits of the land; it was so called because neither the money nor the lands were lost, and were not left in dead pledge, but this was a *living* pledge, for the profits of the land were constantly paying off the debt. Littleton § 206; 1 Powell, Mortg. 3.

**VAGABOND.** One who wanders about idly, who has no certain dwelling. It is not synonymous with vagrant. 28 Tex. App. 562.

**VAGRANCY.** When not defined by a statute, it must be considered such a vagabondage as fairly comes within the common-law meaning of the word. 41 Mich. 299; 90 *id.* 3.

**VAGRANT.** A person who lives idly, without any settled home. A person who refuses to work, or goes about begging. This latter meaning is the common one in statutes punishing vagrancy. See 1 Wils. 331; 8 Term 26; 90 Mich. 3. See TRAMP.

**VAGRANT ACT. In English Law.** The statute 5 Geo. IV. c. 83, which is an act for the punishment of idle and disorderly persons. 2 Chit. Stat. 145.

**VAGUENESS.** Uncertainty.

Certainty is required in contracts, wills,

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pleadings, judgments, and, indeed, in all the acts on which courts have to give a judgment, and if they be vague so as not to be understood, they are, in general, invalid; 5 B. & C. 583. A charge of frequent intemperance and habitual indolence is vague and too general; 2 Mart. La. N. S. 530. See 36 Ch. Div. 348; CERTAINTY; NONSENSE; UNCERTAINTY.

**VALESHERIA.** See ENGLESHIRE.

**VALID.** Having force, of binding force; legally sufficient or efficacious; authorized by law. Anderson, L. Dict.

**VALIDITY.** Legal sufficiency in contradistinction to mere regularity. An official sale, an order, judgment, or decree may be regular; the whole practice in reference to its entry may be correct, but still invalid for reasons going behind the regularity of its forms. 1 Flipp. 487.

**VALOR BENEFICIORUM** (Lat.). The value of every ecclesiastical benefice and preferment, according to which the first-fruits and tenths are collected and paid. The valuation by which the clergy are at present rated was made 26 Hen. VIII., and is commonly called The King's Books. 1 Sharsw. Bla. Com. *284.

**VALOR MARITAGII** (Lat.). The amount forfeited under the ancient tenures by a ward to a guardian who had offered her a marriage without disparagement, which she refused. It was so much as a jury would assess, or as any one would give *bona fide*, for the value of the marriage. Littleton 110. A writ which lay against the ward, on coming of full age, for that he was not married by his guardian, for the *value of the marriage*, and this though no convenient marriage had been offered. *Termes de la Ley.*

**VALUABLE CONSIDERATION.** See CONSIDERATION.

**VALUABLE SECURITY.** Every valuable security is a valuable thing, but many valuable things are not valuable securities. The words "other valuable things" include everything of value; 35 N. J. L. 452; as a promissory note; 29 *id.* 13. Ice has been held a *valuable article*; 33 Ind. 402. *Valuable papers* are not papers having a money value, but only such as are kept and considered worthy of being taken care of by the particular person; 2 Head (Tenn.) 306. They have been defined to be such as are regarded by a testator as worthy of preservation: in his estimation, of some value. The term is not confined to deeds for lands or slaves, obligations for money or certificates of stock: 5 Coldw. 129.

**VALUATION.** The act of ascertaining the worth of a thing. The estimated worth of a thing. 7 Nev. 99. See VALUE.

**VALUATION LIST. In English Law.** A list of all the ratable hereditaments in a parish.

**VALUE.** The utility of an object. The worth of an object in purchasing other goods. The first may be called value in use; the latter, value in exchange.

When applied without qualification to property of any description, necessarily means the price which it will command in the market; 17 Wend. 399. See 30 W. Va. 102. In an indictment, it has been held to be a synonym of "effect" or "import." 25 Ohio St. 488.

Value differs from price, *q. v.* The latter is applied to live cattle and animals; in a declaration, therefore, for taking cattle, they ought to be said to be of such a price: and in a declaration for taking dead chattels, or those which never had life, it ought to lay them to be of such a value; 2 Lilly, Abr. 639. See 119 Mass. 126.

It is also distinguished from income when applied to property; 45 Barb. 247. As used in reference to lands taken under eminent domain, it is a relative term, depending on the circumstances. Salable value, actual value, and cash value all mean the same thing and are designed to effect the same purpose; Burr. Tax. 227. See 101 U. S. 162. See INTRINSIC VALUE. Upon the question of the value of an article evidence of its original cost is relevant; 83 Fed. Rep. 95.

**VALUE RECEIVED.** A phrase usually employed in a bill of exchange or promissory note, to denote that a consideration has been given for it. These words are not necessary; 11 A. & E. 702; 21 Wisc. 607; though it is otherwise in some states if the bill or note be not negotiable; 19 Conn. 7; 29 Ill. 104; extrinsic evidence is admissible between immediate parties to prove absence, failure, or illegality of consideration; 5 Allen 589; 9 *id.* 45, 253.

The expression value received, when put in a bill of exchange, will bear two interpretations; the drawer of the bill may be presumed to acknowledge the fact that he has received value of the payee; 3 Maule & S. 351; 2 McLean 213; or when the bill has been made payable to the order of the drawer and accepted, it implies that value has been received by the acceptor; 5 Maule & S. 65; 19 Barb. 409. In a promissory note, the expression imports value received from the payee; 5 B. & C. 360; and sufficiently expresses a consideration; 149 U. S. 298; although not necessarily in money; 32 Ia. 265.

**VALUED POLICY.** See POLICY.

**VARA.** A measure used in Mexican land grants equal to 32.9927 inches. 161 U. S. 219.

**VARIANCE.** A disagreement or difference between two parts of the same legal proceeding which ought to agree together. Variances are between the writ and the declaration, and between the declaration, or bill in equity, and the evidence.

Variance in matter of substance is fatal to the action; 4 Ala. 319; 10 Johns. 141; and is ground for demurrer or arrest of judgment; 3 Den. 356; 7 T. B. Monr. 290.

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but if in matter of form merely, must be pleaded in abatement; 1 Ill. 298; 1 McLean 319; or special demurrer; 2 Hill S. C. 585; and a variance between the allegations and evidence upon *some material* points only is as fatal as if upon all; 7 Taunt. 385; but, if it be merely formal or immaterial matter, will be disregarded; 7 Cra. 408; 11 Ala. 542. The court may allow a technical variance between the pleadings and proofs to be cured by an amendment not introducing any other cause of action or affecting the merits of the case between the parties; 138 U. S. 623. Slight variance from the terms of a written instrument which is professedly set out in the words themselves is fatal; Hampst. 294.

It is too late after plea to take advantage of a variance between the description in the writ and the declaration of property replevied; 95 Mich. 594.

Where, in an action on contracts, the pleader did not set out the exact words of the contract, and a different contract expressed in different words was proved, there is no real variance, as the difference between the declaration and the proofs must be real and tangible to constitute a variance; 25 U. S. App. 58. Where the plaintiff declared that his cattle died of "Texas cattle fever," and that it was contagious, and the court found that the cattle died of "Texas fever," and it was infectious, held that the variance was immaterial; 163 U. S. 468. So where in an indictment the name of the "National State Bank," "carrying on a national banking business at the City of Exeter," was used instead of "The National Granite State Bank of Exeter;" 162 U. S. 87.

**VASSAL. In Feudal Law.** The name given to the holder of a fief bound to perform feudal service: this word was then always correlative to that of lord, entitled to such service.

The vassal himself might be lord of some other vassal.

In after-times, this word was used to signify a species of slave who owed servitude and was in a state of dependency on a superior lord. 2 Bla. Com. 53.

**VAVASOUR** (diminutive from *vasalus*, or, according to Bracton, from *vas sortitus ad valitudinem*). One who was in dignity next to a baron. Britton 109; Bracton, lib. 1, c. 8. One who held of a baron. Encyc. Brit.

**VECTIGALIA. In Roman Law.** Duties which were paid to the prince for the importation and exportation of certain merchandise. They differed from tribute, which was a tax paid by each individual. Code 4. 61. 5. 13.

**VEHICLE.** The word includes every description of carriage or other artificial contrivance used or capable of being used as a means of transportation on land; U. S. Rev. Stat. § 4; a street sprinkler is a vehicle; 71 Mo. 92; but not a street car; 14 Pa. 484; or a ferry boat; 25 Ind. 286. See BICYCLE; TEAM.

**VEIN.** See LODE.

**VEJOURS.** An obsolete word, which signified viewers or experts.

**VENAL.** Something that is bought. The term is generally applied in a bad sense; as, a venal office is an office which has been purchased.

**VENDEE.** A purchaser; a buyer.

**VENDITION.** A sale; the act of selling.

**VENDITIONI EXPONAS** (Lat.). That you expose to sale.

**In Practice.** The name of a writ of execution, directed to the sheriff, commanding him to sell goods or chattels, and in some states, lands, which he has taken in execution by virtue of a *fieri facias*, and which remain unsold.

Under this writ the sheriff is bound to sell the property in his hands, and he cannot return a second time that he can get no buyers; Cowp. 406.

**VENDITOR REGIS** (Lat.). The king's salesman, or person who exposes to sale goods or chattels seized or distrained to answer any debt due to the king. Cowel. This office was granted by Edw. I. to Philip de Lordiner, but was seized into the king's hands for abuse thereof. 2 Edw. II.

**VENDOR.** The seller; one who disposes of a thing in consideration of money.

**VENDOR'S LIEN.** An equitable lien allowed the vendor of land sold for the unpaid purchase-money. 3 Pom. Eq. Jur. § 1260. See LIEN.

**VENEZUELA.** A republic of South America. The president is elected by the federal council for four years and is assisted by six ministers and a federal council of sixteen members appointed by congress. The senate is selected for four years and consists of three members for each of the eight states. The house of representatives, elected for four years, is chosen on a basis of representation by the people. Each state has its own executive and legislature.

**VENIRE FACIAS** (Lat.). That you cause to come. According to the English law, the proper process to be issued on an indictment for any petit misdemeanor, on a penal statute, is a writ called *venire facias*.

It is in the nature of a summons to cause the party to appear; 4 Bla. Com. 18, 351. See Thomp. & M. Juries 62.

**VENIRE FACIAS JURATORES** (Lat.). (Frequently called *venire* simply.)

The name of a writ directed to the sheriff, commanding him to cause to *come* from the body of the county, before the court from which it issued, on some day certain and therein specified, a certain number of qualified citizens who are to act as jurors

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in the said court. Steph. Pl. 104. See 6 S. & R. 414; 3 Chitty, Pr. 797; JURY.

**VENIRE FACIAS DE NOVO** (Lat.). The name of a new writ of *venire facias;* this is awarded when, by reason of some irregularity or defect in the proceeding on the first venire, or the trial, the proper effect of the venire has been frustrated, or the verdict become void in law; as, for example, when the jury has been improperly chosen, or an uncertain, ambiguous, or defective verdict has been rendered. Steph. Pl. 120; or when a judgment is reversed on a writ of error.

A motion for a *venire de novo* is properly denied, where there is no defect, ambiguity, or uncertainty in the verdict; 6 Ind. App. 268; 8 *id.* 590; and upon reversal of a judgment, the awarding the writ is controlled by the character of the case and the sound discretion of the appellate court; 98 Pa. 142. See RES JUDICATA.

**VENTE A REMERE. In French Law.** A sale made, reserving a right to the seller to repurchase the property sold by returning the price paid for it.

The term is used in Canada and Louisiana. The time during which a repurchase may be made cannot exceed ten years, and, if by the agreement it so exceed, it shall be reduced to ten years.

**VENTER, VENTRE** (Lat. the belly). The wife; for example, a man has three children by the first and one by the second venter. A child is said to be *en ventre sa mere* before it is born; while it is a fœtus. See UNBORN CHILD.

**VENTRE INSPICIENDO.** See DE VENTRE INSPICIENDO; JURY OF WOMEN; PHYSICAL EXAMINATION.

**VENUE** (L. Lat. *visnetum*, neighborhood. The word was formerly spelled *visne*. Co. Litt. 125 *a*).

The county in which the facts are alleged to have occurred, and from which the jury are to come to try the issue. Gould, Pl. c. 3, § 102; 1 How. 241. Some certain place must be alleged as the place of occurrence for each traversable fact; Com. Dig. *Pleader* (C. 20). Generally, in modern pleading, in civil practice, no special allegation is needed in the body of the declaration, the venue in the margin being understood to be the place of occurrence till the contrary is shown; Hempst. 246.

*In local actions* the true venue must be laid; that is, the action must be brought in the county where the cause of action arose, where the property is situated, in actions affecting real property; 2 Zabr. 204; and there can be no change of venue in such cases; 3 N. Y. 204. Thus, in actions on a lease at common law, founded on privity of contract, as debt or covenant by lessor or lessee; 1 Saund. 241 *b*; 3 S. & R. 500; venue is transitory, but when founded in privity of estate, as in case of assignment, the venue is local; 1 Saund. 257. By various early statutes, however, actions on leases have become generally transitory. In such action, some particular place, as, a town, village, or parish, must formerly have been designated; Co. Litt. 125. But it is said to be no longer necessary except in replevin; 2 East 503; 1 Chitty, Pl. 251. As to where the venue is to be laid in case of a change of county lines, see 18 Ga. 690; 16 Pa. 3; 102 Cal. 501.

*In transitory actions* the venue may be laid in any county the plaintiff chooses; that is, he may bring suit wherever he may find the defendant, and lay his cause of action to have arisen there, even though the cause of action arose in a foreign jurisdiction; Steph. Pl. 306; 18 Ga. 690; 1 How. 241. In case the cause was to be tried in a different county from that in which the matter actually arose, the venue was anciently laid by giving the place of occurrence, with a scilicet giving the place of trial; 1 How. 241; 3 Zabr. 279. In some cases, however, by statutes, the venue in transitory actions must be laid in the county where the matter occurred or where certain parties reside; 3 Bla. Com. 294. And generally, by statute, it must be in the county where one of the parties resides, when between citizens of the same state.

*In criminal proceedings* the venue must be laid in the county where the occurrence actually took place; 4 C. & P. 363; and the act must be proved to have occurred in that jurisdiction; 26 Pa. 513; 4 Tex. 450; 6 Cal. 202. Where the offence is committed by letter, the sender may be tried at the place where the letter is received by the person to whom it is addressed; 136 U. S. 256. See 49 Fed. Rep. 843. An indictment for murder charging that an offence was committed on board of an American vessel on the high seas within the jurisdiction of the court and within the admiralty jurisdiction of the United States, sufficiently avers the locality of the offence; 154 U. S. 134. One who obtains goods from a salesman under false pretences may be tried in the county from which the goods were shipped; 167 Pa. 225.

Statement of venue in the margin and reference thereto in the body of an indictment is a sufficient statement of venue; 79 Me. 78; 8 Mo. 283; and the venue need not be stated in the margin if it appears from the indictment; 5 Gray 478; 25 Conn. 48; 2 McLean 580.

Want of any venue is a cause for demurrer; 5 Mass. 94; or abatement; Archb. Civ. Pl. 78; or arrest of judgment; 4 Tex. 450. So defendant may plead or demur to a wrong venue; 13 Me. 130. *Change* of venue may be made by the court to prevent, and not to cause a defeat of justice; 3 Bla. Com. 294; 2 Wisc. 397; 20 Ill. 259, both in civil; 7 Ind. 110; 31 Miss. 480, and criminal cases; 7 Ind. 160; 28 Ala. N. s. 28; 5 Harring. 512; and such change is a matter of right on compliance with the requirements of the law; 9 Tex. 358; 2 Wisc. 479,

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15 Ill. 511; 8 Mo. 606. That such change is a matter of discretion with the court below, see 28 Ala. N. s. 28; 31 Miss. 490; 3 Cal. 410; 8 Ind. 439; 50 Kan. 773; 75 Ia. 50; 91 Tenn. 617; 131 U. S. 22.

See JURISDICTION.

**VERAY.** An ancient manner of spelling *vrai*, true. In the English law there are three kinds of tenants: *veray*, or true *tenant*, who is one who holds in fee-simple; *tenant by the manner* (see TENANT); and *veray tenant by the manner*, who is the same as tenant by the manner, with this difference only, that the fee-simple, instead of remaining in the lord, is given by him or by the law to another. Hamm. N. P. 394.

**VERBAL.** Parol; by word of mouth: as verbal agreement; verbal evidence. Sometimes incorrectly used for oral.

**VERBAL NOTE.** In diplomatic language, a memorandum or note, not signed, sent when an affair has continued a long time, without any reply, in order to avoid the appearance of an urgency which perhaps the affair does not require, and, on the other hand, not to afford any ground for supposing that it is forgotten, or that there is no intention of prosecuting it any further, is called a *verbal note*.

**VERBAL PROCESS. In Louisiana.** A written account of any proceeding or operation required by law, signed by the person commissioned to perform the duty, and attested by the signature of witnesses. See PROCES VERBAL.

**VERDEROR** (fr. French *verdeur*, fr. *vert* or *verd*, green; Law L. *viridarius*). An officer in king's forest, whose office is properly to look after the *vert*, for food and shelter for the deer. He is also sworn to keep the assizes of the forest, and receive and enrol the attachments and presentments of trespasses within the forest, and certify them to the swanimote or justice-seat; Cowel; Manwood, For. Law 332.

**VERDICT.** The unanimous decision made by a jury and reported to the court on the matters lawfully submitted to them in the course of a trial of a cause.

A *general* verdict is one by which the jury pronounce at the same time on the fact and the law, either in favor of the plaintiff or defendant. Co. Litt. 228; 4 Bla. Com. 461.

A general verdict is a finding by the jury in the terms of the issue referred to them. 8 Ga. 208; Tidd, Pr. 798.

A general verdict must be regarded as affirming the truth of every fact necessary to support the general conclusion arrived at, and every reasonable presumption arises in its favor, while nothing will be presumed in aid of the special findings as against the general verdict; 118 Ind. 5. If there is any reasonable hypothesis whereby a general verdict and the special finding can be reconciled, judgment must follow the general verdict; 117 *id.* 234; 119 *id.* 218; and a general verdict on an indictment is sufficient if supported by any one of the counts; 101 N. C. 680; 85 Ala. 14; 34 Fed. Rep. 873.

The jury may find such a verdict whenever they think fit to do so.

A *partial* verdict in a criminal case is one by which the jury acquit the defendant of a part of the accusation against him, and find him guilty of the residue.

A *privy* verdict is one delivered privily to a judge out of court. A verdict of this kind is delivered to the judge after the jury have agreed, for the convenience of the jury, who, after having given it, separate. This verdict is of no force whatever; and this practice, being exceedingly liable to abuse, is seldom, if ever, allowed in the United States. The jury, however, are allowed in some states, in certain cases, to seal their verdict and return it into court, as, for example, where a verdict is agreed upon during the adjournment of the court for the day. When this is done in criminal cases it is usually the right of the defendant to have the jury present in court when the verdict is opened; 10 Fed. Rep. 269. See PRESENCE; SEALING A VERDICT.

A private verdict must afterwards be given publicly in order to give it any effect.

A *public* verdict is one delivered in open court.

A *special* verdict is one by which the facts are found, and the law is submitted to the judges. 4 Rand. 504; 1 Wash. C. C. 499; 2 Mas. 31. The jury may find a special verdict in criminal cases, but they are not obliged in any case to do so; Cooley, Const. Lim. 393. The special verdict or findings of a jury in order to sustain a judgment, must pass upon all the material issues made in the pleadings so as to enable the court to say upon the pleadings and verdict, without looking at the evidence, which party is entitled to judgment; 40 Minn. 375; 48 *id.* 397; 38 *id.* 260; 150 U. S. 597. A special verdict need only find such facts as are alleged in the pleadings upon one side and denied upon the other; 69 Tex. 124.

The jury have an option, instead of finding the negative or affirmative of the issue, as in a general verdict, to find all the facts of the case as disclosed by the evidence before them, and, after so setting them forth, to conclude to the following effect: That they are ignorant, in point of law, on which side they ought upon those facts to find the issue; that if upon the whole matter the court shall be of opinion that the issue is proved for the plaintiff, they find for the plaintiff accordingly, and assess the damages at such a sum, etc.; but if the court are of an opposite opinion, they find for defendant. This form of finding is called a *special verdict*. In practice they have nothing to do with the formal preparation of the special verdict. When it is agreed that a verdict of that kind is to be given, the jury merely declare their opinion as to any fact remaining in doubt, and then the verdict is adjusted without their further interference. It is settled under the correction of the judge, by the counsel on either side, according to the state of the facts as found by the jury, with respect to all particulars on which they have delivered an opinion, and, with respect to other particulars, according to the state of facts which it is agreed that they ought to find upon the evidence before them. The special verdict, when its form is thus settled, is, together with the

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whole proceedings on the trial, then entered on record; and the question of law, arising on the facts found, is argued before the court in banc; 3 Bla. Com. 377.

There is another method of finding a special verdict: this is when the jury find a verdict generally for the plaintiff, but subject nevertheless to the opinion of the judges or the court above on a *special case*, stated by the counsel on both sides, with regard to a matter of law; 3 Bla. Com. 378. See 10 Mass. 64; 11 *id.* 358.

A juror may dissent at any time from a verdict to which he had before agreed until the same is recorded; 15 Am. L. Rev. 423. A mistake in the verdict may be corrected before it is recorded and the jury discharged; 98 N. C. 678.

Where a jury being equally divided in opinion come to an agreement by *lot*, it was formerly held that its verdict was legitimate; 1 Keble 811; but such verdicts are now held to be illegal, and will be set aside. The "quotient" verdict is so called from the fact that the jurors, having agreed to find for the plaintiff, further agree that their verdict shall be in such sum as is ascertained by each juror privately marking down the sum of money to which he thinks the plaintiff entitled, the total of these sums being divided by twelve. This method is almost universally condemned, the ground of the objection being that such an agreement cuts off all deliberation on the part of the jurors, and places it in the power of one of their number by naming a sum extravagantly high or ridiculously low to make the quotient unreasonably large or small; 6 Sm. & M. 55; 1 Wash. Ty. 329; 134 Ind. 166; so of a verdict in a criminal case fixing the term of imprisonment; 30 Tex. Cr. Rep. 156; *contra*, in the case of a fine in a criminal case for libel; 95 Ky. 322. But where the calculation is purely informal, for the purpose of ascertaining the sense of the jury, the objection is obviated, and the verdict will stand; 1 Humph. 399; 98 Ill. 410; 74 Ia. 659; 23 Neb. 602; 77 Cal. 588; 40 Kan. 588; 3 Misc. Rep. 322. A verdict obtained by taking one-twelfth of the aggregate amount of the several estimates of the jurors is not objectionable when there was no antecedent agreement to be bound by the result, and when each juror deliberately accepted the amount thus ascertained; 57 Fed. Rep. 898; 37 Neb. 742; but if in pursuance of an agreement to be bound by the result, the verdict must be set aside; 1 Col. App. 250; 85 Tenn. 246; 25 Cal. 399; 112 Ill. 656; 17 R. I. 240. So where two of the jurors agree that if one places a coin and the other guesses heads or tails, and the guess is right, they will agree with the majority; 23 Cal. 47; or where a verdict is reached by drawing lots it will be set aside; 39 Cal. 489; 68 Ga. 182; 20 Ia. 195; 160 Mass. 395. See JURY.

A verdict allowing a larger sum than is claimed in the petition must be set aside; 78 Ia. 300. Where a verdict in an action for breach of covenant is larger than the plaintiff's claim a remittitur is properly allowed; 60 Vt. 486; and a remission of a part of the verdict, followed by a judgment for the remaining sum, as a condition of the denial of a new trial, does not deprive the defendant of his constitutional right to have the question of damages tried by a jury, or constitute a re-examination of the facts tried by the jury in violation of the 7th amendment of the U. S. constitution; 180 U. S. 69. A verdict received on Sunday is valid; 29 U. S. App. 32; a third successive verdict was set aside in 164 U. S. 229.

See NEW TRIAL; TRIAL; AFFORCE THE ASSIZE.

**VERGE.** An uncertain quantity of land, from fifteen to thirty acres. Toml. See COURT OF THE MARSHALSEA; VIRGA.

**VERIFICATION** (Lat. *verum*, true, *facio*, to make). An averment by the party making a pleading that he is prepared to establish the truth of the facts which he has pleaded.

Whenever new matter is introduced on either side, the plea must conclude with the verification or averment, in order that the other party may have an opportunity of answering it; 1 Saund. 103, n. 1. This applies only to pleas.

In one instance, however, new matter need not conclude with a verification, and then the pleader may pray judgment without it: for example, when the matter pleaded is merely negative; Lawes, Pl. 145. The reason of it is evident: a negative requires no proof; and it would, therefore, be impertinent or nugatory for the pleader, who pleads a negative matter, to declare his readiness to prove it.

The usual form of verification of a plea containing matter of fact is, "*And this he is ready to verify*," etc. See 3 Bla. Com. 309.

See BILL; INJUNCTION.

**In Practice.** The examination of the truth of a writing; the certificate that the writing is true. See AUTHENTICATION.

**VERIFY.** Sometimes to confirm and substantiate by oath, and sometimes by argument. 3 How. Pr. 284.

**VERMONT.** One of the United States.

At the outbreak of the Revolution the people of Vermont joined their brethren in the contest, though independent of the federal government. In 1777 they declared their territory to be "a free independent jurisdiction," and adopted a constitution which with subsequent amendments is still the constitution of the state. Under this constitution the state maintained its government and its independence for fourteen years, until its admission to the Union in 1791. The institutions of Vermont were modelled in large part from those of Connecticut (Art. 25).

Every man of the age of twenty-one years, born in the United States or naturalized, who has resided one year in the state, is of quiet and peaceable behavior, and takes the oath of allegiance, becomes a freeman of the state.

The constitution was amended in 1786, 1793, 1828, 1836, 1850, and 1870.

THE EXECUTIVE POWER of the state is vested in the governor, lieutenant-governor, and treasurer, who are elected bi-ennially. The governor has no power of appointment to office except of his own secretary, unless in case of vacancies occurring during the recess of the legislature. He has power to grant pardons except in cases of impeachment and of treason and murder in which he may reprieve, but not pardon, until after the next session of the legislature, and cannot commute.

THE LEGISLATIVE POWER is exercised by a senate of thirty members, elected by the counties in proportion to the population, each county electing at least one; and by a house of representatives of about two hundred and thirty members, of whom each town in the state elects one and no more.

THE JUDICIARY POWER is vested in a supreme court, courts of chancery, county courts, probate courts, and justices of the peace. The *supreme court* consists of a chief justice and six assistant justices, who are elected by the legislature biennially. It has original jurisdiction in cases of *mandamus*, *quo warranto*, and petitions for new trials, and appellate jurisdiction from all final decrees in the courts of chancery, and by writ of error on exceptions upon questions of law in all cases of the county courts.

The *courts of chancery* are holden twice a year in each county by a justice of the supreme court, and have the general powers of the English courts of chancery.

The *county courts* are holden by a justice of the supreme court and two assistant judges elected by the people for the county biennially. They have general original jurisdiction in all actions for recovery of lands or involving the title thereto, in actions for divorce, *audita querela*, and upon money demands above the sum of two hundred dollars, and in certain cases below that sum; and in proceedings for establishing or discontinuing roads and bridges, removal of paupers, etc.; and they have appellate jurisdiction from the probate courts, and from the judgments of justices of the peace in all criminal cases, and in all civil cases

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where the demand exceeds ten dollars, or if upon note, twenty dollars.

The *probate courts* are holden by judges of probate, elected by the freemen biennially for the probate districts, each of which is either a county or a division of a county. The probate courts have exclusive original jurisdiction of the settlement of the estates of deceased persons, of guardianship, and of proceedings in insolvency.

**VERSUS.** Against; as, A B *versus* C D. This is usually abbreviated *v.* or *vs.*

Vs. and versus have become ingrafted upon the English language; their meaning is as well understood and their use quite as appropriate as the word *against* could be; 25 N. H. 523. See TITLE.

**VERT.** Everything bearing green leaves in a forest. Manwood, For. Law 146.

**VERY LORD AND VERY TENANT.** They that are immediate lord and tenant one to another. Cowel.

**VESSEL. In Maritime Law.** A ship, brig, sloop, or other craft used in navigation. 1 Boulay-Paty, tit. 1, p. 100. The term is rarely applied to any water craft without a deck; 3 Mas. 137; but has been used to include everything capable of being used as a means of transportation by water; 27 La. Ann. 607.

By R. S. § 3, "the word 'vessel' includes every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water. See 48 Fed. Rep. 703.

A floating elevator towed from place to place, and used to transfer grain, has the characteristics of a vessel; 8 Bened. 506. So of a scow adapted only for use in port in carrying ballast to and from vessels, having neither steam power nor sails nor rudder, and moving by steam tugs; 3 Fed. Rep. 411; so of canal boats; *id.*; so of a scow built for carrying a steam shovel worked by the steam engine of the scow; 30 Fed. Rep. 206; and a barge having no sails, masts, or rudders and used only for the transportation of bricks, suitable only to be towed by a tug; 36 *id.* 607; so of a floating scow fitted with steam appliances for deepening channels; 40 *id.* 353; a steam dredge; 53 *id.* 607; 30 *id.* 206; 83 *id.* 840; a barge and scow; 61 *id.* 502; 77 *id.* 476. The means of propulsion makes no difference; 8 Sawy. 211. An open boat is not a vessel; 5 Mas. 120; nor a raft; 14 Fed. Rep. 236; nor a canal boat; 5 Wend. 564.

Vessels navigated to a port are subject to distinct duties and obligations, and are not dutiable as imported merchandise; 166 U. S. 110.

Vessels must have their names marked on them; 2 Supp. R. S. 541.

See SHIP; PART-OWNERS.

**VEST.** To give an immediate fixed right of present or future enjoyment. An estate is vested in possession when there exists a right of present enjoyment; and an estate is vested in interest when there is a present fixed right of future enjoyment. Fearne, Cont. Rem. 2.

**VESTED ESTATE.** A vested estate, whether present or future, may be absolutely or defeasibly vested. 89 Mich. 428.

**VESTED INTEREST.** See next title.

**VESTED REMAINDER.** An estate by which a present interest passes to the party, though to be enjoyed *in futuro*, and by which the estate is invariably fixed to remain to a determinate person after the particular estate has been spent. 2 Bouvier, Inst. n. 1831. It imports, *ex vi termini*, a present title in the remainderman; 112 N. C. 1. See REMAINDER; Tudor, L. Cas. R. P. 820.

**VESTED RIGHT.** See RIGHT.

**VESTIGIAL WORDS.** Those contained in a statute which by reason of a succession of statutes on the same subject-matter, amending or modifying previous provisions of the same, are rendered useless or meaningless by such amendments. 164 U. S. 70.

**VESTING ORDER.** An order which may be granted by the chancery division of the high court of justice (and formerly by chancery) passing the legal estate in lieu of a conveyance.

**VESTRY.** The place in a church where the priest's vestments are deposited. Also, an assembly of the minister, church wardens, and parishioners, held in the vestry of the church. In America, a body elected by a church congregation to administer the affairs of the church. See Baum, Church Law.

**VESTURE OF LAND.** A phrase including all things, trees excepted, which grow upon the surface of the land and clothe it externally.

He who has the vesture of land has a right, generally, to exclude others from entering upon the superficies of the soil. Co. Litt. 4 *b*; Hamm. N. P. 151. See 7 East 200.

**VETERA STATUTA** (Lat.). The name of *vetera statuta*—ancient statutes—has been given to the statutes commencing with Magna Charta and ending with those of Edward II. Crabb, Eng. Law 222.

**VETERINARY SURGEON.** One who treats domestic animals for injuries or diseases. The same rules are applicable to the case of a veterinary surgeon bringing an action to recover for the value of his services as are applicable to other surgeons; 69 Hun 428. He must possess and exercise a reasonable degree of learning and skill, and use reasonable and ordinary care and diligence in the exercise of his skill and the application of his knowledge; 69 Hun 428; 10 *id.* 358; 29 Neb. 352; 48 Vt. 557. See PHYSICIAN.

**VETITUM NAMIUM** (Law Lat. *vetitum*, forbidden, *namium*, taking). Where the bailiff of a lord distrains beasts or goods of another, and the lord forbids the

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bailiff to deliver them when the sheriff comes to make replevin, the owner of the cattle may demand satisfaction in *placitum de vetito namio*. Co. 2d Inst. 140; 2 Bla. Com. 148. See WITHERNAM; 2 Poll. & Maitl. 575.

**VETO** (Lat. I forbid). A term including the refusal of the executive officer whose assent is necessary to perfect a law which has been passed by the legislative body, and the message which is usually sent, stating such refusal and the reasons therefor. See EXECUTIVE POWER.

By the constitution of the United States government, the president has a power to prevent the enactment of any law, by refusing to sign the same after its passage, unless it be subsequently enacted by a vote of two-thirds of each house. U. S. Const. art. 1, § 7. When a bill is engrossed, and has received the sanction of both houses, it is transmitted to the president for his approbation. If he approves of it, he signs it. If he does not, he sends it, with his objections, to the house in which it originated, and that house enters the objections on the journal and proceeds to reconsider the bill. See Story, Const. § 878; 1 Kent, Comm. 239. Similar powers are possessed by the governors of many of the states. See STATUTE.

The veto power of the British sovereign has not been exercised for more than a century. It was exercised once during the reign of Queen Anne. 10 Edinburgh Rev. 411; Parks, Lect. 126. But anciently the king frequently replied, *Le roi s'avisera*, which was in effect withholding his assent. In France the king had the initiative of all laws, but not the *veto*. See 1 Toullier, nn. 39, 42, 52, note 3.

**VEXATION.** The injury or damage which is suffered in consequence of the tricks of another.

**VEXATIOUS ACTIONS ACT.** An act of parliament of 1896, authorizing the high court to order, on the application of the attorney-general, that a person shown to be habitually and vexatiously litigious, without reasonable ground, shall not institute legal proceedings in that or any other court, without leave of that court or a judge thereof, upon satisfactory proof that such legal proceedings are not an abuse of the process of the court and that there is a *prima facie* ground therefor. The order when made is published in the Gazette. See 76 L. T. 351.

**VEXATIOUS SUIT.** **Torts.** A suit which has been instituted maliciously, and without probable cause, whereby a damage has ensued to the defendant.

The *suit* is either a criminal prosecution, a conviction before a magistrate, or a civil action. The suit need not be altogether without foundation: if the part which is groundless has subjected the party to an inconvenience to which he would not have been exposed had the valid cause of complaint alone been insisted on, it is injurious; 4 Co. 14; 1 Pet. C. C. 210; 4 S. & R. 19, 23.

To make it vexatious the suit must have been instituted maliciously. See MALICIOUS PROSECUTION; FALSE IMPRISONMENT.

**VEXED QUESTION.** A question or point of law often discussed or agitated, but not determined or settled.

**VI ET ARMIS** (Lat.). With force and arms. See TRESPASS.

**VIA** (Lat.). A cart-way,—which also includes a foot-way and a horse-way. See WAY.

**VIABILITY** (from the French *vie*). Capability of living. A term used to denote the power a new-born child possesses of continuing its independent existence.

That a child may be viable, it is necessary that not only the organs should be in a normal state, but likewise all the physiological and pathological causes which are capable of opposing the establishment or prolongation of its life be absent.

Although a child may be born with every appearance of health, yet, from some malformation, it may not possess the physical power to maintain life, but which must cease from necessity. Under these circumstances, it cannot be said to exist but temporarily,—no longer, indeed, than is necessary to prove that a continued existence is impossible.

It is important to make a distinction between a viable and a non-viable child, although the latter may outlive the former. The viable child may die of some disease on the day of its birth, while a non-viable child may live a fortnight. The former possesses the organs essential to life, in their integrity; while the latter has some imperfection which prevents the complete establishment of life.

As it is no evidence of non-viability that a child dies within a few hours of its birth, neither is it a proof of viability if a child appears to be well and the function of respiration be fully established.

There are many affections which a child may have at birth, that are not necessarily mortal, such as transposition of some of the organs, and other malformations. There are also many diseases which, without being necessarily mortal, are an impediment to the establishment of independent life, affecting different parts of the system; such as inflammation, in addition to many malformations. There is a third class, in which are many affections that are necessarily mortal; such as a general softening of the mucous membrane of the stomach and intestines, developed before birth, or the absence of the stomach, and a number of other malformations. These distinctions are of great importance; for children affected by peculiarities of the first order must be considered as viable; affections of the second may constitute extenuating circumstances in questions of infanticide; while those of the third admit of no discussion on the subject of their viability.

The question of viability presents itself to the medical jurist under two aspects: *first*, with respect to infanticide, and *second*, with respect to testamentary grants and inheritances. Billard on Infants, translation by James Stewart, M. D., Appendix; Briand, *Méd. Lég. 1ère partie*, c. 6, art 2. See 2 Savigny, *Dr. Rom.* Append. III., for a learned discussion of this subject.

**VIABLE.** See VIABILITY.

**VICARAGE.** **In Ecclesiastical Law.** The living or benefice of a vicar; usually consisting of the small tithes. 1 Burn, Eccl. Law 75, 79.

**VICARIUS APOSTOLICUS.** An officer through whom the Pope exercises authority in parts remote, and who is sometimes sent with episcopal functions into provinces where there is no bishop resident or there has been a long vacancy in the see, or into infidel or heretical countries. 2 Phill. Int. L. 529.

**VICE.** A term used in the civil law and in Louisiana, by which is meant a defect in a thing; an imperfection. For example, epilepsy in a slave, roaring and crib-biting in a horse. Redhibitory vices are those for which the seller will be compelled to annul a sale and take back the thing sold. Pothier, Vente 203; La. Civ. Code, art. 2498.

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**VICE-ADMIRAL.** The title of a naval officer next in rank after an admiral.

Under R. S. § 1362 it was provided that the grades of admiral and vice-admiral in the United States navy should not be filled and that when a vacancy occured the grades should cease to exist.

**VICE-ADMIRAL OF THE COAST.** A county officer in England appointed by the admiral "to be answerable to the high admiral for all the coasts of the sea, when need and occasion shall be." He also had power to arrest ships, when found within a certain district, for the use of the king. His office was judicial as well as ministerial. The appointment to the office is still made for a few countries of England. For a detailed account of this office and its functions, see "The Office of Vice-Admiral of the Coast," by Sir G. Sherston Baker.

**VICE-CHANCELLOR.** A judge, assistant to the chancellor.

He held a separate court, and his decrees were liable to be reversed by the chancellor. He was first appointed 53 Geo. III. In 1841 two additional vice-chancellors were appointed; and there were then three vice-chancellors' courts. 3 Sharsw. Bla. Com. 54, n.

There is also a vice-chancellor of the county palatine of Lancaster; 3 Steph. Com. 331. By the Judicature Act of 1873, the vice-chancellors were transferred to the high court of justice and appointed judges of the chancery division, and on their death or retirement their successors were styled judges of her majesty's high court of justice. There is one vice-chancellor in Ireland. The office exists in New Jersey. See CHANCELLOR; CHANCELLOR'S COURTS IN THE TWO UNIVERSITIES.

**VICE-CONSUL.** An officer who performs the duties of a consul within a part of the district of a consul, or who acts in the place of a consul. He is not a deputy, but an acting consul; 33 Fed. Rep. 165. See 1 Phil. Ev. 306; CONSUL.

**VICE-PRESIDENT OF THE UNITED STATES.** The title of the second officer, in point of rank, in the government of the United States.

As to his election, see PRESIDENT OF THE UNITED STATES. His office in point of duration is coextensive with that of the president. The constitution of the United States, art. i. s. 3, clause 4, directs that "the vice-president of the United States shall be president of the senate, but shall have no vote unless they be equally divided." And by article 2, s. 1, clause 6, it is provided that "in case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice-president."

When the vice-president exercises the office of president, he is called the President of the United States.

**VICE-PRINCIPAL.** See MASTER AND SERVANT.

**VICE VERSA** (Lat.). On the contrary; on opposite sides.

**VICECOMES.** The sheriff.

**VICECOMES NON MISIT BREVE** (Lat. the sheriff did not send the writ). An entry made on the record when nothing has been done by virtue of a writ which has been directed to the sheriff.

**VICINAGE.** The neighborhood; the venue. See 36 W. Va. 84; JURY.

**VICINETUM** (Lat.). The neighborhood; vicinage; the venue. Co. Litt. 158 *b*.

**VICINITY.** Etymologically, by common understanding, it admits of a wider latitude than proximity or contiguity, and may embrace a more extended space than that lying contiguous to the place in question; and, as applied to towns and other territorial divisions, may embrace those not adjacent; 12 Gray 545; 63 N. H. 246. In a statute authorizing the extension of the street and an appointment of benefits upon lots in the vicinity the term is a relative one and does not denote any particular definite distance from the extension of the street but must be construed according to the circumstances of each case; 18 Pa. 26. The meaning of vicinity of a city must depend upon the size of the city, etc., and its particular surroundings; 52 Mich. 36. See NEIGHBORHOOD.

**VICIOUS INTROMISSION. In Scotch Law.** A meddling with the movables of a deceased, without confirmation or probate of his will or other title. Whart. Lex.

**VICONTIEL.** Belonging to the sheriff.

**VICTORIA.** A British colony in Australia. It became a distinct colony in 1851. It has a governor appointed by the crown and a parliament of two houses, one of ninety-five members and one of forty-eight, both elected by the people. It has a supreme court presided over by a chief justice and five puisne judges, a court of insolvency, courts of assize and general sessions, county courts, and courts of mines. See AUSTRALIA.

**VIDELICET** (Lat.). A Latin adverb, signifying to wit, that is to say, namely; *scilicet*. This word is usually abbreviated *viz.*

The office of the videlicet is to mark that the party does not undertake to prove the precise circumstances alleged; and in such cases he is not required to prove them; Steph. Pl. 309; 7 Cow. 42; 8 Taunt. 107; Greenl. Ev. § 60; 1 Litt. Ky. 209. See Yelv. 94; 3 Saund. 291 *a*, note; 4 B. & P. 465; 2 Pick. 214; 47 Ill. 175.

**VIDUITY.** Widowhood.

**VIEW.** Inspection; a prospect.

See ANCIENT LIGHTS; NUISANCE; VIEWERS; 16 Am. L. Rev. 628; 63 Me. 385.

**VIEW, DEMAND OF.** In most real and mixed actions, in order to ascertain the identity of land claimed with that in the tenant's possession, the tenant is allowed, after the demandant has counted, to *demand a view* of the land in question, or, if the subject of claim be rent, or the like, a view of the land out of which it issues. Com. Dig. *View;* 2 Saund. 45 *b*.

This right, however, is confined to real or mixed actions; for in personal actions the view does not lie. In the action of dower *unde nihil habet*, it has

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been much questioned whether the view be demandable or not; 2 Saund. 44, n. 4; and there are other real and mixed actions in which it is not allowed. The view being granted, the course of proceeding was to issue a writ commanding the sheriff to cause the defendant to have a view of the land. The duty of suing out the writ lies upon the demandant; and when the sheriff causes view to be made, the demandant is to show to the tenant in all ways possible, the thing in demand, with its metes and bounds. On the return of the writ into court, the demandant must count *de novo*—that is, declare again; Com. Dig. *Pleader* (2 Y 3); and the pleadings proceed to issue. This proceeding of demanding view is, in the present rarity of real actions, unknown in practice. It is said in 141 U. S. 951, that there are only two cases in the books [1 Arn. 244; 8 Dowl. Pr. c. 201] where orders to inspect a building were requested. Both were refused.

The right to grant an application for the jury to view the premises during the trial of a case rests in the discretion of the trial judge; 82 Wis. 81; 17 Colo. 448; 110 N. C. 438; 95 Mich. 586; 41 Ill. App. 584; 4 Wash. 436. Where the facts are such that they can be accurately described to the jury the court may properly deny a request to view the premises; 4 Ind. App. 100; also where a motion is made to have the jury view the scene of an accident several years after it happened, and where the condition of the premises had changed in the meanwhile; 89 Mich. 315. In Pennsylvania (act of 1895), in proceedings under eminent domain, either party may require a view of the premises.

Where, on a trial for murder, the jury viewed the *locus* of the crime, but the accused, at his special request, did not accompany them, the court held that the view was not a part of the trial, and the conviction was affirmed. Authority and reason are said to be the other way; 12 Harv. L. Rev. 212, citing 43 Hun 401; 68 Cal. 623.

See PHYSICAL EXAMINATION.

**VIEW OF FRANKPLEDGE.** An examination to see if every freeman within the district had taken the oath of allegiance, and found nine freemen pledges for his peaceable demeanor. 1 Reeve. Hist. Eng. Law 7. It took place, originally, once in each year, after Michaelmas, and subsequently twice, after Easter and Michaelmas, at the sheriff's tourn or court-leet at that season held. See COURT-LEET; SHERIFF'S TOURN.

**VIEWERS.** Persons appointed by the courts to see and examine certain matters and make a report of the facts, together with their opinion, to the court. In practice, they are usually appointed to lay out roads, and the like.

**VIFGAGE.** See VADIUM VIVUM.

**VIGILANCE.** Proper attention in proper time.

The law requires a man who has a claim to enforce it in proper time, while the adverse party has it in his power to defend himself; and if by his neglect to do so he cannot afterwards establish such claim, the maxim *vigilantibus non dormientibus leges subveniunt* acquires full force in such case. See LACHES.

**VILL.** In England this word was used to signify the parts into which a hundred or wapentake was divided. Fortescue, *de Laud.* c. 24. See Co. Litt. 115 *b*. It also signifies a town or city. Barrington, Stat. 133.

**VILLAGE.** Any small assemblage of houses for dwellings or business, or both, in the country, whether they are situated upon regularly laid out streets and alleys, or not. 27 Ill. 48, approved in 71 *id.* 569. See 80 Mich. 410; 35 L. R. A. 396, n.; TOWN.

**VILLAIN.** An epithet used to cast contempt and contumely on the person to whom it is applied. To call a man a villain in a letter written to a third person will entitle him to an action without proof of special damages. 1 B. & P. 331.

**VILLEIN** (*vilis*, base or *villa*, estate). A person attached to a manor, who was substantially in the condition of a slave, who performed the base and menial work upon the manor for the lord, and was, generally, a subject of property and belonging to him. 1 Washb. R. P. 26.

The feudal villein of the lowest order was unprotected as to property, and subject to the most ignoble services. But his circumstances were very different from the slave of the Southern states, for no person was in the eye of the law a villein except as to his master; in relation to all other persons he was a freeman. Littleton, Ten. ss. 189, 190.

**VILLEIN IN GROSS.** A villein annexed to the person of the lord, and transferable by deed from one person to another. Littleton § 181.

**VILLEIN REGARDANT.** A villein annexed to the manor or land; a serf.

**VILLEIN SOCAGE** (Sax. *soc*, free, or Lat. *soca*, a plough). The villeins, from living on one piece of land, came at last to be allowed to hold it by tenure of *villeinage*, *e. g.* uncertain menial services. These services at last became fixed; the tenure was then called *villein socage*. 1 Washb. R. P. 26.

**VILLEINAGE.** See VILLEIN SOCAGE.

**VILLENOUS JUDGMENT. In Old English Law.** A judgment given by the common law in attaint, or in cases of conspiracy. Its effects were to make the object of it lose his *liberam legem* and become infamous. He forfeited his goods and chattels, and his lands during life; and this barbarous judgment further required that his lands should be wasted, his houses razed, his trees rooted up, and that his body should be cast into prison. He could not be a juror or witness. 4 Bla. Com. 136.

**VINCULO MATRIMONII.** See A VINCULO MATRIMONII; DIVORCE.

**VINDICTIVE DAMAGES.** See DAMAGES; EXEMPLARY DAMAGES.

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**VINTNER.** One who sells wine. A covenant prohibiting the trade of a vintner includes a person selling wines not to be drunk on the premises. 25 L. T. N. S. 312.

**VIOLATION.** An act done unlawfully and with force. In the English statute of 25 Edw. III. st. 5, c. 2, it is declared to be high treason in any person who shall violate the king's companion; and it is equally high treason in her to suffer willingly such violation. This word has been construed under this statute to mean carnal knowledge. 3 Inst. 9; Bacon, Abr *Treason* (E).

**VIOLENCE.** The abuse of force. That force which is employed against common right, against the laws, and against public liberty. Merl. *Répert.*

Violence is synonymous with physical force, and the two are used interchangeably, in relation to assaults, by elementary writers on criminal law. 31 Conn. 212. See ASSAULT; ROBBERY.

**VIOLENT.** Not natural or spontaneous, not intentional, voluntary, expected or usual. 44 Hun 606.

**VIOLENT PROFITS. In Scotch Law.** The gains made by a tenant holding over are so called. Erskine, Inst. 2. 6. 54.

**VIOLENTLY. In Pleading.** This word was formerly supposed to be necessary in an indictment, in order to charge a robbery from the person; but it has been holden unnecessary; 1 Chitty, Crim. Law *244. The words "feloniously and against the will," usually introduced in such indictments, seem to be sufficient. It is usual, also, to aver a *putting in fear*; though this does not seem to be requisite.

**VIRGA.** An obsolete word, which signifies a rod or staff, such as sheriffs, bailiffs, and constables carry as a badge or ensign of their office. More commonly, spelled verge, *q. v.* Hence *verger*, one who carried a white wand before the judges. Toml. A verger now commonly signifies an inferior officer in a cathedral or parish church. Moz. & W.

The stick or wand with which persons are in England admitted as tenants.

**VIRGINIA.** One of the thirteen original United States.

The name was given to the colony in honor of Queen Elizabeth. In 1606, James I. granted letters patent for planting colonies in Virginia. The government prescribed was that each should have a council, consisting of thirteen persons, appointed by the king, to govern and order all matters according to laws and instructions given them by the king. There was also a council in England, of thirteen persons, appointed by the crown to have the supervising, managing, and direction of all matters that should concern the government of the colonies. This charter was followed by royal instructions dated the 20th November, 1606. See 1 Hening, Va. Stat. 76, 571. Under this charter a settlement was made at Jamestown in 1607, by the first colony. Upon the petition of the company, a new charter was granted by king James, on the 23d May, 1609, to the treasurer and company of the first (or southern) colony for the further enlargement and explanation of the privileges of that company. 1 Hening, Stat. 80.

This charter granted to the company in absolute property the lands extending from Cape or Point Comfort (at the mouth of James River) along the sea-coast two hundred miles to the northward, and from the same point along the sea-coast two hundred miles to the southward, and up into the land throughout, from sea to sea, west and northwest, and, also, all islands lying within one hundred miles of the coast of both seas of the precinct aforesaid. A new council in England was established, with power to the company, to fill all vacancies therein by election.

On the 12th of March, 16$\frac{12}{13}$, king James granted a third charter to the first company, enlarging its domain so as to include all islands within three hundred leagues from its borders on the coast of either sea. In 1612, a considerable proportion of lands previously held and cultivated in common was divided into three-acre lots and a lot appropriated in absolute right to each individual. Not long afterwards, fifty acres were surveyed and delivered to each of the colonists. In 1618, by a change of the constitution of the colony, burgesses elected by the people were made a branch of the legislature. Up to this time the settlement had been gradually increasing in number, and in 1624, upon a writ of *quo warranto*, a judgment was obtained dissolving the company and revesting its power in the crown. In 1651 the plantation of Virginia came, by formal act, under the obedience and government of the commonwealth of England, the colony, however, still retaining its former constitution. A new charter was to be granted, and many important privileges were secured. In 1680 a change was made in the colonial government, divesting the burgesses of the exercise of judicial power in the last resort, as had before that time been practised by that body and allowing appeals from judgments of the general courts, composed of the governor and council, to the king in council, where the matter in controversy exceeded the value of £300 sterling. Marshall, Col. 163; 1 Campb. 337.

By the treaty of 1763, all the conquests made by the French in North America, including the territory east of the Mississippi, were ceded to Great Britain.

The constitution of the colonial government of Virginia seems never to have been precisely fixed and accurately adjusted in any written memorials that are now accessible. The powers exercised by the burgesses varied at different periods. The periods of their election and the length of time they continued in office it is difficult to ascertain from the records of colonial history, and the qualifications of voters to elect them varied much at different periods. See Rev. Code 38, Leigh's note; 2 Burk, App. 1. On the 12th of June, 1776, a declaration of rights pertaining to the people, as a basis and foundation of government, was adopted by the convention. This declaration still remains a part of the Virginia Code. On the 29th of June, 1776, Virginia adopted a constitution by a unanimous vote of the convention. The Articles of Confederation were not finally adopted by congress until the 15th of November, 1777, and were adopted, subject to the ratification of the states. These articles were laid before the Virginia Assembly on the 9th of December, 1777, and on the 15th unanimously assented to. In compliance with the recommendation of congress, by a resolution of September 6, 1780, Virginia, by an act passed the 2d of January, 1781, proffered a cession of her western lands. The cession was finally completed and accepted in 1784. Virginia as early as 1785 prepared to erect Kentucky into a state, and this was finally affected in June, 1792.

The state constitution framed and adopted by Virginia in 1776 gave way to a second that was framed in convention, adopted by the people, and went into operation in 1830. This second constitution was superseded by a third, which was framed in convention of 1851, and, being adopted by the people, took effect in 1852.

A convention assembled at Alexandria February 13, 1864, composed of delegates from such portions of Virginia as were then within the lines of the Union army and had not been included in the recently formed state of West Virginia. This convention adopted a constitution April 11, 1864, but it was not submitted to the people for ratification. The present constitution of the state was framed by

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a convention called under the reconstruction act of congress which met at Richmond and completed its labors in 1868. Under the authority of an act of congress approved April 10, 1869, the instrument was submitted to the vote of the people and adopted.

LEGISLATIVE DEPARTMENT.—The legislative power of the commonwealth is vested in a general assembly, consisting of a senate and house of delegates. The house of delegates is elected biennially by the voters of the several cities and counties, on the Tuesday succeeding the first Monday in November. Under the terms of the constitution it consists of not more than one hundred nor less than ninety members.

The senators are elected for the term of four years, for the election of whom the counties, cities, and towns shall be divided into not more than forty districts. Under the constitution not less than thirty-three nor more than forty senators are elected.

The general assembly meets, unless oftener convened by the governor, annually, but no session shall continue longer than ninety days without the concurrence of three-fifths of the members.

EXECUTIVE DEPARTMENT.—The chief executive power of the commonwealth is vested in a governor. He holds his office for the term of four years, to commence on the first day of January next succeeding his election, and is ineligible to the same office for the term next succeeding that for which he was elected, and to any other office during his term of service.

He has power to remit fines and penalties in such cases and under such rules and regulations as may be prescribed by law; and except when the prosecution has been carried on by the house of delegates, or the law shall otherwise particularly direct, to grant reprieves and pardons after conviction; to remove political disabilities consequent upon conviction for offences committed prior or subsequently to the adoption of this constitution; and to commute capital punishment.

A *Lieutenant-Governor* is elected at the same time, and for the same term, as the governor; and his qualifications and the manner of his election in all respects are the same.

The lieutenant-governor is president of the senate, but has no vote.

A secretary of the commonwealth, treasurer, and auditor of public accounts are elected by the joint vote of the two houses of the general assembly, and continue in office for the term of two years unless sooner relieved.

JUDICIARY DEPARTMENT.—The judiciary department consists of a supreme court of appeals, circuit courts, and county courts.

*The Supreme Court of Appeals* consists of five judges, any three of whom may hold a court. It has appellate jurisdiction only, except in cases of *habeas corpus*, *mandamus*, and prohibition. It has no jurisdiction in civil cases where the matter in controversy, exclusive of costs, is less in value or amount than five hundred dollars, except in controversies concerning the title or boundaries of land, the bequests of a will, the appointment or qualification of a personal representative, guardian, committee, or curator, or concerning a mill, roadway, ferry, or landing; or the right of a corporation or of a county to levy tolls or taxes, and except in cases of *habeas corpus*, *mandamus*, and prohibition, or the constitutionality of a law. *Provided*, that the assent of a majority of the judges elected to the bench shall be required to declare any law null and void by reason of its repugnance to the federal constitution or to the constitution of this state. The judges are chosen by the joint vote of the two houses of the general assembly, and hold their office for twelve years.

Special courts of appeals, to consist of not less than three nor more than five judges, may be formed of the judges of the supreme court of appeals, and of the circuit courts, or any of them, to try any cases remaining on the dockets of the present court of appeals when the judges thereof cease to hold their offices; or to try any cases which may be on the dockets of the supreme court of appeals established by this constitution, in respect to which a majority of the judges of said court may be so situated as to make it improper for them to sit on the hearing thereof; and also to try any cases on the said dockets which cannot be otherwise disposed of with convenient despatch.

When a judgment or decree is reversed or affirmed by the supreme court of appeals, the reasons therefor must be stated in writing, and preserved with the record of the case.

*Circuit Courts.*—The state is divided into eighteen judicial circuits, which may be increased or diminished by the general assembly. For each circuit a judge is chosen by the joint vote of the two houses of the general assembly, who holds office for a term of eight years. He must possess the same qualifications as a judge of the supreme court of appeals, and reside in the circuit of which he is judge. A circuit court is held at least twice a year by the judges of each circuit.

*County Courts.*—In each county of the commonwealth there is a county court, held monthly. Counties having less than eight thousand inhabitants are attached to adjoining counties for the formation of districts. These judges are chosen in the same manner as circuit court judges. They hold their office for the term of six years, and during their continuance in office must reside in their district. The county courts have exclusive original jurisdiction of all criminal cases. They have jurisdiction of the probate of wills, appointment of guardians, etc.

**VIRILIA** (Lat.). The privy members of a man, to cut off which was felony at common law, though the party consented to it. Bract. lib. 3, p. 144.

**VIRTUTE OFFICII** (Lat.). By virtue of his office. A sheriff, a constable, and some other officers may *virtute officii* apprehend a man who has been guilty of a crime in their presence.

**VIS** (Lat. force). Any kind of force, violence, or disturbance relating to a man's person or his property.

**VIS IMPRESSA** (Lat.). Immediate force; original force. This phrase is applied to cases of trespass when a question arises whether an injury has been caused by a direct force or one which is indirect. When the original force, or *vis impressa*, had ceased to act before the injury commenced, then there is no force, the effect is mediate, and the proper remedy is trespass on the case.

When the injury is immediate consequence of the force, or *vis proxima*, trespass *vi et armis* lies; 3 Bouvier, Inst. n. 3483.

**VIS MAJOR** (Lat.). A superior force. In law it signifies inevitable accident.

This term is used in the civil law in nearly the same way that the words *act of God* (*q. v.*) are used in the common law, but for some purposes it is a wider phrase; 1 C. P. Div. 429. Generally, no one is responsible for an accident which arises from the *vis major*; but a man may be so where he has stipulated that he would, and when he has been guilty of a fraud or deceit; 2 Kent 448.

A loss by *vis major* is one that results immediately from a natural cause without the intervention of man, and could not have been prevented by the exercise of prudence, diligence, and care. 17 U. S. App. 526. See UNFORESEEN EVENT; ACT OF GOD; PERIL OF THE SEA.

**VISA. In Civil Law.** The formula put upon an act; a register; a commercial book, in order to approve of it and authenticate it.

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**VISCOUNT** (Lat. *vice-comes*). This name was made use of as an arbitrary title of honor, without any office pertaining to it, by Henry VI. for the first time. The sheriff or earl's deputy holds the office of *vice-comes*, of which viscount is a translation, but used, as we have just seen, in a different sense. The dignity of a viscount is next to an earl. 1 Bla. Com. 397.

**VISIT, RIGHT OF. In International Law.** A term used on the continent of Europe as synonymous with the right of search (*q. v.*). See 11 Wheat. 42.

**VISITATION.** The act of examining into the affairs of a corporation.

The power of visitation is applicable only to ecclesiastical and eleemosynary corporations. 1 Bla. Com. 480. The visitation of civil corporations is by the government itself, through the medium of the courts of justice. See 2 Kent 240. In the United States, the legislature is the visitor of all corporations founded by it for public purposes; 4 Wheat. 518. See SEARCH.

**VISITATION BOOKS.** Compilations made out or collected by the heralds in the circuits which their commissions authorized them to make, for the purpose of inquiring into the state of families and registering marriages and descents which were verified to them by oath. They are good evidence of pedigree. 3 Bla. Com. 105.

**VISITER, or VISITOR.** An inspector of the government, of corporations, or bodies politic. 1 Bla. Com. 482.

**VISNE.** The neighborhood; a neighboring place; a place near at hand; the venue.

The district from which juries were drawn at common law. 36 W. Va. 84.

Formerly the visne was confined to the immediate neighborhood where the cause of action arose, and many verdicts were disturbed because the visne was too large, which becoming a great grievance, several statutes were passed to remedy the evil. The 21 James I. c. 13, gives aid after verdict, where the visne is partly wrong,—that is, where it is warded out of too many or too few places in the county named. The 16 & 17 Charles II. c. 8, goes further, and cures defects of the visne wholly, so that the cause is tried by a jury of the proper county. See VENUE.

**VIVA VOCE** (Lat. with living voice). Verbally. It is said a witness delivers his evidence *viva voce* when he does so in open court: the term is opposed to deposition. It is sometimes opposed to ballot: as, the people vote by ballot, but their representatives in the legislature vote *viva voce*.

**VIVARY.** A place where *living* things are kept: as, a park on land; or, in the water, as a pond.

**VIVISECTION.** No person employed in any school, except medical or dental schools in the State of Washington, shall practise vivisection upon any vertebrate animal in the presence of any pupil, or any child or minor, nor, in such presence, exhibit any vertebrate animal upon which vivisection has been practised. And the dissection of dead animals shall be confined to the class-room and the presence of these pupils engaged in the study to be illustrated thereby, the penalty is by fine of not less than fifty nor more than one hundred dollars. Act, February 17, 1897.

In Massachusetts, by the act of March 22, 1894, vivisection in the public schools is prohibited, and dissection is confined to certain classes, under penalty of a fine.

In England, by 39 & 40 Vict. c. 77, public exhibitions of vivisection are forbidden, and stringent rules are given under which it may be done for the benefit of science if the subject is under the influence of some anæsthetic.

**VIVUM VADIUM.** See VADIUM VIVUM.

**VOCATIO IN JUS** (Lat.). **In Roman Law.** According to the practice in the *legis actiones* of the Roman law, a person having a demand against another verbally cited him to go with him to the prætor: *in jus eamus; in jus te voco.* This was denominated *vocatio in jus.* If a person thus summoned refused to go, he could be compelled by force to do so, unless he found a *vindex*,—that is, *procurator*, or a person to undertake his cause. When the parties appeared before the prætor, they went through the particular formalities required by the action applicable to the cause. If the cause was not ended the same day, the parties promised to appear again at another day, which was called *vadimonium.*

**VOCIFEROUS.** In a statute forbidding the use of loud and vociferous language, making a loud outcry; clamorous; noisy. Webst.; 20 S. W. Rep. (Tex.) 859.

**VOID.** That which has no force or effect. This word is often used as in effect meaning "voidable" only; 110 Ind. 202; and is seldom, unless in a very clear case, to be regarded as implying a complete nullity, but is to be taken in a legal sense, subject to a large qualification in view of all the circumstances calling for its application and the rights and interest to be affected in a given case; 50 N. H. 552. See 50 Mo. 287. In formal instruments it has been held to mean voidable; 4 B. & Ald. 401; 4 Bing. N.C. 395; and in contracts of infants; 14 Ir. C. L. 61. The distinction between void and voidable transactions is a fundamental one, though it is often obscured by carelessness of language. An act or agreement void from the beginning has no legal effect at all except so far as any party to it incurs penal consequences. A voidable act on the contrary takes its full and proper legal effect unless, and until it is disputed, and set aside by some tribunal entitled so to do; Poll. Contr. 8. A voidable contract has been defined to be such an agreement as that one of the parties is entitled at his option to treat as never having been binding on him; *id.* 9. As applied to contracts the distinction between the terms void and voidable is often one of great

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practical importance, and wherever technical accuracy is required, the term void can only be properly applied to such contracts as are a mere nullity and incapable of ratification or confirmation; 6 Metc. 417. Agreements to hinder, delay, and defraud creditors are not void but merely voidable against the creditors, while valid between the parties; Pom. Contr. § 282.

The distinction between contracts which are illegal and those which are void has never been precisely worked out, but where a contract is merely void, its defect in this respect cannot affect collateral transactions otherwise in themselves valid, while an unlawful purpose taints collateral and innocent transactions; 7 L. Quart. Rev. 339. The general rule of law is that a contract made in violation of a statute is void; 145 U. S. 426, and cases cited. Contracts which are void at common law, because they are against public policy, like contracts prohibited by statute, are illegal as well as void; 150 Mass. 1. An illegal contract is as a rule not merely voidable but void, and can be the basis of no judicial proceeding. See ULTRA VIRES.

Among the contracts made illegal by statute are: those relating to usury; 5 Johns. Ch. 122; gaming contracts (see GAMING); wager contracts (see WAGER); those which tend to promote champerty and maintenance (*q. v.*), or those compounding felonies or suppressing public prosecution of criminals; 3 P. Wms. 276. See 31 Am. L. Rev. 19, as to the validity of contracts of foreign corporations, where by statute they are prohibited from doing business in the state.

A contract binding the maker to do something opposed to the public policy of the state or nation, or which conflicts with the wants, interest, or prevailing sentiment of the people, or our obligations to the world, or is repugnant to the morals of the times, is void, however solemnly the same may be made; Greenh. Pub. Pol. Rule II., citing 30 Maine 402; 17 Vt. 105; and though made in another country where its validity is undoubted; L. R. 14 Ch. D. 351 (see LEX LOCI). The assignor of a contract has no better rights therein than the party to it, even if he had no notice of its illegality; 127 Mass. 123.

Among those contrary to public policy and illegal at common law are contracts in restraint of marriage or of trade, or of bidding at public auctions, or relating to marriage brokerage, to hinder legislation, whether public or private (see LOBBYING), or to promote the appointment of a party to an office, to influence public elections to office, or to remunerate officers in addition to their lawful fees for acts which they are bound to do by virtue of their office or to assign fees and profits of official positions requiring personal supervision (see OFFICER); or any contract involving the sale of personal influence; 103 U. S. 276; 66 Fed. Rep. 427; a contract by a mother surrendering her child to a charitable institution; 6 Dist. Rep. Pa. 256; contracts where the consideration is the commission of some crime or some flagrantly immoral act (see CONSIDERATION); Pom. Contr. § 282. See the various subjects enumerated for cases. As to the effect of war upon contracts, see WAR.

As to particular cases, see the several titles upon the subjects involved.

**VOIDABLE.** See VOID.

**VOIR DIRE.** A preliminary examination of a witness to ascertain whether he is competent.

When a witness is supposed to have an interest in the cause, the party against whom he is called has the choice to prove such interest by calling another witness to that fact, or he may require the witness produced to be sworn in his *voir dire* as to whether he has an interest in the cause or not; but the party against whom he is called will not be allowed to have recourse to both methods to prove the witness's interest. If the witness answers he has no interest, he is competent, his oath being conclusive; if he swears he has an interest, he will be rejected.

Though this is the rule established beyond the power of the courts to change, it seems not very satisfactory. The witness is sworn on his *voir dire* to ascertain whether he has an interest which would disqualify him, because he would be tempted to perjure himself if he testified when interested. But when he is asked whether he has such an interest, if he is dishonest and anxious to be sworn in the case, he will swear falsely he has none, and, his answer being conclusive, he will be admitted as competent; if, on the contrary, he swears truly he has an interest, when he knows that will exclude him, he is told that for being thus honest he must be rejected. A suitable inquiry is permissible in order to ascertain whether a juror has any bias and this must be conducted under the supervision of the court and be largely left to its sound discretion. There is no objection in not allowing a juror to be asked as to his political affiliations and whether they would bias his judgment, in the absence of any statement tending to show a special reason for asking; 158 U. S. 408; a juror may be asked whether he is a member of certain secret societies; 30 S. W. Rep. (Tex.) 1110; or has ever belonged to "the committee of 100"; 158 U. S. 408. The court may assume an exclusive examination of jurors, though it is the better practice to allow counsel to examine; 17 So. Rep. (Fla.) 284.

See 1 Dall. 375; INTEREST; JURY.

**VOLUNTARY.** Willingly; done with one's consent; negligently. Wolff § 5.

To render an act criminal or tortious, it must be voluntary. If a man, therefore, kill another without a will on his part while engaged in the performance of a lawful act, and having taken proper care to prevent it, he is not guilty of any crime. And if he commit an injury to the person

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or property of another, he is not liable for damages, unless the act has been voluntary or through negligence; as, when a collision takes place between two ships without any fault in either. 2 Dods. Adm. 83; 3 Hagg. Adm. 320, 414.

When the crime or injury happens in the performance of an unlawful act, the party will be considered as having acted voluntarily.

**VOLUNTARY ASSIGNMENT.** See VOLUNTARY CONVEYANCE; 22 Neb. 514.

**VOLUNTARY CONVEYANCE.** A conveyance without any valuable consideration.

Voluntary conveyances are discussed most frequently with reference to the statutes 13 Eliz. c. 5 (for the protection of creditors) and 27 Eliz. c. 4 (for the protection of subsequent purchasers). A voluntary conveyance, however, is not within these statutes unless it is fraudulent; Cowp. 434. And as between the parties a voluntary conveyance is generally good.

In determining whether a voluntary conveyance is fraudulent and within the stat. 13 Eliz. c. 5, a distinction is made between existing (or previous) and subsequent creditors. An *existing* creditor, so called, is one who is a creditor at the time of the conveyance; and it was at one time held that, as against him, every voluntary conveyance by the debtor is fraudulent; 8 Wheat. 229; without regard to the amount of the debts, the extent of the property in settlement, or the circumstances of the debtor; 3 Johns. Ch. 500; but this rule is now subject to great modifications both in England and in the United States; see 1 Am. L. Cas. 37–40; and the conclusion to be drawn from the more recent cases is that the whole question depends in great measure on the ratio of the debts, not so much to the property the debtor parts with, as to that which he retains; 24 Pa. 511; 2 Beav. 344; 4 Drew. 632. A *subsequent* creditor is one who becomes a creditor after the conveyance, and, as against him, a voluntary conveyance is not void unless actually fraudulent; 1 Am. L. Cas. 40; but there is great diversity in the definition of the fraud of which he may avail himself; see 3 De G. J. & S. 293; L. R. 5 Ch. Ap. 518; 3 Johns. Ch. 501; 39 Pa. 499; 9 W. N. C. (Pa.) 353.

Whenever a voluntary conveyance is made, a presumption of fraud properly arises upon the statute of 27 Eliz. c. 4, which presumption may be repelled by showing that the transaction on which the conveyance was founded virtually contained some conventional stipulations, some compromise of interests, or reciprocity of benefits, that point out an object and motive beyond the indulgence of affection or claims of kindred, and not reconcilable with the supposition of intent to deceive a purchaser. But, unless so repelled, such a conveyance, coupled with a subsequent negotiation for sale, is conclusive evidence of statutory fraud.

The principles of these statutes, though they may not have been substantially reenacted, prevail throughout the United States. General reference may be made to Hunt, Fraud. Conv.; May, Stats. of Eliz.; Bump, Fraud. Conv.; Note to Twyne's Case, 1 Sm. L. Cas. (cases to 1879 discussed in 18 Am. L. Reg. N. S. 137); Note to Sexton *v.* Wheaton, 1 Am. L. Cas.; Story, Eq. Jurisp. §§ 350–436.

**VOLUNTARY DEPOSIT.** See DEPOSIT.

**VOLUNTARY ESCAPE.** See ESCAPE.

**VOLUNTARY EXPOSURE TO UNNECESSARY DANGER.** Where the insured was shot when unarmed, in the course of an altercation, it was held that there could be recovery, though the insured may have been the aggressor, if he had no reason to believe that his opponent was armed. The court held that the test was whether the assured "had voluntarily or intentionally done some act which reasonable prudence would have pronounced dangerous and in which death had followed as a consequence;" 40 S. W. Rep. (Tenn.) 1080. Where a party going home at night voluntarily left other and safe paths of travel and used a dangerous railway trestle; 80 Ga. 541; and where the assured sat down on a railway track when an engine moving toward him was only 25 feet away; 133 N. Y. 366; and where the assured jumped in the dark from a freight train in rapid motion; 94 Wis. 180; the exception in the policy was held to apply. But it must be shown that there is on the part of the insured some degree of consciousness of the danger which results in the accidental death of the insured; 92 Tenn. 167; 58 Wis. 13; 84 *id.* 389; 126 Mo. 104; 61 N. W. Rep. (Ia.) 485. See also 102 Pa. 262.

A voluntary exposure to unnecessary danger implies a conscious, intentional exposure, something of which one is conscious but willing to take the risk. By taking a policy against accident one naturally understands that he is to be protected against accident resulting in whole or in part from his own inadvertence. The phrase means something more than contributory negligence or want of ordinary care on the part of the assured: 62 N. W. Rep. (Ia.) 807. The phrase is not the entire equivalent of ordinary negligence; a degree of consciousness of danger is necessary; 92 Tenn. 167. See INSURANCE.

**VOLUNTARY JURISDICTION. In Ecclesiastical Law.** That kind of jurisdiction which requires no judicial proceedings: as, the granting letters of administration and receiving the probate of wills.

**VOLUNTARY MANSLAUGHTER.** See MURDER; MANSLAUGHTER; HOMICIDE.

**VOLUNTARY NONSUIT. In Practice.** The abandonment of his cause by a



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plaintiff, and an agreement that a judgment for costs be entered against him. 3 Bouvier, Inst. n. 3306.

**VOLUNTARY SALE.** See SALE.

**VOLUNTARY WASTE.** See WASTE.

**VOLUNTEERS.** Persons who receive a voluntary conveyance.

It is a general rule of the courts of equity that they will not assist a mere volunteer who has a defective conveyance. Fonbl. Eq. b. 1, c. 5, s. 2; and see the note there for some exceptions to this rule. See, generally, 1 Madd. 271; 1 Supp. to Ves. Ch. 320; 2 *id.* 321; Powell, Mortg.

**In Military Law.** Persons who, in time of war, offer their services to their country and march in its defence.

One who freely enlists in the place of another, and becomes his substitute of his own free will and accord, is a volunteer within the spirit and intent of the statutes; 43 Barb. 239. See MILITIA.

**VOTE.** Suffrage; the voice of an individual in making a choice by many. The total number of voices given at an election; as, the presidential vote.

In a *viva voce* election for a public officer, a voter cannot change his vote, once made, after subsequent votes have been made and recorded; 37 S. W. Rep. (Ky.) 155.

In cumulative voting the voter must put opposite the name of the candidate on whom he intends to cumulate something to indicate the number of votes he intends to cast for him, in default of which he will be taken to have cast but a single vote for the candidate against whom he has made a mark, although he has marked but a few names or only one; [1897] 1 Q. B. 449.

See ELECTION; BALLOT; SUFFRAGE; VOTER.

**VOTER.** One entitled to a vote; an elector. The right to fix the qualifications of voters is in the states, except so far as it is limited by the 15th amendment to the constitution of the United States, which provides that the right of the citizens to vote shall not be denied or abridged by the United States or any state, on account of race, color, or previous condition of servitude. The qualifications of voters are similar in all the states, but not uniform. They have been summarized as follows: 1. Citizenship, either by birth or naturalization; 2. Residence for a given period of time in the state, county, and voting precinct; 3. Age, the limit is twenty-one years in all the states; 4. The payment of taxes, in some states, and in many states, registration; 5. Freedom from infamy, of having committed an infamous crime; 6. Freedom from idiocy or lunacy; McCrary, Elect. § 4. Residence means actual settlement within the state; 23 Colo. 99. See also 35 Am. L. Reg. N. S. 780. The legislature cannot require a longer residence for voters at primary elections than the constitution prescribes for voters at elections "authorized by law," which term includes primary elections; 41 L. R. A. (Cal.) 196. A person who is capable of transacting the ordinary business of life, even though laboring under some hallucination or delusion, unless it be shown to extend to political matters, cannot be denied the privilege of voting on the ground of want of mental capacity; 88 Ill. 499.

**VOTING MACHINE.** In Rhode Island, upon the application of the governor, the justices gave an opinion that a statute authorizing the use of a voting machine would be constitutional. 19 R. I. 729, Rogers, J., dissenting. The New York constitution does not interfere with the existing legislation authorizing the use of voting machines. See 150 N. Y. 242.

**VOTING TRUST.** A term applied to the accumulation in a single hand or in a few hands of shares of corporate stock belonging to several or many owners in order, thereby, to control the business of the company. In some instances the certificates are placed in the hands of a single holder or of a committee, accompanied by irrevocable proxies to vote on them. In other instances the stock is placed in the name of such committee. Certificates are usually issued to the beneficial owners of the stock, and these certificates are bought and sold in the market. It has been held that all agreements to tie up stocks by irrevocable proxies or by placing them in the hands of trustees are illegal, and any beneficial owner may withdraw his stock from them at pleasure; 35 Hun 641; 43 N. Y. Sup. 506; 84 Ala. 608; whether he be a party to the agreement or an assignee of the stock of such party; 60 Conn. 553; 65 Hun 606; 52 N. J. Eq. 178; 6 Co. Ct. R. Pa. 193.

An agreement not to sell stock except by consent of all parties to the agreement is held to be in restraint of trade and void; 35 Hun 461. It has, however, been held that an agreement among the stockholders to hold the stock together and to sell it together is valid; 11 Jones & Sp. 507.

A by-law which provides that if any stockholder shall desire to dispose of his stock, he shall give written notice to the president, and that the stockholders shall then have the option to purchase it at the price named, with an option to the corporation to purchase if the other stockholders decline, is a restraint on the power of alienation and void; 34 Atl. Rep. (Md.) 1127.

Where stock is transferred to a trustee under a contract by which he agrees to hold and vote it for the benefit of two other persons and himself jointly, to dispose of it when and as agreed upon by himself and one of the other parties, the other parties have no such title or right of possession thereof as would give either of them a right of action against the trustee for conversion upon his refusal to transfer

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to such party one-third of the stock; 75 Fed. Rep. 62.

Where a statute forbade a consolidation of competing lines, the purchase by a railroad company of the stock of a competing line which was then vested in a third party as trustee, was held void and the trustee was enjoined from voting thereon; 50 Fed. Rep. 338.

Where stock was vested in a trustee under an agreement that it was to remain with such trustee for four years, certain stockholders agreeing not to sell their holdings without first offering them to the remaining parties to the agreement, and the trustee holding an irrevocable power of attorney to vote the stock, it was held that the trust agreement was not void *per se*, and that as long as the beneficial owners did not make any effort to withdraw from the trust there was no reason why the trustee should not vote upon it; 5 Blatch. 525.

The holders of a majority of the stock of a railroad company agreed that it should be vested in the name of the president of another railroad company, who should deliver to an appointee of the directors of the company in question an irrevocable proxy to vote upon such stock; certificates were issued to the stockholders who were parties to the agreement. Certain parties purchased a minority of the trust certificates and requested the return of the stock, which was refused. The court enjoined the trustee from voting on the stock and compelled a transfer to the beneficial owners thereof, holding that the right was vested in the latter and the trustee could not lawfully refuse it to them; 14 Wkly. L. Bull. (Ohio) 68. See 15 *id.* 419, 423. See also 30 Fed. Rep. 91, substantially to the same effect.

In the Reading railroad trust, reported in 47 Leg. Int. (Phila. C. P.) 26, on the reorganization of the company, certain securities and stock were vested in a reconstruction board under a voting trust, by which certificates of beneficial interest were issued. On a bill by a stockholder to restrain the trustees from voting upon the stock held by them at an election soon to occur, an injunction was refused because the interests were too complicated to permit of interference upon such short notice. The court (Hare, P. J.) was of opinion that the voting trust was necessary to sustain and carry out the provisions of the reorganization and that the voting trustees represented not only the stock but the other securities and liens on the property, under the reorganization.

In 12 So. Rep. 723, the court was of opinion that the cases in which voting trusts were considered illegal were based rather upon the ground of the unlawful purpose for which they were created than upon their intrinsic illegality, and it reached substantially the same result as the Reading railroad case cited above.

Where certain stock was deposited by various stockholders with a firm of bankers for the purpose of arranging differences between preferred and common stockholders and to aid in the adjustment of the affairs of the company generally, it was held that such depositary was entitled to vote on such stock; 49 Ohio St. 669.

See 44 Am. L. Reg. & Rev. 413, where a form of certificate is given and the cases are collected by Charles H. Burr, Jr., who finds a definite formulation of conclusions to be impossible.

**VOUCHEE.** In common recoveries, the person who is called to warrant or defend the title is called the vouchee. 2 Bouvier, Inst. n. 2093.

**VOUCHER. In Accounts.** An account-book in which are entered the acquittances or warrants for the accountant's discharge. Any acquittance or receipt which is evidence of payment or of the debtor's being discharged. See 3 Halst. 299; 8 N. J. L. 299; 1 Metc. Mass. 218. A merchant's books are the vouchers of the correctness of his accounts and a receipt is voucher of payment, but neither is conclusive. 12 Abb. Pro. 202.

When used in connection with the disbursement of money, voucher means a written or printed instrument in the nature of a bill of particulars, account, etc., which shows on what account and by what authority a particular payment has been made. 54 N. W. Rep. (Neb.) 866; 107 Ill. 495.

**In Old Conveyancing.** The person on whom the tenant to the *præcipe* calls to defend the title to the land, because he is supposed to have warranted the title to him at the time of the original purchase.

The person usually employed for this purpose is the crier of the court, who is therefore called the common voucher. See Cruise, Dig. tit. 36, c. 3, s. 1; 22 Viner, Abr. 26; RECOVERY.

**VOUCHER TO WARRANTY.** The calling one who has warranted lands, by the party warranted, to come and defend the suit for him. Co. Litt. 101 *b*.

**VOYAGE. In Maritime Law.** The passage of a ship upon the seas from one port to another, or to several ports. The term includes the enterprise entered upon and not merely the route. 113 Mass. 326. Where a loss was occasioned whilst loading the cargo, it was held to be during the voyage; L. R. 15 P. D. 203.

Every voyage must have a *terminus a quo* and a *terminus ad quem*. When the insurance is for a limited time, the two extremes of that time are the *termini* of the voyage insured. When a ship is insured both outward and homeward, for one entire *premium*, this, with reference to the insurance, is considered but one voyage, and the *terminus a quo* is also the *terminus ad quem*; Marsh. Ins. b. 1, c. 7, s. 1–5. As to the commencement and ending of the voyage, see RISK.

The voyage, with reference to the legality of it, is sometimes confounded with the

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traffic in which the ship is engaged, and is frequently said to be illegal only because the trade is so; but a voyage may be lawful, and yet the transport of certain goods on board the ship may be prohibited; or the voyage may be illegal, though the transport of the goods be lawful; Marsh. Ins. b. 1, c. 6, s. 1. See DEVIATION.

**In the French Law,** the *voyage de conserve* is the name given to designate an agreement made between two or more sea-captains that they will not separate in their voyage, will lend aid to each other, and will defend themselves against a common enemy or the enemy of one of them in case of attack. This agreement is said to be a partnership. 3 Pardessus, *Dr. Com.* n. 656; 4 *id.* 984; 20 Toullier, n. 17.

**VULGO CONCEPTI** (Lat.). **In Civil Law.** Bastards whose father was unknown. Leg. 53, ff. *de statu hominum.* Those, also, whose fathers, though known, could not lawfully be recognized as such: viz., the offspring of incest and adultery. Code Civ. 3. 7. 1.

# W.

**WADSET. In Scotch Law.** The old term for a mortgage. A right by which lands or other heritable subjects are impignorated by the proprietor to his creditor in security of his debt. Like other heritable rights, it is protected by seisin.

Wadsets are commonly made out in the form of mutual contracts, in which one party sells the land and the other grants the right of reversion. Erskine, Inst. 2. 8. 1. 2.

Wadsets are *proper*, where the use of the land shall go for the use of the money; *improper*, where the reversor agrees to make up the deficiency; and where it amounts to more, the surplus profit of the land is applied to the extinction of the principal. Erskine, Inst. 2. 8. 12. 13.

**WAGE.** To give a pledge or security for the performance of anything: as, to wage or gage deliverance, to wage law, etc. Co. Litt. 294. This word is but little used.

**WAGER.** A bet; a contract by which two parties or more agree that a certain sum of money, or other thing, shall be paid or delivered to one of them on the happening or not happening of an uncertain event. See 85 Tenn. 572; 75 Ill. 560.

A contract upon a contingency by which one may lose but cannot gain, or the other can gain but cannot lose, is a wager; 15 Gratt. 653; but there must be a risk by both parties; 5 Humph. 561. In 1 Bosw. 207, it was said: "A wager is something hazarded on the issue of some uncertain event; a bet is a wager, though a wager is not necessarily a bet."

At common law, wagers were not, *per se*, void; 2 Term 610; 37 Cal. 670; 3 McLean 100; 25 Tex. 586. By an English statute passed in 1845, wagers were prohibited, and similar statutes have been passed in many of the states. See Dos Passos, St. Br. 409; MARGINS.

Where a contract is a mere device to avoid the statute, it is illegal, but the burden of proving its illegality is upon the defendant; 70 N. Y. 202; and the intention of the parties is for the jury; 20 E. L. & E. 290; 72 Pa. 155. See 48 Ill. App. 39; 89 Pa. 250.

The principle which determines whether the sale of stocks is a wagering contract, is that a *bona fide* contract to buy and sell will be sustained, but where there is no actual sale and the transaction is to be settled by the payment of differences it will be set aside; 79 Ill. 328; Dos Passos, St. Br. 410; even where the principals may not be able to enforce the contract and the broker through whom the transaction is made is ignorant of their intention, he may recover for money paid out in commissions; *id.* 410; *contra*, 119 Mo. 126; the same principle applies to contracts for the sale and delivery of grain; 52 Wis. 593; and indeed to any contract for the sale or purchase of any personal property to be delivered at a future date, which is intended by both parties as a wager on the rise and fall of prices and to be settled by payment of differences; 85 Tenn. 572, 581; 38 Fed. Rep. 635; 46 Ohio St. 951; 85 Ky. 230; 131 U. S. 336; 38 Mo. App. 383; see 82 Fed. Rep. 833; but an agreement to sell grain for future delivery is not necessarily a gambling transaction; 37 Neb. 766.

A purchase, with an option to the seller to deliver on a certain day, is not a wager; 79 Ill. 351; 47 Minn. 228; and the usage allowing merchants to settle such contracts by "differences" does not necessarily render such contracts void; Gresham, J., in 12 Chic. L. N. 241. See 41 Fed. Rep. 174. Margins advanced to brokers on contracts made to be settled on differences may be recovered; 43 Ill. App. 439. Contracts of sales for future delivery are subject to the same principle; they are valid if there is a *bona fide* intention to deliver, even if the seller is not the owner of the property sold, at the time of the contract; 74 Ia. 468; 34 Mo. App. 302; otherwise they are void; 11 Fed. Rep. 193; 54 Mo. App. 606; 47 Minn. 228; see 77 Md. 504; 36 Ill. App. 179; but where purchases and sales are actually completed by delivery to the

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holder, who obtained the money to pay advances by hypothecating the stock, the transactions are valid; [1895] A. C. 318. See a note in 33 Am. L. Reg. N. s. 436. A case varying from the general rule that where accounts are to be settled by differences, the transaction is a gambling one, confines it to cases where neither party expects any delivery at any time and holds the transaction valid if the final balance is to be by delivery, though intermediate balances were otherwise settled; 88 Me. 230. The law looks at the intention of the parties, which is a fact for the jury, and oral evidence may be given of the circumstances, without respect to the form of the transaction; 47 Fed. Rep. 574; but a transaction which on its face is legitimate cannot be held void as a wagering contract by showing that one party only so understood and meant it to be. The proof must go further and show that this understanding was mutual; 149 U. S. 481. See Dos Passos, St. Br. 477. See also OPTION; FUTURES; MARGIN.

It has been held that contracts between the purchaser of futures and a broker, made without the state, though valid where made, could not be enforced in the state where it was invalid by statute; 71 Miss. 514; the same principle applies to notes given in settlement of gambling transactions; 155 Ill. 617. Where a note which was delivered to a broker to secure him against loss in stock transactions was transferred to an innocent purchaser without notice, equity would not compel its return, because given for a gambling debt; 173 Pa. 525; and a mortgage securing advances for margins on a contract for future delivery was held valid where the advances were made in good faith to save loss; 32 Fed. Rep. 833; but the original payee cannot recover on a note, for money advanced upon or in execution of a contract of wager, to which he is a party or direct participant in the name of or on behalf of the parties; 131 U. S. 336. See 25 App. Div. N. Y. 228.

The English statute prohibiting the recovery of money, etc., deposited to abide the event of a wager, applies only to a deposit as the stake to abide the event of a wager and not to deposits as security for the observance by the loser, of the terms of the wagering contract, and the authority to return the latter may be revoked and the securities recovered at any time before their appropriation; [1891] 2 Q. B. 329.

If all options were prohibited, all conditional contracts would have to be prohibited. See Dr. Wharton's note to 11 Fed. Rep. 193; also 70 N. Y. 202.

When one loses a wager and gets another to pay the money for him, an action lies for the recovery of the money; 15 C. B. N. S. 316; but see 97 Pa. 202, 298. So it is said that where an agent advances money to his principal to pay losses incurred in an illegal transaction, the contract between them, made after the illegal contract is closed, is binding; 2 Woods 554. See 98 Mass. 161. Where a broker sued his principal for advances and commissions on the purchase of property, it was held that the fact that persons from whom the broker bought the property for his principal had not the goods on hand when the contract was made, and that they had no reasonable expectation of acquiring them except by purchase, did not defeat the broker's right to recover; 14 Bush 727. See, also, 5 M. & W. 462.

See Biddle, Stock Brokers; Lewis, Stocks; article by Dr. Wharton in 8 Cr. L. Mag. 1, on Political Economy and Criminal Law.

Wagers on the event of an election laid before the poll is open; 1 Term 56; 4 Johns. 426; 4 H. & McH. 284; or after it is closed; 8 Johns. 147, 454; are unlawful. See McCreary, Elect. § 149. And wagers are against public policy if they are in restraint of marriage; 10 East 22; if made as to the mode of playing an illegal game; 2 H. Bla. 43; 1 N. & M'C. 180; or on an abstract speculative question of law or judicial practice, not arising out of circumstances in which the parties have a real interest; 12 East 247. But see 1 Cowp. 37.

Wagers, though on indifferent subjects, are inconsistent with good morals, and as such, are void, as against public policy; 23 Or. 419.

Wagers as to the sex of an individual; Cowp. 729; or whether an unmarried woman had borne or would have a child; 4 Camp. 152; are illegal, as necessarily leading to painful and indecent considerations. Every bet about the age, or height, or weight, or wealth, or circumstances, or situation of any person, is illegal; and this, whether the subject of the bet be man, woman, or child, married or single, native or foreigner, in this country or abroad; 1 Rawle 42. And it seems that a wager between two coach-proprietors, whether or not a particular person would go by one of their coaches, is illegal, as exposing that person to inconvenience; 1 B. & Ald. 683.

In the case even of a legal wager, the authority of a stakeholder, like that of an arbitrator, may be rescinded by either party before the event happens. And if, after his authority has been countermanded and the stake has been demanded, he refuse to deliver it, trover or assumpsit for money had and received is maintainable; 1 B. & Ald. 683. And where the wager is in its nature illegal, the stake may be recovered, even after the event, on demand made before it has been paid over; 4 Taunt. 474. But see 12 Johns. 1; 29 Neb. 812; 9 Colo. 212. Where the stakeholder of a wager void as between the parties is notified by one of them not to pay over the money to his adversary, even after the result of the event has become known, but before payment has been made, he cannot defeat an action by such party for its recovery; 5 Tex. Civ. App. 293; 48 Mo. App. 319. See STAKEHOLDER; MARGIN; HORSE RACE.

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**WAGER OF BATTLE.** A superstitious mode of trial, at one time common throughout Christendom, introduced into England by William the Conqueror.

It was resorted to in three cases only: in the court martial or court of chivalry; in appeals of felony and upon approvements; and upon issue joined in a writ of right. Co. Litt. § 294. On appeals parties fought in their own proper persons, on a writ of right by their champions. But if the appellant or approval were a woman, a priest, an infant, or of the age of sixty, or lame or blind, or a peer of the realm, or a citizen of London; or if the crime were notorious; in such cases wager of battel might be declined by the appellant or approver. But where the wager of battel was allowed, the appellee pleaded not guilty, and threw down his glove, declaring he would defend the same with his body. The appellant took up the glove, replying that he was ready to make good his appeal, body for body. Thereupon the appellee, taking the Bible in his right hand, and in his left the right hand of his antagonist, swore to this effect: "Hear this, O man, whom I hold by the hand, who callest thyself John by the name of baptism, that I, who call myself Thomas by the name of baptism, did not feloniously murder thy father, William by name, nor am anywise guilty of the said felony; so help me God and the saints; and this I will defend against thee by my body, as this court shall award." The appellant replied with a like oath, declaring also that the appellee had perjured himself. Then followed oaths by both parties against amulets and sorcery as follows: "Hear this, ye justices, that I have this day neither eat, drank, nor have upon me neither bones, stones, nor grass, nor any enchantment, sorcery, or witchcraft, whereby the law of God may be abased, or the law of the devil exalted; so help me God and his saints." The battle was then begun; and if the appellee were so far vanquished as not to be able or willing to fight any longer, he was adjudged to be hanged immediately; but if he killed the appellant, or could maintain the fight from sunrising till the stars appeared in the evening, he was acquitted. Also if the appellant became recreant, and pronounced the word *craven*, he lost his *liberam legem*, and became infamous (see CRAVEN), and the appellee recovered his damages, and was forever quit of any further proceedings for the same offence. The proceedings in wager of battel in a writ of right were similar to the above except that the battle was by champions. It was the only mode of determining a writ of right until Henry II. introduced the *grand assize*, *q. v.* The prevalence of judicial combats in the Middle Ages is attributed by Mr. Hallam to systematic perjury in witnesses, and want of legal discrimination on the parts of judges. Moz. & W. It was not abolished in England till the enactment of stat. 59 Geo. III. c. 46. See 1 B. & Ald. 405; 3 Bla. Com. 339; 4 *id.* 347; APPEAL. This mode of trial was not peculiar in England. The emperor Otho, 983, held a diet at Verona, at which several sovereigns and great lords of Italy, Germany, and France were present. In order to put a stop to the frequent perjuries in judicial trials, this diet substituted in all cases, even in those which followed the course of the Roman law, proof by combat for proof by oath. Henrion de Pansey, *Auth. Judic.* Introd. c. 3. And for a detailed account of this mode of trial see Herbert, Inns of Court 119. The last case in which the right was asserted was Ashton *vs.* Thornton, 1 B. & Ald. 405, where Lord Ellenborough declared that it was part of the general law of the realm and must be enforced, no matter how much disapproved. See Wills, Circ. Ev. 290, for a detailed statement of the facts. At the next session of the British parliament an act was passed to abolish appeals of murder, treason, felony, or other offences, and wager of battel, or joining issue or trial by battel, in writs of right. 59 Geo. III. c. 46. In the Statutes of South Carolina, Edition of 1857, it is said to be in existence in that state. For the history of this species of trial, see 3 Bla. Com. 337; 4 *id.* 347; *Encyclopédie*, *Gage de Bataille*; Steph. Pl. 122, and App. note 35. The Laws Lumber Room, by Francis Watt.

**WAGER OF LAW.** In Old Practice. An oath taken by a defendant in an action of debt that he does not owe the claim, supported by the oaths of eleven neighbors.

When an action of *debt* is brought against a man upon a simple contract, and the defendant pleads *nil debet*, and concludes his plea with this plea, with this formula, "And this he is ready to defend against him the said A B and his suit, as the court of our lord the king here shall consider," etc., he is then put in sureties (*vadios*) *to wage his law* on a day appointed by the judge. The *wager of law* consists in an oath taken by the defendant on the appointed day, and confirmed by the oaths of eleven neighbors or *compurgators*. This oath had the effect of a verdict in favor of the defendant, and was only allowed in the actions of debt on simple contract, and detinue; nor was it allowed to any one not of good character. In consequence of this privilege of the defendant, *assumpsit* displaces debt as a form of action on simple contracts, and instead of detinue, trover was used. But in England wager of law was abolished by 3 & 4 Will. IV. c. 42, § 13. And even before its abolition it had fallen into disuse. It was last used as a method of defence in 2 B. & C. 538, where the defendant offered to wage his law, but the plaintiff abandoned the case. This was in 1824. If it ever had any existence in the United States, it is now completely abolished; 8 Wheat. 642.

The name (in law Latin, *vadiatio legis*) comes from the defendant's being put in pledges (*vadios*) to make his oath on the appointed day. There was a similar oath in the Roman law, and in the laws of most of the nations that conquered Rome. It was very early in use in England, as Glanville distinctly describes it. Glanville, lib. 1. c. 9, 12. See Steph. Pl. 124, 250; Co. 2d Inst. 119; 3 Chitty, Pl. 967; 13 Viner, Abr. 58; Bac. Abr. For the origin of this form of trial, see Steph. Plead. notes XXXIX.; Co. Litt. 394, 395; 3 Bla. Com. 341.

See OATH DECISORY.

**WAGER POLICY.** One made when the insured has no insurable interest. See INSURABLE INTEREST; POLICY.

**WAGES.** A compensation given to a hired person for his or her services. See MASTER AND SERVANT; SEAMEN; STORE ORDERS.

**WAGON.** A common vehicle for the transportation of goods, wares, and merchandise of all descriptions. The term does not include a hackney coach; 5 Cal. 418; but a "buggy" is a wagon; 7 Kan. 325; *contra*, 27 Mo. 507; as is a hearse, within the meaning of an exemption law; 65 Wis. 431.

**WAIFS.** Stolen goods waived or scattered by a thief in his flight in order to effect his escape.

Such goods, by the English common law, belong to the king; 1 Bla. Com. 296; 5 Co. 109; Cro. Eliz. 694. This prerogative has never been adopted here against the true owner, and never put in practice against the finder, though against him there would be better reason for adopting it; 2 Kent 292.

**WAINAGIUM** (Sax. *wæg*, Lat. *regina*). That which is necessary to the farmer for the cultivation of his land. Barrington, Stat. 12; Magna Charta, c. 14. According to Selden and Lord Bacon, it is not the same as *contenementum*, used in the same chapter of Magna Charta, meaning the power of entertaining guests or, countenance, as common people say.

**WAITING CLERKS IN CHANCERY.** It was the duty of these officers

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to wait in attendance on the court of chancery. The office was abolished in 1842.

**WAIVE.** A term applied to a woman as *outlaw* is applied to a man. A man is an outlaw; a woman is a waive. Crabb, Tech. Dict.

To abandon or forsake a right.

To abandon without right: as, "if the felon waives, that is, leaves any goods in his flight from those who either pursue him, or are apprehended by him so to do,—he forfeits them, whether they be his own goods, or goods stolen by him." Bac. Abr. *Forfeiture* (B).

**WAIVER.** The relinquishment or refusal to accept of a right. Cited 4 Misc. Rep. 58.

The intentional relinquishment of a known right with both knowledge of its existence and an intention to relinquish it. 32 Pac. Rep. (Or.) 689. See 32 Conn. 40; 143 Mass. 374; 76 Va. 314; 105 U. S. 359.

In practice, it is required of every one to take advantage of his rights at a proper time; and neglecting to do so will be considered as a waiver. If, for example, a defendant who has been misnamed in the writ and declaration pleads over, he cannot afterwards take advantage of the error by pleading in abatement; for his plea amounts to a waiver. Failure of counsel, either in brief or oral argument, to allude to an assignment of error, is a waiver thereof; 72 Fed. Rep. 508.

In seeking for a remedy, the party injured may, in some instances, waive a part of his right and sue for another: for example, when the defendant has committed a trespass on the property of the plaintiff by taking it away, and afterwards he sells it, the injured party may waive the trespass and bring an action of assumpsit for the recovery of the money thus received by the defendant; 1 Chitty, Pl. 90. A delay of two years in bringing an action *in rem* on a maritime lien, the vessel meantime having passed into other hands, is a waiver of the lien; 84 Fed. Rep. 830; but when objections are seasonably and appropriately made there can be no waiver; 116 Ind. 578; and mere indulgence or silent acquiescence in the failure to perform is never construed into a waiver, unless some element of estoppel can be invoked; *id.*

In contracts, if, after knowledge of a supposed fraud, surprise, or mistake, a party performs the agreement in part, he will be considered as having waived the objection; 1 Bro. P. C. 289.

When a constitutional provision is designed for the protection solely of the property rights of the citizen, it is competent for him to waive the protection, and to consent to such action as would be invalid if taken against his will; Cooley, Const. Lim. 219. See 3 N. Y. 511; 6 Hill 147. In criminal cases this doctrine must be true only to a very limited extent; Cooley, Const. Lim. 220. See JURY.

As to what will amount to a waiver of a forfeiture, see 1 Conn. 79; 7 *id.* 45; 1 Johns. Cas. 125; 14 Wend. 419; 8 Pick. 292; 2 N. H. 120, 163; 1 Ohio 21; CONDITION.

**WAKENING. In Scotch Law.** The revival of an action.

An action is said to sleep when it lies over, not insisted on for a year, in which case it is suspended. Erskine, Inst. 4. 1. 33. With us a revival is by *scire facias*.

**WAND OF PEACE. In Scotch Law.** The wand which the messenger carries along with his blazon, in executing a caption, and with which he touches the prisoner. A sliding along this staff of a movable ring, or the breaking of the staff, is a protest that the officer has been resisted or deforced. Bell, Dict. *Imprisonment.*

**WANTED.** In a statute for condemning land, "wanted" for the construction of a railroad, does not mean desired, but is synonymous with necessary. 80 Ky. 267. The term is frequently used to mean need or require. 34 Conn. 403.

**WANTON AND FURIOUS DRIVING.** An offence against public health, which under the stat. 24 & 25 Vict. c. 100, s. 56, is punishable as a misdemeanor by fine or imprisonment. In this country the offence is usually provided for by state, county, or municipal legislation.

**WANTONLY.** Done in a licentious spirit, perversely, recklessly, without regard to propriety or the rights of others; careless of consequences, and yet without settled malice. 98 N. C. 641; 97 *id.* 465; 35 Fed. Rep. 282.

**WANTONNESS.** A licentious act by one man towards the person of another, without regard to his rights: as, for example, if a man should attempt to pull off another's hat against his will, in order to expose him to ridicule, the offence would be an assault, and if he touched him it would amount to a *battery*. See 94 N. C. 888.

**WAPENTAKE** (from Sax. *wapen*, i. e. *armatura*, and *tac*. i. e. *tactus*). A Saxon court held monthly by the alderman for the benefit of the hundred.

It was called a *wapentake* from *wapon*, arms, and *tac*, to touch; because when the chief of the hundred entered upon his office he appeared in the field on a certain day, on horseback, with a pike in his hand, and all the principal men met him with lances. Upon this he alighted, and they all touched his pike with their lances, in token of their submission to his authority. In this court causes of great moment were heard and determined, as Mr. Dugdale has shown from several records. Besides which it took cognizance of theft, trials by ordeal, view of frankpledge, and the like; whence after the conquest it was called the sheriff's tourn, and, as regarded the examination of the pledges, the court of the view of frankpledge. These pledges were no other than the freemen within the liberty, who, according to an institution of King Alfred, were mutually pledged for the good behavior of each other. Fortescue, *de Laud.* c. 24; Dugdale, Orig. Jur. 27; 4 Bla. Com. 273. Sir Thomas Smith derives it from the custom of taking away the arms at the muster of each hundred, from those who could not find sureties for good behavior. Rep. Angl. lib. 2, c. 16.

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**WAR.** An armed contest between nations. Grotius, *de Jur. Bell.* l. 1, c. 1. The state of nations among whom there is an interruption of all pacific relations, and a general contention by force, authorized by the sovereign. Mann. Comm. 98; 1 Kent *61, n. (h.).

An armed contest to maintain the rights of a nation or to bring about a settlement of its disputes with other nations. It is also defined as a hostile contest with armies between two or more states claiming sufficient rights. Snow, Lect. Int. L. 82.

A civil war is one confined to a single nation. It is public on the part of the established government, and private on the part of the people resisting its authority, but both the parties are entitled to all the rights of war as against each other, and even as respects neutral nations; Wheat. Int. L. § 296.

The right of making war belongs in every civilized nation to the supreme power of the state. The exercise of this right is regulated by the fundamental laws in each country, and may be delegated to its inferior authorities in remote possessions, or even to a commercial corporation. A contest by force between independent sovereign states is called a public war. If it is declared in form, or duly commenced, it entitles both the belligerent parties to all the rights of war against each other. A formal declaration of war to the enemy was once considered necessary to legalize hostilities between nations. The Romans declared war with religious ceremony; and an invasion without a declaration was unlawful: 1 Kent *53. The present usage is to publish a manifesto within the territory of the state declaring war, announcing the existence of hostilities and the motives for commencing them, usually to warn neutral states; Snow, Lect. Int. L. 82. A civil war is never declared; Boyd's Wheat. Int. L. § 294. It dates from the time the insurgents are declared belligerents; Snow, Lect. Int. L. 82. Even where there is a formal declaration of war, there is said to be strong tendency to date the war from the first act of hostility; *id.* That the recent tendency is to consider a declaration of war desirable and necessary, see 28 Am. L. Rev. 754. Since the time of Bynkershoek it has been the settled practice in Europe that war may lawfully exist by a declaration which is unilateral, or without a declaration on either side; it may begin by mutual hostilities; 1 Kent 54; at least as to subjects of a belligerent state; L. R. 3 Adm. & Ecc. 390; but some public act should be done to announce to the people a state of war, and to apprise neutrals of its existence; 1 Halleck, Int. Law, Baker's ed. 542. A state of war may exist without any formal declaration of it by either party, and this is true of both civil and foreign war; 2 Black 635. A state of civil war exists whenever the regular course of justice is interrupted by insurrection; *id.*

The war between Great Britain and the United States was a civil war until the declaration of independence, when it became a public war between independent governments; 3 Dall. 199, 224. So the late war of secession in this country was a civil war after the president's proclamation of August 16, 1861. See 37 Ga. 482; 23 Am. L. Reg. 129; SECESSION. The general doctrines applicable to the subjects of belligerent natives have been held to be applicable to the hostile parties in that war; 2 Black 635. In a civil war the sovereign has belligerent as well as sovereign rights against his rebel subjects, and may exercise either at his discretion; 2 Wall. 419; 100 Mass. 576.

The constitution of the United States (art. 1, sec. 8) provides that congress shall have power to declare war. See 2 Wall. 404; 11 *id.* 268, 331. An act of congress is necessary to the commencement of a foreign war and is in itself a declaration; 1 Kent 55. It fixes the date of the war; Thayer, Const. Cas. 2352. After congress has acted, it is not necessary to communicate the action to the enemy; 1 Kent 55; but an Indian war may exist without act of congress; 28 Ct. of Cl. 147. Actual hostilities may determine the date of the commencement of a war; a formal proclamation is unnecessary; 87 Fed. Rep. 927.

Belligerent states not infrequently adopt the rule of reciprocity in the conduct of war, but this usage has not yet assumed the character of a positive law. Frequently an opposing belligerent applies the rule of reciprocity and metes out to his adversary the same measure of justice that he receives from him. But it is said that where one belligerent exceeds his extreme rights and becomes barbarous and cruel in his conduct, the other should not, as a general thing, follow and retort upon its subjects by treating them in like manner; 2 Halleck, Int. Law 35.

Under the regulations of the United States, the army is not allowed to use the enemy's flag or uniform for purposes of deceit, but the navy may use a foreign flag to deceive the enemy if it is hauled down before a gun is fired; Snow, Lect. Int. Law 82. See WEAPONS; FLAG.

When war exists between two nations, every individual of the one is at war with every individual of the other; though it is said that modern international law has attempted, with some success, to confine the contest to the armies of the contesting powers and relieve non-combatants from loss and suffering as much as possible; Snow, Lect. Int. Law 82.

War gives this government full right to take the persons and confiscate the property of the enemy wherever found in the United States, and while the humane policy of modern times may have mitigated this rigid rule, it cannot impair the right itself; 8 Cra. 110. The right to take enemy's property found in the United States requires an act of congress; *id.*, Story, J., diss. This rule applies to the property of a neutral within the enemy's lines; 97 U. S. 60; but it was held in 2

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Wall. 419, that the right to take the property of an enemy on land is substantially restricted "to special cases dictated by the necessary operations of the war;" "the seizure of private property of pacific persons for the sake of gain is excluded." See 143 U. S. 356.

A belligerent may, by express law or edict, confiscate the property or even the land of an alien enemy, within its territory or occupation; 6 Wall. 759; 100 Mass. 574.

The right of a belligerent to confiscate debts due by its subjects to enemy's subjects is usually recognized, but seldom exercised; 1 Kent *62; and this is more especially true in relation to the public debt of a belligerent state to an enemy's subject; 1 Halleck, Int. L. 535. The seizure by the United States of enemy's property on land cannot be authorized by the law of nations; it can be upheld only by an act of congress; 5 Blatch. 231. Vessels and cargo belonging to trading concerns in the enemy's country, or corporations organized under its laws, are subject to capture, regardless of the domicil of the partners or stockholders; 87 Fed. Rep. 927.

A belligerent has a right to seize and retain as prisoners of war all subjects of an enemy state found within its territory; but this right has usually been modified by treaty, usage, or municipal regulations, and is seldom enforced; 1 Halleck, Int. L., Baker's ed. 530.

Territory conquered during a war is part of the domain of the conqueror for all commercial and belligerent purposes, so long as he continues in possession; 9 Cra. 191; but it is not incorporated into the domain of the conqueror except by a treaty of peace under which the former owner renounces it, or by long possession; 2 Gall. 485.

It is a general practice to permit alien residents to remain in the country during a war and to protect their property from seizure, or, if they return to their own state, to allow them to take it with them. Even property of the enemy found afloat in ports at the breaking out of the war is usually allowed safe conduct to a home port with time to finish loading cargo. The president's proclamation of April 26, 1898, fixed April 21 as the beginning of the Spanish war, and gave Spanish merchant vessels found in United States ports till May 21, inclusive, to load and depart with safe conduct to their destination, except vessels carrying military or naval officers, or coal in excess of their own needs, or contraband, or despatches; and permitted any such vessels which, prior to April 21, had sailed from any foreign port to any United States port, to reach their destination, unload, and return to any port not blockaded.

Congress declared on April 25, 1898, that a state of war had existed from and after April 21, 1898, and this fixed the latter date as the beginning of that war: 87 Fed. Rep. 925.

War suspends all commercial intercourse between the citizens of belligerent states, except so far as may be allowed by the sovereign authority. The only exceptions are contracts for ransom and other matters of absolute necessity and the payment of debts to an agent of an alien enemy where such agent resides in the same state with the debtor; but even such payments to an agent of an alien enemy must not be done with a view of transmitting the funds to the principal during the continuance of war; 95 U. S. 429.

The doctrine of the renewal of contracts suspended by a war is based on considerations of equity and justice and cannot be invoked to revive a contract which it would be inequitable to revive, as where time is of the essence of the contract or the parties cannot be made equal; 93 U. S. 24. In a learned opinion by Gray, J., in 100 Mass. 57 (quoted with approval in 95 U. S. 429, and 169 U. S. 72), it was said:—

"The result is, that the law of nations, as judicially declared, prohibits all intercourse between citizens of the two belligerents which is inconsistent with the state of war between their countries, and that this includes any act of voluntary submission to the enemy, or receiving his protection; as well as any act or contract which tends to increase his resources; and every kind of trading or commercial dealing or intercourse, whether by transmission of money or goods, or orders for the delivery of either, between the two countries, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmission, or by insurances upon trade with or by the enemy. Beyond the principle of these cases the prohibition has not been carried by judicial decision. The more sweeping statements in the text-books are taken from the *dicta* which we have already examined, and in none of them is any other example given than those just mentioned. At this age of the world, when all the tendencies of the law of nations are to exempt individuals and private contracts from injury or restraint in consequence of war between their governments, we are not disposed to declare such contracts unlawful as have not been heretofore adjudged to be inconsistent with a state of war."

The trading or transmission of property or money which is prohibited by international law during war, is from or to one of the countries at war. An alien enemy residing in this country may contract and sue as a citizen can; 100 Mass. 573. Where a creditor, though the subject of the enemy, remains in the country of the debtor, or has an agent there, payment to the creditor or his agent is not a violation of the duties imposed by a state of war upon the debtor; *id.*

The breaking out of a war does not necessarily and as a matter of law revoke every agency: it depends upon the circumstances and the nature of the agency; 169 U. S. 73. A contract of agency of an in-

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surance company is revoked; 95 *id.* 425, citing 93 *id.* 24. In order to the subsistence of an agency during the war, it must have the assent of the parties; 95 *id.* 429.

Contracts between parties within the Confederacy made during the civil war were valid; 143 *id.* 346.

War suspends the capacity of an alien enemy to sue in our courts; 7 Cra. 603; 2 Paine 639. But see 4 Am. L. T. 68. An assignee of an alien enemy cannot sustain a claim in a prize court; 1 Gall. 563; but an alien enemy may come into admiralty and defend his property seized as prize on the high seas; 5 Blatch. 231. The right to proceed in an action begun before the war is only suspended; Woolw. 102. Neither interest nor the statute of limitations run during a war.

As to the effect of war on life insurance contracts, the authorities vary; that the failure to pay premiums avoids the policy, see 93 U. S. 24; 95 *id.* 425; that the contract is not annulled by war, but only suspended, see 7 Bush 179; 87 N. J. L. 444; 20 Gratt. 614; 9 Blatch. 234; 45 Miss. 581. In most of the latter cases either the insured had made a tender of the premiums or the company's agent had removed during the war; 1 Biddle, Ins. § 489. There seems to be authority that a fire insurance policy is not annulled by war; see 9 Heisk. 399; as to a marine policy, see 50 N. Y. 619. And see, generally, 23 Am. L. Reg. 129; 25 *id.* 651; 11 Am. L. Rev. 221; 1 Biddle, Ins. § 489.

No civil liability attached to officers or soldiers for an act done in accordance with the usages of civilized warfare, in the late rebellion under and by military authority of either party; 131 U. S. 405. The legal condition of a Confederate soldier was that of a soldier serving against the United States under a hostile power. His legal condition subsequent to May, 1865, was that of a prisoner of war upon parole; 23 Ct. Cls. 326.

The following has recently been adjudicated in cases arising out of the Spanish-American war:

Vessels of war have the right, in the absence of any declaration of exemption by the political power, to capture enemy's property wherever found afloat, and the burden is on the claimant to show that it comes within the exemption of any such proclamation; 87 Fed. Rep. 927.

Cargo shipped from this country in an enemy's vessel to residents of a neutral country is presumably neutral cargo; but if so shipped to the enemy's country it is presumptively enemy's property, but the latter presumption may be overcome; *id.*

See BELLIGERENCY; BLOCKADE; BOOTY; CAPTURE; CONTRABAND; MANIFESTO; MEDIATION; MILITARY OCCUPATION; NEUTRALITY; PAROLE; PARTIES; PEACE; POSTLIMINIUM; PRISONER OF WAR; PRIVATEER; PRIZE; QUARTER; RANSOM; RECAPTURE; REPRISAL; RETORSION; SEARCH; SAFE-CONDUCT; SPY; TREATY OF PEACE; TRUCE; UTI POSSIDETIS; WEAPONS.

**WAR CLAIMS.** As to federal legislation on this subject, see 163 U. S. 244. The act of 1875, Feb. 18, provided that the court of claims should have no jurisdiction over claims growing out of the destruction of property during the civil war; and the act of March 3, 1887, excludes such claims from the jurisdiction of the said court and of the district and circuit courts. Decisions under the act of 1864 will be found in 163 U. S. 253, which holds that the court of claims has no jurisdiction over a claim for railroad iron appropriated by the army "while suppressing the rebellion." The United States is not responsible for the destruction of private property by their military operations during the civil war, committed by either army; nor, where they rebuilt the property (a railroad bridge), can it recover from the owner for the cost; 120 U. S. 227. See UNITED STATES COURTS.

**WAR OFFICE. In England.** A department of state from which the sovereign issues orders to his forces. Whart. Lex.

**WARD.** An infant placed by authority of law under the care of a guardian.

While under the care of a guardian, a ward can make no contract whatever binding upon him, except for necessaries. When the relation of guardian and ward ceases, the latter is entitled to have an account of the administration of his estate from the former. During the existence of this relation the ward is under the subjection of his guardian, who stands *in loco parentis*. See GUARDIAN.

The English Judicature Act of 1873 assigns the wardship of infants and the care of infants' estates to the chancery division of the high court of justice. Whart. Lex.

A subdivision of a city to watch in the daytime, for the purpose of preventing violations of the law. It is the duty of all police officers and constables to keep ward in their respective districts. It now indicates a subdivision of a city.

**WARD IN CHANCERY.** An infant who is under the superintendence of the chancellor. See WARD; COURT OF CHANCERY.

**WARD-HOLDING. In Old Scotch Law.** Military tenure by which lands were held. It was so called from the yearly tax in commutation of the right to hold vassals' lands during minority. It was abolished in 1747. Bell, Dict.

**WARDEN.** A guardian; a keeper. This is the name given to various officers: as, the warden of the prison, the wardens of the port of Philadelphia, church-wardens. As to the latter, see Baum, Church Law.

**WARDEN OF THE CINQUE PORTS.** See CINQUE PORTS.

**WARDMOTE** (from *ward*, and Sax. *mote*, or *gemote*, a meeting).

**In English Law.** A court held in

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every ward in London, with power to inquire into and present all defaults concerning the watch and police doing their duty, that engines, etc., are provided against fire, that persons selling ale and beer be honest and suffer no disorders, nor permit gaming, etc., that they sell in lawful measures, and searches are to be made for beggars, vagrants, and idle persons, etc., who shall be punished. Chart. Hen. II.; Cunningham; Wharton.

**WARDSHIP. In English Law.** The right of the lord over the person and estate of the tenant, when the latter was under a certain age.

Wardship was incident to a tenure by knight's service (see FEUDAL LAW), and to a tenure in socage; by the latter the nearest relation to whom the inheritance could not descend was entitled to the custody of the person and estate of the heir till he attained the age of fourteen years; at which period the wardship ceased, and the guardian was bound to account. Wardship in copyhold estates partook of that in chivalry and that in socage. Like the former, the lord was the guardian; like the latter, he was required to account. 2 Bla. Com. 67, 87, 97; Glanville, lib. 7, c. 9; Grand Cout. c. 33; Reg. Maj. c. 42.

**WAREHOUSE.** A place adapted to the reception and storage of goods and merchandise. 22 Me. 47.

A radical change was made in the revenue laws of the United States by the establishment, under the act of congress of Aug. 6, 1846, of the warehousing system. This statute is commonly called the Warehousing Act. Its evident object is to facilitate and encourage commerce by exempting the importer from the payment of duties until he is ready to bring his goods into market; 13 How. 295. Previous to the passage of that act, no goods chargeable with cash duties could be landed at the port of delivery until the duties were paid at the port of entry. The importer had no right to land them anywhere until they had passed through the custom-house. Before that act, the only provisions existing in relation to the warehousing of goods were merely applicable to special cases, such as where the vessel in which the goods were imported was subject to quarantine regulations, or where the entry might have been incomplete, or the goods had received damage, or where a landing was compelled at a port other than the one to which the vessel was destined, on account of distress of weather or other necessity, or in case of the importation of wines, etc.

The warehousing system was extended by the establishment of private bonded warehouses. Act of Mar. 28, 1854, R. S. §§ 2964, 2965.

Merchandise arriving at certain ports, destined for certain other ports, may be shipped to destination in bond without appraisement and liquidation of duties. See 2 Supp. R. S. 3, note.

Where warehouses are situated in a state, and their business carried on therein exclusively, a state statute prescribing regulations for their governance is not unconstitutional, it being a matter of purely domestic concern, and even where their business affects interstate as well as state commerce, such a statute can be enforced until congress acts in reference to their interstate relations; 94 U. S. 113.

Goods stored in a United States bonded warehouse on which duties remain unpaid are in possession of the United States, and an order directing a warehouseman to deliver them to a vendee, even though accepted by the warehouseman, does not constitute a constructive or symbolical delivery, or a receipt or an acceptance of the goods sufficient to satisfy the statute of frauds; 2 Sawy. 428.

Every distiller of spirits shall provide a warehouse on his distillery premises to be used only for storage of distilled spirits of his own manufacture under an internal revenue storekeeper and to be considered a bonded warehouse of the United States; R. S. § 3271 *et seq.*

The word "warehouse," when used alone, means a bonded warehouse; 154 U. S. 51, 87.

See POLICE POWER; RATES; WAREHOUSEMAN.

**WAREHOUSEMAN.** A person who receives goods and merchandise to be stored in his warehouse for hire. He is not a guarantor of the title of property placed in his custody, although his receipts therefor are by statute negotiable; 103 U. S. 352.

He is bound to use ordinary care in preserving such goods and merchandise, and his neglect to do so will render him liable to the owner; 1 Esp. 315; Story, Bailm. § 444; 12 Johns. 232; 2 Wend. 593; 2 Ala. 284; 13 Fed. Rep. 69; 115 Mass. 332; 20 Hun 438; 70 Ill. 121; 85 Ind. 201. The warehouseman's liability commences as soon as the goods arrive and the crane of the warehouse is applied to raise them into the warehouse: 4 Esp. 262. See 102 N. C. 390; 51 Barb. 148. He cannot have possession of another man's property, with its accompanying duties and responsibilities forced upon him against his will; 45 N. J. Eq. 50.

Warehousemen have a lien on property left in their custody, for their hire, labor, and services; 1 Esp. 109; 7 W. & S. 466; Jones, Liens § 967; being due on all goods stored under a single contract; 53 Fed. Rep. 401; though in some cases this lien has been looked upon only as specific, and not general; 13 Ark. 446. See Story, Bailm. 452; 3 Kent § 635; 14 Am. L. Reg. N. S. 465. A warehouseman cannot recover storage for property stored for a certain time for a definite sum, where it is destroyed within the time, without his negligence; 38 Pac. Rep. (Cal.) 635; 36 Hun 194; but under a custom to collect charges when the goods are ordered out, their

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accidentally burning will not release the owner from paying storage; 15 S. Rep. (Ala.) 143. Grain delivered to a warehouseman upon the agreement that it may be mixed with other of like grade, and held for the owner is a bailment not a sale; 88 Ill. App. 98.

A statute requiring warehousemen operating public elevators to insure grain at their own expense is valid; 153 U. S. 391. See WHARFINGER; RATES.

*Warehouse Receipts.* Receipts given by a warehouseman for chattels placed in his possession for storage purposes. 40 Ill. 320. They are not in a technical sense negotiable instruments, but have been made so in many of the states by special statute; 2 Ames, Bills & N. 782. It has been held, that, even where no statute has been enacted on this subject, inasmuch as these instruments have come to be considered the representatives of property, and an assignment is equivalent to the delivery of property, the warehouseman is estopped, as against an assignee for value without notice, to set up facts or agreements contradictory to their terms; 14 Cent. L. J. 432 (Tenn.). In order that receipts should be construed as warehouse receipts the special statutes on the subject must be strictly complied with; 9 Biss. 396; 101 U. S. 557. The holder of such receipts takes the same title to the goods as if the goods themselves had been delivered to him; 19 Am. L. Reg. N. S. 303 (Ky.). See 43 Wisc. 267; 78 Ga. 574; 6 Colo. 356; 11 Or. 277.

See LIEN; BILL OF LADING; RATES; IMPAIRING THE OBLIGATION OF CONTRACTS.

**WARRANDICE.** In Scotch Law. A clause in a charter of heritable rights, by which the grantor obliges himself that the right conveyed shall be effectual to the receiver. It is either personal or real. A warranty. Erskine, Inst. 2. 3. 11.

**WARRANT.** A writ issued by a justice of the peace or other authorized officer, directed to a constable or other proper person, requiring him to arrest a person therein named, charged with committing some offence, and to bring him before that or some other justice of the peace.

Warrant and commission, outside of naval technicality, are synonymous words. There is no difference in force between a commission and a warrant as used in the navy, except that one recites that the appointment is made by and with the advice and consent of the senate, and the other does not. Both are signed by the president; 18 Ct. Cls. 543.

A *bench-warrant* is a process granted by a court, authorizing a proper officer to apprehend and bring before it some one charged with some contempt, crime, or misdemeanor. See BENCH-WARRANT.

A *search-warrant* is a process issued by a competent court or officer authorizing an officer therein named or described to examine a house or other place for the purpose of finding goods which it is alleged have been stolen. See SEARCH-WARRANT.

Under the English Extradition Act of 1870, 33 & 34 Vict. c. 52, § 26, a warrant is defined as "any judicial document authorizing the arrest of a person accused or convicted of crime." 51 L. J. Q. B. 419; 9 Q. B. D. 93.

A warrant should regularly bear the hand and seal of the justice, and be dated. It should contain a command to the officer to make a return thereof and of his doings thereon. But the want of such a command does not excuse him from the obligation of making a proper return; 3 Cush. 438. And it is no ground for discharging a defendant that the warrant does not contain such a command; 2 Gray 74. No warrant ought to be issued except upon the oath or affirmation of the witness charging the defendant with the offence; 3 Binn. 88. A warrant will not justify the arrest of one not named therein, by reason of the fact that the name used was supposed to be his; 153 U. S. 78. It is competent to show that the affidavit was not filed until after the arrest; 136 Ind. 105. Under a statute authorizing a *habeas corpus* to determine the identity of the person arrested, the inquiry may embrace the sufficiency of the papers; 15 Misc. Rep. 303. In England a person riding a bicycle without a light at night cannot be arrested or even stopped to ascertain his name and address, without a warrant; [1897] 2 Q. B. 452.

The reprehensible practice of issuing blank warrants, which once prevailed in England, was never adopted here. 2 Russ. Cr. 512; Ld. Raym. 546; 1 H. Bla. 13. See SEARCH-WARRANT; ARREST.

**WARRANT OF ATTORNEY.** An instrument in writing, addressed to one or more attorneys therein named, authorizing them, generally, to appear in any court, or in some specified court, on behalf of the person giving it, and to confess judgment in favor of some particular person therein named, in an action of debt, and usually containing a stipulation not to bring any writ of error, or file a bill in equity, so as to delay him.

This general authority is usually qualified by reciting a bond which commonly accompanies it, together with the condition annexed to it, or by a written defeasance stating the terms upon which it was given and restraining the creditor from making immediate use of it. In *form*, it is, generally, by deed; but it seems it need not necessarily be so; 5 Taunt. 264. This instrument is given to the creditor as a security. Possessing it, he may sign judgment, without its being necessary to wait the termination of an action. See 14 East 576; 2 Term 100.

A warrant of attorney given to confess a judgment is not revocable, and notwithstanding a revocation, judgment may be entered upon it; 2 Ld. Raym. 766, 850. The death of the debtor is, however, generally speaking, a revocation; Co. Litt. 52 b.

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In Pennsylvania, judgment may be entered by the prothonotary on such a warrant without the intervention of an attorney; 4 Sm. L. 278; the instrument must show on its face the amount due, unless it can be rendered certain by mere calculation; 73 Pa. 354. The general power ceases with the entry of judgment; 8 Johns. 361; 9 Minn. 55; *contra*, 1 Me. 257; 18 Wis. 575.

The virtue of a warrant of attorney is spent by the entry of one judgment, and a second judgment entered on the same warrant is irregular; 6 S. & R. 296; 3 Wash. C. C. 558. See POWER OF ATTORNEY.

**WARRANTEE.** One to whom a warranty is made. Sheppard, Touchst. 181.

**WARRANTIA CHARTÆ.** An ancient and now obsolete writ which was issued when a man was enfeoffed of land with warranty and then he was sued or impleaded in assize or other action, in which he could not vouch or call to warranty.

It was brought by the feoffor pending the first suit against him, and had this valuable incident, that when the warrantor was vouched, and judgment passed against the tenant, the latter obtained judgment simultaneously against the warrantor, to recover other lands of equal value. 2 Rand. 141, 156; 11 S. & R. 115.

**WARRANTOR.** One who makes a warranty. Shepp. Touchst. 181.

**WARRANTY. In Insurance.** A stipulation or agreement on the part of the insured party, in the nature of a condition.

An *express* warranty is a particular stipulation introduced into the written contract by the agreement of the parties.

An *implied* warranty is an agreement which necessarily results from the nature of the contract: as, that the ship shall be seaworthy when she sails on the voyage insured.

An express warranty usually appears in the form of a condition, expressed or directly implied in the phraseology of the policy, stipulating that certain facts are or shall be true, or certain acts are or shall be done by the assured, who by accepting the insurance ratifies the stipulation.

Where the stipulation relates wholly to the future, it is a promissory condition or warranty; 1 Phill. Ins. § 754.

An express warranty must be strictly complied with; and the assured is not permitted to allege, in excuse for non-compliance, that the risk was not thereby affected, since the parties have agreed that the stipulated fact or act shall be the basis of the contract; 1 Phill. Ins. § 755; unless compliance is rendered illegal by a subsequent statute; *id.* § 769. All reasonable doubts as to whether statements inserted in or referred to in an insurance policy are warranties or representations should be resolved in favor of the assured; 58 Ark. 528; 51 N. J. L. 175.

A breach of warranty vitiates the insurance, though the insured made the warranty without knowledge of its falsity; 131 N. Y. 485; 48 Mo. App. 1; 20 U. S. App. 337; 9 L. R. Q. B. 328.

The doctrine of the divers warranties and conditions in the different species of insurance has been the subject of a great mass of jurisprudence: viz.—

*In fire policies*, with reference to assignments of the insured property, or the policy; 17 N. Y. 424, 509; 6 Gray 160; 30 Pa. 311; 26 Conn. 165; 25 Ala. 355; 78 Ia. 216; 64 Miss. 1; conformity to charter; 32 N. H. 318; 8 Cush. 393; 1 Wall. 273; condition of the premises, including construction, locality, and manner of using; 18 N. Y. 168, 385; 8 Cush. 79; 31 N. H. 231; 2 Curt. 610; 4 Ohio St. 285; 27 Pa. 325; 4 R. I. 141; distance of other buildings; 7 N. Y. 153; 6 Gray 105; 81 Ia. 496; frauds; 28 N. H. 149, 157; 2 Ohio St. 452; 40 Mo. App. 276; kind of risk; 25 N. H. 550; 3 Md. 341; 6 McLean 824; 37 Minn. 300; smoking on premises; 127 U. S. 399; limiting right of action; 5 Gray 432; 6 Ohio 599; 5 R. I. 394; 24 Ga. 97; notice and demand; 18 Barb. 69; and proof of loss; 2 Gray 480; 11 N. Y. 81; 29 Pa. 198; 18 Ill. 553; 6 Ind. 137; other insurance; 13 N. Y. 79, 253; 22 Conn. 575; 5 Md. 165; 37 Me. 137; 9 Cush. 479; 4 N. J. 447; 21 Mo. 97; 86 Ala. 424; 71 Mich. 414; 98 N. C. 143; 31 Ill. App. 398; payment of premium; 18 Barb. 541; suspension of risk; 11 N. Y. 89; 43 Me. 393; title; 1 Curt. 193; 1 Cush. 280; 17 Mo. 247; 23 Pa. 50; 17 Mo. 247; 14 N. Y. 253; value; 11 Cush. 324; waiver of compliance with a warranty; 4 N. J. 67; 6 Gray 192; concealment of facts as to title; 150 Pa. 270; 16 Or. 283; 24 Neb. 358.

*In life policies*, with reference to assignment; 5 Sneed 259; representation, or other stipulations; 3 Gray 180; 1 Bosw. 338; 3 Md. 341; 21 Pa. 134; 13 La. Ann. 504; 19 Mo. 506; 74 Hun 385; 58 Ark. 528; 60 Fed. Rep. 727; 56 Conn. 528; that the insured is alive and in sound health; 14 App. Div. N. Y. 142. Where an application for life insurance is to be treated as a warranty it is to that extent a part of the policy; 75 Fed. Rep. 637. A warranty that the insured will not die by his own hand is valid; *id.* 637.

*In marine policies*, with reference to assignments; 33 La. 338; contraband trade; 43 Me. 460; other insurance; 17 N. Y. 401; seaworthiness; 3 Ind. 23; 1 Wheat. 399; 1 Binn. 592; 1 Johns. 241; 7 Pick. 259; 4 Mas. 439; 1 Camp. 1; 2 B. & Ald. 320; 5 M. & W. 414; Roccus, n. 22; 85 Me. 215; 124 U. S. 405; 136 *id.* 408; suspension of risk; 3 Gray 415; title; 19 N. Y. 179.

*Waiver* of the right to insist upon the performance of a condition may occur under a policy of this description; as, of the condition relative to assignment; 32 N. H. 95; or answers to questions; 7 Gray 261; or distance of buildings; 6 Gray 175; going out of limits; 33 Conn. 244; additional insurance; 1 Ind. App. 411; limitation of action; 14 N. Y. 253; 142 Pa. 332; offer of arbitration; 6 Gray 192; payment

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of premium or assessment; 25 Conn. 442; 38 Me. 439; 31 Pa. 438; proof of loss; 21 Mo. 81; seaworthiness; 37 Me. 137; title; 35 N. H. 328; 83 Me. 362. An insurance company cannot set up a forfeiture for a condition broken, against one whom its conduct has induced to believe that such provision would not be insisted upon; 184 Ill. 583; so an insurer is estopped to set up a breach of a warranty written by its agent for an illiterate person; 117 N. Y. 310; or made by the error of the agent; 79 Fed. Rep. 245.

A clause in a policy of insurance against fire, that nothing but a distinct specific agreement clearly expressed and indorsed on the policy shall operate as a waiver of any printed or written condition, warranty, or restriction thereon, is construed to refer to those conditions which enter into and form a part of the contract of insurance, and not to these stipulations which are to be performed after a loss has occurred, such as giving notice and furnishing preliminary proof of loss; 36 Ind. 102; May, Ins. 626.

See DEVIATION; POLICY; REPRESENTATION; SEAWORTHINESS.

**In Sales of Personal Property.** A warranty is an express or implied statement of something which a party undertakes shall be part of a contract, and, though part of the contract, *collateral to the express object of it.* Benj. Sales § 600. See 60 N. Y. 450.

An *express* warranty is one by which the warrantor covenants or undertakes to insure that the thing which is the subject of the contract is or is not as there mentioned: as, that a horse is sound; that he is not five years old.

Where there is an express warranty on the sale of goods to be delivered, the buyer is not estopped by accepting the goods; but he can retain the same, stand on his warranty, and recover for the breach. See 81 Wis. 399.

To create an express warranty, the word "warrant" need not be used, nor are any particular words necessary; 75 Cal. 558.

An *implied* warranty is one which, not being expressly made, the law implies by the facts of the sale. Cro. Jac. 197.

In general, there is no implied warranty of the *quality* of the goods sold; 2 Kent 374; Co. Litt. 102 *a*; 1 Pet. 317; 1 Johns. 274; 4 Conn. 428; 18 Pick. 59; 72 Pa. 229; 4 Hayw. 227; especially in cases of a specific chattel already existing which the buyer has inspected; 4 M. & W. 64; 42 N. H. 165.

But where a chattel is to be made or supplied to the order of the purchaser, there is an implied warranty that it is fit for the purpose for which it is ordinarily used, or for which it has been specially made; Benj. Sales § 645; 53 N. Y. 515; 37 Neb. 68; 50 Mo. App. 121; 21 Or. 289. Thus where a party conveyed a ship to another by deed, but at the time of the conveyance the ship was ashore in a wrecked and ruinous condition, it was held that there was an implied warranty that the article conveyed should be a ship, and not a mere "bundle of timber"; 3 M. & W. 390. Another exception is in the sale of goods by sample. There is a warranty that their quality is equal to the sample; 13 Mass. 139; 3 Rawle 37; 44 N. Y. 289; 64 Hun 634; 73 Ia. 712; but a sale of goods by sample only binds the vendor to supply goods equal to sample, and not goods fit for a particular purpose; 37 S. C. 7. See SAMPLE. An implied warranty may also result from the usage of a particular trade; 2 Disney 482; 4 Taunt. 847. In a sale by description of goods not inspected by the buyer, there is an implied warranty that the goods are salable or merchantable; 24 Wisc. 508; 21 Ia. 508; 53 N. Y. 518; 4 Camp. 144; 76 Ga. 629; 16 Or. 381; but see 23 Me. 212: and an express warranty of quality excludes any implied warranty that the articles sold are merchantable or fit for their intended use; 134 U. S. 306. It has been held that words of description constitute a warranty that the articles sold are of the quality and description so described; 11 Pick. 99; 3 Rawle 23; but the better opinion has been said to be that the words of description constitute not a *warranty* of the description, but a *condition precedent* to the seller's right of action, that the thing which he offers to deliver, or has delivered, should answer the description; 4 M. & W. 39. Where the buyer relies on the seller's skill and judgment to supply him an article, there is an implied warranty that the article will suit the desired purpose; 2 M. & G. 279; Benj. Sales § 661. Finally, it is said that that there is always an implied warranty in sales of provisions for household use; 18 Pick. 57; 18 Mich. 51; 50 Barb. 116. But see Benj. Sales § 670.

In the sale of commercial paper without indorsement or express assumption of liability on the paper itself, the contract of sale and the obligations which arise from it as between vendor and vendee are governed by the common law relating to the sale of goods and chattels; and the undoubted rule is that in such a sale the obligation of the vendor is not restricted to the mere question of forgery *vel non*, but depends on whether he has delivered that which he contracted to sell, this rule being designated in England as a condition of the principal contract, and in this country being generally termed an implied warranty of identity of the thing sold; 163 U. S. 385.

The rule of the civil law was that a fair price implied a warranty of quality; Dig. 21. 2. 1. This rule has been adopted in Louisiana; 1 La. Ann. 27; and in South Carolina; 1 Bay 324. There may be an implied warranty as to character; 13 Mass. 139; 2 Harr. & G. 495; 20 Johns. 294; 4 B. & C. 108; and even as to quality, from statements of the seller; 40 Me. 9; 24 Barb. 549. See 2 Misc. Rep. 295.

A purchaser may examine an article and exercise his judgment upon it, and at

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the same time protect himself by a warranty; 158 Mass. 178; but if he elects not to accept the property as not answering the warranty, there is no duty imposed upon either party thereafter to make further tests or experiments to see whether the property complies with the warranty; 9 U. S. App. 550.

It is settled that in an executory agreement the vendor warrants, by implication, his title to the goods which he promises to sell, and that in the sale of an ascertained specific chattel, an affirmation by the vendor that the chattel is his is equivalent to a warranty of title, and that this affirmation may be implied from his conduct as well as his words. It is further said that the present rule in England is, in the absence of such implication or affirmation, that the sale of a personal chattel implies an affirmation by the vendor that the chattel is his, and, therefore, he warrants the title, unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold; Benj. Sales §§ 627, 639.

As to the goods in the possession of the vendor, there is an implied warranty of title; but where the goods sold are in possession of a third party at the time of the sale, then there is no such warranty; 36 Me. 501; 28 Miss. 772; 2 Kent 478; 8 Mont. 380; 25 Neb. 360; 39 Kan. 365; 47 Minn. 500; 122 Pa. 7; *contra*, 3 Term 58; 17 C. B. N. S. 708.

An implied warranty of quality exists in cases of the sale of food provisions on grounds of public policy, but the exception is limited to sales for immediate consumption; 73 N. W. Rep. (Minn.) 163; 145 Mass. 439; 49 N. E. Rep. (Ill.) 210. See 18 N. Y. L. J. (Feb. 18, 1898).

A vendor knowing he has no title, and concealing the fact from the vendee, is liable on the ground of fraud; Benj. Sales § 627.

Antecedent representations, made as an *inducement* to the buyer, but not forming part of the contract when concluded, are not warranties; it is not, however, necessary that the representation should be made simultaneously with the bargain, but only that it should enter into it; 15 C. B. 130; Benj. Sales § 610. No special form of words is necessary to constitute a warranty; 45 Cal. 573; 75 *id.* 358; 75 Ill. 81; 4 Daly 277; 3 Mod. 261. The question is for the jury, to be inferred from the sale and the circumstances of the particular case; 8 Cow. 25; 9 N. H. 111; 149 Pa. 458; 63 Hun 636; 75 Cal. 558; even if the contract is written; Benj. Sales § 614; but see 10 Allen 242. The rule is *simplex commendatio non obligat*. See 2 Esp. 572. A warranty made after a sale requires a new consideration; 3 Q. B. 234; 100 Mass. 532. See 148 Mass. 608; representatious made after a sale is complete and after delivery, and not entering into the consideration, cannot amount to a warranty; 62 Mich. 157.

Where one orders a specific article, there is only an implied warranty that the article supplied shall correspond with the designation and no implied agreement that it shall be fit for the purpose for which the buyer designed it; 28 U. S. App. 87.

Where a known, described, and definite article is ordered of a manufacturer, though he has notice that it is required for a particular purpose, there is no implied warranty that it shall answer that purpose; 141 U. S. 510. Affirmations of the essential qualities of goods made by the vendor and relied upon by the vendee, constitute an express warranty; 15 U. S. App. 218.

Proposals made by an equipment company to a street railway company to furnish electric equipment which should comply with certain conditions of performances, are affirmations of quality amounting to a warranty; 27 U. S. App. 364. Where there is a complete contract of sale in writing, there can be no implied warranty as to the subject-matter; 43 Ill. App. 175; 38 Cent. L. J. 70. As to implied warranty in a manufacturer's executory contract of sale, see 36 Cent. L. J. 192. In the sale of a patent there is an implied warranty of title, without regard to the form of the instrument of transfer; 3 Fed. Rep. 898. In Louisiana a warranty, while not of the essence, is of the nature of a contract of sale, and is implied in every such contract; 163 U. S. 386.

**In Sales of Real Property.** A real covenant, whereby the grantor of an estate of freehold and his heirs were bound to warrant the title, and, either upon voucher or by judgment in a writ of *warrantia chartæ*, to yield other lands to the value of those from which there has been an eviction by a paramount title. Co. Litt. 365 *a*.

*Collateral* warranty existed when the heir's title was not derived from the warranting ancestor, and yet it barred the heir from claiming the land by any collateral title, upon the presumption that he might thereafter have assets by descent from or through the ancestor; and it imposed upon him the obligation of giving the warrantee other lands in case of eviction, provided he had assets. 2 Bla. Com. 301.

*Lineal* warranty existed when the heir derived title to the land warranted, either from or through the ancestor who made the warranty.

The statute of 4 Anne, c. 16, annulled these collateral warranties, which had become a great grievance. Warranty in its original form has never, it is presumed, been known in the United States. The more plain and pliable form of a covenant has been adopted in its place; and this covenant, like all other covenants, has always been held to sound in damages, which, after judgment, may be recovered out of the personal or real estate, as in other cases. And in England the matter has become one of curious learning and of little or no practical importance. See 4 Kent 469; 3 Rawle 67, n.; 2 Wheat. 45; 1

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Sumn. 358; 17 Pick. 14; 1 Ired. 509; 2 Saund. 88, n. 5.

Mr. Rawle, in his work on Covenants for Title 205, says there is no evidence that the covenants of warranty as employed in the United States ever had a place in English conveyancing. In the earlier conveyances which remain on record in the colonies are to be found some or all of the covenants which were coming into use in the mother country, together with a clause of warranty, sometimes with and sometimes without the addition of words of covenant. Later the words of covenant became more general, and at the present day their use is almost universal. As to the extent and scope of the American covenant of warranty, the sounder view is that it is merely a covenant for quiet enjoyment, the only difference being that under the latter, a recovery may sometimes be had where it would be denied under the former. See COVENANT.

**WARRANTY, VOUCHER TO.** In Old Practice. The calling a warrantor into court by the party warranted (when tenant in a real action brought for recovery of such lands), to defend the suit for him; Co. Litt. 101 *b*; 2 Saund. 32, n. 1; and the time of such voucher is after the demandant has counted.

It lies in most real and mixed actions, but not in personal. Where the voucher has been made and allowed by the court, the vouchee either voluntarily appears, or there issues a judicial writ (called a summons ad warrantizandum), commanding the sheriff to summon him. Where he, either voluntarily or in obedience to this writ, appears and offers to warrant the land to the tenant, it is called entering into the warranty; after which he is considered as tenant in the action, in the place of the original tenant. The demandant then counts against him *de novo*, the vouchee pleads to the new count, and the cause proceeds to issue.

**WARREN** (Germ. *wahren*, French *garenne*). A place privileged by prescription or grant of the king for the preservation of hares, conies, partridges, and pheasants, or any of them. An action lies for killing beasts of warren inside the warren; but they may be killed *damage feasant* on another's land; 5 Co. 104. It need not be inclosed; Co. 4th Inst. 318.

**WASHINGTON.** One of the states of the United States of America.

By the act February 22, 1889, the people of Washington were enabled to form a constitution and state government, and be admitted into the Union on an equal footing with the original states. Accordingly, after all the requirements had been complied with on November 11, 1889, the president by proclamation announced the admission of Washington into the Union.

THE LEGISLATIVE POWER is vested in a senate and a house of representatives.

The *house of representatives* is composed of not less than sixty-three nor more than ninety-nine members. They are elected biennially for a term of two years.

The *senate* consists of members chosen for a term of four years. The number of senators shall not be more than one-half nor less than one-third of the number of members of the house of representatives.

THE EXECUTIVE DEPARTMENT consists of a governor, lieutenant-governor, secretary of state, treasurer, auditor, attorney-general, superintendent of public instruction, and a commissioner of public lands.

The supreme executive power is vested in a governor who holds office for four years. He has the usual powers and duties of the executive. He has pardoning power subject to statutory regulations. In case of the removal, death, or disability of the governor the duties of the office devolve upon the lieutenant-governor.

THE JUDICIAL POWER is vested in a supreme court, superior courts, justices of the peace, and such inferior courts as may be established by the legislature.

The *supreme court* consists of five judges. It is always open for the transaction of business except on non-judicial days. The number of the judges may be increased by the legislature. It has original jurisdiction in *habeas corpus*, *quo warranto*, and *mandamus* as to all state officers, and appellate jurisdiction in all actions and proceedings except in civil actions at law for the recovery of money or personal property when the original amount in controversy, or the value of the property, does not exceed the sum of two hundred dollars, unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute. It has power to issue writs of *mandamus*, etc., and all writs necessary for the exercise of its jurisdiction.

*Superior courts* are held in each county. They have original jurisdiction in all cases in equity and in all cases at law which involve the title to real property, or the legality of any tax, impost, etc., and in all other cases in which the demand or the value of property in controversy amounts to one hundred dollars, and in all criminal cases amounting to felony, of all cases of misdemeanor not otherwise provided for, of actions of forcible entry and detainer, of proceedings in insolvency, of actions to prevent or abate nuisances, and of all matters of probate and divorce. The superior court also has original jurisdiction in all cases in which jurisdiction is not vested exclusively in some other court, and has the power of naturalization. It has appellate jurisdiction from justices' and other inferior courts.

**WASTE.** Spoil or destruction, done or permitted, to lands, houses, or other corporeal hereditaments, by the tenant thereof to the prejudice of the heir or of him in reversion or remainder.

"Any unauthorized act of a tenant for a freehold estate not of inheritance, or for any lesser interest, which tends to the destruction of the tenement, or otherwise to the injury of the inheritance." Poll. Torts 327.

*Permissive waste* consists in the mere neglect or omission to do what will prevent injury: as, to suffer a house to go to decay for the want of repair. And it may be incurred in respect to the soil, as well as to the buildings, trees, fences, or live stock on the premises. See *infra*.

*Voluntary waste* consists in the commission of some destructive act: as, in pulling down a house or ploughing up a flower-garden. 1 Paige, Ch. 573.

*Equitable waste* may be defined as such acts as at law would not be esteemed to be waste under the circumstances of the case, but which in the view of a court of equity are so esteemed from their manifest injury to the inheritance, although they are not inconsistent with the legal rights of the party committing them. 2 Story, Eq. Jur. § 915.

*Voluntary waste* is committed upon cul-

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tivated *fields, orchards, gardens, meadows*, and the like, whenever a tenant uses them contrary to the usual course of husbandry or in such a manner as to exhaust the soil by negligent or improper tillage; 6 Ves. Ch. 328; 2 Hill 157; 2 B. & P. 86. It is, therefore, waste to convert arable into wood land, or the contrary; Co. Litt. 53 *b*. Cutting down fruit-trees, although planted by the tenant himself, is waste; 2 Rolle, Abr. 817; and it was held to be waste for an outgoing tenant of garden-ground to plough up strawberry-beds which he had bought of a former tenant when he entered; 1 Camp. 227. When lands are leased on which there are open mines of metal or coal, or pits of gravel, lime, clay, brick, earth, stone, and the like, the tenant may dig out of such mines or pits; but he cannot open any new mines or pits without being guilty of waste; Co. Litt. 53 *b*; 110 Pa. 473. See 64 Cal. 134; MINES; OIL. Any carrying away of the soil is also waste; Comyns, Dig. *Waste* (D 4); 6 Barb. 13; Co. Litt. 53 *b*; 1 Sch. & L. 8. And so is the taking of clay from the soil and manufacturing it into bricks and selling the same; 31 W. Va. 621; 13 Q. B. 591. A tenant in common who quarries stone from the common property is guilty of waste; 117 Mo. 414; and a life tenant who unlawfully removes petroleum; 39 W. Va. 231.

Waste need not consist in loss of market value; it may be an injury in the sense of destroying identity; L. R. 20 Eq. 539.

It is committed *in houses* by removing things once fixed to the freehold, although they may have been erected by the lessee himself, unless they are mere fixtures. See FIXTURES. It may take place not only in pulling down houses or parts of them, but also in changing their forms; as, if the tenant pull down a house and erect a new one in its place, whether it be larger or smaller than the first; 2 Rolle, Abr. 815; 4 Utah 107; 13 Q. B. 588; or convert a parlor into a stable, or a grist-mill into a fulling-mill; *ibid.*; or turn two rooms into one; *ibid.* See 13 Q. B. 572; 14 Ves. 526. The placing of an excessive weight in a building, by reason of which it falls, is waste; 152 Mass. 567. The building of a house where there was none before was, by the strict rules of the common law, said to be waste; Co. Litt. 53 *a*; and taking it down after it was built was waste also; 1 B. & Ad. 161; 4 Pick. 310; 19 N. Y. 234; 16 Conn. 322; 2 McCord 329; 1 Harr. & J. 289; 1 Watts 378.

Voluntary waste may also be committed *upon timber*. The law of waste accommodates itself to the varying wants and conditions of different countries: that will not, for instance, be waste in an entire woodland country which would be so in cleared one. The clearing up of land for the purpose of tillage in a new country where trees abound is no injury to the inheritance, but, on the contrary, is a benefit to the remainderman, so long as there is sufficient timber left and the land cleared bears a proper relative proportion to the whole tract; 4 Kent 316; 5 Watts 463; 6 T. B. Monr. 342; 26 Wend. 122; see 99 N. C. 583; 81 Mich. 332; where timber is grown for sale, cutting timber would be a "mode of cultivation." See L. R. 18 Eq. 309; [1891] 3 Ch. 206.

The extent to which wood and timber on such land may be cut without waste is a question of fact for a jury; 7 Johns. 227. A tenant may always cut trees for the repair of the houses, fences, hedges, stiles, gates, and the like; Co. Litt. 53 *b*; 100 N. C. 41; 91 Ky. 533; and for making and repairing all instruments of husbandry; Wood, Inst. 344. See ESTOVERS. He may fell dead or dying timber; 110 Pa. 473; 11 Vt. 293. And he may, when unrestrained by the terms of the lease, cut timber for firewood, if there be not enough dead timber for such purposes; Com. Dig. *Waste* (D 5). But not ornamental trees or those planted for shelter; 6 Ves. Ch. 419; or to exclude objects from sight; 16 Ves. Ch. 375; 7 Ired. Eq. 197; 6 Barb. 9. He cannot promiscuously cut trees to make staves to be sold; 71 Wis. 336; nor railroad ties; 40 Mo. App. 515.

It is waste for a tenant for life to neglect to pay the interest on a mortgage whereby the land was sold to the prejudice of the remainderman; 16 Hun 226; and so of a failure to pay taxes; 51 Me. 434; 59 Miss. 289; 59 Wis. 557; 25 *id.* 679.

Windfalls are the property of the landlord; for whatever is severed by inevitable necessity, as, by a tempest, or by a trespasser, and by wrong, belongs to him who has the inheritance; 3 P. Wms. 268; 11 Co. 81.

In general, a tenant is answerable for waste although it is committed by a stranger; for he is the custodian of the property, and must take his remedy over; 2 Dougl. 745; 1 Taunt. 198; 1 Denio 104.

*Permissive waste* to buildings consists in omitting to keep them in tenantable repair; suffering the timbers to become rotten by neglecting to cover the house; or suffering the walls to fall into decay for want of plastering, or the foundation to be injured by neglecting to turn off a stream of water, and the like; Co. Litt. 53 *a*. See 41 N. J. Eq. 130; 59 Miss. 289; LANDLORD AND TENANT. Permissive waste in houses, however, as a general rule, is now only punishable when a tenant is bound to repair, either expressly or by implication; 4 B. & P. 298; 10 B. & C. 312. See 107 N. C. 630.

*The redress* for this injury is of two kinds, *preventive* and *corrective*. A reversioner or remainderman, in fee, for life, or for years, may now recover, by an ordinary action at law, all damages he has sustained by an act of *voluntary waste* committed by either his tenant or a stranger, provided the injury affects his reversion. But as against a tenant for years, or from year to year, he can only sustain an action for damages for *permissive waste* if his lease obliges the tenant



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to repair; 2 Saund. 252 *d*, note; 10 B. & C. 312; 41 Ch. D. 352. Where a particular course of user has been carried on for a considerable course of time, with the apparent knowledge and consent of the owner of the inheritance, all lawful presumptions will be made in favor of the lawfulness of the acts complained of; Poll. Torts 328; 4 App. Cas. 465. The statutes of the several states also provide special relief against waste in a great variety of cases, following, in general, the Statute of Gloucester, which not only forfeits the premises, but gives exemplary damages for all the injury done. The rules as to waste are less stringent in the western states than in the east.

These legal remedies, however, are still so inadequate, as well to prevent future waste as to give redress for waste already committed, that they have in a great measure given way to the remedy by bill in equity, by which not only future waste, whether voluntary or permissive, will be prevented, but an account may be decreed and compensation given for past waste in the same proceeding; 2 Mer. 408; 2 Story, Eq. Jur. 179. Complainant in an action for waste must either have actual possession, or must show in himself an actual, valid, subsisting title; 85 Tenn. 154.

A contingent remainderman may maintain an injunction to restrain waste by the life tenant; 31 W. Va. 621.

An action on the case in the nature of waste, will lie by the holder of a mortgage on lands, against a purchaser from the mortgagor of the equity of redemption, for acts of waste committed with a knowledge that the value of the security will be injured thereby. This was a case of new impression (so stated in both courts) and was decided on general principles; 4 N. Y. 110. affirming 4 Barb. 347.

The reversioner need not wait until waste has actually been committed before filing his bill; for if he ascertains that the tenant is about to commit any act which would operate as a permanent injury to the estate, or if he threatens or shows any intention to commit waste, the court will at once interfere and restrain him by injunction from doing so; 18 Ves. Ch. 355; 1 Johns. Ch. 435; 1 Jac. & W. 653.

Sometimes a tenant, whether for life or for years, by the instrument creating his estate, holds his lands *without impeachment of waste*. This expression is equivalent to a general permission to commit waste, and at common law would authorize him to cut timber, or open new mines and convert the produce to his own use; Co. Litt. 220; 11 Co. 81 *b*; 15 Ves. 425. But equity puts a limited construction upon this clause, and only allows a tenant those powers under it which a prudent tenant in fee would exercise, and will, therefore, restrain him from pulling down or dilapidating houses, destroying pleasure-houses, or prostrating trees planted for ornament or shelter; 2 Vern. 739; 6 Ves. 110.

As to remedy by writ of estrepement to prevent waste, see ESTREPEMENT; 2 Yeates 281; 3 Bla. Com. 226.

As to remedies in cases of fraud in committing waste, see Hov. Frauds 226–238.

**WASTE-BOOK.** A book used among merchants. All the dealings of the merchants are recorded in this book in chronological order as they occur.

**WATCH.** To stand sentry and attend guard during the night-time. Certain officers called watchmen are appointed in most of the United States, whose duty it is to arrest all persons who are violating the law or breaking the peace. See 1 Bla. Com. 356; 1 Chitty, Cr. Law 14, 20.

**WATCH AND WARD.** A phrase used in the English law to denote the superintendence and care of certain officers whose duties are to protect the public from harm.

**WATCHMAN.** An officer in many cities and towns, whose duty it is to watch during the night and take care of the property of the inhabitants. He possesses, generally, the common-law authority of a constable to make arrests, where there is reasonable ground to suspect a felony, though there is no proof of a felony having been committed; 1 Chitty, Cr. Law 24; 1 B. & Ald. 227. See ARREST.

**WATER.** That liquid substance of which the sea, the rivers, and creeks are composed.

A pool of water, or a stream or watercourse, is considered as part of the land; hence a pool of twenty acres would pass by the grant of twenty acres of land, without mentioning the water; 2 Bla. Com. 18; 2 N. H. 255, 391; 1 Wend. 255; 5 Conn. 497; 8 Pa. 13. A mere grant of water passes only a fishery; Co. Litt. 4 *b*; 5 Cow. 216. But the owner of land over which water flows may grant the land, reserving the use of all the water to himself, or may grant the use of all or a portion of the water, reserving the fee of the land to himself; 26 Vt. 64; 3 Hill N. Y. 418; 6 Metc. 181.

**WATER BAILIFF.** **In English Law.** An officer appointed to search ships in ports. 10 Hen. VII. 30.

**WATER COMPANY.** A municipality has no implied power, from the mere fact of its creation, to engage in the business of supplying its citizens water for pay. It cannot do so except by virtue of express legislative authority. A municipality having such legislative authority, which has entered into a contract with an existing water company to supply the citizens with water, has thereby exhausted its power and cannot subsequently erect its own water works for the same purpose; 177 Pa. 643; 180 *id.* 509. See 186 Pa. 74; *contra*, in Rhode Island; 80 Fed. Rep. 611.

In Pennsylvania a water company under a statute which provides that water com-

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panies shall furnish pure water, will be enjoined from collecting water rents when it has supplied water utterly unfit for domestic use or for steam purposes. The courts cannot decree that the company must obtain a supply of pure water. They can only enjoin it from collecting water rents for impure water; 172 Pa. 489.

A water company which has a contract with a city to furnish water to extinguish fires is not liable to the owners of private property destroyed by fire through its failure to furnish water according to the contract; 88 Tex. 233; there is no privity of contract between the parties to the action; 46 Conn. 24; 83 Ga. 219; 139 Ind. 214; 54 Ia. 59; 37 Neb. 546; 78 Hun 146; 11 Atl. Rep. (Pa.) 300; 3 Lea (Tenn.) 42; 81 Wis. 48; nor does the fact that the ordinance granting the franchise requires the company to supply the city and its inhabitants with sufficient water to put out fires, or to maintain the water at a certain pressure, create the necessary privity of contract; 83 Ga. 219; 37 Neb. 546; 81 Wis. 48; not even a statute, requiring the pipes to be kept charged at a certain pressure, will give the right of action; 2 Exch. Div. 441, reversing 6 L. R. Exch. 404. Such owner cannot maintain an action, even though the city has raised by taxation a special fund, to which the plaintiff contributed, to pay for a sufficient supply of water for use in case of fire; 79 Ia. 419; or though the citizens pay a special tax to the company, under its contract with the city; 119 Mo. 304. Nor has a municipality such an interest in the property destroyed as to give it a right of action, and the owner of the property destroyed cannot maintain an action as assignee of the right of action of the municipality; 16 Nev. 44. An action of tort will not lie; 83 Ga. 219. But it has been held that when the contract of a water company with the city declares that it is made, *inter alia*, for the protection of private property against destruction by fire, the owner of property which is taxed for water rent, and is destroyed by fire through the failure of the company to supply a sufficient quantity of water, may, in his own name, sue the company on its contract with the city; 89 Ky. 340.

A company for furnishing water to the public is subject to the visitatorial power of the state; 172 Pa. 506.

An existing system of water supply in a municipality which is the property of private individuals and is operated under a contract with the municipal corporation, is private property which may be acquired by eminent domain, on the payment of a just compensation, including compensation for the termination of the contract; 166 U. S. 685.

The right which a water company acquires by a lease from a riparian owner and not by the exercise of eminent domain is no greater than the right of the riparian owner; 182 Pa. 418.

A regulation by which the company refuses to turn on the water for a building until unpaid rates of previous owners are paid is unreasonable and void unless authorized by statute; 40 L. R. A. (Mass.) 657.

See WATER RENTS; RATES.

**WATER-COURSE.** This term is applied to the flow or movement of the water in rivers, creeks, and other streams.

It is a more comprehensive word than "river." In its most general sense, it means a course or channel in which water flows. In its legal sense, it consists of bed, banks, and water; a living stream confined in a channel, but not necessarily flowing all the time; 7 Ind. App. 309.

A water-course is a stream *usually* flowing in a particular direction, in a definite channel, and discharging into some other stream or body of water; and the term does not include surface-water conveyed from a higher to a lower level for limited periods during the melting of snow, or during or soon after the fall of rain, through hollows or ravines, which at other times are dry; 27 Wisc. 656. See 100 Mich. 424.

It must be a stream in fact, as distinguished from mere surface drainage rendered necessary by freshets or other extraordinary causes, though the flow of water need not be constant; 38 Neb. 406. See 118 Ind. 125; 21 Or. 35. A stream does not cease to be a water course and become mere surface water, because at certain points it spreads over a level meadow several rods in width, and flows for a distance without defined banks before flowing again into a definite channel; 16 Or. 165.

In a legal sense, property in a water-course is comprehended under the general name of *land:* so that a grant of land conveys to the grantees not only fields, meadows, and the like, but also all the rivers and streams which naturally pass over the surface of the land; 1 Co. Litt. 4; 2 N. H. 255; 5 Wend. 423. See WATER.

The right of a riparian proprietor to the flow of a stream over his land, may be severed from the land by grant, and where such right has been conveyed without reservation, the grantor cannot maintain an action to enjoin a diversion of water; 91 Cal. 146; 85 *id.* 219. See 16 Colo. 16.

Those who own land bounding upon a water-course are denominated by the civilians *riparian* proprietors; and this convenient term has been adopted in the common law; Ang. Wat.-Courses 3; 3 Kent 354; 55 Fed. Rep. 854.

In the United States all navigable water-courses are a species of highway, and come under the control of the states, except when they are used in foreign or interstate commerce, and then congress has authority over them; Cooley, Const. Lim. 589. See NAVIGABLE WATERS. States within which lands bordering on a river are situated have the right, not only to control and levee its banks, to prevent the adjoining country from overflow, but to compel riparian owners to maintain such

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levees at their own expense; 78 Cal. 125. See RIVER.

The public cannot, in the United States, gain any proprietary right in streams of inland water too small to be used for the transportation of property; Ang. Water-C. § 2; 11 Me. 278. In the case of navigable waters used as a highway of commerce between the states or with foreign nations, no state can grant a monopoly for the navigation of any portion of such waters; 9 Wheat. 1; 146 U. S. 387; 85 Wis. 445; 144 N. Y. 88; 64 Fed. Rep. 486. A state has the same power to improve such waters as it has in the case of any highway; Cooley, Const. Lim. 738; 29 Fla. 1; 148 U. S. 312; 152 U. S. 1; 87 Wis. 151; and, having expended money for such improvement, it may impose tolls upon the commerce which has the benefit of the improvement; 3 McLean 226; 8 Bush 447. See 119 U. S. 543. The states may authorize the construction of bridges over such waters, for railroads and other species of highways, notwithstanding they may to some extent interfere with navigation. See Hare, Am. Const. L. 457, 487, 497; 4 Pick. 460; 38 Ill. 467; 50 Fed. Rep. 16; 83 Me. 419; 125 U. S. 1; 53 Fed. Rep. 549; BRIDGE. A state may establish ferries over such waters; 1 Black 603; 41 Miss. 27; and authorize the construction of dams; Cooley, Const. Lim. 740. A state may also regulate the speed and general conduct of ships and other vessels navigating its water highways, provided its regulations do not conflict with any regulations made by congress; 1 Hill N. Y. 469. See Cooley, Const. Lim. 737, 741.

The riparian proprietor owns to high-water mark on all navigable rivers; 21 Am. Dec. 707; and that mark is limited by the outflow of the medium high tide, between the spring and neap tides; 44 N. J. Eq. 398. See NAVIGABLE WATERS. The beds of navigable rivers between the lines of ordinary low water on their opposite sides belong to the state, to be held and controlled by and for the public; 122 Pa. 191. Water-courses above the flow of the tide are private, but, if sufficiently large to be of public use in transporting property, are highways over which the public have a common right in subservience to which the private ownership of the soil is to be enjoyed; 26 Am. Dec. 525.

By the rules of the common law, all proprietors of lands have precisely the same rights to waters flowing through their domains, and one can never be permitted so to use the stream as to injure or annoy those situated on the course of it, either above or below him. They have no property in the water itself, but a simple usufruct; *aqua currit et debet currere ut currere solebat*, is the language of the law. Accordingly, while each successive riparian proprietor is entitled to the reasonable use of the water for the supply of his natural wants and for the operation of mills and machinery; 86 Ala. 587; 86 Ky. 44; 50 Me. 602; 44 N. H. 580; L. R. 2 Ex. 1; 24 Pa. 302; he has no right to flow the water back upon the proprietor above; Cro. Jac. 556; 20 Pa. 85; 1 B. & Ald. 674; 3 Green N. J. 116; 4 Ill. 452; 38 Me. 243; 62 Ala. 369; 50 Conn. 346; nor to discharge it so as to flood the proprietor below; 17 Johns. 306; 5 Vt. 371; 3 Harr. & J. 231; nor to divert the water; 17 Conn. 288; 13 Johns. 212; 24 Ala. N. S. 130; 28 Vt. 670; 22 Am. Dec. 745; 2 Dian. 400; 93 Cal. 407; 66 Hun 632; 29 N. Y. Sup. 729; 79 Wis. 334; 133 U. S. 541; 40 N. Y. 191; 31 Vt. 358; 182 Pa. 418; even for the purpose of irrigation, unless it be returned without essential diminution; 5 Pick. 175; 8 Me. 253; 12 Wend. 330; 4 Ill. 496; 75 Cal. 426; 24 Pa. 298; 3 Kent 440; nor to obstruct or detain it, except for some reasonable purpose, such as to obtain a head of water for a mill and to be again discharged, so as to allow all on the same stream a fair participation; 10 Cush. 367; 6 Ind. 324; 28 Vt. 459; 4 Mas. 401; 17 Johns. 306; 13 Conn. 303; 155 Pa. 523; 112 Mo. 6; 69 Tex. 617; 10 Ch. Div. 707; see DAM; nor to pollute the quality of the water by unwholesome or discoloring impurities; 23 Barb. 297; 3 Rawle 397; 8 E. L. & E. 217; 4 Ohio 833; 63 Han 306; 57 Fed. Rep. 1000; [1893] App. Cas. 691; 77 Ia. 460; 83 Ga. 187; but see, where the pollution results from a reasonable use, 73 Me. 297; 44 N. H. 580; 135 Ind. 547; 77 Ia. 576; as to turning surface-water off one's own land on to a neighbor's, see 31 Am. Rep. 216; 35 *id.* 431; 44 Ark. 360; 134 Ill. 96; 142 Mass. 110; 92 N. Y. 10; 133 Pa. 226. But, while such are the rights of the riparian proprietors when unaffected by contract, these rights are subject to endless modifications on the part of those entitled to their enjoyment either by grant; 3 Conn. 378; 13 Johns. 525; 17 Me. 281; 6 Metc. 131; 7 Pa. 348; 18 E. L. & E. 164; 9 N. H. 282; 3 N. Y. 253; or by reservation; 6 N. Y. 33; 20 Vt. 250; or by a license; 2 Gill 221; 13 Conn. 303; 14 S. & R. 267; or by agreement; 19 Pick. 449; Ang. Water-C. § 141; 3 Harr. & J. 282; 17 Wend. 136; see 110 Pa. 45; or by twenty years' adverse enjoyment from which a grant or contract will be implied; 1 Camp. 463; 4 Mas. 397; 6 Scott 167; 9 Pick. 251; Ang. Water-C. § 200; 47 Hun 333; 62 N. H. 233; 72 Ala. 277; in such a way as to adapt the uses of the water to the complex and multiplying demands and improvements of modern civilization. But there can be no prescriptive right to maintain an obstruction to the navigation of a public stream; 86 Ala. 88. It is not appurtenant to the land or taxable as part thereof or in itself, but only indirectly in connection with the value of the mill with which it is used; 37 Atl. Rep. (Me.) 331; *contra*, 64 N. H. 337.

Wherever a water-course *divides two estates*, each estate extends to the thread or central line of the stream; but the riparian owner of neither can lawfully carry off any part of the water without the consent of the other opposite, each riparian pro-

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prietor being entitled not to half or other proportion of the water, but to the whole bulk of the stream, undivided and undivisible, or *per my et per tout;* 8 Me. 253; 3 Sumn. 189; 13 Mass. 507; 1 Paige, Ch. 447; 2 Am. Dec. 574; 16 *id.* 342. If the bed of a water-course is *suddenly* changed, former boundaries and possessions are ot altered; but if the stream *gradually* gain on a person's land, the loser of the soil has no remedy; 2 Bla. Com. 262; 17 Vt. 387; Ang. Water-C. § 57; see 35 Fed. Rep. 188; [1896] 1 Ch. 73. A grant bounded by a navigable water-course extends only to high-water mark; but one bounded by a non-navigable stream extends to the middle thereof; 16 Am. Dec. 447; 30 *id.* 278, 286. See 140 U. S. 371; 152 *id.* 1; 4 Ia. 199; 94 U. S. 324; 11 Fed. Rep. 394. When an island is on the side of a river, so as to give the riparian owner of that side only one-fourth of the water, he has no right to place obstructions at the head of the island to ca[illegible] half of the stream to descend [illegible]he river, but the owner op[illegible] to the flow of the remain[illegible]s; 10 Wend. 260.

The app[illegible]ation of the water of an unnavigable [illegible]m by a riparian owner in such quant[illegible]h to diminish unreasonably the supply [illegible]other riparian owners is a private n[illegible]e, for which an injunction will lie; [illegible]l. Rep. 133; 2 Johns. Ch. 162.

Artific[illegible]ter-courses, canals, sewers, water-wor[illegible], etc., are wholly the creatures of statute, except when a man has a drain across another's land, and there it is generally a question of grant or easement. See 31 Atl. Rep. (Vt.) 291.

As to under-ground flow of water, see SUBTERRANEAN WATER; and see, also, 111 Cal. 639; 92 Ia. 297; 46 N. Y. Supp. 141; 161 Pa. 283; [1895] App. Cas. 587; 40 Pac. Rep. 709; 8 Ohio Cir. Ct. R. 194; 20 So. Rep. (Fla.) 780. And see, generally, Washburn, Easements; Angell, Water-Courses; Woolrych, Waters; Schultes, Aquatic Rights; Coulson & Forbes, Law of Waters; RIVER; STREAM; LAKE; GREAT LAKES; ADMIRALTY; POOL; POND; RIPARIAN PROPRIETORS; SURFACE WATERS; IRRIGATION; POLLUTION.

**WATER MARK.** See HIGH WATER MARK; TIDE.

**WATER ORDEAL.** See ORDEAL.

**WATER RENTS.** Water rents in a borough which owns the water-works and licenses those who desire to use its water to do so at rates fixed by its ordinance, are not in the nature of taxes, but are licenses, and not, therefore, collectible by the borough tax collector as such, but their collection may be delegated to the appointee of the borough council. 19 C. C. R. (Pa.) 414. As to legislative control of, see RATES.

Under a covenant by a lessor to pay "all water rents imposed or assessed upon the premises or on the lessor or lessees in respect thereof," the lessor is not bound to pay for water supplied by a water company to the lessees for trade purposes; (C. A.) [1897] 1 Ch. 633.

**WATERGANG** (Law Lat. *watergangium*). A Saxon word for a trench or course to carry a stream of water, such as are commonly made to drain water out of marshes. *Ordin. Marisc. de Romn. Chart.* Hen. III.

**WATERGAVEL.** A rent paid for fishing in, or other benefit from, some river. Chart. 15 Hen. III.

**WAVESON.** Such goods as appear upon the waves after shipwreck. Jacob, Law Dict.

**WAY.** A passage, street, or road.

A right of way is the privilege which an individual, or a particular description of individuals, as, the inhabitants of a village or the owners or occupiers of certain farms, have of going over another's ground. It is an incorporeal hereditament of a real nature, entirely different from a common highway. Cruise, Dig. tit. xxiv. s. 1.

A right to pass over another's land more or less frequently according to the nature of the use to be made of the easement, and how frequently is immaterial, provided it occurred as often as the claimant had occasion or chose to pass. 105 Mass. 319.

A right of way may arise: *By prescription* and immemorial usage, or by an uninterrupted enjoyment for twenty years under a claim of right; Co. Litt. 113; 4 Gray 177, 547; 20 Pa. 331, 458; 4 Mas. 402; 24 N. H. 440; 130 Ind. 31; 75 Fed. Rep. 520; 86 Hun 384; 93 Ga. 300. *By grant;* as, where the owner grants to another the liberty of passing over his land; 1 Ld. Raym. 75; 19 Pick. 250; 7 B. & C. 257. (See 93 Mich. 599.) If the grant be of a freehold right it must be by deed; 5 B. & C. 221; 4 R. I. 47. *By necessity;* as, where a man purchases land accessible only over land of the vendor, or sells, reserving land accessible only over land of the vendee, he shall have a way of necessity over the land which gives access to his purchase or reservation; 5 Taunt. 311; 23 Pa. 338; 2 Mass. 203; 11 Mo. 513; 29 Me. 499; 27 N. H. 448; 19 Wend. 507; 15 Conn. 39; 126 Mass. 445; 55 Cal. 350; 102 Cal. 362; 40 Kan. 203; 85 Cal. 131; and this may exist even after the vendor has conveyed his land to a third person; 123 Ind. 372; but a way of necessity is not created by the fact that a road over grantor's land would be of less distance to a highway than a road already established; 116 Mo. 379. The necessity must be absolute, not a mere convenience; 2 M'Cord 445; 24 Pick. 102; 69 Me. 323; 91 *id.* 227; 107 N. C. 63; 98 Mass. 50; 126 *id.* 445; 11 Ch. Div. 968; 2 Allen 543; L. R. 9 Ch. 111; *contra*, 7 Barb. 309; and when it ceases the way ceases with it; 18 Conn. 321; 1 Barb. Ch. 353. *By implication;* 90 Tenn. 556. *By reservation* expressly made in the grant of the land over which it is claimed; 10 Mass. 183; 25 Conn. 331. *By custom;* as

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where navigators have a right of this nature to tow along the banks of navigable rivers with horses; 3 Term 253. *By acts of legislature;* though a private way cannot be so laid out without the consent of the owner of the land over which is to pass; 15 Conn. 39, 83; 4 Hill 47, 140; 4 B. Monr. 57.

A right of way may be either a right in gross, which is a purely personal right incommunicable to another, or a right appendant or annexed to an estate, and which may pass by assignment with the estate to which it is appurtenant; 3 Kent 420; 1 Watts 35; 19 Pick 250. A right of way appurtenant to land is appurtenant to all and every part of the land, and if such land be divided and conveyed in separate parcels, a right of way thereby passes to each of the grantees; 1 Cush. 285; 1 S. & R. 229. A way is never presumed to be in gross when it can be construed to be appurtenant to land; 82 Va. 462; 1 Wood, Ry. Law 697. Where a way appurtenant to land granted is not located by the grant, the parties may locate it by parol agreement at any point on the premises over which the right is granted; 65 Vt. 333.

Ways may be abandoned by agreement, by evident intention, or by long non-user. Twenty years' occupation of land adverse to a right of way and inconsistent therewith bars the right; 2 Whart. 123; 16 Barb. 184; 5 Gray 409. Where a way of necessity once existed it will be presumed to exist until some fact is shown establishing non-existence; 102 Cal. 362.

Ways may be assigned, except when they are in gross, which is a mere personal right, and cannot be granted to another; 19 Ill. 558.

A person cannot acquire a prescriptive right of way over his own lands, or the lands of another which he occupies as tenant; 116 Mo. 379; and where one has uninterruptedly used a way over another's land for the necessary length of time to establish an easement by adverse user, it will be presumed that the user was adverse, and under claim of title, and the burden is on one claiming that it was by virtue of a license to prove that fact; 68 Hun 269.

The owner of a right of way may disturb the soil to pave and repair it. But a way granted for one purpose cannot be used for another; 10 Gray 61; 11 *id.* 150.

A person having a right of way which is obstructed by a house erected upon the way may, after notice and request to remove it, pull it down, although it is actually inhabited; [1891] 3 Ch. 411.

Lord Coke, adopting the civil law, says there are three kinds of ways: a footway, called *iter;* a footway and horseway, called *actus;* a cartway, which contains the other two, called *via;* Co. Litt. 56 *a.* To which may be added a *driftway,* a road over which cattle are driven; 1 Taunt. 279.

See 3 Kent 419; Washb.; Jones, Easem.; Crabb, R. P.; Cruise, Dig.; HIGHWAY; STREET; EASEMENT; THOROUGHFARE.

**WAY-BILL.** A writing in which are set down the names of passengers who are carried in a public conveyance, or the description of goods sent with a common carrier by land.

**WAY-GOING CROP. In Pennsylvania.** By the custom of the country, a tenant for a term certain is entitled, after the expiration of his lease, to enter and take away the crop of grain which he had put into the ground the preceding fall. This is called the *way-going crop;* 5 Binn. 289; 2 S. & R. 14; 1 Pa. 224. See AWAY-GOING CROP; EMBLEMENTS.

**WAYS AND MEANS.** In legislative assemblies, there is usually appointed a committee whose duties are to inquire into and propose to the house the ways and means to be adopted to raise funds for the use of the government. This body is called the committee of ways and means.

**WEAPON.** An instrument of offensive or defensive combat. Statutes have been passed in many of the states prohibiting the carrying of concealed weapons. They are merely police regulations; La. Ann. 399. To constitute the offence accomotion is not necessary, the possession sufficient; 31 Ala. 387; even if the weapon is not in perfect order and ready for use; 53 *id.* 508; 6 Blackf. 31; 45 Miss 6[illegible] Persons on their own premises; 45 Ala 26; or on a journey (see TRAVELLER); having good reasons to fear bodily harm; 9 Ala. 61; are exempted from the operation of such statutes; as are officers of the law; 18 Tex. App. 57. See ARMS; CONCEALED WEAPONS.

The ordinary implements of war are lawful: swords, fire-arms, and cannon, and even those which are secret or concealed, such as pits and mines. But this does not include poisoned weapons of any kind. Great Britain, France, Prussia, Russia, and other nations united in a declaration at St. Petersburg in 1868, by which they agreed to renounce, in case of war among themselves, the employment of any projectile of a weight less than 400 grammes, charged with fulminating or inflammable substances. 1 Halleck, Int. L., Baker's ed. 563.

**WEAR, WEIR.** A dam made across a river accommodated for the taking of fish or to convey a stream to a mill. Jacob. See DAM.

**WEAR AND TEAR.** Destruction to some extent, *e. g.* destruction of surface by ordinary friction, but the words do not include total destruction by a catastrophe which was never contemplated by either party. 5 C. P. Div. 507.

Natural and reasonable wear and tear covers only such decay or depreciation in value of the property as may arise from ordinary and reasonable use; and injury by a freshet is not within the exception; 20 N. J. L. 547.

**WEARING APPAREL.** As generally used in statutes, refers not merely

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to a person's outer clothing, but covers all articles usually worn, and includes underclothing. 147 U. S. 494. It may include a gold watch; 2 Flipp. 325; 12 Or. 431; but see 16 Ga. 479; 33 Me. 535; but not a travelling trunk or a breastpin; 33 N. H. 345; and under the revenue laws shoes are not included; 37 Fed. Rep. 782. See BAGGAGE.

**WED.** A covenant or agreement: thus, a wedded husband.

**WEEK.** Seven days of time.

The week commences immediately after twelve o'clock on the night between Saturday and Sunday, and ends at twelve o'clock, seven days of twenty-four hours each, thereafter. See 4 Pet. 361; 24 L. J. Ch. 368; or it may mean a period of time of seven days duration without reference to when that period commences; 5 Nev. 430.

The first publication of a notice of a sale, under a power contained in a mortgage, which requires the notice to be published "once each week for three successive weeks," need not be made three weeks before the time appointed for the sale; 117 Mass. 480. See 4 Pet. 361; TIME.

**WEEKLY PAYMENT LAWS.** See LIBERTY OF CONTRACT.

**WEIGHAGE. In English Law.** A duty or toll paid for weighing merchandise: it is called *tronage* for weighing wool at the king's beam, or *pesage* for weighing other avoirdupois goods. 2 Chitty, Com. Law 16.

**WEIGHT.** A quality in natural bodies by which they tend towards the centre of the earth.

Under the police power, weights and measures may be established and dealers compelled to conform to the fixed standards under a penalty; Cooley, Const. Lim. 749.

Under the article *Measure*, it is said that by the constitution congress possesses the power "to fix the standard of weights and measures," and that this power has not been exercised.

The weights now generally used in the United States are the same as those of England; they are of two kinds.

AVOIRDUPOIS WEIGHT.

*First*, used in almost all commercial transactions, and in the common dealings of life.

60 grains = 1 dram.
8 drams = 1 ounce.
16 ounces = 1 pound (lb.).
25 or 28 pounds = 1 quarter (qr.).
4 quarters = 1 hundredweight (cwt.).
20 hundredweight = 1 ton.

*Second*, used for meat and fish.

8 pounds = 1 stone.

*Third*, used in the wood-trade.

| | | *Cwt.* | *qr.* | *lb.* |
|---|---|---|---|---|
| 7 pounds = 1 clove. | = | | | |
| 14 pounds = 1 stone. | = | 0 | 0 | 14 |
| 2 stones = 1 tod. | = | 0 | 1 | 0 |
| 6½ tods = 1 wey. | = | 1 | 2 | 14 |
| 2 weys = 1 sack. | = | 3 | 1 | 0 |
| 12 sacks = 1 last. | = | 39 | 0 | 0 |

*Fourth*, used for butter and cheese.

8 pounds = 1 clove.
56 pounds = 1 firkin.

TROY WEIGHT.

24 grains = 1 pennyweight.
20 pennyweights = 1 ounce.
12 ounces = 1 pound.

These are the denominations of troy weight when used for weighing gold, silver, and precious stones, except diamonds. Troy weight is also used by apothecaries in compounding medicines; but by them the ounce is divided into eight drams, and the dram into three scruples, so that the latter is equal to twenty grains. For scientific purposes (when the metric system is not employed, as it now usually is), the grain only is used, and sets of weights are used constructed in decimal progression from 10,000 grains downward to one-hundredth of a grain. The carat used for weighing diamonds is three and one-sixth grains. See GRAMME.

A short account of the French weights and measures is given under the article MEASURE.

**WEIGHT OF EVIDENCE.** This phrase is used to signify that the proof on one side of a cause is greater than on the other.

When a verdict has been rendered against the weight of the evidence, the court may, on this ground, grant a new trial; but the court will exercise this power not merely with a cautious but a strict and sure judgment, before they send the case to a second jury.

The general rule, under such circumstances, is that the verdict once found shall stand: the setting aside is the exception, and ought to be an exception of rare and almost singular occurrence. A new trial will be granted on this ground for either party: the evidence, however, is not to be weighed in golden scales; 2 Bingh. N. C. 109; 3 Me. 276; 8 Pick. 122; 5 Wend. 595. See NEW TRIAL.

**WELL.** A hole dug in the earth in order to obtain water.

In a deed, well designates the portion of land under and occupied by the excavation, and its surrounding retaining walls, and by any structures or appliances built upon the land to facilitate its use, and also the water actually at any time in the excavation; 157 Mass. 431.

The owner of the estate has a right to dig in his own ground at such a distance as is permitted by law from his neighbor's land; he is not restricted as to the size or

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depth, and is not liable to any action for rendering the well of his neighbor useless by so doing. See 74 Me. 170; 62 Ga. 296; SUBTERRANEAN WATERS.

**WELL KNOWING. In Pleading.** Words used in a declaration when the plaintiff sues for an injury which is not immediate and with force, and the act or nonfeasance complained of was not *prima facie* actionable. Not only the injury, but the circumstances under which it was committed, ought to be stated: as, where the injury was done by an animal. In such case the plaintiff, after stating the injury, continues, the defendant, *well knowing* the mischievous propensity of his dog, permitted him to go at large. See SCIENTER.

**WELSH MORTGAGE. In English Law.** A species of security which partakes of the nature of a mortgage, as there is a debt due, and an estate is given as security for the repayment, but differs from it in the circumstances that the rents and profits are to be received without account till the principal money is paid off, and there is no remedy to enforce payment, while the mortgagor has a perpetual power of redemption. It is now rarely used.

It is a species of *vivum vadium*. Strictly, however, there is this distinction between a Welsh mortgage and a *vivum vadium*: in the latter the rents and profits of the estate are applied to the discharge of the principal after paying the interest; while in the former the rents and profits are received in satisfaction of his interest only; 1 Powell, Mortg. 378 *a*; Jones, Mtg. 1153. See MORTGAGE.

**WELSHING.** One who receives a sum of money or valuable thing, undertaking to return the same or the value thereof together with other money, if an event (for example, the result of a horse-race) shall be determined in a certain manner and at the time of receiving the deposit intends to cheat and defraud the depositor. Coldr. & Hawks. Gambling 303. The crime is larceny at common law.

**WERE.** The name of a fine among the Saxons imposed upon a murderer.

The life of every man, not excepting that of the king himself, was estimated at a certain price, which was called the *were* or *æstimatio capitis*. The amount varied according to the dignity of the person murdered. The price of wounds was also varied according to the nature of the wound, or the member injured.

**WERGILD, WEREGILD. In Old English Law.** The price which, in a barbarous age, a person guilty of homicide or other enormous offence was required to pay, instead of receiving other punishment. 4 Bla. Com. 188.

See, for the etymology of this word, and a tariff which was paid for the murder of the different classes of men, Guizot, *Essais sur l'Histoire de France*, *Essai 4ème*, c. 2, § 2.

**WEST SAXON LAGE.** The law of the West Saxons, which was observed in the counties in the south and west of England, from Kent to Devonshire, in the beginning of the eleventh century; supposed by Blackstone to have been much the same as the laws of Alfred. 1 Bla. Com. 65.

**WEST VIRGINIA.** The name of one of the United States of America.

This state was formed in 1861 of the western counties of Virginia, owing to their non-concurrence in the ordinance of secession passed by the legislature of that state. A constitution was framed by a convention which met at Wheeling on November 26, 1861. This was submitted to the people on April 3, 1862, and ratified almost unanimously. The consent of the body, recognized by the federal government as the legislature of Virginia, was given, and congress then passed an act approved December 31, 1862, providing for the admission of the new state into the Union upon condition of the adoption of an amendment to the constitution providing for emancipation of slaves. This was done, and the state was admitted to the Union. The first constitution remained in force until 1872, when the present constitution was framed by a convention which met on January 16, 1872, and completed its labors on April 9 of that year. It was submitted to the people and ratified by them on August 22, 1872.

THE LEGISLATIVE POWER.—The legislative power is vested in a senate and house of delegates, their official designation being "the legislature of West Virginia." The senate is composed of twenty-four members elected for four years. The first house of delegates consisted of sixty-five members, provision being made for an increased number in proportion to the increase of population. Members of the house of delegates are elected for two years.

The legislature assembles biennially, and not oftener, unless convened by the governor.

THE EXECUTIVE POWER.—The executive power is vested in a *Governor*, *Secretary of State*, *State Superintendent of Free Schools*, *Auditor*, *Treasurer*, *and Attorney-General*, who is *ex-officio Reporter* of the court of appeals. Their terms of office are respectively for four years, and commence on the fourth day of March next after the election.

The chief executive power is vested in the governor. He is ineligible for re-election to the succeeding term of his office.

He has the power to commute capital punishment, and to reprieve or pardon offenders after conviction, excepting where the prosecution has been carried on by the house of delegates. In case of the governor's death, resignation, or inability to serve, the president of the senate shall assume his office until the vacancy is filled, or the disability removed.

THE JUDICIARY DEPARTMENT.—The Judiciary power is vested in a *supreme court of appeals*, in *circuit courts* and the judges thereof, in *county* and *corporation courts*, and in *justices of the peace*.

The *supreme court of appeals* consists of four judges, any three of whom constitute a quorum. They are elected by the people and hold office for twelve years. This court has original jurisdiction in cases of *habeas corpus*, *mandamus*, and prohibition; and appellate jurisdiction in civil cases where the matter in controversy exclusive of costs is of greater value than one hundred dollars; in controversies concerning the title or boundaries of land, the probate of wills, the appointment or qualification of a personal representative, guardian, committee, or curator; or concerning a mill, roadway, ferry, or landing; or the right of a corporation or county to levy tolls or taxes; and, also, in cases of *quo warranto*, *habeas corpus*, *mandamus*, and prohibition, and in cases involving freedom, or the constitutionality of a law; also in criminal cases where there has been a conviction of felony, or misdemeanor in a circuit court, and where a conviction has been had in any inferior court and affirmed in a circuit court.

*Circuit Courts.*—The state is divided into thirteen circuits, and for each circuit a judge is elected by the voters thereof, who holds his office for eight years. The circuit courts have the supervision of all proceedings before the county courts and other inferior tribunals, by *mandamus*, prohibition or *certiorari*. They have, except in cases excepted by the constitution exclusively to some other tribunal,

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original and general jurisdiction of all matters of law where the amount in controversy, exclusive of interest, exceeds fifty dollars; in cases of *quo warranto*, *habeas corpus*, *mandamus*, or prohibition; in all cases in equity, and of all felonies and misdemeanors. They have appellate jurisdiction, upon petition, and assignment of error, in all cases of judgments, decrees, and final orders rendered by the county court, and such other inferior courts as may be appointed by law, where the matter in controversy, exclusive of costs, is of greater value than twenty dollars; in controversies respecting the title or boundaries of land, the probate of wills, the appointment or qualification of a personal representative, guardian, committee, or curator, or concerning a mill, roadway, ferry, or landing, or the right of a corporation or county to levy tolls or taxes, and also in cases of *habeas corpus*, *quo warranto*, *mandamus*, prohibition, and *certiorari*, and in cases involving freedom, or the constitutionality of a law; and in all cases of conviction under criminal prosecutions in said court. It has such original jurisdiction as may be prescribed by law.

*County Courts.*—There is in each county of the state a county court, composed of a president and two justices of the peace; the president of the court is elected by the voters of the county, and holds his office for four years.

The *county court* has original jurisdiction in all actions at law where the amount in controversy exceeds twenty dollars; and also in all cases of *habeas corpus*, *quo warranto*, *mandamus*, prohibition, and *certiorari*, and in all suits in equity, in all matters of probate, the appointment and qualification of personal representatives, guardians, committees, and curators, and the settlement of their accounts, and in all matters relating to apprentices, and of all criminal cases, under the grade of felony, except as above provided. It has the custody, through its clerks, of all writs, deeds, and other papers presented for probate or record in the county. It has also the superintendence and administration of the internal police and fiscal affairs of the county. It has jurisdiction of all appeals from the judgment of the justices, and its decision is final upon such appeals, except such as involve the title, right of possession, or boundaries of lands, the freedom of a person, the validity of a law, or an ordinance of any corporation, or the right of a corporation, to levy tolls or taxes.

**WESTERN AUSTRALIA.** A colony of Great Britain in Australia. See AUSTRALIA.

**WESTERN RESERVE.** See OHIO.

**WESTMINSTER 2nd, STATUTE OF.** A statute of 13 Edw. I. c. 24 (1285), under which it was provided that where in one case a writ was found and in a like case no writ was to be found, the clerks of the chancery should agree in making a writ, or adjourn the complaint until the next parliament and refer to it the cases in which they could not agree; Steph. Pl. *7. See CONSIMILI CASU.

**WETHER.** A castrated ram, at least one year old: in an indictment it may be called a sheep. 4 C. & P. 216.

**WHALER.** A vessel employed in the whale fishery.

It is usual for the owner of the vessel, the captain, and crew, to divide the profits in just proportions, under an agreement similar to the contract Di Colona, which see.

**WHARF.** A space of ground artificially prepared for the reception of merchandise from a ship or vessel, so as to promote the convenient loading and discharge of such vessel.

A wharf occupied by a ferry company, to which access can only be had through a gate controlled by the ferry company, or over private property of another, is a private wharf; 78 Hun 166; but a public quay in a city, dedicated to public use, does not cease to be *locus publicus* and become private property because it is leased by the public authorities for a purpose subservient to the public use; 140 U. S. 654.

At common law, the soil of all tide-waters below high-water mark being vested in the crown, the erection of a wharf thereon without the consent of the crown is an encroachment upon the royal domain of that kind which has been denominated a *purpresture*, and, as such, may be either abated, or, if more beneficial to the crown, the party arrested, unless it be a public nuisance; 10 Price 350, 378; 18 Ves. 214; 2 Story, Eq. Jur. § 920. But if it obstruct navigation to such a degree as to be a public nuisance, neither the crown nor its grantee has authority to erect or maintain it without the sanction of an act of parliament; 8 Ad. & E. 336; 5 M. & W. 327; Phear, Rights of Water 54. It is not every wharf erected in navigable water which is a nuisance, for it may be a benefit rather than an injury to the navigation: and it is for the jury to determine, in each particular case, whether such a wharf is a nuisance or not; 1 C. & M. 496; 4 Ad. & E. 384; 6 *id.* 143; 15 Q. B. 276.

A riparian owner has, at common law, a qualified interest in the water frontage belonging by nature to his land, and the right to construct thereon wharves, piers, or landings; 107 N. C. 139. But this certainly can only be by consent of the authorities, and so as not to interrupt navigation unduly.

In this country, the several states, being the owners of the soil of the tide waters within their respective territories, may by law authorize and regulate the erection of wharves thereon, at least until the general government shall have legislated upon the subject; 4 Ga. 26; 7 Cush. 53; 2 H. & M'H. 244; 11 Gill & J. 351; and may grant to a municipal corporation the exclusive right to make and control wharves on the banks of a navigable river; 95 U. S. 80. The riparian proprietor is entitled to make a landing, wharf, or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may prescribe; 146 U. S. 445; 10 Wall. 504. In Massachusetts and Maine, by a colonial ordinance, the provisions of which are still recognized as the law of those states, the property of the shores and flats between high and low water mark, for one hundred rods, subject to the rights of the public, was transferred to the owners of the upland, who may, therefore, wharf out to that distance, if by so doing they do not unreasonably interrupt navigation; 1 Cush. 313, 395; 36 Me. 16; 42 *id.* 9. If without legislative sanction they extend a wharf beyond that distance, such extension is *prima facie* a nuisance, and will be abated as such, unless it can be shown that

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it is no material detriment to navigation; 20 Pick. 186; 10 R. I. 477. In Connecticut, and probably in other states, by the law of the state founded upon immemorial usage, the proprietor of the upland has the right to wharf out to the channel,—subject to the rights of the public; 9 Conn. 38; 25 *id.* 345; 16 Pet. 369; 1 Dutch. 525; 6 Ind. 223; 62 Conn. 132; 23 Minn. 18; 55 Fed. Rep. 854. In Pennsylvania, the riparian proprietor is held to be the owner of the soil between high and low water mark, and to be entitled to erect wharves thereon; 1 Whart. 131; 2 *id.* 539; but not without express authority from the state; 61 Pa. 21. In the same state it has been held that wharves are not the private property of him who erects them, and persons who go upon and fasten vessels to them are not trespassers; 39 Leg. Int. 32; and that in an action for the use and occupation of a wharf, a contract express or implied must be proved; 28 Am. L. Reg. 145.

The owner of a wharf is liable for damages caused to a vessel by concealed obstructions which he might have ascertained by reasonable diligence; 37 Fed. Rep. 160; see 36 *id.* 927; and such claims are within the jurisdiction of admiralty; and a libel *in personam* will lie; 45 Fed. Rep. 588. The wharfinger was also held liable for damages to vessels caused by the insufficiency of the wharf; 79 Fed. Rep. 113.

Owners of land abutting on a lake, the title to which is in the state, have the right to build wharves in aid of navigation, but not obstructing it, far enough to reach water navigable for such boats as are in use; 40 L. R. A. (Wis.) 635. See an extended note to this case on the right of the riparian owner to erect wharves, where the English and American cases are collected and classified.

See, generally, 2 Sandf. 258; 3 How. 212; 1 Gill & J. 249; 11 *id.* 351; 8 Term 606; RIPARIAN PROPRIETORS; WATER-COURSE; RIVERS.

**WHARFAGE.** The money paid for landing goods upon, or loading them from, a wharf. Dane, Abr. Index; 4 Cal. 41.

Wharfingers in London are not entitled to wharfage for goods unloaded into lighters out of barges fastened to their wharves; 3 Burr. 1409; 1 W. Bla. 243. And see 5 Sandf. 48. It has been held that, owing to the interest which the public have in the matter, rates of wharfage may be regulated by statute; 11 Ala. N. S. 586. And see 5 Hill 71; 2 Rich. 370; 8 B. & C. 42; 2 Mann. & R. 107.

Claims for wharfage are cognizable in admiralty, and, if the vessel is a foreign one or from another state, the claim of the wharfinger is a maritime lien against the vessel, which may be enforced by a proceeding *in rem*, or by a libel *in personam* against the owner of such vessel; 95 U. S. 18; 56 Fed. Rep. 609. A state statute conferring a remedy for such claims by proceedings *in rem* is void; 43 N. Y. 554. But as to domestic vessels, the lien of the wharfinger is only enforceable as a *common-law* lien; 1 Newb. 553; 9 Phila. 364. See 60 Fed. Rep. 766. In the absence of any agreement between the parties, reasonable wharfage will be allowed; 95 U. S. 68. A lease giving the lessee "the sole and exclusive right to use the public wharf for his ferry boat," does not authorize the collection of toll for wharfage; 1 Newb. 541. A municipal corporation cannot exact a charge upon vessels for entering or leaving a port or remaining therein and using the wharves or landings, for the *general revenue* of such corporation; 20 Wall. 577; 95 U. S. 80; but it may collect from parties using its wharves, such reasonable fee as will fairly remunerate it for the use of its property; 100 U. S. 423; *id.* 430; 95 *id.* 80; 40 Fed. Rep. 392. That such fees are regulated by the tonnage of the vessel will not constitute them a tonnage tax under the constitution, art. 1, paragraph 3, § 10; 20 Gratt. 419. See 9 Fed. Rep. 679; 25 Alb. L. J. 254. A ship compelled by stress of weather to moor to a wharf for safety, is not liable to a charge for wharfage, where the wharf is a private one, and no fixed rate of charge is in use; 42 Fed. Rep. 173. Vessels which have made use of a wharf, whether under express or implied contract, are not entitled to refuse payment of wharfage on the ground that the wharfinger is not the legal owner of the property; 59 Fed. Rep. 628.

**WHARFINGER.** One who owns or keeps a wharf for the purpose of receiving and shipping merchandise to or from it for hire.

A wharfinger stands in the situation of an ordinary bailee for hire, and therefore, like a warehouseman, he is responsible for ordinary neglect, and is required to take ordinary care of the goods intrusted to him as such; 2 Barb. 328; 4 Ind. 368; 10 Vt. 56; 4 Term 581. The wharfinger is not an insurer of the safety of his dock, but he must use reasonable care to keep it in safe condition, for vessels which he invites to enter it; 127 Mass. 236; 7 Blatch. 290; 15 Wall. 649; Poll. Torts 483; [1891] A. C. 11. He is not, like an innkeeper or carrier, to be considered an insurer unless he superadd the character of carrier to that of wharfinger; 5 Burr. 2825; 12 Johns. 232; 7 Cow. 497; 5 Mo. 97. The responsibility of a wharfinger begins when he acquires and ends when he ceases to have the custody of the goods in that capacity.

When he begins and ceases to have such custody depends, generally, upon the usages of trade and of the business. When goods are delivered at a wharf, and the wharfinger has agreed, expressly or by implication, to take the custody of them, his responsibility commences; but a mere delivery at the wharf, without such assent, does not make him liable; 3 Camp. 414; 6 Cow. 757; 10 Vt. 56; 14 M. & W. 28. When goods are in the wharfinger's possession to be sent on board of a vessel for a voyage, as soon as he delivers the posses-

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sion and the care of them to the proper officers of the vessel, although they are not actually removed, he is, by the usages of trade, deemed exonerated from any further responsibility; 1 M. & W. 174; 1 Gale 420; 99 Mass. 220. The wharfinger does not, however, discharge his duty by delivering them to one of the crew, but should deliver them to the captain of the vessel, or some other person in authority on board of it; 1 C. & P. 638. And see 2 C. & M. 531; 7 Scott 876; 4 Q. B. 511.

A wharfinger has a general lien upon all goods in his possession for the balance of his account; 4 B. & Ald. 50; 12 Ad. & E. 639; 7 B. & C. 212; 95 U. S. 68; and in repect to the right of lien there is no distinction between the wharfinger and the warehouseman; 23 Am. L. R. Eq. 465, 468. A wharfinger has equally a lien on a vessel for wharfage; Ware 354; Gilp. 101. See WHARFAGE.

**WHEEL.** The punishment of the wheel was formerly to put a criminal on a wheel, and then to break his bones until he expired. This barbarous punishment was never used in the United States; and it has been abolished in every civilized country.

**WHELPS.** The young of certain animals of a base nature or *ferœ naturæ*.

It is a rule that when no larceny can be committed of any creatures of a base nature which are *ferœ naturæ*, though tame and reclaimed, it cannot be committed of the young of such creatures in the nest, kennel, or den; Co. 3d Inst. 109; 1 Russ. Cr. 153.

The owner of the land is, however, considered to have a qualified property in such animals, *ratione impotentiæ;* 2 Bla. Com. 394.

**WHEN.** At which time. At that time. 90 Mo. 646.

*In wills*, standing by itself unqualified and unexplained, this is a word of condition denoting the time at which the gift is to commence; 6 Ves. Jr. 243; 10 Co. 50; 16 C. B. 59.

The context of a will may show that the word is to be applied to the possession only, not to the vesting of a legacy; but to justify this construction there must be circumstances, or other expressions in the will, showing such to have been the testator's intent; 7 Ves. 422; 3 Bro. C. C. 471. See 2 Jar. Wills 417. See DEVISE; TIME.

**WHEN AND WHERE.** Technical words in pleading, formerly necessary in making *full defence* to certain actions. See 1 Chit. Pl. *445; DEFENCE.

**WHENEVER.** Though often used as equivalent to "as soon as," is also often used where the time intended by it is, and will be, until its arrival, or for some uncertain period at least, indeterminate. 14 R. I. 188.

**WHEREAS.** This word implies a recital, and, in general, cannot be used in the direct and positive averment of a fact in a declaration or plea. Those facts which are directly denied by the terms of the general issue, or which may, by the established usage of pleading, be specially traversed, must be averred in positive and direct terms; but facts, however material, which are not directly denied by the terms of the general issue, though liable to be contested under it, and which, according to the usage of pleading, cannot be specially traversed, may be alleged in the declaration by way of recital, under a whereas; 2 Chitty, Pl. 151, 178, 191.

**WHEREUPON.** Sequence; succession; order of action; relation. A thing done with reference to something previously done. It is interchangeable with the words upon which, and after which. 1 Wyo. 419.

**WHIPPING.** The infliction of stripes.

This mode of punishment, which is still practised in several states, has yielded in most of the states to the penitentiary system. It is still used in Maryland for wife-beating, and in Delaware for all felonies (but not for women).

Whipping has been held to be punishment worse than death; 7 Tex. 69; but see 2 Rich. 418. It is not a "cruel or unusual punishment"; 59 Md. 264.

The punishment of whipping, so far as the same was provided by the laws of the United States, was abolished by the act of congress of February 28, 1839, s. 5. See CORRECTION; SEAMEN.

This punishment has never been altogether abolished in England. At common law it was inflicted on inferior persons for petty larceny, etc.; but by the usage of the star chamber, never on a gentleman. By 1 Geo. IV. c. 57, it was abolished as to women. By 5 & 6 Vict. striking or firing at the queen is punishable with whipping thrice or fewer times. The Criminal Law Consolidation Acts of 1861 authorize the whipping of males below 16 who have been convicted of sending letters threatening to kill; placing explosives near a house, ship, etc.; defiling a girl under 13 years of age; robbing with violence (not over twenty-five stripes); but it must be done in private and only once, and the court must specify the number of strokes and the instrument. By 25 Vict. c. 18, for boys under 14, the number of stripes shall not exceed twelve with a birch rod. For the offences of robbery accompanied with personal violence, and of attempting by any means to strangle or to render insensible any one with intent to enable himself or others to commit an indictable offence, in addition to imprisonment, the 24 & 25 Vict. c. 100, and 26 & 27 Vict. c. 96, direct that the offender, if a man, be once, twice, or thrice privately whipped. See Whart. Lex.

It is forbidden by the constitution of South Carolina and Georgia, except that in Georgia convicts can be so punished. It is in use in some penal institutions as a

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means of discipline. The latter subject has of late years been examined by a commission in connection with the Elmira Reformatory.

**WHISKEY.** See LIQUOR LAWS.

**WHITE BONNET. In Scotch Law.** A fictitious bidder at an auction. Where there is no upset price, and the auction is not stated to be without reserve, there is no authority for saying that employment of such person is illegal. Burton, Law of Scotl. 362.

**WHITE PERSON.** As used in the naturalization laws, a person of the Caucasian race. 5 Sawy. 155. It does not include a Mongolian; *id.*; it includes a person nearer white than black or red; 11 Ohio 375. In the legislation of the slave period it referred to a person without admixture of colored blood, whatever the actual complexion might be; 39 Ark. 192. The words white and colored as used in the statutes providing for the maintenance of schools are held to be used in the ordinary acceptation; 9 Ohio St. 407.

**WHITE RENTS. In English Law.** Rents paid in silver, and called *white rents*, or *redditus albi*, to distinguish them from other rents which were not paid in money. Co. 2d Inst. 19. See ALBA FIRMA.

**WHOLE BLOOD.** Being related by both the father and mother's side; this phrase is used in contradistinction to *half blood*, which is relation only on one side. See BLOOD.

**WHOLESALE.** To sell by wholesale is to sell by large parcels, generally in original packages, and not by retail.

**WHOLESALE PRICE.** The price fixed on merchandise by one who buys in large quantities of the producer or manufacturer, and who sells the same to jobbers or to retail dealers therein. 88 Ia. 169.

**WIDOW.** An unmarried woman whose husband is dead.

In legal writings, widow is an addition given to a woman who is unmarried and whose husband is dead. A widow who has married again cannot be a widow; 20 Q. B. D. 103. A woman surviving a man to whom she has been married, but with regard to whom she had obtained a declaration of nullity of marriage, is not a widow; 52 L. J. Ch. 239. The addition of spinster is given to a woman who never was married. Lovelace, Wills 269. See ADDITION. As to the rights of a widow, see DOWER; QUARANTINE.

**WIDOW'S BENCH.** The share of her husband's estate which a widow is allowed besides her jointure. Whart. Lex.

**WIDOW'S CHAMBER.** In London, the apparel of a widow and the furniture of her chamber, left by her deceased husband, is so called, and the widow is entitled to it. 2 Bla. Com. 518.

**WIDOWER.** A man whose wife is dead. A widower has a right to administer to his wife's separate estate, and, as her administrator, to collect debts due to her, generally, at common law, for his own use.

**WIDOWHOOD.** The state of a man whose wife is dead, or of a woman whose husband is dead. In general, there is no law to regulate the time during which a man must remain a widower, or a woman a widow, before they marry a second time. The term widowhood is mostly applied to the state or condition of a widow.

**WIFE.** A woman united to a man by marriage. See MARRIED WOMAN.

**WIFE'S EQUITY.** The equitable right of a wife to have settled upon her and her children a suitable provision out of her estate whenever the husband cannot obtain it without the aid of a court of equity. Shelf. Marr. & D. 605.

By the marriage the husband acquires an interest in the property of his wife, in consideration of the obligation which he contracts by the marriage of maintaining her and their children. The common law enforces this duty thus voluntarily assumed by him, by an action, and, therefore, allows him to alien the property to which he is thus entitled *jure mariti*, or in case of his bankruptcy or insolvency it would vest in his assignee for the benefit of his creditors, and the wife would be left, with her children, entirely destitute, notwithstanding her fortune may have been great. To remedy this evil, courts of equity, in certain cases, give a provision to the wife, which is called the wife's equity.

The principle upon which courts of equity act is, that he who seeks the aid of equity must do equity; and that will be withheld until an adequate settlement has been made; 1 P. Wms. 459. See 5 My. & C. 105.

Where the property is equitable and not recoverable at law, it cannot be obtained without making a settlement upon a wife and children, if one be required by her; 2 P. Wms. 639; and where, though the property be legal in its nature, it becomes from collateral circumstances the subject of a suit in equity, the wife's right to a settlement will attach; 5 My. & C. 97. See 5 Madd. 149; 13 Me. 124; 9 Watts 90; 5 Johns. Ch. 464; 2 Bland, Ch. 545.

The wife's equity to a settlement is binding not only upon the husband, but upon his assignee, under the bankrupt or insolvent laws; 3 Ves. 607; 6 Johns. Ch. 25, 4 Metc. 486; 4 Gill & J. 283; 5 T. B. Monr. 338; 10 Ala. N. S. 401; 1 Ga. 637. And even where the husband assigned the wife's equitable right for a valuable consideration, the assignee was considered liable; 4 Ves. 19. When the property of the husband is settled upon his wife and children, the settlement will be valid against subsequent creditors if at the time of the settlement being made he was not indebted; 8 Wheat. 229; 4 Mas. 443; 21 N. H. 34; 38

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Miss. 717; 25 Conn. 154; but if he was then indebted it will be void as to the creditors existing at the time of the settlement; 3 Johns. Ch. 481; 5 Md. 68; 18 B. Monr. 496; 8 Wheat. 229; unless in cases where the husband received a fair consideration in value for the thing settled, so as to repel the presumption of fraud; 10 Ves. 139; 6 Ind. 121; 28 Ala. N. S. 432; 7 Pick. 533.

As to the amount of the rights of the wife, the general rule is that one-half of the wife's property shall be settled upon her; 2 Atk. 423; 3 Ves. Ch. 166. But it is in the discretion of the court to give her an adequate settlement for herself and children; 5 Johns. Ch. 464; 6 *id.* 25; 3 Cow. 591; 1 Des. Eq. 263; 2 Bland, Ch. 546; 1 Cox N. J. 153; 5 B. Monr. 31; 3 Ga. 193; 9 S. & S. 597.

Whenever the wife insists upon her equity, the right will be extended to her children; but the right is strictly personal to the wife, and her children cannot insist upon it after her death; 2 Ed. Ch. 337; 1 J. & W. 472; 1 Madd. 467; 11 Bligh N. S. 104; 2 Johns. Ch. 206; 3 Cow. 591; 10 Ala. N. S. 401.

The wife's equity will be barred by an adequate settlement having been made upon her; 2 Ves. Ch. 675; by living in adultery apart from her husband; 4 Ves. Ch. 146; but a female ward of court, married without its consent, will not be barred although she should be living in adultery; 1 Ves. & B. Ch. 302.

See White & T. L. C. Eq.

**WILD ANIMALS.** Animals in a state of nature; animals *feræ naturæ*. See WHELP; ANIMALS; FERÆ NATURÆ.

**WILFULLY.** Intentionally.

In charging certain offences, it is required that they should be stated to be wilfully done. Archb. Cr. Pl. 51, 58; Leach 556. In an indictment charging a wilful killing, it means intentionally and not by accident; 116 Mo. 96.

It is distinguished from maliciously in not implying an evil mind; L. R. 2 Cr. Cas. Res. 161.

It implies that the act is done knowingly and of stubborn purpose, but not with malice; 97 N. C. 465; and in penal statutes, it means with evil intent, or with legal malice; 98 Cal. 268; or with a bad purpose; 20 Mass. 220, quoted in 155 U. S. 446. It is frequently understood as signifying an evil intent without justifiable excuse; 1 Bish. Cr. Law 428.

In Pennsylvania it has been decided that the word *maliciously* was an equivalent for the word *wilfully*, in an indictment for arson. 5 Whart. 427. See MENS REA.

**WILL.** The disposition of one's property, to take effect after death. Swinb. Wills pt. 1, § 2; Godolphin pt. 1, c. 1, s. 2.

The term will, as an expression of the final disposition of one's property, is confined to the English laws and those countries which derive their jurisprudence from that source. The term *testamentum*, or *testament*, is exclusively used in the Roman civil law and by the continental writers upon that subject. Some controversy seems to exist whether the word *testamentum* is strictly derived from *testatum* or from that in combination with *mentis*. There does not seem to be much point in this controversy, for in either view the result is the same. It is the final declaration of the person in regard to the disposition of his property. It is his *testimony* upon that subject, and that is the expression of his *mind* and *will* in relation to it.

The practice of allowing the owner of property to direct its destination after his death is of very ancient date. Genesis, xlviii. 22; Gal. iii. 15; Plutarch's Life of Solon; Roman Laws of the Twelve Tables. But wills are not like succession, a law of nature. A stage where they are not recognized always, in every society, precedes the time when they are allowed. In their early growth they were not regarded as a method of distributing a dead man's goods, but as a means of transferring the power and authority of a family to a new chief. It is not until the latter portion of the middle ages that they become a mode of diverting property from the family or of distributing it according to the fancy of the owner. Maine, Anc. Law 171-217. Nor is the power to dispose of property by will a constitutional right. It depends almost wholly upon statute; 100 Mass. 234. See TAX.

The right of disposing of property by will did not exist in early times among the ancient Germans, or with the Spartans under the laws of Lycurgus, or the Athenians before the time of Solon. 4 Kent 502, and note.

And in England, until comparatively a recent period, this right was to be exercised under considerable restrictions, even as to personal estate. 2 Bla. Com. 492.

Until the statute of 32 & 34 Henry VIII., called the statute of wills, the wife and children were each entitled to claim of the executor their reasonable portion of the testator's goods, *i. e.* each one-third part. So that if one had both a wife and children, he could only dispose of one-third of his personal estate, and if he had either a wife or child, but not both, he could dispose of one-half; Fitzh. N. B. 122 H (b), 9th ed.; 2 Saund. 66, n. (9); 2 Bla. Com. 492. All restrictions are now removed from the disposition of property by will, in England, whether real or personal, by the statute of 1 Vict. c. 26; 3 Jarm. Wills (Randolph & Talcott's ed.) 731. As to the history of the rise of the English will, see 11 Harv. L. Rev. 69. And in the Roman civil law the children were always entitled to their share, or legitime, being one-fourth part of the estate, of which they could not be deprived by the will of their father. The legitime was by the emperor Justinian increased to one-third part of the estate where there were four or a less number of children, and if more than four then they might claim one-half the estate, notwithstanding the will. Novell. 18, c. 1; 2 Domat, Civil Law 15. See LEGITIME.

And by the existing law of the state of Louisiana, one is restrained of disposing of his whole estate if he have children. One child may claim one-third of the estate, two may claim half, and three two-thirds, as their legitime, or reasonable part of the estate. See Louisiana Code.

According to the civil law the naming of an executor was of the essence of a will; and that constituted the essential difference between a will and a codicil; the latter, not making any such appointment (*absque executoris constitutione*), was, on that account, called an unsolemn last will. Swinb. Wills 29. The executor under a Roman will succeeded to the entire legal position of the deceased. He continued the legal personality of the testator, taking all the property as his own, and becoming liable for all the obligations. Maine, Anc. Law 126.

In the United States the homestead laws in some states affect the validity of wills by making void a husband's devise of homestead land; 3 Jarm. Wills (Randolph & Talcott's ed.) 740. See same citation for regulations in various states as to devises to corporations, or for charitable purposes.

A testator, by his will, may make any disposition of his property not inconsistent with the laws or contrary to the policy of the state; 77 Ga. 636; 84 Ala. 48.

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An instrument testamentary in form, which contains no disposition of property, is no will and should not be admitted to probate. So held of a writing merely making a declaration of legitimacy of two children, and revoking all previous testamentary dispositions; 5 Ohio Leg. News 505; and a letter to an undertaker authorizing the cremation of the writer's body, and saying, "My brother will be sole administrator and take charge of the estate," was held not to appoint an executor, or make a devise, or be entitled to probate; 118 Cal. 428.

Wills are unwritten or nuncupative, and written. See NUNCUPATIVE WILL.

A will may be written in pencil. But it is a strong indication that the will so written was not a final act, but merely a deliberative one. This indication may, however, be overcome by proof; 84 Pa. 510; 1 Hagg. 219; 3 Moo. P. C. 223; 23 Beav. 195. It was held in Pennsylvania that writing on a slate is insufficient; 11 Phila. 541; but in a note to the citation of this case a *quære* is suggested whether a slate and pencil might not be used in an extreme case; Schoul. Wills § 258, note.

One may bind himself to dispose of his property in a certain way, and such contract will, in a proper case, be specifically enforced; but if it respects realty it must be in writing under the statute of frauds; 90 Va. 728. Where a will was executed by the testator *in extremis* upon the assurance of one of three residuary legatees that a bequest intended by the testator to be made, but omitted from the will, should be executed as if made; it was held that the share of the legatee making the promise should contribute its ratable proportion of the omitted bequest, and the question whether such a promise by one of a class of legatees or devisees was binding on the others was left undecided; 37 Atl. Rep. (N. J.) 735.

THE TESTATOR'S CAPACITY. He must be *of the age of discretion*, which, by the common law of England, was fixed at twelve in females, and fourteen in males; Swinburne, pt. 2, § 2. pl. 6; Godolphin, pt. 1, c. 8, § 1; 1 Will. Ex. 13; 1 Jarm. Wills 29.

This is now regulated by statute, both in England and most of the United States. The period of competency to execute a will, in England, is fixed at twenty-one years, and the same rule is adopted in many of the United States, and the disposition is strongly manifested in that direction throughout the states; 3 Jarm. Wills (Randolph & Talcott's ed.) 748, note.

"Sound mind and memory," which constitute testamentary capacity, may be properly described as that condition which would render the testator capable of transacting the ordinary business of life; 126 Ill. 507.

Though a will be dictated by testator when entirely competent, it is none the less invalid if executed by him at a time when he was not of sound and disposing mind; 19 D. C. 495.

*Aliens.* By the common law in England, an alien could not devise or take by devise, real estate; and an alien enemy could not devise personalty until 33 Vict. c. 14 § 2. This rule is now, in the United States, much altered by statute; 1 Redf. Wills 8–14; 3 Jarm. Wills (Randolph & Talcott's ed.) 743, note. *Indians*, in the absence of statute on the subject, are governed by the same law as resident aliens: p. 745 of last citation. See same citation as to *convicts*, for whom the regulations are mostly statutory. *Coverture* was a disability in the execution of a will, unless by the consent of the husband; 2 Bla. Com. 498; 4 Kent 505; 1 Will. Ex. 42. But a married woman could not, even with her husband's consent, devise land, because she would thereby exclude her heir; otherwise with chattels; 12 Mass. 525; 16 N. H. 194; 10 S. & R. 445; 15 N. J. Eq. 384. In the United States the disability as to coverture has been largely changed by statute; 1 Redf. Wills 22-29; 3 Jarm. Wills (Randolph & Talcott's ed.) 752, note. *Blindness* is so far an incapacity that it requires express and satisfactory proof that the testator understood the contents of the will, in addition to what is required in other cases; 1 Rob. Eccl. 278; 3 Strobh. 297; 1 Jarm. Wills 49. *Deaf and dumb* persons will labor under a similar inconvenience, and especially in communicating with the witnesses, unless they have been educated so as to be able to write; Whart. & St. Med. Jur. § 13. But the witnesses must, to be present with the testator, be within the possible cognizance of his remaining senses; Richardson, J., in 1 Spears 256. Persons deaf, dumb, and blind were formerly esteemed wholly incapable of making a will; but that class of persons are now placed upon the same basis as the two former, with only the additional embarrassment attending the defect of another sense; 1 Will. Ex. 17, 18; 1 Redf. Wills 53. A *speechless paralytic*, who retained his interest in and knowledge of the details of his business, and whose mind was unimpaired up to the time of his death, was held capable of making a will where his wishes as to the disposition of his property were communicated by negative and affirmative replies to questions asked him, and, after it had been written, it was read to him item by item, and his assent given by nods of his head; 22 Ore. 551.

*Idiots* are wholly incapable of executing a will, whether the defect of the understanding is congenital or accidental. *Lunatics* are incapable of executing a last will and testament, except during such a lucid interval as allows the exercise of memory and judgment. It must be an absolute, but not necessarily a perfect, restoration, to reason and reflection, and not a mere temporary remission; Tayl. Med. Jur. 642; 3 Bro. C. C. 441; 3 Add. Eccl. 79; Pothier, Obl., Evans ed. Atl. 579; Whart. & St. Med. Jur. § 255; Rush, Mind 162; Ray, Med. Jur. § 279; Combe, Ment. Der.

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241; 9 Ves. Ch. 611; 13 *id.* 87; 12 Am. L. Reg. 385; 1 Phila. 90; 31 N. J. Eq. 633; 94 Ill. 560; 26 Wend. 255; 1 Redfield on Wills 107, 120. But mere weakness of understanding is not sufficient to invalidate a will, if the testator is capable of comprehending the object in view; 17 Ark. 292; 2 Bradf. 42; 2 J. J. Marsh. 340; 10 S. & R. 84. Nor as a matter of law is a testator of unsound mind, if he mistakenly believed that his relatives had mistreated him, and therefore made no provision for them in his will; 94 Cal. 406. See 67 Hun 408; 37 W. Va. 38.

When a testator has the legal capacity to make a will he has the legal right to make an unequal, unjust, or unreasonable will; 29 W. Va. 784; 32 *id.* 119; 84 Ala. 53. The fact that a will is unreasonable is not enough to render it invalid; 96 Cal. 448; but it tends to prove invalidity; 63 Conn. 365.

A belief in spiritualism does not constitute incapacity to make a will; 53 Md. 376; 96 Cal. 448; 161 Ill. 114; see 31 Am. L. Reg. N. S. 569; especially if the views held thereon had nothing to do with making the will; *id.*; nor moral insanity; 25 N. Y. S. 109; nor delusions, except so far as they concern the person to whom they relate; 62 Wis. 216; 20 Oreg. 239; see 121 N. Y. 406 (unless they are insane delusions; 53 Md. 376); nor partial unsoundness; L. R. 5 Q. B. 549; 62 Barb. 250; nor does incapacity to manage one's ordinary affairs; 136 Mass. 145; nor advanced age, nor enfeebled condition; 72 N. Y. 269; nor failure of memory alone; unless it be total or extend to the members of his family or property; 4 Kent 510; if the testator comprehends the nature and extent of his property and the nature of the claims of those he is excluding, he is competent; 71 Mo. 553; L. R. 5 Q. B. 549; 5 N. Y. Surr. 204; 3 Redf. 384; 75 Ill. 260; L. R. 3 P. & D. 64; 21 Vt. 168; 37 W. Va. 38; 85 Va. 546; 50 N. J. Eq. 428, 439; 88 Mich. 567; 162 Pa. 567; 114 Mo. 35; 134 Ind. 437; 94 Cal. 406. The nature and character of the will are generally irrelevant; 28 Barb. 653; 39 N. Y. 153; though unreasonable or unnatural provisions are evidence of mental defect; 104 Pa. 199; 105 Ind. 456; 126 N. Y. 423.

A finding that a testator was insane at any time prior to the making of the will does not support a presumption that the insanity continued to the making of the will, unless it is also found that the insanity is habitual and fixed; 97 Ala. 731; 65 Vt. 370. When it appears that the will is the direct offspring of monomania it should be held invalid, notwithstanding the general soundness of the testator; 6 Ga. 324; 7 Gill 10; 8 Watts 70. See, also, 6 Moore, P. C. 341, 349; 12 Jurist 947, where Lord Brougham contends for the extreme notion that every person laboring under any form of partial insanity or monomania is incompetent to execute a valid will, because the mind being one and entire, if unsound in any part it is an unsound mind. This extreme view will scarcely gain final acceptance in the courts; Whart. & St. Med. Jur. § 18, *contra.*

As to the burden of proof in contests of wills, on the ground of mental incapacity of the testator, see 36 Cent. Law J. 408; 93 Mich. 234; 129 Ill. 392; 146 *id.* 337; 110 Mo. 456; 95 Ala. 486.

*Delirium* from disease or stimulus. This, while the paroxysm continues to such an extent as to deprive a person of the right exercise of reason, is a sufficient impediment to the execution of a will; Ray, Ins. §§ 253, 254, 390; Tayl. Med. Jur. 626; Rush, Mind 282; 18 Ves. Ch. 12; 17 Jur. 1045; 1 Ves. Sen. 19. See, also, 2 Aik. Vt. 167; 1 Bibb 168. But there is not the same presumption of the continuance of this species of mental perversion, whether it proceed from the intoxication of stimulus or the delirium of fever, as in ordinary insanity; 3 Hill, So. C. 68; 4 Metc. Mass. 545. See DELIRIUM FEBRILE; DELIRIUM TREMENS; DRUNKENNESS; DEMENTIA; IDIOT. *Fraud.* If a person is induced by fraud or undue influence to make a will or legacy, such will or legacy is void; 4 Ves. 802; 6 H. L. Cas. 2; 35 N. Y. 559; 50 Md. 466, 480; 1 Jarm. Wills (5th ed.) 35; 1 Redf. Wills 507-537. See UNDUE INFLUENCE.

THE MODE OF EXECUTION. This depends upon the particular form of the statutory requirements; 3 Jarm. Wills (Randolph & Talcott's ed.) 763, note, *et seq.*

In New York an attorney may be a witness to the preparation and execution of the will in case he is one of the subscribing witnesses thereto; Laws, 1892, ch. 514.

Under the English statute of frauds, 29 Car. II., as "signing" only was required, it was held that a mark was sufficient; 3 Nev. & P. 228; 8 Ad. & E. 94; 10 Paige, Ch. N. Y. 85. And under the statute of 1 Vict. c. 26, the same form of execution is required so far as signing is concerned. But sealing seems not to be sufficient where signing is required; 1 Wils. 313; 1 Jarm. Wills 69, 70, and cases cited. So, it was immaterial in what part of the will the testator signed. It was sufficient if the instrument began, I, A B, etc., and was in the handwriting of the testator, and he treated that as signing or did not regard the instrument as incomplete, as it evidently would be so long as he intended to do some further act to authenticate it; 3 Lev. 1; Freem. 538; 1 Eq. Cas. Abr. 403, pl. 9; Prec. in Chanc. 184; 21 Vt. 256. But, if it appear from the form of attestation at the close, or in any other way, that the testator did not regard the instrument as complete, the introduction of the testator's name at the beginning, in his own handwriting, is not a sufficient signing; Dougl. 241; 1 Gratt. 454; 13 *id.* 664; 10 Paige, Ch. 85. See 7 Q. B. 450. Where the whole of the disposing portion of a will was written on the first side of a sheet of foolscap, the second and third sides being blank, while the attestation clause, with the signatures of the testator

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and the witnesses, was on the fourth side, the will was held to be duly executed; [1892] Prob. 377. It was not held necessary under the statute of frauds of Charles II. that the witnesses should subscribe in the presence of each other. They might attest the execution at different times; Prec. in Chanc. 184; 1 Ves. Ch. 12; 1 Will. Ex. 79. But the statute 1 Vict. requires both the witnesses to be present when the testator signs the will or acknowledges his signature; and they must afterwards attest in the presence of the testator, although not of each other; 3 Curt. Eccl. 659; 1 Will. Ex. 79, and note; 84 Ala. 53; 64 Md. 188.

In Wisconsin by act of April 3, 1895, it is provided that the signature of the testator made by another shall be attested and subscribed by witnesses in the presence of each other; Laws, 1895, c. 120.

The term "presence" in a statute requiring the subscription of witnesses to a will, to be made in the presence of a testator, means "conscious presence"; 85 Va. 546.

A joint will, executed by two brothers, revocable at the will of either, is valid; 92 Ky. 76.

*Olograph wills* in general require no attestation; 3 Jarm. Wills (Randolph & Talcott's ed.) 767, note.

The statutes in the different states differ to some extent, but agree substantially with the English statute of Charles II. In Pennsylvania no subscribing witnesses are required except to a will containing a gift to charity. In Louisiana upon the probate of an olographic will the judge is required to interrogate witnesses and make sure that they know the handwriting; Laws, 1896, c. 119. Olographic wills are valid in Nevada; Laws, 1895, c. 111.

The testator must sign before the witnesses subscribe; L. R. 2 P. & D. 97; 39 N. Y. 153. But if the testator acknowledge his signature, so that the witnesses can see it at the time, it is enough; 7 P. D. 102. A will may be signed by another, if done in the testator's presence and at his request, when he cannot write; 58 N. H. 7; or is physically incapacitated; 46 S. C. 299; but see 94 Tenn. 538.

The competency of witnesses and the validity of devises to witnesses, or to the husband or wife of a witness, are questions usually controlled by statute; 3 Jarm. Wills (Randolph & Talcott's ed.) 775, note, *et seq.*

PUBLICATION. The best-considered cases, under statutes similar to that of Charles II., only require the production of the instrument by the testator for the purpose of being attested by the witnesses, if it bear his signature; 11 Cush. 532; 1 Burr. 421; 3 *id.* 1775; 4 Burn, Eccl. Law 102; 6 Bingh. 310; 7 *id.* 457; 7 Taunt. 361; 1 Cr. & M. 140; 3 Curt. Eccl. 181; 30 Ga. 808; 2 Barb. 385; 46 Ill. 61; 34 Me. 162; 3 Redf. 74; 44 Wisc. 392; 50 N. J. Eq. 742. Where a will or codicil refers to an existing unattested will or other paper, it thereby becomes a part of the will; 2 Ves. Ch. 238; 1 Ad. & E. 423; 1 Will. Ex. 86, and note; 1 Rob. Eccl. 81; but a document referred to in a will, which is not in existence at the time of its execution, does not constitute a part of the will, and is not entitled to probate as such; 74 Cal. 144. Witnesses may attest by a mark; 8 Ves. Ch. 185, 504; 5 Johns. 144; 4 Kent 514, n.; 51 Ark. 48.

REVOCATION. The mode of revocation of a will provided in the statute of frauds, Car. II., is by "burning, cancelling, tearing, or obliterating the same." See 47 Minn. 171. In the present English statute of wills, the terms used are "burning, tearing, or otherwise destroying." If the testator has torn off or effaced his seal and signature at the end of a will, it will be presumed to have been done *animo revocandi*; 1 Add. Eccl. 78; 25 N. J. Eq. 501. So, too, where lines were drawn over the name of the testator; 64 Hun 635; 83 Ala. 432. So, also, where the instrument had been cut out from its marginal frame, although not otherwise defaced, except that the attestation clause was cut through, it was held to amount to a revocation; 1 Phill. Eccl. 875, 406.

It is not requisite in order to effect the revocation that the testator should effect the destruction of the instrument. It is sufficient if he threw it upon the fire with the intention of destroying it, although some one snatch it off after it is slightly burned, and preserve it without his knowledge; 2 W. Blackst. 1043. But it would seem that it must be an actual burning or tearing to some extent,—an intention merely to do the acts not coming within the statute; 6 Ad. & E. 209; 2 Nev. & P. 615. See 47 Minn. 171. But, aside from the statute, a mere intention to revoke evidenced by any other act, will be effectual to revoke: as, burning or tearing, etc.; 8 Ad. & E. 1. How much the will must be burned or torn to constitute a revocation under the statute of frauds was left by the remarks of the different judges in Doe v. Harris, 6 Ad. & E. 209, in perplexing uncertainty; 1 Williams, Ex. 121.

If the testator is arrested in his purpose of revocation before he regards it as complete, it will be no revocation, although he tore the will to some extent; 3 B. & Ald. 489.

It is held in England that a letter, duly signed and attested, requesting a third person to destroy the testator's will, is sufficient to revoke it; 2 P. & D. 406.

A will may be revoked in part; 2 Rob. Eccl. 562, 572. But partial revocations which were made in anticipation of making a new will, and intended to be conditional upon that, are not regarded as complete until the new will is executed; 1 Add. Eccl. 409; 2 *id.* 316. See 8 Sim. 78. Thus a "memorandum of my intended will" was upheld as a will, and held not to be revoked by the drawing up of a new will which was not signed; 2 Hagg. Eccl. 225; 14 C. L. J. 248.

Parol evidence is inadmissible to show that a testator wanted his will to be re-

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voked in the event of a certain contingency happening before his death; 13 Rept. (Md.) 526; but see, *contra*, 3 Sw. & Tr. 282.

By the present English statute, every obliteration or interlineation or alteration of a will is required to be complete so that the words obliterated or their effect are not apparent, and they must be authenticated in the same mode that the execution of the will is required to be. Hence, unless such alterations are signed by the testator, and attested by two witnesses, they are not to be regarded as made, however obvious the intention of the testator may be. But if the words are so obliterated as to be no longer legible, they are treated as blanks in the will; 3 Curt. Eccl. 761.

The mere act of defacing a will by accident and without the intention to revoke, or under the misapprehension that a later will is good, will not operate as a revocation; 1 P. Wms. 345; Cowp. 52; 1 Saund. 279 *b*, *c*; 1 Add. Eccl. 53. The revocation of a will is *prima facie* a revocation of the codicils; 4 Hagg. Eccl. 361. But it is competent to show that such was not the testator's intention; 2 Add. Eccl. 230; 1 Curt. Eccl. 289; 1 Will. Ex. 134. The same capacity is requisite to revoke as to make a will; 7 Dana 94; 11 Wend. 227; 9 Gill 169; 7 Humphr. 92. A testator who is insane cannot revoke an existing will; 65 Cal. 19; [1893] P. 282; 73 Mo. 595; and tearing a will while suffering from delirium tremens is not a revocation; L. R. 3 P. & D. 37.

Revocation induced by fraud or undue influence is not effectual; 73 Me. 595; 68 Md. 203.

The making of a new will purporting on its face to be the testator's last will, and containing no reference to any other paper, and being a disposition of all the testator's property, and so executed as to be operative, will be a revocation of all former wills, notwithstanding it contain no express words of revocation; 2 Curt. Eccl. 468; 18 Jur. 560; 4 Moore, P. C. 29; 2 Dall. 266. So the appointment of an executor is a circumstance indicating the exclusiveness of the instrument; 1 Macq. Hou. L. 163, 173. And the revocation will become operative, notwithstanding the second will becomes inoperative from the incapacity of the devisee; 1 Pick. 535, 543.

It is regarded as the *prima facie* presumption from the revocation of a later will, a former one being still in existence and uncancelled, that the testator did intend its restoration without any formal republication; 4 Burr. 2512; Cowp. 92; 3 Phill. Eccl. 554; 2 Dall. 266. But it is still regarded as mainly a question of intention to be decided by all the facts and circumstances of the case; 1 How. Miss. 336; 2 Add. Eccl. 125; 3 Curt. Eccl. 770; 1 Moore, P. C. 299, 301; 1 Will. Ex. 155, 156; 2 Dall. 266; 86 Tenn. 173. The revocation of a will by intentionally destroying it will not revive a former will which was expressly revoked by the later one; 72 Tex. 281; and revocation by the mere execution of a subsequent will without a clause of revocation is denied, but it is held that the *destruction* of the later will revives the former one; 37 L. R. A. (Mich.) 561; 142 Mass. 515, in which case the testator had made three successive wills, intending to choose one of them and then cancelled the first and third; but it will not where the testator intended to make a new one; 86 Tenn. 173. The probability of there having been a revocation can be shown by proving the testator's verbal statements concerning his will; 11 Biss. 256; but a declaration of an intent to make a will at a future time, even when made as a formal recital in a deed, is not a revocation of an earlier will; 110 Pa. 232. Where there has been an act sufficient to constitute a revocation, it would seem that a verbal statement as to the intent of such act would be evidence. See 63 N. H. 485. An express revocation must be made in conformity with the statute, and proved by the same force of evidence requisite to establish the will in the first instance; 8 Bingh. 479; 1 Will. Ex. 160. If one republish a prior will, it amounts to a revocation of all later wills or codicils; 1 Add. Eccl. 38; 7 Term 138. A subsequent will containing a clause revoking former wills is not evidence of revocation until it is admitted to probate; 139 Mass. 164; 138 *id.* 116.

When a will, once known to exist, and to have been in the custody of the testator, cannot be found after his decease, the legal presumption is that it was destroyed by the testator with the intention of revoking it; 47 Ohio St. 323; where a will was executed in duplicate and the one retained by testatrix was not forthcoming at her decease, it was held that she was presumed to have destroyed it, *animo revocandi;* 58 L. T. R. 60.

*Implied revocations* were very common before the statute of frauds. But since the new statute of 1 Vict. c. 26, § 19, as to all estates real and personal, it is provided that no will shall be revoked on the ground of a presumed intention resulting from change of circumstances. Before that, it was held under the statute of frauds, by a succession of decisions, that, even as to lands, the marriage of the testator and the birth of children who were unprovided for was such a change of circumstances as to work an implied revocation of the will; 2 Show. 242; 4 Burr. 2171, 2182, in note; and, finally, by all the judges in England in the exchequer chamber; 8 Ad. & E. 14; 2 Nev. & P. 504. This latter case seems finally to have prevailed in England until the new statute; 2 Moore, P. C. 51, 63, 64; 2 Curt. Eccl. 854; 1 Rob. Eccl. 680. And the subsequent death of the child or children will not revive the will without republication; 1 Phill. Eccl. 342; 2 *id.* 266. See 63 Ia. 124.

The marriage alone or the birth of a child alone is not always sufficient to operate a revocation; 4 Burr. 2171; Ambl. 487, 557, 721; 5 Term 52, and note. The mar-



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riage alone of a woman will work a revocation; 4 Rep. 61. See 131 N. Y. 620; 90 Va. 728; 88 Pac. Rep. (Col.) 427. Not so the marriage alone of a man. See statutes providing for revocation of will on the marriage of the testator; Mass. Laws, 1892, ch. 118; Arizona Laws, 1891, ch. 92. But the birth of a child, with circumstances favoring such a result, may amount to an implied revocation; 5 Term 52, and note; 1 Phil. Eccl. 147. See 50 Fed. Rep. 310; 63 Ia. 124. A will not made in contemplation of matrimony is revoked by the marriage of the testator and the birth of a posthumous child; 31 Fla. 139; 70 Ga. 464. For the history of the common law on this subject, see 4 Johns. Ch. 510 *et seq.* In the absence of statute this rule of the common law may be considered abrogated in those states which give a married woman unrestricted testamentary powers. This matter is controlled in most of the American states, more or less, by statute; 3 Jarm. Wills (Randolph & Talcott's ed.) 783, note. In many of them a posthumous child unprovided for in the will of the father inherits the same as if no will had been made; 160 Pa. 433. In others, all children born after the execution of the will, and in some states all children not provided for in the will, are placed on the same ground as if no will existed; 1 Will. Ex. 170, n. 1, 171, n. 1.

By the express provisions of the act of 1 Vict. the marriage of the testator, whether man or woman, amounts to a revocation; 1 Jarm. Wills 106-173. See 89 Law T. 20. Subsequent marriage revokes the antenuptial will made by a wife; 141 Mass. 75; *contra*, 60 N. H. 439. The adoption of a child does not revoke an antecedent will of the adopting parent; 124 Ind. 1.

Where a will is executed in duplicate, only one part of which the testator retains, if he destroys that one, an intention to revoke is presumed; 84 Ala. 53.

REPUBLICATION. This, under the statute of frauds, could only be done in the same manner a will of lands was required to be first executed. And the same rule obtains under the statute of 1 Vict., and in many, perhaps most, of the American states. The general rule may be said to be, that a will can be republished only by an instrument of as high a nature as that which revoked it. Thus a will once revoked by written declaration cannot be republished by parol; 2 Conn. 67; 9 Johns. 312; 12 Ired. L. 355; 7 Jones (N. C.) L. 134. In Pennsylvania, a parol republication is allowed. But the intention of the testator to republish must be clearly proved; 1 Grant, Cas. 75; 2 Whart. 103. It is doubtful, however, if parol evidence alone is sufficient; 10 Ired. L. 459. A codicil ratifying and confirming a will, in whole or in part, will amount to a republication of the will, as of the date of the codicil; 30 Neb. 149.

*Constructive* republication is effected by means of a codicil, unless neutralized by internal evidence of a contrary intention; 1 Eq. Cas. Abr. 406, D, pl. 5; 1 Ves. Sen. 437; 1 Jarm. Wills 175, and notes; 3 Pick. 213.

PROBATE OF WILLS. The proof of a will of personal property must always be made in the probate court. But in England the probate of the will is not evidence in regard to real estate. In most of the American states the same rule obtains in regard to real as to personal estate—as the probate court has exclusive jurisdiction, in most of the states, in all matters pertaining to the settlement of estates; 9 Co. 36, 38 *a*; 4 Term 260; 1 Jarm. Wills 118; 8 N. H. 124; 12 Metc. 421; 8 Ohio 5. An executor who offers a will for probate in Maryland is required to be examined on oath whether or not he knows of any other will or codicil; Laws, 1890, ch. 416.

In New York on petition for probate of will the surrogate must cite all persons in being who would take an interest in any portion of the property, executors, and trustees; Laws, 1891, ch. 174.

In Vermont there is a provision by statute for notice to legatees on the admission to probate of a will containing bequests to associations; Laws, 1892, ch. 47.

In Oregon wills must be recorded in all counties in which the testator left real property; Laws 1891, p. 3. A will refused probate for want of testamentary capacity in the state of testator's domicil has been admitted to probate in another state where lands passed under it; 4 Call 89; and see 45 La. Ann. 1287. See PROBATE OF WILLS.

The probate of a will has no effect out of the jurisdiction of the court before which probate is made, either as to persons or property in a foreign jurisdiction; 8 Ves. Ch. 44; 1 Johns. Ch. 153; 12 Vt. 589; Story, Confl. Laws §§ 512-517. In regard to the probate of wills passing realty, the *lex rei sitæ* governs; personalty is controlled by the *lex domicilii*; Whart. Confl. Laws §§ 570, 587, 592; 3 Bradf. 379; Story, Confl. Laws §§ 69, 431; 10 Moore, P. C. 306. But the indorsement of negotiable paper by the executor or administrator in the place of his appointment will enable the indorsee to maintain an action in a foreign state upon the paper in his own name; 9 Wend. 425. But see 5 Me. 281; 2 N. H. 291, where the rule is held otherwise. The executor may dispose of bank-shares in a foreign state without proving the will there; 12 Metc. 421.

Any person interested in the will may compel probate of it by application to the probate court, who will summon the executor or party having the custody of it; 4 Pick. 33; 3 Bacon, Abr. 34, *Executors*. The judge of probate may cite the executor to prove the will at the instance of any one claiming an interest; 4 Pick. 33; 1 Will. Ex. 201; 1 Jarm. Wills 224. The attesting witnesses are indispensable, if the contestants so insist, as proof of the execution and authenticity of the will and the competency of the testator, when they can be had; 2 Greenl. Ev. § 691; 1 Jarm. Wills 226, and note. But if all or part of the subscribing witnesses are

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absent from the state, deceased, or disqualified, then their handwriting must be proved; 9 Ves. Ch. 381; 19 Johns. 186; 1 Jarm. Wills 226, and notes. And see 17 Ga. 364; 9 Pick. 350; 6 Rand. 33. It will be presumed that the requisite formalities were complied with when the attestation is formal, unless the contrary appear; 8 Md. 15; 11 N. Y. 220; 30 Pa. 218; 1 Jarm. Wills 228, and notes; 36 S. C. 428. But it has sometimes been held that no such presumption will be made in the absence of a subscribing witness who might be called; 19 Johns. 386. While the probate of a will settles the question of due execution, it does not establish validity, or determine its force and effect upon titles to real estate claimed under it; 50 Fed. Rep. 310. Wills over thirty years old, and appearing regular and perfect, and coming from the proper custody, are said to prove themselves; 1 Greenl. Ev. §§ 21, 570. See LOST INSTRUMENT.

In most of the United States statutory provision has been made for proving foreign wills by exemplified copy; 3 Jarm. Wills (Randolph & Talcott's edition) 725, note.

GIFTS VOID FOR UNCERTAINTY. Where the subject-matter of the gifts is not so defined in the will as to be ascertained with reasonable certainty; 25 Pa. 460; 12 Gratt. 196; 1 Jarm. Will 317; 1 Swanst. 201; the person intended to be benefited may not be so described or named that he can be identified. But, in general, by rejecting obvious mistakes, this kind of uncertainty is overcome; 1 Jarm. Wills 330–348, and notes. Determinate meanings have now been assigned to numerous doubtful words and phrases, and rules of construction adopted by the courts, which render devises void for uncertainty less frequent than formerly; 1 Jarm. Wills 356–383. A will otherwise effective, should not be refused probate because certain bequests contained therein are void for uncertainty; 74 Cal. 144; 27 Abb. N. C. 429; 4 Misc. Rep. 232; 76 Hun 469; 89 Tenn. 219. By statute in California when the validity of a gift, devise, or trust under a will is involved in an action, the will is admissible as evidence, and the validity of the gift, devise, or trust shall be determined; Laws, 1895, p. 77.

The testator's body cannot be disposed of by his will, because the law recognizes no property in a dead body, and it is the duty of the executor to bury it; 21 Am. L. Reg. N. S. 508.

PAROL EVIDENCE, HOW FAR ADMISSIBLE. The rule in regard to the admissibility of parol evidence to vary, control, or to render intelligible the words of a will, is not essentially different from that which obtains in regard to contracts. It may be received to show the state of the testator, the nature and condition of his property, his relation to the contestants, and all the surrounding circumstances. But this is done to place the court in the condition of the testator, in order as far as practicable to enable them the more fully to understand the sense in which he probably used the language found in his will; 1 Nev. & M. 524; 15 Pick. 400; 1 Phill. Ev. 532–547; 1 Greenl. Ev. §§ 287–289; 1 Jarm. Wills 349, and notes; 2 Ired. 192. To ascertain the intention of testator, circumstances existing at the date of the execution of a will, but not those subsequent thereto, are admissible in evidence; 133 N. Y. 456; 154 Pa. 523; 92 Ga. 216. Letters and oral declarations of the testator are not admissible to show the intention of the testator; 2 Vern. 625; 14 Johns. 1; 2 W. & S. 455. But see 22 Wend. 148. Parol evidence is not admissible to supply any word or defect in the will; 7 Gill & J. 127; 8 Conn. 254; 23 Barb. 285; 27 Ala. N. S. 489. Parol declarations of the testator about the time of making the will are often admitted to show the state of mind, capacity, and understanding of the testator; but they are not to be used to show his intention; that must be learned from the language used; 8 Conn. 254; 156 Mass. 379; *id.* 265. Parol evidence is inadmissible to prove that a gift to a nephew was really intended for the wife's nephew of the same name; 187 Pa. 118; but see 12 Harv. L. Rev. 210. See, generally, Tud. Lead. Cas. R. P. 918; Wigram, Wills.

As to construction of wills see DEVISE; LEGACY. See also Schouler; Jarman; Theobald, Wills; CANCELLATION; LATENT AMBIGUITY; AMBIGUITY; LEGACY; MURDER; NUNCUPATIVE WILL. As to conditions in restraint of marriage, see CONDITION; RESTRAINT OF MARRIAGE.

See, generally, as to statutory provisions, the very full and learned note, at the end of Randolph & Talcott's edition of Jarm. Wills (vol. 3). As to what is necessary to constitute a devise by implication, see 10 Lawy. Rep. Ann. 816, n.

*Foreign Wills.* Where a German testator specially appointed a person in England to realize on his English estate and transmit the proceeds to the German executor, the court declined to grant probate to these persons as executors according to the tenor of the will; [1894] 2 Q. B. 260.

Where property was settled upon English trustees with power of appointment, the owner of the power exercised the power it gave by will made in English form but invalid by French law. It was held that the appointment was valid; L. R. 1 P. D. 90.

There may be independent wills in different jurisdictions; [1894] P. 9; [1896] P. 65.

Where a testator made two separate wills dealing separately with English and Scotch assets, the court being satisfied that no creditor would be prejudiced, granted letters under the English will without requiring the Scotch will to be incorporated, upon condition that a copy thereof should be filed and a note to that effect made on the probate; [1891] P. 285.

Where an executor was absent and expected to be absent for two years and had

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given X a power of attorney to act for him, administration with the will annexed was granted to X for the benefit of the executor; [1891] P. 251.

In Georgia no more witnesses are required to prove a foreign will of personalty than for its execution; Laws, 1892, p. 112. A New York statute of May 14, 1892, Laws, c. 591, provides how the validity of a will may be tested in court, and a South Carolina act of Dec. 24, 1891, Laws, c. 722, prescribes the proceedings where a person producing a will is a non-resident.

**In Criminal Law.** The power of the mind which directs the action of a man.

In criminal jurisprudence, the necessity of the concurrence of the will is deemed so far indispensable that, in general, those persons are held not amenable as offenders against the law who have merely done the act prohibited, without the concurrence of the will. This has reference to different classes of persons who are regarded as laboring under defect of will, and are, therefore, incapable of committing crime.

*Infants*, who, from want of age, are excused from punishment. The age of discretion, or capacity for crime, is fixed, by the common law of England, at fourteen years; 1 Hale, Pl. Cr. 25–29; 1 Russ. Cr. 2; and between males and females, no distinction is made in regard to capacity for crime; 1 Hale, Pl. Cr. 25–29.

Below the age of seven years, infants are presumed so incapable of any malicious design as not to incur the guilt of felony or of any other crime; 1 Hale, Pl. Cr. *supra*.

Between the ages of seven and fourteen years, an infant, although presumed, *prima facie*, incapable of incurring the guilt of crime, is, nevertheless, liable to trial and to be proved guilty upon the facts of the particular case evincing guilty consciousness. The reports abound with cases where clear evidence of criminal consciousness was shown, and of very marked atrocity, from the age of nine years and upward; 1 Russ. Cr. 2–6; 1 Hale, Pl. Cr. 25–29. See INFANT; DISCRETION.

Persons laboring under *mental imbecility* are not amenable for crime. See INSANITY; LUCID INTERVALS.

*Persons subject to the power of others.* This exemption from crime, in the English common law, extends to the wife while in the immediate presence and under the power of the husband, but not to a child or servant. And in respect of the enormity of the offences of treason and murder, the wife even is not excused by the command of the husband; 1 Hale, Pl. Cr. 44, 516; 1 Hawk. Pl. Cr. c. 1, s. 14. The wife is liable, too, for all offences committed not in the presence of the husband, and also where she is the principal party concerned; 1 Hawk. Pl. Cr. c. 1, § 14; 1 Hale, Pl. Cr. 44, 516. The distinction between the wife and the child and especially the servant, where the relation of master and servant is of a permanent character, or where the law gives the master unlimited control over the acts of the servant, seems not to rest upon any well-founded basis in present social relations. The English law does not regard one in the power of robbers or of an armed force of rebels as responsible, *criminaliter*, for his acts. No more should one be who is wholly under the power of another, as a child or servant may be; 1 Russ. Cr. 14. See Ch. J. Howe, 18 St. Trials 293. These questions should, in strictness, be referred to the jury as matters of fact. See DURESS; COERCION.

*Ignorance of law* will not excuse any one. But ignorance of fact sometimes renders that innocent which would otherwise be a crime: as, where one kills an innocent person, mistaking him for an assassin or robber; 1 Hale, Pl. Cr. c. 6; 1 Russ. Cr. 19, 20. See IGNORANCE.

**WILL, ESTATES AT.** See ESTATES AT WILL.

**WINCHESTER, STATUTE OF.** An English statute, 13 Edw. I. relating to the internal police of the kingdom. It required every man to provide himself with armor to aid in keeping the peace; and if it did not create the offices of high and petty constables, it recognized and regulated them, and charged them with duties answering somewhat to those of our militia officers. The statute took its name from the ancient capital of the kingdom. It was repealed by the statute of 7 & 8 Geo. IV. c. 27.

**WINDFALL.** See TIMBER; WOODS.

**WINDING UP.** The process of liquidating the assets of a partnership or corporation, for purposes of distribution. In England a number of statutes, known as the Winding-up Acts, have been passed to facilitate the settlement of partnership affairs; Lind. Part. book iv. c. 3.

**WINDOW.** An opening made in the wall of a house to admit light and air, and to enable those who are in to look out. Cited in 46 Mo. App. 508.

The owner has a right to make as many windows in his house, when not built on the line of his property, as he may deem proper, although by so doing he may destroy the privacy of his neighbors; Bacon, Abr. *Actions in General* (B).

In cities and towns it is evident that the owner of a house cannot open windows in the party wall, *q. v.*, without the consent of the owner of the adjoining property, unless he possesses the right of having *ancient lights*, which see. The opening of such windows and destroying the privacy of the adjoining property is not, however, actionable; the remedy against such encroachment is by obstructing them, without encroaching upon the rights of the party who opened them, so as to prevent a right from being acquired by twenty years' use; 3 Camp. 82; 4 Misc. Rep. 48. A bay or bow-window that projects over the land of another is a nuisance, and actionable as though it was an actual invasion of the soil; 107 Mass. 234; 16 S. & R. 38); Wood,

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Nuisance 118. Where it projects beyond the street line, it has been held in Pennsylvania a *purpresture*, and the erection of it may be restrained by injunction, although authorized by a special city ordinance; 10 W. N. C. Pa. 10; see 100 Pa. 182; whether the window reached to the ground; *id.*; or was built out of the second story; 39 Leg. Int. Pa. 108. See AIR; ANCIENT LIGHTS; HIGHWAY; BAY WINDOW; LIGHT.

**WINE.** The unfermented juice of the grape. 5 Blackf. 118. See LIQUOR LAWS.

**WIRES.** By the provisions of the Revised Statutes § 5263, electrical companies must so construct and maintain their lines as not to obstruct ordinary travel or navigation. This act grants to the companies which accept its provisions a species of easement or right of way; 38 Fed. Rep. 552. It does not prevent state legislatures from enacting statutes requiring telegraph wires to be placed underground; 125 N. Y. 641; 145 U. S. 175; and when declared a nuisance, they may be forcibly removed, although the subways are not in a condition to receive them; 125 N. Y. 641.

The attachment of wires to the roof of a building may be prohibited by municipal ordinance in the exercise of the police power; 45 Fed. Rep. 493; and the company is liable to the owner of the premises for making such attachment without permission; 114 Mass. 149.

Although not an insurer of safety to travellers all reasonable precautions must be taken *in stringing wires;* 2 Col. 148; 91 U. S. 495; and in investigating promptly detached or grounded wires; 161 Mass. 583; 27 S. W. Rep. (Tex.) 66; and in removing dead wires in the case of fire or accident; 33 Minn. 340; but the mere fact that one was killed by a hanging wire does not prove negligence; 34 Atl. Rep. (N. J.) 1069; *contra*, 114 N. C. 203.

In many of the states the insulation of the wire is made the subject of statutory provision, and even in the absence of such provision, it has been held that non-insulation is negligence; 161 Mass. 583.

The company will be liable for damages if a dead wire, coming into contact with a live wire of another company, becomes charged and causes injury or death; 27 S. W. Rep. (Tex.) 66.

One whose occupation requires his proximity to an electric wire may presume it to be insulated; 44 La. Ann. 692; and he is not required to make an examination in order to ascertain if such be the case; 107 Cal. 120. A traveller may pick up a wire from the street and throw it outside the regular line of travel without being guilty of contributory negligence; 156 Mass. 393; 114 N. C. 203; 27 S. W. Rep. (Tex.) 66. For injuries so received damages may be recovered either from the city; 156 Mass. 393; or from the company; 27 S. W. Rep. (Tex.) 66. But in order to sustain an action for damages, it must be clearly shown that there was no contributory negligence; 9 So. Rep. (La.) 488. It has been considered contributory negligence to step on a live wire after a warning; 9 Houst. 306.

The wires of electric light and electric railway companies, unlike those of telegraph and telephone companies, carry a strong and dangerous current, and such companies are bound to the highest degree of care in the pursuit of their business; 114 N. C. 203.

If a telephone wire has been negligently allowed to drop across a trolley wire, the owner of the latter is jointly liable with the owner of the telephone wire for injuries to a third person caused by electricity conveyed through it from the trolley wire; 33 S. W. Rep. (Ark.) 426. See 31 L. R. A. 566; 9 Harv. L. Rev. 505; Keasbey, Electric Wires; Croswell, Electricity; ELECTRIC LIGHT; TELEGRAPH; TELEPHONE; NEGLIGENCE; MASTER AND SERVANT.

**WIRTA.** A measure of land among the Saxons, containing sixty acres.

**WISBUY, LAWS OF.** See CODE.

**WISCONSIN.** One of the states of the United States.

It was originally part of the Northwest Territory. See OHIO. It was made a separate territory, with the name of Wisconsin, by act of April 20, 1836. The territory was afterwards divided, and the territory of Iowa set off, June 12, 1838. It was admitted into the Union May 29, 1848.

The constitution was adopted by a convention at Madison, on February 1, 1848. This constitution, as modified by amendments, is still in force.

THE LEGISLATIVE POWER is vested in a senate and assembly.

The *Senate* is composed of not more than one-third nor less than one-fourth the number of the representatives. They are elected by the people for four years.

The *Assembly* is composed of not less than fifty-four and not more than one hundred members, elected biennially. No person is eligible to the legislature who has not resided one year within the state.

THE EXECUTIVE POWER.—The *Governor* is elected for the term of two years. He has the power to grant reprieves, commutations, and pardons after conviction for all offences except treason and in cases of impeachment, upon such conditions and with such restrictions and limitations as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons. Upon conviction for treason he has the power to suspend the execution of the sentence until the case is reported to the legislature at its next meeting, when the legislature may either pardon or commute the sentence, direct the execution of the sentence, or grant a further reprieve.

The *Lieutenant-Governor* is elected at the same time as the governor, for the same term, and must possess the same qualifications as the governor. He is president of the senate, but has only a casting vote. In case of the impeachment of the governor, or of his removal from office, death, inability from mental or physical disease, resignation, or absence from the state, the powers and duties of the office devolve upon him for the residue of the term, or until the disability, etc., is removed.

THE JUDICIAL POWER is vested in a supreme court, circuit courts, courts of probate, and in justices of the peace. The *Supreme Court* consists of one chief and four associate justices, elected for ten years. It is a court of appellate jurisdiction only, but may issue writs of *mandamus*, *certiorari*, *habeas corpus*, *quo warranto*, *procedendo*, and *supersedeas*.

The *Circuit Court* is composed of judges elected one from each judicial district for six years. The state is divided into seventeen judicial circuits. A judge must be at least twenty-five years old, a citizen of the United States, and a qualified elector. It has original jurisdiction of all civil and

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criminal matters, and appellate jurisdiction from all inferior courts and tribunals and a supervisory power over the same.

*County Courts* are held in each county. Their jurisdiction extends to the probate of wills, and granting letters testamentary and of administration on the estates of all persons deceased; to all matters relating to the settlement of estates of deceased persons and of minors and others under guardianship; and to all cases of trusts created by will admitted to probate in such court; and such other jurisdiction as may be conferred by law.

**WITCHCRAFT.** Under 33 Hen. VIII. c. 8 and 1 Jac. I. c. 12, the offence of witchcraft, or supposed intercourse with evil spirits, was punishable with death. These acts were not repealed till 1736. 4 Bla. Com. 60.

**WITENA-GEMOTE** (spelled, also, wittena-gemot, gewitena-gemote; from the Saxon *wita*, a wise man, *gemote*, assembly,—the assembly of wise men).

An assembly of the great men of the kingdom in the time of the Saxons, to advise and assist in the government of the realm.

It was the grand council of the kingdom, and was held, generally, in the open air, by public notice or particular summons, in or near some city or populous town. These notices or summonses were issued upon determination by the king's select council, or the body met without notice, when the throne was vacant, to elect a new king. Subsequently to the Norman conquest it was called *commune concilium regni*, *curiam agna*, and finally *parliament*; but its character had become considerably changed. It was a court of last resort, more especially for determining disputes between the king and his thanes, and, ultimately, from all inferior tribunals. Great offenders, particularly those who were members of or might be summoned to the king's court, were here tried. The casual loss of title-deeds was supplied, and a very extensive equity jurisdiction exercised. 1 Spence, Eq. Jur. 73; 1 Bla. Com. 147; 1 Reeve, Hist. Eng. Law 7; 9 Co. Pref.

The principal duties of the witena-gemote, besides acting as high court of judicature, was to elect the sovereign, assist at his coronation, and co-operate in the enactment and administration of the laws. It made treaties jointly with the king, and aided him in directing the military affairs of the kingdom. Examination into the state of churches, monasteries, their possessions, discipline, and morals, were made before this tribunal. It appointed magistrates, and regulated the coin of the kingdom. It also provided for levying upon the people all such sums as the public necessities required; and no property of a freeman was, in fact, taxable without the consent of the gemote. Bede, lib. 2, c. 5; 3 Turner, Angl. Sax. 209; 1 Dugdale, Mon. 20; Sax. Chron. 126, 140.

The deliberations of their body had great weight; all important actions, such as law-making, were done by their advice; but they could not and did not pretend to do without the consent of the freeholders when a capital decision—such as the voting of a tax, the election of a king, the passing of a law—was in question. At first the king of the English would go around with his proposed laws to the several folk-mote, getting the separate consent of each, but in the tenth century the kings bethought them of summoning the moots of the various shires to meet them at some convenient central spot, as Oxford or London, and what this collective moot or *Mycel-gemot* agreed to need not be confirmed again, since men from every shire were present. The Mycel-gemot was the *Magnum Concilium* of the Normans and developed into the High Courts and Parliaments of the thirteenth century. 1 Social England 136. See Stevens, Sources of the Constitution 62.

**WITH STRONG HAND. In Pleading.** A technical phrase indispensable in describing a forcible entry in an indictment. No other word or circumlocution will answer the same purpose. 8 Term 357.

**WITHDRAW.** To take away what has been enjoyed; to take from. 54 Ga. 409.

**WITHDRAWING A JUROR.** An agreement made between the parties in a suit to require one of the twelve jurors impanelled to try a cause to leave the jury-box; the act of leaving the box by such a juror is also called the withdrawing a juror.

This arrangement usually takes place at the recommendation of the judge, when it is obviously improper the case should proceed any further. And it seems now settled that in civil cases the court has power to do this, in the exercise of a sound discretion, without the consent of the parties, instead of nonsuiting the plaintiff; 8 Cow. 127.

The effect of withdrawing a juror puts an end to that particular trial, and each party must pay his own costs; 3 Term 657; 2 Dowl. 721; 1 Cr. M. & R. 64. In Pennsylvania, the costs abide the event of the suit; Tr. & H. Pr. § 689.

But the plaintiff may bring a new suit for the same cause of action; Ry. & M. 402; 3 B. & Ad. 349. See 3 Chitty, Pr. 917.

In American practice, however, the same cause goes over, or is continued, without impairing the rights of either party, until the next term.

Where the plaintiff, at the suggestion of the judge, withdraws a juror, with the understanding of bringing the matter to a final conclusion, it amounts to an undertaking not to bring an action for the same cause; and if a second action be commenced, the court will stay the proceedings as against good faith; 1 Chit. Arch. Pr. 285. If, after a prisoner has pleaded to an indictment, and after the jury have been sworn and evidence offered, the public prosecutor, without the consent of the prisoner, withdraw a juror merely because he is unprepared with his evidence, the prisoner cannot afterwards be tried on the

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same indictment; 2 Cai. Cas. 304; Arch. Cr. Pr. & Pl. 347.

**WITHDRAWING RECORD.** The withdrawing by plaintiff's attorney of the *nisi prius* record filed in a cause, before a jury is sworn, has the same effect as a motion to postpone. 2 C. & P. 185; 3 Camp. 333.

**WITHERNAM.** The name of a writ which issues on the return of *elongata* to an alias or pluries writ of replevin, by which the sheriff is commanded to take the defendant's own goods which may be found in his bailiwick, and keep them safely, not to deliver them to the plaintiff until such time as the defendant chooses to submit himself and allow the distress, and the whole of it to be replevied; and he is thereby further commanded that he do return to the court in what manner he shall have executed the writ. Hamm. N. P. 453; Co. 2d Inst. 140; Fitzh. N. B. 68, 69.

**WITHHOLD.** Withholding property is not equivalent to concealing property. To withhold commissions implies a temporary suspension rather than a total and final denial or rejection of the same. 149 U. S. 278.

**WITHIN.** In the limits or compass of. 54 Ala. 531. In may be used in the sense of in or at the end of. 4 Cush. 420.

**WITHOUT.** Outside; beyond. 91 U. S. 277; 9 Mass. 456.

**WITHOUT DAY.** This signifies that the cause or thing to which it relates is indefinitely adjourned: as, when a case is adjourned without day it is not again to be inquired into. When the legislature adjourn without day, they are not to meet again. This is usually expressed in Latin, *sine die*.

**WITHOUT IMPEACHMENT OF WASTE.** When a tenant for life holds the land without impeachment of waste, he is, of course, dispunishable for waste, whether wilful or otherwise. But still this right must not be wantonly abused so as to destroy the estate; and he will be enjoined from committing malicious waste; Bac. Abr. *Waste* (N); 2 Eq. Cas. Abr. *Waste* (A, pl. 8). See IMPEACHMENT OF WASTE; WASTE.

**WITHOUT PREJUDICE.** See COMPROMISE.

**WITHOUT RECOURSE.** See SANS RECOURS; INDORSEMENT.

**WITHOUT RESERVE.** These words are frequently used in conditions of sale at public auction, that the property offered, or to be offered, for sale, will be sold *without reserve*. When a property is advertised to be sold without reserve, if a puffer be employed to bid, and actually bid at the sale, the courts will not enforce a contract against a purchaser, into which he may have been drawn by the vendor's want of faith; 5 Madd. 34. See PUFFER; AUCTION.

**WITHOUT THIS, THAT. In Pleading.** These are technical words used in a traverse (*q. v.*) for the purpose of denying a material fact in the preceding pleadings, whether declaration, plea, replication, etc. The Latin term is *absque hoc* (*q. v.*). Com. Dig. *Pleader* (G 1); 1 Chitty, Pl. 576, note *a*.

**WITNESS** (Anglo-Saxon *witan*, to know). One who testifies to what he knows. One who testifies under oath to something which he knows at first hand. 1 Greenl. Ev. §§ 98, 328.

One who is called upon to be present at a transaction, as, a wedding, or the making of a will. When a person signs his name to a written instrument to signify that the same was executed in his presence, he is called an attesting witness.

The principal rules relating to witnesses are the same in civil and in criminal cases, and the same in all the courts, as well in those various courts whose forms of proceeding are borrowed from the civil law, as in those of the common law; 3 Greenl. Ev. §§ 249, 402; 2 Ves. Ch. 41; 17 Mass. 303.

AS TO THE COMPETENCY OF WITNESSES. The question of the competency of a witness is for the court, and not for the jury; 37 W. Va. 565; 107 Mo. 37; and an objection to competency is not necessarily waived if not taken before his examination in chief; 17 S. E. Rep. (Va.) 946.

All persons, of whatever nation, may be witnesses; Bacon, Abr. *Evidence* (A). But in saying this we must, of course, except such as are excluded by the very definition of the term; and we have seen it to be essential that a witness should qualify himself by taking an oath. Therefore, all who cannot understand the nature and obligation of an oath, or whose religious belief is so defective as to nullify and render it nugatory, or whose crimes have been such as to indicate an extreme insensibility to its sanctions, are excluded. And, accordingly, the following classes of persons have been pronounced by the common law to be incompetent. See OATH.

*Infants* so young as to be unable to appreciate the nature and binding quality of an oath. A child under the age of fourteen is presumed incapable until capacity be shown, but the law fixes no limit of age which will of itself exclude. Whenever a child displays sufficient intelligence to observe and to narrate, it can be admitted to testify; 7 C. & P. 320; 2 Brewst. 404; 44 Mich. 486; 88 Ala. 151; 88 Wis. 180; 158 U. S. 523. A child five years old has been admitted to testify; 1 Greenl. Ev. § 367; 3 C. & P. 598; 1 Mood. 86; 10 Mass. 225; 8 Johns. 98; 88 Wis. 180; 158 U. S. 523. But if the child is not sufficiently instructed on this "point," the trial may be put off, in order to give the necessary instruction; 2 Leach, C. C. 86; but only in the discretion of the court; 2

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C. & K. 246. The law presumes that all witnesses tendered in a court of justice are not only competent but credible. If a witness is incompetent, this must be shown by the party objecting to him; if he is not credible, this must be shown either from his examination, or by impeaching evidence *aliunde;* 1 Whart. Ev. § 392. See DISCRETION.

*Idiots, lunatics, intoxicated persons,* and, generally, those who labor under such privation or imbecility of mind that they cannot understand the nature and obligation of an oath. The competency of such is restored with the recovery or acquisition of this power; 10 Johns. 362; 28 Conn. 177; 16 Vt. 474; 7 Wheat. 458; but the question of their credibility should be left to the jury; 97 Ala. 85. And so a lunatic in a lucid interval may testify; 1 Greenl. Ev. § 365; even though an inmate of an insane asylum; 86 Atl. Rep. (Del.) 458; 82 Fed. Rep. 720; or one who has been adjudged insane; 80 *id.* 85. Persons deaf and dumb from their birth are presumed to come within this principle of exclusion until their competency is shown; 1 Greenl. Ev. § 366; but such a person is not deemed to be an idiot; 118 Mo. 127. A witness unable to speak or hear is not incompetent, but may give his evidence by writing or by signs, or in any other manner in which he can make it intelligible; Steph. Ev. art. 107. See 11 Cush. 417. A person in a state of intoxication cannot be admitted as a witness; 15 S. & R. 235. See Ray, Med. Jur. c. 22, § 300; 16 Johns. 143. Deficiency in perception must go to the incapacity of perceiving the matter in dispute, in order to operate as an exclusion, hence a blind man can testify to what he has heard, and a deaf man to what he has seen; 1 Whart. Ev. § 401.

*Such as are insensible to the obligation of an oath, from defect of religious sentiment or belief.* Atheists, and persons disbelieving in any system of divine rewards and punishments, are of this class. It is reckoned sufficient qualification in this particular if one believe in a God and that he will reward and punish us according to our deserts. It is enough to believe that such punishment visits us in this world only; 1 Greenl. Ev. § 369; 5 Mass. 18; 14 Mass. 184; 26 Pa. 274; 16 Ohio 121; 7 Conn. 66; 22 So. Rep. (La.) 841.

It matters not, so far as mere competency is concerned, that a witness should believe in one God, or in one God rather than another, or should hold any particular form of religious belief, provided only that he brings himself within the rule above laid down. And, therefore, the oath may be administered in any form whatever, and with any ceremonies whatever, that will bind the conscience of the witness; 1 Greenl. Ev. § 371; 1 Sm. L. Cas. 739. By statute in England and in most of the United States, religious disbelief no longer disqualifies, provision being made for an affirmation instead, and the witness, if testifying falsely, being subject to the penalties of perjury; Whart. Ev. § 395, n. See ATHEIST.

*Persons infamous, i. e.* those who have committed and been legally convicted of crimes the nature and magnitude of which show them to be insensible to the obligation of an oath. See INFAMY. Such crimes are enumerated under the heads of treason, felony, and the *crimen falsi;* 1 Greenl. Ev. § 373; 2 Dods. Adm. 191. See CRIMEN FALSI.

The only method of establishing infamy is by producing the record of conviction. It is not even sufficient to show an admission of guilt by the witness himself; 9 Cow. 707; 2 Mass. 108; 97 *id.* 587; but in England a witness may be asked whether he has been convicted, etc.: Steph. Ev. art. 130. Pardon or the reversal of a sentence restores the competency of an infamous person, except where this disability is annexed to an offence by a statute; 1 Greenl. Ev. § 378; 2 Salk. 513; 2 Hargr. Jurid. Arg. 221. See 53 Fed. Rep. 352; 144 U. S. 263; 21 Tex. App. 1; even if granted for the reason, among others, that his testimony was desired by the government in a cause then pending; 142 U. S. 450. See PARDON.

This exclusion on account of infamy or defect in religious belief applies only where a person is offered as a witness; 1 Greenl. Ev. § 374; 2 Q. B. 721. But wherever one is a party to the suit, wishing to make affidavit in the usual course of proceeding, and, in general, wherever the law requires an oath as the condition of its protection or its aid, it presumes conclusively and absolutely that all persons are capable of an oath; Stark. Ev. 393; 1 Ashm. 57. There is a conflict of authority as to how far a foreign judgment of an infamous offence disqualifies a witness. In New York, he is not disqualified; 77 N. Y. 400. In Pennsylvania, he is held not to be disqualified unless the record of conviction be produced, and not then if he has served out his term of imprisonment; 3 Brewst. 461. In Massachusetts, the record is admitted merely to affect his credibility; 17 Mass. 575. In New Hampshire, the witness will be disqualified if the laws of his own state make him so, and the crime, if committed in New Hampshire, would have had the same effect; 10 N. H. 22. In Alabama: 23 Ala. 44; and Virginia; 6 Gratt. 706; the record is rejected altogether; but not so in North Carolina; 3 Hawks 393. He is disqualified in Nevada; 15 Nev. 64. See Whart. Confl. Laws §§ 107, 769. A conviction and sentence can have no such effect beyond the limits of the state in which the judgment is rendered unless the statute of another state give such effect to them; 144 U. S. 263. If a statute permits a defendant in a criminal case to testify on his own behalf, he may do so, though infamous, but not against a co-defendant; 35 S. C. 279.

*Slaves* were generally held incompetent to testify, by statutory provisions, in the slave states, in suits between white per-

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sons; 7 T. B. Monr. 91; 4 Ohio 353; 5 Litt. 171.

When it is said that all persons may be witnesses, it is not meant that all persons may testify in all cases. The testimony of such as are generally qualified and competent under other circumstances or as to other matters is sometimes excluded out of regard to their special relations to the cause in issue or the parties, or from some other circumstances not working a general disqualification.

*Parties to the record* were not competent witnesses, at common law, for themselves or their co-suitors. Nor were they compellable to testify for the adverse party; 7 Bingh. 395; 20 Johns. 142; 21 Pick. 57; 11 Conn. 342; but they were competent to do so; although one of several co-suitors could not thus become a witness for the adversaries without the consent of his associates; 1 Greenl. Ev. § 354; 5 How. 91; 6 Humph. 405. Regard was had not merely to the nominal party to the record, but also to the real party in interest; and the former was not allowed to testify for the adverse side without the consent of the latter; 1 Greenl. Ev. § 329; 16 Pick. 501; 20 Johns. 142. Persons who have no interest in the matter in controversy are not incompetent merely because parties to the action; 118 Ind. 227; 134 U. S. 650.

In some jurisdictions a party had the right of compelling his adversary to answer interrogatories under oath, as also to appear and testify. And, in equity, parties could require and use each other's testimony; and the answer of a defendant as to any matters stated in the bill was evidence in his own favor; 1 Greenl. Ev. § 329; 2 Story, Eq. Jur. 1528.

There were other exceptions to this rule. Cases where the adverse party had been guilty of some fraud or other tortious and unwarrantable act of intermeddling with the complainant's goods, and no other evidence than that of the complainant himself could be had of the amount of damage,—cases, also, where evidence of the parties was deemed essential to the purposes of public justice, no other evidence being attainable,—were exceptions; 1 Greenl. Ev. § 348; 1 Me. 27.

On this same principle, *persons directly interested in the result of the suit* (see INTEREST), or in the record as an instrument of evidence, were excluded; and where the event of the cause turned upon a question which if decided one way would have rendered the party offered as a witness liable, while a contrary decision would have protected him, he was excluded; Stark. Ev. 1730. But to this rule, also, there were exceptions: Stark. Ev. 1731; of which the case of agents testifying as to matters to which their agency extended, forms one: 1 Greenl. Ev. § 386; so also an employe of a charitable institution; 105 Pa. 155; or a taxpayer of a town to which a library was given by will; 160 Mass. 140; were not incompetent for interest.

In both England and the United States, the rules of exclusion on the ground of interest have been abrogated. The object of the statutes has been to remove all artificial restraints to competency so as to put the parties upon a footing of equality with other witnesses, both in their admissibility to testify for themselves, and in their being compellable to testify for others; 21 Wall. 488. In most of the statutes, however, cases are excepted where a suit is brought by or against executors or administrators. In these cases where one of the parties to a contract is dead, the survivor is not permitted to testify; 66 Pa. 297; but this exception does not exclude directors or stockholders of a corporation which is a party, when the other party is dead; 32 S. W. Rep. (Mo.) 654; 24 S. E. Rep. (Ga.) 409. But the exception does not make the surviving party incompetent, it only precludes him from testifying to communications with the deceased; 59 Me. 259; 64 Ill. 121. The test is the nature of the communications. The witness cannot testify to personal communications with the deceased party; 64 Barb. 189; 12 Gray 459; 76 Ia. 101; 100 N. C. 150; but it has been held that if documents can be proved by independent evidence, the case is not within the exception; 21 Mich. 364. A husband may testify to conversation between his wife and the decedent, in which he took no part: 38 S. C. 158; but one who is interested in the contest of a will cannot testify as to conversations between testator and another in which the witness took no part; 78 Hun 43. If the suit is brought against co-defendants, of whom only one is dead, when the contract was made either with the living co-defendants, or with the living and dead concurrently, the case is not within the exception; 9 Allen 144; 22 Ohio St. 208. But where an action was brought against three partners, one of whom subsequently died, and his executors were substituted, the plaintiff is not a competent witness as to anything which occurred during the lifetime of the deceased partner although the latter may have taken no part in the contract on which the action was brought; 87 Pa. 111. In an action by a surviving partner on a book account, the defendant is competent to testify to payments by him to the deceased partner; 9 Ind. App. 321.

Under these statutes, which confine the exception to suits against executors and administrators, the death of an agent of one party, through whom the contract was made, does not prevent the surviving party from testifying to the contract; 2 W. N. C. (Pa.) 665; but under statutes which exclude the surviving party to a contract, the death of a contracting agent excludes the surviving party who contracted with him; 26 Wisc. 500. See 113 N. C. 551. An agent who makes a sale of goods for his principal is not incompetent to testify to the circumstances of the transaction because of the death of the buyer: 50 Ohio St. 648. Unless the exception expressly covers all suits against executors and administrators,

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it does not exclude the plaintiff from proving matters occurring since the death of the party of whom the defendant is executor; 48 N. H. 90. The exception in statutes where the exclusion relates only to the surviving party in contracts does not include torts; 60 Mo. 214. When the deposition of a deceased party afterwards is put in evidence, the other party being still living, such other party should be admitted as a witness in reply; 52 Ga. 385; 114 Mo. 66. See, generally, 12 L. R. A. 836. As to exclusion of testimony against a decedent on the ground of interest, see 12 Lawy. Rep. Ann. 886.

*Husband and wife* were excluded at common law from giving testimony for or against each other when either was a party to the suit or interested. And neither was competent to prove a fact directly tending to criminate the other. This rule was founded partly on their identity of interest, and partly, perhaps chiefly, on the policy of the law which aims to protect the confidence between man and wife that is essential to the comfort of the married relation, and, through that, to the good order of society. Whether or not the disability of husband or wife may be removed by consent of the other is matter of dispute; 3 C. & P. 551; 1 Greenl. Ev. § 340. In England, by stat. 16 & 17 Vict. c. 83, consent removes the disability; Whart. Ev. § 428. But it is not removed by death, nor by the dissolution of the marriage relation, so far as respects information derived confidentially during marital intercourse; 47 N. H. 100. She may, however, testify as to matters which transpired subsequently to a divorce; 86 Ala. 86.

The wife of a member of a partnership is not competent as a witness in a suit against the partnership; 64 Vt. 583.

The rule is not ordinarily affected by statutes permitting husband or wife to testify for or against each other; 60 Barb. 527; nor does the statute as to the evidence of parties in interest generally affect their common-law incapacity to testify; 18 Wall. 452.

Some exceptions to this rule; 1 Greenl. Ev. § 343; are admitted out of necessity for the protection of husband and wife against each other, and for the sake of public justice, as in prosecutions for violence committed by either of them upon the other. See Bac. Abr. *Evidence* (A); 1 Greenl. Ev. § 334; 1 Ves. Ch. 49; Ry. & M. 253; 137 U. S. 496. It is not error to receive the testimony of the wife of a person on trial for murder by consent of his counsel if she is advised by the court that she need not testify unless she desires to do so; 146 U. S. 325.

*Parties to negotiable instruments* are, in some jurisdictions, held *incompetent to invalidate these instruments* to which they have given currency by their signature. Such seems to be the prevailing, but not universal, rule in the United States; while in England such testimony is admitted, the objection going only to its credibility; 1 Greenl. Ev. § 383; 1 Term 296; 9 Metc. 471; 3 How. 73; 5 N. H. 147; 20 Pa. 469; 24 Vt. 459; 18 Ohio 579; 1 Miss. 541; 1 Conn. 260; 4 Tex. 371; 3 Harr. & J. 172.

And, finally, there are certain *confidential communications;* 1 Greenl. Ev. § 236; to which the recipient of them, from general considerations of policy, is not allowed to testify. But the privilege may be waived by the party entitled to claim the benefit of it, as when two physicians were in consultation, a party by calling one waives the right to object to the testimony of the other against her; 42 N. E. Rep. (N. Y.) 410. See CONFIDENTIAL COMMUNICATIONS.

*Judges* are not compellable to testify to what occurred in their consultations; but they may be examined as to what took place before them on the trial in order to identify the case, or prove the testimony of a witness; 1 Whart. Ev. § 600; see 4 Sandf. 120; but in England there is a doubt as to the latter proposition; Steph. Ev. art. 111; and it is said that in England a barrister cannot be compelled to testify as to what he said in court in his character of barrister; *id.*

The fact that one is counsel in the case does not disqualify him from testifying; 32 Tex. Cr. R. 102.

*Persons in possession of secrets of state* or matters the disclosure of which would be prejudicial to the public interests, are not allowed to testify thereto; 1 Greenl. Ev. § 250.

*Grand jurors and persons present before a grand jury;* 1 Greenl. Ev. § 252; are not permitted to testify to the proceedings had before that body; 1 Phill. Ev. 177. See CONFIDENTIAL COMMUNICATIONS.

THE MEANS OF SECURING THE ATTENDANCE AND TESTIMONY OF WITNESSES. In general, all persons who are competent may be compelled to attend and testify. As to compelling expert witnesses to attend, see EXPERTS.

Provision has been made by statute, in most if not in all of the states, for the case of persons living at an inconvenient distance from the place of trial, as well as for the case of such as are sick or about to leave the state, or otherwise likely to be put to great inconvenience by a compulsory attendance, and also for such as are already in a foreign jurisdiction, by allowing the taking of their deposition in writing before some magistrate or officer near at hand, to be read at the trial; 1 Greenl. Ev. § 321.

In criminal cases, all persons are compellable to appear and testify without any previous tender of their fees; and any bystander in court may be compelled to testify without a previous summons or tender of fees; 1 Greenl. Ev. § 311; 4 Cow. 49; 13 Mass. 501; 4 Cush. 249.

But in civil suits which are between man and man, a party is allowed to compel the attendance and testimony of a witness only on condition of a prepayment or tender of his fees for travel to the place of

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trial, and for one day's attendance there. This seems, as a general rule, to be the least that can be tendered; 1 Greenl. Ev. § 310; 4 Johns. 311; 1 Metc. Mass. 293; 8 Mo. 288; 41 N. H. 121. See 40 Ill. App. 628; and a witness who attends without the payment or tender of his fees, waives their tender or payment in advance; 87 Wis. 525. In the courts of the United States, as well as in England, a witness may require his fees for travel both ways; 1 Greenl. Ev. § 310; 6 Taunt. 88. And in civil cases a person cannot be compelled to testify, although he chance to be present in court, unless regularly summoned and tendered his fees; 1 Phill. Ev. 388. Being in attendance in obedience to a summons, he may, nevertheless, refuse to testify from day to day, unless his daily fees are paid or tendered; 2 Phill. Ev. § 376. Whether or not he may refuse to *attend* from day to day without the prepayment or tender of his daily fees, is a matter about which there are different decisions; 1 Greenl. Ev. § 310; 10 Vt. 493; 14 East 15. A witness may maintain an action against the party summoning him for his fees; Stark. Ev. 1727. Federal courts allow mileage and *per diem* fees, although no subpœna was issued; 54 Fed. Rep. 464; 36 *id.* 113; 37 *id.* 844. As to additional compensation to experts, see EXPERTS, and also 48 N. E. Rep. (Ill.) 108, and comments thereon in 18 N. Y. L. J. (Dec. 3, 1897).

Witnesses are also compellable to produce papers in their custody to which either party has a right as evidence, on the same principle that they are required to testify what they know; 1 Greenl. Ev. § 558. See DISCOVERY; SUBPŒNA DUCES TECUM.

This rule as to title-deeds appears to be peculiar to England. In this country, it is said that a witness, not a party, may be compelled to produce any of his private papers. Whether the court, on inspection, will require them to be put in evidence may be a matter of discretion; Steph. Ev. art. 118, n. See 14 Gray 226.

The attendance of witnesses is ordinarily procured by means of a writ of subpœna; sometimes, when they are in custody, by a writ of *habeas corpus ad testificandum;* and sometimes, in criminal cases, by their own recognizance, either with or without sureties; 1 Greenl. Ev. §§ 309, 312; 2 Phill. Ev. 370, 374. If a witness disobey the summons, process of attachment for contempt will issue to enforce his attendance and an action also lies against him at common law; 1 Greenl. Ev. § 319; 1 Stark. Ev. 1727.

Nor can any third party intervene to prevent the attendance of a witness. Neither can he take advantage of a witness's attendance at the place of trial, to arrest him on civil process. See PRIVILEGE FROM ARREST.

Where a non-resident is in attendance on a trial in a circuit court of the United States as a witness in a case therein pending, he is privileged from service of summons in a civil action issued from a state court of such state, and the privilege extends to a reasonable time after the disposition of the cause to enable him to return to his own state; 11 Fed. Rep. 582. See 25 Alb. L. J. 424; 53 Vt. 694; and this is the general rule.

AS TO THE EXAMINATION OF WITNESSES. In the common-law courts, examinations are had *viva voce*, in open court, by questions and answers. The same course is now adopted to a great extent in equity and admiralty courts, and other proceedings according to the forms of the civil law. But the regular method of examining in these last-named courts, as also in the court of claims, is by deposition taken in writing out of court; 2 Story, Eq. Jur. § 1527; 3 Greenl. Ev. § 251.

A trial court may ask a witness such questions as it deems necessary for its own information and that of the jury; 122 Mo. 607.

On motion, in civil and criminal cases, witnesses will generally be excluded from the court-room while others are undergoing examination in the same case; this, however, is not matter of right, but within the discretion of the court; 1 Greenl. Ev. § 432; 4 C. & P. 585; 2 Swan 237; 3 Wisc. 214.

Witnesses are required to testify from their own knowledge and recollection. Yet they are permitted to refresh their memory by reference, while on the stand, to papers written at or very near the time of the transaction in question. See MEMORANDUM.

Being once in attendance, a witness may, in general, be compelled to answer all questions that may legally be put to him. See EVIDENCE.

Yet there are exceptions to this rule. He is not compellable where the answer would have a tendency to expose him to a penal liability or any kind of punishment, or to a criminal charge or a forfeiture of his estate; 1 Greenl. Ev. § 451. See PRIVILEGE.

The court, it is said, decides as to the tendency of the answer, and will instruct the witness as to his privilege; 2 Phill. Ev. 417; 4 Cush. 594; 1 Den. 319. It has been held that the question whether an answer would have this tendency is to be determined by the oath of the witness; 17 Jur. 393. And in point of fact, out of the necessity of the case, it is a matter which the witness may be said practically to decide for himself. The witness may answer if he chooses; and if he do answer after having been advised of his privileges, he must answer in full; and his answer may be used in evidence against him for all purposes; 1 Greenl. Ev. §§ 451, 453; 4 Wend. 252; 11 Cush. 437; 12 Vt. 491; 20 N. H. 540. It is held that a defendant who voluntarily offers himself as a witness on his own behalf waives this privilege of refusing to answer a question because it may tend to criminate him; 98 N. C. 599. The objection that the answer may tend to criminate can only be made by the wit-

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ness himself; 16 Colo. 250. See 28 Fla. 90.

Whether a witness be compellable to answer to his own degradation or infamy is a point as to which some distinctions are to be taken: a witness cannot refuse to testify simply because his answer would *tend* to disgrace him; it must be seen to have that effect certainly and directly; 1 Greenl. Ev. § 456. He cannot, it would seem, refuse to give testimony which is material and relevant to the issue, for the reason that it would disgrace him, or expose him to civil liability. A witness is not the sole judge whether a question put to him, if answered, may tend to criminate him. The court must see from the circumstances of the case that there is reasonable ground to apprehend danger to the witness from his being compelled to answer, in order to excuse him, But if the fact once appear that the witness is in danger, great latitude will be allowed him in judging for himself the effect of any particular question; 26 Ch. Div. 294; 1 Greenl. Ev. § 454; 1 Mood. & M. 108; 4 Wend. 250; 2 Ired. 346. See 8 Misc. Rep. 159. A witness may, however, be compelled to testify concerning his criminal acts, when prosecution therefor is barred; 66 Vt. 302; but only after it is shown affirmatively that no prosecution is pending against him; 43 N. E. Rep. (Ill.) 781.

But it would appear that he may refuse where the question (being one put on cross-examination) is not relevant and material, and does not in any way affect the credit of the witness; 3 Camp. 519; 18 N. H. 92; 1 Gray 108. Whether a witness, when a question is put on the cross-examination which is not relevant and material to the issue, yet goes to affect his credit, will be protected in refusing to answer, simply on the ground that his answer would have a direct and certain effect to disgrace him, is a matter not clearly agreed upon. There is good reason to hold that a witness should be compelled to answer in such a case; 1 Stark. Ev. 144; 1 C. & P. 85; 2 Swanst. 216; 2 Camp. 637; 3 Yeates 429. But the whole matter is one that is largely subject to the discretion of the courts; 1 Greenl. Ev. §§ 431, 449.

There seems no doubt that a witness is in no case competent to allege his own turpitude, or to give evidence which involves his own infamy or impeaches his most solemn acts, if he be otherwise qualified to testify; Stark. Ev. 1737. See 15 Cent. L. J. 343.

The privilege given by the 5th amendment to the constitution, that no person shall be compelled in any criminal case to be a witness against himself, extends to a proceeding before a grand jury; 142 U. S. 547. The provision of the Interstate Commerce Commission Act, compelling parties to testify even though the evidence may tend to criminate them, is not in conflict with the fifth amendment, since the statute itself protects them from punishment; 161 U. S. 591, affirming 70 Fed. Rep. 46; Field, Gray, Shiras, and White, JJ., dissenting. See INTERSTATE COMMERCE COMMISSION.

The course of examination is, first, a direct examination by the party producing the witness; then, if desired, a cross-examination by the adverse party, and a re-examination by the party producing; 1 Starkie, Ev. 128, 129. As to the *direct* examination, the general rule is that leading questions, *i. e.* such as suggest the answer expected or desired, cannot be put to a witness by the party producing him. But this rule has some reasonable exceptions; 1 Greenl. Ev. § 434. See 85 Neb. 351; 97 Ala. 681; as, where a witness is hostile, leading questions are proper; 43 Ill. App. 180; 62 Mich. 451; also when the answers of a witness have taken by surprise the party calling him; 154 U. S. 134. A court of error will not reverse because a leading question was allowed; 87 Pa. 124; 22 N. J. 372; 3 Allen 466; 139 Ill. 644; 1 Misc. Rep. 354; *contra*, 99 Ill. 368. As the allowance of leading questions is largely in the discretion of the trial judge, the appellate court will reverse for such cause only where there has been an abuse of discretion; 91 Mich. 611. See 75 Hun 17; 85 Wis. 615; 91 Ga. 319; 154 U. S. 134; 52 Mo. App. 102; 75 Ia. 742. See LEADING QUESTION.

Leading questions, however, are allowed upon cross-examination. See, generally, CROSS-EXAMINATION.

The right of re-examination extends to all topics upon which a witness has been cross-examined; but the witness cannot at this stage, without permission of the court, be questioned as to any new facts unconnected with the subject of the cross-examination and not tending to explain it; 1 Greenl. Ev. § 467.

But the court may in all cases permit a witness to be called either for further examination in chief, or for further cross-examination; Steph. Ev. art. 126; and may itself recall a witness at any stage of the proceedings, and examine or cross-examine, at its discretion; 6 C. & P. 653. If new matter is introduced on the re-examination, by permission of the court, the adverse party may further cross-examine upon that matter; Steph. Ev. art. 127.

A party cannot impeach the credit of his own witness. But he is sometimes, in cases of hardship, permitted to contradict him by other testimony; 1 Stark. Ev. 147; 1 Greenl. Ev. § 442. And a party *bona fide* surprised at the unexpected testimony of his witness may be permitted to interrogate him, as to previous declarations alleged to have been made by him inconsistent with his testimony, the object being to prove the witness's recollection, and to lead him, if mistaken, to review what he has said; 1 Whart. Ev. § 549. See *infra*.

The credit of an adversary's witness may be impeached by cross-examination, or by general evidence affecting his reputation for veracity (but not by evidence of par-

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ticular facts which otherwise are irrelevant and immaterial), and by evidence of his having said or done something before which is inconsistent with his evidence at the trial. Also, of course, he may be contradicted by other testimony; 1 Greenl. Ev. §§ 401. But he cannot be contradicted as to collateral and irrelevant matter on which he was cross-examined; 66 Miss. 196; 75 Cal. 108; 76 Ia. 67; 39 Kan. 115; 97 N. C. 443; 58 Ark. 125. In some states evidence may be given of a witness's general reputation (*q. v.*); 4 Wend. 257; 2 Dev. 209; 115 Mo. 419. See 29 Mich. 173; 97 *id.* 484. But the testimony of a witness cannot be impeached by evidence of particular crimes; 98 Ala. 45; nor can a woman be impeached by evidence of the lack of chastity; 94 Mich. 630. See IMPEACHMENT.

In order to test a witness's accuracy, veracity, or credibility, he may be cross-examined as to "his relations to either of the parties or the subject-matter in dispute; his interest, his motives, his way of life, his associations, his habits, his prejudices, his physicial defects and infirmities, his mental idiosyncrasies, if they affect his capacity; his means of knowledge and powers of discernment, memory, and description—may all be revelant." May's Steph. Ev. art. 129. But it has been said that questions otherwise irrelevant cannot be asked for the purpose of testing his moral sense; 4 Cush. 593. He cannot be discredited by asking him if he has not been impeached as a witness upon the trial of another action; 76 Cal. 192.

Generally, where proof is to be offered that a witness has said or done something inconsistent with his evidence, a foundation must first be laid and an opportunity for explanation offered, by asking the witness himself whether he has not said or done what it is proposed to prove, specifying particulars of time, place, and person; 1 Greenl. Ev. § 462; 2 Br. & B. 313; 16 How. 38; 76 Pa. 83; 132 U. S. 394; 98 N. C. 708; 97 Mo. 165; 77 Ga. 781; 23 Neb. 683; 74 Ia. 623; 86 Ala. 110; 137 U. S. 507; but in other cases it has been held that no foundation need first be laid; 17 Mass. 160; 58 Mo. 35; 22 Conn. 622; 31 Vt. 442. Such statements made on other occasions must be material to the cause; 32 W. Va. 177. Statements introduced for contradictions must be those of the witness; 160 U. S. 70. The failure to lay a proper foundation cannot avail on appeal, where it was apparent that the witness understood the occasion referred to and had full opportunity to explain deficiencies; 83 Fed. Rep. 147.

In England and Massachusetts, by statute, the same course may be taken with a witness on his examination in chief, if the judge is of opinion that he is hostile to the party by whom he was called, and permits the question. Apart from statute such evidence has not generally been considered as admissible; May's Steph. Ev. art. 131; 56 N. Y. 585; 49 Cal. 384; if the sole effect is to discredit; but if the purpose be to show the witness he is in error, it is admissible; 15 Ad. & E. 378; 58 N. Y. 230.

Proof of declarations made by a witness out of court in corroboration of the testimony given by him at the trial is, as a general rule, inadmissible. See 83 Ala. 5; 27 Tex. App. 347. But when a witness is charged with having been actuated by some motive prompting him to a false statement, or that the story is a recent fabrication, it may be shown that he made similar statements before any such motive existed; 68 Ill. 514; 48 Cal. 85; 11 How. 480; 74 Cal. 1. See 98 N. C. 629; 103 *id.* 419.

Evidence of general good reputation may be offered to support a witness, whenever his credit is impeached, either by general evidence affecting his reputation, or on cross-examination; 1 Greenl. Ev. § 469; 77 Ga. 563.

A party cannot attack the credibility of his own witness in the case, even after he has become the witness of his adversary; 5 So. Rep. (Ala.) 829; except where the witness does not testify as he did on the preparatory examination and his testimony is unfavorable; 42 Ill. App. 178; 151 U. S. 303; the contradiction of such witness may be allowed; 79 Ga. 605; 111 N. C. 314.

MODIFICATIONS OF THE COMMON LAW. There have been various important modifications of the common law as to witnesses, in respect of their competency and otherwise, as well in England as in this country. A general and strong tendency is manifest to do away with the old objections to the competency of witnesses, and to admit all persons to testify that can furnish any relevant and material evidence,—leaving these to judge of the credibility of the witnesses. Such is the law and practice in most English and American jurisdictions. The statutes vary in their terms, and the decisions should be read in connection with them.

**WITTINGLY.** Knowingly; designedly. 54 Miss. 493; 44 Conn. 359.

**WOLF'S HEAD. In Old English Law.** See CAPUT LUPINUM.

**WOMEN.** All the females of the human species. All such females who have arrived at the age of puberty. *Mulieris appellatione etiam virgo viri potens continetur.* Dig. 50. 16. 13.

A woman by the fact of marriage invests herself with the nationality of her husband; 13 Op. Att. Gen. 128; 14 *id.* 402; *contra*, 2 Knapp, P. C. 364. See DOMICIL.

Single or unmarried women have all the civil rights of men; they may, therefore, enter into contracts or engagements; sue and be sued; be trustees or guardians; they may be witnesses, and may for that purpose attest all papers; but they are, generally, not possessed of any political power; and are not as citizens eligible to public office or entitled to vote; 16 How.

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287; 21 Wall. 162; but in many of the states they may vote at school elections as in Colorado, Montana, The Dakotas, Idaho, Wisconsin, Massachusetts, Illinois, Kansas, Nebraska, Washington, and Wyoming.

As to the right of a woman to practise law, see ATTORNEY.

If the constitution of a state prevents a woman from being a member of a school committee, it must be by force of some express provision thereof or else by necessary implication arising from the nature of the office itself; 115 Mass. 602; and where an office is created and regulated by statute and the constitution confers upon the general court authority to name and settle all civil officers within the commonwealth, the election and constitution of whom are not otherwise provided for in the constitution, a woman may fill a local office of an administrative character; *id.*; but see 83 Ky. 464, where it was held that when a woman is excluded from the right to vote for any particular office, she is also excluded from the right to hold the office voted for. In California they may pursue *any* lawful business or profession; Cons. of Cal. art. 20, § 18. In Illinois, a woman may be a master in chancery; 99 Ill. 501; and in Iowa, a county recorder; Laws of 1880, c. 40. See 25 Alb. L. J. 104. In Colorado, a deputy clerk; 11 Colo. 191; a policeman; 19 Co. Ct. Rep. (Pa.) 657.

It has been held that a woman may not be a justice of the peace; 107 Mass. 604; 62 Me. 596; or a jailer; 83 Ky. 457; or a superintendent of a medical hospital for the insane; 29 Ohio St. 347; or a member of a board of workhouse directors; 4 Ohio C. C. 329 (*contra*, 136 Mass. 578); or county superintendent of schools; 29 Ore. 464 (*contra*, 13 Wash. 360; 115 Mass. 602; 16 Kan. 601; 33 Minn. 345); or school director; 39 S. W. Rep. (Mo.) 81; or a notary public; 51 N. E. Rep. (Ohio) 135; 150 Mass. 586. In England a woman may be elected to the office of sexton; 7 Mod. 263; or governor of a workhouse; 2 Ld. Raym. 1014; or overseer; 2 Term 395; or a commissioner of sewers; 13 Vin. Abr. 159; but a woman is not entitled to vote at elections for members of parliament; 38 L. J. C. P. 25; Whart. Lex.; Morse on Citizenship; she may act as postmistress in the United States. See MARRIED WOMAN; NATURALIZATION; 38 L. R. A. 208.

**WOODGELD.** In Old English Law. To be free from the payment of money for taking of wood in any forest. Co. Litt. 233 *a*. The same as PUDZELD.

**WOODMOTE.** The court of attachment. Cowel.

**WOODS.** A piece of land on which forest-trees in great number naturally grow. According to Lord Coke, a grant to another of *omnes boscos suos*, all his woods, will pass not only all his trees, but the land on which they grow. Co. Litt. 4 *b*. See 72 Me. 459. A field grown up in wire-grass surrounded by a fence and used for pasturing is not a woods. 84 N. Car. 264; but see 5 Jones 4. See TIMBER; SALE.

**WOOLSACK.** The seat of the lord chancellor in the house of lords, being a large square bag of wool, without back or arms, covered with red cloth. The judges, king's counsel-at-law, and masters in chancery sit also on woolsacks. The custom arose from wool being a staple of Great Britain from early times. Encyc. Amer.

**WORDS.** See CONSTRUCTION; INTERPRETATION; LIBEL; SLANDER.

**WORK AND LABOR.** In actions of assumpsit it is usual to put in a count, commonly called a common count, for work and labor done and material furnished by the plaintiff for the defendant; and when the work was not done under a special contract the plaintiff will be entitled to recover on the common count for work, labor, and materials. 4 Tyrwh. 43; 2 Carr. & M. 214. See ASSUMPSIT; QUANTUM MERUIT.

**WORKHOUSE.** A prison where prisoners are kept in employment; a penitentiary. A house where the poor are taken care of and kept in employment.

**WORKING DAYS.** Working days include all days except Sundays and legal holidays and do not include days on which, by the custom of the port, baymen stop work on the day of the funeral of one of their deceased members; 84 Fed. Rep. 688. In settling laydays, or days of demurrage, sometimes the contract specifies "working days"; in the computation, Sundays and custom-house holidays are excluded; 1 Bell, Com. 577. See DEMURRAGE; LAY-DAYS.

Running or calendar days on which the law permits work to be done. The term excludes Sundays and legal holidays, but not stormy days: 2 U. S. App. 297; 14 Fed. Rep. 422; 20 *id.* 144; 19 *id.* 459.

Working or lay-days, by the general rule, do not commence until the vessel has arrived at the usual place for unloading; 1 H. & C. 388. But where such place is a dock, it has been held that they begin when she enters the dock, and not when she reaches her place of discharge in the dock; 1 Bing. N. C. 283. The parties may, however, stipulate as they please as to the time when they shall commence; 5 Bing. N. C. 71. And it sometimes depends on the usage of the port; 24 E. L. & Eq. 305. Usage, however, cannot be admitted to vary the express terms of the contract; Pars. Ship. & Adm. 313. See DEMURRAGE; LAY-DAYS.

**WORKMAN.** One who labors; one who is employed to do business for another. See MASTER AND SERVANT.

**WORSHIP.** Honor and homage rendered to God. 59 N. H. 536. See CHRISTIANITY; DISTURBANCE OF PUBLIC WORSHIP; RELIGION.

**In English Law.** A title or addition

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given to certain persons. Co. 2d Inst. 666; Bacon, Abr. *Misnomer* (A 2).

**WORTHIEST OF BLOOD.** An expression used to designate that in descent the sons are to be preferred to daughters, which is the law of England. See some singular reasons given for this, in Plowd. 305.

**WOUND.** Any lesion of the body.

In this it differs from the meaning of the word when used in surgery. The latter only refers to a solution of continuity; while the former comprises not only these, but also every other kind of accident, such as bruises, contusions, fractures, dislocations, and the like. Cooper, Surg. Dict.; Dunglison, Med. Dict.

Under the statute 9 Geo. IV. c. 21, s. 12, it has been held in England that to make a wound, in criminal cases, there must be an injury to the person by which the skin is broken; 6 C. & P. 684. See DEATH.

**WRECK** (called in law Latin *wreccum maris*, and in law French *wrec de mer*).

Such goods as after a shipwreck are cast upon the land by the sea, and left there within some country so as not to belong to the jurisdiction of the admiralty, but to the common law. Co. 2d Inst. 167; 1 Bla. Com. 290. A ship becomes a wreck when, in consequence of injuries received, she is rendered absolutely unnavigable, or unable to pursue her voyage, without repairs exceeding the half of her value; 6 Mass. 479. A sunken vessel is not a wreck, but derelict; *wreck* applies to property cast upon land by the sea; 7 N. Y. 555; 38 Fed. Rep. 503. See SUNKEN WRECK.

Goods found at low water, between high and low water mark, and goods between the same limits partly resting on the ground, but still moved by the water, are wreck; 3 Hagg. Adm. 257, 294. Wreck, by the common law, belongs to the king or his grantee; but if claimed by the true owner within a year and a day the goods, or their proceeds, must be restored to him, by virtue of stat. Westm. I., 3 Edw. I. c. 4. Ships and goods found derelict or abandoned at sea belonged until lately to the office of the lord high admiral, by a grant from the crown, but now belong to the national exchequer, subject, however, to be claimed by the true owner within a year and a day; 1 Hagg. 383.

But in America the king's right in the sea-shore was transferred to the colonies, and therefore wreck cast on the sea-shore belongs to the owner of the shore, as against a mere stranger, if not reclaimed; 13 Pick. 255. See, also, 113 Mass. 377.

In this country, the several states bordering on the sea have enacted laws providing for the safekeeping and disposition of property wrecked on the *coast*. In one case, it was held that the United States succeeded to the prerogative of the British crown, and are entitled to derelict ships or goods found *at sea* and unclaimed by the true owner; but in the southern district of Florida it is held that such derelicts, in the absence of any act of congress on the subject, belong to the finder or salvor, subject to the claim of the true owner for a year and a day. Marv. Wreck. Stealing from a wrecked or distressed ship, etc., wilfully obstructing the escape of any person endeavoring to save his life therefrom, showing false lights, or extinguishing any true one, with intention to bring any vessel, etc., into danger, distress, or shipwreck, are made felony, punishable by fine and imprisonment, by act of congress of March 3, 1825; R. S. § 5358; 12 Pet. 72. Wrecked goods upon a sale or other act of voluntary importation become liable to duties; 9 Cra. 387. See SALVAGE; TOTAL LOSS.

**WRIT.** A mandatory precept, issued by the authority and in the name of the sovereign or the state, for the purpose of compelling the defendant to do something therein mentioned.

It is issued by a court or other competent jurisdiction, and is returnable to the same. It is to be under seal and tested by the proper officer, and is directed to the sheriff or other officer lawfully authorized to execute the same. Writs are divided into—original, of mesne process, of execution. See 3 Bla. Com. 273; Gould, Pl. c. 2, s. 1.

The list of original writs was not the reasoned scheme of a provident legislator, calmly devising apt remedies for all conceivable wrongs, rather it was the outcome of the long and complicated struggle whereby the king drew into his court all the litigation of the realm. The statute of Westminster 2d (1285) allowed the chancery to vary the old forms so as to suit new cases, but only new cases which fall under old law.

This gave in time one new form of action—trespass upon the special case—and this again threw out branches which came to be considered distinct forms of action, namely, assumpsit and trover. Equity, again, met some of the new wants, but others had to be met by a stretching and twisting of the old forms which were made to serve many purposes for which they were not originally intended; Poll. Torts, 5th ed. 535, note by F. W. Maitland; and see 3 Harv. L. Rev. 217. As to the history of assumpsit, see 2 Harv. L. Rev. 1, 53, by Prof. J. B. Ames. See WESTMINSTER 2D, STATUTE OF.

**WRIT DE BONO ET MALO.** See DE BONO ET MALO; ASSIZE.

**WRIT DE EJECTIONE FIRMÆ.** See EJECTMENT.

**WRIT DE HÆRETICO COMBURENDO.** See DE HÆRETICO COMBURENDO.

**WRIT DE HOMINE REPLEGIANDO.** See DE HOMINE REPLEGIANDO.

**WRIT DE ODIO ET ATIA.** See DE ODIO ET ATIA; ASSIZE.

**WRIT DE RATIONABILI PARTE BONORUM.** A writ which was sued

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out by a widow when the executors of her deceased husband refused to let her have a third part of her late husband's goods, after the debts were paid. Fitzh. N. B. 284.

**WRIT OF ASSISTANCE.** A writ issuing out of chancery in pursuance of an order, commanding the sheriff to eject the defendant from certain lands and to put the plaintiff in possession. Cowel; 3 Steph. Com. 602; 18 Ill. 67. An ancient writ issuing out of the exchequer. Moz. & W.

A writ issuing from the court of exchequer to the sheriff commanding him to be in aid of the king's tenants by knight's service, or the king's collectors, debtors, or accountants, to enforce payment of their own dues, in order to enable them to pay their own dues to the king. 1 Madox, Hist. Exch. 675.

A writ commanding the sheriff to assist a receiver, sequestrator, or other party in chancery to get possession of land withheld from him by another party to the suit. Quincy, Mass. Appx.; 2 Dan. Ch. Pr. 1062.

These writs which issue from the equity side of the court of exchequer or from any court of chancery are at least as old as the reign of James I., and were formerly in common use in England, Ireland, and some of the United States; 1 Ves. 454; 3 Swanst. 299, n.; but whether from the odium attached to the name in Massachusetts or from the practice in that state to conform processes in equity to those at law, no instance is known of such a writ having been issued in that commonwealth. Quincy, Mass. Appx. 369.

A writ of assistance is founded on the general principle that a court of equity will, when it can do so justly, carry its own decrees into full execution without relying on the co-operation of any other tribunal; 27 N. J. Eq. 482, where it was remarked that it was of comparatively recent use in that state, the first instance being in 1853. It can issue only against parties affected by the decree; 101 U. S. 849; the right to it may be lost by laches; 69 Ala. 484. The order granting this writ is not appealable; 3 MacArthur 402.

It will not issue in favor of a purchaser at an execution sale, where there is a *bona fide* contest as to the right of possession; 71 Wis. 585.

Writs of assistance to seize uncustomed goods were introduced by statute 12 Charles II., c. 19, and were perhaps copied from the sheriff's patent of assistance: 4 Doug. 347; these writs authorized the person to whom they were issued, with the assistance of the sheriff, justice of the peace, or constable, to enter into any house where the goods were suspected to be concealed. One acting under this writ and finding nothing was not justified; 4 Dougl. 347. See Quincy, Mass. Rep. Appx.; 1 Thayer, Cas. Const. L.; 2 Dan. Ch. Pr. 1062.

**WRIT OF ASSOCIATION.** **In English Practice.** A writ whereby certain persons (usually the clerk of assize and his subordinate officers) are directed to associate themselves with the justices and sergeants; and they are required to admit the said persons into their society in order to take the assizes. 3 Bla. Com. 59. See ASSIZE.

**WRIT OF CONSPIRACY.** The name of an ancient writ now superseded by the more convenient remedy of an action on the case, which might have been sued against parties guilty of a conspiracy. Fitzh. N. B. 260.

It did not lie at common law, in any case, except when the conspiracy was to indict the party either of treason or felony; all the other cases of conspiracy in the books were but actions on the case; 7 Hill N. Y. 104

**WRIT OF COVENANT.** A writ which lies where a party claims damages for breach of covenant, *i. e.* of a promise under seal.

**WRIT OF DEBT.** A writ which lies where the party claims the recovery of a debt, *i. e.* a liquidated or certain sum of money alleged to be due to him.

This is debt *in the debet*, which is the principal and only common form. There is another species mentioned in the books, called the debt *in the detinet*, which lies for the specific recovery of *goods* under a contract to deliver them. 1 Chitty, Pl. 101.

**WRIT OF DECEIT.** The name of a writ which lies where one man has done anything in the name of another, by which the latter is damnified and deceived. Fitzh. N. B. 217.

The modern practice is to sue a writ of trespass on the case to remedy the injury. See DECEIT.

**WRIT OF DETINUE.** See DETINUE.

**WRIT OF DOWER.** A writ which lies for a widow claiming the specific recovery of her dower, no part having been yet assigned to her. It is usually called a writ of dower *unde nihil habet*. 3 Chitty, Pl. 393. There is another species, called a *writ of right of dower*, which applies to the particular case where the widow has received a part of her dower from the tenant himself; and of land lying in the same town in which she claims the residue. This latter writ is seldom used in practice. See DOWER.

**WRIT OF EJECTMENT.** See EJECTMENT.

**WRIT OF ENTRY.** See ENTRY, WRIT OF.

**WRIT OF ERROR.** A writ issued out of a court of competent jurisdiction, directed to the judges of a court of record in which final judgment has been given, and commanding them, in some cases themselves to examine the record, in others

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to send it to another court of appellate jurisdiction, therein named, to be examined, in order that some alleged error in the proceedings may be corrected. Steph. Pl. 138; 2 Saund. 100, n. 1; Bac. Abr. *Error*.

The first is called a writ of error *coram nobis* or *vobis*. When an issue in fact has been decided, there is not, in general, any appeal except by motion for a new trial; and although a matter of fact should exist which was not brought into the issue, as, for example, if the defendant neglected to plead a release, which he might have pleaded, this is no error in the proceedings, though a mistake of the defendant; Steph. Pl. *118. But there are some facts which affect the validity and regularity of the proceeding itself; and to remedy these errors the party in interest may sue out the writ of error *coram vobis*. The death of one of the parties at the commencement of the suit, the appearance of an infant in a personal action by an attorney and not by guardian, the coverture of either party at the commencement of the suit, when her husband is not joined with her, are instances of this kind; 1 Saund. 101; Steph. Pl. *119; 1 Browne, Pa. 75. The writ of error *coram vobis* is used to correct errors of fact and not of law; 37 Ill. App. 311.

The second species is called, generally, writ of error, and is the more common. Its object is to review and correct an error of the law committed in the proceedings, which is not amendable or cured at common law or by some of the statutes of amendment or jeofail. See, generally, 1 Vern. 169; 1 Salk. 322; 2 Saund. 46, 101; 3 Bla. Com. 405.

It lies only to remove causes from a court of record. It is in the nature of a suit or action when it is to restore the party who obtains it to the possession of anything which is withheld from him, not when its operation is entirely defensive; 3 Story, Const. § 1721. And it is considered, generally, as a new action; 15 Ala. 9.

If a writ of error can ever be issued *nunc pro tunc*, after the lapse of the time allowed by law for bringing suits in error, the default must be attributable solely to official delinquency; 32 Fla. 273.

A party cannot pursue the remedies of appeal and writ of error simultaneously. He is not entitled to his writ of error at least until the appeal is dismissed; 30 Mo. App. 503.

A writ of error does not vacate the judgment of the court below; that continues in force until reversed; 100 U. S. 81. See APPEAL; BILL OF EXCEPTION.

**WRIT OF EXECUTION.** A writ to put in force the sentence that the law has given. See EXECUTION.

**WRIT OF EXIGI FACIAS.** See EXIGENT; EXIGI FACIAS; OUTLAWRY.

**WRIT OF FORMEDON.** This writ lies where a party claims the specific recovery of lands and tenements as issue in tail, or as remainder-man or reversioner, upon the determination of an estate in tail. Co. Litt. 236 *b*. See FORMEDON.

**WRIT OF INQUIRY.** See INQUISITION; INQUEST.

**WRIT OF MAINPRISE.** A writ directed to the sheriff (either generally, when any man is imprisoned for a bailable offence and bail has been refused, or specially, when the offence or cause of commitment is not properly bailable below), commanding him to take sureties for the prisoner's appearance, commonly called mainpernors, and to set him at large. 3 Bla. Com. 128. See MAINPRISE.

**WRIT OF MESNE. In Old English Law.** A writ which was so called by reason of the words used in the writ, namely, *Unde* idem A *qui medius est inter C et præfatum B*; that is, A, who is mesne between C, the lord paramount, and B, the tenant paravail. Co. Litt. 100 *a*.

**WRIT OF PRÆCIPE.** This writ is also called a writ of covenant, and is sued out by the party to whom lands are to be conveyed by fine,—the foundation of which is a supposed agreement or covenant that the one shall convey the land to the other. 2 Bla. Com. 349.

**WRIT OF PREVENTION.** This name is given to certain writs which may be issued in anticipation of suits which may arise. Co. Litt. 100. See QUIA TIMET.

**WRIT OF PROCESS.** See PROCESS; ACTION.

**WRIT OF PROCLAMATION.** A writ which issues at the same time with the *exigi facias*, by virtue of stat. 31 Eliz. c. 3, s. 1, by which the sheriff is commanded to make proclamations in the statute prescribed.

When it is not directed to the same sheriff as the writ of *exigi facias* is, it is called a foreign writ of proclamation. 4 Reeve, Hist. Eng. Law 261.

**WRIT OF PROHIBITION.** See PROHIBITION.

**WRIT OF QUARE IMPEDIT.** See QUARE IMPEDIT.

**WRIT OF RECAPTION.** A writ which lies where, pending an action of replevin, the same distrainer takes, for the same supposed cause, the cattle or goods of the same distrainee. See Fitzh. N. B. 169.

This writ is nearly obsolete, as trespass, which is found to be a preferable remedy, lies for the second taking; and, as the defendant cannot justify, the plaintiff must necessarily recover damages proportioned to the injury.

**WRIT OF REPLEVIN.** See REPLEVIN.

**WRIT OF RESTITUTION.** A writ which is issued on the reversal of a judgment commanding the sheriff to restore to the defendant below the thing levied



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upon, if it has not been sold, and, if it has been sold, the proceeds. See RESTITUTION.

**WRIT OF RIGHT.** The remedy appropriate to the case where a party claims the specific recovery of corporeal hereditaments in fee-simple, founding his title on the right of property, or mere right, arising either from his own seisin or the seisin of his ancestor or predecessor. Fitzh. N. B. 1 (B); 3 Bla. Com. 391.

At common law, a writ of right lies only against the tenant of the freehold demanded; 8 Cra. 239.

This writ brings into controversy only the rights of the parties in the suit; and a defence that a third person has better title will not avail; 7 Wheat. 27; 3 Pet. 133; 3 Bingh. N. S. 434; 6 Ad. & E. 103.

**WRIT OF SUMMONS.** See SUMMONS.

**WRIT OF TOLL. In English Law.** The name of a writ to remove proceedings on a writ of right patent from the court-baron into the county court. 3 Bla. Com. App. No. 1, § 2.

**WRIT OF TRIAL. In English Law.** A writ directing an action brought in a superior court to be tried in an inferior court or before the under-sheriff, under stat. 3 & 4 Will. IV. c. 42. It is now superseded by the County Courts Act of 1867, c. 142, s. 6, by which a defendant in certain cases is enabled to obtain an order that the action be tried in a county court; 3 Steph. Com. 515, n.

**WRIT OF WASTE.** The name of a writ to be issued against a tenant who has committed waste of the premises. See WASTE.

**WRIT PRO RETORNO HABENDO. In Practice.** The name of a writ which recites that the defendant was summoned to appear to answer the plaintiff in a plea whereof he took the cattle of the said plaintiff (specifying them), and that the said plaintiff afterwards made default, wherefore it was then considered that the said plaintiff and his pledges of prosecuting should be in mercy, and that the said defendant should go without day, and that he should have return of the cattle aforesaid. It then commands the sheriff that he should cause to be returned the cattle aforesaid to the said defendant without delay, etc. 2 Sell. Pr. 168.

**WRITER OF THE TALLIES. In England.** An officer of the exchequer whose duty it was to write upon the tallies the letters of tellers' bills. The office has long been abolished. See TALLY.

**WRITERS TO THE SIGNET. In Scotch Law.** Anciently, clerks in the office of the secretary of state, by whom writs passing the king's signet were prepared. Their duty now is to prepare the warrants of all lands flowing from the crown, and to sign almost all diligencies of the law affecting the person or estate of a debtor, or for compelling implement of decree of superior court. They may act as attorneys or agents before the court of sessions and have various privileges. Bell, Dict. *Clerk to Signet*.

**WRITING.** The act of forming by the hand letters or characters of a particular kind, on paper or other suitable substance, and artfully putting them together so as to convey ideas.

The word "writing," when not used in connection with analogous words of more special meaning, is an extensive term, and may be construed to denote a letter from one person to another. But such is not its ordinary and usual acceptation. Neither in legislative enactments nor in common intercourse are the two terms "letter" and "writing" equivalent expressions. In law the term "writing" is much more frequently used to denote legal instruments, such as deeds, agreements, memoranda, bonds, and notes, etc. In the statute of frauds the word occurs in that sense in nearly every section. But in its most frequent and most familiar sense the term "writing" is applied to books, pamphlets, and the literary and scientific productions of authors; 135 U. S. 258.

It differs from printing, which is the formation of words on paper or other proper substance by means of a stamp. Sometimes by writing is understood printing, and sometimes printing and writing mixed. See 9 Pick. 312. A theatre ticket is the subject of forgery. "Printing" is "writing" in the legal sense of the term, and an instrument, the words of which are printed either wholly or in part, is equally valid with an instrument written by a pen; 34 Fed. Rep. 652; 127 U. S. 467.

Many contracts are required to be in writing; all deeds for real estate must be in writing, for it cannot be conveyed by a contract not in writing, yet it is the constant practice to make deeds partly in printing and partly in writing. Wills, except nuncupative wills, must be in writing, and signed by the testator; and nuncupative wills must be reduced to writing by the witnesses within a limited time after the testator's death.

Records, bonds, bills of exchange, and many other engagements must, from their nature, be made in writing.

The notes of a stenographer, taken when the witness gives his oral testimony in court, is a "taking in writing," as required by a statute; 32 La. Ann. 648.

As to a writing being in lead pencil, see, generally, 45 La. Ann. 651; 133 Pa. 245; 84 *id.* 510; 12 Johns. 102; WILL.

See ALTERATION; FORGERY; FRAUDS, STATUTE OF; LANGUAGE; SALE; TYPEWRITING; STENOGRAPHER.

**WRITING OBLIGATORY.** A bond; an agreement reduced to writing, by which the party becomes bound to perform something, or suffer it to be done.

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**WRITTEN INSTRUMENT.** A judgment and a tax duplicate have been held not to be written instruments, within the meaning of a statute requiring a copy to be filed with the pleadings; 38 Ind. 48; 39 *id.* 172.

**WRONG.** An injury; a tort; a violation of right.

In its broad sense, it includes every injury to another, independent of the motive causing the injury; 36 Kan. 570.

A wrong is an invasion of right to the damage of the party who suffers it. It consists in the injury done, and not commonly in the purpose or mental or physical capacity of the person or agent doing it. It may or may not have been done with bad motive; the question of motive is usually a question of aggravation only; 143 N. Y. 447.

In its most usual sense, wrong signifies an injury committed to the person or property of another, or to his relative rights unconnected with contract; and these wrongs are committed with or without force. But in a more extended signification, wrong includes the violation of a contract; a failure by a man to perform his undertaking or promise is a wrong or injury to him to whom it was made; 3 Bla. Com. 158.

A *public* wrong is an act which is injurious to the public generally, commonly known by the name of crime, misdemeanor, or offence; and it is punishable in various ways, such as indictments, summary proceedings, and, upon conviction, by death, imprisonment, fine, etc.

*Private* wrongs, which are injuries to individuals, unaffecting the public; these are redressed by actions for damages, etc. See REMEDIES; TORT.

**WRONG-DOER.** One who commits an injury; a *tort-feasor*. See Dane, Abr.

**WRONGFULLY.** In a wrong manner; unjustly; in a manner contrary to the moral law, or to justice. Webster, cited 91 Ind. 536.

**WRONGFULLY INTENDING. In Pleading.** Words used in a declaration when in an action for an injury the motive of the defendant in committing it can be proved; for then his malicious intent ought to be averred. This is sufficiently done if it be substantially alleged, in general terms, as wrongfully intending. 3 Bouvier, Inst. n. 2875.

**WYOMING.** One of the states of the United States.

Wyoming became one of the states of the Union by virtue of the act of congress of July 10, 1890.

By act of congress, approved July 25, 1868, the territory of Wyoming was constituted. See MONTANA; NEW MEXICO.

THE LEGISLATIVE POWER is vested in a senate and house of representatives.

The *Senate* consists of members elected for four years. At least one is selected from each county.

The *House of Representatives* consists of members elected for two years. Their number shall never be greater than three times nor less than twice the number of senators.

THE EXECUTIVE POWER is vested in a governor elected for a term of four years. He has the power to remit fines, to grant reprieves and pardons after conviction for all offences except treason in cases of impeachment. During the absence or disability of the governor the secretary of state acts as governor.

THE JUDICIAL POWER is vested in the senate as a court of impeachment, in a supreme court, district courts, courts of arbitration, and other inferior courts established by legislature. The *Supreme Court* consists of three judges elected by the people for a term of eight years. It has appellate jurisdiction in both civil and criminal causes and original jurisdiction in *quo warranto* and *mandamus* as to state officers, and in *habeas corpus*, and has power to issue writs of *mandamus*, review, prohibition, *habeas corpus*, *certiorari*, and other writs necessary to the exercise of its jurisdiction.

The *District Courts* have original jurisdiction of all cases both at law and in equity and in all criminal cases, and of all matters of probate and insolvency. It has appellate jurisdiction from justices, and other inferior courts. They have power to issue writs of mandamus, etc., in their respective districts. The state is divided into four districts.

# Y.

**YACHT.** A light sea-going vessel for the purpose of pleasure, racing, and the like. See VESSEL. A steam pleasure yacht is an "ocean going vessel" and not a coasting vessel; 150 U. S. 674.

By the act of January 25, 1897, foreign-built yachts thereafter purchased by American citizens are subject to tonnage duties; 166 U. S. 110. See 142 U. S. 479; [1897] A. C. 59; VESSEL; SHIP; NAVIGATION RULES.

**YARD.** A measure of length, containing three feet, or thirty-six inches.

A piece of land inclosed for the use and accommodation of the inhabitants of a house. In England it is nearly synonymous with backside. 1 Chitty, Pr. 176; 1 Term 701.

**YARDLAND. In Old English Law.** A quantity of land containing twenty acres. Co. Litt. 69 *a*.

**YEAR.** The period in which the revolution of the earth round the sun, and the accompanying changes in the order of nature, are completed.

The civil year differs from the astronomical, the latter being composed of three hundred and sixty-five days, five hours, forty-eight seconds and a fraction, while the former consists sometimes of three hundred and sixty-five days, and at others,

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in leap-years, of three hundred and sixty-six days.

The year is divided into half-year, which consists, according to Co. Litt. 135 *b*, of one hundred and eighty-two days; and quarter of a year, which consists of ninety-one days. *Id.*; 2 Rolle, Abr. 521, l. 40. It is further divided into twelve months.

The civil year commences immediately after twelve o'clock at night of the thirty-first day of December, that is, the first moment of the first day of January, and ends at midnight of the thirty-first day of December twelve months thereafter. See Com. Dig. *Annus*; 2 Chitty, Bla. Com. 140. Before the alteration of the calendar from old to new style in England (see BISSEXTILE) and the colonies of that country in America, the year in chronological reckoning was supposed to commence with the first day of January, although the legal year did not commence until March 25, the intermediate time being doubly indicated; thus February 15, 172⅘, and so on. This mode of reckoning was altered by the statute 24 Geo. II. c. 23, which gave rise to an act of assembly of Pennsylvania, passed March 11, 1752, 1 Smith, Laws, 217, conforming thereto, and also to the repeal of the act of 1710.

In New York it is enacted that whenever the term "year" or "years" is or shall be used in any statute, deed, verbal or written contract, or any public or private instrument whatever, the year intended shall be taken to consist of three hundred and sixty-five days; half a year, of a hundred and eighty-two days; and a quarter of a year, of ninety-two days; and the day of a leap year, and the day immediately preceding, if they shall occur in any period so to be computed, shall be reckoned together as one day. Rev. Stat. vol. 2; c. 19, t. 1, § 3. The meaning of the term "year," as used in a contract, is to be determined from the connection in which it is used and the subject-matter of the contract; 77 Cal. 236; 73 Ind. 54. See AGE; ALLOWANCE; TIME; REGNAL YEARS; OLD STYLE.

The omission of the word "year" in an indictment is not important, provided the proper numerals are written after the month and day of the month; 22 Minn. 67. An indictment which states the year of the commission of the offence in figures only, without prefixing "A. D.," is insufficient; 5 Gray 91; but it has been held otherwise in Maine under a statute; 47 Me. 388. See YEAR OF OUR LORD.

**YEAR AND DAY** A period of time much recognized in law.

It is not in all cases limited to a precise calendar year. In Scotland, in computing the term, the year and day is to be reckoned, not by the number of days which go to make up a year, but by the return of the day of the next year that bears the same denomination; 1 Bell, Com. 721. See Bac. Abr. *Descent* (I 3). In the law of all the Gothic nations, it meant a year and six weeks.

It is a term frequently occurring; for example, in case of an estray, if the owner challenged it not within a year and a day, it belonged to the lord; 5 Co. 108. So of a wreck; Co. 2d Inst. 168. This time is given to prosecute appeals and for actions in a writ of right, and, after entry or claim, to avoid a fine; Plowd. 357 *a*. And if a person wounded die in that time, it is murder; Co. 3d Inst. 53; 6 Co. 107. So, when a judgment is reversed, a party, notwithstanding the lapse of time mentioned in the statute of limitations pending that action, may commence a fresh action within a year and a day of such reversal; 3 Chitty, Pr. 107. Again, after a year and a day have elapsed from the day of signing a judgment no execution can be issued till the judgment be revived by *scire facias*; Bac. Abr. *Execution* (H).

Protection lasted a year and a day; and if a villein remain from his master a year and a day in an ancient demesne, he is free; Cunningham, Dict. If a person is afraid to enter on his land, he may make claim as near as possible,—which is in force for a year and a day; 3 Bla. Com. 175. In case of prize, if no claim is made within a year and a day, the condemnation is to captors as of course; 2 Gall. 388. So, in case of goods saved, the court retains them till claim, if made within a year and a day, but not after that time; 8 Pet. 4.

Coke gives various rules as to the proposition that the common law has often limited year and day as a convenient time. See Co. Litt. 254 *b*; 5 Rep. 218.

See Possession for Year and Day, by F. W. Maitland, in 5 L. Q. Rev. 253, containing much learning.

The same period occurs in the Civil Law, in the Book of Feuds, the Laws of the Lombards, etc.

**YEAR-BOOKS.** Books of reports of cases in a regular series (the first one being written in 1292; 1 Poll. & Maitl. 195), from the reign of the English King Edward II., 1292, inclusive, to the time of Henry VIII., which were taken by the prothonotaries or chief scribes of the courts, at the expense of the crown, and published annually—whence their name Year-Books. They consist of eleven parts, namely:—Part 1. Maynard's Reports *temp.* Edw. II.; also divers Memoranda of the Exchequer *temp.* Edward I. Part 2. Reports in the first ten years of Edw. III. Part 3. Reports from 17 to 39 Edward III. Part 4. Reports from 40 to 50 Edward III. Part 5. Liber Assisarum; or, Pleas of the Crown *temp.* Edw. III. Part 6. Reports *temp.* Hen. IV. & Hen. V. Parts 7 and 8. Annals; or, Reports of Hen. VI. during his reign, in 2 vols. Part 9. Annals of Edward IV. Part 10. Long Quinto; or, Reports in 5 Edward IV. Part 11. Cases in the reigns of Edward V., Richard III., Henry VII. and Henry VIII. A reference to them by a learned judge as mere "lumber garnered of obsolete feudal law," indicates their practical value in modern times. Wallace, Reporters; 2 Wall. Jr. 309. See REPORTS.

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Their usefulness is now, however, considered rather greater than that. Professor Wambaugh (Study of Cases § 98) says they "are the work of skilled lawyers; and the reports of cases, when complete, present an adequate view of the pleadings." They were Court Rolls, intended for the preservation of the results in order to fix the rights of the parties, but not adapted for use as precedents. *Id.* See 1 Dougl. v; 1 Co. XXVI.

**YEAR, DAY, AND WASTE** (Lat. *annus, dies, et vastum*) is a part of king's prerogative, whereby he takes the profits of the lands and tenements of those attainted of petty treason or felony, for a year and a day, but, in the end, may waste the tenements, destroy the houses, root up the woods, gardens, and pasture, and plough up the meadows (except the lord of the fee agree with him for redemption of such waste); after which the lands are to be restored to the lord of the fee. Staundford, Prerog. c. 16, fol. 44. By Magna Charta, it would appear that the profits for a year and a day were given in lieu of the waste. 9 Hen. III. c. 22. But 17 Edw. II. declares the king's right to both.

**YEAR OF OUR LORD.** In England the time of an offence may be alleged as that of the sovereign's reign, or as that of the year of our Lord. The former is the usual mode. Hence there "year" alone might not indicate the time intended, but as we have no other era, therefore, any particular year must mean that year in our era. 14 Gray 38. The abbreviation A. D. may be omitted; and the word year is not fatal; 47 Me. 393; 22 Mo. 71; *contra*, 5 Gray 92. See REGNAL YEARS.

**YEARS, ESTATE FOR.** See ESTATE FOR YEARS.

**YEAS AND NAYS.** The list of members of a legislative body voting in the affirmative and negative of a proposition.

The constitution of the United States, art. 1, s. 5, directs that "the yeas and nays of the members of either house, on any question, shall, at the desire of one-fifth of those present, be entered on the journal." See 2 Story, Const. 301.

Constitutional provisions in some states require the yeas and nays to be entered on the journal on the final passage of every bill. See 68 Ill. 160; 22 Mich. 104; 54 N. Y. 276. These directions are clearly imperative; Cooley, Const. Lim. 171.

The power of calling the yeas and nays is given by all the constitutions of the several states; and it is not, in general, restricted to the request of one-fifth of the members present, but may be demanded by a less number; and, in some, one member alone has the right to require the call of the yeas and nays.

**YEOMAN.** In the United States this word does not appear to have any very exact meaning. It is usually put as an addition to the names of parties in declarations and indictments. In England it signifies a free man who has land of the value of forty shillings a year. Co. 2d Inst. 668; 2 Dall. 92. The local volunteer militia raised by individuals with the approbation of the queen are also called yeomen. The term *yeomanry* is applied to the small freeholders and farmers in general. Hallam, Cons. Hist. c. 1.

**YIELDING AND PAYING.** These words, when used in a lease, constitute a covenant on the part of the lessee to pay the rent; Platt, Cov. 50; 3 Pa. 464; 2 Lev. 206; 3 Term 402; 1 B. & C. 416; 2 Dowl. & R. 670; but whether it be an express covenant or not seems not to be settled; 2 Lev. 206; T. Jones 102; 3 Term 402.

In Pennsylvania, it has been decided to be a covenant running with the land; 3 Pa. 464. See 1 Saund. 233, n. 1; 9 Vt. 191.

**YORK-ANTWERP RULES.** Certain rules relating to uniform bills of lading formulated by the Association for the Reform and Codification of the Laws of Nations, now the International Law Association.

**YORK, CUSTOM OF,** is recognized by 22 & 23 Car. II. c. 10, and 1 Jac. II. c. 17. By this custom, the effects of an intestate are divided according to the anciently universal rule of *pars rationabilis*. 4 Burn, Eccl. Law 342.

**YORK, STATUTE OF.** The name of an English statute, passed at York, 12 Edw. II. 1318. It contains many wise provisions and explanations of former statutes. Barrington, Stat. 174. There were other statutes made at York in the reign of Edward III., but they do not bear this name.

**YOUNG ANIMALS.** It is a rule that the young of domestic or tame animals belong to the owner of the dam or mother, according to the maxim, *Partus sequitur ventrem*. Dig. 6. 1. 5. 2; Inst. 2. 1. 9. See WHELP.

**YOUNGER CHILDREN.** When used with reference to settlements of land in England, this phrase signifies all such children as are not entitled to the rights of an eldest son, including daughters who are older than the eldest son. Moz. & W.

**YOUTH.** This word may include children and youth of both sexes. 2 Cush. 519, 528.

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# Z.

**ZAMINDAR, or ZEMINDAR.** A landholder in India, who is the responsible collector of revenues on behalf of the government. Wilson's Gloss.

**ZINC ORE.** A mineral body, containing so much of the metal of zinc as to be worth smelting. 55 N. J. L. 350.

**ZOLL-VEREIN.** A union of German states for uniformity of customs, established in 1819. It continued until the unification of the German Empire, including Prussia, Saxony, Bavaria, Wurtemberg, Baden, Hesse-Cassel, Brunswick, and Mecklenberg-Strelitz, and all intermediate principalities. It has now been superseded by the German Empire; and the Federal Council of the empire has taken the place of that of the Zoll-verein. Whart. Lex. See Miller, Const. 439.

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NOTE.—For a brief abstract of the Bankrupt Act of 1898, see UNITED STATES COURTS.

THE END.

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